

Legal Status of Children in Islamic Law

(A Comparative Study)

By:

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Abstract

Children are human beings under the age of puberty. They are different from adults due to their legal capacity. According to Islamic Law Legal Capacity (ahliyyat) is the ability or fitness to acquire rights and exercise them. It has two aspects; the first is based on the acceptance or acquisition of rights (ahliyyat al-wujb) and the other on the performance of duties, (ahliyyat al-ada) .The first aspect of legal capacity exists in children but the second is missing and their legal capacity is categorized as deficient or defective. The defective legal capacity does not affect

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capacity for acquisition or *ahliyyat al waujub* .All rights and obligations are acquired, as their establishment requires for the capacity of acquisition. However the capacity of performing (duties) remains suspended until the age of puberty. Almost the same is case in the western legal thought. *Ahliyyat al waujub* protect all the rights of child in Islamic Law and legally entitled them for their all benefits.

Children are human beings but at the same time, are different from adults. A child, because of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth. Children have a right to enjoy the pleasures of childhood, to be free to play and enjoy recreational activities. Participation in cultural pursuits and sports, and other activities that exercise their body as well as mind and imagination and aid in their physical, mental and emotional are also included in their rights. There is a long history of struggle for children's rights. The parents are always advocates of children's rights. The religious leaders and spiritual movement were also trying to teach about the rights of children. The states were individually trying to do legislation but there was no internationally

recognized rule for the protection of children until the adaptation of international convention by the United Nation general assembly on November 20, 1989.¹The studies of Children Rights in west, with reference to different cultures and religions, usually assumed that children have no legal capacity in Islamic Law, based in effect on the Islamic principle of *akl* (Reason). Thus without *akl* (Reason) acts of children carry no legal consequence and they have been provided limited rights in general and to girls in particular.²

This study is aimed is to analyze the legal status of children in Islamic Law and check the validity of above perception in the light of arguments based mainly on original sources while comparing it with other legal systems and International Law.

This study will proceed from a brief description of children in Islamic and International law. The legal personality of children in Islamic law has been discussed in second part of this study. Following this, Legal

¹-Wallace, R. *International Human Rights Text &Materials* (London: Sweet & Maxwell publishing, 1997) p.210.

²-David Pearl, 'A note on Children's Right in Islamic Law', *Children's Rights and Traditional Values*, Edited by: Gillian Douglas and Leslie Sebba, Ashgate,(USA, 1998),p88-89.

personality of children in western legal thoughts has been elaborated. The comparison of status of children in Islamic and western laws has been presented in the conclusion.

1-INTRODUCTION TO CHILDREN

1.1-Definition of a child in Islamic Law

The word (طفل) *Tifal* is used in Arabic for denoting small things, birds, animals and people. The children and childhood is described by the term (الطفولة) *Altafula*¹. In literal sense *Tifal* means newly born child. This word is also applied on fetus and its plural is al-atfāl.²This word is used in Quran in the meanings of children. Allah said:

(يَا أَيُّهَا الَّذِينَ آمَنُوا لِيَسْتَأْذِنَكُمْ الَّذِينَ مَلَكَتْ أَيْمَانُكُمْ وَالَّذِينَ لَمْ يَبْلُغُوا الْحُلُمَ مِنْكُمْ ثَلَاثَ مَرَّاتٍ مِنْ قَبْلِ صَلَاةِ الْفَجْرِ وَحِينَ تَضَعُونَ ثِيَابَكُمْ مِنَ الظَّهِيرَةِ وَمِنْ بَعْدِ صَلَاةِ الْعِشَاءِ ثَلَاثُ عَوْرَاتٍ لَكُمْ لَيْسَ عَلَيْكُمْ وَلَا عَلَيْهِمْ جُنَاحٌ بَعْدَهُنَّ طَوَافُونَ عَلَيْكُمْ بَعْضُكُمْ عَلَى بَعْضٍ

¹ -Al-Dūbalbī Abdūsalam, *Al-Islam wa Al-Tifal* (Cyprus, 1993), p.33.

