

## INTERNATIONAL LAW AND MUNICIPAL LAW

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### 4.1. Introduction

This chapter will begin by evaluating the theoretical issue that lies at the crux of the relationship between international law and municipal law.<sup>1</sup> This will be followed by an assessment of the role of municipal law in international law and the reception of international law in English municipal law. A key feature of this chapter is a unique consideration of how Pakistani courts assimilate international law into the domestic legal system. The chapter will highlight that the interaction between international law and domestic law is increasing as a result of globalisation. It will be argued that a broad internationalist spirit is vital for the progressive application of international law in Pakistani courts.

The analysis of the complex juridical relationship between international law and municipal law is useful from two perspectives.<sup>2</sup> The relationship sheds light on the general concept of law and legal system. Simultaneously, it offers insights into the foundations, structure and sources of international law. The philosophically unresolved problem whether international law and municipal law are constituent of a single universal legal system or multiple independent legal systems has been a pervasive issue. Monism believes in a progressive internationalisation of national law inspired by aspects of natural law jurisprudence, whereas, dualism emphasises a legal positivist notion of state sovereignty which requires a municipal legislative act to bring international law into effect in a national legal system.<sup>3</sup> The Westphalian model of sovereignty characterised by positivist international law theory conceives ‘state sovereignty’ as states possessing some unrestricted freedoms as an *a priori* consequence of their statehood.<sup>4</sup> This freedom is said to exist prior to law, thus positivists argue that international law can only exist as an expression of state sovereign will. States are viewed as the key actors in the formation of international law.

The subject of considerable debate in the first half of the twentieth century, monism and dualism are regarded by many modern scholars as having limited explanatory power as theories because of their failure to capture how international law works within states in practice. Indeed, one of the main critiques of both theories is that no state’s system is strictly

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<sup>1</sup> In this chapter, the terms ‘municipal’, ‘national’, ‘domestic’ and ‘internal’ are used synonymously to refer to the legal system of a state.

<sup>2</sup> See generally, Malcolm N Shaw, *International Law* (8<sup>th</sup> Edition, Cambridge University Press 2017); James Crawford, *Brownlie’s Principles of Public International Law* (9<sup>th</sup> Edition, OUP 2019); Rüdiger Wolfrum, *The Max Planck Encyclopaedia of Public International Law* (2<sup>nd</sup> Edition, OUP 2013); Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing 2005); Malcolm Evans, *International Law* (5<sup>th</sup> Edition, OUP 2018).

<sup>3</sup> For a discussion of ‘natural law’ and ‘legal positivism’, see, James W. Harris, *Legal Philosophies* (2<sup>nd</sup> Edition, Butterworths 1997).

<sup>4</sup> John Austin was a nineteenth century English legal positivist who conceived the sovereign as a pre-legal political fact, in terms of which law and all legal concepts are definable. See Harris (n 3) 36.

monist or dualist. Notwithstanding their decline as theories, monism and dualism retain significance as analytical tools. They will serve as a consistent starting point for the examination of the relationship between international and municipal law in this chapter.

Dualism emphasises the independent and separate character of the international and national legal systems.<sup>5</sup> International law is viewed as regulating the relationship between states, whereas, municipal law applies within a State, regulating the relations of its citizens *inter partes* and with the state. Neither legal order has the power to encroach upon the rules of the other. When an international law rule applies, a rule of the national legal system has authorised the application of that rule. In the case of a conflict between international law and national law, the dualist would assume that a national court would apply national law.

According to monism, national and international law form one single universal legal system. As a result, international law can be applied directly without any municipal legislative act authorising the application of international law in the national legal system. There is no single definitive creed of monism but several varieties thereof.

#### **4.2. The Philosophical Problem**

This section will examine monism and dualism as two opposing conceptions of the concept of the relationship between international law and municipal law.<sup>6</sup> When the discussion of the issue arose at the end of the nineteenth century, international relations between the fledging nation states were relatively unsophisticated. Heinrich Triepel conducted a study of the emergent international legal order.<sup>7</sup> He concluded that the rules of international law in force concerned fields of application other than those of relevance to municipal law. Secondly, the main sources of international law were based exclusively on the express consent of states. Thirdly, the subjects of international law were exclusively states.

Since the Second World War, fundamental changes have occurred which have superseded the factual basis for Triepel's study. The modern development of international law has created a large number of new vertical norms for states. As a result, the subject-matter within the municipal jurisdiction of states has receded. It is no longer possible to clearly demarcate separate fields of application for international and municipal legal norms. For instance, the multi-layered private international law (conflict of laws) rules of the European Union (EU) Member States reflect the diverse competence of the municipal, supranational and international legal order.<sup>8</sup> Human rights law is another area where

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<sup>5</sup> The international and municipal legal systems under dualism can be loosely compared to hermetically sealed units.

<sup>6</sup> A distinction between the terms 'concept' and 'conception' is drawn by the author in this chapter in the sense frequently employed by Dworkin in Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 71 – 72; The distinction was openly adopted by Rawls in John Rawls, *A Theory of Justice* (Harvard University Press 1971) ch 5.

