

A Theoretical Analysis: Safeguarding Orphans' Rights in Pakistan's Legal Landscape

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ABSTRACT

Children are of paramount importance in our global community as they represent hope for a better future. It is of utmost importance that their well-being and rights be safeguarded and upheld. Orphans in particular are vulnerable members of society who require special attention and protection. A comprehensive legal framework that fortifies their rights is necessary to ensure their holistic development and security. This study adopted a multifaceted approach, integrating doctrinal and qualitative methodologies to comprehensively address the issues surrounding the protection of orphaned children. A qualitative analysis was conducted to examine the existing legal structures regarding children's rights in Pakistan. Unfortunately, there is a gap in legal provisions specifically designed to protect orphaned children within the country. This disheartening observation highlights the oversight and neglect of orphaned children in the discourse on societal protection. In a world where young individuals are often voiceless, their vulnerabilities demand immediate attention and redressal. The absence of meaningful discussions about their well-being makes safeguarding their rights even more challenging. Certainly, without a discourse centered on their needs and requests, the endeavor to shield orphaned children from harm remains an uphill battle. This study sheds light on the existing legal framework for children's rights in Pakistan. The absence of specific legislation protecting orphaned children reminds us of the urgent need for inclusive dialogue and legislative action. Only through proactive engagement and advocacy can we pave the way for a more equitable and secure future for these precious lives, ensuring that their rights are recognized and protected.

1. Introduction

Legal Children are considered the precious and most valuable assets of their families, particularly and of any society and community as a whole, and are one of the essential elements in the formation of an organization that constitutes the reasons and purpose of living a life full of smiles and emotions in this digital and mechanical era of human life. They opened new chapters on their parents' lives. Allah created them and handed them over to their parents while giving them full charge to their children and filling the hearts of

parents with love and affection, which lies in the actual test and purpose of life and society. In the minority age group, they should have the exclusive right to enjoy their lives with complete freedom.

However, they operate within the boundaries set by law and societal norms. On the other hand, throughout the developing phase, children recognize their individuality and communal responsibility towards families and communities, as they build the fate and future of communities and nations.

Title: *A Theoretical Analysis: Safeguarding Orphans' Rights in Pakistan's Legal Landscape*

Author: Munazza Razzaq, Azizah Mohd, Noraini Md Hashim

Children are inherently endowed with inalienable rights that span their journey from birth to adulthood, transcending the societal and state realms. These encompass an array of fundamental entitlements including the right to life, liberty, education, optimal healthcare, and unrestricted access to essential services. These rights are not merely abstract ideals; they are actionable, enforceable, and attainable through the auspices of the State. Consequently, it is imperative to preclude the classification of children as vulnerable and as disregarded entities within any societal faction.

In every advanced society worldwide, children possess universally acknowledged entitlement. Nevertheless, distressing and inconceivable scenarios exist in which children encounter barriers and vulnerabilities that impede access to essential rights and necessities. It remains undeniable that children have intrinsic rights, underscoring their need for safeguarding, which is a pivotal factor in facilitating their optimal growth and development. Nonetheless, the presence of stark and unpleasant truths in life and society can lead to shifts in circumstances, transforming the environment for children from being protected to vulnerable.

The multiple reasons for their vulnerability include the death of their parents, being born illegitimate, child trafficking, child abuse, and at times domestic and social violence. In any state, these are the commonly known causes and reasons for their exposure to the problematic sphere of their lives; in such phases of life, they require the support of society and the state.

Orphans are considered supportless, undefended, and neglected in most societies. In addition to their routines and necessities, they face numerous other severe psychological and social issues, problems, and complications in the community. There are three categories of orphans: orphans whose fathers died, those who lost their mothers, and, lastly, when, in some unfortunate cases, they lost both parents. All these orphans deserve equal care and protection from the law because they are badly

broken, deprived, and have already suffered an irreparable loss of the ones they loved.

Therefore, the state's objective is to guide societal conduct towards these children, aiming to ensure their well-being. This is accomplished by implementing effective laws and their enforcement to prevent mistreatment and exploitation, while empowering them to become influential and designated as peers. While the rights of all vulnerable children are equally significant, this study centers on orphaned children's rights within Pakistan's legal framework.

