ARTICLES

CONDUCT OF FOREIGN RELATIONS, INCLUDING TREATY-MAKING POWERS, UNDER THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN*

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The age of autocracy and despotism in which Montesquieu lived convinced him that “when legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner”¹. He therefore, propagated his theory of “Separation of Powers”. Montesquieu’s view that the maintenance of independence as between the legislative, the executive and judicial branches was a security for the people found favour with the framers of the American constitution who attempted to avoid concentration of power in any single branch of Government. However, Madison in the Federalist No. 47 pointed at the impossibility of absolute division of power and interpreted Montesquieu’s declaration not to mean isolation of fully independent organs but that the various branches of government should be independent of each other “as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity”.² In short, neither Montesquieu nor the framers of the American Constitution contemplated complete isolation in the sense that one organ or the Government acted independently of the other, but both aimed rather at establishing a balance between the various organs or the Government in such a way as to enable each branch to have a check upon the other.

* The views expressed in this article are those of the author and do not necessarily reflect the policy of the Government of Pakistan.

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1. This quotation is from FREUND, A. SUTHERLAND; M. HOWE and E. BROWN, *Constitutional Law: cases and other problems*, (4th edn.) p. 649.

2. *Federalist* No. 47 at p. 246.

The term "separation of power" has, in recent years, once again acquired importance with the constitutional lawyers. The framers of the constitutions in the newly independent states endeavoured to include this principle in their constitutions to impress upon the world that the system of government they were evolving in their countries was democratic in nature and guaranteed individual liberty as specified in various international instruments and jealously guarded by the countries of Western Europe and other democratic States. In these countries human rights have acquired a prominent place not only in their domestic laws but also form an important pillar in the formulation and conduct of their external relations. Consequently, the framers, in many cases, genuinely attempted to create a system of government where governmental powers and responsibilities are distinctly set apart. However, despite the best of intentions and a genuine attempt to achieve that objective, complete isolation was found impossible, particularly in countries with the Westminster system of government. While attempting to implement the doctrine of "separation of powers", in most cases the framers came up with substantially mixed-up principles and as a consequence of this we perceive a shift towards the constitutional doctrine of "checks and balances", particularly between the legislative and the executive branches of government. In fact, the authors of the constitutions in various countries found in the British system of "checks and balances" an equilibrium through the constitutional mechanism for the successful resolution of the political problem of relationship between the legislative and executive organs of the government. In past practice, therefore, we see the evolution of a system in which there are separate organs or institutions of the government performing distinct functions assigned to them under the constitution but instead of competing with each other they share the powers and endeavour to accommodate each other through comity between the co-ordinate branches. The object to establish a mechanism where all powers were not concentrated in any single branch of government was achieved to a large extent and the system the framers of the constitutions came up with saw to it that while different organs performed different functions they were not wholly unconnected with each other or performed functions in complete isolation.

In domestic affairs the framers of the constitution did not face any serious problems. Consequently, we see that in this field the constitutional provisions for sharing of responsibilities are reasonably clear. However, it is mostly in the field of foreign affairs that the constitutional provisions of most of the constitutions are somewhat cryptic and ambiguous. The constitution of the Islamic Republic of Pakistan, too, does not articulate this point. However, as we shall see later, it acts to our advan-

tage for the successful conduct of diplomacy that our constitution does not clearly define the roles of the executive and the legislature in the formulation and conduct of foreign policy.

"Foreign Policy" consists of a variety of acts and may include both formal and informal processes. It includes, in the first place, an informal conduct of relations on day-to-day basis which may include appointment of ambassadors to foreign countries, receiving ambassadors of foreign countries etc. In the performance of more formal acts, on the other hand, the appropriate governmental authority may conclude treaties with foreign countries. It is this latter category of acts, more formal in nature, that we will be discussing in this article in greater detail.

