

DOLI INCAPAX AND THE LEGAL CAPACITY OF CHILDREN AND JUVENILES: SHARIA VS. LAW

DR.Syed Hasnat Ahmad Shah Gillani

Department of Law

University of Azad Kashmir.

gillani500@gmail.com

Abstract

This study is aimed to analyze the legal status of children in terms of criminal liability in Islamic law while comparing it with Pakistani legal system and international law. Study shows that the provisions of Islamic law have much to contribute to the area of human rights, especially to the area of the rights of the child, as shown in the discussion of a few principles in this paper. All we need is a positive attitude towards, and confidence in, our own legal heritage-

1. Introduction

A child under the age of criminal responsibility lacks the capacity to commit a crime which termed as *Doli Incapax* in legal Latin terms, and this legal maxim is to be consider as basic rule in deterring criminal liability of any person in English law.¹ This means they are immune from criminal prosecution – they cannot be formally charged by authorities with an offence nor be subjected to any criminal law procedures or measures. The significance of the minimum age of criminal responsibility is that it recognizes that a child has to attain the emotional, mental and intellectual maturity to be held responsible for their actions. The minimum age of criminal responsibility set by different countries ranges hugely from as low as six up to 18 years of age. The median age of criminal responsibility worldwide is about 12 to 16, once having the requisite capacity to be held responsible for offending behavior does not mean that children over the age of criminal responsibility should be subject to adult-oriented, formal criminal prosecution.² However, children above the age of criminal responsibility can be arrested, detained and imprisoned. This means that children are drawn at an early age into criminal justice systems that can stigmatize them and damage their long-term prospects and opportunities. With that, it is important to weigh that what the Islamic law and the international standards say about the minimum age of criminal responsibility and then looks at how minimum ages work in practice in our legal system under penal provisions. Along the same lines, Pakistani legal system follows obligations under the UN Convention on the Rights of the Child (CRC) towards all children under the age of 18 and, as a matter of priority, governments should have develop separate justice systems for children that do not focus on punishment or retribution but on their rehabilitation and reintegration into society and on promoting respect for the child's sense of dignity and worth.³

With that realization, as comparison with common law system which is termed as the defense of infancy, is a form of defense known as an excuse so that defendants falling within the definition of an "infant" are excluded from criminal liability for their actions, if at the relevant time, they had not reached an age of criminal responsibility. After reaching the

¹ Crofts, Thomas. "Reforming the age of criminal responsibility." *South African Journal of Psychology* 46, no. 4 (2016): 436-448.

² Cipriani, Don. *Children's rights and the minimum age of criminal responsibility: a global perspective*. Routledge, 2016.

³ Nyazee, Imran Ahsan. "Islamic Law and the CRC (Convention on the Rights of the Child)." *Islamabad law review* 1 (2003): 1.

initial age, there may be levels of responsibility dictated by age and the type of offense committed.

Under the English common law, the defense of infancy was expressed as a set of presumptions in a doctrine known as *doli incapax*. A child under the age of seven was presumed incapable of committing a crime. The presumption was conclusive, prohibiting the prosecution from offering evidence that the child had the capacity to appreciate the nature and wrongfulness of what they had done. Children aged seven to under fourteen were presumed incapable of committing a crime but the presumption was rebuttable. The prosecution could overcome the presumption by proving that the child understood what they were doing and that it was wrong. In fact, capacity was a necessary element of the state's case. If the state failed to offer sufficient evidence of capacity, the infant was entitled to have the charges dismissed at the close of the state's evidence. *Doli incapax* was abolished in England and Wales in 1998, but persists in other common law jurisdictions.⁴

