

The Application of Human Rights Treaties in Dualist Muslim States: The Practice of Pakistan

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ABSTRACT

I argue that Islamic law treats ratified human rights treaties as part of the law of the land and as directly applicable in courts in Muslim states such as Pakistan where Sharia is the main source of law. The Islamic approach is the better and more effective approach for the enjoyment of human rights. Article 227(1) of the 1973 constitution of Pakistan demands Islamization of all existing laws and prohibits the enactment of laws incompatible with Islamic law. Pakistan has failed to Islamize its constitutional provisions on the ratification and status of ratified treaties and continues to practice the dualist doctrine inherited from the British colonial era. Pakistan has acceded to seven core human rights treaties, but they are not incorporated in the legal system of Pakistan. This has led to a legal culture where human rights treaties are seen as applicable on the international plane only. I make a case for the Islamization of the constitutional provisions in relation to human rights and other treaties and until the constitution is amended under Article 227(1), I propose an ad hoc framework for relying on unincorporated human rights treaties and customary international law based on the developed British dualist doctrine which will contribute to the enjoyment of human rights in Pakistan.

I. INTRODUCTION

Pakistan has acceded to a number of human rights treaties, but the state of human rights is alarming. Human rights violations of children, women, freedom of expression, and ethnic minorities are soaring. In January 2018, the rape and murder of a six-year-old girl by her neighbor shocked the nation.¹ In a similar case in January 2018, another young girl was raped and murdered.² In Balochistan, an eight-year-old boy was found hanging from a tree; a medical examination found that he was sexually abused before his murder.³ Sahil, an NGO focusing on child sexual abuse, in its “Cruel Numbers 2020,” said that 2,960 cases of child abuse were reported in the national media, 51 percent of which were girls.⁴ At least ten journalists were killed, and a large number were threatened, kidnapped, tortured and arrested.⁵ Curbs on the media continue and journalists are complaining that they are “compelled to self-censor for fear of

being persecuted by state and non-state actors.”⁶ The Human Rights Commission of Pakistan (HRCP) “recorded 430 cases of honor killing in 2020, involving 148 male and 363 female victims.”⁷ There was also a sharp rise in the cases of domestic violence in 2020.⁸ “Accusations of blasphemy, forced conversions and marginalization of religious minorities and sects” are common.⁹ In 2020, 586 persons were charged under the blasphemy law and thirty-one alleged that they were forcefully converted to Islam.¹⁰ According to HRCP, the “Justice Project Pakistan [JPP] has recorded 17 cases of custodial deaths” since 26 June 2020.¹¹ Many cases go unreported.¹²

The state of human rights is deteriorating despite the fact that Pakistan has acceded to seven core human rights treaties.¹³ In 1948, Pakistani also voted in favor of the Universal Declaration of Human Rights 1948.¹⁴ Pakistan as a state party has acquired human obligations and is required to comply with them in good faith. There are, however, two main reasons for the lack of effective judicial application of human rights law in Pakistan: Pakistan’s complacency in following the dualist doctrine (the British doctrine has developed greatly in light of human rights treaties obligations) it has inherited from the British colonial era and not Islamizing the constitutional provisions on the ratification and status of human rights treaties as is mandated by Article 227(1) of the 1973 constitution. Dualism has given birth to a legal culture wherein it is possible to become a practicing lawyer and a judge without studying international law.¹⁵ Such a legal culture psychologically “disposes both counsel and judge to treat international law as some exotic branch of the law, to be avoided if at all possible.”¹⁶

The UN Charter guarantees the principle of “sovereign equality” of all member states.¹⁷ Sovereign states voluntarily take part in the formation and subsequent ratification and accession of treaties. The implementation and application of human rights treaties is based on the consent

of state parties.¹⁸ The core human rights treaties do not specify a method for how states parties may implement and apply human rights law within their jurisdictions.¹⁹ The International Covenant on Civil and Political Rights (ICCPR) confirms this flexibility stating that each state party “undertakes to take the necessary steps, *in accordance with its constitutional processes* and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary *to give effect to the rights recognized.*”²⁰

This article seeks to answer the question of whether and how the Pakistani judiciary may rely on unincorporated human rights treaties and customary international law. Drawing on the analysis of Islamic law, the 1973 constitution, and Pakistani and English jurisprudence, I argue that under Islamic law, human rights treaties are directly applicable in the domestic system and an Islamic law approach to the ratification and enforcement of human rights treaties is a better approach. Pakistan, acting under Article 227(2) of the 1973 constitution, should Islamize the procedure on the ratification of treaties, and determine the status of ratified treaties and customary international law in line with Islamic law. Adopting an Islamic law approach will maximize the judicial application of human rights law leading to enhanced enjoyment of human rights in Pakistan. The district judiciary is a gateway to public litigation and litigants at district judiciary would benefit the most from the direct application of human rights law. This is because currently a misperception is prevalent in the district judiciary that it does not have jurisdiction to enforce human rights law and fundamental rights.²¹ Until the Islamic approach is introduced, I propose an *ad hoc* framework as to how Pakistani courts may rely on unincorporated human treaties and customary international law for the protection of human rights. The *ad hoc* framework is derived from the analysis of the developed English and inchoate Pakistani jurisprudence on human rights law.

II. THE 1973 CONSTITUTION AND ISLAMIZATION OF LAW

The 1973 constitution declares Islam as a state religion.²² Article 227(1) requires that all existing laws must be brought in conformity with the Quran and Sunnah, and no law shall be made which is incompatible with the Quran and Sunnah.²³ In essence, all laws must meet the Islamic legal compatibility test.²⁴ The spirit of Article 227(1) also means that all laws must be interpreted compatibly with Islamic injunctions.²⁵ The Islamization of laws must take place through and on the recommendation of the constitutional body called the Council of Islamic Ideology (CII). One of the main functions of the CII is “to make recommendations as to the measures for bringing existing laws into conformity with the Injunctions of Islam.”²⁶ A number of governments have made efforts to Islamize laws but these efforts have been piecemeal and the law on ratification and enforcement of international treaties is not Islamized.²⁷

A. The Islamic law and Treaties

Islamic law puts great emphasis on fulfilling obligations and uses words such as *Aqd*, *Ahd* and *Mithaq* for agreements and treaties. The primary source of Islamic law—the Quran (5:1)—states: “Fulfil all obligations [*uqud*].” *Uqud* is a plural of *Aqd*, which means “a contract or legal transactions.”²⁸ The term is used to refer to the conclusion of contracts of sale, loan, and marriage, and it denotes legal action that becomes effective upon the acceptance of an offer.²⁹ *Ahd* refers to a “covenant or compact, as in agreement or swearing of allegiance. [This] [d]escribes various relationships between early Muslims and other groups with whom they were allied.”³⁰ *Ahd* is mentioned at least forty-six times in the Quran for various forms of agreement, such as making a promise (2:124, 177; 9:75, 111; 23:8; 70:32); an agreement (19:78, 87); a

covenant (2:177); and swearing (16:91, 17:34).³¹ It has been used for *Ahd* made among Muslims or between Muslims and non-Muslims.³² *Mithaq* has been used about twenty-three times in the Quran together with *Ahd* (2:27, 13:20) having the same meaning as *Ahd*.³³ “*Mithaq* is a noun that signifies covenant, agreement, treaty or alliance.”³⁴

The Quran and practice of Prophet Muhammad (peace be upon him) is replete with examples of making treaties with other tribes and rulers. The Quran emphasizes fulfilling obligations without making any distinction with whom the *Ahd/Mithaq* has been entered into.³⁵ In discussing law making in Islam, Hamidullah argues that there were other sources of law making during the period of Prophet Muhammad (peace be upon him). One of them is treaties.³⁶ “If Muslims enter into an agreement with a party and accept certain conditions, these become binding on the entire community until such time as the agreement expires.”³⁷ “Compliance with them is as obligatory as obedience to permanent laws derived from the Quran and Sunnah.”³⁸ The Treaty of Hudaibiyah (AD 628 / AH 6) sheds light on the process of treaty making, writing it down, witnesses, signature, and immediate enforcement.³⁹ The Hudaibiyah treaty was agreed after discussion between the parties and among Muslims themselves.⁴⁰ There were strong views among Muslims on some of the terms of the treaty. For instance, Muslims were very unhappy with one of the terms asking Muslims to give up pilgrimage that year.⁴¹ Another condition was that those from the tribe of Quraysh joining Muslims should be returned to Quraysh whereas those from Muslims joining Quraysh shall not be returned.⁴² However, through consultation among Muslims under the leadership of Prophet Muhammad (peace be upon him), the treaty was finalized.⁴³

Once the terms were agreed upon, they became binding on Muslims. The Prophet Muhammad (peace be upon him) and the signatory and emissary of Quraysh tribe, Suhayl Bin

Amr, were busy writing the treaty when Abu Jandal (son of Sohail from Quraysh tribe who had converted to Islam), showed up to join the Muslims.⁴⁴ Suhayl stood up, slapped Jandal, grabbed him by the neck, and dragged him to the Quraysh side.⁴⁵ Muslims were perturbed when Jandal was calling Muslims for help, saying that Quraysh would persecute him for his new faith.⁴⁶ The Prophet Muhammad (peace be upon him) said:

Abu Jandal, count on a reward, for God will give you and those who are oppressed with you relief and a way out. We have made a treaty and peace between ourselves and these people; we have given them and they have given us a promise, and we will not act treacherously toward them.⁴⁷

