
From ratification to implementation:
'domesticating' the CEDAW in state, government
and society. A case study of Pakistan

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1 Introduction

This chapter investigates the extent to which the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) finds a place in governmental and non-governmental policy documents, legislation, judicial decisions, governance structures and institutions in Pakistan. It poses the question whether the CEDAW's pre- and post-ratification processes and attendant discourse have 'domesticated' it within state, government and society in that jurisdiction. The study suggests that in a country where pluralism is deeply embedded in legal culture as well as in religious and cultural norms, human rights instruments in general and the CEDAW in particular receive an ambivalent and mixed reception as the newest layer of plural legalities.¹

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¹ For a study of cases in the superior courts from 1980 to 2003 where human rights norms and instruments inform judgments, see S. S. Ali, 'Interpretative strategies for women's human rights in a plural legal framework: exploring judicial and state responses to Hudood laws in Pakistan', in A. Hellum, J. E. Stewart, A. Tsanga and S. S. Ali (eds.), *Human Rights, Plural Legalities and Gendered Realities: Paths Are Made by Walking* (Harare: Weaver Books, 2006) 381–406.

This case study draws upon a variety of governmental and non-governmental sources,² and surveys of judicial decisions of the high courts and the Supreme Court that have invoked the CEDAW since Pakistan's ratification in 1996, and is informed by the academic literature on the approach of Pakistan and other Muslim states to the CEDAW. The author herself was a participant in the accession process and draws upon those personal experiences in developing the present study. She wrote a comparative study of the CEDAW, Islamic law and the laws of Pakistan, advancing the case for ratification.³ As a member of the women's and human rights movement, she campaigned for its ratification in seminars and workshops. As a member of the Senate Commission of Inquiry for Women⁴ and the Prime Minister's National Consultative Committee, she was privy to discussions leading to the Cabinet's decision to ratify, and she brings this privileged insight to this chapter. In the post-ratification period, she held the post of Cabinet Minister for Health, Population and Women's Development in the government of the North-West Frontier Province⁵ (1999–2001) and was the first Chair of the National Commission on the Status of Women (NCSW) (2000–1). This chapter has also benefitted from discussions and personal communications with members of the Pakistani NGO community, in particular those involved in the 38th Session of the CEDAW Committee, in 2007, where Pakistan's country reports were under discussion.

2 The CEDAW within a religious, cultural and socio-legal context

Since its inception as an independent nation in 1947, Pakistan has struggled with multiple strands of its identity (religious, cultural, ethnic and

² Including Government of Pakistan (GOP) documents, discussions in the Prime Minister's National Consultative Committee for Women (1994–5), documents relating to the Senate Commission of Inquiry for Women (1995–7), working papers on the GOP's position regarding the CEDAW, Pakistan's country reports to the CEDAW Committee, shadow reports to the CEDAW Committee from NGOs and civil society organisations, and the Concluding Comments of the CEDAW Committee upon consideration of Pakistan country reports.

³ S. S. Ali, *A Comparative Study of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, Islamic Law and the Laws of Pakistan* (Peshawar: Shaheen Printing Press, 1995).

⁴ Leading to the Commission's 1997 *Report of the Commission of Inquiry for Women in Pakistan*.

⁵ Now renamed the Khyber Pukhtunkhwa.

linguistic)⁶ and the manner in which these inform conceptions of state, government, law and society, as well as the status of women. Pakistan's Islamic identity (and its role in the Constitution and in law-making as well as the broader nation-building project) is the core element in debates on women's rights in that jurisdiction. As Mullally so aptly observes:

Although the fundamental rights chapter of the Constitution guarantees equality before the law, the pursuit of gender equality has frequently been sacrificed to religious-cultural claims defining and limiting women's status. Yielding to such claims has served the interests of nation-building while at the same time guarding against any serious threat to the modernizing agendas of Pakistan's political élite. Lost within such compromises is the recognition of women as bearers of rights, with equal rights to participate in the definition of religious-cultural norms.⁷

It is pertinent, besides, to highlight the discursive nature of an Islamic legal tradition that is susceptible to multiple interpretations of the Qur'an and Sunna (the primary sources of Islamic law), resulting in a plurality of views regarding authoritative and legitimate formulations of 'Islamic' law:⁸ General Zia-ul-Haq's 'Islamisation' of laws and society in Pakistan in the 1970s and 1980s, for example, used the slogan '*chador aur chardewari*' ('women veiled and within the confines of the home') despite its questionable basis in the Islamic tradition;⁹ meanwhile, the established right within the Hanafi school of juristic thought (of which most Pakistanis are adherents) of an adult Muslim woman to enter into a contract of marriage without the intervention, presence or consent of her male guardian (*wali*) was challenged in the Saima Waheed case.¹⁰

The vast majority of Pakistanis are adherents of Sunni Islam, which does not subscribe to an official clergy. This simple but important observation provides a background by which to understand why individuals and

⁶ Pakistan is home to some half a dozen major ethnic groups and a similar number of smaller ones including Punjabi, Baluch, Sindhi, Pukhtun and others.