2. Concept of childhood and Adulthood

The definition of adult is different in various statutes. For the purpose of marriage contract, it is 16 years for male and 14 years for female, when they become major for giving free consent .for the purpose of civil contract, it is 18 years, but when there is ward, whose guardian has been appointed, then the age of majority is 21 years, for the purpose of general exceptions under Pakistan penal code, the age of 10 years provided full exemption, and up to the age of 14 qualified exemption is provided from criminal liability. After expiry of 14 years of age one is fully responsible for his criminal acts and omissions .however, chapter IV of Pakistan penal Code provides the definition of adult up to the age of 18 years, and any person below such age is treated as minor. notwithstanding, this definition is subject to anything repugnant in the subject or context, which provides discretion to the courts to treat the person below the age of 18 years, but above the age of 14 years, if he has achieved the full maturity to understand the consequences of his acts, to be major. Therefore, for the offences under the penal code, an accused under 16 years of age, was treated not adult.⁵ Any person who is not adult is called minor .a minor accused less than 16 years old is juvenile, capital punishment is not to be imposed, and he is entitled to be benefit of section 282 –B, being mandatory. Accused less than 18 years of age is not sufficient to withhold normal penalty, unless it is specifically established that there were some surrounding circumstances justifying award of lessor penalty.⁶⁷

With that added understanding, in Islamic law two terms are used, Tifal and Sabi, the word “Tifal” is used in Arabic for denoting small things, birds, animals and people. The children and childhood is described by the term “*Al Tafula*”.⁸ In literal sense Tifal means newly born child. This word is also applied on fetus and its plural is *Al-atfal*. This word is used in Quran in the meanings of children.

“But when the children among you come age, let them ask for permission, as do those before them.”⁹

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

⁴ Hamer, David, and Thomas Crofts. "The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)." *Oxford Journal of Legal Studies* 43, no. 3 (2023): 546-573

⁵ 2000 P.Cr.L.J.139

⁶ NLR 2004 CrI. (Qut)107

⁷ 2004 P.Cr.L.J.874

⁸ Al-Diibaibi Abdiilsalam, A/-Jslam wa Al/-Tifal(Cyprus, 1993), p.33.

⁹ Al-Quran, 24:58-59

period starts from creation of a human being as *Janin* (fetus) and remain until the age of puberty. Famous theologian and jurist of Islam Imam *Ghazali* defined *al-Tafula* as “a phase of life of human being which starts from his creation as fetus then birth and remains up to his puberty.¹⁰ 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 any one due to influence of his parents.

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. According to Islamic concepts, a human being as a result of intercourse between male and female starts his life as a fetus in the boom of his mother. Then he starts the period of suckling and after that, he becomes child.

2.1. Discernment in Islamic Law

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 gasira*. The Muslim jurists developed this concept in order to meet the needs of the child.* 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.¹¹

2.2. Legal Significance of Puberty in Islamic and English Law

Survey of preexisting laws shows that existing law implanted already provides for sympathetic and concessionary treatment of minor accused persons below the age of 10 years absolutely, and above the age of 10 years, but below the age of 14 years, in certain conditional circumstances. Which means that less than 14 years is out of question for the discussion of puberty. Provisions of Ss 82 and Ss.83 of Pakistan Penal Code shows that a child below the age of 10 years is incapable of committing offence because he is *doli incapax*, incapable of forming possession of necessary means *rea* for an offence, whereas a child between age of 10 and 14 years can be capable of forming that very element for an offence, unless it is established that he has not attained maturity of understanding to judge of nature and consequences of his conduct.¹² According to the provisions of the Majority Act, 1875, the age of majority of a person domiciled in Pakistan is 18 years except in cases where a Guardian of a minor is appointed by the court, in which case the age of majority extends to twenty-one.

A child, as long as he is a child, that is, as long as he has not attained puberty, has no criminal liability. Criminal liability in Islamic law, prior to the attunement of puberty, has nothing to do with mental maturity. 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 *rushed* (puberty) he will be considered as adult and it can be possible from 12 to 18 years of his age.¹³ 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, Hanfia are not

¹⁰ -JUwaily Saeed Salim, *Mafhoom al Tifal wa Himayhathu i Al Shariya Al Islamia wa Al Qanoon Al-datiwal International Seminar on Haqqiq al-Insan beina al- Shariya al- Islamia w al Qanon-al-Wazi*, *Academiya Niaf al- arbia Lil Aloom al- Amnia* (Riyadh: 2001),P2/831

¹¹ Wijaya, Andi, and Siti Nurhaliza. "Critical Analysis of Children's Legal Skills in the Hanafi Mazhab." *Indonesian Journal of Islamic Law* 4, no. 1 (2021): 1-16.