The Prophet Muhammad (peace be upon him) had also concluded a treaty with various tribes in Madina in the first year of Hijra (migration) (AD 622/ AH 1) such as Mithaq-e-Madina (AD 622/ AH 1). Mithaq-e-Madina⁴⁸ and Hudaibiyah demonstrate the process for the formation of treaties under Islamic law. Treaty terms were debated among Muslims and with the other parties, were written,⁴⁹ signed, witnessed and enforced at once. The Quran, however, states that treaties shall be respected as long as the other party abides by the treaty terms: “And if you apprehend a breach from a people, then, throw (the treaty) towards them in straight-forward terms. Surely, Allah does not like those who breach the trust.”⁵⁰ This principle is reflected in Section 47 of Mithaq-e- Madina,⁵¹ which also means that the termination of the treaty should be declared openly so that the enemy may not remain under the impression that the treaty is intact.⁵² The thrust of this principle is prohibiting treacherous conduct. A good example is when the Prophet Muhammad (peace be upon him) announced to the polytheists that their covenants—Mithaq-e-Madina—with Muslims were terminated after they had continuously failed to respect their treaties.⁵³

Muslims are not allowed to agree to terms of treaties, which would be incompatible with

the clear principles (*nasus, plural of nas*) contained in the Quran and Sunnah. Islamic law allows Muslim states to enter reservations in respect of incompatible terms of modern human rights treaties. Muslim states must, however, consider whether there is a room for new or different interpretation and/or reformation of Islamic law before entering reservations. After exhausting the routes of reinterpretation and reformation of Islamic law, specific reservations to the incompatible provisions shall be entered. Once the terms of a treaty are agreed and accepted, then the treaty becomes part of the law of the Muslim state. Hamidullah argues that “the whole of international law is, in a sense, part of the internal legislation and law of the land” but it falls in the category of law, which is not permanent like the clear principles of Islamic law contained in the Quran and Sunnah.⁵⁴ As treaties are susceptible to denouncement and derogation, it is in this sense that treaty law is not seen as a permanent law. Hamidullah has made a valid argument as treaties can end as per the stipulated terms of a treaty or parties may denounce or terminate a treaty.⁵⁵

Custom is a recognized secondary source of Islamic law.⁵⁶ The custom to be accepted as a source of law must be prevalent in the country and must not be against clear principles of the Quran and Sunnah.⁵⁷ The Prophet Muhammad (peace be upon him) followed many Arab customs in Madina. Some customs were disapproved through Quranic injunctions or the practice of Prophet Muhammad (peace be upon him). The remaining customs were followed in Madina as well as newly conquered areas. The Prophet Muhammad (peace be upon him) accepted and followed international customs, e.g. in relation to sending and receiving emissaries.⁵⁸ As Islamic law considers accepted treaties as part of Islamic law and binding on everyone, similarly, using *qiyas* (analogical deduction), international customs that do not conflict with the clear principles of the Quran and Sunnah may be treated as a source of Islamic international law.

This was the position of Islamic law on treaties and customary law when Muslims were one *Ummah* (community) well before the emergence of nation state or the theories of dualism and monism.⁵⁹ The emergence of nation state and the disintegration of Muslim *Ummah* into multiple states have, however, not affected the Islamic legal position on making and incorporating treaties into Islamic law upon ratification. The principle of fulfilling treaty obligations is the same, but the procedure for making, accepting, and incorporating treaties may be slightly different from the earlier Islamic practice. The 1973 constitution mandates the Council of Islamic Ideology to make recommendations for Islamization of law.⁶⁰ It is proposed that the Council conduct careful compatibility studies of human rights treaties and, in case of some incompatibilities, try to minimize or remove them through reinterpretation of Islamic and *Ijtihad* (independent reasoning). The Council may appoint an expert panel to assist it on international law. Where incompatibility is found, which cannot be removed through reinterpretation of Islamic law or *Ijtihad*, then a narrow and specific reservation may be entered. The rest of the treaty provisions shall become part of Pakistani law and directly applicable in courts. The same procedure should be adopted for acceding to the remaining core human rights and other treaties.

III. PAKISTAN: INHERITANCE OF ENGLISH DUALISM

Pakistan gained independence from the British Empire on August 14, 1947 and adapted existing law through the Pakistan (Adaptation of Existing Pakistan Laws) Order 1947.⁶¹ The Government of India Act 1935 became the interim Constitution of Pakistan which was based on the British dualist tradition.⁶² To implement Article 28 of the International Convention for the Amelioration

of the Conditions of the Wounded and Sick in Armies in the Field Geneva Convention July 27, 1929, the Geneva Convention Implementing Act 1936 was passed to “provide for the discharge of the obligations imposed by article 28 of that Convention.”⁶³ To give effect to certain provisions of the United Nations Charter, the United Nations (Security Council) Act (as amended on 31 July 2020) 1948 was passed.⁶⁴ To give effect to the Convention on the Privileges and Immunities of the United Nations 1946, the United Nations (Privileges and Immunities) Act 1948 was passed.⁶⁵ Section 2 states that “the provisions set out in the Schedule to this Act of the Convention on the Privileges and Immunities [. . .] 1946, shall have the force of law in Pakistan.”⁶⁶

The tradition of transforming international treaties through Acts of parliament continued during the lifetime of the defunct 1956 and 1962 constitutions. To give effect to the United Nations Convention on the Declaration of Death of Missing Persons 1950, the United Nations (Declaration of Death of Missing Persons) Act 1956 was enacted.⁶⁷ Section 2 states that the provisions set out in the schedule to this Act “shall have the force of law in Pakistan.”⁶⁸ To give effect to the Vienna Convention on Diplomatic Relations 1961 and the Vienna Convention on Consular Relations 1963, the Diplomatic and Consular Privileges Act 1972 was enacted before the 1973 constitution.⁶⁹ The Act sets out selected provisions in two different schedules saying that these provisions “shall have the force of law in Pakistan.”⁷⁰

The 1973 constitution does not provide procedure for ratification and status of ratified treaties. Accession to treaties is an Executive act. The constitution has divided subjects, for law-making purpose, into two legislative lists: Federal and Provincial. “The implementing of treaties and agreements [. . .] with other countries”⁷¹ has been on the Federal Legislative List since 1973.⁷² Pakistan has in recent years enacted a number of laws to transform treaties into Pakistani

law. The aim of the Industrial Relation Act 2012 (IRA) is to consolidate law in respect of trade unions as freedom of association is a fundamental right of the citizens of Pakistan and Pakistan has also ratified the International Labour Organization's Conventions No.87 (Convention concerning Freedom of Association and Protection of the Right to Organize) and 98 (Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively).⁷³ The legality of IRA was challenged. On appeal from the High Court, the Supreme Court of Pakistan held:⁷⁴

[Parliament] was conscious of the fact that the matters relating to trade unions and labour disputes [. . .] have been dealt with and protected under the International Labour Organization's Conventions No.87 (Convention concerning Freedom of Association and Protection of the Right to Organise) and 98 (Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively) which are covered under Entries Nos.3 and 32 of Part-I of the [Federal Legislative List]. Thus, the Federal Legislature has legislative competence to legislate in this regard to discharge the obligations created under the International Treaties and Conventions. Therefore, the IRA [Industrial Relations Act] 2012 has been validly enacted by the Parliament.⁷⁵

In *Shela Zia*, the Supreme Court said:

An international agreement between the nations if signed by any country is always subject to ratification, but it can be enforced as a law only when legislation is made by the country through its legislature. Without framing a law in terms of the international agreement, the covenants of such agreement cannot be implemented as a law nor do they bind down any party. This is the legal position of such documents, but the fact remains that they have a persuasive value and command respect.⁷⁶

The above wording appears to state a general position under international law but Akhtar J (with the other two judges agreed) seems to be recasting the Pakistani position as a dualist state.

Construing this statement in this way is the only sensible and legally correct way as otherwise, both monists and dualists can question its validity. Monists argue that once a treaty is ratified, it becomes part of the national legal system and in some countries such as France and the

Netherlands treaties once ratified are given supreme status.⁷⁷ Dualists can validly challenge the statement that a State party is always bound by the terms of the treaty internationally and a state cannot invoke its internal law for not complying with the treaty. The most important point, however, is that the Supreme Court considers treaty to be of persuasive value commanding respect even when not ratified by Pakistan.

A. Forms of Incorporation

The incorporation of treaties takes many forms in Pakistan. First, the traditional and standard form is that an Act of Parliament “copy out” provisions of a treaty and attach those as schedule to the Act. Pakistan has signed and ratified the International Convention on the Settlement of Investment Disputes between States and Nationals of other States and “to implement” it, the Parliament passed the Arbitration (International Investment Disputes) Act 2011.⁷⁸ The Act has incorporated the Convention in full setting out its provisions in the schedule to the Act.⁷⁹

The second form is where the statute mentions the relevant international treaty as well as borrows the treaty language in drafting statutory provisions. A good and encouraging example using broad human rights language is the ICT [Islamabad Capital Territory] Rights of Persons with Disability Act, 2020. In its preamble, it states:

It is expedient to put in place legal and institutional framework to protect the rights of persons with disabilities in general and women, children and the elderly in particular, as called for by the United Nations Convention on the Rights of Persons with Disabilities, as well as other human rights treaties and conventions to which Pakistan is a state party.⁸⁰

Section 2 of the Act has borrowed some definitions such as “discrimination on the basis of disability” from the CRPD whereas Section 5(2) has taken the right to privacy from Article 22(2)

of CRPD.⁸¹ It is clear that the intention of parliament here was indirect incorporation. This form of incorporation is next to an Act of Parliament giving effect and force of law to a treaty.

The third form is that the Act mentions the relevant treaty, which Pakistan has signed and ratified in its preamble. The Zainab Alert, Response and Recovery Act 2020 particularly mentions Pakistan's obligations under international treaties: "it is obligatory on the Government of Pakistan to make provisions for ensuring the right to life [. . .] under various national and international laws [. . .] including [. . .] the United Nations Convention on the Rights of the Child [CRC] ratified by Pakistan on 12 November 1990."⁸² This type of language would greatly assist the courts when they are applying and interpreting this Act: they will be able to allude to and rely on human rights treaties as for all practical purposes; the intention of the parliament was to legislate in line with Pakistan's human rights obligations under the CRC.