⁷ S. Mullally, "As nearly as may be": debating women's human rights in Pakistan' *Social and Legal Studies* 14 (2005) 341–58.

⁸ S. S. Ali, *Gender and Human Rights in Islam and International Law. Equal before Allah, Unequal before Man?* (The Hague: Kluwer Law International, 2000).

⁹ For a detailed discussion see K. Mumtaz and F. Shaheed, *Women of Pakistan: Two Steps Forward, One Step Back?* (Lahore: Vanguard, 1987) Chapter 7.

¹⁰ *Abdul Waheed v. Asma Jehangir* PLD (1997) Lahore 301. In a similar case the father was convicted for murdering his daughter who had married of her own volition without the consent of the family: see *Muhammad Siddique v. State* PLD 449 (2001). The Maliki and Shafai schools, however, hold that a woman's consent must be given through her *wali*: M. A. Mannan (ed.), *DF Mulla's Principles of Mahomedan Law* (Lahore: PLD Publishers, 1995) at 390.

groups vie for authority and legitimacy in the name of Islam and Islamic law. In the sphere of women's rights, this absence of an organised clergy leads to 'forum shopping' for opinions of religious scholars by government and people to advance their rights or undermine them, as the case may be.¹¹ The potential for using Islam as a socio-economic and political tool in both the public and private spheres is significant and is employed by religious and secular parties as well as by the wider public. The founder of Pakistan did not envisage the nation as a theocracy, a position evident from his public expressions of Pakistan as a modern, democratic state where everyone was equal before and afforded the protection of the law.¹² Yet parallel to such sentiments have always existed religious and conservative forces demanding a clear expression and manifestation of an Islamic identity. Soon after the independence of Pakistan, the liberal, democratic element inside as well as outside of government realised the importance of 'playing the Islamic card'.¹³ Aware that multiethnic, multicultural and multilingual Pakistan needed a central theme to bind it together as a nation, religion became the obvious binding force. Consequently, Pakistan's Islamic identity has been highlighted in pronouncements from government, a trend that has found favour with the majority of the population, for whom 'cultural Islam' is an important part of their identity.¹⁴

In the context of women's rights, Islam has been and continues to be used both for *and* against women's rights and equality, depending on who is deploying the argument and at what forum.¹⁵ Since the inception of

¹¹ For example, Maulana Fazlullah, a militant clergyman from the Swat valley, has used FM radio to broadcast venomously misogynistic rhetoric, exhorting men to keep women inside the house, declaring them as the cause of all evils in society; while in 2010 Islamabad's Lal Masjid seminary led a vigilante campaign against women of 'loose morals' in the name of an Islamic duty to 'promote virtue and prevent vice'.

¹² See his presidential address of 11 August 1947 in J. Ahmed (ed.), *Speeches and Writings of Mr Jinnah* (Lahore: Sh. Muhammad Ashraf, 1964).

¹³ For a detailed discussion with reference to the Constitution, see G. W. Chaudhary, *Constitutional Development in Pakistan* (London: Lowe and Brydone, 1971) and Chaudhary, 'Religious minorities in Pakistan', *Muslim World* 46 (1956) 313–23.

¹⁴ See generally M. Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden: Martinus Nijhoff, 2006); M. Lau, 'Sharia and national law in Pakistan' in J. M. Otto (ed.), *Sharia Incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in the Past and Present* (Leiden: Leiden University Press, 2010) 373–432; A. M. Weiss, 'Interpreting Islam and women's rights: implementing CEDAW in Pakistan', *International Sociology* 18:3 (2003) 581–601; A. M. Weiss (ed.), *Islamic Reassertion in Pakistan* (Syracuse University Press, 1986); F. Halliday and H. Alavi (eds.), *State and Ideology in the Middle East and Pakistan* (London: Macmillan Educational Ltd, 1988).