² -Mūkhtār Al-sihah, p394; Mūajam alfāz al-Qūran al-kareem, p.1/74.

كَذَلِكَ يُبَيِّنُ اللَّهُ لَكُمْ الْآيَاتِ وَاللَّهُ عَلِيمٌ حَكِيمٌ (58) وَإِذَا بَلَغَ الْأَطْفَالُ مِنْكُمُ الْحُلُمَ فَلْيَسْتَأْذِنُوا كَمَا اسْتَأْذَنَ الَّذِينَ مِنْ قَبْلِهِمْ كَذَلِكَ يُبَيِّنُ اللَّهُ لَكُمْ آيَاتِهِ وَاللَّهُ عَلِيمٌ حَكِيمٌ (59)

[But When the children among you come age, let them ask for permission, as do those before them.]¹

In Islamic legal sense childhood is a period in which a human being is not obliged to follow the law, and in the case of violation of law, he or she is not liable to punishment. This period starts from creation of a human being as *Janin* (fetus) and remain until the age of puberty.² Famous theologian and jurist of Islam Imam *Ghazali* defined al-Tafūlā as "a phase of life of human being which starts from his creation as fetus then birth and remains up to his puberty. This period of development in child is influenced from the environment that is exciting around him. He is born as monotheist he becomes, Christian or Jew, or Magian due to influence of his parents."³

1- Al-Qūran, 24:58-59

2-Jūwailly Sāeed Salīm, *Mafhoom al Tīfal wa Himayhathu f i Al-Shariya Al Islamia wa Al Qānoon Al-daūwal* International Seminar on Haqūq al-Insan beina al- Shariya al- Islamia w al-Qanon al-Wazī, Acādemiya Nīaf al- arbia Lil Aloom al- Amnia (Riyadh: 2001),P2/831.

3- AlGhazālī, al-Mūnqāz Min al-Zalāl (Beirut, 1980), p.89.

This definition is based on famous Tradition of Holy Prophet in which he explains that a child is born as monotheist but later on his parents make him Christian or Jew or Magian .The above mentioned definition of childhood not only fixed its period but it also describes influence of environment in which child grows up.¹According to Islamic concepts, a human being as a result of intercourse between male and female starts his life as a fetus in the womb of his mother. Then he starts the period of suckling and after that, he becomes child.²

1.2-Age of puberty in Islamic Law

No particular age is determined for puberty in Islamic Law. There are different opinions of jurists regarding age of puberty but all Muslim jurists are agreed on a point that when one person attained *rūshed* (puberty) he will be considered as adult and it can be possible from 12 to 18 years of his age. They agreed that child reached to the manhood when nocturnal emissions began. In the opinion of majority of Muslim jurists, puberty of manhood is presumed at the age of fifteen in both male and female. However Hanfīa are not agreed with the majority and they

¹- Al-Dūbaibī, *op.cit.*, p41.

²-The periods of human life have been mentioned in al-Qūran. See 46:14,31:13,2:231,17:24,22

declare eighteen years for male and seventeen years for female as age of puberty.¹

A famous jurist of fourteenth century *Ibn Qayyim al-Jawziyya* has discussed the phases of childhood and age of puberty. He divided it into the period of distinguish between good and evil (*tamyiz*), and puberty (*rūshed*). The first period is characterized by the child's ability to grasp the meaning of Islam. According to a general view, seven is the age of *tamyiz* although there is other opinions in which *tamyiz* are ranging from three to ten.² By presenting all these possibilities, *ibn Qayyim al-Jawziyya* emphasizes the individual differences from the point of view of intellectual development. Similarly, he avoids giving a categorical definition for the onset of puberty. Although he regards the age of fifteen as the starting point of adolescence, he recognizes individual differences, which should be taken into account when considering the religious duties of a young man.³

¹ -Nyazee Imran Ahsan, *Islamic Jurisprudence (Usul al-Fiqh)* (Islamabad: International Institute of Islamic Thought and Islamic Research Institute, 2000), p.113.