Fourth, in some cases, a statute may not allude to an international treaty but there is extrinsic evidence to suggest the statute intended to give effect to a treaty. The Constitution (Eighteen Amendment) Act 2010 introduced Article 10-A recognizing the right to a fair trial: "[f]or the determination his civil rights and obligations and in any criminal charge against him a personal shall be entitled to a fair trial and due process."⁸³ Article 10-A does not, however, spell out the constituent elements of a fair trial. That has been left to the courts to determine through various interpretive techniques. In *Gillani*, a seven-member bench of the Supreme Court held that by "not defining the term the legislature, perhaps intended to give it the same meaning as is broadly universally recognized and embedded in our own jurisprudence."⁸⁴ The court, however, did not cite any extrinsic evidence such as parliamentary debates; statement of objectives by the minister or any other material from the preparatory history. It is worth noting that Article 14 of the ICCPR details elements of the right to a fair trial, but the right to a fair trial was inserted in

the constitution on 19 April 2010 whereas Pakistan acceded to ICCPR on June 23, 2010.⁸⁵

Pakistan had, however, signed the ICCPR on April 17, 2008, acquiring the obligations “to refrain from acts which would defeat the object and purpose”⁸⁶ of the ICCPR. In enacting Article 10-A, the parliament might have been cognizant of Pakistan’s obligations generated by signing before acceding to ICCPR in 2010. Although it is not clear how the Supreme Court discovered the intention of parliament, it is an encouraging sign of judicial thinking in the right direction.

B. Customary International law

There is no clear statement on the status of customary international law either in the constitution of Pakistan or case law but the general tendency seems to be that customary international law is considered part of Pakistani law if it does not conflict with the constitution, statute and case law.

In *Pakistan Muslim League*, the Supreme Court held:

The fundamental right granted by Article 15 of the Constitution [i.e. freedom of movement] is backed by international norms. Article 9 of the Universal Declaration of Human Rights declares: "No one shall be subjected to arbitrary arrest, detention or exile." Furthermore, Article 13 states: "Everyone has the right to leave any country, including his, own, and to return to his country." . . . Although the Human Rights Declaration is not a legally binding treaty, its provisions are considered customary international law and binding, as such, on all member States of the United Nations and therefore on Pakistan.⁸⁷

The Supreme Court did not say in terms that customary international law is part of Pakistani law. This is a crucial point as international customary law binds Pakistan internationally, and it could be interpreted as referring to Pakistan’s internationally binding obligations. In *Qureshi*,⁸⁸ the Supreme Court did not clearly say that customary international law is part of Pakistani law but

the tenor of the discussion and heavy reliance on English case law is suggestive of judicial inclination to treat customary international law as part of Pakistani law if it does not conflict with Pakistani law. The constitution does not mention customary international law and the jurisprudence is not sufficiently developed but tendency towards incorporationist approach can be detected in some judgements.

C. Treaties and Interpretation of Statutes in Pakistan

State parties may enter reservations to treaties modifying the legal effect of or excluding obligations. The reservation must not, however, defeat the “purpose and object” of the treaties. Pakistan has acceded to seven core human rights treaties and two optional protocols to the CRC.⁸⁹ It has entered reservations to four treaties and the second optional protocol⁹⁰ to the CRC. No reservation has been entered to the CRC itself or the first optional protocol. The declaration to the second optional protocol is specific explaining that the age limit for entry into the armed forces is 16 and that those under 18 are not sent to combat zones. The other two treaties without reservations are the CERD and CRPD. Pakistan’s declaration⁹¹ to ICCPR upon signature is nothing more than a statement reserving its right to enter reservation in future. This is unnecessary as states party may enter or withdraw reservations at any time. Pakistan has entered reservation⁹² to the ICESCR saying that it will use its available resources for the realization of rights contained in the Covenant. This is also unnecessary as the Covenant imposes obligations of progressive realization depending on the maximum availability of resources.⁹³ The international obligations under these five core treaties are, therefore, intact with the exception of minor modification to second optional protocol of the CRC. Pakistan’s reservation to CEDAW

states that “The accession [. . .] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan.”⁹⁴ It is overbroad, vague and has made a hash of Pakistan’s international obligations. The reservation has criticism of other states parties as they consider it to be against the purpose and object of CEDAW.⁹⁵ The reservation needs revisiting as the Federal Shariat Court⁹⁶ and other courts,⁹⁷ relying on CEDAW, have interpreted the equality clause in Article 25 of the constitution as guaranteeing gender equality. As the constitution prohibits discrimination based on sex, and women are entitled to fundamental rights, this blanket reservation does not make sense and is inhibitive. Reservation to the Convention against Torture is careful and specific, excluding certain obligations.⁹⁸ The reservation does not accept the Convention to provide legal basis for extradition with other states; the competence of the committee to receive and consider communication and ousts the jurisdiction of the International Court of Justice in case of dispute regarding the interpretation or application of the Convention. Apart from these modifications, the remaining obligations are all intact. Pakistani courts should interpret statutory law in the light of the specific reservations and compatibly with human rights treaties. Otherwise, it could lead to frustrating international obligations caught by Articles 26 (the good faith principles) and 27 (the unacceptability of internal law as an excuse for non-compliance) of Vienna Convention on the Law of Treaties (VCLT).⁹⁹

There is limited but encouraging evidence that some judges tend to interpret treaties and domestic law compatibly. They have relied on human rights law in a number of ways. First, the courts tend to believe that the parliament do not enact laws which are incompatible with Pakistan’s human rights obligations. This is why they tend to *interpret laws compatibly* with human rights law. Article 10-A recognizes the right to a fair trial but did not spell out its constituent elements. As discussed above, in *Gillani*, the Supreme Court interpreted and gave

meaning to the right to a fair trial in the light of the universally recognized principles.¹⁰⁰

Second, the senior courts tend to give *wider interpretation* to the constitutionally guaranteed fundamental rights. “In interpreting a provision of a Constitution the widest construction possible in its context, should be given according to the ordinary meaning of the words used [. . .]. A Constitution is not to be interpreted in a narrow or technical manner, and a construction which leads to a legal vacuum is to be avoided.”¹⁰¹ In *Al-Jehad Trust*,¹⁰² the Supreme Court emphasized liberal construction of fundamental rights compatibly with human rights standards:

The Fundamental Rights enshrined in our Constitution in fact reflect what has been provided in some of the above-quoted Universal Declaration of Human Rights. It may be observed that this Court while construing the former may refer to the latter if there is no inconsistency between the two with the object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations.¹⁰³

Third, Pakistani courts treat customary international law as binding on Pakistan, but there is lack of clarity whether or not it is part of Pakistani law like customary international law is part of the common law in the UK. In *Pakistan Muslim League*,¹⁰⁴ Chief Justice Iftikhar Chaudhry said that UDHR is customary international law and binding on Pakistan. He did not identify which articles were customary and binding. The court did not cite sources to support the customary status of the UDHR or conduct its own customary status assessment. This is a misleading bald statement as not all of UDHR is customary.¹⁰⁵

The courts can and should interpret Pakistani law compatibly with customary international law. A good example is prohibition on torture. Article 14(2) of the constitution prohibits torture for extracting evidence but it does not define torture.¹⁰⁶ Similarly, Article 156(d) of the 2002 Police Order states that a police officer can be imprisoned for five years for inflicting

torture and violence to any person in custody but, like the constitution, the Police Order does not define the term.¹⁰⁷ Article 1 of the Convention against Torture has provided a comprehensive definition of torture.¹⁰⁸ Pakistani courts can seek guidance from Article 1 as it is customary law and Pakistan has acceded to it. .

Fourth, Pakistani courts tend to seek guidance from and rely on treaties where Pakistani law is vague or under developed. In *Ubaidullah*,¹⁰⁹ the Supreme Court borrowed and applied the concept of disability contained in Article 1(2) of the CRPD. Another example is discrimination against women. Article 25(2) of the constitution prohibits discrimination based on sex but does not define discrimination.¹¹⁰ Pakistani courts may turn to Article 1 of CEDAW, which defines discrimination against women.¹¹¹ In *Shela Zia*, the Supreme Court said that treaties command respect and are of persuasive value.¹¹² Pakistan is not party to the Convention for the Protection of All Persons from Enforced Disappearance 2006 but to achieve the ends of justice, in the *Missing Persons case*, the Supreme Court relied on it:

Article 10 provides direct protection from enforced disappearances. Thus the crime against humanity of enforced disappearances is clearly violative of the Constitution of Pakistan. Therefore, this Court can also apply the principles enshrined in the 2006 Convention in order to achieve the ends of justice.¹¹³

Relying on these interpretive techniques of human rights treaties and comparable Pakistani legal provisions, the judiciary can play a pivotal role in the protection of human rights.

D. The British Doctrine of Dualism

Although based on the British doctrine of dualism, the Pakistani jurisprudence on the treatment of unincorporated human rights treaties and customary international law is minimal and inchoate.