<sup>7</sup> Heinrich Triepel, *Völkerrecht und Landesrecht* (Hirschfeldt, Leipzig 1899).

<sup>8</sup> The classification of private international law as municipal law occurred in the late nineteenth century. The resulting monolithic conception of international law is partly a product of the emphasis on the conception of state 'sovereignty' in legal positivist international legal theory, which classified the decision of states with respect to private international law disputes as a matter of discretionary comity. Both private law and private international law were excluded from the domain of international law. See Mukarrum Ahmed, *The Nature and*

overlapping legal competence exists between the international and municipal legal system. Therefore, the idea that separate fields of application exist with no interpenetration between international and municipal law no longer corresponds with reality.

Triepel's study neglected the fact that customary international law forms part of both international law and municipal law and illustrates interpenetrative influences.<sup>9</sup> Moreover, the general principles of law recognised by civilised nations cannot be deemed to emanate exclusively from either the international or municipal legal system. The international law-making process has diversified and it is no longer necessary to have recourse to examples from supranational legal orders, such as the EU, to find sources not based on the express will of states. HLA Hart, when discussing the nature of international law and the possible formulation of a 'basic norm' of international law, has discussed the principle of *pacta sunt servanda* as a potential candidate.<sup>10</sup> However, he reasoned that this view has been abandoned by many theorists and it is incompatible with the fact that not all obligations under international law arise from 'pacta', however widely the term is construed.<sup>11</sup> It should be noted that Hart recognised that regulatory constraints played at least some role within an emerging international legal order.<sup>12</sup> Therefore, *pacta sunt servanda* based on the consent of states does not offer a satisfactory and comprehensive justification of the customary behaviour of states in international law.

Triepel's third finding concerns the subjects of international law. The recognition that international organisations have become subjects and that individuals may exceptionally be made not only its addressees, but also its subjects, reflects the emergence of a cosmopolitan conception of sovereignty.<sup>13</sup> The argument that international law rules are exclusively addressed to states is therefore no longer realistic.

The criticisms of dualism are not sufficient to reason that the whole doctrine is fallacious and anachronistic. Dualists frequently argue that international courts only apply sources of international law and characterise municipal law as a question of 'fact'.<sup>14</sup> They can

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*Enforcement of Choice of Court Agreements: A Comparative Study* (Hart Publishing 2017) 14-21. It should be noted that dualism is also modelled on the legal positivist notion of state sovereignty that was prevalent in the late nineteenth century.

<sup>9</sup> Triepel (n 7).

<sup>10</sup> Herbert Hart, *The Concept of Law* (OUP 1961) 228.

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.* 231; See also, James E Penner, *McCoubrey & White's Textbook on Jurisprudence* (4<sup>th</sup> Edition, OUP 2008) 98.

<sup>13</sup> See Alex Mills, 'Normative Individualism and Jurisdiction in Public and Private International Law: Towards a Cosmopolitan Sovereignty' (Inaugural Cambridge Journal of International and Comparative Law Conference: Agents of Change: The Individual as a Participant in the Legal Process, Cambridge, 19 May 2012); Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 *British Yearbook of International Law* 187.

<sup>14</sup> Foreign law is also a question of 'fact' in private international law disputes before English courts. A party relying on foreign law has to plead and prove the content of the foreign applicable law. If foreign law is not pleaded or proved, the English court will apply English law to the dispute. On the other hand, civil law legal systems characterise foreign law as a question of law. See Richard Fentiman, *Foreign Law in English Courts* (OUP 1998); Sofie Geeroms, *Foreign Law in Civil Litigation* (OUP 2004). English private international lawyers often justify the treatment of foreign law as pragmatic, efficient and in accordance with party autonomy but the relegation of foreign law in English courts might also be explained with the idea of dualism and a legal positivist notion of state sovereignty, where the applicable foreign law of another state exists separately and independently of English law.

rely on dicta of the International Court of Justice (ICJ) and the Permanent Court of International Justice (PCIJ) to conclude that municipal law does not belong to the same legal order as international law.

All forms of monism are premised on the idea that ‘law’ has to be understood as a unity and that its validity has to be derived from one common source. Theoretically, this hypothesis is fulfilled whether this common source is found in the national or international level.<sup>15</sup> However, the assumption that national law could constitute the common source for international law results in the negation of the international legal order. This chapter only considers those monistic theories which accept the precedence of international law.

Hans Kelsen advanced the idea that the final source of validity of all law had to be found in a basic rule (*grundnorm*) of international law:<sup>16</sup>

“Since the basic norms of the national legal orders are determined by a norm of international law, they are basic norms only in a relative sense. It is the basic norm of the international legal order which is the ultimate reason of validity of the national legal orders, too.”<sup>17</sup>

The legal order of municipal law is derived from international law by way of delegation.<sup>18</sup> All norms of international law are superior to municipal law, and municipal law contrary to international law is void. The norms of international law are directly applicable in the municipal legal system. This idea of a basic rule as the ultimate source of all law reflects the influence of the Vienna Circle’s theory of logical positivism.<sup>19</sup>

Hersch Lauterpacht was a vehement advocate of a different form of monism. He emphasised that individuals are the ultimate subjects of international law. As such, individuals represent both the justification and moral limit of the legal order.<sup>20</sup> International law is seen as the best available moderator of human affairs, and also as a condition of the legal existence of states, and therefore of the national legal systems.<sup>21</sup>

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<sup>15</sup> See François Rigaux, ‘Hans Kelsen on International Law’ (1998) 9 *European Journal of International Law* 325.

