

UPHOLDING THE INTERNATIONAL RULE OF LAW

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ABSTRACT

The Higher Judiciary in Pakistan, has occasionally referred to international law treaties and instruments when resolving issues that have some relevance with international law. These references were predominantly drawn from private international law as in majority of these cases, the international law of arbitration was referred to and discussed. Related concepts like sales of goods, international letter of credit were the most leaned upon areas of international law but this was predominantly what we referred to as the 'private international law basket'. Seldom, references from public international law domain were also discussed but the only area that attracted attention from public international law was the law of human rights; in-fact one notices frequent references to the United Nations Human Rights Declaration (UNDHR), International Covenant of Civil and Political Rights (ICCPR) and other HR instruments when the courts were seized on matters relating to the interpretations of fundamental rights provided under all the Constitutions of Pakistan including the 1973 Constitution. However, recently the Superior Courts have shown more interest in other areas of international law such as the 'use of force', interpretation of the UN Charter, particularly in light of the implementation of Chapter VII, the law of conflict and some UNSC resolutions. This article examines and maps the recent and novel trend of the judiciary's reliance upon principles of public international law; in-fact their judgments cover large swaths of the legal landscape from intellectual property law to environmental law to international trade law.

INTRODUCTION

In Pakistan the three organs of the state coexist interdependently and even though the Judiciary is independent from the state, it is a subset of the state and thus plays a vital role in the legal policy making of the state. The influence of the Superior Courts in the State's institutional function is evident via their realization that the Rule of Law does not only imply domestic law but international law as well; this includes upholding international norms and obligations and complying with international treaties that Pakistan is a signatory to.

Interestingly, as mentioned in the abstract, the Superior Courts of Pakistan have engaged with the subject of private international law since the last 70 years and there is

considerable jurisprudence²⁹⁸ on arbitration, transnational sales of goods, joint venture agreements, agency agreements and international letters of credits.

In the realm of private international law, the Chief Justice of Pakistan (CJP) in a 2016 judgment,²⁹⁹ while shedding light upon the extent of the jurisdiction of Pakistani courts, pronounced that:

“it is incumbent upon the courts of Pakistan to keep the principles of Conflict of Laws or Private International Law in mind whilst dealing with matters involving questions of cross-border succession. These principles are based on mutual respect for and recognition of, the judicial systems and the laws of other countries”

Some of the footnoted judgments below reflect the erudite competence of the superior courts in the arena of Private International law. However, in case of Public International law, the superior courts have mostly confined to references related to human rights treaties and human rights conventions. Consequently, the human right treaties are the most quoted in public international law jurisprudence and documents by the Superior Courts of Pakistan.

Nevertheless, in the last five years the Supreme Court has in particular begun to take note of other public international law treaties and subject areas such as trade and tariff agreements pertaining to the World Trade Organization (WTO) regime, wild life related treaties, intellectual property law, transnational terrorism and crime, movement of narcotics, ILO Conventions and international humanitarian law etc. Interestingly, the Superior Court has been at the forefront of promoting harmonization of domestic law and its application with international law standards and treaties ratified by Pakistan.

²⁹⁸ Examples of some of the judgments on P.v.t International Law have been reproduced hereunder:
Judgment on the issue whether the Plaintiff could invoke Section 4 of the Recognition & Enforcement (Arbitration Agreements & Foreign Arbitral Award), Act, 2011, PLD 2016 Sindh 169, *Global Quality Foods Pvt Ltd V Hardee's Food Systems*.

Famous Judgment on Reko Diq that involved a comprehensive discussion on various international law issues including whether the Chagai Hills Exploration Joint Venture Agreement (CHEJVA) was processed under the Foreign Private Investment Act of 1976, the scope of enforceability of an award under the New York Convention etc, PLD 1968 Karachi, 480, 1998 SCMR 1618, PLD 2000 SC 841,

²⁹⁹ PLD 2016 SC, 174

This is partially also due to the 18th amendment and the strengthening of entry No. 3 of the Federal Legislative List (FLL) Part 1 through the introduction of Item 32 (in the FLL (Part 1)) that enables states to legislate at a federal level on the subject that is related to an internationally binding treaty, even if the said subject is devolved to a province.