It may learn from the ever-expanding British interpretive techniques. The United Kingdom has different approaches to the domestic application of treaties and customary international law: the transformation and incorporation doctrines respectively.¹¹⁴

E. Treaties

Parliament is the supreme law-making body in the UK. The Executive on behalf of the UK under its prerogative power signs and ratifies treaties. As an Executive act, the treaty does not become law in the UK.¹¹⁵ Due to separation of powers, the Executive cannot legislate. The treaty needs to be transformed into the UK law through an Act of Parliament. Transformation is a positivist-dualist doctrine under which a treaty shall be expressly transformed into the UK law through an Act of Parliament.¹¹⁶ The Constitutional Reform and Governance Act 2010 provides for prior parliamentary approval of treaty ratification in most cases.¹¹⁷ However, “[i]t does not change the current position that an Act of Parliament would be required if it were intended to give *effect* in domestic law to matters embodied in such an agreement.”¹¹⁸ Lord Oliver, in *JH Rayner*, said that “a treaty is not part of English law unless and until it has been incorporated into the law by legislation.”¹¹⁹ Lord Millett, in *Thomas*, has summed up the UK’s position:

Their Lordships recognise the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a treaty [...] is an act of the executive Government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. When so enacted, the courts give effect to the domestic legislation, not to the terms of the treaty.¹²⁰

Domestic legislation giving effect to international treaties in domestic law may take different forms. “It is wrong to think of incorporation as a single phenomenon, a treaty may be received into and given effect [. . .] in more than one way.”¹²¹ First, the statute may directly enact the provisions of a treaty where treaty provisions are “copied out” and set out as a schedule to the enabling statute.¹²² The long title of the Diplomatic Privileges Act 1964 states that this is an “Act to amend the law on diplomatic privileges and immunities by *giving effect* to the Vienna Convention on Diplomatic Relations; and for purposes connected therewith.”¹²³ Section 2 states that “the Articles set out in Schedule 1 to this Act [. . .] *shall have the force of law in the United Kingdom.*”¹²⁴ The Human Rights Act 1998 giving effect to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) is another example where Schedule 1 contains provisions of the ECHR.¹²⁵ Second, the statute may “employ its own substantive provisions to give effect to a treaty.”¹²⁶ Here the parliamentary counsel uses English statutory language to give general effect to the treaty.¹²⁷ Third, in some cases, the statute makes no specific reference to the treaty but there is extrinsic evidence to suggest that the statute intended to give effect to a treaty. In *Westinghouse*, the court held that although the Evidence (Proceedings in Other Jurisdictions) Act 1975 did not mention the Hague Convention on the Taking of Evidence abroad in Civil or Commercial Matters 1970 but has, in effect, “enacted the Hague Convention of 1968 as part of the law of this country.”¹²⁸ In *ZH (Tanzania)*, Lady Hale said that protecting “the best interests of the child” contained in Article 3(1) of the UN Convention on the Rights of the Child 1989 is:

a binding obligation in international law, and *the spirit, if not the precise language*, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children [. . .]. [S]ection 55 of the Borders, Citizenship and Immigration Act 2009 now provides that [. . .] the Secretary of State must make arrangements for

ensuring that those functions “are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.”¹²⁹

Both of these statutes—the Children Act 2004 and the Borders, Citizenship and Immigration Act 2009 - do not mention the UN Convention on the Rights of the Child.¹³⁰ Fourth, a treaty may be incorporated through what is called “indirect” or incorporation “for all practical purposes.”¹³¹ United Kingdom is a party to the Convention Relating to the Status of Refugees 1951 and has given primacy to it in its legal system.¹³² Section 2 of the Asylum and Immigration Appeals Act 1993 states that “Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.”¹³³ This is a good example of incorporation for all practical purposes.

F. Customary International law

The doctrine of incorporation applies to customary international law, which espouses that international law is part of common law without the need for ratification through constitutional procedures.¹³⁴ Blackstone’s commentaries are cited for this approach as he said that “the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and it is held to be a part of the law of the land.”¹³⁵ Blackstone mentioned the “law of nations” but Shaw argues that it refers to customary international law and different rules apply to treaties.¹³⁶ He also, correctly, claims that the doctrine of incorporation has become the main British approach.¹³⁷ In *Keyu*, Lord Mance noted that “Common law judges on any view retain the power and duty to consider how far customary

international law on any point fits with domestic constitutional principles and understandings.”¹³⁸

Lord Mance clarified the current judicial position as

the presumption when considering any such policy issue is that CIL [customary international law], once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration.¹³⁹

In *Belhaj*, Lord Sumption said that “international law is not a part of but is one of the sources of the common law.”¹⁴⁰ Shaw wisely cautions against bald statements that customary international law is part of English common law, as courts will have to determine whether a custom exists; whether there is any constitutional bar to incorporation and/or whether it offends public policy. He favors presumptive rather than automatic incorporation.¹⁴¹ This reminds us of a bald statement of the Supreme Court of Pakistan in the case of *Pakistan Muslim League* discussed above.

G. Treaties and Interpretation of Statutes in the UK

“It is part of the public policy of the [United Kingdom] that the courts should in principle give effect to clearly established rules of international law.”¹⁴² In English law, the interpretation of treaties and statutes are divided into two categories:¹⁴³ the interpretation of enabling instruments and the interpretation of other legislation in the light of treaties the UK has ratified.¹⁴⁴ As to enabling statutes, the English legal cannons of interpretation apply. The focus of the courts here is on the statute itself, not the transformed treaty. The statute is given primacy as between the treaty and the statute.¹⁴⁵ For instance, if there were words in the Human Rights Act 1998 requiring

interpretation, those words would be interpreted according to English canons of interpretation, as the Act is the governing law. If the words or language used in the statute were ambiguous in a material sense, then “it would no doubt have been possible as a matter of law to take into account in the process of construction the Treaty provisions.”¹⁴⁶ The terms of the legislation, however, should be construed, as far as is possible, to conform to the treaty. In *Brind*, Lord Bridge said: “in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that parliament intended to legislate in conformity with the Convention, not in conflict with it.”¹⁴⁷ Before *Brind*, in *Salomon*, Diplock LJ said: “Parliament does intend to act in breach of international law, including therein specific treaty obligations.”¹⁴⁸ Ratified but not transformed treaties may give rise to legitimate expectations. In *Thomas*, Lord Goff and Lord Hobhouse said: “We accept that treaty obligations assumed by the Executive are capable of giving rise to legitimate expectations which the Executive will not under the municipal law be at liberty to disregard.”¹⁴⁹

In a dualist state such as the UK treaties have no direct effect until transformed through an Act of Parliament in the domestic system. Once transformed, the courts rely on them as Acts of parliament rather than international treaties. As Acts of parliament, the English canons of interpretation apply to treaty enabling statutes. Statutes, however, need to be construed compatibly with treaty obligations, as parliament does not intend to legislate in breach of treaty obligations. Customary international law is part of common law if it does not conflict with constitutional principles, statutes and law declared by courts. Common law, however, has to give in to statute in case of conflict. Common law, like statutory law, is interpreted in a way, which does not place the UK in breach of its international obligations.

Treaties not transformed into the UK law may be relied upon where common law is uncertain or underdeveloped. The English courts have taken into account human rights treaties in cases such as telephone taping;¹⁵⁰ freedom of association¹⁵¹ and the offence of criminal libel.¹⁵² Higgins calls it a changing legal culture where judges try to find imaginative ways of relying on unincorporated human rights treaties.¹⁵³ For interpreting the terms of a treaty, the courts apply the interpretation of treaty provisions as reflected in Articles 31-33 of Vienna Convention on the Law of Treaties 1969 (VCLT).¹⁵⁴ There is, however, not much difference between these and the English cannons of interpretation of statutes.¹⁵⁵

The above analysis establishes that Pakistan has inherited dualism from the UK and has been following it since 1947. Like the UK, treaties need to be transformed into the Pakistani legal system for having the force of law in Pakistan. In the UK, however, the ratification process is given constitutional cover through the Constitutional Reform and Governance Act 2010, whereas the Pakistani constitution is silent on ratification.¹⁵⁶ The practice, however, is that treaties are ratified by the Executive, i.e. government of Pakistan as treaties and related matters are on the Federal Legislative List. The forms of incorporating treaties in the Pakistani legal system bears resemblance to the British patterns, e.g. copying out provisions and attaching them to schedules of statutes and indirect incorporation. The UK's position on customary international law is clearer, whereas Pakistan's position is not. The case of *Pakistan Muslim League* provides some encouraging clues that the courts may rely on customary international law though. The Islamic law position on customary law is much clearer and encouraging.

Pakistani courts might learn and adopt the British model in respect of customary international law until the constitution is Islamized. In the UK, it is part of public policy to act compatibly with international law. Ministers have an overarching duty to comply with the law

including international law and treaty obligations.¹⁵⁷ There is no parallel public policy or ministerial code in Pakistan for acting compatibly with international law and treaty obligations. However, Pakistan's conduct in the case of *Jadhav Case*¹⁵⁸ is commendable as it complied with provisional measures and currently enacted legislation¹⁵⁹ to review the case in the light of the International Court of Justice (ICJ) decision. The courts in the UK interpret laws on the presumption that parliament does not intend to enact laws incompatible with treaty obligations, especially human rights treaties. In Pakistan, some judgements of the senior courts provide encouraging signs where courts have followed the British practice, but it is piecemeal and inconsistent. There is room for Pakistani courts to learn from the British trends in relying on unincorporated treaties and customary international law.

IV. TOWARDS THE FRAMEWORK FOR ENFORCING HUMAN RIGHTS TREATIES IN PAKISTAN

Islamic law treats ratified treaties as part of law of the land and are directly applicable in courts. Article 227 of the 1973 Constitution demands Islamization of laws, but deplorably Pakistan has not Islamized this aspect of its constitution in the last forty-eight years.¹⁶⁰ It has, instead, continued with the inherited British dualism. Even in practicing the British dualism, Pakistan is far behind the developed British practice. I argue that the constitution shall be brought in conformity with Islamic law on the ratification procedure and status of ratified treaties but until the constitution is amended, Pakistan can learn from the developed British practice and should adopt it as an *ad hoc* model. Pakistan may learn from the British practice in three main areas, i.e. the public policy to act compatibly with international law; the treatment and status of customary law in Pakistani law; and imaginative ways of relying on unincorporated treaties.