In most constitutions the framers have attempted to resolve this difficult and often extremely sensitive issue by attempting to designate an organ or a governmental functionary of the State to negotiate and conclude treaties with foreign government and take measures to implement them within the State. It would, therefore, be pertinent to examine relevant constitutional provisions of some other countries before an in-depth examination can be undertaken of our own constitutional provisions on this subject.

In most of the constitutions within a federal system of government the framers contemplated a superstructure of the central government with specific enumerated powers contained in the federal legislative list and residuary powers entrusted to the provinces. However, even under this type of constitutional arrangement the central government, in most countries, is given virtual monopoly of power in foreign affairs. This is also the case in Pakistan as we shall see later in this article when discussing the relevant constitutional provisions.

In contemporary times the complex world situation prevents watertight divisions of functions as there are twilight zones in which there might be overlapping of authority as well as functions. Conduct of foreign relations falls into this category or the twilight zone. It not only involves the routine day-to-day conduct of affairs with foreign countries like sending letters on auspicious occasions, conveying messages on national days, or on assumption of high offices like that of the Head of State or the Head of Government, or receiving foreign diplomats accredited to that country, but also performing more formal functions like negotiating and subsequently concluding treaties which may have far-reaching consequences for that State both internally involving its own subjects, and externally, in its dealing with other countries. Some of these treaties may require covering legislations for their implementation whereas others may involve the legislature for their ratification and their enforcement within the State.

At times a conflict may arise between the legislative and the executive branches regarding foreign relations, particularly in a parliamentary form of government, where there is a greater degree of accountability and responsibility to Parliament as the government's life depends on it. However, even in such a system, the role of the executive in foreign policy is inherently more prominent. In our own constitution one thing is clear in that the executive is not bound to consult the legislature³ but may do so if it so desires in order to keep an equilibrium between the executive and the legislative organs of government.

Further, co-operation between the two organs is also essential as in certain cases assistance of the legislature may be necessary for the successful conduct of international relations. The foremost reason for this co-operation is that legislative power for all practical purposes is unlimited. Under the constitution of Pakistan the responsibility of the *Majlis-e-Shoora* (Parliament) to enact laws and sanction funds means that it can influence virtually any aspect of the conduct of our relations with other nations. If for practical reasons our constitution has entrusted the executive to conduct our relations with other countries it does not mean that the legislature has lost its authority to participate in foreign affairs. It is, therefore, quite frequent that the National Assembly and the Senate, either separately or in a joint session of the *Majlis-e-Shoora*, discuss the government's foreign policy in general or any specific aspects of it. Further, the executive carries out its constitutional function by seeing to it that the laws passed by Parliament are not in any manner infringed while accepting international obligations under a treaty.

I shall now examine the relevant constitutional provisions of a few other countries to give a rough idea of the diverse constitutional provisions and disparate State practices. Some countries empower a specific organ of the State to conduct relations with foreign countries including the conclusion of treaties whereas the constitutions of other States provide for legislative approval for treaties concluded by the executive. In Algeria, for example, the President of the Republic has the authority to define the policy of the government and direct, conduct and co-ordinate the external policy of the country in accordance with the will of the people as rendered by the party and expressed by the National Assembly. However, the President is empowered to sign, and after consultation⁴ with the National Assembly, ratify and implement treaties and agreements. In Brazil the constitution gives the President the "exclusive

3. See PLD (1973) S.C. 563.

4. The common meaning of «consultation» is to ask for advice or opinion. It is more than a mere «notification» which may imply only conveying of information, and perhaps less than to seek advice and consent as in the United States which contains the need for approval.

power" to maintain relations with foreign States, but for the conclusion of international treaties and convention or for ratification of those treaties he has to seek the approval of the National Congress.

On the other hand, in some other countries legislative approval is required in certain types of treaties only. The Czechoslovak constitution, for example, makes the approval by the national Assembly a necessary pre-requisite to the validity of political treaties, economic treaties of general nature and such other treaties which require legislative cover for their implementation. However, in other matters the President represents the State in foreign relations, including negotiation, conclusion and ratification of treaties, not requiring legislative approval. The last category of acts can also be delegated to the government or even individuals.⁵ Similarly in Denmark the King acts "on behalf of the realm in international affairs" except that where his actions relate to acquisition or cession of territory he has to seek the concurrence of the Parliament (Folketing) as this may involve modification of the constitution. This amendment of the constitution is outside the pale of authority vested in the monarch by the constitution.