²-Ibn al-Jawzi, *Tūhfāt al mawdūd fi Ihkām al Mūwlūd*, (Bombay: 1961), p 23.

³-Avener Gil 'adi, "Children of Islam Concepts of Childhood in Medieval Muslim Society", (U.K 1992), p.92.

In classical view of Islamic Law the fixation of particular age of puberty is difficult due to the differences of human beings. Not all human beings are attaining puberty on the same age. May be this is a reason that Muslim Jurists stressed more on nocturnal emissions as sign of puberty than any particular age.

1.3-Definition of a child in International Law

The statutory definition of "child" shows the idea that a child is one who has not reached the age of puberty. A part from statute and in the ordinary use of the English language, a person of fourteen years of age is a child. But it is impossible to lay down any definite boundaries as separating 'children' from young men and women. It is supposed that their maximum age is somewhere between six teen and twenty.¹

According to the definition of Children Act 1958 'Child means a person under the age of sixteen.'² The Convention on the Rights of the Children 1989 defines that a child means every human being below the age of 18 years unless, under the law applicable to the child,

¹ -Johans.James, Stroud's Judicial Dictionary of Words and Phrases,(London: Sweet & Maxwell Limited, 5th Edition 1986),p.419.

²- UK Children Act 1958,Section.17 (1)

majority is attained puberty in early age.¹ The Convention clearly specifies the upper age limit for childhood as 18 years, but recognizes that majority may be obtained at an early age under laws applicable to the child. The articles, thus, accommodates the concept of an advancement of majority at an early age either according to the upper limit in childhood is specified as an age of 'childhood' rather 'majority' recognizing that in most legal system, a child can acquire full legal capacity with regard to various matters at different age.²

The Roman law recognizes two stages of minority. First stage is the age of 12 years for girls and 14 years for boys and second stage is the age of 18 years.³ The Scottish Law following its Roman origins divides person under the age of Majority into pupils (Boys under the age of 14 and girls under the age of 12) and minors (Boys and girls between those ages and eighteen).⁴

The UN convention allows states to fix age of puberty other than eighteen years but it emphasizes that states

¹- United Nation Convention on the Rights of the Children, 1989, Article No. 1

²- Newel Peter, *The UN Convention and Children's Rights in The UK* (London: National Children's Bureau, 1991)p.2.

³- See Kaser, *Roman Private Law* (2nd Edition .1956), p.87.

⁴- Scottish Law Commission, *Legal Capacity and Responsibility of Minors and Pupils* (1985) P.7

substituting an earlier age for specific purposes must do so in the context of the convention guiding principles. This must be non-discrimination and in the best interest of the child.¹

The UN Convention Article No. 1 left deliberately vague so as to allow contracting party flexibility in interpretation of 'child'. This article is silent on the issue of when rights may be afforded. Is it at the point of birth or before? This is in spite of the fact that in the preamble to the convention reference is made to the need for 'special safeguards and care including appropriate legal protection, before as well as after birth', likewise states are free to determine when childhood ends. The convention confines itself to guaranteeing the right to life.²

The above discussion shows that eighteen years age can be taken as standard age for end of childhood and attainment of manhood. It also clarifies that if any state decides to take less than eighteen-year age as age of puberty it will not be against the spirit of UN Convention provided that this decision is non discriminate and in the best interest of the child.

¹-The Convention on the Right of Children, Article 2(2),3(1) ; Newel Peter, op.cit.p2-3.

²- Ibid, Article 6(1), (2)

1.4-Comparison

In the light of above discussion it can be said that there is no big difference in the definition of a Child in International law and Islamic law. According to the majority of Muslim jurist, a person will be considered adult when he will attain the age of puberty. This age will be determined on the on the bases of the claim from the child. International law is more specific in this regard. Convention on the Rights of the Children recommends age of 18 years as age of puberty but it also allows to specify less than this age as age attaining the manhood and rights of adults. The majority of Muslim jurists have not fixed maximum age of puberty. However they have not stopped from such kind of fixation therefore fixation of minimum age of adult i.e. 18 years per International law does not appear contradictory to Islamic Law.