It is a public policy that the UK does not act in violation of its human rights obligations.¹⁶¹ This means that parliament does not intend to make laws incompatibly with human rights obligations and courts interpret laws compatibly with human rights standards. The Ministerial Code also requires Ministers to comply with the law, including international law.¹⁶² There is no such clear policy or a ministerial code in Pakistan. In *Gillani*, however, while interpreting the right to a fair trial recognised by Article 10-A of the constitution, the Supreme Court did say that perhaps parliament “intended” to give it the same meaning as is broadly universally recognized.¹⁶³ Pakistan, however, needs a policy statement regarding acting compatibly with international law like the UK.

The position of Pakistani law and practice vis-à-vis customary law is not clear. In *Pakistan Muslim League*, the Supreme Court held that UHDR as a customary law is binding on Pakistan but it did not say whether it was part of domestic law.¹⁶⁴ The British courts treat customary law as part of common law or as a source of common law if it does not conflict with the constitutional principles, statutes and the law declared by courts. Common law, however, has to give in to statute. This means that customary law falls within the lower category of English common law. However, the standard practice is that parliament will not make laws that substantially go against common law principles. It will not be wrong to say statutory law is reflective of common law. Pakistan can adopt a clear policy in respect of customary international law and its status in the Pakistani legal system.

The practice of incorporating treaties in the UK and Pakistan is similar. An act of parliament is required to give effect and force of law in the domestic system. The forms of treaty incorporation such as “copying out” or indirect incorporation are also identical. Pakistan seems to have closely followed the British practice in this area but it is behind in finding “imaginative

ways,” as Higgins call it, in applying unincorporated treaties.¹⁶⁵ Pakistan has a legal culture where one can become a judge and an advocate without properly studying international law unlike the UK where citing, interpreting, and relying on international law is common for lawyers and judges. In the British legal culture, international law is treated as a familiar topic whereas in Pakistan most judges and lawyers treat international law as some exotic branch of the law, to be avoided if at all possible, to borrow the words of Higgins. The poor treatment of international law in judgments such as *Pakistan Muslim League* and *Shehla Zia* is reflective of this legal culture.¹⁶⁶ The trend of relying on unincorporated treaties is growing, especially among lawyers who have studied in the UK and other common law countries such as Australia, Canada, and USA. The limited jurisprudence is pointing towards willingness of some judges to rely on human rights treaties.

From the above analysis, the following framework for relying on unincorporated human rights treaties emerges. First, Pakistan has not given effect to any human rights treaty it has acceded. Pakistan has, however, indirectly and for all practical purposes incorporated CRC and CRPD. Courts can rely on and apply these treaties, i.e. they have direct effect. Apart from CEDAW, Pakistan has not entered substantive reservations to treaties it has acceded to. They can be relied on in interpreting Pakistani law.

Second, although the policy and practice of Pakistan is not clear, courts can rely on customary international law if it does not conflict with the constitution, statutory, and Islamic law. The spirit of the obiter remarks on the customary status of UDHR in *Pakistan Muslim League* supports this.¹⁶⁷ As Pakistan is following the British dualist doctrine, the proposal will bring Pakistan closer to the British practice.

Third, courts are required to interpret laws compatibly with constitutionally guaranteed

fundamental rights. Fundamental rights, in turn, are subject to wider interpretation as was held in *Al-Jehad Trust*. Courts can use human rights law as an aid for wider interpretation if Pakistani law is ambiguous or lacking in detail. In *Pakistan Muslim League*, the Supreme Court gave wider interpretation to the right to freedom of movement (i.e. to enter and move freely throughout Pakistan) in the light of Article 9 of the UDHR and Article 12 of the ICCPR holding the right to enter prohibits forced exile.¹⁶⁸ Similarly, in *Gillani*, the right to a fair trial was given meaning in the light of the universally recognized principles.¹⁶⁹ In *Getz Pharma*, the Sindh High Court deduced the right to health interpreting the fundamental rights to life and human dignity guaranteed in the constitution in the light of Article 12 of the IESCR.¹⁷⁰

Fourth, courts can rely on human rights law to fill a vacuum in national law. In *Ubaidullah*, the Supreme Court adopted the definition of disability contained in Article 1(2) of the CRPD.¹⁷¹ Article 14 of the constitution and Article 156(d) of the Police Order 2002 mention but do not define torture.¹⁷² Torture is not defined anywhere else in Pakistani law either. The courts can borrow the definition from Article 1 of the Convention against Torture. Similarly, racial and sex discrimination are defined in CERD and CEDAW respectively but not in Pakistani law.¹⁷³ Courts may turn to those comprehensive definitions in interpreting Pakistani law.

Fifth, courts can rely on treaties Pakistan has not acceded to yet for meeting ends of justice. To meet the ends of justice, in the *Missing Persons Case*, the Supreme Court relied on a core human rights treaty Pakistan is not party to, i.e. the Convention against Enforced Disappearance 2006.¹⁷⁴ In *Shehla Zia*, the Supreme Court said that international treaties command respect and are of persuasive value.¹⁷⁵ This is particularly true in the case of human rights treaties creating rights similar to comparable fundamental rights in the constitution. A good example is the European Convention on Human Rights 1950 which the superior courts

have cited in a number of cases despite the fact that, unlike UN treaties, it is a treaty for members of the Council of Europe

V. CONCLUSION

Human rights violations remain unabated despite Pakistan's accession to seven core human rights treaties and a decent set of fundamental rights guaranteed by the constitution mirroring, to a greater extent, provisions of UDHR. Pakistan as a dualist state has not given domestic effect to the ratified treaties except indirect incorporation of CRC and CRPD. Islamic law treats ratified treaties as part of Islamic law and are directly applicable in courts. Article 227(1) demands the Islamization of law in Pakistan but the constitution is not Islamized on the ratification and status of ratified treaties. Pakistan needs to amend the constitution by providing procedure for ratification of treaties and status of ratified treaties and customary international law in line with Islamic law. Islamizing the law in relation to treaties will maximize the application of human rights law leading to the enjoyment of human rights in Pakistan. The signs for emerging human rights culture is encouraging but until the law is Islamized, Pakistan should learn from the developed British dualist practice especially in interpreting Pakistani law compatibly with human rights law. The proposed Islamic and the *ad hoc* British framework would greatly contribute to the enjoyment of human rights in Pakistan.

Endnotes

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This article is dedicated to the memory of my mother who passed away during the lifetime of this research project.

¹ *Pakistan Zainab Murder: Imran Ali Hanged for Six-year-old's Death*, BBC ASIA (Oct. 17, 2018), <https://www.bbc.co.uk/news/world-asia-45885686>. Imran Ali was charged with similar crimes against other girls and, after standing trial, was convicted and hanged. Pakistan coming under extreme pressure from society enacted the Zainab Alert, Response and Recovery Act 2020 to track child abusers. See M. Illyas Khan, *Pakistan Zainab Murder: New Law Aims to Catch Child Abusers*, BBC (Mar. 12, 2020), <https://www.bbc.co.uk/news/world-asia-51852381>.

² *Asma, Four, "Raped, Strangled to Death," in Mardan*, AL-JAZEERA (Jan. 17, 2018), <https://www.aljazeera.com/news/2018/1/17/asma-four-raped-strangled-to-death-in-mardan>.

³ HUMAN RIGHTS COMMISSION OF PAKISTAN, STATE OF HUMAN RIGHTS IN PAKISTAN 2020, (2021) <http://hrcp-web.org/hrcpweb/> [hereinafter PHRC, 2020 REPORT].

⁴ SOHAIL AHMED, WAQAS HAMEED, MARYAM KHALID SAHIL, SAHIL, CRUEL NUMBERS 2020 (Manizeh Bano, ed., 2021).

⁵ PHRC, 2020 REPORT, *supra* note 3, at 13.

⁶ *Id.* at 14.

⁷ *Id.* at 16.

⁸ *Id.*

⁹ *Id.* at 15.

¹⁰ *Id.* For further discussion and data, see the thematic report of the HUMAN RIGHTS COMMISSION OF PAKISTAN, CONSPICUOUS BY ITS ABSENCE: FREEDOM OF RELIGION OR BELIEF IN PAKISTAN (2020).

¹¹ Human Rights Commission of Pakistan, *HRCP, JPP Call on Government to Criminalise Torture*, HUMAN RIGHTS COMMISSION OF PAKISTAN, (June 26, 2021), <http://hrcp-web.org/hrcpweb/hrcp-jpp-call-on-government-to-criminalise-torture/>.

¹² *Id.*

¹³ They are: International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) (ICCPR); International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966) (ICESCR), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976); Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (*entered into force* Sept. 3, 1981) (CEDAW); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., U.N. Doc. A/39/51 (1985), 1465 U.N.T.S. 85 (*entered into force* June 26, 1987) (CAT); Convention on the Rights of the Child, *adopted* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990) (CRC); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (May 25, 2000); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (May 25, 2000). Pakistan has also acceded to the Convention on the Rights of Persons with Disabilities, *adopted* 13 Dec. 2006, G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/106 (2007) (*entered into force* May 3, 2008) (CRPD); International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969), *reprinted in* 5 I.L.M. 352 (1966) (CERD). For status of human rights treaties ratifications, see United Nations Treaty Collection, Status of Treaties (2021), https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en [hereinafter UN Treaty Collection].

¹⁴ See United Nations Digital Library, General Assembly Voting Data (Dec. 10, 1948), <https://digitallibrary.un.org/record/670964?ln=en>.