JURISDICTIONS UPHOLDING INTERNATIONAL RULE OF LAW IN PAKISTAN: A
BREAKDOWN

1. LABOUR LAW

In a recent judgment³⁰⁰ issued by a three-member bench, headed by the former Chief Justice of Pakistan, Mian Saqib Nisar, and comprising of Justice Mushir Alam and Justice Sajjad Ali Shah, the Court *upheld the rule of international law* while addressing the moot question of whether the Federal Legislature possessed the legislative competence and the authority to enact laws related to trade unions and labour disputes at trans-provincial level.

The judgment while examining if the Industrial Relations Act (IRA 2012) was a valid piece of legislation or not, noted that “*through the 18th amendment the Concurrent Legislative List (CLL) (Entries No. 26 and 27 whereof covered the subjects, inter alia of labour disputes and trade unions) was abolished from the Constitution*”³⁰¹ but as mentioned above Entry No. 3 was strengthened via Entry, No. 32 in Part-1 of the Federal Legislative List (FLL) that dealt with subjects related to *international treaties, conventions and agreements and international arbitration*.³⁰² Thus, Entry No. 32 read in light of Entry No.3³⁰³ grants wide-scope powers to the Federal Legislature to regulate and enact laws governed by International instruments that Pakistan has ratified; in this context the international law being, the International Labour Organization’s Conventions No. 87.

³⁰⁰ Civil Appeals No.1583 to 1598 of 2014

³⁰¹ *id* at p 46

³⁰² Item No. 32 of the Federal Legislative List, Part 1

³⁰³ This refers to item No.3 of the Federal Legislative List, Part 1

“*External affairs; the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to Governments outside Pakistan*”

Hence, the recent judgment has far-reaching consequences with regard to the emphasis laid down by the Superior Judiciary in underlining Pakistan's responsibility as a state in discharging its international obligations. Furthermore, this ruling also sheds clarity upon the ambiguity of the 18th amendment (that affected the balance of power between the Federal and Provincial Legislatures)

Interestingly, this nascent trend is also reflected through recent judgments that elucidate Pakistan's obligations as an international state in light of the international treaties ratified by Pakistan.

2. INTERNATIONAL TRADE LAW

In a petition filed by Pakistan Banaspati Manufacturers Association (PVMA)³⁰⁴ in 2017 the Islamabad High Court directed the Ministry of Science and Technology (MoST) to take remedial steps to ensure that the Punjab Food Authority (PFA) was fulfilling its commitments in compliance with the World Trade Organization (WTO) and in line with the WTO regime in relation to the standards of ghee and cooking oil. As per Article 2 and 3 of the Technical barriers to Trade Agreement ("TBT" Agreement) to which Pakistan is a signatory, each Member State is expected to ensure that inter alia the local government bodies are complying with the TBT Agreement's rules and conditions. However, since the PFA had been regulating practices in contravention to the standards set out by the Pakistan Standards Quality Control Authority (a Federal Body); the PFA was deemed to be violating Pakistan's international commitments. Hence, the above mentioned direction was issued by the federal government.

Another noteworthy 2017 judgment, via a majority opinion delivered by Shahid Jamil Khan³⁰⁵ highlighted significant principles related to International trade law while discussing the scope of the 'Free Trade Agreement between Pakistan and China (FTA), under Article 8, that 'envisaged progressive elimination of customs duties on import of goods originating in

³⁰⁴ <https://fp.brecorder.com/2017/06/20170619190896/.fp.brecorder.com/2017/06/2017/201706190896/>.