¹² 2004 YLR (Lah)1404

¹³ -Nyazee Imran Ahsan, *Islamic Jurisprudence (Usal_ al Figh)*(Islamabad: International Institute of Islamic Thought and Islamic Research Institute,2000),p.113.

agreed with the majority and they declare eighteen years for male and seventeen years for female as age of puberty.

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 (dished). 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.'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. 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. ¹⁴

2.3.A1- Rushed (Maturity)

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 capacity of minor is categorized as deficient or defective. Minority in fact 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 nonperformance 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 aq/(for its fulfillment) and non-discriminating minor (sabi ghayr mumalyyaz) lacks, because he does not understand kitab. He is therefore not liable for /badat, financial transaction or punishment.

Children are human beings but at the same time, are different from adults.¹⁵ A child, because of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.

3. Meaning of Child in International Legal Instruments.

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 imposable 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. According to the definition of Children Act 1958 ¹⁶ Child means a person under the age of sixteen.' 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, majority is attained puberty in early age. ¹⁷ 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

¹⁴ _Tbn al-Jawzi, Tuhfat al mawdiid fi Inkam al Mawlud, (Bombay: 1961),p 23

¹⁵ Islam, Mohammad Saiful. "Fundamental human rights towards childhood: Islamic guidelines are unique to protect the child." *Journal of Asia Pacific Studies* 4, no. 2 (2015): 177-202.

¹⁶ UK Children Act 1958,Section.17 (1)

¹⁷ United Nation Convention on the Rights of the Children, 1989, Article No. 1

in childhood is specified as an age of 'childhood' rather 'majority' recognizing that in most legal system, a child can acquire full regal capacity with regard to various matters at different age. 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. 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) The UN convention allows states to fix age of puberty other than eighteen years but it emphasizes that states 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.¹⁸

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. 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.

3.1 Juvenile Offender under International Law

In the international law juvenile's rights are definite in various ways, covering a large range of political, civil, social, cultural and economic rights. The first international legally binding instrument addressed to child is The United Nations Convention on the Right of the Child (UNCRC), recommended to the United Nations on the 20th of November 1989 (UNICEF, 1989).¹⁹ It was the process of raising consciousness before the world community that child need different protections for fulfill basic human rights for everybody under the age of eighteen. By the sign and approve the CRC the state parties agree to arrange the required changes in their national legislation. For example Bangladesh enacts the Child Act, 2013, and China enhanced its criminal law to prohibit the death penalty for juvenile offenders in 1997. Before this document various instruments were adopted to protect the right of juvenile offenders.²⁰

BEIJING RULES, 1985 emphasizes on Formation of laws, rules & provisions specifically for juvenile offenders & distinct institutions for administering justice to them. (ALI, 2014) Havana Rules 1990 considers care of juvenile.

In Article 6, The International Covenant on Civil and Political Rights (ICCPR) states, "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age." (ICCPR, 1966) Convention on the Rights of the Child (CRC) unambiguously eliminates juvenile offenders from the death penalty. In Article 37 states, "Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for

¹⁸ The Convention on the Right of Children, Article 2(2),3(1) ; Newel Peter, op.cit.p2-3.

¹⁹ Tanveer, Fizza. "The United Nations Convention on the Rights of the Child (UNCRC): Examining the Tenets, Practices, and Related Studies." Library of Progress-Library Science, Information Technology & Computer 44, no. 3 (2024).

²⁰ Islam, M. S. (2015). Child Abuse and the Recent Trends in Bangladesh: A Critical Analysis from Islamic and Bangladeshi Laws. IOSR Journal of Humanities and Social Science (IOSR-JHSS), 20(12), 58-66.

offences committed by persons below eighteen years of age.”(UNCRC, 1989) This provision is fundamental principles of juvenile justice. ²¹

The Universal Declaration of Human Rights (UDHR), 1948 stress on the principle of the right to be presumed innocent until proved guilty.²² The Cairo Declaration on Human Rights in Islam (CDHRI) and The Organization of the Islamic Cooperation (OIC) which proclaims Islamic Sharia as its single source and provides an outline on the Islamic perspective of human rights including juvenile. ²³

4. Concept of Legal capacity (Ihliya al Ada and Ihliya al wujob)

*“The fitness of a person for the application of law to his action is legal capacity”.*²⁴

