

The Illusory Implantation of Treaties: Critical Reflections on Giving Effect to Treaties in Pakistan

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Abstract

Pakistan has ratified several international treaties and brought them into domestic law. However, many of these treaties have not been incorporated into the domestic laws with true letter and spirit. The relevant domestic authorities are not truly empowered, or no procedures have been created for the proper and effective implementation of many treaties. Additionally, the legislature and the judiciary have not developed a methodology to interpret treaty-based legislation following the treaty standards or in concurrence with the treaty norms. Instead, the domestic effect of treaties is limited by the interpretation of treaty-based legislation under domestic standards. Effectively, the system is based upon an illusion of rights in the absence of a comprehensive system. Through a doctrinal and comparative research methodology, this paper argues that when treaties are ratified and brought into domestic legislation, they must set up a system of honoring the commitments in a meaningful manner rather than fulfill a political slogan and false appearance or a facade. The paper suggests that Pakistan can learn from other countries where a proper mechanism is enshrined for the implantation of treaties.

Keywords: Treaties, International law, Human Rights, UK, Comparative Law, Interpretation, Doctrine of Compatibility, India, Investment Laws, BITs.

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1. Introduction

This essay makes an effort to comprehend how Pakistani international law has evolved. It is crucial to realize that international law is a system of cooperation and coordination among States based on consent. The implementation of international law into domestic law has thus far been a haphazard and unorganized endeavor. Under international treaty law, the legal duty arises at the execution of the ratification instrument. Not all treaties would indeed require domestic implementation, but some do, like the core International human rights treaties.¹ There is no specific provision in the Vienna Convention on the Laws of Treaties 1969 (VCLT) requiring the domestic implementation of treaties. The basic rule remaining in place is that States are free to determine how they meet their treaty obligations.² International law leaves it to the domestic legal order to determine how it gives effect its treaty obligations in the domestic legal arena.³ The only international law requirement is that treaties are to be performed in good faith.⁴

A treaty's incorporation into national law is not generally required unless it is specified in the treaty itself. We must first make a distinction between states where an international treaty applies directly as domestic law, or a "monistic state," where the treaty has direct effect under national law, and states where a treaty only applies domestically to the extent that it has been implemented as national law, or a "dualistic state," as noted by Nyazee,

¹ "Pakistan's Domestic Implementation of Its International Human Rights Obligations - Summary of Findings" (Ministry of Planning, Development & Special Development, 2017), <https://www.pc.gov.pk/uploads/report/Domestic.pdf>.

²Mario Mendez, "The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts", in *The Legal Effects of EU Agreements* (Oxford, 2013; online edn, Oxford Academic, 23 May 2013) <https://doi.org/10.1093/acprof:oso/9780199606610.003.0002>, 1-60

³ Ibid.

⁴ "Vienna Convention on the Law of Treaties" (1969), art. 26.

There are different theories about the coexistence of international law with municipal law. The oldest, perhaps worn out, theory is that of Dualism, which regards the two law systems as separate. The other view, upheld by Hans Kelsen and Hersch Lauterpacht, is called Monism, which views municipal law as a subset of international law. A third theory is that of Monism Naturalism, which considers municipal law to be subservient to international law and international law subservient to natural law. The fourth theory is that of Coordinationsim, which maintains that municipal courts are generally obliged to make municipal law conform to the requirements of international law.⁵

There are two ways to implement a treaty through legislation:

1. When a national law is passed to implement a treaty as national law, this is known as incorporation.
2. Transformation, or the conversion of a treaty's provision into one or more national laws that adhere to the state's legal history and cultures.⁶

The only thing that matters is how the manner in which the agreement is put into practice and likewise, what level of national law it shall take effect as a subject of domestic law. It has no bearing on the State's responsibility to respect and uphold the terms of the treaty under international law. Due to this, it is crucial that governments carefully review their domestic laws before ratifying a treaty to ensure that they do not clash with it. Additionally, it is crucial that new laws or revisions to existing ones be passed

⁵ Imran Ahsan Khan Nyazee. "Islamic Law and Human Rights," *Islamabad Law Review* 1, no. 1 & 2 (2003): 58, <https://ssrn.com/abstract=2407010>.

⁶ Mario Mendez, "The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts," in *The Legal Effects of EU Agreements*, ed. Mario Mendez (Oxford University Press, 2013), 1–60, doi:10.1093/acprof:oso/9780199606610.003.0002.

concurrently with the treaty's entry into effect. Even if a treaty has not been adopted, its content may nonetheless be respected in everyday life due to the evolving customary international law. A State's preference for one legal method over another must be considered.