Orphans, particularly those living in Pakistan, do not receive their fundamental rights, starting from the right to life, health, family identity, and education. However, the continued denial of these rights has created economic, social, civil, and political apprehensions among orphaned children. It is unfortunate to say that, like certain other countries in Pakistan, the families, friends, or relatives of the deceased father consider the children of the dead as a burden on them.

Hence, to achieve legal ramifications, it is imperative to establish a structured legal framework to apply laws. Allah Almighty created the first legal system for human well-being worldwide. In the light of and pursuit of this divine legal system, humans have attempted to introduce man-made legal systems. According to society's needs, beliefs, and circumstances, it achieves the best standards of life and moral values with the support of legal rules backed by the sovereign state.

The central inquiry of this study revolves around the following question: what is the theoretical and legal framework for protecting orphan rights in Pakistan? The overarching objective achieved through this inquiry is to delve into legislative measures to safeguard orphans' well-being.

Moreover, to delve into resolving the core research inquiry, an essential question emerges: what is the legal system? Why is this important? The best answer to this question is that the legal system is the basic structure of rules set

out and framed by the sovereign in any state through which it endeavors to establish legal relations between right and duty, power and liability, immunity, and disability between individuals and the state to achieve the required purposes. Of course, goals may differ, depending on the legal system. However, the modality through which these purposes are fulfilled is the same in every legal system, with the help of jurial relations.

The legal system determines the position of any state, whether it is developed or underdeveloped. Robust legal systems are essential requirements and preconditions for sustaining the development of any state. Furthermore, the feeble legal system in an underdeveloped world is the main obstacle to growth. (Lubna Hassan,48-59)

The subsequent matter involves defining the role of the legal system's rule of law. In this context, the rule of law restricts government authority and safeguards individual rights. At its core, the rule of law asserts dominance over individuals and government. It emphasizes that everyone, regardless of their societal standing or position, must be held accountable to the law and treated equitably by the legal system. The rule of law goes beyond mere legal regulation: it safeguards freedom, human rights, and uniform treatment under law. ¹This study is grounded in the theoretical legal structure of orphans in Pakistan. Thus,

The focus here is on examining laws concerning children and orphaned individuals.

2. Definition of Child Under Different Statutes in Pakistan

Defining what constitutes a child is the central concern in this research, given the absence of a specific and unchanging legal description for the term "child." Hence, it is worth referring to all relevant laws in Pakistan that describe the term child'. Accordingly, it discusses special enactments, judgments, and conventions that

contain provisions for children and minors. (Lubna Hassan,48-59)

According to the Majority Act 1875, a "minor" is defined as an individual under 18. However, as per the Offence of Zina (Enforcement of Hudood) Ordinance 1979, an "adult" or "major" is described as a male over the age of 18 and a female who is either over 16 or has reached the age of puberty.

Meanwhile, the new law, the Zainab Alert Response and Recovery Act, 2020, regarding child abduction and commission of rape legislated in 2020, defines a child under Section 2(g). A "child" refers to an individual who has not reached the age of eighteen when an offence is committed or when a report of their disappearance or abduction is made.

Conversely, the Pakistan Penal Code establishes a lower age limit for criminal accountability at seven years old, as stated in Section 82. No action can be deemed an offence when committed by a child below ten years of [ten] years.

On the other hand, the Pakistan Penal Code fixes the minimum age for criminal responsibility for seven years under section 82. Additional clarification is provided in Section 83, which outlines when the actions of a child are considered an offence, as per Section 83 of the Pakistan Penal Code: an act committed by a child above the age of seven but below 12, who lacks sufficient maturity of understanding to assess the nature and consequences of their behavior on that occasion, is not deemed an offence. This provision also applies to children above ten but below 14, who have yet to reach an adequate level of maturity to comprehend the implications of their actions.

Furthermore, Section 497 of the Criminal Procedure Code includes specific privileges, such as the possibility of non-bailable charges, for

individuals under age 16 who are involved in the offence.