The constitutional provisions referred to above provide for legislative approval for treaties generally or for certain types of treaties only. However, for the conduct of foreign relations on day-to-day basis the head of State is endowed with absolute powers by which he constitutionally represents the State in its external relations. The reason perhaps is that in routine matters, which may at times require urgent handling, the head of State alone can act quickly and informally and if the situation so requires discretely and secretly. In certain cases of urgent nature, if no action is taken with dispatch, no action may be taken at all and a State may suffer irreparable loss on account of the default. Parliaments, which meet only occasionally, can act in a formal manner either by enacting laws or by adopting resolutions. They cannot respond expeditiously in cases requiring urgent attention to meet certain emergent situations. For those reasons the head of the executive, who is always in session, is generally given "foreign relations power" in the State. This aspect has been reflected in most of the constitutions adverted to earlier. However, there is also a tendency, particularly in those countries which follow the British constitutional pattern, not to involve the legislature either for conducting foreign relations in general or for entering into binding treaties, unless the implementation of these treaties require a change in the law of the State, in which case the legislature is approached to extend legal cover for their enforcement. This point shall be dealt with later while discussing the con-

5. Articles 42 and 62 of the Czechoslovak constitution of 1960.

stitutional provisions of the Constitution of the Islamic Republic of Pakistan, which follows the Westminster pattern. But before undertaking that exercise it would be essential to determine the status of treaties in the context of our domestic law as that would, to a large extent, determine the ambit of applicability and their implementation within the country.

In some countries once a treaty is ratified in accordance with the domestic procedures it becomes the Law of the Land. In a few other cases a treaty may even overrule the domestic law if, there is a conflict between the treaty obligations and the municipal law. In such cases it can be said that a treaty not only becomes a part of the municipal law of that State but in its application is considered even superior to the internal laws. In France, for example, "treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party"⁶. This means that a treaty may have superior status subject to reciprocity in respect of the application of the treaty by the other contracting State or States.

In the Federal Republic of Germany the Basic Law provides that "the general rules of international law form part of the Federal Law. They take precedence over the laws and create rights and duties directly for the inhabitants of the Federal Territory".⁷ If a treaty is concluded in accordance with customary rules of international law it shall fall within the ambit of this provision.

In the United States a treaty concluded by the President is submitted to the Senate for its advice and consent and if it obtains the consent of the Senate by a two-thirds majority⁸ it shall become "the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding"⁹.

While in some States the constitutions or domestic laws provide that treaties concluded in accordance with the prescribed procedure form an integral part of their internal laws, or even superior to them, a majority of States, including Pakistan, do not follow this principle. The rationale for the last mentioned principle is that a treaty cannot be the source of law and, therefore, it cannot impose duties or confer rights on anyone except the State in its international relations. Consequently, parliamentary sanction in the form of a statute is necessary, not only for treaties requiring for their execution a change in the law but also for treaties the execution

6. Article 55 of the French constitution of 1958.

7. Article 25 of the Basic Law (constitution) of the Federal Republic of Germany.

8. Article II Sec. 2 of the constitution of the United States of America.

9. Article VI Sec. 2. *Ibid.*

of which presupposes the grant to the competent executive authority of some new powers already possessed by it. In view of the above the legal pre-requisite for the implementation of treaties in Pakistan are summed up in the following paragraphs.

If a treaty concluded by the Government of Pakistan does not alter the municipal law and does not require the conferment of any legal power on the executive for its implementation, no legislation would be required as such a treaty is consistent with the existing laws and may be implemented without the umbrella of a covering legislation.