Treaties may serve as a roadmap for how States Parties must implement them domestically. A treaty may specify precise requirements or provide general direction on the actions to be taken. It should be noted in this regard that signing and then ratifying a treaty constitutes the first step in becoming a party to it. Even though, as previously indicated, it is often ratification that binds the state to the obligation under the treaty, signing the treaty nonetheless has some legal ramifications. Under the VCLT, a state that has signed a treaty subject to ratification is obliged to refrain from acts that would “defeat the object and purpose of the treaty”.⁷ Even while it is not legally bound by the terms of a treaty until it has been ratified, a state that has signed one might be considered to be expected to remain loyal to it. In monistic governments, the international treaty will typically take precedence over domestic law if there is a disagreement between the state's obligations under the two.

This is not as obvious in a dualistic system. In such a situation, the court may hold that the international treaty duty only applies insofar as it has been incorporated into or otherwise transformed into national law. If there is an obvious conflict between a national law or a treaty commitment, the national court may decide to follow the national law even when they are aware that doing so may indicate that the treaty obligation of the state is broken. In such a situation, it will up to the legislator to act and address the issue to prevent the conflicting issues.

Pakistan has ratified several international treaties and brought them into domestic law. However, many of these treaties have not been

⁷ Vienna Convention on the Law of Treaties, art. 19.

incorporated into the domestic laws with true letter and spirit. The relevant domestic authorities are not truly empowered, or no procedures have been created for the proper and effective implementation of many treaties. Additionally, the legislature and the judiciary have not developed a methodology to interpret treaty-based legislation under the treaty standards or in concurrence with the treaty norms. Instead, the domestic effect of treaties is limited by the interpretation of treaty-based legislation following domestic standards. Effectively, the system is based upon an illusion of rights in the absence of a comprehensive system. This paper argues that when treaties are ratified and brought into domestic legislation, they must set up a system of honoring the commitments in a meaningful manner rather than fulfill a political slogan and false appearance or a facade. The paper suggests that Pakistan can learn from other countries where a proper mechanism is enshrined for the implantation of treaties.

Unfortunately, how international law is often used in Pakistan is very disturbing and confused. International law is already accused of its hegemonic attitude⁸. According to Shah, in a nation like Pakistan where there is no political stability, the branches of government's arbitrary interpretation of international law exacerbate confusion and disorder in the daily lives of Pakistanis,

Pakistan binds itself to certain international obligations unnecessarily. A related query is whether Pakistan enters into international treaties exclusively for what it perceives as beneficial political and economic considerations without making the necessary legal assessments and without

⁸ Heike Krieger, "Populist Governments and International Law," *European Journal of International Law* 30, no. 3 (2019): 978, doi:10.2139/ssrn.3339338.

adequately deliberating on the state's ability to implement the obligations that it is assuming.⁹

Unfortunately, a country that strongly relies on international investment and trade regulations and has an import-driven economy that has had significant difficulties in its interaction with the rest of the world does not have a well-defined function in international law.¹⁰ The country's branches of government have an ambiguous and capricious approach toward international law, as is demonstrated by the country's current economic problems. The implementation of international law in Pakistan affects a variety of areas, including trade, commerce, security, and most significantly, human rights. Consequently, we must give serious consideration to the idea of incorporating international agreements with care and thoroughness.¹¹

Given that we live in a globalized society, international law has become more convincing and pervasive in Pakistan. According to Mehboob, it becomes very difficult for Pakistan to evade the mandatory nature of international law once it has been adopted by other States in order to thrive economically and culturally,

Pakistan has also not been immune to this global trend. Over the years, Pakistan has signed hundreds of bilateral treaties, accords, and agreements with about 100 countries. There are about 60 multilateral treaties and conventions signed with

⁹ Sikander Ahmed Shah, "Reactive Pakistan," *Dawn*, May 29, 2014, <https://www.dawn.com/news/1109254/reactive-pakistan>.

¹⁰ Ahmer Bilal Soofi, "China or the US?," *Dawn.Com*, May 6, 2023, <https://www.dawn.com/news/1751210>.

¹¹ Ali Nawaz Khan and Dr. Hafiz Aziz ur Rehman, "Legal Framework of Foreign Investment in Pakistan: An Appraisal of Protectionist Approach," *Pakistan Social Sciences Review* 4, no. IV (2020): 171–185, [https://doi.org/10.35484/pssr.2020\(4-iv\)12](https://doi.org/10.35484/pssr.2020(4-iv)12).

various international entities mostly under the UN and its various agencies.¹²

International law instruments are becoming more compelling in the modern world especially the evolving role of the customary international law. Due to the dynamic nature and proliferation of instruments and customary international law, even the argument for a rigorous interpretation of state sovereignty is losing ground¹³ such as Pakistan's Financial Action Task Force (FATF) responsibilities¹⁴, the Generalized System Preference Plus schemes (GSP Plus) for trade incentives to Pakistan from the EU member states have made the ratification of international human rights conventions legally binding by making it more lucrative for a State like Pakistan to sign and ratify these treaties without actually recognizing them in their true letter and spirit.¹⁵