<sup>16</sup> Cf Hart (n 10) ch 10, rejected the positivist account of international law because of the dependence on the problematic conception of sovereignty. He argued that international law is simply a set of primary rules which creates obligations, rejecting the idea that *a priori* norms such as sovereignty operate as a rule of recognition or as a justification of those rules. John Austin excluded international law from the province of jurisprudence and positive law by referring to it as ‘positive morality’, see WL Morison, *John Austin* (Edward Arnold 1982) 64.

<sup>17</sup> Hans Kelsen, *General Theory of Law and State* (1945) 367, 369-370; Hans Kelsen, *Principles of International Law* (2nd edn, 1966) 562; See also, Penner (n 12) 51-52.

<sup>18</sup> Harris (n 3) 74.

<sup>19</sup> ‘Logical positivism’ is a twentieth century philosophical movement holding that all meaningful statements are either analytic or conclusively verifiable or at least confirmable by observation and experiment and that metaphysical theories are therefore strictly meaningless. The Vienna Circle’s formulation was entirely driven by Ludwig Wittgenstein’s *Tractatus Logico-Philosophicus* (Kegan Paul 1922), which dominated analytical philosophy in the 1920s and 30s.

<sup>20</sup> Hersch Lauterpacht, *International Law and Human Rights* (1950) 70.

<sup>21</sup> Lassa Oppenheim, *International Law* (Hersch Lauterpacht ed, 8<sup>th</sup> Edition, Longmans, Green and Co. 1955) 38.

According to Kelsen, the authority of states to exercise jurisdiction in their territory is delegated from international law. However, the actual interaction between international and municipal law does not support this finding. International law is rarely concerned with the jurisdiction of states to regulate their domestic affairs. If the basis for international law as well as for municipal law is found in the consciousness of a legal community or in “the idea of law”,<sup>22</sup> the artificial conception of a delegation of authority to states is not needed. In this connection, a parallel can be drawn with federal states. The legal community of the same people constitutes the basis for the federal state and for the legal systems of its constituent elements. By analogy, the national legal communities form the international community.

According to radical monism, the supremacy of international law is not limited to the international level but equally determines its application on the municipal plane. Legal provisions of the municipal legal order which are inconsistent with international obligations are void. The theory of the supremacy of international law within the universal and unique legal order covering all levels is sufficient to constitute a basis for this result. State practice which is not in conformity with this doctrine is regarded as irrelevant and must be changed.

A revised theory has taken into account several criticisms based on an analysis of state practice. This moderate monism does not insist on the conception of a delegated power of states, but rather emphasises the fact that international law determines a margin of action for each state which delineates its liberty of action.<sup>23</sup> Municipal law inconsistent with international obligations is not automatically void. The supremacy of international law is nevertheless maintained in the sense that the state is bound by international law when exercising its jurisdiction and that a statute which does not conform to international standards may only be applied provisionally by national courts until the state fulfils its duty to bring it into conformity with its international obligations. In the case of treaty obligations, any party to the relevant convention whose own rights are affected may request a revision of the municipal law. Some modern developments have made provision for bringing municipal law into conformity with international law.<sup>24</sup>

The argument for a ‘provisional validity’ of norms of municipal law which do not comply with international obligations has been criticised by the opponents of monism. In their opinion, a general procedure established by international law would be necessary in order to ensure the conformity between municipal and international law. As long as such a procedure does not exist, one cannot refer to the validity of international law in the municipal plane without having recourse to the authority of the state in order to form a basis for the application of international law in domestic courts.<sup>25</sup>

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<sup>22</sup> E Kaufmann ‘Traité international et loi interne’ (1958) 41 *Rivista di Diritto Internazionale* 369–89.

<sup>23</sup> Pierre-Marie Dupuy, ‘International Law and Domestic (Municipal) Law’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law* (2<sup>nd</sup> Edition, OUP 2013) [17].

<sup>24</sup> For example, in the UK, a judge can issue a declaration under Section 4 of the Human Rights Act 1998 that a statute is incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950).

<sup>25</sup> Dupuy (n 23) [18].

Arguments drawn from state practice have led to a revision of both monism and dualism theories. The direct application of international law by state courts is no longer a point of contention. Such direct application cannot be based solely on a monistic conception but rather on some form of dualism. A national legal order can refer to another legal order and provide for the application of that order's norms without incorporating them into its own legal system. The main remaining divergence between monism and dualism relates to the influence of international law on national statutes which are not in conformity with international law. Monists, having revised their original theory, now insist on the existence of an international responsibility of states to bring domestic law into conformity with international law. This responsibility is regarded as proof of the pre-eminence of international law.