³⁰⁵ 2017 PTD 1796

the territory of the other party'. The predominant question to be answered was whether the FTA was to be considered as an offshoot of the General Agreement on Tariff and Trade (GATT) and based on that proposition could an exemption of Regulatory Duty be justified or not under Section 18 (5) of the Customs Act 1969. The Court held that 'an agreement which is essentially bilateral cannot be given multilateral hue especially when it is between two nations' and hence since FTA is a bilateral agreement it could not be read in light of Section 18(5).

3. DRUG REGULATION AND NARCOTICS

Justice Dost Mohammad, senior judge of the Supreme Court has often advocated the utility of international law principles in domestic law. In a 2016 judgment³⁰⁶ that dealt with the subject of narcotic substances and more specifically the definition of 'poppy straw', the minority opinion led by him stated, that since Section 2(t) of the Control of Narcotic Substances Act, 1997 was misleading, the "Government and the Legislature may take guidance from the international conventions and expert research opinions to amend definition clauses"³⁰⁷ in the Act of 1997.

4. INTERNATIONAL HUMANITARIAN LAW (IHL)

Ever since the commencement of military operations authorized under Article 245 of the Constitution, the legality of these operations became shrouded ambiguity. Initially these operations were over-simplified and categorized as counter-terrorism or law enforcement measures. Furthermore, the narrative of the non-state actors being dismissive about the Constitution and the law had also created difficulty in putting the non-state actors into a legal category of "terrorists" "criminals" "offenders" "miscreants" "foreign-funded agents" "enemy agent"; In fact the Prime Minister had gone so far as to say that Pakistan was at war so as to constitute the operations as an executive determination. The judiciary, on the other hand, was also creating confusion in determining the legal nature of these non-state actors and it is at this point that the Supreme Court grappled with this position. It relied upon

³⁰⁶ 2016 SCMR 621

³⁰⁷ *id*

public international law principles within the international humanitarian law (IHL) paradigm and decided to construct an authentic assessment of the legal conditions relating to the law of war for the first time.

The principal judgment³⁰⁸ that explicated the international humanitarian law paradigm, and Pakistan's responsibility within it in countering non-state actors engaged in the acts of terrorism, was delivered in a majority opinion by Justice Azmat Saeed on August 2015. While illuminating the notion of "threat of war"³⁰⁹ and upholding the establishment of military courts under the 21st amendment he held that:

"A perusal of Article 245(1) reveals that the Armed Forces of Pakistan, to achieve the ends mentioned therein i.e. the Defence of Pakistan shall act on the direction of the Federal Government. Broadly speaking two sets of eventualities have been catered for in the said Article. First the event of "external aggression" or "threat of war" and the second eventuality to "act in aid of civil power".³¹⁰

Furthermore, it was elaborated that:

"The gravity of the current situation and the intensity of the armed conflict, warrants its description as a "threat of war" permitting the trial of civilians by Court Martial".³¹¹ He held that these "people, claiming to be a member of a terrorist group or organization, using the name of religion have created the warlike situation; the gravity whereof cannot be squeezed into the narrow confines of a state of affairs where mere acting in "aid of civil power" by the Armed Forces would suffice. It is in the above backdrop in order to deal with the current situation, an additional tool to counter the situation has been provided by way of the questioned Amendments in the Constitution and the Pakistan Army Act."³¹²

The concurring opinion by Justice Umar Ata Bandial leaned upon canons of international law particularly of the rights enjoyed by 'captured insurgents' mentioned in the Geneva Convention. The opinion highlighted that:

³⁰⁸ PLD 2015 SC 401

³⁰⁹ *id* at Para 145 of Azmat Saeed"s, J at para 135.

³¹⁰ *id*

³¹¹ District Bar Association Rawalpindi case at Para 143 of Azmat Saeed"s judgment, J

³¹² District Bar Association Rawalpindi case at Para 144-145 of Azmat Saeed"s judgment.

