

The Age of Majority in International Human Rights Law and Pakistan's Legal Obligations: An Overview

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Abstract

This work discusses the background of international human rights; how the UN and other international human rights organizations were created owing to various human rights violations in World War II; how there was a grand realization of creating and enforcing international human rights standards due to the failure of domestic legislation in the protection of human rights; what are international human rights protection mechanisms; how these international protection mechanisms work; what are international treaties, what these international treaties entail; what obligations are enforced upon a state once they ratify a treaty; how a treaty body inquires; investigates and reports upon a state party's progress following their ratification of the treaty; how in some cases; some treaty bodies also have a complaint mechanism in which the treaty body can hear complaints about a state party from individuals of that same state or also entertain inter-state complaints; how Pakistan is also under an obligation to fulfill international human rights standards, with the main focus on Convention on the Rights of the Child (CRC), 1989 and more specifically its Article 1 which is about the legal status of child; what is the age of marriage as per international law; how has Pakistan applied the same as a state party to the CRC; and whether the state can legislate upon the matter with the aim of fulfilling its obligations stipulated under the CRC? The main findings of this work are: that international human rights came into being due to the various human rights violations during World Wars I & II, that international bodies like the UN were created due to the need of making international human rights standards, that treaty bodies were created so as to enforce binding agreements which are called treaties between the state party and treaty bodies, that these treaties entail legal obligations for the state which has ratified the treaty much like a domestic statute, these obligations consist of administrative, legislative, judicial, educational and financial measures which the state party are to undertake so as to protect the human rights which are enumerated within said treaty, that the treaty has a body of experts which also act as a reporting mechanism so as to inquire and check upon a state's progress following the ratification of the treaty, that in some cases, some treaty bodies entertain complaints of individuals who allege that the state party has violated their rights, that they can also entertain inter-state complaints, that the international human rights protection mechanism consists of having state parties to adhere the legal obligations of said treaty and that the treaty body of said treaty shall inquire, investigate and report on a state's party progress of adhering to said treaty's obligations and also entertain

complaints of individuals of that state, that the CRC is also a treaty which has a treaty body, that Pakistan is a state party to the CRC, that our progress before and after the CRC has not changed much and is not sufficient for complying with our obligations; and that the state should legislate a uniform law for the age of marriage so as to fulfill our obligations under the CRC and that there is no bar under the Shari'ah from doing so.

Key Words: *International Human rights, international protection mechanisms, age of marriage, international treaties.*

1. Introduction

This work discusses the background of international human rights; how the UN and other international human rights organizations were created owing to various human rights violations in World Wars I & II; how human rights protections could no longer be left to a state's domestic law and policy, how there was a grand realization of creating and enforcing international human rights standards; what are international human rights protection mechanisms; how these international protection mechanisms work; what are international treaties, what these international treaties entail, what obligations are enforced upon a state once they ratify a treaty, how a treaty body inquires, investigates and reports upon a state party's progress following their ratification of the treaty, how in some cases, some treaty bodies also have a complaint mechanism in which the treaty body can hear complaints about a state party from individuals of that same state or also entertain inter-state complaints, how Pakistan is also under an obligation to fulfill international human rights standards, with the main focus on CRC, and more specifically Article 1 which we will again narrow down to the legal definition of child in Pakistani legal discourse; how is the issue of marriageable age dealt within the legal discourse in Pakistan; how the courts of Pakistan have interpreted and applied the age of marriage; what is the age of marriage as per international law; how has Pakistan applied the same as a state party to the Convention on the Rights of the Child; and whether the state can legislate upon the matter with the aim of fulfilling its obligations stipulated in the CRC?

Other related issues are discussed wherever necessary along the way. The methodology used in this work is doctrinal.

2. Background of the International Human Rights Development

Before we discuss the domestic law and policy of Pakistan, we have to first understand the international law that has developed and how this affects Pakistan. After the two world wars, the United Nations came into being. It was established as an international cooperative peacekeeping organization which will have the aim of protecting international security.¹ The organization was also the first international step towards the protection and realization of human rights. The horrors of the two world wars, particularly World War II, where various human rights violation committed by Nazi Germany and other such authoritarian states led by dictators like Stalin, Mussolini and more led to a worldwide awakening to protect and enforce human rights. There was a grand realization that the protection of human rights must not be left to domestic devices but rather an international standard for human rights must be established and protected and enforced, hence the birth of the United Nations. The founding treaty of the United Nations, the UN Charter, adopted in 1945 stipulates in its preamble that

“We the people of the United Nations Determined to save succeeding generations from the scrouge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from various and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom”.