¹⁵ I have been leading a very successful judicial training on human rights and the rule of law for Pakistani judges since February 2014 and trained over 200 judges. See *Pakistan's Top Judges Turn to University of Hull for Help on Human Rights Record*, UNIV. OF HULL (July 15, 2018), <https://www.hull.ac.uk/work-with-us/more/media-centre/news/2019/pakistans-top-judges-turn-to-university-of-hull>; *UNDP Pakistan Builds Gilgit Baltistan Judiciary's Capacity With Human Rights and Rule of Law Trainings*, U.N. DEV. PROGRAMME REL (Mar. 17, 2021), <https://www.pk.undp.org/content/pakistan/en/home/presscenter/pressreleases/2021/undp-pakistan-builds-gilgit-baltistan-judiciarys-capacity-with-h.html>. From extended discussions with judges of the district judiciary and various High Courts, this legal culture was poignantly visible. The most revealing was the misperception among judges of the district judiciary that they could not rely on human rights treaties as well as fundamental rights contained in the 1973 constitution. They believed that enforcing human rights and fundamental rights fell within the domain of senior judiciary, i.e., High Court and Supreme Court.

¹⁶ ROSALYN HIGGINS, *PROBLEM & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 205 (2010). Higgins has succinctly described Monism and Dualism as under:

Monists contend that there is but a single system of law, with international law being an element within it alongside all the various branches of domestic law. For the monist, international law is part of the law of the land alongside labour law, employment law, contract law, and so forth. Dualists contend that there are two essentially different legal systems, existing side by side within different spheres of actions—the international plane and the domestic plane.

For discussion on monism and dualism see also: MALCOM N. SHAW, *INTERNATIONAL LAW* 99 (8th ed. 2017); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), *HUMAN RIGHTS AND REFUGEE PROTECTION: SELF-STUDY MODULE 46* (2006); JAMES CRAWFORD, BROWNLIE'S *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 45 (8th ed. 2012); David Feldman, *The Internationalization of Public Law and its Impact on the UK*, in *THE CHANGING CONSTITUTION* 126 (Jeffrey Jowell & Colm O'Cinneide eds., 9th ed. 2019); Eileen Denza, *The Relationship Between International and National Law*, in *INTERNATIONAL LAW* 386 (Malcolm D. Evans ed., 5th ed. 2018). See generally FATIMA SHAHEED, *USING INTERNATIONAL LAW IN DOMESTIC COURTS* (2005).

¹⁷ U.N. Charter art. 2(2), signed 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force Oct. 24, 1945).

¹⁸ See Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969), pmbl, ¶ 4, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), reprinted in 8 I.L.M. 679 (1969).

¹⁹ There are nine core human rights treaties. Pakistan has ratified seven of them. See *The Core International Human Rights Instruments and Their Monitoring Bodies*, OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS REL (2021), <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx>.

²⁰ ICCPR, *supra* note 13, art. 2(2).

²¹ See the discussion in footnote 16 above.

²² Pakistan Code, Constitution of the Islamic Republic of Pakistan, art. 2 (1973), [hereinafter PAKISTAN CONST.].

²³ *Id.* art 227(1).

²⁴ *Id.* Islamic law for different Muslim sects means as they interpret it, art 227(1). The Islamization of law does not apply to the law of personal status of non-Muslims, art 227(3); for useful general discussion see also *Federation of Pakistan v. Farishta* PLD Supreme Court 120 (1981).

²⁵ See, e.g., *Commissioner of Income Tax Peshawar v. Seimen* PLD 1991 Supreme Court 368 where the Supreme Court held:

So long as the existing statutes were not brought in conformity with injunctions of Islam, their interpretation, application and enforcement, wherein discretionary judicial elements were involved, only that course would be adopted which was in accord with the Islamic philosophy, its common law and jurisprudence.

This principle of compatible interpretation of statutes with Islamic law has been discussed in a large number of cases: Haji Nizam Khan's case PLD 1976 Lahore 930; Muhammad Bashir v. State, PLD 1982 Supreme Court 139; Mian Aziz A. Sheikh's case PLD 1989 Supreme Court 613.

²⁶ PAKISTAN CONST., *supra* note 22, art. 227(2), art 230 (c).

²⁷ In 1979, laws on sexual offences, theft, alcohol and whipping were introduced. The 1973 constitution itself contained a large number of Islamic provisions. For a very useful discussion on Islamization, see PLD 1986 Supreme Court 204 where the Shariat Appellate Bench of the Supreme Court has discussed the constitutional as well as Islamic law in greater depth.

²⁸ Quran (5:1).

²⁹ JOHN L. ESPOSITO, THE OXFORD DICTIONARY OF ISLAM 22 (2006).

³⁰ JOHN L. ESPOSITO, THE OXFORD DICTIONARY OF ISLAM 9 (2003). *See* MUHAMMAD ASAD, THE MESSAGE OF THE QURAN 205 (1997) where he, citing Raghīb, says that this verse refers to three kinds of covenants: between God and man; between man and his soul and between a man and his fellow men.

³¹ Ibrahim Sumer, *Ahd/Ahada*, in THE QUR'AN: AN ENCYCLOPEDIA (Oliver Leaman ed., 2008).

³² For a good discussion on Covenants and its various forms, see *id.* He clarifies the covenants Allah with various prophets, children of Israel, and with Prophet Muhammad, (peace be upon him) and covenants (treaties) the Prophet made with non-Muslims. *See generally* MUHAMMAD AL-HASAN AL-SHAYBANI, KITAB AL-SIYAR AL-SAGHIR, THE SHORTER BOOK ON MUSLIM INTERNATIONAL LAW (Mahmood Ahmad Gazi trans., 2004).

³³ *Id.*

³⁴ Rafik Berjak, in THE QUR'AN: AN ENCYCLOPEDIA, *supra* note 31, at 408. For a detailed discussion of the three terms, see LIAQUAT ALI KHAN NIAZI, ISLAMIC LAW OF CONTRACT 9-15 (1991).

³⁵ Quran (5:1)

³⁶ MUHAMMAD HAMIDULLAH, THE EMERGENCE OF ISLAM 270 (2004).

³⁷ *Id.* at 271. Muslims can only agree to terms of treaties, which do not conflict the clear and

obligatory principles of Islamic law contained in the Quran and Sunnah. See MUHAMMAD HAMIDULLAH, *THE MUSLIM CONDUCT OF STATE* 32, 60-61 (1968). In his treaty with the people of Najran, Prophet Muhammad (peace be upon him), made a provision that “They will not indulge in usury (interest);” see ABU UBAYD AL-QASIM B. SALAM, *KITABUL AL-AMWAL, THE BOOK OF FINANCE* 163 (1991). There are a number of excerpts from other treaties the Prophet Muhammad (peace be upon him) made with different people.

³⁸ HAMIDULLAH *supra* note 36, at 271.

³⁹ THE LIFE OF MUHAMMAD: A TRANSLATION OF IBN ISHAQ'S SRAT RASUL ALLAH 504 (A. Guillaume trans. 1967).

⁴⁰ *Id*

⁴¹ *Id*

⁴² *Id*

⁴³ The companions always acted as advisors and consultative group. During the Treaty of Hudaibiyah, some close companions of the Prophet Muhammad (peace be upon him) such as Hazrat Omer were not happy with certain terms of the treaty such as abandoning pilgrimage that year but accepted it at the insistence of Prophet Muhammad (peace be upon him). Similarly, Hazrat Ali refused to write the treaty when Suhayl objected to words “This is what Muhammad, the messenger of Allah has agreed with Suhayl bin Amr.” See ISHAQ, *supra* note 39.

⁴⁴ *Id.* at 505.

⁴⁵ *Id*

⁴⁶ *Id*

⁴⁷ ABI JAFFAR MUHAMMAD BIN JARIR TABARI, *THE HISTORY OF AL-TABARI VOL VIII* 86-87 (Michael Fishbein trans. 1997); See also Abi Jaffar Muhammad Bin Jarir Tabari, *Tarikh al-rusul wal-mummluk [History of Al-Tabari]* 292-93 (Muhammad Ibrahim trans. 2003).

⁴⁸ Mithaq-e-Madina (AD 622 / AH 1) was another example: see MUHAMMAD HAMIDULLAH, *THE FIRST WRITTEN CONSTITUTION IN THE WORLD: AN IMPORTANT DOCUMENT FROM THE TIME OF THE HOLY PROPHET* 54 (1994).

⁴⁹ *Id.* See also TABARI, *supra* note 48; ISHAQ, *supra* note 42, at 231-35; MUHAMMAD BIN ISMAIL AL-BUKHARI, *KASHFUL BARI: KITAB—AL-MAGHAZI, BOOK OF GHAZWAT* (Saleem Ullah Khan trans. 2008).

⁵⁰ Quran (8:58).

⁵¹ HAMIDULLAH, THE FIRST WRITTEN CONSTITUTION IN THE WORLD, *supra* note 48.

⁵² *See generally* NIAZ A SHAH, ISLAMIC LAW AND THE LAW OF ARMED CONFLICT: THE ARMED CONFLICT IN PAKISTAN 55 (2011).

⁵³ Abdullah Yusuf Ali, *The Meaning of the Holy Quran* (Amana Publication 2004), 437 (commentary on verses 1-5 of *sura* / chapter 9 of the Quran). For full details, see Niaz A Shah, *supra* note 52, 55-56.

⁵⁴ *See* HAMIDULLAH, THE FIRST WRITTEN CONSTITUTION IN THE WORLD, *supra* note 48, at 34.

⁵⁵ Human rights treaties allow and contain denunciation provisions. *See, e.g.*, CERD, *supra* note 13, art. 21; CRC *supra* note 13, art. 52; CAT, *supra* note 13, art. 31, are just a few examples.

⁵⁶ *See* Sir ABDUR RAHIM, THE PRINCIPLES OF ISLAMIC JURISPRUDENCE (2004). *See also* ANWAR AHMAD QUADRI, ISLAMIC JURISPRUDENCE IN THE MODERN WORLD 227-28 (2007).