Dualists lay emphasis on the absence of formal sanctions. They regard it as decisive that the revocation of such norms remains in the competence of the state. A state's international responsibility does not render a statute void, and a judgment of an international court may only impose the duty to pay reparations. The relevance attributed to state responsibility for the relations between international law and municipal law is therefore a central feature of this debate.

In general, common law commentators have not laid the same emphasis on theoretical problems. Gerald Fitzmaurice even stated that "the entire monist-dualist controversy is unreal, artificial and strictly beside the point".<sup>26</sup> Instead of maintaining the dogmatic controversy, contemporary scholars consider it more important to contribute to a solid foundation of international law as a legal order.<sup>27</sup> The next two sections examine the role of municipal law in international law and the reception of international law in English municipal law.

### **4.3. The Application of Municipal Law in International Law**

A state cannot plead provisions of its own law or lacunas in that law in answer to a claim against it for a breach of its international law obligations.<sup>28</sup> The Permanent Court of International Justice and the International Court of Justice have endorsed this position.<sup>29</sup> This

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<sup>26</sup> Gerald Fitzmaurice 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 (2) *Recueil des cours* 1–227, 71.

<sup>27</sup> Dupuy (n 23) [22].

<sup>28</sup> Art 27, Vienna Convention on the Law of Treaties (VCLT) (22 May 1969, 1155 UNTS 331), referring to justification for failure to perform a treaty. Cf Art 46, VCLT, permitting a state to argue the invalidation of consent by reason of the violation of its internal law where the violation was 'manifest and concerned a rule of its internal law of fundamental importance'.

<sup>29</sup> PCIJ: *SS Wimbledon* (1923) PCIJ Ser A No 1, 29; *Jurisdiction of the Courts of Danzig* (1928) PCIJ Ser B No 15, 26–7; *Free Zones of Upper Savoy and the District of Gex* (1930) PCIJ Ser A No 24, 12; ICJ: *Anglo-Norwegian Fisheries*, ICJ Reports 1951, 116, 132; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ Reports 1988 12, 34; *Elettronica Sicula SpA (ELSI) (US v Italy)*, ICJ Reports 1989 p 15, 51, 74; *Avena (Mexico v US)*, ICJ Reports 2004 p 12, 65; *Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ Reports 2012 p 422, 460.

principle is reflected in Article 3 of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts.<sup>30</sup>

“The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”

The classification of applicable municipal law in international adjudication under international law is disputable. Municipal norms cannot be equated with international law norms in terms of pedigree. However, municipal law may be characterised as issues of ‘fact’ with quasi-normative implications by an international court or tribunal. Until recently, the PCIJ’s statement in 1926 in the *German Interests in Polish Upper Silesia* cases was regarded as answering this question:<sup>31</sup>

“From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.”

A refined definition of this relationship, expressed by the ICJ in the *Barcelona Traction* case, is less restrictive:<sup>32</sup>

“Thus the Court has ... not only to take cognizance of municipal law but also to refer to it ... In referring to such rules, the Court cannot modify, still less deform them”.

The difference between the two positions is clear. The court may only take cognizance of facts if they are raised and proved by a party. If reference is made to sources of municipal law, this implies that a quasi-normative character is attributed to them. It should be noted that in the *Serbian Loans* case the PCIJ even stated that the court, under certain conditions, “is obliged to apply municipal law”.<sup>33</sup>

In the *Barcelona Traction* case, the recognition of an institution of municipal law, namely of a limited company, was at issue. The Court took its decision in view of the fact that “international law has not established its own rules” for this legal issue.<sup>34</sup> Judge Fitzmaurice even spoke of the municipal system which the Court “sought to apply on the international plane”,<sup>35</sup> while other members of the Court felt inclined to defend the traditional conceptions and terminology.<sup>36</sup>

A legal basis for the application of judicial precedent developed by municipal courts can be found in the principle of a reserved domain of domestic jurisdiction. However, the

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<sup>30</sup> ILC *Yearbook* 2001/II (2), 36. Also, Draft Declaration on Rights and Duties of States, GA Res 375(IV), 6 December 1949, Art 13.

<sup>31</sup> PCIJ (1926) Ser A No 7, 19.

<sup>32</sup> *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)*, Second Phase, ICJ Reports 1970, 3, 37.

<sup>33</sup> *Serbian Loans* (1929) PCIJ Ser A No 20, [242].

<sup>34</sup> *Barcelona Traction* (n 32) 34.

<sup>35</sup> *ibid*, Separate Opinion of Judge Fitzmaurice, 72.

<sup>36</sup> *ibid*, Separate Opinion of Judge Morelli, 233–234; Separate Opinion of Judge Gros, 272.

principle of *iura novit curia* does not apply in cases where an international court or tribunal refers to municipal law.<sup>37</sup>

#### **4.4. The Application of International Law in Municipal Law**

This section examines the application of international law within the municipal legal system.<sup>38</sup> In particular, treaties must be distinguished from customary international law as sources of international law. Treaties are written agreements that are signed and ratified by contracting states and binding on them. Customary international law consists of those rules that have arisen as a consequence of practices engaged in by states. The analysis of the reception of international law in the United Kingdom (UK) in this part is followed by a novel consideration of how the Pakistani legal system incorporates international law.