2) LEGAL PERSONALITY OF A CHILD IN ISLAMIC LAW

2.1-Concept of Legal Capacity in Islamic law

In Islamic Law, the terminology *Ahliyyah* is used for legal capacity or Legal personality. The literal meaning of the word *ahliyyah* is absolute fitness or ability. *Ahliyyah* is 'the ability or fitness to acquire rights and exercise them and to accept duties and perform them'¹. This meaning

¹- Nyazee, op.cit, p.110.

indicates two types of capacity: the first is based on the acceptance or acquisition of rights and the other on the performance of duties, which are named as *ahliyyat al-wujb* and *ahliyyat al-ada*” or the capacity for acquisition (of rights) and the capacity for execution or performance of duties. Capacity for acquisition enables a person to acquire both rights and obligations, while capacity for execution gives him the ability to exercise such rights and perform his duties¹.

Al-Zarqa defines legal capacity (*ahliyyah*) as “a description presumed in a person rendering such a person a possible candidate to receive a legislative injunction”.² *Al-Sabouni* sees *al-ahliyyah* as “the ability of a person to oblige, be obliged and conduct ones affairs by oneself”.³ *El-Alami* refers to it as “the fitness of a person to enter into obligation that is to bind and be bound”.⁴

Al-ahliyyah (legal Capacity) requires set of qualification in accordance with which a person becomes able to acquire right, bear obligations and conduct actions and transactions that are able to produce their legal effects. These definitions entail four conditions. The

¹- Ibid, p111

²-Zahraa, Mahdi, ‘The Legal Capacity of women In Islamic Law,’ Arab Law Quarterly, vol. 11, year 1996,p245.

³- Ibid, p245.

⁴- Ibid, p245.

candidate of *al-ahliyyah* must be (1) a person, (2) able to acquire right,(3)able to bear obligation; and(4)able to conduct legally effective action and transactions. In Islamic law, the child has capacity of acquisitions but he has no capacity of performance. It will be easy to understand legal capacity of a child in Islamic law after going through its kind because it will clarify his legal status.

2.2-Kinds of Legal Capacity in Islamic Law

The Muslim Jurists has divided legal capacity into following three kinds:

A-Complete Capacity

The complete legal capacity (*al- ahliyyah al-kamila*) is found in a human being after his birth and makes him eligible for acquisition of all kinds of rights and obligations. *Al- ahliyyah al-kamila* is established in a person when he or she attains full mental development, and acquires the ability to discriminate. The ability of discrimination is associated with the external standard of the puberty. However, attaining *bulugha* (puberty) alone is not sufficient. It is necessary for a person to acquire complete capacity for execution, in addition to puberty, the possession of *rushed* (discrimination; maturity of actions)

is stipulated as well.¹ The jurists have imposed the condition of *rūshed*² on the bases of following legal evidence from the Quran:

وَابْتَلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا
فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ وَلَا تَأْكُلُوهَا إِسْرَافًا وَبِدَارًا أَنْ يَكْبُرُوا وَمَنْ كَانَ
غَنِيًّا فَلْيَسْتَعْفِفْ وَمَنْ كَانَ فَقِيرًا فَلْيَأْكُلْ بِالْمَعْرُوفِ فَإِذَا دَفَعْتُمْ إِلَيْهِمْ
أَمْوَالَهُمْ فَأَشْهَدُوا عَلَيْهِمْ وَكَفَىٰ بِاللَّهِ حَسِيبًا (6)

[Make trial of orphans until they reach the age of marriage; then if ye find sound Judgment in them, release their property to them: but Consume it not wastefully, nor in haste against their growing up]³

This verse clearly shows two conditions that must be fulfilled before the wealth of orphans can be handed over to them. These are *bulugha* (puberty) and *rūshed*.