This was followed by the Universal Declaration of Human Rights which was adopted by the UN General Assembly in 1948. In its preamble, it stipulates

¹ “History of the United Nations” January 12 2023, <https://www.un.org/en/about-us/history-of-the-un>

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

“But the enumeration of human rights was not simply frozen by proclamation in 1948. Since that time dozens of treaties (agreements that create binding legal obligations for states) and intergovernmental Declarations have supplemented this proclamation of rights.”² There are various names for treaties, such as covenants, conventions, accords etc. Following the adoption of the Universal Declaration, the UN’s Human Rights Commission began work on a legally binding text in the form of a treaty together with measures for implementation.³ It is these texts that we call treaties today that are the crux of the international human rights law. These treaties are binding agreements. This is a very brief background on the history of international human rights law, anything more on this subject will be beyond the scope of this work.⁴

2.1. International Protection of Human Rights Mechanisms

While it is understood that treaties are binding agreements between the state and the UN. Now we need to understand how are treaties binding? And what sort of obligations do the treaties entail? Well, a covenant becomes binding when a state ratifies it. Merely signing the covenant does not get the job done. “Signing does not make a convention binding, but it indicates support for the principles of the convention and the country’s intention to ratify it.”⁵ So a state party to a covenant has to ratify it after signing it, only then will the covenant be binding upon the state party. Now what sort of obligations will be thrust upon the state party? The provisions enumerated within the covenant itself of course. Each and every covenant has a preamble followed by its own provisions,

² Andrew Clapham, *Human Rights, A Very Short Introduction* (New York, Oxford University Press, 2007), 23-24.

³ Ibid, at 48.

⁴ See supra note 2

⁵ “Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities” , January 12, 2023, <https://www.un.org/esa/socdev/enable/convinfaq.htm#:~:text=An%20international%20convention%20or%20treaty,%2C%20transport%2C%20and%20human%20rights.>

very similar to a domestic statute. They are to be followed in letter and spirit similar to how a domestic statute is to be binding. But what type of actions will the state take in order to follow the covenant in letter and spirit? Well, the state party would have to make sure that the human rights enumerated within the particular treaty shall be fully realized. That the state party shall make sure that the human rights are protected. They shall take measures to make sure that the human rights are enforced. Hence, the actions that are being discussed here refer to legislative, administrative and financial ones. This is enumerated within Article 2 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These two covenants were adopted by the UN General Assembly in 1966. These two together with the Universal Declaration of Human Rights form what is popularly called the “International Bill of Human Rights”. Hence, the two covenants are the most important ones. Their provisions are also similar. But for our purposes, we shall concern ourselves with Article 2. “Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction. Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.”⁶ “The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party....”⁷ “Article 2 requires that States Parties adopt legislative,

⁶ “Human Rights Committee, General Comment 31, Nature of the General Legal Obligations on State Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004)”, at para 3, January 12th 2023, <http://hrlibrary.umn.edu/gencomm/hrcom31.html>

⁷ Ibid, at para 4.

judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.”⁸ “Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required to comply and to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant’s substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.”⁹ To summarize the above, a state party to a covenant must implement it by amending its legislation to meet the covenant’s standards. To provide for judicial remedies for any violation of the treaty. And to provide accountability to those who violate the provisions of the treaty, whether they are public officials or individuals. And of course, the state is to implement the treaty by spreading awareness

⁸ Ibid, at para 7.

⁹ Ibid, at para 13.

in educational institutes, finance organizations and institutes that protect the human rights that are enumerated within the provisions of the treaty. That is to say not every provision of the treaty is always binding. Some states may take reservations against certain provisions of the treaty by stating that it goes against their cultural norms and values. “A reservation is a declaration by a state made upon signing or ratifying a treaty that the state reserves the right not to abide by certain provisions of the treaty.”¹⁰ Hence, upon ratifying a treaty, a state party can reserve the right to not have some particular provisions be binding upon them. But of course, it does not just end there. Each and every treaty has its own respective committees. They are called the human rights treaty bodies. “The treaty bodies perform a number of functions aimed at monitoring how the treaties are being implemented by their state parties. All treaty bodies, with the exception of the Subcommittee on Prevention of Torture, are mandated to receive and consider reports submitted periodically by State parties detailing how they are applying the treaty provisions nationally. The treaty bodies issue guidelines to assist States with the preparation of their reports, draft general comments interpreting the treaty provisions and organize discussions on themes related to the treaties. Some, but not all, treaty bodies also perform a number of additional functions aimed at strengthening the implementation of the treaties by their state parties. Most treaty bodies may consider complaints or communications from individuals alleging that their rights have been violated by a state party, provided that State has opted into this procedure. Some may also conduct inquiries and consider inter-State complaints.”¹¹ Hence, a treaty body is a committee of experts that monitors a state’s progress, receives periodic reports from them and gives them their observations and