On the other hand, if the provisions of a treaty are at variance with the provisions of our domestic laws or expressly contemplate that its performance pre-supposes a change in any existing law, statutory cover would be needed and therefore, would necessarily require the involvement of the *Majlis-e-Shoora* (Parliament).

In view of the general observations expressed the foregoing paragraphs, I would now like to turn to the specific provisions of the Constitution of the Islamic Republic of Pakistan (1973)¹⁰ which constitute the legal basis for the government's authority to conduct international relations in general and, in particular, to conclude treaties with foreign governments, after having concluded a treaty, to express the consent of the State to be bound by the international conventions, treaties, agreements, etc. and/or, having ratified the treaties, to take all necessary measures to implement them in Pakistan.

The 1973 Constitution of the Islamic Republic of Pakistan provides that:

"[t]he executive authority of the Federation shall vest in the President and shall be exercised by him, either directly or through officers sub-ordinate to him, in accordance with the Constitution"¹¹.

To facilitate his work the constitution further provides that:

"[t]here shall be a Cabinet of Ministers, with the Prime Minister as its head, to aid and advise the President in the exercise of his functions"¹².

Further still, the constitution envisages that while conducting the business of the Federal Government:

"all executive actions of the Federal Government shall be expressed to be taken in the name of the President who shall by rules specify the manner in which orders and other instruments are made and executed"¹³.

10. This includes the amendments carried in 1985 under the Eighth Constitutional Amendment.

11. Article 90 Clause (1) of the Constitution of the Islamic Republic of Pakistan.

12. Article 91.

The above noted constitutional provisions clearly provide that all executive actions are taken by the Federal Government which consists of the "President and the Cabinet of Pakistan" is the "Head of State" and represents "the unity of the Republic" and the executive authority also vests in him, all executive actions are taken in his name. As regards the conduct of external relations in particular the constitution specifically proves that:

"subject to the constitution, the executive authority of the Federation shall extend to the matters with respect to which the *Majlis-e-Shoora* (Parliament) has power to make laws, including the exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan".¹⁴

These constitutional provisions, read in conjunction, provide the juridical source for the exercise of functions relating to foreign affairs in Pakistan. It equips the executive with the tools to conduct foreign relations, but keeping in view the federal character of our constitutional system it also clarifies that executive power must follow the legislative power in the sense that the federal government can act only in respect of those subjects over which the federal legislature (*Majlis-e-Shoora*) has either the exclusive or preferential constitutional power to legislate. Those subjects are enumerated in the Federal legislative list and the concurrent legislative list respectively. In the latter case although the provinces can also legislate the federal legislature takes precedence in case of a conflict of interest between the centre and the federating units. The Fourth Schedule, which deals with the Federal legislative list, includes "External Affairs" as a subject over which the *Majlis-e-Shoora* has the exclusive authority to legislate. This item is further elaborated and brings within its ambit "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".¹⁵

In view of the constitutional provisions referred to above it is submitted that under our constitution it is the executive that represents Pakistan in its relations with foreign countries. This position was confirmed by the Supreme Court in giving its advisory opinion on a reference by the then President of Pakistan, Mr. Z. A. Bhutto, following the events that took place in Pakistan in December 1971 and the circumstances in which Bangladesh emerged as an independent country. The Government of Pakistan was confronted with the question whether or not to accord recognition to this erstwhile part of Pakistan which, as a result of Indian intervention

13. Article 99.

14. Article 97.

15. Item No. 3 in the Fourth Schedule of the Constitution.

had become Bangladesh. The Government of Pakistan at that time thought it wise to move a resolution in the National Assembly "which would express the opinion of the National Assembly of Pakistan that the Government may accord formal recognition to Bangladesh at a time when in the judgment of the Government such recognition would be in the best national interest". In its advisory opinion on this reference the Supreme Court held:

"[t]hat the recognition of a foreign State is an Act of State falling exclusively within the executive competence of the Government but there is no bar to the executive seeking the approval in advance of the legislature of its contemplated acts. Indeed [...] a general practice seems to be growing up for the executive as a matter of abundant caution to get such approval of the legislature even for acts which are purely within its executive competence"¹⁶.