B- Deficient Legal Capacity

Deficient capacity or *al- ahliyyah al-naqisaa* is assigned to a person in whom the bases of legal capacity

¹- Niazee, op.cit., p113.

²-This term signifies the handling of financial matters in accordance with the dictates of reason.

³- Al-Qūran, 4:6.

are not fully developed. Thus, a person may not have been born yet or he may not have reached full mental development. In other cases, the attribute of being a human may be missing altogether.¹

C- Imperfect Legal Capacity

Imperfect legal capacity or *al- ahliyyah al-qaisirah* is assigned in cases where the bases of capacity, being a human and possession of discretion are present but an external attribute has been introduced that do not permit the recognition of the legal validity of certain acts.²

2.3-Levels of Legal Capacity

The legal capacity of a human being starts from his creation in the womb of mother and it remains until his death. Its different levels develop with the development of human being. The Muslim jurists have identified five stages and their corresponding levels of legal capacity as under:

A-The unborn child (*Janin*) جنين

During the first stage, which exists during pregnancy prior to the birth of a baby, deficient or incomplete

¹- Zahraa Mehdi, op.cit.,p.248.

²- Al Sarkhasi, Abubakar Muhammad ibn Abi Sahl Ahmed (1090 C.E), "Usul al-Sarkhasi"Edited by Wafa al- Afghani, (Cairo, 1953), p.2/333-334.

capacity is established for an unborn child or the fetus (*Janin*). Deficient capacity implies that only rights are established for the *Janin* and no obligations are imposed on it. The reason is that the *Janin* is considered part of the mother in some respects.¹ In other respects, the *Janin* enjoys a separate life and prepares for separation from the womb. His personality is therefore, considered deficient or incomplete. By virtue of this deficient capacity, the *Janin* acquires certain right: freedom from slavery, inheritance, bequest and parentage. On the other hand, the *Janin* is not liable for satisfaction of rights owed to other.² A purchase made by the *Wali* (guardian) on behalf of the *Janin* cannot makes the *Janin* liable for the payment of the price. Likewise, the maintenance of close relatives and the membership of the (*Aqilah*) cannot be enforced against him. Once the child is born, these rights can be enforced against him, but not when the obligations were acquired during the gestation period.³

B-Childhood

The childhood stage starts at birth and lasts until the age of discernment. During this stage, children have a full

¹- Niazee, op.sit.p.248.

²- Al Sarkhasi, op.cit., p.2/334.

³- Niazee,op.cit., p115; Zahraa,Mehdi,op.cit.,p.248.

ahliyyat al-wujub, as at this stage they become able to acquire rights and bear obligations but until he attains the age of actual or legal puberty, he lacks capacity for execution. Although all statements, expressions of will, actions and transactions that are carried out by the child itself have no legal value and produce no legal effect, the child can still bear certain obligations.¹

C-Discernment

This stage starts at the age of discernment and lasts until puberty. During this stage the child has full *ahliyyat al-wujub* and restricted civil discretion capacity that is called *ahliyyat al-ada al qasira*. The Muslim jurists developed this concept in order to meet the needs of the child.² In this stage the child is allowed to execute his capacity for the performance of certain kind of acts, which are not usually allowed to children.

D-Puberty

The fourth stage of capacity is started when a child attains full legal capacity after having full puberty. The Muslim jurist has indicated two ways of identification of puberty. It can be either factual, when the natural signs of

¹- Ibid.

²- Al-Zarqa Ahmad M., *al-Madkhil Fil Fiqh al-Islami* (6th edition, 1959) p2/733; Zahraa, Mehdi, *op.cit.*, p.249.

puberty, such as nocturnal emission for a boy and menstruation for a girl appear or presumed in case of delay in the appearance of natural signs. The identification of natural signs is usually based on local customs. At this stage the person is considered to possess full religious legal capacity, which is named as *ahliyyat al-ada diniyyah*. In this situation, the human being is liable before God for his religious duties.