According to the principle of ‘incorporation’, international law was part of the law of England.<sup>39</sup> However, this liberal approach was subject to qualifications. Parliamentary supremacy meant that treaties concluded by a royal prerogative were not part of English law. Furthermore, in accordance with the ‘act of state’ doctrine, the executive had authority in matters of the foreign prerogative (notably recognition). It is now necessary to examine the application of treaties and customary international law in English domestic law.

##### **4.4.1. Treaties**

In England, conclusion and ratification of treaties are subject to the royal prerogative, but Parliament has to legislate to incorporate a treaty into UK law.<sup>40</sup> This approach of English law is broadly reflected in other Commonwealth countries such as Pakistan. The rule does not apply in the very rare cases where the Crown’s prerogative can directly extend without the need for legislation.<sup>41</sup>

As a dualist system, English law will not ordinarily permit unimplemented treaties to be given legal effect by the courts.<sup>42</sup> A concise statement of this rule was provided by the Privy Council in *Thomas v Baptiste*:<sup>43</sup>

“Their Lordships recognise the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a treaty ... is an act of

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<sup>37</sup> *Iura novit curia*: “The court knows the laws” in Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (OUP 2011).

<sup>38</sup> Art 38(1) ICJ Statute: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

<sup>39</sup> See generally, Shaw (n 2) Ch 4; Crawford (n 2) Ch 3.

<sup>40</sup> ‘The bedrock of the British constitution’: *R (Jackson) v Attorney General* [2006] 1 AC 262, 274 (Lord Bingham).

<sup>41</sup> *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 500.

<sup>42</sup> *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499–500 (Lord Oliver).

<sup>43</sup> [2000] 2 AC 1 (PC), 23 (Lord Millett); *ibid*, 31–33 (Lord Hoffmann & Lord Goff).

the executive government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. When so enacted, the courts give effect to the domestic legislation, not to the terms of the treaty.”

Therefore, according to the principle of ‘no direct effect’, unimplemented treaties cannot create enforceable rights.<sup>44</sup> In similar vein, unimplemented treaties cannot override statutes and their infringement by the UK is domestically without legal effect. Decisions by international courts and tribunals which adjudicate the UK to be in breach of unimplemented treaty obligations have no domestic effect.<sup>45</sup>

Once a treaty is implemented by Parliament, the resulting legislation becomes part of UK law and is applicable in the courts.<sup>46</sup> The statute implementing the treaty will function as any other Act of Parliament. Thus, for example, the words of a subsequent Act of Parliament will prevail over the provisions of a prior treaty in the case of clear inconsistency between the two.<sup>47</sup>

An apparent exception to the treaty incorporation principle are treaties concluded by the institutions of the European Union (EU), with the Court of Justice of the EU (‘CJEU’) holding these to be directly enforceable within Member States as part of the *acquis communautaire*.<sup>48</sup> However, EU treaties have this effect in UK law because of the relevant statute.<sup>49</sup> The EU’s institutional structure and legal order is *sui generis*,<sup>50</sup> EU Treaties and Regulations are directly applicable as they come into force without any action on the part of Member States.<sup>51</sup> The principles of supremacy<sup>52</sup> of EU law and the direct effect<sup>53</sup> of EU law

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<sup>44</sup> Ss 20–22, The Constitutional Reform and Governance Act 2010, provide for prior parliamentary approval of treaty ratification in most cases, but it does not change the no direct effect rule.

<sup>45</sup> *R v Lyons* [2003] 1 AC 976, 987 (Lord Bingham), 995 (Lord Hoffmann).

<sup>46</sup> A clear example of this is Schedule 1 of the Human Rights Act 1998 (UK), which gives qualified domestic effect to the ECHR.

<sup>47</sup> *IRC v Collco Dealings Ltd* [1962] AC 1; *Woodend (KV Ceylon) Rubber and Tea Co v IRC* [1971] AC 321.

<sup>48</sup> The *acquis communautaire* is the collective legal term for EU law. It stands for the whole body of written and unwritten EU laws, the EU’s political aims, and the obligations, rights, and remedies the Member States share and must adhere to with regard to the EU. See Meinhard Hilf, ‘Acquis communautaire’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law* (2<sup>nd</sup> Edition, OUP 2013) [1].

<sup>49</sup> See European Communities Act 1972 (UK).

<sup>50</sup> Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press 2015) 710.

<sup>51</sup> The principle of direct applicability refers to the extent to which EU measures take effect in the legal system of each Member State without the need for further implementation by the Member States themselves. Authority for this interpretation is Art 288 of the Treaty on the Functioning of the European Union (TFEU), which states specifically that a Regulation “shall be binding in its entirety and directly applicable in all Member States”. Therefore, Regulations shall take effect in the legal system of each Member State without the need for any further implementation.

<sup>52</sup> In *Costa v ENEL* (6/64) [1964] ECR 585 the ECJ espoused the principle of supremacy of EU law and stated that EU law could not “be overridden by domestic legal provisions, however framed, without being deprived of its character as [Union] law and without the legal basis of the [Union] itself being called into question”. See Paul Craig and Grainne De Burca, *EU Law: Text, Cases and Materials* (5<sup>th</sup> Edition, OUP 2011) ch 9.