Therefore, it might be inferred that perhaps the State of Pakistan entered its international law commitment hastily without carefully reviewing all of the specifics, which was perceived as a conflict between international and domestic law principles. For instance, the second portion of this article's assessment of the repercussions of the Treaties' unintended implementation in Pakistan in-depth examines the Reko Diq case before the Supreme Court of Pakistan, where Pakistan is still feeling the effects of breaking its responsibility under international law.¹⁶

¹²Ahmed Bilal Mehboob, "International Obligations," *Dawn*, July 18, 2021, <https://www.dawn.com/news/1635700>.

¹³Aleksi Pursiainen, "The FATF and Evolution of Counterterrorism Asset Freezing Laws in the Nordic Countries: We Fought the Soft Law and the Soft Law Won," in *International Actors and the Formation of Laws*, ed. Katja Karjalainen, Iina Tornberg, and Aleksi Pursiainen (Springer Nature, 2022), 135.

¹⁴ "FATF and Pakistan: Exploring Pakistan's Journey through the Grey-List" (Research Society of International Law (RSIL)), <https://rsilpak.org/fatf/>.

¹⁵ "EU Links GSP Plus Status to Human Rights," *The Express Tribune*, May 31, 2022, <https://tribune.com.pk/story/2359204/eu-links-gsp-plus-status-to-human-rights>.

¹⁶ Amber Darr, "Long Read: The Reko Diq 'Fiasco' in Perspective: Pakistan's Experience of International Investment Arbitration," *South Asia@LSE*, August 14, 2019, <https://blogs.lse.ac.uk/southasia/2019/08/14/long-read-the-reko-diq-fiasco-in-perspective-pakistans-experience-of-international-investment-arbitration/>.

When Pakistan signed a multilateral international human rights treaty, this situation became more complicated and difficult, and incorporating it into domestic law became more interesting politically because it occasionally could touch Pakistan's socio-religious sensibilities and vitiate the very object and purpose of that treaty as the commitments made by Pakistan are only either a pleasing attempt to appease its international pressure or to gain some financial benefit. International law treaties are viewed as political negotiating chips in a country like Pakistan where neither the Critical Legal Studies approach nor the so-called Third World approach to International Law (TWAIL) exist as noted by Azeem in his book 'Law, State and Inequality in Pakistan: Explaining the Rise of the Judiciary':

This book shows imperialist center-periphery dependency relations are not located outside but has been internal to the state and society of Pakistan in the form of a hegemonic class of which the military is also a part. Therefore, legally backed but despotic regime changes in Pakistan were not debated at WTO forums. Legal amendments, repeals, and enactments, which are blunted at the implementation stage are supposed to be corrected by the judiciary through 'good governance' interventions. Latin American countries, only due to rising working-class politics, resisted international law regimes in a way never possible in Pakistan, but also as not anticipated by TWAIL.¹⁷

To avoid these confrontational attitudes towards international law in Pakistan. This paper concludes that there is a legislative vagueness to fill that gap and vacuum in Pakistan. The first part of the paper discusses the

¹⁷ Muhammad Azeem, *Law, State and Inequality in Pakistan: Explaining the Rise of the Judiciary* (Springer Singapore, 2017), 273-274.

mechanism adopted by Pakistan judicially and legislatively for the implantation of treaties in Pakistan, the second part critically analyze and evaluate the consequences of that treaty implantations methods, and the third part suggest that Pakistan can adopt the mechanism that is adopted by the India and UK for the implementation of treaties. The fourth part is the conclusion that the Legal and Judicial instruments like the declaration of incompatibility and clearly stated method of interpretations and compatibility can add seriousness to the illusory treaty implementation in Pakistan as noted by Siddique:

A proclivity for offering facile solutions devoid of any empirical and sociological understanding of context to the complex issue of economic, political, and consequent legal disempowerment, can also therefore jeopardize the meaningfulness of these approaches.¹⁸

Without seriously filling in these legislative gaps, Pakistan's implementation of treaties will remain hazy and dependent on the whims and desires of its international players, which will not help or resolve the disastrous situation involving the illusory implantation of international law in Pakistan.

2. The Constitutional Framework for the Implantation of Treaties in Pakistan

2.1 The Power of Executive Regarding International Law

Pakistan has embraced and upheld the dualist nation's rules in practice. The acceptance of specific legislation, which implicitly includes the adoption of international accords and treaties, is discussed in Article 268(7) of the Pakistani Constitution of 1973:

¹⁸ Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge University Press, 2013), 243.