Islamic Law and Jurisprudence has described a complete system of Legal capacity. According to the it every Muslim is dressed characteristically with legal capacity, which is honor as well as accountability this is very significant as all the general fortifications in criminal law and ownership of pledged capacity enclosed under this issue. For taking legal capacity there are amount of circumstances that must be satisfied before the law can work for or against a person. 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’ This meaning 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 alwujb 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 duties. 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 candidate of 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.²⁵

4.1. Kinds of Legal capacity

One is complete respective capacity which is found in human being after his birth which makes him qualified for the attainment of all types of rights and responsibilities. Complete active capacity is recognized in human being when he or she reaches full mental growth and obtains the aptitude to distinguish. Other is called Deficient capacity which means It is that

²¹ Muhtar, Abdul Kadir Zaylani, and Muh Risnain. "The The Right to Life Based on The International Covenant on Civil And Political Rights And Its Application In Indonesian National Law." *Mataram Journal of International Law* 2, no. 2 (2024): 125-144.

²² Wilson, Tamfuh YN. "The United Nations Declaration of Human Rights 1948: Successes and Challenges." *African Journal of International and Comparative Law* 30, no. 4 (2022): 599-618.

²³ Organisation of Islamic Conference. "The Cairo Declaration on Human Rights in Islam." Organisation of Islamic Conference, 1990.

²⁴ Zahraa, M. (1996). The legal capacity of women in Islamic law. *Arab LQ*, 11, 245.

²⁵ Omar, Muhammad Naim. "The concept of impediments to legal capacity (awarid alahliyyah) in Islamic Law of contract and the Egyptian Civic Code of 1948." PhD diss., University of Wales Trinity Saint David, 2006.

where the foundation of legal capacity is not completely advanced e. g. unborn child, minor. Third is called Imperfect capacity which means where the foundation of legal capacity is present such as being a human and will but some exterior characteristic does not permit the gratitude of the legal cogency of certain performances.

Conclusion

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 exemptions from sentences in their personalities even before their birth. 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. Similarly, it is also internationally established that neither capital penalty nor life imprisonment shall be enforced for offences committed by children. This provision also adopt in the legislations in Pakistan. A child, as long as he is a child, that is, as long as he has not attained puberty, has no criminal liability. Criminal liability in Islamic law, prior to the attunement of puberty, has nothing to do with mental maturity. Thus, he cannot be accused of a crime or be subjected to criminal proceedings. Disciplining may be undertaken by the guardian or by the state or even by a teacher, but in a manner that is similar to that of a parent observing the norms of the Shari'ah. Once puberty has been attained, the child is no longer a child, and is a full adult, even if he is below the age of 15 years. However, puberty is difficult to prove primarily because this is done after the fact that is, at the time of trial the defense can always deny the child had attained puberty at the time of commission of the crime. In the absence of proof of puberty, the majority of the jurists determined the age to be 15 years for both girls and boys. This is the view followed in Pakistan's Hudud laws. These ages are based primarily on rational arguments. Puberty is achieved by a child when his or her sex glands become functional and the secondary sexual features appear, and it could be different from person to person so as the benefit of doubt should be given to the accused if he has not attained the age. In the advancement of the Sharia, it is acceptable for the State to adopt a policy to prevent maltreatment in the society, under the doctrine of public interest or that of inspiring good and stopping harm (hisbah). Islamic law deliberates a person as fully accountable when he/she has attained the age of puberty. This means the physical maturity, not necessarily the mental maturity. Criminal accountability firms not by a person's age but by biological maturity. Only people who are balig (of legal age in the logic of biological sexual maturity) can be criminally liable. They are punishable, however, only if a complete possession of their mental abilities (aqil).

In the matter of juvenile, According to Article 1 of the United Nations Convention on the Rights of the Child, 1989 a child is defined as "a human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier". In the Children Act 2013, a child is defined in section 4 and includes anyone up to the age of 18 years.

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- ¹ Tanveer, Fizza. "The United Nations Convention on the Rights of the Child (UNCRC): Examining the Tenets, Practices, and Related Studies." *Library of Progress-Library Science, Information Technology & Computer* 44, no. 3 (2024).
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