In fact tradition is crystallizing in Pakistan whereby the foreign policy is debated in both the National Assembly and the Senate either separately or in a joint session of the *Majlis-e-Shoora*. In recent months the opposition requisitioned several sessions of the National Assembly and/or the Senate to discuss government's foreign policy.

As regards what constitutes the "executive" under our constitution it is submitted that the powers of the Federation under the 1973 constitutional framework vest in the President of the Republic, although the constitution also provides that for the exercise of this power the President is dependent on the advice of the Cabinet or the Prime Minister, as the case may be. This position is reflected in Article 48 clause (1) of the constitution which lays down that "in the exercise of his functions, the President shall act in accordance with the advice of the Cabinet (or the Prime Minister)", although clause (2) mentions the exceptions. However, his functions relating to the conduct of foreign relations do not come within the exception contained in clause (2) of Article 48 which provides that "notwithstanding anything contained in clause (1), the President shall act in his discretion in respect of any matter in respect of which he is empowered by the constitution to do so, and the validity of anything done by the President in his discretion shall not be called in question on any ground whatsoever". The subjects in relation to which the President can exercise discretion are specified in the constitution. In the conduct of foreign relations the President has only limited discretion in cases such as declara-

16. See PLD (1973) S.C. 563. In this opinion the Supreme Court upheld the views expressed in Halsbury's *Laws of England*, vol. II (3rd edn.) pp. 285 and 287, paragraphs 603 and 607.

tion of war, etc.¹⁷, but in most cases he would be bound by the advice of the Cabinet or the Prime Minister, as the case may be.

Having established the constitutional power of the executive organ to conclude treaties it would now be appropriate to discuss the legally binding nature of treaties in our domestic law, and their implementation by the executive or their enforcement through the courts in case of failure on the part of the authorities to implement those obligations.

As pointed out earlier the power to enter into treaties vests in the executive. However, in the absence of an express provision in our constitution regarding the legal status of treaties in relation to our domestic law they do not become part of our domestic law and, therefore, in case of any conflict between any provision of the statute and our obligations under a treaty the statute shall prevail. In such cases, if Pakistan expresses its consent to be bound by a treaty through ratification or accession a covering legislation may be necessary either in the form of an overriding statute or as an amendment of the existing legislation or enactment of an enabling provision in an existing law, enabling the competent organ to apply an existing statute to situations envisaged in the treaty through an executive action. For example, as discernible from the earlier discussion, the executive organ has no authority to grant immunities from our laws under a treaty or otherwise, to any class of persons, who under the established law of the land are not entitled thereto. This would normally be possible only by a statute. This doctrine is based on the jurisprudential principle that creation of a new category of individuals who are placed outside the scope of the law of the land and to whom immunities should apply involves changes in the law which is outside the executive competence. Only legislature can change the law. Thus, if under a Pakistani law representatives of foreign State-owned corporations or officials of foreign governments on deputation in Pakistan are not entitled to immunity, then a treaty would not be able to confer the same upon them in a municipally binding manner. If this had not been the case, there would have been no legal necessity for the enactment of such laws as the United Nations (Privileges and Immunities) Act 1948, and the Diplomatic and Consular (Privileges and Immunities) Act 1972. The prevailing legal position in Pakistan is that if the government desires to extend some or all the privileges and immunities mentioned in the first of the two legislative instruments mentioned above to the representatives or officials of any other international organization outside the United Nations system, then a notification will have to be issued in the official gazette under Section 2 of that Act extending its scope to such other organizations.

17. See Article 232 of the Constitution of the Islamic Republic of Pakistan.

Through this administrative mechanism the Government of Pakistan may clothe with immunity a person or a class of persons not normally entitled to it under the laws of Pakistan.