*“The treatment of belligerent citizen and unlawful combatants in custody who have waged war against the State is not just a matter of municipal law. The subject attracts the principles of International law on armed conflict of war”.*³¹³

He added that:

*The terrorist militants fighting against Pakistan captured by the Armed Forces of Pakistan may be considered for protection under the 4th Geneva Convention dealing with civilians in the captivity of a party to the conflict of which they are not nationals. However, under the exclusionary Article 5 of the 4th Geneva Convention, a belligerent civilian who has committed hostile acts against the detaining State may forfeit certain human rights privileges under the said Convention; however he still remains entitled to a fair and regular trial prescribed by the said Convention”.*³¹⁴

In light of the IHL framework, another significant judgment, that served a reminder to Pakistan and the international community, particularly the U.S, to be mindful of its international legal obligations, was delivered by Justice Dost Mohammad, then functioning as the Chief Justice of Peshawar High Court. While relying upon the U.N Charter and Conventions, the Peshawar High Court declared the drone strikes carried out by CIA and the U.S Authorities were a ‘war crime and a blatant violation of the the basic human rights protected under the international law’.³¹⁵

5. NUCLEAR NON-PROLIFERATION

Ever since the episode of the clandestine nuclear market of Abdul Qadeer Khan,³¹⁶ Pakistan has been under immense pressure to ensure its compliance under UNSC resolution 1540. Adhering to its domestic and international needs, a new overarching nuclear control programme operating under the National Command Authority was brought in place.

³¹³ District Bar Association Rawalpindi case at Para 19 of Umar Ata Bandial, J

³¹⁴ District Bar Association Rawalpindi case at Para 21-22 of Umar Ata Bandial, J

³¹⁵ Writ Petition No. 1551-P/2012, p 17

³¹⁶ Yuan, Jing dong editor. “International Developments.” Asian Export Control Observer, no.1, Apr.2004, pp.1-22

Consequently, the National Command Authority Act enacted in 2010 significantly outlined the statement of objects and purposes of the UNSC resolution 1540.

Moreover, the National Command Authority Act was also the subject of a judgment³¹⁷ delivered by Justice Ejaz Afzal Khan, where he not only underscored Pakistan's international legal obligation under United Nation Security Council Resolution 1540³¹⁸ but also drew a link between Pakistan's domestic legal obligations and Chapter VII of the U.N Charter. The pleading counsel, representing the National Command Authority (NCA), advocated to have the status of the organization declared as non-statutory in light of Pakistan's compliance towards its international legal obligations. Currently, a review petition has been filed against this decision but the final verdict pertaining to this case will have far reaching consequences keeping in mind the international law paradigm.³¹⁹

6. FOREIGN RELATIONS AND LAW OF THE ENDANGERED SPECIES

The significance of international law in the realm of foreign relations law and in maintaining effective bilateral relations between Pakistan and other states can be underscored via the recent judgment on the *Houbara bustard* hunting³²⁰ by the Supreme Court of Pakistan. The Court ordered that neither the Federal Government nor a province could grant license to permit hunting of the bird under the Federal Government's obligations under the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) and the Convention on Migratory Species of Wild Animals (CMS). Earlier this year, the Chief Justice of the Lahore High Court temporarily stopped the hunting on the bird by relying on an international environmental law principle i.e. the precautionary principle.

³¹⁷ 2016 PLD 377

³¹⁸ UNSC resolution 1540 stipulates that states "shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport or use nuclear, chemical or biological weapons...."

³¹⁹ Recently, Marshall Islands (RMI) filed a case against Pakistan and a few other states before the ICJ alleging that Pakistan had violated its international law obligations under customary international law and hence should cease its arms race and ensure nuclear disarmament. Even though the case was ruled in favour of Pakistan, yet it signifies not only the extensive debate over the nuclear arms race but the necessity of Pakistan adhering to its international legal stipulations coupled with equipping itself with a comprehensive understanding of the international law framework.

³²⁰ 2016 SCMR48 &2016 PLD 421

However, in order to promote bilateral ties between the Gulf States and Pakistan, the ban was recently lifted to issue hunting permits to foreign dignitaries.