⁵⁷ *Id.*

⁵⁸ *See* IBN SAD, KITAB AL-TABAQAT AL-KABIR, THE GREAT BOOK OF BIOGRAPHIES 304 (S. Moinul Haq trans. Kitab Bhavav 2009). *See generally*, Muhammad Basheer Ismail, *Islamic Law and Transnational Diplomatic Law* (Palgrave Macmillan 2016).

⁵⁹ In *A.M v. Qureshi v. Union of Soviet Socialist Republics* PLD 1981 Supreme Court 377, Afzal Zullah J. claims that Islamic legal theory can be said to be based on Monist doctrine. After his decent analysis of Islamic international law (*siyar*) and international law, he could have worded his conclusion differently, i.e., the Western doctrine of monism is akin to Islamic law.

⁶⁰ PAKISTAN CONST., *supra* note 22.

⁶¹ Indian Independence Act, 1947, 10, 11 Geo. 6.

⁶² The Government of India Act, 1935, 26 Geo. 5.

⁶³ The Pakistan Code, Geneva Convention Implementing Act 1936, pmb1, ¶ 3.

⁶⁴ The Pakistan Code, United Nations (Security Council) Act 1948, <https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-apaUY2NpZ5k%3D-sg-jjjjjjjjjjjj>.

⁶⁵ The Pakistan Code, United Nations (Privileges and Immunities) Act 1948, <https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-ap%2BUaA%3D%3D-sg-jjjjjjjjjjjj>.

⁶⁶ *Id.* §2(1).

⁶⁷ The Pakistan Code, United Nations (Declaration of Death of Missing Persons) Act 1956,

<https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-ap%2BabA%3D%3D-sg-jjjjjjjjjjjj>.

⁶⁸ *Id.* §2(1).

⁶⁹ The Pakistan Code, Diplomatic and Consular Privileges Act 1972, <https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-bpuUY2Nw-sg-jjjjjjjjjjjj>.

⁷⁰ *Id.* §2(1). In *A.M v. Qureshi v. Union of Soviet Socialist Republics* PLD 1981 Supreme Court 377, the court held that “the provisions of these conventions have been incorporated and statutorily recognised and enforced in Pakistan” via the 1972 Act. *Id.* § 22.

⁷¹ Constitution of Pakistan, Schedule IV: Federal Legislative List, entry 3. *See also* Entry 32 which was added by the Eighteen Amendment in April 2010.

⁷² *Id.* pmb1.

⁷³ The Pakistan Code, The International Relations Act, 2012, <https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-apaUY2FqaZk%3D-sg-jjjjjjjjjjjj>.

⁷⁴ *See Sui Southern Gas v. Federation of Pakistan* [2018] SCMR 802 [16].

⁷⁵ For a different view, see *Syed Imran Ali Shah v. Government of Pakistan* 2013 PLC Lahore High Court 143 where the High Court at [47] held that labor is a provincial matter and only provincial legislature can legislate in this regard. There is an appealing reasoning saying that the Pakistani federation is based on the concept of cooperative federation and the federation can direct the province to make laws for implementing treaties.

⁷⁶ *Shehla Zia v. WAPDA* PLD 1984 Supreme Court 693 [9].

⁷⁷ *See Denza, supra* note 16, at 386.

⁷⁸ The Pakistan Code, Arbitration (International Investment Disputes) Act, 2011, ¶1, <https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-apaUY2FsaJs%3D-sg-jjjjjjjjjjjj>.

⁷⁹ *Id.*

⁸⁰ The Pakistan Code, ICT [Islamabad Capital Territory] Rights of Persons with Disability Act, 2020, pmb1, ¶ 2 <https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-apaUY2NpaZw%3D-sg-jjjjjjjjjjjj>.

⁸¹ *See CRPD, supra* note 13, art. 2, 22(2).

⁸² The Pakistan Code, The Zainab Alert, Response and Recovery Act 2020, pmb1, ¶ 4, <http://www.na.gov.pk/en/acts-tenure.php>.

⁸³ PAKISTAN CONST., *supra* note 22, art. 6(10)(A), *inserted by* amend. 18, §5. For principle of due process, see *New Jubilee Insurance Company v. National Bank of Pakistan* PLD 1999 Supreme Court 1126, [12].

⁸⁴ *Suo Motu Case No. 4, (2010) (aka Syed Yousaf Raza Gillani case)* PLD 2012 Supreme Court 553, [33].

⁸⁵ ICCPR, *supra* note 13, art. 14.

⁸⁶ Vienna Convention on the Law of Treaties, art. 18, U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331 (*entered into force* 27 Jan. 1980), *reprinted in* 8 I.L.M. 679 (1969) [hereinafter VCLT].

⁸⁷ *Pakistan Muslim League v Federation of Pakistan*, PLD 2007 Supreme Court 642, [33].

⁸⁸ *See Qureshi, supra* note 6170, at 26-32. In *Turab*, the Islamabad High Court has provided a better clue for the incorporationist approach:

Article 13 of the Universal Declaration of Human Rights is akin to Articles 9 and 15 of our Constitution. Since there is no inconsistency between Article 13 of the Universal Declaration of Human Rights and the provisions of our Constitution, the former can be cited and relied upon before Courts in Pakistan.

Ali Muhammad Turab v. Federation of Pakistan PLD 2020 Islamabad 454, [10].

⁸⁹ *See* Office of the High Commissioner for Human Rights (OHCHR), Ratification of 18 International Human Rights Treaties, <https://indicators.ohchr.org/>.

⁹⁰ *Id.* The declaration states:

- i. The minimum age of recruitment of personnel into the armed forces of Pakistan is 16 years.
- ii. The armed forces personnel are sent to combatant areas only after they attain eighteen years of age.
- iii. The recruitment into the armed forces of Pakistan is purely voluntary, and made through open competition on merit without any force or coercion.
- iv. The recruit is required to present B-Form issued by the National Database and Registration Authority as a token of proof of having attained minimum age prescribed under the law for recruitment.

In the case of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000, when a State deposits an instrument of

ratification, approval, etc., it must at the same time also deposit a binding declaration under Article 3 (2) in which it sets forth the minimum age at which that State will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

⁹¹ *Id.* “The Government of the Islamic Republic of Pakistan reserves its right to attach appropriate reservations, make declarations and state its understanding in respect of various provisions of the Covenant at the time of ratification.”

⁹² *Id.* “Pakistan, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, shall use all appropriate means to the maximum of its available resources.”

⁹³ ICESCR, *supra* note 13, art. 2(1).

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

⁹⁴ OHCHR, *supra* note 89.

⁹⁵ See objections of other states parties (e.g. Norway, the Netherlands etc.) to Pakistan’s reservations: *See* UN Treaty Collection, *supra* note 13, Status of Treaties: CEDAW.

⁹⁶ *In re: Suo Motu Case No.1/k of 2006 (Gender Equality) PLD 2008 1.* In this case the Islamic / Shariat court relied on Islamic law and Pakistan’s international obligations under CEDAW and declared a part of Citizenship Act 1951 as against gender equality.

⁹⁷ *Saima v. The State*, PLD 2003 Lahore 747.

⁹⁸ G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 8, 28 (Dec. 10, 1984): “The Government of the Islamic Republic of Pakistan declares that pursuant to Article 8, paragraph 2, of the Convention, it does not take this Convention as the legal basis for cooperation on extradition with other States Parties.”

In accordance with Article 28, paragraph 1, of the Convention, the Government of the Islamic Republic of Pakistan hereby declares that it does not recognize the competence of the Committee provided for in Article 20’. Article 30 ‘The Government of the Islamic Republic of Pakistan does not consider itself bound by Article 30, Paragraph 1 of the Convention.

⁹⁹ VCLT, *supra* note 86, arts. 26-27.

¹⁰⁰ *See* Suo Motu Case No. 4, *supra* note 84.

¹⁰¹ Pakistan Muslim League v. Federation of Pakistan PLD 2007 Supreme Court 642, [33]. *See also* Sui Southern Gas *supra* note 74 where the Supreme Court said that parliament was “conscious” of ILO Conventions on labor and union rights.

¹⁰² Al-Jehad Trust v. Federation of Pakistan 1990 SCMR 1379, [16]. *See also* Khadim Hussain v. Secretary, Minister of Human Rights PLD 2020 Islamabad 268, [14].

¹⁰³ Al-Jehad Trust v. Federation of Pakistan, *supra* note 102. *See Also* Farooq Leghari v. Federation of Pakistan PLD 1999 Supreme Court 57 where ICCPR and the European Convention on Human Rights were cited. In Getz Pharma v. Federation of Pakistan PLD 2017 Sindh 157, the Sindh High Court deduced the right to health from the constitution of Pakistan and ICESCR.

¹⁰⁴ Pakistan Muslim League v. Federation of Pakistan, *supra* note 101. Chaudhry J. has, in the same vein, declared enforced disappearance as crime against humanity “all over the world” and has described it as customary international law. *See* Human Rights Case No. 29388-K of 2013 [aka Missing Persons Case] PLD 2014 Supreme Court 305, [16].

¹⁰⁵ A limited number of provisions such as prohibition of slavery, torture, racial discrimination are considered customary, *See* CRAWFORD, *supra* note 16, at 595.

¹⁰⁶ PAKISTAN CONST., *supra* note 22, art. 14(2).

¹⁰⁷ The Police Order 2002, 156(d) <http://punjablaws.gov.pk/laws/2185a.html>.

¹⁰⁸ *See* CAT, *supra* note 13, art. 1.

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

¹⁰⁹ Malik Ubaidullah v. Government of Punjab PLD 2020 Supreme Court 599, [3]. *See also* Mohammad Shafiq-ur-Rehman v. Federation of Pakistan PLD 2017 Lahore 558. This case is related to the rights of disabled persons to be included in national census.

¹¹⁰ PAKISTAN CONST., *supra* note 22, art.25(2).

¹¹¹ *See* CEDAW, *supra* note 13, art. 1.