¹⁰ “What are Reservations to Treaties and where can I find them”, January 13th 2023, <https://ask.un.org/faq/139887#:~:text=A%20reservation%20is%20a%20declaration,on%20the%20Law%20of%20Treaties>. – not a proper reference,

¹¹ “The United Nations Human Rights Treaty System, Fact Sheet No. 30/Rev.1”, at 21, January 12th 2023 <https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-30-rev-1-united-nations-human-rights-treaty-system> - – not a proper reference,

recommendations on said report on the basis of “concluding observations”. They also give their own interpretations of a treaty on the basis of “general comments” they pass to fill in any gaps or holes in the treaty itself. These extra interpretations also come in the form of “Optional Protocols”. Most of the treaty bodies entertain individual complaints of people who have had their rights infringed by the state and could not receive adequate remedy domestically, only if the state party has ratified this part of the treaty of course. Some also function as a quasi-judicial forum, inquire into a matter and even entertain the complaints of one state against another! Now that we have understood how the international protection mechanism works, let us now move on to the heart of the matter.

3. Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) is one of the core nine international treaties. It was adopted by the UN General Assembly on November 20th, 1989. Pakistan ratified the CRC on 1990. Since then, Pakistan has submitted four reports periodically since 1993, the latest being in 2014. We are concerned with the latest report of Pakistan and the treaty body’s recommendations on that report. But that is also to say we are not going to talk about the whole treaty itself. We will strictly confine ourselves to Article 1 of the CRC which stipulates that “*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*” Anything more will be beyond the scope of this paper. Originally when Pakistan had ratified the CRC, it had done so with a reservation that “Provisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values.” This has been withdrawn on 23rd July 1997.¹² This might seem a great

¹² “Reservations and Declarations”, January 13th 2023, http://www.bayefsky.com/html/pakistan_t2_crc.php – not a proper reference,

cause for concern but the issue has been discussed thoroughly by Professor Munir. After a thorough analyses of both the provisions of the CRC and the rights of the child as stipulated by the sharia, he concluded that the CRC and the rights of the child in Islam are in fact compatible and not against one another. Anything more on this will be beyond the scope of this paper so we shall leave it that.¹³ So, Article 1 has given the definition of a child, which is anyone who is under 18, unless of course the domestic law of a state has set an earlier age for majority. This imposes the obligation on Pakistan to treat the child to be under 18 for all purposes, whether it be for marriage, driving, employment etc. We shall of course strictly confine ourselves with the age of marriage. Marriageable age has long since been a problem since the time of Colonial India. It has also been the subject of immense debate. We shall now examine Pakistan's progress by analyzing Pakistan's periodic report submitted on 23rd March 2014 and then analyzing the treaty body's recommendations in their concluding observations.

3.1. Pakistan's Progress

Pakistan has claimed in its report that from time-to-time laws are reviewed by the Law and Justice Commission and that there is a consultative process taking place to consider amendments in the *Zina and Hudood Ordinance* as well as the Child Marriage Restrain Act 1929 with reference to the definition of the child.¹⁴ Pakistan had also submitted that the provinces of KPK, Punjab, Balochistan and Sindh have drafted bills to amend the Child Marriage Restraint Act, 1929.¹⁵ However, so far the province of Sindh had passed its legislation which is discussed below. It is pertinent to mention that the Khyber Pakhtunkhwa (KPK) Child Protection Welfare Act 2010 and

¹³ See, Muhammad Munir, *Rights of the Child in Islam: Theory, Mechanisms, Practices and Convention on the Rights of the Child*, (Islamabad, Iqbal Research Institute for Research and Dialogue, 2017).