7. ENVIRONMENTAL LAW

Pakistan's environmental law jurisprudence is acclaimed for generating discourse on international law principles. In a recent 2018 judgment,³²¹ Mansoor Ali Shah once again applied the internationally recognized 'precautionary principle' in addressing the issue of pollution and the hazardous smog in the city of Lahore. Moreover, Justice Ayesha. A. Malik of the Lahore High Court elaborated upon the above-mentioned acknowledged principle in an environment case³²² related to the legality of the power exercised by the Environment Protection Agency (EPA) under Section 16 of Environment Protection Act, 1997. The Court held that the 'spirit of section 16 is based on the Precautionary Principle and Pakistan's commitment to uphold sustainable development and the Precautionary Principle was affirmed through its ratification of the Rio Declaration and other international instruments'.

Another environmental law case that enunciated principles of Public international law was the renowned Orange Line³²³ case. It highlighted the significance of preservation and maintenance of historical heritage by relying on the World Cultural and National Heritage Convention that recognizes the duty of the "international community as a whole to protect the World Heritage and the Member States to ensure protection, conservation of heritage sites and its transmissions to the future generations".³²⁴

Furthermore, a distinguished Lahore High Court judgment,³²⁵ further expanded the judiciary's ambit of reliance on Public International law principles when adjudicating upon the issue of including people with disabilities or persons in the upcoming National Population Census. The CJ of Lahore High Court articulated that since the *United Nations*

³²¹ PLD 2018 Lahore 1

³²² 2017 CLC 772

³²³ 2016LHC2454 delivered by Justice Abid Aziz Sheikh

³²⁴ *id* at pg. 37

³²⁵ PLD 2017 Lahore 558 delivered by Justice Mansoor Ali Shah

Conventions on the Rights of Persons with Disabilities (CRPD) was ratified by Pakistan in 2011, the state was mandated to collect appropriate information regarding persons with disabilities “in order to formulate and implement policies to give effect to the purposes of the Convention”.³²⁶ The Honourable Court also referred to the *United Nations Principles and Recommendations for Population and Housing Census* to assert the significance of collecting information on persons with disabilities through the census data for general strategy planning and services and ‘monitoring selected aspects of disability trends in the country’.

8. HEALTH LAW

The Sindh High Court, has frequently placed reliance on different principles of Public international law. In 2017 judgment³²⁷ the Court in an opinion delivered by Justice **Zulfiqar Ahmad Khan**, expounded upon the interpretation of the right to health, while dealing with the subject of access to affordable medicine. The judiciary held that the right to health was contained in the penumbra of the right to life, enshrined under Article 9 of the Constitution of Pakistan and safeguarded by various international instruments “including the International Covenant of Economic, Social and Cultural Rights (ICESCR) ratified by Pakistan, that recognizes the rights of nationals to the enjoyment of the highest attainable standard of of physical and mental health”.³²⁸ The judgment also accentuated Pakistan’s responsibility as an international state player under Article 12.1 of the ICESCR to provide essential drugs and facilitate access to health facilities to its population; a denial of which could be “considered non-overt discrimination based on wealth.”³²⁹

9. POLICE AND CRIMINAL LAW

Moreover, the expansive role of the public international law framework was reiterated in another recent 2017 judgment³³⁰ delivered by Justice Muneeb Akhtar and that predominantly encircled the issue of the inept state of policing in Karachi. In light of the background of the

³²⁶ *id*

³²⁷ PLD 2017 Sindh 157

³²⁸ *id*

³²⁹ *id*

³³⁰ CP D-7097 of 2016 & CP D-131 of 2017

case, it is important to touch upon the principal facts of the case. Post the 18th amendment, the Sindh Act, 2011 repealed the Police Order 2002, reviving the Police Act of 1861 and the Petitioners had challenged the 2011 Sindh Act as being unconstitutional and invalid as it “substantially eroded and compromised the efficacy and availability of the fundamental rights in the Province”. The Court while declaring that the legislative competence of the police was in the exclusive “provincial domain”³³¹ and that the Sindh Act and therefore Police Act, 1861 was *intra vires* of the Constitution, remarked that for purposes of giving directions and making orders for the enforcement of fundamental rights, the Police Act was to be interpreted using the ‘*Ghaidan*’³³² approach as applied by the House of Lords in reading the Human Rights Act, 1998, in light of the European Convention on Human Rights. Section 3 of the Human Rights Act, 1998 stipulates:

