

The Debate of Differences between International Law and the Civic or Constitutional Laws in Pakistan; A Way Forward

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This study has no aim to hurt any ideological or social segment but purely based on academic purposes.

Abstract

Universally and locally, all the courts regard international laws. However, many scholars have traced differences in practices while following civil or constitutional laws in Pakistan. According to them, several constitutional rules create confusion regarding following either international law or local laws (inspired by religion or sect). Similarly, they also criticize the practices of courts for manipulating their verdicts for the sake of satisfying religious sentiments. Therefore, this study tries to investigate whether this allegation can be proved academically, or is there any connection between courts' verdicts and religious culture. At the same time, this study also evaluates whether there can be differences between international law and civic laws in any state like Pakistan, or whether this practice causes the emergence of a theocratic state.

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Introduction

International Law is a package of rules, norms and even principles that operate the conduct and mutual relations of the member sovereign states of the international community. Municipal Law on the other hand is the internal law or domestic law of a sovereign state which governs and regulates the domestic aspect of the government. It deals between the citizens of a state and issues, and individually with the citizens. It also deals between the administrative appliance and individuals while the International Law predominantly and directly concentrates upon the relationship, conduct and transactions between the

sovereign States and also between the sovereign states and non-state actors i.e., non-governmental organizations and international governmental organizations (Alexander, 2018).

The main reason or issue of relationships between municipal law and international law has been much controversy in terms of its subject matter among scholars, jurists and international lawyers. Because most of the time, in a municipal court whenever an international law rule is contended to rectify a decision has always raised a problem. Rigorously, much controversy and discrepancy in the procedure to this subject matter has among those lawyers, jurists and practitioners who support the '*monist doctrine*' and those who follow the '*dualist doctrine*'. Presently, observable disparity and discrepancy in between States' practice has further sped the abrupt approach of these two schools of thought i.e., dualist and monist doctrines (Hans, 1958) (Heinrich, 1899).

Those states who follow the *Dualist Doctrine* while practicing International Law's rule assert that the law is a supreme sovereign's act within the state. Yet, Municipal Law and International Law are treated and thus consider two different legal practice systems. Henceforth, the norms and rules of International Law irrespective of its sources whether primary or subsidiary, would not be automatically configured as an integral part of the state's municipal laws. If a state exercises an internal law rule, then it must be incorporated and made an integral part of the state's municipal law according to the established administrative and legislative measures of the domestic legal system of the state. Although, most of the states do not give the primacy to International Law over the municipal law (Andrea, 2004). Quite contrary to the dualist doctrine, the *Monist Doctrine* acknowledges the unitary inference of law. According to this doctrine, municipal law and international law are the two aspects of the signal unitary legal methods. Consequently, the believers of the monist school of thought assert that there is no need for the incorporation of international law rules or norms to make them an integral part of the municipal law of the state to practice it in the domestic legal procedure. According to some states, even jurists and international lawyers while practicing international law rules, in case of conflict or inconsistency between international law and municipal law — hold the high status to international law — preeminence is given to the former. However, if a state goes beyond the limitations implied by the international law, then its acts will be considered null and void (Joseph Gabriel, 1936).

In order to have an apparent insight of the two schools of thought i.e., dualist and monist doctrines and their mutual relationship it would be adequate at the onset to investigate the disparate practices of sovereign states to discern how states follow different doctrines, while, applying the international law rules and norms within the framework of their municipal legal order and how the conflict, if there any, between the domestic law and international law rules within the state have been fixed. This can be observable from several aspects and can be limited for studies to the three contrary approaches vis-à-vis the primacy of international law, the primacy of municipal law and communion and harmonization between the two discussed doctrines.

Although, some states e.g., the United Kingdom in respect to customary international law automatically incorporate and makes it an integral part the domestic laws and follow the monist conception while in terms of treaties the same country United Kingdom follows and practices the dualistic approach (Luzius, 2007). However, most of the state's practice the dualist approach in terms of the practice and application of the treaties in international law in their domestic legal adjudication.

The International Law Practice in Pakistan

In both the cases i.e., treaties and customary international law, the Islamic Republic of Pakistan also follows the '*Dualist Doctrine*'. The application in Pakistan's Municipal Legal Order in both the cases would rely on the subject-matter which discern the regulation of the state obliged for the its domestic application vis-à-vis either by an executive act or legislative camouflage. It is because to influence of making the proposition of international provisions appropriate for the plea by the domestic courts of Pakistan. Generally speaking, an apparent distinction may be established between these three criteria: rules or norms of international law not wrapped by statutory apparatus; rules or norms of international law which are already wrapped by a legislative apparatus; and finally rules or norms of international law which are confiscatory with any statutory apparatus and may require legal content for their applicability.