All laws (including Ordinances, Orders-in-Council, Orders, rules, bylaws, regulations and Letters Patent constituting a High Court, and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extraterritorial validity...¹⁹

The executive has the authority to enact laws that are mentioned in the Federal Legislative list that specifically mention international law.²⁰ Moreover, in accordance with the Constitution of Pakistan 1973, treaty making powers are vested in the executive domain. Despite the fact that Article 268 (7) does not precisely mention international law in the list of existing laws, yet its inclusion is strongly implied.²¹ This power of executive is mentioned in Article 97²² and 142 (a).²³ Although provincial governments now have the authority to sign international agreements alongside the federal government, they are not aware of their obligation under international law.²⁴

The Pakistan Parliament has made an effort to introduce legislations in the Parliament in an effort to democratize the country's treaty making process and avoid the executive's branch soul authority. 'The National

¹⁹ "The Constitution of Pakistan," (1973) (Updated 2010).

²⁰ Items three and thirty-two of the Fourth Schedule Federal Legislative List are as follows: 3. 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; 32. International treaties, conventions and agreements and international arbitration. Ibid.

²¹ *International Law Bench Book for Pakistan* (Research Society of International Law (RSIL), 2019): 22, <https://rsilpak.org/wp-content/uploads/2019/01/international-law-benchbook-for-the-judiciary-in-pakistan.pdf>.

²² "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 law, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan." The Constitution of Pakistan, art. 97.

²³ "Parliament has the exclusive power to make laws with respect to any matter on the Federal Legislative." The Constitution of Pakistan, art. 142 (a).

²⁴ Ahmer Bilal Soofi, "Treaty Cells in Provinces" *Dawn.com*, November 2, 2014, <http://www.dawn.com/news/1142071>.

Commission for International Law and Commitments Bill, 2016'²⁵ and 'The Ratification of Foreign Agreements by Parliament Bill, 2018'²⁶ were introduced as legislation, but sadly the Senate committee rejected both of them.²⁷

Because they are seen as an infringement on the executive's powers, these bills are rejected. Well, if we quickly examine the consideration of such legislation, we find that the Pakistani Parliament is quite reticent to recognize the value and necessity of treaty-making in Pakistan. This legislation also made reference to Pakistan's international law-making process and emphasized that treaty-making is solely the responsibility of the executive and should not be governed by any legislative procedure since it could be hampered or delayed. The constitution of Pakistan also mentions the treaty-making process, and it was declared that only in the circumstances listed below could treaties pertaining to domestic law be approved by Parliament:

Pakistan legislation would be required to give effect to a treaty in the following cases:

- a) Where the treaty provides for a payment of money to a foreign country/body from the Federal Consolidated Fund (Article 79).

²⁵ "The National Commission for International Law and Commitments Bill, 2016," Report of the Standing Committee of Law and Justice, 2016, https://senate.gov.pk/uploads/documents/1484911372_659.pdf.

²⁶ "The Ratification of Foreign Agreements by Parliament Bill, 2018," Report of the Standing Committee of Law and Justice, 2018, https://senate.gov.pk/uploads/documents/1584089438_807.pdf.

²⁷ The bill was opposed by both ministries, calling it a mere duplication of the existing mechanism of oversight of the treaties that have already signed by Pakistan. "Government Bill Seeking Unlimited Pecuniary Jurisdiction for Judges Rejected," *Breccorder*, December 20, 2016, <http://www.breccorder.com/news/4461587>.

- b) Where the treaty affects the justiciable right of a citizen of Pakistan.
- c) Where it requires taking of private property (Article 23) and life or liberty (Article 9) or the imposition of a tax which can be done by legislation (Article 77)²⁸

Therefore, the committee took a very narrow view of the scope of the implantation of treaties in Pakistan,²⁹ the reluctance of the Parliament of Pakistan to adopt a proper mechanism for the adoption of treaties in Pakistan³⁰ has been very vague and its insistence on not changing its method is even more alarming as in the globalized world that we are living it is very difficult to avoid the growing landscape of international law as noted here by Mehboob:

There are two important points which the ruling coalition and parliament need to give serious consideration to when dealing with legislation in general and legislation relating to international treaties in particular. Delay in drafting the necessary legislation and passing it through parliament is not only detrimental to the public interest, but it also damages our international standing.³¹

The multiple issues with Pakistan's implementation of international law in today's increasingly complex, globalized world are not addressed by merely claiming that Pakistan adheres to the dualistic model of international law and only executive oversight of international treaties are enough.

²⁸ “The Ratification of Foreign Agreements by Parliament Bill, 2018.”

²⁹ Ahmad Ghouri. “Democratizing Foreign Policy: Parliamentary Oversight of Treaty Ratification in Pakistan,” *Statute Law Review* 42, no. 2 (2021): 137-155, doi:<http://dx.doi.org/10.1093/slr/hmz023>.