At times it is not necessary that all the provisions of a treaty much be given legal cover through an overriding legislation. Some of the provisions of the treaty may already have been covered by an existing legislative instrument whereas a few other provisions may be covered through minor amendments of some other related laws. Yet other provisions of the treaty may not require any legal cover as the same may fall within the ambit of the discretionary power of the executive and is capable of being implemented through an executive act. Thus in the Diplomatic and Consular (Privileges and Immunities) Act 1972 only those provisions of the Vienna Convention on Diplomatic Relations 1961 have been included in the statute which required legislative cover for their implementation. The provisions which could be implemented through amendments or minor changes in other relevant laws were excluded from the schedule annexed thereto.

For example, exemption from immigration registration of the diplomats was extended under section 6 of the Registration of Foreigners Act 1939. Under this section the Registration of Foreigners (Exemption) Order 1966 was promulgated which enumerated the persons to whom exemption applied. Exemption from registration under Section 3 sub-sections (e), (f), (h), and (j) applied to:

- (e) the member of the diplomatic corps holding diplomatic passport and (i) their spouses and children (ii) servants (if they belong to the country of the mission);
- (f) couriers holding diplomatic passports;
- (h) (i) a Consul General, (ii) a Consul, (iii) a Vice Consul, and their spouses and children;
- (j) "any foreigner to whom immunity from alien registration is granted under clause (d) of section 18 of the schedule to the United Nations (Privileges and Immunities) Act 1948 read with section 17 of the schedule to that Act".

As regards the freedom of movement of diplomats and their entry into and stay in Pakistan, the legal position is that all foreigners are governed by the Foreigners Act 1946 and the Foreigners Order 1951. Section 10 of the Act of 1946, however, gives the Federal Government the power to exempt from or modify the application of all or any provision of the Act of 1946 to any individual foreigner or any class or description of foreigners by an order issued by it. Consequently, the Federal Government may by an order exempt the application of the Foreigners Act of 1946 to diplomatic and consular officers and extend to them the freedom of movement

subject, however, to the reasonable restrictions imposed by the receiving State either in their (diplomat's) own interest such as the safety of the diplomats, or in its (State's) own public interest or its security. In such cases the receiving State can legitimately prohibit entry of diplomats to areas to which access is denied for reasons of security by declaring them as prohibited zones.

These are only a few cases cited for the purpose of illustration, in which the domestic laws give the executive the power to honour international commitments through executive directives as the enabling provision of the relevant legislative instrument cater for the situations envisaged under a treaty. It is, therefore, clear that if a treaty does not alter or modify or change the law, the powers of the executive under the constitution are unfettered. Art. 97 of our constitution clearly indicates that the powers of the executive are co-extensive with the legislative power of the Federation. While the executive cannot act against the provisions of a law, it does not follow that in order to enable the executive to function in relation to any particular subject there must be a law already in existence authorizing such action. However, legislation may be required where the constitution itself provides that the act can be done only by legislation, i.e. imposition of a tax or expenditure of money. Similarly, legislative cover would be necessary where the action amounts to amendment of an existing law.

Problems may also arise in cases where the constitution may vest in the executive the authority to act in certain spheres while the exercise of that authority might have the incidental effect of bringing about some changes in either the legal status of territories or the legal status of all or some members of their population, not because the treaty may have the effect of changing the domestic law, but because it might, when put in operation, have some legal consequences on certain aspects of the State. This, and the problems that the government may be faced with, are discussed in the subsequent paragraphs separately, namely (i) the case where the treaty has the effect of changing the status of the territory, and (ii) the case of imposing a Treaty of Peace.

In cases of treaties under which either a part of the territory is ceded or acquired, the question arises as to whether such treaties would require any legal cover for their implementation. The constitution defines territories of Pakistan as comprising territories known by their respective names and "such States and territories as are or may be included in Pakistan, whether by accession or otherwise". This is a residuary provision and may howsoever become included in Pakistan. In that event the inhabitants of that territory would become citizens of Pakistan from the date the President, by order, specifies that the inhabitants of the acceding ter-

ritories, by reason of their connection with that territory shall become citizens of Pakistan and such persons shall become citizen of Pakistan from the date of the order¹⁸. The procedure laid down by the statute is simple and merely provides that when such a situation arises the Federal Government may by notification in the official gazette, and on such terms and conditions as may be specified in such notification, apply all or any of the citizenship rules to persons who, by reason of their connection with any territory which may be incorporated in Pakistan, are to be citizens of Pakistan.¹⁹

On the other hand as regards the cession of a territory, the constitution is silent. It seems that where cession of a territory takes place the legislature may have to be taken into confidence, as it may, in certain circumstances, require legislative cover. Here two types of situations may arise.