E-Maturity

This final stage commences from actual physical and mental maturity with *rūshed*. The criteria for attainment the age of puberty is same for male and female. At this stage, the person is considered eligible for facing the risks and accordingly makes reasonable decisions. On reaching this stage the individual completes capacity for execution and declared eligible for each kind of *Khatab*. *Rushed* is a particular condition of this stage.¹

2.4-Legal Capacity of a Child (Minor) in Islamic Law

A human being remains child in two stages of his legal capacity. These two stages, fetus and child hood, can be denoted with the terminology of minor. The legal

¹- Niazi, op, cit; p.114-114; Zahraa, Mehdi,op.cit.,p.250.

capacity of minor is categorized as deficient or defective. Minority infact is not a cause of defective capacity or even an obstacle in its way, but a necessary stage in the growth of human being. During this stage the human being is eligible for rights that are essential for his welfare but not liable for duties and punishments in case of non-performance of his duties. In Islamic Law minority does not affect capacity for acquisition or *ahliyyat al waujub* .All rights and obligations are acquired, as their establishment requires for the capacity of acquisition. The capacity for execution or *ahliyyat al ada* requires *aqil* (for its fulfillment) and non-discriminating minor (*sabi ghayr mumaiyyaz*) lacks, because he does not understand *kitab*. He is therefore not liable for *ibadat*, financial transaction or punishment.¹ The further details of minor's religious, financial and criminal responsibilities are discussed below.

A-The legal capacity of a Minor in Financial Transactions

The financial transitions are established against the *dhimmah* of the *Sabi* (minor).Though he cannot meet them personally due to the absence of the capacity for execution, the Lawgiver allows his *wali* (guardian) to stand in his place and represent him through a substitute

¹- Sadr al Shariah, al-Thani al Mahbubi, Ubaid Allah bin Masud (d747/1395), "Sharh al-tawdih ala al tanqih", (Cairo), p.2/760

duty. The financial transactions are divided into the following three types for determining the liability of the discriminating minor:

Purely beneficial transactions: The transactions like acceptance of *sadaqah* and gift are falling in this category. These transactions are allowed to a person who has not attained puberty, but can discriminate and has been permitted by his *wali* (guardian) to exercise such acceptance.

Purely harmful transaction: The grant of divorce, manumission (*itq*), charity, loan and bequest (*wassiyah*) are considered transactions resulting in pure financial loss. These are not permitted to non-discriminating minor.

Transactions vacillating between profit and loss. Sale, hire, partnership, and other such transactions are considered valid if rectified by the *wali*.¹

B-The Legal Capacity of a minor in Criminal Matters

Muslim Jurists are agreed that criminal liability does not exist in the case of a person who has not attained the age of puberty. Because he is not a *mukallaf* and the *wali* cannot stand in his place for criminal offence: Punishments being deterrents for the offender himself and

¹ -Alsarkhsi, op, cit,p2/335; Sadr al Shariah,op,cit,p2/762; Niazi,op,cit;p118-119; Zahraa,Mehdi,op.cit.,p249

not for those who represent them. However a child over seven may be liable for *ta'dib* (minor strictness that is usually applied on children for the purpose of training). Yet, this may not be interpreted to mean that minor can be awarded penalties if he is over seven.

C-The legal capacity of minor for worships

The (*ibadat*) worship is not obligatory on the child, as he does not possess the capacity for execution.¹

3- LEGAL PERSONALITY OF A CHILD IN WESTERN LEGAL THOUGHTS

3.1-Definition of a Legal Person

In contemporary concepts of jurisprudence, rights can not be determined in favor of a person unless he is declared as legal person having legal capacity. In the law, there may be men who are not persons; slaves are destitute of legal personality in any system, which regards them as incapable of either rights or liabilities. Like cattle, they are things and the objects of rights, not person and subject of them. Conversely, there are in the law, person who are not men. A joint-stock company or a municipal