³⁰ Another Bill presented in the National Assembly of Pakistan was also pending “The Ratification of International Treaties Act, 2013” Published in the Official Gazette of Pakistan Bill No: 45 of 2013, https://na.gov.pk/uploads/documents/1391684102_283.pdf.

³¹ Ahmed Bilal Mehboob, “International Obligations,” *Dawn.Com*, July 18, 2021, <<https://www.dawn.com/news/1635700>>.

2.2 The Role of the Judiciary

The Supreme Court of Pakistan has also upheld regarding the status of international law that it is under the domain of the federal executive as noted:

An international agreement between the nations if signed by any country is always subject to ratifications, 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.³²

In another case, the Supreme Court also upheld the same principle for the application of international law in Pakistan:

The Supreme Court held that the Federal Government has the power to “exercise executive authority” to ratify a treaty, but not the power to legislate, a role that remains firmly with the Parliament.³³

The judiciary in Pakistan has been very liberally referencing and applying the provisions of international law conventions. The Courts in their different judgments have referenced the provision of Multilateral International Human Rights Law Conventions that Pakistan has yet not ratified for example the Convention on the Enforced Disappearance.³⁴ The courts have also a reference to the Geneva Conventions for the minimum protection

³² Ms. Shehla Zia and Others v. WAPDA, PLD 693 (Supreme Court of Pakistan 1994), 710.

³³ Societe General De Surveillance S.A. v. Pakistan, SCMR 1694 (Supreme Court of Pakistan 2002).

³⁴ Mahera Sajid v. Station House Officer, Police Station Shalimar & 6 Others (W. P. No.2974/2016), CLC 1858 (Islamabad High Court 2018). See also “Pakistan: Ratify Treaty on Enforced Disappearance,” *Human Rights Watch*, August 28, 2013, <https://www.hrw.org/news/2013/08/28/pakistan-ratify-treaty-enforced-disappearance>.

available in the military courts ratified by Pakistan but not incorporated in the Domestic law.³⁵

To sum up, the judiciary in Pakistan has taken a very lax approach to the interpretation and application of international law, and we can draw the conclusion that its primary responsibility is to interpret the law. However, there is currently no clear law stating the clear guidelines for the judiciary that how the interpretation of international law in Pakistan shall be conducted, which has been the root cause of Pakistan's confused or illusory understanding of international law.³⁶

3. Critical Evaluation and Impact of the Unplanned Implantation of the Treaties in Pakistan

In Pakistan, the legislature has been reluctant to pass legislation that would expand its authority to implement treaties, as was already mentioned, and the judiciary has applied international law with a great deal of latitude but without any clear-cut guidelines in the absence of any explicit regulations. According to the RSIL study, which was previously highlighted, Pakistan's judiciary must adhere to international law even in the absence of local legislation.³⁷

This has led to a decision that has called into question the legitimacy of the rule of law in Pakistan, since flagrantly disobeying international obligations can have negative effects on Pakistan's economy, as was the case in the Reko Diq case.³⁸ That case proved unfavorable for the economic aspects of Pakistan. The action taken by the Supreme Court in that case was taken in good faith to rectify corruption and fraud. It was a deal between the Baluchistan government and Tethyan Copper Company Pty Limited

³⁵ District Bar Association, Rawalpindi and Others v. Federation of Pakistan and Others, PLD 401 (Supreme Court of Pakistan 2015).

³⁶ *International Law Bench Book for Pakistan* (RSIL, 2019).

³⁷ *Ibid.*

³⁸ Maulana Abdul Haque Baloch v. Government of Baluchistan, PLD 641 (Supreme Court of Pakistan 2013). Also known as the Reko Diq Case.

(TCC)³⁹ which sued Pakistan in the International Centre for Settlement of Investment Dispute (ICSID) for the execution of mining project in that area but it does disregard Pakistan's International commitments⁴⁰ where Pakistan had to face serious consequences⁴¹ for violating its international obligation.

This forces Pakistan to rethink and critically assess its treaty-making process in order to prevent needless international conflicts and to effectively coordinate with international law by better comprehending it through a rigorous legislative process.⁴²

The second case also demonstrates the illusory implementation of treaties that is in the case of the Convention against Torture (CAT) and International Convention on Civil and Political Rights (ICCPR) in Pakistan where both the treaties have been ratified by Pakistan⁴³ but their

³⁹ "In 2013, the Supreme Court mentioned in its decision that TCC attempted to take undue advantage of the political instability of the time. The foreign companies, through CHEJVA, Addendum No1, and other agreements, preyed upon the huge gaps in understanding on the part of the Balochistan government of large-scale mineral extraction and were in a distinct position to manipulate and dominate. And similar tricks are played once again to strip Balochistan of its ownership rights and due benefits from one of the world's largest copper-gold deposits. In the 2013 decision, the Supreme Court repeatedly lamented the Balochistan government's 'inefficiency' and 'haste' in disposing of a multi-billion-dollar project without exploring the best possible deals in the public interest." Sanaullah Baloch, "The Reko Diq Matter," *The News*, December 20, 2021, <https://www.thenews.com.pk/print/918148-the-reko-diq-matter>.