<sup>53</sup> The principle of direct effect can be interpreted as meaning the extent to which EU law can produce legal rights and obligations which can be used in an action before a national court. The ECJ decision in *Van Gend en Loos v Nederlandse Administratie der Belastingen* (26/62) [1963] ECR 1, [1963] CMLR 105 states that

are both based on the competence of the EU. The CJEU has jurisdiction to interpret EU law through the preliminary reference procedure from the courts of the Member States of the EU.<sup>54</sup>

When interpreting the instrument enabling the treaty, it should be noted that the object of interpretation is at one remove from the treaty.<sup>55</sup> Accordingly, although international courts and tribunals may rule on the interpretation of a treaty, their rulings are not binding on the interpretation of the enabling instrument.<sup>56</sup>

On the other hand, treaty interpretation is based on the requirements of Articles 31 and 32 of the Vienna Convention on the Law of Treaties at least for states bound by the Convention.<sup>57</sup> In the interests of the uniform interpretation of the relevant treaty, the decisions of other national courts on the interpretation of treaties are taken into account.<sup>58</sup>

Diplock LJ noted in that “Parliament does not intend to act in breach of international law, including therein specific treaty obligations.”<sup>59</sup> In addition to legislation, the presumption may also apply to other instruments or guidelines given domestic effect.<sup>60</sup>

The presumption itself will only act as an aid to interpretation where the statutory provision is open textured and lacks *prima facie* clarity. In *Ex p Brind*, Lord Bridge, having regard to the then unimplemented European Convention on Human Rights, said:<sup>61</sup>

“[I]n construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it. Hence, it is submitted, when a statute confers upon an administrative authority a discretion capable of being exercised in a way which infringes any basic human right protected by the Convention, it may similarly be presumed that the legislative intention was that the discretion should be exercised within the limitations which the Convention imposes.”

Interpreting English law in a way which does not place the UK in breach of an international obligation also applies to the common law.<sup>62</sup> Unincorporated treaties may be used to develop the common law particularly where there is a lacuna in the law. For instance, the English

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“[Union] law has an authority which can be invoked by their nationals before those courts and tribunals”. See Craig and De Burca (n 52) ch 7.

<sup>54</sup> Art 267 TFEU; See Craig and De Burca (n 52) ch 13.

<sup>55</sup> Shaw (n 2) 118; Crawford (n 2) 61.

<sup>56</sup> *ibid.*

<sup>57</sup> See Arts 31 and 32, Vienna Convention on the Law of Treaties (VCLT) (22 May 1969, 1155 UNTS 331). Reference to the *travaux préparatoires* is allowed under Art 32 if the meaning of a Convention is ‘ambiguous or obscure’ from the application of Art 31 or if it confirms the meaning arrived at from the application of Art 31.

<sup>58</sup> *R v Immigration Appeal Tribunal, ex p Shah* [1999] 2 AC 629, 657 (Lord Hoffmann).

<sup>59</sup> *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143.

<sup>60</sup> *Mirza v Secretary of State for the Home Department* [1996] Imm AR 314 (CA), 318 (Nourse LJ).

<sup>61</sup> *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 747–8; cf *ibid.*, 760 (Lord Ackner).

<sup>62</sup> *R v Lyons* [2003] 1 AC 976, 992 (Lord Hoffmann).

courts have considered treaty based human rights standards to adjudicate on common law issues.<sup>63</sup>

#### **4.4.2. Customary International Law**

The common law approach to customary international law<sup>64</sup> is that of ‘incorporation’, under which customary rules are considered to be ‘part of the law of the land’ provided they are not inconsistent with Acts of Parliament. Lord Denning’s statement in *Trendtex Trading Corp v Central Bank of Nigeria* is usually cited in support of the proposition:<sup>65</sup>

“Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows ... inexorably that the rules of international law, as existing from time to time, do form part of English law.”

Lord Wilberforce, however, cautioned that it may be wise not to adhere to “the admired judgment of Lord Denning MR than is necessary”.<sup>66</sup> The position in England is not that custom forms part of the common law, but that it is a source of English law that the courts may draw upon as required.<sup>67</sup>

As Lord Bingham said in *R v Jones (Margaret)*:<sup>68</sup>

“The appellants contended that the law of nations in its full extent is part of the law of England and Wales. The Crown did not challenge the general truth of this proposition, for which there is indeed old and high authority ... I would for my part hesitate ... to accept this proposition in quite the unqualified terms in which it has often been stated. There seems to be truth in Brierly’s contention ... that international law is not a part, but is one of the sources, of English law.”