¹⁵ See the discussions in F. Rahman, 'Status of women in Islam' in G. Nishat (ed.), *Women and Revolution in Iran* (Boulder: Westview Press, 1983) 37–54; J. L. Esposito, *Women*

Pakistan, this plurality of views has been apparent in the pronouncements of various political and governmental actors as well as the population in general. Jinnah, the founder of Pakistan, advocated women's rights, education and economic empowerment, and was accompanied by his sister Fatima in public engagements to highlight women's presence in the public sphere. Likewise, Ra'ana Liaquat Ali Khan, the wife of Pakistan's first prime minister, founded the All Pakistan Women's Association (APWA) to empower women in the field of education and skill development. But it was during this period that the conservative politician Abul Ala Maududi wrote his famous book *Purdah and the Status of Women in Islam*,¹⁶ which argued for women's complete segregation and a role inside the home prohibiting engagement in the public sphere.¹⁷ The gap between various ideological positions regarding the rights of women in Pakistan became fertile ground for disputes over women's rights in Islam and international law. Last but not least, customary practices, heavily influenced by patriarchal norms, inform perceptions of women's status and undermine women's rights in Islam.¹⁸

in Muslim Family Law (Syracuse University Press, 1982); A. Al-Hibri, 'Muslim women's rights in the global village: opportunities and challenges', *Journal of Law and Religion* 15 (2001, Fall) 37–66; R. Hassan, 'An Islamic perspective' in J. Belcher (ed.), *Women, Religion and Sexuality* (Geneva: WCC Publications, 1990); F. Mernissi (trans. M. J. Lakeland), *Women and Islam* (Oxford: Basil Blackwell, 1991); L. Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: YUP, 1992); A. Barlas, 'Believing Women': *Unreading Patriarchal Interpretations of the Qur'an* (Austin: University of Texas Press, 2002); Z. Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law* (London: I. B. Taurus, 1993) and *Islam and Gender, the Religious Debate in Contemporary Islam* (Princeton University Press, 1999); S. Haeri, *Law of Desire: Temporary Marriage in Shi'i Iran* (Syracuse University Press, 1989); H. Afshar, 'Behind the veil' in H. Moghissi (ed.), *Women and Islam: Critical Concepts in Sociology* (London: Routledge, 2004) 71–86.

¹⁶ Al-Ash'ari (trans. edn) (Lahore: Islamic Publications, 1972).

¹⁷ Maududi typifies the complexity of Pakistani understandings of 'Islamic' law: in various books he argued that women's empowerment through employment in the public sphere is the cause of societal evils and is prohibited in Islam, asking at one point in *Purdah and the Status of Women in Islam*: 'Why should a woman who wins her own bread, supports herself economically and does not depend on anyone for security and maintenance, remain faithfully attached to one man only for the sake of her sexual desire?' In 1966, nevertheless, Maududi and his party turned a political somersault by supporting a female presidential candidate while the 'liberal' opposition parties (and that of the incumbent president) published pamphlets arguing *against* women as heads of state.

¹⁸ For instance, Islamic law accords women inheritance rights, yet cultural articulations negate this by denying daughters the right to inherit land; male child preference continues as a cultural norm but has no support in Islam, as the Prophet Muhammad himself had no male offspring to survive him and his preference for his daughter Fatima was

Differing conclusions over women's (in)equality produced by diverse lines of argument based on Islam and Islamic law are evident from the debate on whether Pakistan should become party to the CEDAW. The fifteen-year journey toward final accession in 1996 was difficult and contested, both within official circles as well as within various social constituencies, and reflected the plurality of views regarding what constitutes 'Islamically' and culturally acceptable human rights and whether UN human rights instruments are compatible with human rights in the Islamic legal tradition.¹⁹ The debates also reflected the different 'galleries' (national and international) to which government and society perform, and the various audiences observing these performances. Pakistan's history of participation in human rights treaties (including the CEDAW) has also been influenced by a political history that has oscillated between elected governments and military regimes, both of which have used Islam as a tool of political expediency.

The debate, then, over women's rights and the place of the CEDAW is driven by a range of divergent opinions and viewpoints.²⁰ In her analysis of plural legalities and their impact on women's rights in Pakistan, Shaheed notes that the intersection of culture with custom, law and politics has direct implications for women's rights.²¹ It is the power elite who decide what constitutes 'valid' culture and custom and how these will be applied in the formal and informal realm. Pakistan's discourse of women's rights and of the CEDAW is influenced by the interpretations of those in positions of power (often mitigating *against* women's rights), who are not necessarily those in government.²² While government may subscribe

exceptional in its explicitness; adult women have the right to marry of their own choice, but societal norms expect women to defer to the spouse chosen by the family.