In a similar vein, the Juvenile Justice System Act, 2018, in section 2(b), characterizes a "Child" as "a person who has not reached the age of eighteen years" for this Act. Likewise, the Guardian and Wards Act 1890 defines "minor" under section 4(1) as "an individual who, according to the provisions of the Majority Act, 1875, is considered not to have achieved the status of the majority. "

However, in contrast, Section 2(a) of the Child Marriage Restraint Act of 1929 describes a child as "an individual who is below the age of eighteen if male, and under the age of sixteen if female."

Simultaneously, the National Commission on the Rights of Child Act, 2017, was established to fulfill the objectives of the CRC, and it defines a child in section 2(b) as any individual younger than 18 years of age is considered a child.

One significant feature of this Act is that it also defines Child Rights under section 2 (c) as: "Mean and include, but are limited to, rights of the child in the United Nations Convention on Rights of the Child and any other domestic law"

These domestic regulations are applicable across Pakistan, and establish parameters for categorizing children according to legal stipulations. Nonetheless, these regulations lack harmonization among themselves. Therefore, while addressing the delineation of a child, it is crucial to acknowledge that the Pakistani Constitution must provide a specific definition of a child or delineate its associated rights.

The use of the High Court's jurisdiction to address breaches of fundamental rights is a noteworthy development, but it is essential to fulfill specific requirements before the commencement of formal case hearings. Unfortunately, this legal process presents an obstacle when addressing violations of child

rights. Therefore, it is crucial to amend the 1973 Constitution of Pakistan to allow children to seek recourse from superior courts during times of necessity. It is worth noting the Constitution of Finland, where Chapter 2, Section 6 explicitly states that children must be treated equally and as distinct individuals, and that they should have the opportunity to participate in issues related to themselves in a manner appropriate for their developmental stage. This constitutional provision serves as an example for Pakistan and the international community.

The Constitution of Pakistan provides fundamental rights without discrimination. Although the word 'children' is not explicitly mentioned, there is no age limitation anywhere in the Constitution. Moreover, regarding children's and orphans' rights, any person can invoke the High Court's and Supreme Court's jurisdiction on their behalf. (The Constitution of the Islamic Republic of Pakistan, 1973).

Furthermore, at the international level, Pakistan is a signatory to international human rights conventions that address child rights directly or indirectly. Pakistan rectified the United Nations Convention on the Rights of the Child (after this, known as UNCRC) in 1990 with some general reservations. Furthermore, Pakistan's legislative authority construes the Convention in

Constitution. Moreover, the reservations previously set by Pakistan have been rescinded, with subsequent suggestions from the Ministry of Religious Affairs, Council of Islamic Ideology, and Cabinet's decision. The Ministry of Foreign Affairs also made official announcements regarding the withdrawal of these reservations. Pakistan committed to ensuring children's rights by committing to the obligations of the Convention. Therefore, it must develop and undertake all the necessary actions to promote and protect children's rights. Pakistan's commitment to the International Child Protection Convention is presented in table below.

Title: A Theoretical Analysis: Safeguarding Orphans' Rights in Pakistan's Legal Landscape

Author: Munazza Razzaq, Azizah Mohd, Noraini Md Hashim

Convention	Status	Date
Convention On the Rights of The Child (CRC), 1989	Ratified	12 November 1990
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979)	Ratified	12 March 1996
Optional CRC Protocol on Sale of Children, Child Prostitution and Child Pornography	Ratified	5 July 2011
Optional CRC Protocol on Involvement of Children in Armed Conflict	Signed	26 September 2001
Optional Protocol to CEDAW (1999)	Non-Party	This is not applicable Pakistan is not signatory.
Hague Convention on Protection of Children and Inter-country Adoption	Non-Party	This is not applicable Pakistan is not signatory.
Hague Convention on Civil Aspects of International Child Abduction	Non-Party	This is applicable as Pakistan is not the signatory.
Convention on the Rights of Persons with Disabilities (2007)	Ratified	5 July 2011
Convention Against Discrimination in Education (1960)	Non-Party	It is not applicable Pakistan is not signatory.
Minimum Age Convention (ILO Convention #138, 1973)	Ratified	6 July 2006
Worst Forms of Child Labor Convention (ILO #182, 1999)	Ratified	11 October 2001
Convention Against Transnational Organized Crime (2000)	Ratified	13 January 2010
(Palermo) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)	Non-Party	This is not applicable Pakistan is not signatory.
Convention Relating to the Status of Stateless Persons (1954)	Non-Party	This is not applicable Pakistan is not signatory.
International Covenant on Civil and Political Rights (1966)	Ratified	23 June 2010
International Covenant on Economic, Social and Cultural Rights (1966)	Ratified	17 April 2008