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Saima, *supra* note 99, at 9, Jilani J relied on Article 16 of CEDAW together with Article 35 of the constitution for protecting the rights of a married woman.

¹¹² *Shehla Zia v. Wapda*, PLD 1994 Supreme Court 693.

¹¹³ *See* Missing Persons Case, *supra* note 104, at 17.

¹¹⁴ *See generally*, SHAHEED FATIMA, USING INTERNATIONAL LAW IN DOMESTIC COURTS (2005).

¹¹⁵ *See* Philip Sales & Joanne Clement, *International Law in Domestic Courts: The Developing Framework*, 124 L. Q. REV. 388 (2008).

¹¹⁶ SHAW *supra* note 16, at 105.

¹¹⁷ Constitutional Reform and Governance Act 2010, §§20-22, <https://www.legislation.gov.uk/ukpga/2010/25/part/2>.

¹¹⁸ Constitutional Reform and Governance Act: Explanatory Notes <https://www.legislation.gov.uk/ukpga/2010/25/notes>. Emphasis added.

¹¹⁹ *JH Rayner (Mincing Lane) Ltd v. Dept. of Trade* [1990] 2 A.C. 418, 500. In *Rayner*, the court cited a large number of cases in support of this principle. Recently, the Supreme Court, in SC at [76], held that “treaties are agreements intended to be binding upon the parties to them, they are not contracts which domestic courts can enforce.” Lord Reed, in SC, further at [78] held that HJ Ranyer

dictum was cited with approval, and the principle which it lays down reasserted by 11 justices of this court, in *R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* [2018] AC 61, paras 56, 167, 244. As was there explained, the dualist system, based on the proposition that international law and domestic law operate in independent spheres, is a necessary corollary of Parliamentary sovereignty: *See R (SC) v Work and Pensions Secretary* [2021] 3 WLR 428.

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- ¹²⁰ Thomas v. Baptiste (1999) 54 WIR 387, 422.
- ¹²¹ HARRY WOOLF ET AL, DE SMITH'S PRINCIPLES OF JUDICIAL REVIEW 276 (2d ed. 2020).
- ¹²² *Id*
- ¹²³ The Diplomatic Privileges Act 1964, <https://www.legislation.gov.uk/ukpga/1964/81>.
- ¹²⁴ *Id.* § 2. Emphasis added.
- ¹²⁵ Human Rights Act 1998, sch. 1, <https://www.legislation.gov.uk/ukpga/1998/42/contents>.
- ¹²⁶ CRAWFORD, *supra* note 16, at 60.
- ¹²⁷ WOOLF ET AL, *supra* note 121, at 276.
- ¹²⁸ Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] AC 547, 567.
- ¹²⁹ ZH (Tanzania) v. SOS for the Home Dep't [2011] UKSC 4, [2011] 2 AC 166 [23]. Emphasis added.
- ¹³⁰ Children Act 2004, <https://www.legislation.gov.uk/ukpga/2004/31/contents>; Borders, Citizenship and Immigration Act 2009, <https://www.legislation.gov.uk/ukpga/2009/11/contents>.
- ¹³¹ WOOLF ET AL, *supra* note 121, at 276. *See also* R (European Roma Rights Centre) v. Immigration Officer at Prague Airport [2004] UKHL 55, [2005] 2 AC 1, [7].
- ¹³² *State Parties, Including Reservations and Declarations, to the 1951 Refugee Convention*, UNHCR (22 April 1954), <https://www.unhcr.org/en-us/5d9ed32b4>.
- ¹³³ Asylum and Immigration Appeals Act 1993, <https://www.legislation.gov.uk/ukpga/1993/23/section/2>. *See also* R (European Roma Rights Centre) v. Immigr. Officer at Prague Airport [2004] UKHL 55, [2005] 2 AC 1, [7].
- ¹³⁴ For discussion on customary law, see HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 53-91 (2014); The International Court of Justice Handbook 2019, <https://www.icj-cij.org/en/publications>.
- ¹³⁵ *Cited in* SHAW, *supra* note 16, at 106; *See also* R v. Jones (Margaret) [2006] UKHL 16, [2007] 1 AC 136, [11].
- ¹³⁶ *Id.*
- ¹³⁷ *Id.* Chung Chi Cheung v. R [1939] AC 160, 168; 9AD, at 264. *See also* for Lord Denning

view “the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an act of Parliament” *Trendtex Trading Corporation v Central bank of Nigeria* [1977] 2 WLR 356. For good discussion on the incorporation doctrine, see *Ex Parte Pinochet (No. 1)* [2000] 1 AC 61.

¹³⁸ *Keyu v. Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355, [146].

¹³⁹ *Id.* at 150. See also *R v. Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136.

¹⁴⁰ *Belhaj .v Straw* [2017] UKSC 3, [252]. Lord Sumption heavily relied on views of Lord Bingham in *R v Jones* (n 71). See also the Bangalore Principles 1988 14 Commonwealth Law Bulletin 1196.

¹⁴¹ SHAW, *supra* note 16, at 112. See also CRAWFORD, *supra* note 16, at 63, where he argues that “it has become received wisdom that the common law approach to customary international law is that of ‘incorporation’, under which customary rules are to be considered ‘part of the law the land’ provided they are not inconsistent with Acts of Parliament.” See Generally Roger O’Keefe, *The Doctrine of Incorporation Revisited*, 79 BRIT. Y.B INT’L L. 7 (2009). For historic discussion, generally see *Triquet v. Bath* (1764) 3 Burr 1478, 1481; WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, IV, Ch. 5, at 67 (William Carey Jones ed., 1916); *Duke of Brunswick v. King of Hanover* (1844) 6 Beav 1 , 51–52; *Emperor of Austria v. Day* (1861) 2 Giff 628 , 678.

¹⁴² SHAW, *supra* note 16, at 105. “Ministers are under an overarching duty to comply with the law, including international law and treaty obligations.” THE CABINET MANUAL 26, [3.46] (1st ed. 2011). The minister signing a treaty may also create legitimate expectation that its terms would be followed: see WOOLF ET AL, *supra* note 121.

¹⁴³ I. M. Sinclair, *The Principles of Treaty Interpretation and Their Application by the English Courts*, 12 INT’L & COMP. L. Q. 508 (1963).

¹⁴⁴ See CRAWFORD, *supra* note 16, at 61.

¹⁴⁵ *Rey v. Switzerland* [1999] 1 AC 54, 62.

¹⁴⁶ *Id.* at 63. See also *R (Al-Fawwaz) v. Governor of Brixton Prison* [2002] 1 A.C. 556, 607 where Lord Slynn said: “The terms of an extradition treaty cannot be used to construe the Act of Parliament under which the treaty is given effect in our domestic law.”

¹⁴⁷ *Regina v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696, 747-48.

¹⁴⁸ *Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116, 143.

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- ¹⁴⁹ *Thomas v. Baptiste* [1999] UKPC 13, [2000] 2 AC 1, 31.
- ¹⁵⁰ *See Malone v. Metropolitan Police Commissioner (No 2)* [1979] Ch 344, 379 (Megarry V-C).
- ¹⁵¹ *See Cheall v. Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180.
- ¹⁵² *See Gleaves v. Deakin* [1980] AC 477.
- ¹⁵³ HIGGINS, *supra* note 16, at 216.
- ¹⁵⁴ For treaty interpretation, *see* VCLT, *supra* note 86, arts. 31-33. For a good commentary, *see* RICHARD GARDINER, *TREATY INTERPRETATION* (2d ed. 2015); ULF LINDERFALK, *ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* (2007).
- ¹⁵⁵ CRAWFORD, *supra* note 16, at 61.
- ¹⁵⁶ *Constitutional Reform and Governance Act 2010*, *supra* note 118.
- ¹⁵⁷ *See generally* Sinclair, *supra* note 143.
- ¹⁵⁸ *Jadhav (India v. Pakistan)*, Judgement, I.C.J. REPORTS 418 2019, <https://www.icj-cij.org/en/case/168>.
- ¹⁵⁹ *Pakistan Code, International Court of Justice (Review and Re-consideration) Ordinance (2020)*, <https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-apaUY2NpaJY%3D-sg-jjjjjjjjjjjj>.
- ¹⁶⁰ PAKISTAN CONST., *supra* note 22, art. 227.
- ¹⁶¹ This however does not mean that the UK has never accused of human rights abuses or actually violated human rights law. The European Court of Human Rights has found the UK in breach of the European Convention of Human rights in a large number of cases: *see* European Court of Human Rights, *Country Profiles* (July 2021) <https://www.echr.coe.int/Pages/home.aspx?p=press/country&c=>.
- ¹⁶² THE CABINET MANUAL, *supra* note 142 at 26.
- ¹⁶³ *Suo Motu Case No. 4*, *supra* note 84.
- ¹⁶⁴ *Pakistan Muslim League v. Federation of Pakistan*, *supra* note 87.
- ¹⁶⁵ HIGGINS, *supra* note 16, at 216.
- ¹⁶⁶ *See* *Pakistan Muslim League v. Federation of Pakistan*, *supra* note 87; *Shehla Zia v. WAPDA*,

supra note 76.

¹⁶⁷ Pakistan Muslim League v. Federation of Pakistan, *supra* note 87.

¹⁶⁸ *Id.*

¹⁶⁹ Suo Motu Case No. 4, *supra* note 84.

¹⁷⁰ Getz Pharma v. Federation of Pakistan, *supra* note 103.

¹⁷¹ Malik Ubaidullah v. Government of Punjab, *supra* note 109.

¹⁷² PAKISTAN CONST., *supra* note 22, art. 14.

¹⁷³ *Id.*

¹⁷⁴ *See* Missing Persons Case, *supra* note 106, at 16.

¹⁷⁵ Shehla Zia v. WAPDA, *supra* note 76, at 9.