¹⁹ This approach is of course not confined to Muslim countries. There is a rich body of literature on universalism versus relativism in human rights debates, including 'Asian', 'African' and 'Western' concepts of human rights.

²⁰ See e.g. Y. Zaidi, 'The interplay of CEDAW, national laws and customary practices in Pakistan: a literature review' in S. S. Ali (ed.), *Conceptualising Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of Application of CEDAW in Bangladesh, India and Pakistan* (New Delhi: UNIFEM, 2006) 199–263.

²¹ F. Shaheed, 'Engagements of culture, customs and law: women's lives and activism' in F. Shaheed *et al.* (eds.) *Shaping Women's Lives* (Lahore: Shirkatgah, 1998) 61–79.

²² For instance, in 2008 Baluch tribal senators in the Parliament supported the burying alive of women who had acted against cultural norms. Similarly, at the height of the militancy in the Swat valley in 2007–8, girls' schools were burned down and a 'call' to keep them at home was heeded by parents and families concerned about the safety of their daughters. Students of religious *madrasahs* have been known to harass women who do not cover their head when in public.

to the rhetoric of women's rights, and may desire to be *seen* to subscribe by the international community and by elements of Pakistani civil society, there exists a dissonance between formal laws and governmental policy on the one hand, and practices and beliefs on the other.²³

3 The arduous journey toward accession

Demands for the ratification of the CEDAW were made by women's NGOs and the human rights movement in Pakistan as soon as it was adopted at the UN in 1981;²⁴ yet it took fifteen years of consistent lobbying to keep the issue alive until the decision to accede was finally made.²⁵ On a number of occasions during the mid to late 1980s,²⁶ the government signalled its intention to sign the Convention, but the issue remained unresolved. It is worthwhile discussing briefly one particular such initiative in 1987, as it reflects the thinking within many sections of state and society regarding

²³ Witness, for instance, the wide gap between enrolment of girls and boys in schools. At a formal level, all children have access to schools but cultural practices hinder girls from going to school.

²⁴ Pakistan has a robust women's rights and human rights movement dating back to before independence. For an overview see *Women of Pakistan*, *supra* note 9; S. S. Ali, 'Law, Islam and the women's movement in Pakistan' in S. M. Rai (ed.), *Gender and Democratisation: International Perspectives* (London: Routledge, 2000) 41–63.

²⁵ Prominent among the groups and organisations lobbying for the CEDAW were the Human Rights Commission of Pakistan, the Aurat Foundation, Shirkat Gah Women's Resource Centre, the All Pakistan Women's Association, the All Pakistan Women Lawyers Association, Simorgh Women's Resource and Publication Centre, the Applied Socio-economic Research Resource Centre and the Women's Action Forum.

²⁶ The government considered the issue in 1984 but no decision was made (see *Working Paper: The Convention on Elimination of All Forms of Discrimination against Women* (Islamabad: Government of Pakistan, Ministry of Foreign Affairs, 1994)). In 1985 the National Commission on the Status of Women, formed to assess the situation and make recommendations for improvement, repeated the demand for accession. However, no action was taken, and in response to the candid views presented in the report by its outspoken female chair, Zari Sarfaraz, the government withheld publication (see *Report of the Pakistan Commission on the Status of Women* (Islamabad: Government of Pakistan Printing Press, 1986)). The *Report* was finally circulated when Benazir Bhutto assumed power in 1988. It is interesting that General Zia-ul-Haq's government, known for its oppressive policies toward women, found it necessary to create a Women's Division in the Cabinet Secretariat that was later formed into a fully-fledged Ministry of Women's Development and Youth Affairs in 1989. It was this Ministry that led the consultation for signing the CEDAW. In 1989 Benazir Bhutto issued a directive to look into the CEDAW with a view to exploring accession. This was done to coincide with the tenth anniversary of the CEDAW and ahead of Bhutto attending a UN-sponsored symposium in New York. Again, no positive outcome came of this initiative. See *Working Paper*, *supra* this note at 3.

the place and position of women and their stereotypical roles in religion, custom and tradition.