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”

Thus, in order to grant expansive and wide scope meaning to a few challenged sections of the Police Act, 1861 for the purpose of enforcement of fundamental rights, the Court drew a nexus between the Convention rights and the rights guaranteed under the Pakistani Constitution. It further explicated just how the Convention rights were applied in the seminal *Ghaidan v Mendoza*³³³ case to interpret certain words of the Rent Act, 1977, where it was ruled that the Constitutional rights guaranteed under Article 9, 10, 14, 15 and 16 may be applied and interpreted to the Police Act to enforce the positive obligations of the police force.

10. EDUCATION

A seminal judgment³³⁴ that utilized public international law as an effective tool to validate its ruling, covered the subject of the dissemination of the fundamental right to education up to the intermediate school level. The two judge bench observed that since Pakistan was a

³³¹ *id* at para 103,

³³² *id* at para 101(j) *Ghaidan V Mendoza* (2004 UKHL 30)

³³³ 2004 UKHL 30

³³⁴ PLD 2015 Sindh 118 delivered by Justice Shaukat Ali Memon

signatory to the Universal Declaration on Bioethics and Human Rights adopted by UNESCO it made it incumbent upon states to ensure dissemination of information to its citizens. Hence, the provincial education department was directed to devise its future education policies in accordance with its international legal obligations.

11. INTELLECTUAL PROPERTY LAW

In the arena of intellectual property law, a 2015 judgment,³³⁵ issued by Justice Aamer Raza Naqvi, asserted Pakistan's obligation to comply with international patent and trademark laws and standards as it had acceded to the Paris Convention for the Protection of Industrial Property (Paris Convention), 1983. The Court ruled that since the appellant company fell within the definition of Section 86 (1) (a) and (b) of the Trademark Ordinance 2001³³⁶ and because its trademark was a 'well known trademark', therefore the appellant company was entitled to protection as Pakistan was a Convention Country.

12. CITIZENSHIP

Currently, in Pakistan the controversy over dual citizenship and undeclared offshore assets may invite debate over international law principles and the interaction of the international law framework with the state fraternity. The notion of Dual Citizenship is emerging as a novel international law issue and while some advocate that it should be protected as a human right, yet dual nationality can be argued to destabilize inter-state relations. Consequently, the Chief Justice of Pakistan (CJP) has remarked that even though the officers holding dual nationality will not be punished, they would not be able to hold important positions as that would be detrimental to national interest. With regard to the illegal offshore assets being held by Pakistanis the CJP has formed a committee to prepare a legal framework for the provision of information regarding foreign accounts. However, the domestic legal guidelines can only be constructed on the footing of a comprehensive understanding of the international law paradigm.

³³⁵ 2015 CLD 1108

³³⁶ Section 86 (1) and (b) of the Trademarks Ordinance 2001 state that

CONCLUSION

Keeping the above jurisprudence in mind, this article clearly discerns that international law plays a pivotal role in regulating Pakistan's domestic law and its application in the state framework. Moreover, this article also provides an insight into the evolution of Pakistan's issues under the banner of public international law and consequently heightens Pakistan's responsibility as a global actor coupled with obligation of the subsets of the state in upholding the rule of international law.

Furthermore, this article maps a new precedent set by the Superior Judiciary of Pakistan, which is a welcome development given that a major portion of our federal and provincial legislations are linked with any one of Pakistan's numerous ratified treaties. While we are a common law country the courts are progressively discussing, relying and enforcing PIL treaties that are beneficial for Pakistan, not only in terms of domestic law but also with respect to compliance with its international commitments and obligations.