Table 1: Pakistan's Commitments to International Child Protection. (Ayesha Khan, 2012).

The table above summarizes Pakistan's international commitment to protecting its children's rights. Moreover, commitment to various international conventions is the most desired step toward elevating orphan rights at the state level.

After the signing of UNCRC In December 1980, the National Commission for

Child Welfare and Development (after this, NCCWD) was established. It is one of the core institutions that protects and promotes child rights at the national level. At present, the NCCWD operates under the administrative control of the Ministry of Human Rights.

The NCCWD is an advisory entity that provides guidance and recommendations to the Pakistani government regarding child-related rights and protection. Coordination with provincial governments ensures the implementation of child rights policies. In addition, it liaises and coordinates with the Provincial Commissions for Child Welfare and Development and the Children's Complaints Office. Moreover, it collaborates strongly with international and domestic non-governmental organizations to advance and safeguard child rights in Pakistan. The role of NCCWD is to create a child-friendly environment in society.

The NCCWD has embraced a framework consisting of five steps to ensure the robust implementation of CRC. The steps are as follows.

- I. Evaluation of domestic legislation and enforcement of CRC via federal regulations.
- II. Strategies for execution.
- III. Oversight of rights infringements.
- IV. Submission of CRC Reports
- V. Disseminate information about CRC and public education.

However, the NCCWD was established by the resolution of the National Assembly rather than by law. Therefore, it has no legal authority to exercise the rights it is responsible for; at least, it might shed some light on the issue.

Nonetheless, in 2017, the Pakistani Federal Government enacted a new legislation, the National Commission on the Rights of Child Act 2017, applicable across Pakistan. The preamble to the Act provides the following.

"An act to provide for a constitution of a National Commission on the child's rights and for matters connected in addition to that or incidental thereto. However, it is expedient to set

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Author: Munazza Razzaq, Azizah Mohd, Noraini Md Hashim

up a National Commission on the rights of children in accordance with international obligations and for matters connected therewith or incidental thereto. "

Section 2 of the 2017 Act delves into the definitions of various terms employed within legislation. For instance, within the purview of the law, the term 'child' is defined as any individual under the age of 18. Additionally, it defines 'child rights' as comprising, yet not restricted to, the rights delineated in the The Convention on the Rights of the Child by the United Nations and any other relevant domestic statutes.

From the above definitions, the ends of the law are synchronized with the UNCRC, which shows that the Pakistani government is bent on implementing child rights in Pakistan. Furthermore, the Commission is established under the law and its functions are described. The Commission is bound to legislate national laws and create a liaison between federal and provincial legislation. According to the law, the commission is responsible for policies and their implementation throughout Pakistan. It is noteworthy that the Commission is responsible for providing reports per the CRC requirement. Moreover, they are responsible for inquiring about complaints from society, government organizations, and other stakeholders regarding child rights violations.

It is pertinent to highlight that UNCRC is obligated to protect children's rights. Therefore, the body protects children from Pakistan without discrimination. However, orphans in Pakistan lack protection. Thus, it has created a more challenging situation because the Commission is the only organization at the federal level that works throughout Pakistan but only considers orphans to be unique entities.

Because Act 2017 is a new window in Pakistan's legislation for protecting child rights, there is no specific case law to this extent. Accordingly, the National Commission,

established under the law in 2017, prepared various reports for international conventions and national levels. Unfortunately, the 2017 law required more specific provisions for orphans.