¹ -Alsarkhsi,op,sit,p2/335; Sadr al Shariah,op,cit,p2/762; Niazi,op,cit;p118-119; Zahraa,Mehdi,op.cit.,p249 also see Fottrell Deirdre, Revisiting Children's Rights (London :kluwer Law International, ,2000)p.40-41.

corporation is a legal person. So also, in Hindu law, idols are legal persons.¹

To be a legal person is to be the subject of rights and duties. To confer legal rights or to impose legal duties, therefore, is to confer legal personality.² If society by effective sanctions and through its agent will coerce A to act in favor of B, B has a right and A owes a duty. Predictability of social action therefore determines rights and duties and determine legal personality. Whatever the controversies about the 'essential nature' of legal personality, there seems to be a uniform concurrence in these as respectively the test of its existence in a given subject, and the manner in which it conferred, whether upon a natural person or upon an inanimate thing.³

Among definitions to be found in discussion of the subject perhaps, the most satisfactory is that legal personality is the capacity for legal relations.⁴ This definition by Salmond suggest that the subject may have a capacity for legal relation without yet having become a

¹- Fitzgerald, P.J, Salmond on Jurisprudence (London, Sweet & Maxwell, 1966) p.298.

²- Gray, *The Nature and Sources of the Law*, (2d ed. 1921), p27; Smith, Bryant, 'Legal personality,' *Suspicious News Magazine* vol. 12, No. 1 (www. Antishyster. Com), p.80.

³- *Ibid*, p.80.

⁴- Salmond, *op. cit.* p.272.

party to such relations. A minor with capacity to marry is not necessary married but his legal personality is conferred.¹ Gray thinks there can be no right, and therefore no legal personality, without a will to exercise the right. He states, a right should be given effect and there must be an exercise of will.²

Salmond on the other hand discovers a different quality, which, by his definition, is essential to a right. "Not being is capable of rights unless also capable of interests which may be affected by the acts of others".³ According to his definition, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is person even though he be a man.⁴

The above definitions identify rights, duties and will serve as essence of a legal personality.

¹- Legal personality and legal capacity appear to be synonyms and each legal personality/ capacity is function of particular purpose. See. *Ibid.*, p. 80.

²- Gray, *op. cit.*, p25-26

³-Fitzgerald, P.J., "Salmond on Jurisprudence", (London', Sweet & Maxwell, 1966), p.273

⁴- *Ibid.*, p.299.

3.2- Kinds of legal personalities

In the light of above, definition Legal personalities can be divided into following kinds.

A-Natural persons

A natural person is such a human being as is regarded by the law as capable of rights or duties; in the language of Roman law as having a status. As having any such capacity recognized by the law, he is said to be a natural person.

B- Artificial legal personality

The artificial persons are also called 'conventional' or 'juristic' person. They are such masses of property or groups of human beings as are in eye of the law capable of rights and liabilities, in other words, to which the law gives a status of legal personality.¹

3.3-Legal capacity of a child

The unborn child has a legal personality in the law of many states because he is subject of some rights that the law recognizes.² The law is not preventing unborn child from owning property before his birth. His ownership is

¹- Ibid, p97

²- Jude, I, Begbu, Rights of the unborn Child in International Law, (www.etruriante.it/jude/unborn.htm),p.1/3, 6/28/2004.

necessarily contingent, indeed, for he may never be born at all, but it is nonetheless a real and present ownership. A man may settle his property upon his wife and the children to be born of her or he may die intestate and his unborn child will inherit his estate.¹The legal personality attributed to him by way of anticipation falls away (*ab initio*) if he never takes his place among the living. Abortion and child destruction are crimes but such acts do not amount to murder or manslaughter unless the child is born alive before he dies.²

The Roman law divides children into two kinds i.e. pupils and minors. According to case law the pupils are children under the age of twelve (in the case of girls) or fourteen (in the case of boys) and minor are young³ people between the ages of twelve or fourteen (as the case may be) and eighteen. Since there is difference in the legal capacity of pupils and minors, so the law deals them separately. A corresponding distinction is drawn between a child's "tutors" and "curators" as the two categories of guardian for pupils and minors respectively. A child's tutors and curators are usually his parents

¹- Fitzgerald, P.J., op.cit., p.64.