¹⁴ "5th Periodic Report of Pakistan submitted to the CRC treaty body, CRC/C/PAK/5", at para 69, January 21st 2023 <https://www.ohchr.org/en/countries/pakistan>

¹⁵ Ibid, at para 70.

the Sindh Child Protection Authority define a child as below 18 for all purposes and contexts pertaining to the respective Acts, and that the government has also enacted the Hindu Marriage Act 2017 which prohibits marriage of non-Muslim girls below 18 years of age. We shall now analyze the committee's concluding observations and recommendations of the same report. In its concluding observations of Pakistan's report, the committee remarked that "while it welcomes the 2013 amendments to the Sindh Child Marriage Restraint Act to increase the marriage age for both boys and girls to 18 years, the Committee remains concerned about the disparity between the minimum legal age for marriage for boys (18 years) and that for girls (16 years) in all other provinces, and that the Zina and Hudood Ordinances (1979) provide a definition of a "girl child" that only covers girls up to the age of 16 years or puberty. It is also concerned about legal inconsistencies concerning the definition of a child at the federal, provincial and territorial levels, and disparities in that regard between secular and sharia law."¹⁶ The Committee recommended that "The Committee reiterates its previous recommendation that the State party ensure the full harmonization of its legislation as regards the definition of the child so as to define a child as any human being below the age of 18 years. In particular, it recommends amending the Zina and Hudood Ordinances (1979) and the Child Marriages Restraint Acts in all its provinces, in order to align the age of marriage for boys and girls by raising the minimum age of marriage for girls to 18 years."¹⁷ Hence, the treaty body has given the recommendation to legislate a uniform age for the child for all purposes and that the child should be anyone under 18 for all purposes, whether it be marriage, inheritance, capacity for any work etc. But it should be kept in mind that Pakistan's report and the Committee's concluding observations are from 2014. And since then, there has been

¹⁶ "Concluding observations on the fifth periodic report of Pakistan", at para 16, January 21st 2023 <https://www.ohchr.org/en/countries/pakistan>

¹⁷ Ibid, at para 17.

no report of Pakistan and no observations of the Committee. As the report and concluding observations are from 2014, they are indeed outdated. Many things have changed since then. So, we shall now attempt to analyze Pakistan's progress since 2014 to see how far it has come in committing itself to the committee's recommendations.

3.2. Pakistan's Progress Since 2014

Originally, the Child Marriage Restrain Act, 1929 is the leading piece of legislation that deals with child marriage. Section 2(a) of the same stipulates that "*child means a person who, if a male, is under 18 years of age, and if a female, is under [sixteen] years of age.*" However, Section 2(d) stipulates that "*minor means a person of either sex who is under eighteen years of age*" which is very confusing as a child and minor usually means the same thing. What's more concerning is the fact that a female and male child is different for the purposes of marriage. And one of the recommendations of the committee body is that the legislations be aligned with the treaty's provisions and that the age of a child should be a uniform law. It should be pertinent to mention here that Sindh has legislated an Act which stipulates the minimum age of marriage of both boys and girls to be 18 as observed above by the committee. Section 2(a) of the Sindh Marriage Restrain Act 2014 stipulates that "*child means a person male or female who is under 18 years of age*". A small but great step indeed! But what about the other provinces? The other provinces have yet to amend the Child Marriage Restraint Act 1929. Other than Sindh, the rest of the provinces seem to be falling behind in fulfilling its obligations to the covenant. Hence, a child is still defined as anyone who is less than 18 years for a male and anyone who is under 16 years old for the purpose of marriage everywhere in Pakistan other than Sindh. The Majority Act 1875 stipulates that a major is anyone who is 18 years old and anyone with a court appointed guardian as anyone who is 21 years old. The Constitution of 1973 defines a child as anyone who is under 16 years of age for the

purposes of education. The Offence of Zina (Enforcement of Hudood) Ordinance, 1979 defines an adult male as anyone who is 18 years of age and the adult woman as anyone who is 16 years of age. There is another piece of legislation that defines a child as someone who is under 18 years old. That is the Islamabad Capital Territory Child Protection Act 2018. There are also various marriage laws of non-Muslims that stipulate different ages for the purpose of marriage. The legislative framework of Pakistan does not provide for a uniform age of a child for all purposes. Hence, we have not come far at all since 2014. We have yet to fully amend our legislation to adhere to the obligations of the CRC or follow the committee's recommendations for that matter. Different pieces of our legislation provide different definitions of a child for different purposes.¹⁸ It should also be noted that the proposed Hindu Marriage Bill was finally legislated in law on 21st March 2017. It is now called the Hindu Marriage Act of 2017 which provides for the solemnization for Hindu marriages and any other matter relating to Hindu marriages.¹⁹ The Act extends to Islamabad Capital Territory and all the provinces of Pakistan except Sindh as Sindh has legislated its own Marriage Act for Hindus called the Sindh Hindus Marriage (Amendment) Act 2018.²⁰ Hence, by taking this into account Pakistan seems to have made some progress after all when it comes to fulfilling the committee's recommendations.