#### **4.5. International Law in Pakistani Courts**

Pakistan is a dualist state. Dualism approaches municipal and international law as separate and independent systems that only overlap where international law is incorporated through legislative action into municipal law.<sup>69</sup> For the Pakistani courts, in many instances, executive action does not suffice.<sup>70</sup> The Supreme Court of Pakistan has found that where treaty provisions are not incorporated through legislation into the black letter law of the state, they do not ‘have the effect of altering the existing laws,’ which means ‘rights arising therefrom called treaty rights cannot be enforced’ and ‘the Court is not vested with the power to do

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<sup>63</sup> *Malone v Metropolitan Police Commissioner (No 2)* [1979] 1 Ch 344, 379 (Megarry V-C); *Gleaves v Deakin* [1980] AC 477; *Attorney-General v BBC* [1981] AC 303; *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180.

<sup>64</sup> Thomas Bingham, *The Rule of Law* (Allen Lane 2010) ch 10.

<sup>65</sup> [1977] QB 529, 554.

<sup>66</sup> *I Congreso del Partido* [1983] AC 244, 261–2.

<sup>67</sup> James L Brierly, ‘International Law in England’ (1935) 51 *Law Quarterly Review* 24, 31.

<sup>68</sup> [2007] 1 AC 136, 155.

<sup>69</sup> *SGS Societe Generale v Pakistan* ((2002) CLD (Lahore) 790) Muhammad Saeed Akhtar J.

<sup>70</sup> *ibid.* Treaties are concluded in Pakistan without parliamentary oversight. See Ahmad Ghouri, ‘Democratizing Foreign Policy: Parliamentary Oversight of Treaty Ratification in Pakistan’ (2019) 40 *Statute Law Review*.

so.<sup>71</sup> In support of this statement, the Pakistani courts refer to Article 175(2) of the Constitution of Pakistan:<sup>72</sup> “No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.”

A number of Pakistani decisions support the proposition that international law needs to be legislatively incorporated in the Pakistani municipal legal system for it to be effective:

“An international agreement between the nations, if signed by any country, is always subject to ratification, but it can be enforced as a law only when legislation is made by the country through its legislature. Without framing a law in terms of the international agreement of covenants of such agreement cannot be implemented as a law nor do they bind down any party.”<sup>73</sup>

“It is well settled proposition of law that international treaties and convention, unless incorporated in the municipal laws, the same cannot be enforced domestically.”<sup>74</sup>

“Where there is a conflict between a municipal law and any provisions of an international convention, which has not been legislated or enacted, the provisions of municipal law shall prevail.”<sup>75</sup>

Surprisingly, some Pakistani court rulings support the erroneous proposition that municipal law is superior in pedigree to international law.

“We are not to lose sight of the established legal principal prevalent in our legal jurisdiction that when international obligations and bilateral commitments come in conflict with municipal laws, the later are to prevail.”<sup>76</sup>

“We are inclined to hold that the absence of any provisions in the relevant [domestic] law, the Pakistani courts are not entitled to take note of the factum of violation of any provisions of international agreement or law, the Pakistani courts are bound to give effect to the municipal law as they are.”<sup>77</sup>

It is argued that it will be difficult to “fit” future Pakistani decisions into the aberrational foundations of the preceding strain of case law because a better “justification” for the law based on sound principle can be found.<sup>78</sup> A “justification” for the application of international law in Pakistani courts that is internationalist in spirit and does not envisage the Pakistani

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<sup>71</sup> *Societe General De Surveillance S.A. v Pakistan* ((2002) SCMR (Supreme Court) 1694, [23]) Munir A Sheikh J.

<sup>72</sup> Article 175(2) of the Constitution of the Islamic Republic of Pakistan, 1973 (Last amended on 31 May 2018).

<sup>73</sup> *Shehla Zia v WAPDA* ((1994) PLD (Supreme Court) 693) Nasim Hasan Shah CJ, Saleem Akhtar and Manzoor Hussain Sial JJ.

<sup>74</sup> *Govt. of Punjab v Aamir Zahoor-ul-Haq* ((2016) PLD (Supreme Court) 421) Anwar Zaheer Jamali CJ, Mian Saqib Nisar, Iqbal Hameedur Rahman, Umar Ata Bandial and Qazi Faez Isa JJ.

<sup>75</sup> *Commander Aziz Khan v Director General, Ports and Shipping* ((1991) CLC (Karachi) 362) Saleem Akhtar and Imam Ali Kazi JJ.

<sup>76</sup> *Ahtabar Gul v State* ((2014) PLD (Peshawar) 10) Yahya Afridi and Syed Afsar Shah JJ.

<sup>77</sup> *Indus Automobile v. Central Board of Revenue* ((1988) PLD (Karachi) 99) Ajmal Mian and Allahdino G Memon JJ.