⁴⁰ Muhammad Mumtaz Ali Khan, Ikram Ullah and Aisha Tariq, "Assumption of Jurisdiction by Pakistani Supreme Court in Reko Diq Case: Another Violation of International Investment Law," *Journal of Business and Social Review in Emerging Economies* 7, no. 3 (2021): 649-657, <https://doi.org/10.26710/jbsee.v7i3.1862>.

⁴¹ "Agreement was suspended in 2011 due to a dispute over the legality of its licensing process. As a result, the International Court of Arbitration levelled \$6.4bn award on the government of Pakistan while at the same time the London Court of Arbitration was also imposing another \$4bn fine on Pakistan." Syed Irfan Raza, "Pakistan Signs Deal to Avoid \$11bn Penalty in Reko Diq Case," *Dawn.com*, March 21, 2022, <https://www.dawn.com/news/1681071>.

⁴² Ahmer Bilal Soofi, "Sanctity of Contracts", *Dawn.Com*, May 12, 2023, <https://www.dawn.com/news/1752510>.

⁴³ Pakistan Ratified ICCPR and CAT on 23 June 2010, <https://mofa.gov.pk/mous-agreements/#:~:text=to%20that%20Convention.,Geneva%2C%206%20September%201952.,the%20Execution%20of%20the%20Convention.>

consequences are not well thought and that resulted in the confused understanding of international law in Pakistan.

The Senate passed the Torture, Custodial Death, and Custodial Rape (Prevention and Punishment) Bill, but it has not yet been signed into law since it is incompatible with the geopolitical conditions that exist in Pakistan today, where a culture of impunity is pervasive. It is worrying for the implementation of international treaties in Pakistan that the Parliament is reluctant to make the CAT clause justiciable in Pakistani courts.⁴⁴

The incorporation of the ICCPR into Pakistani domestic law suffered the same fate. Pakistan's reservations are not accepted by the human rights committee because Pakistan has not yet been able to adequately explain why only Muslims are allowed to hold the positions of Prime Minister or President in this nation.⁴⁵ The reserving country claims that these reservations are contrary to the treaty's object and purpose specifically Article 25 of the ICCPR.⁴⁶ The Western countries have objected to this reservation. For example, the objection filed by Belgium states that:

The reservations implement the Covenant's provisions contingent upon their compatibility with the Islamic Sharia and/or legislation in force in Pakistan. This creates uncertainty as to which of its obligations under the Covenant

⁴⁴ "Pakistan: Make Torture a Crime," *Human Rights Watch*, August 23, 2022, <https://www.hrw.org/news/2022/08/23/pakistan-make-torture-crime>. See also "Criminalising Torture in Pakistan: The Need for an Effective Legal Framework," *Justice Project Pakistan JPP*, accessed September 8, 2023, <https://jpp.org.pk/report/criminalising-torture-in-pakistan-the-need-for-an-effective-legal-framework/>.

⁴⁵ Sana Khan, "Implementation of International Human Rights in Pakistan: Finding a Balance between Western Conceptions and Islamic Law," *Manchester Journal of Transnational Islamic Law & Practice* 17 no. 1 (2021): 170, SSRN: <https://ssrn.com/abstract=3949782>.

⁴⁶ Article 25 of the ICCPR states that: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country." ICCPR, art. 25.

Pakistan intends to observe and raises doubts as to Pakistan's respect for the object and purpose of the Covenant." The Human Rights Committee of the ICCPR has also regretted in its concluding observation that Pakistan has yet not removed this reservation for the better implementation of the human rights covenant in Pakistan.⁴⁷

The most important lesson Pakistan should have taken away from breaching its BIT with Australia at the ICSID forum was the need for utmost vigilance when it came to the signing and ratification of the agreement. Sadly, Pakistan has not yet used this lesson in light of its growing involvement with the China-Pakistan Economic Corridor (CPEC) legislation, which could jeopardize Pakistan's responsibility to keep its GSP Plus status.⁴⁸

All of these instances show that Pakistan does ratify a number of international treaties without fully appreciating the implications of its obligations under those treaties. The international community has less faith in Pakistan because of the vague, ambiguous, and haphazard execution of treaties. The people of Pakistan have suffered because of the careless application of treaties in that country.