Act 2017 is a step towards the efforts of Majlis-e-Shoora in that they legislate the law. This has been pending approval since 1990 after the UNCRC amendment. Hence, the federal government enacted another direction: the Islamabad Capital Territory Child Welfare Act 2018.

Thus, the preamble explains the law's mandate to protect children living in Islamabad from all forms of abuse, exploitation, and maltreatment. Section 1(2) of the ICT Child Protection Act 2018 states that the Act applies to the entire Islamabad Capital Territory.

It is worth mentioning that under the ICT Child Protection Act 2018, one of the essential definitions relating to 'unattended children' under Section 2(v) is a child of unverified parentage, a ward of the state, forsaken, disregarded, and without a permanent guardian, lacking shelter, or not under the lawful guardianship of any individual.

This definition clarifies all categories of children and, most importantly, includes orphans in the provision of law for the first time, which is considered the most constructive aspect of the ICT Child Protection Act 2018. As such, the Act is viewed as a model law for Pakistan's provinces to protect children.

The ICT Child Protection Act (2018) mandates that child protection institutions protect the fundamental rights of unattended children. Furthermore, it is a rehabilitative legal provision for children's improvement and welfare. Therefore, this law provides a new horizon for legal practitioners and society. When critically evaluating this law, it is essential to note that it has been four years since its enactment. However, it is unfortunate that the implementation mechanism could be better as the Human Rights Ministry is accountable for handling all matters

and issues regarding achieving the purposes of the ICT Child Protection Act, 2018.

One of the most critical issues regarding its implementation is that the Islamabad Capital Territory Child Protection Advisory Board, under Section 6 of the ICT Child Protection Act 2018, has an advisory position only to advise the Federal Government on the law. As such, when any institution holds an advisory status, it automatically lacks true interest in implementation. Consequently, the Board has no power to make decisions or take strict action against people who do not follow the law. The Federal Government may have been empowered to establish a Child Protection tribunal under the law to achieve its purpose of the law executed.

Furthermore, orphans' inheritance rights in their grandfather's property are also discussed in Section 4 of the Muslim family law ordinance, 1961 (hereafter referred to as MFLO, 1961), which declares the inheritance rights of orphans in their grandfather's estate if a father is predeceased. Hence, orphaned grandchildren step into the shoes of inheritance on their grandfather's property, as it is essential for their survival, as mentioned below:

“In the event of the death of any son or daughter of the propositus before the opening of the succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter would have received if alive. (PLD 2000 FSC 1)

Subsequently, Mr. Allah Rakha challenged the Muslim Family Law Ordinance 1961 in the Federal Shariat Court (FSC). The learned Judges of the FSC discussed all provisions of the law provided by Islamic jurists on the issue of legal fertility. After a lengthy discussion, the FSC declared Section 4 null and void as opposed to the Islamic principles of inheritance. In 2000, he challenged this decision and filed an appeal before the Supreme Court

Shariat Appellate Bench. After 22 years, the appeal continued to pend before the bench

3. Provincial Legislation on Children's Rights in Pakistan

Pakistan has four provinces, namely, Punjab, Sindh, Khyber Pakhton Khawa, and Baluchistan, functioning as a federation. According to the 1973 Constitution, provincial governments were instituted by Pakistan. Articles 141-159 of the Constitution of Pakistan discuss the relationship between federations and provinces. It is essential to mention that issues related to children come under the ambit of provinces. Provincial governments enact legislation while considering the principles of UNCRC and federal legislation.

The Punjab Assembly played a pivotal role in legislating the laws for children. Several enactments have been implemented since its inception. The most important laws are as follows.