<sup>78</sup> For the ideas of “fit” and “justification” in the adjudication of “hard cases”, see, Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) ch 4.

judiciary as insular and parochial. Indeed, an enlightened and inclusive approach to the application of international law in Pakistani courts may be based on the idea of upholding fundamental rights and the rule of law. This awareness of international law's utility in enforcing fundamental rights and the rule of law is reflected in Pakistani court rulings:

“We are of the view that nations must march with international community and the municipal law must respect rules of international law, even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict [with acts of Parliament].”<sup>79</sup>

“The Fundamental Rights enshrined in our Constitution in fact reflect what has been provided in [the] Universal Declaration of Human Rights. It may be observed that this Court while construing the former may refer to the latter if there is no inconsistency between the two with the object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations.”<sup>80</sup>

“It is by now settled that International Law, unless in direct conflict with the municipal law, ought to be applied and respected by municipal courts in deciding matters arising therefrom.”<sup>81</sup>

“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...”<sup>82</sup>

“National courts should strive for uniformity in the interpretation of treaties/conventions and therefore the case-law developed in other jurisdictions can and ought to be taken into consideration by courts of the states party to such treaties.”<sup>83</sup>

Pakistani courts are also aware of their responsibility to uphold the international obligations of the state, including recognising the potential consequences of breaching such obligations.<sup>84</sup> Parliament frequently refers to international law and international organisations in the municipal laws of Pakistan. As Parliament accepts the influence of international law on municipal law and the integration of both legal orders in domestic law, the judiciary should also be keen to adopt an enlightened and inclusive approach to international law to uphold the rule of law and fundamental rights.

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<sup>79</sup> *Najib Zarab Ltd. v Pakistan* ((1993) PLD (Karachi) 93) Syed Haider Ali Pirzada and Shaukat Hussain Zubedi JJ.

<sup>80</sup> *Al-Jehad Trust v Federation of Pakistan* ((1999) SCMR (Supreme Court) 1379) Ajmal Mian CJ, Muhammad Bashir Jehangiri, Mamoon Kazi, Ch Muhammad Arif and Munir A Sheikh JJ.

<sup>81</sup> *Haji Lal Muhammad v Pakistan* ((2014) PLD (Peshawar) 199) Yahya Afridi and Malik Manzoor Hussain JJ.

<sup>82</sup> *Hanover Fire Insurance Co. v Muralidhar Banechand* ((1958) PLD (Supreme Court) 138) M Shahabuddin, AR Cornelius, Muhammad Sharif and Amiruddin Ahmad JJ.

<sup>83</sup> *Abdullah v Cnan Group Spa* ((2014) PLD (Karachi) 349) Munib Akhtar J.

<sup>84</sup> *Lakhra Power Generation Company v Karadeniz Powership Kaya Bey* ((2014) CLD (Karachi) 337) Munib Akhtar J; *Suleman v Manager Domestic Banking, Habib Bank* ((2003) CLD (Karachi) 1797) Sabihuddin Ahmad and Zia Pervez JJ.

#### 4.6. Conclusion: International Law and Municipal Law in a Globalised World

The role of the state in the modern world is complex. According to positivist international law theory, each state is sovereign. In reality, with the rise of globalisation, not even the most powerful of states can be entirely sovereign. Interdependence of contemporary society ensures that the actions of one state could have serious global implications.

This has led to an increasing interaction of international law and domestic law across a number of fields, such as human rights, environmental and international investment law, where at the least the same topic is subject to regulation at both the domestic and the international level. The EU's regional legal order is a unique example of the integration of Union law into the law of the Member States. The multi-layered private international law (conflict of laws) rules of the EU Member States reflect the diverse competence of the municipal, European Union and international legal order.

With the rise of international law, questions begin to arise about the relationship between the municipal law of a particular country and the rules and principles of the international legal community. It has been observed that a normative character may be attributed to applicable municipal law in proceedings under international law before an international court or tribunal.

International law primarily relies on domestic legal and political structures for implementation.<sup>85</sup> As a result of the increased interaction between international and municipal laws, the study of international law as it is applied and interpreted by domestic courts is developing into a sub-discipline termed 'comparative international law':<sup>86</sup>

“Comparative international law entails identifying, analyzing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law.”

Comparative international law differs from the idea of fragmentation<sup>87</sup> and variable geometry.<sup>88</sup> Instead, it focuses largely on similarities and differences between national or regional actors in their approaches to international law.

International law is a dynamic corpus of law which may materially enrich the domestic jurisprudence of Pakistan. The traditional view of international law as entirely distinct from municipal law has run its course and a more integrated approach is required. Ideally, the Pakistani judiciary should be at the crescendo of enlightened thought on international law. International law, whether derived from custom or a treaty, becomes

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<sup>85</sup> Wayne Sandholtz, 'How Domestic Courts Use International Law' (2015) 38 *Fordham Int'l L.J.* 595.

<sup>86</sup> Anthea Roberts, Paul B Stephan, Pierre-Hughes Verdier and Mila Versteeg, 'Comparative International Law: Framing the Field' (2015) 109 *American Journal of International Law* 467, 469.

<sup>87</sup> Fragmentation is the product of a system of laws that, by and large, lacks a sense of vertical integration or hierarchy: See James Crawford, *Chance, Order, Change: The Course of International Law* (Brill 2014) 283.

<sup>88</sup> 'Variable-geometry Europe' is the term used to describe the idea of a method of differentiated integration whereby common objectives are pursued by a group of Member States both able and willing to advance, it being implied that the others will follow later. (Europa.eu Glossary) [europa.eu/legislation\\_summaries/glossary/multispeed\\_europe\\_en.htm](http://europa.eu/legislation_summaries/glossary/multispeed_europe_en.htm).

incorporated into the domestic legal system and should be used proactively by the Pakistani judiciary.

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