⁴⁷ United Nation Treaty Collection on International Covenant on Civil and Political Rights, Other Western countries also made the same reservations that Islamic Sharia Law is incompatible with modern human rights law https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en#EndDec.

⁴⁸ "Pakistan Should Leverage CPEC, GSP Plus to Attract Investment," *The Express Tribune*, March 18, 2019), <https://tribune.com.pk/story/1931608/pakistan-leverage-cpec-gsp-plus-attract-investment>. See Also Siegfried O. Wolf, "The GSP+ Conundrum and the CPEC's Impact on EU-Pakistan Economic and Trade Relations," in *The China-Pakistan Economic Corridor of the Belt and Road Initiative: Concept, Context and Assessment* (Cham: Springer International Publishing, 2020), 243–60, doi:10.1007/978-3-030-16198-9_7.

4. Methods Adopted by India and the UK for the Implantation of Treaties

First, consider the case of India, where the constitutional clause is much clearer than that of Pakistan. When the Indian Constitution specifies in Article 253 of the Indian Constitution the implementation of an international agreement:

The parliament has the sole right to make laws for the whole or any part of the territory of India with the motive of executing an international treaty, agreement or convention with other countries or any decision made at any association or conference.⁴⁹

The Indian Constitution is also quite plain and clear on the role of Parliament in the legislation of foreign treaties for their implementation. Even so, it is often hotly challenged, as in the *Azadi Bachao* case,⁵⁰ where the petitioner accused the executive of allegedly engaging in treaty shopping in one of its Bilateral Investment Treaties (BITs) that India signed with Mauritius. It is significant to note that the Supreme Court of India refrained from interfering with executive matters and did not challenge the authority of the parliament to enact treaties.⁵¹ Here it is worth quoting the recommendations of the Report of the People's Commission on the Patent Laws for India January 2003. The following are the recommendations:

a. whilst the treaty-making power (Article 73 read with List I entries 13 and 14) vest in the union and require legislation to translate the treaty into the validity of enforceable law

⁴⁹ "The Constitution of India," (1950), art. 253 on Legislation for giving effect to international agreements.

⁵⁰ *Union of India and Anr v. Azadi Bachao Andolan and Anr* (The Supreme Court of India) decided on 7 October, 2003.

⁵¹ Anjana Haines, "The MLI Wipes Out Indian Jurisprudence on Treaty Shopping," *International Tax Review*, April 9, 2020, <https://www.internationaltaxreview.com/article/2a6a5kj0p2b6ojikoo6ps/the-ml-wipes-out-indian-jurisprudence-on-treaty-shopping>.

(Article 253) the treaty-making power cannot be seen as a law unto itself but must operate within the discipline of the Constitution. This is all the more important because the world is being increasingly governed by treaties, which are being enforced through their mechanisms, and by intense social, economic, and political pressures.

b. the discipline of the constitution requires that the Union government which is the exclusive repository of the treaty-making power, cannot and should not enter into treaties that undermine the Constitution.

c. Procedurally, before a treaty (especially a multilateral treaty) is signed it is imperative that it should be a (i) place for discussion before a parliament with full particulars (ii) place within a public domain for discussion (iii) circulated to the states for their opinion and discussion and (iv) not confirmed until and unless the discussion is over. This exercise necessarily needs to be repeated as further issues arise in respect of any one treaty.

d. parliament needs to set up special treaties committee which earmarks the treaty for consideration and ensures that the public, federal, and parliamentary process is complied with especially listing areas for confirmatory procedures.

e. there is nothing in the Constitution which forbids the process is regulated by statutes which should be enacted.⁵²

It is interesting to note that this situation exists despite a clear directive in the Indian constitution addressing the country's treaty-making provisions. In order to avoid any anomalies and the perception of treaty shopping,

⁵² Shiva Kant Jha., *Judicial Role in Globalised Economy: With a Focus on Tax Treaties (Pax Mercatus)*, (India: Wadhwa and Company Nagpur, 2005) 353-354.

which can weaken a nation's sovereignty and its citizen's fundamental rights, the recommendation still emphasized that treaty-making powers should be considered in Parliament through appropriate legislation as noted by Ranjan:

International law-making is often critiqued for the democratic deficit. In India, the executive has the power to ratify international treaties without much parliamentary scrutiny. Arguably, judicially incorporating international law without parliamentary scrutiny legitimizes such a democratic deficit. Accordingly, judicial incorporation of international law is questioned because it amounts to the judiciary riding roughshod over the parliament.⁵³

The discussion given above implied that implementing treaties, even in India, should be done thoughtfully and in a manner consistent with the country's constitutional ideals and standards, necessitating democratic and legislative scrutiny.