For the purpose of a detailed examination which is attempting of the legitimate perspective in order of the application of international law in Pakistan is crucial to evaluate that in which government's organ Pakistan taken such actions or which organs as are presumed important for exercising and implementing the obligations of international law. In Pakistan, the constitutional provisions are essential to be identified for the specification of a governmental agency that is responsible for the International Relations of Pakistan. The Islamic Republic of Pakistan interprets the magnitude of the executive authority in the article 97 as below:

"Subject to the Constitution, the executive authority of the Federation shall extend to the matters with respect to which Majlis-e-Shoora [Parliament] has power to make laws, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan."

It is apparent that the Article 97 employs the role or operations of foreign relations to the Federal Government, the breadth of the roles is not certainly determined (Constitution of Pakistan, 1973). However, it may not be credible to distinguish, with any extent of preciseness, the executive roles *in relation to areas outside Pakistan*, it can be asserted that they are approximately a residue functions of the federal government, following the separation of the judicial functions and legislative functions. All these may comprise tasks related to foreign policy direction and all those acts concerned to it, comprising the requirement of legislative sanctuary, if vital, for the authority of foreign policy. The compliance of Pakistan with international legal provisions. The reality is that to some degree, the executive's power in foreign affairs is limited in the Fourth Schedule under the Federal legislative list is meant in detail, but not inclusive. It is also mentioned there that the Federal Government is responsible for "*External Affairs*," according to the Legislative List. This is demonstrated by the inclusion of topics such as defense of the country in its capacity, Pakistan's security and execution of any aspect of the state in terms of its extradition, agreement, treaties and pacts. However, if any legal sanctuary is required for the implementation of multilateral or bilateral treaties to which Pakistan has agreed, the federal parliament has the authority to adopt legislation to give the treaty municipal legal effect. As a result, intimate amortization between the legislative and executive organs is required, which may vary depending on the

type of government in position. The governmental setup under Pakistan's constitution will be briefly reviewed below in order to provide clear knowledge of the enforcement system (Constitution of Pakistan, 1973).

The political system of Pakistan is federal parliamentary. It means it is a federal country governed by a Westminster-style legislative system. Legal protection would not be difficult to come by as long as the administration has a majority in Parliament. Legal protection would not be difficult to get as long as the government has a majority in Parliament, which is required for maintenance of the government. In this federal parliamentary system of Pakistan, the legislative and executive functions are often fused and coalesce into each other and those who are legislators and executors are function the same. However, in the case of the presidential form of government executive and legislative functions are often very complicated. Eventually, the constitution Pakistan provides that the government has the majority in the Parliament, so, it is lenient to perform the international law obligation and norms in the municipal legal order (Constitution of Pakistan, 1973).

The federal government has broad margin when it comes to the formulation of policies. The Constitution merely serves as a framework for political action. Article 40 of the Constitution of Pakistan contains the guideline as follows:

"The state shall endeavor to preserve and strengthen fraternal relations among Muslims countries based on Islamic unity, support the common interests of the peoples of Asia, Africa and Latin America, promote international peace and security, foster goodwill and friendly relations among all nations, and encourage the settlement of international disputes by peaceful means."

Article 40 of the Constitution of Pakistan does not deal with the municipal applicability of international law rules. It is up to the Government of Pakistan to determine whether it should give municipal effect to its international obligations keeping in view its laws and practice (Jamshed A, 1991). his approach is followed about both treaties and customary international law (Constitution of Pakistan, 1973).

International Law Rules Application Conflicting Other Domestic Laws on Same Subjects

In the Islamic Republic of Pakistan, the plea of International Law rules by the municipal courts is mainly subject to the following two limitations i.e., International Law norm conflicting with an act or statute of Parliament and an international law norm conflicting with limitation imposed in the constitution by sharia or Islamic law.

1) Applicability of International Law Rules Repugnant to the Injunction Islam

The 1973 Constitution of the Islamic Republic of Pakistan brings about the '*Objective Resolution*' as its considerable piece. The following is one of the concerning provisions¹ of the objective resolution:

"Wherein the Muslims shall be enabled to order their lives in their individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah."

The Constitution of the Islamic Republic of Pakistan also asserts about the establishment of the *Federal Shariat Court* as is follow:

"May, [either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet [...]."

Article 227 of the Islamic Republic of Pakistan further lay down that:

"All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah [...] and no law shall be enacted which is repugnant to such injunctions."

Keeping in view of the upper provisions of the Constitution of the Islamic Republic of Pakistan implied that it is very difficult and uncompromising that a provision of a bilateral or multilateral treaty or a rule or norm of a customary international law that is conflicting with the basic principles or injunction of the sharia of Islamic Law as mentioned in tin primary sources of Islamic Jurisprudence i.e., Quran and the Sunnah of the Prophet (PBUH) would always be applicable in the Islamic Republic of Pakistan (Constitution of Pakistan, 1973).