²-Ibid, also see Pound, "Jurisprudence", (ST. PAU, MINN, WEST Publishing co, 1959) Vol. 4/ p.202.

³- Kaser, 'Roman private Law', (2nd et, 1968), p.66-67; Lea, 'Elements of Roman Law', (4th edition. 1956), P.87.

although in certain cases, for example, where the child has no parent, a special guardian may be appointed to him.¹

A pupil has no capacity to act for himself. His tutor manages his affairs and enters into legal transactions on his behalf in his own name. The general approach of the law in this regard based on the incapacity of the pupil, whose tutor must, in principle act on his behalf. If a pupil, enters into any contract it will be void and all legal acts must be performed on his behalf by his tutor. Where a pupil has no tutor or, having a tutor, purports to contract on his own behalf, he cannot be sued on the contract.²

A minor have a limited capacity. He may enter into transactions in his own name, but if he has a curator, he must obtain his consent to most transactions. Even if he does have a curator, there are certain things, which a minor is entitled to do alone. So, he does not need his curator's consent to make a will, enter into contracts for the supply of necessities, which are defined as goods suitable to the minor's condition in life and to his actual

¹ -Legal Capacity and Responsibility of Minors and Pupils, Scottish law commission, pamphlet, p.2.

²- Fraser, Personality and Child (3 rd Ed, 1906), p204; Legal Capacity and Responsibility of Minor and Pupils, consultative memorandum No. 65. 1985, Scottish law Commission, p.8.

requirements, obtain employment or enter into contracts in the course of his profession, trade or business. ¹

4- COMPARISON & CONCLUSION

The legal personality of a child is recognized in Islamic law and western legal thoughts. According to the different legal theories, Islamic as well as western, rights cannot be determined without legal recognition of a human being so the legal personality of a child is recognized for declaring him eligible of rights.

In Islamic law, legal personality of a person provides him fitness for execution of his rights and his duties. The western legal experts declare legal personality as the subject of rights and duties. In both legal systems we find similarities regarding legal personality of a child. The elements of legal personality, which are necessary for safeguarding rights of children, are attributed to them but the remaining parts of the legal personality, which impose duties on them, remain suspended until the attainment of puberty.

Both legal systems recognize different stages of child until he attains full legal capacity. Islamic law divides these stages into five levels; these levels are unborn child,

¹- Ibid,, p.12-13.

childhood, decrement, puberty and maturity. In western legal system these stages are divided into unborn child, pupil, minor and mature. Both in Islamic law and in western legal thoughts some rights of execution of will are recognized in favor of a minor who is close to attain the age of maturity but he can not execute it without rectification from his guardians which is called in Islamic law *wali* and in Roman law tutor or curators. Islamic law and other modern legal theories declare unborn child as eligible for rights. But the UN convention of children rights is silent about the rights of unborn children. The consequence of the absence of legal protection of the natural rights of the unborn child, both in national and international laws is that there is a constant violation of these rights. Therefore, there is an urgent need for a universal legal protection of these rights.

The above discussion shows that children are as important in Islamic Law as in any other legal System. The Muslim jurists do not ignore their legal Status. The part of legal capacity that makes them entitle for rights exists in their personalities even before their birth. They are eligible for all rights, which are required for their healthy smooth and satisfactory upbringing without any discrimination of male and female. This study also proved that the presumption 'Islamic Law has not recognized

legal personality of children' is not correct. They have perfect legal status, which enable them to enjoy with their full rights. It is necessary that the role of Islamic civilization which it has played for safeguarding the interests of the children may not be ignored in the struggle of children rights. The Muslims states have to play in this regard leading role so that rights of children and their status in the Muslim societies reflect true Islamic teachings.