One is where a part of the territory, which according to the definition in the constitution constitutes part of the territory of Pakistan, is ceded and where legislative cover may be required. This was the line of argument at the Supreme Court in its advisory opinion referred to earlier. The Supreme Court observed, *inter alia*:

“[t]hough treaties relating to war and peace, the cession of territory, or concluding alliances with foreign powers are generally conceded to be binding upon the nation without express parliamentary sanction, it is deemed safer to obtain such sanction in the case of an important cession of territory”²⁰.

It is submitted that in the situation contemplated the legislature must be involved in all circumstances as cession of a part of the territory may in certain cases involve amendment of the constitution in accordance with the specified constitutional procedure. Here again we may be confronted with two types of situations.

The first type of situation that may arise is where boundary adjustments are carried out under a treaty in areas where no demarcation has ever taken place. This act of the executive may not require any covering legislation as it is not clear whether it has any affect on the territory of the State or not. In most cases settlement of boundary disputes cannot be held to be cession of a territory. Thus final demarcation of the boundaries with Iran and China did not need legal cover for their implementation. Neither was legal cover required for implementing the Rann of Kutch award.

18. Section 13 of the Pakistan Citizenship Act 1951.

19. Rule 18 of the Citizenship Rules 1952.

20. PLD (1973) S.C. 563.

The other type of situation that may confront Pakistan is where a part of the territory, as defined in the constitution is ceded under a treaty. In such cases, the legislature will have to be involved as this act of the executive would, in fact, amount to an amendment of the constitution, which under the constitution of 1973 is outside the pale of the executive authority.

Another point that requires detailed consideration is whether the executive organ of the government can impose a treaty of peace on the people of Pakistan. In Pakistan, as already discussed, the Federal Government has the exclusive power to conclude treaties. Further, the constitution imposes on the Federal Government the obligation to take all necessary measures for the defence of the federation, or any part thereof, in peace or in war.²¹ In this regard Article 245(1) provides that the "Armed Forces shall, under the direction of the Federal Government, defend Pakistan against external aggression or threat of war....". As declaration of war is the prerogative of the Federal Government (or more precisely the President) it can also be inferred that conclusion of peace treaties, which is an integral part of the conduct of the functions relating to foreign affairs, are also binding unless they require legal cover for any of the reasons discussed herein before. The Supreme Court in its advisory opinion referred to earlier held that "treaties relating to war and peace.....are generally conceded to be binding upon the nation without express Parliamentary sanctions". Both²² the Tashkent Declaration as well as the Simla Agreement were for all practical purposes peace treaties and neither of them required any legislative cover for their implementation.

It is clear that the executive may conclude and implement treaties without legislative cover which do not infringe upon domestic laws or are considered detrimental to public order. I now intend to briefly discuss the extent to which the court may apply treaties which do not conflict with out domestic laws while the subject-matter they deal with have not been covered by the municipal laws of Pakistan.

In our legal system, as is apparent from the earlier discussion, international law does not automatically form part of our domestic law. Consequently a treaty which has not been given statutory protection generally lacks the force of law in this country and, therefore, the courts are not legally bound to take cognizance of it. However, on the question whether they should or should not take cognizance of such treaties, there are two schools of thought.