2) Application of International Law Rules Coinciding Domestic Legislation

Applicability of international law rules in some circumstances, a simple administrative directive or executive order can be used herein Municipal laws and international legal standards are in sync. In such a circumstance, it might be claimed that the rules of international law are part of a larger system a set of rules for regulating actions inside the municipal legal system order. Pakistan, for example, enacted the

¹ (Juliana Usman & Sameena Saeed, 2021)

United Nations (Privileges and Immunities) Act, 1948 to give local legal effect to the United Nations Convention on the Privileges and Immunities of the United Nations. Pakistan's Act of 1948 provides that members of any international organization or its officials and representatives are entitled to privileges and immunities similar to those extended to the United Nations. The only thing that needs to be done is for the Federal Government to issue a notification in the Official Gazette (a purely executive) in order that the Act takes effect with regard to the international organizations mentioned in the notification (Juliana Usman & Sameena Saeed, 2021).

Other legislative provisions that allow the Federal Government to carry out Pakistan's foreign duties under any specific international instrument. If the government, in accordance with an international agreement, has to make it easier for a foreign national to stay in the country (Juliana Usman & Sameena Saeed, 2021). The government of Pakistan has the authority to do so under the Foreigner's Act 1946, Section 10, which stipulates as:

"Federal Government may by order declare that any or all of the provisions of this act or the orders made thereunder shall not apply, or shall apply with such modifications or subject to such conditions as may be specified, to or in relation to any individual foreigner, or any class or description of foreigners."

In accordance with the jurisdiction conferred in it under the Finance Act, the Central Board of Revenue can also award exemption from tariffs, customs, and other taxes (Nadeem, 2019). Extradition is only possible to a state with whom Pakistan has an extradition treaty or for which a notification has been made in the Official Gazette, according to the Pakistan Extradition Act 1972 (Anees Iqbal & Muhammad Qaiser, 2017). It would not be necessary to adopt legislation to incorporate a treaty for the purposes of implementation. It would only be necessary to notify it.

Furthermore, if officials or representatives of foreign organizations established in Pakistan under a treaty are excluded from registration, the Registration of Foreigners Act 1939, section 6 applies:

"The Federal Government may, by order, declare that any or all the provisions of the rules made under this Act shall not apply, or shall apply with such modifications or subject to such conditions as may be specified in the said order, to or in relation to any individual foreigner or any class or description of foreigners" (Raza & Ghazala Rafi, 2015)

3) Applicability of International Law Rules Conflicting Municipal Law

Above, it has been highlighted Shariat in relation to the constraints on the adoption of rules of international customary law or treaty law into municipal legal systems. The city government is also a

stumbling block. In effect is the law. As a result, the rule of law prevails in most countries. Unless the state constitution specifies differently, international legal rules apply. International law has no precedence in Pakistan, and local law will take precedence. In the event of a conflict with international law, it will take precedence. In cases when domestic law and international law rules collide, Pakistani courts have always given domestic law precedence. Initially, Pakistani courts held that traditional marriage was illegal. It was impossible to apply an in international law regulation unless it was backed up by local law (PLD, 1962).

In the case of *Federation of Pakistan v. Messrs Dalmia Cement Co. Ltd.*, this point was made sufficiently clear. The Pakistani Supreme Court stated in this case:

"if the proposition that a new state is bound by the obligations of its predecessor is accepted, even then it will not be possible to grant any relief to the respondent company, because in the absence of a statutory recognition the municipal courts have no authority to enforce such an obligation."

Nonetheless, as previously discussed, this concept has evolved, and foreign legal rules have been applied by Pakistani courts even in the absence of official recognition. The courts took a consistent and uniform approach. policy in circumstances when international law and domestic law conflicted provisions of domestic law However, when judging cases presented before them, the Courts were faced with two types of situations: (i) where the treaty itself established legislation for its implementation, and (ii) when customary international law or treaty rules differed from the legislative provisions. In Pakistan, there are various instruments in use. It is not always required to make laws when a treaty requires the adoption of legislation for its execution. If a legal instrument already exists, it will immediately cover the treaty. If there is no existing implementing legal document, and if the treaty cannot be implemented covering legislation would be required if the presidential order was not followed by covering legislation. This brings us to the second issue of contention, namely where the customary or when a treaty rule of international law clashes with home law or another. In Pakistan, norms or customs have legal force (Juliana Usman & Sameena Saeed, 2021).