1. The Punjab Children Act, 1952
2. The Punjab Children Ordinance, 1983
3. The Punjab Children (Amendment) Ordinance, 2001
4. The Punjab Destitute and Neglected Children Act, 2004 and its Amendment in 2017
5. The Punjab Free and Compulsory Education Act, 2014
6. The Punjab Child Marriage Restraint Act, 2015
7. The Punjab Restriction on Employment of Children Act, 2016”

The Punjab Government has legislated a child protection bureau to protect children's rights and welfare. Simultaneously, different institutions have been established to protect vulnerable children in other cities in Punjab. Unfortunately, there is no specific law for protecting the rights of orphans.

Regarding the Sindh government, in addition to constitutional provisions and federal-level legislation, specific laws were promulgated by the Provincial Assembly of the Sindh government as follows: “The Sindh Child Protection Authority Act, 2011.

Title: A Theoretical Analysis: Safeguarding Orphans' Rights in Pakistan's Legal Landscape

Author: Munazza Razzaq, Azizah Mohd, Noraini Md Hashim

I. "The Sindh Child Marriage Restraint Act, 2013.

II. The Sindh Prohibition of Employment of Children Act, 2017; and

III. The Sindh Right of Children to Free and Compulsory Education Act, 2013."

The Sindh Child Protection Authority was enacted to protect the children. Furthermore, this research focuses on orphan rights, which need to be added to the legislation of Sindh. It is one of the major loopholes because it focuses on the weakest group of society.

On the other hand, the Khyber Pakhtunkhwa government enacted a law to protect children in 2010 after the 18th amendment in the Constitution of Pakistan, i.e., "Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010."

Under this Act, a child protection institution was established to fulfil the aim of the law. The institution strives to offer at-risk child inclusion, nurturing, safeguarding and recovery. Moreover, for abandoned children, the government establishes the "Kafalat Ghar" or "Children Home" or "Orphanage."

In child protection matters, Khyber Pakhtunkhwa, like other provinces, has legislated and established institutions to protect welfare and child rights and, most importantly, has also focused on orphans.

As for Baluchistan, its government enacted a law in 2016 to protect children, i.e., "The Baluchistan Child Protection Act, 2016." The Balochistan Assembly passed a law to protect children's rights, but, unfortunately, the government of Baluchistan has not paid much attention to its implementation. Hence, this area requires special care to protect children's rights.

4. Conclusion

This article offers an in-depth analysis of the theoretical and legal framework governing orphan rights in Pakistan. Nonetheless, it is evident from the discourse that Pakistani legal statutes do not explicitly cater to orphans' genuine well-being in the country. The rights of orphaned individuals emerge as a pivotal domain demanding concentrated attention both at the federal and provincial echelons, with the primary objective of ensuring their welfare, safeguarding them against maltreatment, and averting their potential degradation into marginalized and disregarded members of society.

Furthermore, although legislative bodies have introduced specific provisions for the care and protection of orphans, comprehensive and pragmatic legislation that effectively addresses societal requirements still need to be enacted. Notably, the Muslim Family Law Ordinance of 1961 briefly touched on the inheritance rights of orphaned grandchildren regarding their grandfathers' assets. Nonetheless, this provision was later annulled by the FSC in 2000, because it was found to conflict with Islamic law and the directives of the Quran and Sunnah.

Considering these circumstances, it is necessary to establish distinct legal frameworks at both the federal and provincial levels that align with the tenets of Islam, catering to orphans' welfare and legal entitlements. Such legislation serves as a concerted effort to bridge existing gaps and deficiencies in the current legal landscape, ensuring that orphaned individuals receive the care, protection, and rights they deserve.

Title: *A Theoretical Analysis: Safeguarding Orphans' Rights in Pakistan's Legal Landscape*

Author: Munazza Razzaq, Azizah Mohd, Noraini Md Hashim

References

The Child Marriage Restraint Act, 1929.

Criminal Procedure Code, 1898.

The Constitution of Finland.

Constitution of the Islamic Republic of Pakistan, 1973.

The Guardian and Wards Act of 1890.

The Islamabad Capital Territory Child Protection Act, 2018.

Juvenile Justice System Act, 2018.

Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010.

The Majority Act of 1875.

Muslim Family Law Ordinance, 1961.

National Commission on the Rights of the Child Act, 2017.

The Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

Pakistan Penal Code, 1860.