21. See item 1 of the Fourth Schedule of the Constitution of the Islamic Republic of Pakistan.

22. PLD (1973) S.C. 563.

One view is that a treaty should not be binding on the courts unless they have the legal cover. If the government, through an appropriate organ, did not take any action to make the treaty obligation legally binding it would not be appropriate for the courts to do so and thereby assume the role of the legislature. It would be wrong for the courts to do something indirectly which has not been done directly through the enactment of the law – a treaty to which the legislature has failed to attribute the force of law cannot be given that very same force by the judiciary.

The other school of thought base their argument on public policy and contend that a judge must give effect to a rule of customary international law and, therefore, it is incumbent upon him to ascertain the law as applied by other civilized nations. If a treaty is in conformity with the rules established in customary international law the court must consider the treaty either as a source or as evidence of customary international law provided that it does not violate the domestic statutory norms. This approach is also in accord with the public policy imperatives that customary rules of international law applied by the civilized States must be respected in deference to international comity.

As discussed in the foregoing paragraphs under our constitution the powers of the executive are co-extensive with the legislative powers of the Federation over which the *Majlis-e-Shoora* has the exclusive competence to legislate. Further, it has also been established that in our legal system, in case of any conflict between our laws and treaty obligations, the Courts shall apply the laws of the land. However, while it is clear that the executive cannot act against the provisions of any law for the time being in force in Pakistan, it does not at all follow that in order to enable the executive to function in relation to any particular subject or situation, there must be a law already in existence. As discussed earlier in this article, the constitution of the Islamic Republic of Pakistan gives the Federal Government ample space to maneuver while conducting its foreign relations. While it is true that the doctrine of the supremacy of the law denotes, *inter alia*, the overriding imperative to secure observance of the statute and the common law in all spheres, it is equally clear that there are spheres in which activities are reserved to other agencies including the executive, on which courts seek and accept guidance from the executive, particularly where the executive action in relation to the conduct of foreign affairs has legal implications. For example, the existence of a state of war has legal implications on whether a certain individual is a friendly alien or an enemy alien and the property owned by such person has to be given different treatment depending on whether a state of war exists or not; whether certain territory is recognised as an independent state and the decision of the executive one way or the other will have the legal

effect on whether or not to extend sovereign immunity to the State property or public actions; whether a particular representative is recognized as a diplomatic agent and the advice of the executive either way will have the legal consequence of determining whether he is entitled to diplomatic privileges and immunities or not. In all such cases the practice in Pakistan has been that the courts apply to the executive whenever they desire to know the factual position²³, and the advice of the executive authority concerned, in our case the Foreign Office, is usually considered as conclusive. In case of treaties concluded with foreign countries, if we invoke the above principle as an analogy, it would only be appropriate that while the courts should not apply treaties in complete disregard of our laws they should recognize the obligations incurred by the executive if no infraction of the laws results thereby. It would be highly undesirable that the courts should come to a decision which might embarrass the government with regard to the obligations which the Government of Pakistan may have incurred under a treaty. Entering into treaties with other countries falls within the ambit of the "Act of State" doctrine. Therefore, the courts can take judicial notice of such acts of State, and for this purpose, in any case of uncertainty, the courts may seek the necessary information from the appropriate governmental agencies, and the information so received should be conclusive²⁴.

It has never been my intention to pronounce on how our courts should act in cases where a treaty, entered into with foreign governments by the executive, has not been given statutory cover, and how the judiciary, when called upon to pronounce on the *vires* of such a treaty, should act. However, keeping in view international practice and our own limited experience in this field I may venture to briefly suggest certain guidelines on this subject.

I entirely support the principle of supremacy of our laws over any treaty obligation that we may incur in case of any inconsistency between the two. As a sovereign State our laws should prevail and, therefore, the executive, while negotiating a treaty or ratifying an international convention must first ensure that the obligations it is likely to incur thereunder must not in any manner infringe upon our laws or our legitimate national interests. However, in cases where there is no such conflict or inconsistency the treaty obligation must prevail and the judiciary should not feel shy in taking cognizance of the treaty provisions simply because there is no legal provision recognizing such an obligation.

23. See the Civil Procedure Code.

24. See n. 16 *supra*.