Pakistan should adopt the clause in the Indian constitution that addresses the function of international law. The UK is the other country that Pakistan can consult for advice. Pakistan's legal system must alter, and pertinent legislation needs to be framed in order to give clear advice on the function of treaties in the domestic legal system and to define the function of customary international law in Pakistan as noted by Shah:

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

⁵³ Prabhash Ranjan, "The Supreme Court of India and International Law: A Topsy-Turvy Journey from Dualism to Monism," *Liverpool Law Review* 43, no. 3 (2022): 30, <http://dx.doi.org/10.2139/ssrn.4210902>.

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. The practice, however, is that treaties are ratified by the Executive, i.e., the government of Pakistan as treaties and related matters are on the Federal Legislative List. The forms of incorporating treaties in the Pakistani legal system bear 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... In Pakistan, some judgments of the senior courts provide encouraging signs where courts have followed the British practice, but it is piecemeal and inconsistent.⁵⁴

The UK Constitutional Reform and Governance Act 2010 in its Part 2 regarding the Ratification of Treaties in its Section 20⁵⁵ and 21⁵⁶ discuss the role of Parliament for the Ratification of Treaties. The UK Human Rights Act 1998⁵⁷ on the legislative and judicial functions in putting into effect the European Convention on Human Rights (ECHR)⁵⁸ is very extensive. The sections pertaining to the Statement of Incompatibility and Interpretation of

⁵⁴ Niaz A. Shah, "The Application of Human Rights Treaties in Dualist Muslim States: The Practice of Pakistan" *Human Rights Quarterly* 257, no. 44 (2022): 257–85, <http://dx.doi.org/10.1353/hrq.2022.0020>.

⁵⁵ "UK Constitutional Reform and Governance Act," (2010) sec. 20 on Treaties to be laid before Parliament before ratification. <https://www.legislation.gov.uk/ukpga/2010/25/contents>.

⁵⁶ Ibid. sec. 21 on Extension of 21 sitting day period.

⁵⁷ "The Human Rights Act," (1998) sec 3. Interpretation of legislation: 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. Section 4. Declaration of incompatibility applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

⁵⁸ "Convention for the Protection of Human Rights and Fundamental Freedoms" (European Convention on Human Rights, as amended) (ECHR)," (1950).

Legislation, discuss the role of the legislature in establishing treaty rights by giving them legal effect in domestic legislation, respectively. In those areas, there has also been a thorough discussion of the judiciary's function in upholding the ECHR. They have adopted legislative tools to diligently incorporate international obligations.

As international law requires more than just signature and ratification, Pakistan should be more receptive to learning from other nations' experiences and examples of how to implement treaties. Whether it is the BIT or a multilateral human rights convention, Pakistan cannot ignore the influential role of the treaty-making power in the globalized world. For a country to successfully implement a treaty that is significant for its citizens, the role of the parliament and judiciary is extremely important. This significant process, which lacks legitimacy, consistency, and sustainability, can become even more convoluted and difficult due to legislative and judicial ambiguity.

5. Conclusion

Up to this moment, Pakistan's implementation of the treaty has been a very gradual process that has been governed by the Constitution's broad interpretation of the Executive power. International law has now influenced every aspect of Pakistani law, including its criminal, civil, trade, and investment standards. The article argues that even if one disagrees with international law, still cannot ignore it. Due diligence is therefore necessary, as there are clear roles for the executive, judicial, and legislative branches; disregarding this law is detrimental for Pakistan.

The monist/dualist debate is utterly irrelevant to Pakistan's implementation of international law. In order to avoid any form of incoherence, illegitimacy, or sustainability, the implementation of treaties in Pakistan must be done effectively through a judicial and legislative document that clearly specifies roles from the explicitly defined law and the

growing acceptance of international law as the customary international law as practice by the judiciary in Pakistan. Pakistan cannot choose not to follow international law because it is a poor economic and political entity. As was already established, overseas entities played a significant role in our commerce and investment.

The above-mentioned countries have passed treaty implementation laws outlining the functions of respective legislatures and judiciaries, including India and the UK. The rules themselves cannot escape the complexity of international law, but they will provide a clear solution and a sustainable way to eliminate its complexity and incompatibility in Pakistan. The BIT that India joined resulted in a judicial challenge, as we saw in the case of India where the international law is still under executive domain, so the constitutional clarity and legislation won't fully eliminate challenges, but it will create a more democratic way to settle the dispute between the conflicting objectives of international law. The role of the judiciary and parliament will increase, thus enhancing the democratic nature of Pakistan's treaty-making process. The creation of international treaties is sometimes criticized for lacking democracy.

Pakistan must immediately enact legislation that will enable the monitoring of treaty implementation there. Through the submission of laws, Pakistan has endeavored to properly implement treaties, but the Parliament has been reluctant to take on this important task, harming Pakistan's sovereignty, and domestic socio-religious and political sensibilities.