3.3. Proposed Solution

¹⁸ Amr Ibn Munir, "The Jurisprudence of Marriageable Age for Girls in Pakistan: A Critical Evaluation", January 22 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4332899 where the different pieces of legislation that define a child differently for different purposes has been thoroughly discussed.

¹⁹ "The Hindu Marriage Act 2017, January 22nd 2023, <https://pakistancode.gov.pk/pdf/files/administrator8cf3b3c8dbef7ea138cd39d37850f2fc.pdf>

²⁰ "The Sindh Hindus Marriage (Amendment) Act 2018", January 22nd 2023, <http://sindhlaws.gov.pk/setup/publications/PUB-18-000069.pdf>

The question then arises what should the state do in order to fulfill its obligations under the CRC? Well, the answer is pretty simple. It should simply legislate a new law that provides a uniform age for all purposes. And that the law provides the age to be of 18 years old. Other than fulfilling its international obligations, it would also help with better efficiency of administration matters. In fact, the same was observed by Babar J. in *Mst. Mumtaz Bibi v Qasim*²¹. He ruled that “*For rule of law to make sense, the corpus of laws applicable within a jurisdiction must speak with one voice. In view of the provisions of the statutes cited above, it is patent that our laws define a child as a person who has not reached the age of 18.*”²² While the observations are indeed accurate, the judgment itself suffers from the fact that the instant case was an average run of the mill child abduction and forced marriage case. The age of majority was not an issue that was needed to be brought up. A judge’s role is to interpret and apply the law, not to make law. Of course, many people would be against the legislation of a single uniform law citing the reason that it is unislamic. But I would state the opposite. As mentioned before, there has been work done that shows that the CRC and the Shari’ah are not in fact conflicting one another. So, there should be no bar by the State to legislate a uniform law for the age of majority for all purposes. The same was also observed by Aamer J. in *Abdul Razaq v The State*.²³ After analyzing the verses of Qur’an, the jurisprudence of classical jurists and also consulting D. F. Mulla, he ruled that “*In the above backdrop, it is appropriate that the Federal Government should intervene and legislate upon the matter to remove all the anomalies as such in light of the afore-noted judgment of the Hon’ble Federal Shariat Court. Though no age limit is prescribed in the Holy Qur’an and as such the criteria for entering into Nikah is fluid, there is no bar on the State to legislate upon the matter and fix the age for the*

²¹ 2022 PLD Islamabad 228.

²² Ibid, at para 37.

²³ 2022 PCr.LJ 953 [Islamabad].

said purposes as has been done by the Government of Sindh.”²⁴ Although the judgment itself was confined only to the question of marriageable age, his observation that there is nothing stopping the state to legislate a proper age for the age of marriage is entirely accurate and the same can be said for the age of majority.

4. Conclusion

To sum up the above, international human rights was established and developed on the wake of various human rights violations during World War I & II. Treaties were developed and treaty bodies were established which led an international human rights protection mechanism being established which consists of state parties to a treaty who have ratified said treaty will be monitored on their progress via reports and recommendations, complaints both by individuals and groups can be taken into account and inquiries can also be conducted by the treaty bodies if this part of the treaty body’s functions has been ratified by a state party. The state party to the treaty must either amend existing legislations or make new legislations to align itself with the treaty’s obligations. It must provide proper judicial remedies and as well allocate sufficient financial resources to fulfill the treaty’s obligations. Pakistan has ratified the CRC in 1990 and as a state party are bound to follow the obligations of the treaty especially Article 1 of the treaty which defines a child as anyone under 18. Since it has ratified the CRC, Pakistan has yet to fully align itself with the treaty’s obligations especially Article 1 despite the fact that it has taken no reservation against said Article. The legislative framework is not uniform. Different pieces of legislations define a child differently for different purposes. Different ages have been provided for marriage, for majority, for minor etc. In some legislations, the age stipulated is 18 while in others, it is 16 particularly for girls. Although

²⁴ Ibid, at para 15.

there is some progress in the province of Sindh who have legislated 18 as the new age of marriage, the rest of the provinces have still yet to do the same, meaning Pakistan is not fully fulfilling its obligations under the CRC. Pakistan must legislate a uniform age for all purposes not just for the sake of fulfilling the obligations of the CRC but also for better administrative efficiency, for better protection of rights especially in the cases of forced child and eloped marriages etc as observed by Babar J. There is also no bar on the state not to do so as observed by Hon'ble Justice Aamer Farooq.

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