However, previously said, Pakistan adheres to the 'dualist' concept in terms of both customary international law and treaties, however as previously indicated, under certain instances, Pakistani courts do take judicial notice of, and enforce, treaties. As a matter of policy, implement international customary or treaty law to satisfy the goals of justice. The issue was also addressed extensively in *Messrs Najib Zarab Ltd v. The Government of Pakistan*. In this case, the court considered two issues: (i) whether international law is taken from its own force; and (ii) whether international law is pulled from its own force. Without the assistance of municipal law, becoming the law of the country, and whether in the event of a conflict, it takes precedence over municipal law (Juliana Usman & Sameena Saeed, 2021).

As a result, it is evident that in Pakistan, if international law rules conflict with local law, the latter will prevail. It's tough to go against domestic law that reflects a sovereign state's will. The country's Courts, being one of the most important organs of a sovereign state, and not of a republic, if international law

clashes with national law, national law must be applied it. However, because Pakistan is a member of the United Nations, its courts have jurisdiction must, as far as possible, interpret the facts in the absence of a prima facie conflict as a result of local law "in order to prevent a conflict with the international community or the United Nations international law principles that are well-established". This principle was accepted in an earlier case in which Justice *Nasim Hasan Shah* placing reliance held:

"The Law of Pakistan is that every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of Nations or with the established rules of international law" (Juliana Usman & Sameena Saeed, 2021)

Conclusion

To sum up, international law norms are as a conclusion of its proceeding evolution in catering for recently arising dilemmas would continue, a highly specialized area of the regular legal procedure with which municipal courts do not impose with repeatedly in their regular procedure. As the importance of foreign acts and law in our municipal courts, international legal norms, obligations and principles also comprise a query of evidence with which the domestic courts in Islamic Republic of Pakistan may not be communal and, accordingly, opinions and viewpoints of professionals and experts on the subject of international law may be authorized. However, justice and prudence urge that the domestic courts of Pakistan should deal with international law and its norms on the same basis as International Law and, in backing of it, disclose the conclusion of specialists on international law.

To very closely examine of the several judgments of the Pakistan's domestic courts it evolves simply obvious that any law or norms of customary international law which have the consequently two governing components i.e., (i) a general practice of sovereign states and (ii) acknowledgement by nations of this general practice as a law, shall be applied by the domestic courts in Pakistan procured the equivalent do not confrontation with any proposition of provision of legislation or principles of Islamic Jurisprudence or Sharia Law. Scholarly works on international law have been accepted and relied on by the domestic court's practice. However, the writings of which courts should take judicial heed and admit in proof in assistance of a legal recommendation must be robust, standard international law textbooks, universally also ratified similarly.

Moreover, it proposed that the municipal courts in the state of Pakistan may put up with judicial heed of the rules or norms of international law just as they do of international law. Municipal courts shall persuade international law professionals and experts to come across as *amicus curiae* to encourage the courts to deliver that the rule of international law in concern is not *Prima Jacie* in a quarrel with a statutory apparatus or the Shariat itself.

References

Aneeslqbal; Shah, Muhammad Qaiser. "The Legal Conundrum of Extradition Vis-a-Vis Constitution of Pakistan 1973." *JL & Soc'y* 48 (2017): 39.

Bianchi, Andrea. "International law and US courts: The myth of Lohengrin revisited." *European Journal of International Law* 15, no. 4 (2004): 751-781.

Farhat, Syed Nadeem. "Citizenship Laws of Pakistan: A Critical Review." *Policy Perspectives* 16, no. 2 (2019): 59-85.

Hamid, Jamshed A. "Conduct of foreign Relations, including Treaty-making Powers, under the Constitution of the Islamic Republic of Pakistan." In *Asian Yearbook of International Law, Volume 1 (1991)*, pp. 1-18. Brill Nijhoff, 1992.

Kelsen, Hans, and Alexander Nikolaevic Makarov. *The Unity of International Law and State Law*. 1958

Orakhelashvili, Alexander. *Akehurst's Modern Introduction to International Law*. Routledge, 2018.

PLD [1962] Supreme Court 260.

Raza, Syed Sami, and Ghazala Rafi. "A Preliminary Note on the Genealogy of the concept of Enemy Alien in Pakistan." *Pakistan Journal of Criminology Volume 7*, no. 2 (2015): 43-54.

Starke, Joseph Gabriel. "Monism and dualism in the theory of international law." *Brit. YB Int'l L.* 17 (1936): 66.

Tripel, Heinrich. *international and national law*. Published by CL Hirschfeld, 1899.

Wachani, Juliana Usman, and Sameena Saeed. "Controversial Status of Objective Resolution in the Form of Article 2A in the Constitutional History of Pakistan." *Pakistan Journal of International Affairs* 4, no. 2 (2021).

Wildhaber, Luzius. "The European convention on human rights and international law." *International & Comparative Law Quarterly* 56, no. 2 (2007): 217-231.