In 1987 it was recommended by a committee of federal Ministries that Pakistan sign,²⁷ but only with a blanket reservation stating that 'The Government of the Islamic Republic of Pakistan agree[s] to ratify the convention to the extent that articles and sub-clauses are not repugnant to the teachings of the Holy Quran and the Government of Pakistan shall be the sole judge of the question whether such repugnancy exists.'²⁸ This proposal, an example of 'playing the Islamic card' before a conservative domestic audience, would have been unacceptable to the international community, since it would have given Pakistan the right to interpret the CEDAW in accordance not with international norms but with domestic understandings of women's rights. Conversely, such a reservation would no doubt have met with the approval of those significant numbers of Pakistanis who consider Islam to be the overarching normative framework informing their legal and social system.

The Ministry of Foreign Affairs, however, conscious of how such a reservation would be received internationally, opposed this on the grounds that other states would enter objections, the reservation being conceived as contrary to the 'object and purpose of the Convention' under Article 28(2).²⁹ Despite this, the Ministry's comments on the difficulties encountered by non-Western states in ratifying the CEDAW resonated with the sentiments of the proposed reservation:

[The CEDAW] was the result of Western women's rights activists and does not take into account the varied socio-economic conditions as well as the diverse customs, values, and religious and ethical perspectives of different societies in various parts of the world ... The Convention has been used by Western human rights activists as an instrument to not only criticise the situation in various Islamic countries but also the very fundamentals of the Islamic faith.³⁰

The Ministry's statement also reflected the existence and power of popular ideas of gender stereotypes, in that 'diverse customs, values, and religious and ethical perspectives' and 'varied socio-economic conditions' (as quoted above) were taken to inevitably imply a defensible gender *inequality* and a conflict with ideas of non-discrimination. If anything, of course, it can be argued that it is a government's duty to *remove* 'varied

²⁷ Including the Ministries of Law and Justice, Religious Affairs, Education, Foreign Affairs, and the Cabinet Secretariat.

²⁸ See *Working Paper*, *supra* note 26 at 2.

²⁹ *Ibid.* ³⁰ *Ibid.*

socio-economic conditions' insofar as they threaten access to basic human rights. Deeply entrenched in the Ministry's comments were popularly held convictions regarding the 'alien-ness' of women's rights emanating from 'Western' forums,³¹ regardless of the fact that these rights were being demanded by Pakistani women themselves. A final reason for reluctance to ratify the CEDAW in 1987 was that becoming a party would entail international scrutiny of the position of women in Pakistan, including the compilation of a country report and discussion thereof by the CEDAW Committee, a situation the Ministry of Foreign Affairs did not feel comfortable with. The matter did not progress much further.

During Benazir Bhutto's second tenure as prime minister (October 1993 to November 1996) serious efforts were initiated toward ratification. The government's renewed motivation is apparent from a letter written in August 1993 by the Secretary of the Ministry of Women's Development to the Foreign Secretary, recommending that 'the issue of Pakistan's ratification may be re-examined in view of the fact that women in Pakistan have made substantial progress in improving their status and also as citizens of this country and that *Pakistan's non-ratification was creating international embarrassment*'.³²

A series of meetings was held in Islamabad, some of which I had the privilege to attend in my capacity as a member of the Prime Minister's Consultative Committee on Women. Four meetings are especially noteworthy,³³ at which representatives from the relevant Ministries (including the Ministry for Religious Affairs, the Interior Ministry and the Council of Islamic Ideology) and NGOs³⁴ presented their views and comments on possible ratification.³⁵ The agreed outcome was that a case be prepared

³¹ Such popular rhetoric is evident in newspaper and journal articles as well as books authored by, among others, members of Jamaat-e-Islami (the Islamic Party), who frame the West as the morally corrupt 'other' conspiring to undermine a pristine Muslim populace through notions of human rights, liberalism and 'permissive' societal structures. For a detailed discussion see S. A. Cheema, *Problematizing 'Authenticity': A Critical Appraisal of the Jamaat-i-Islami Gender Discourse* (Warwick University PhD thesis, 2011).

³² *Working Paper*, *supra* note 26 at 3 (emphasis added).

³³ These meetings were held on 5 October 1994 and 4 January, 31 January and 13 June 1995.

³⁴ The consensus among NGOs in Pakistan whose views were solicited was that Pakistan should ratify the CEDAW without reservation (the author was personally present at this meeting, held in the Foreign Office on 5 October 1994). NGOs present included the APWA, Aurat Foundation, Shirkat Gah, the HRCP and Behbood.

³⁵ These views were sought by the Ministry of Foreign Affairs through O.M. No. UN (II)-9/4/94, dated 19 May 1994.

for the government to sign the CEDAW, subject to one specific 'temporary' reservation to Article 2(f), which relates to requiring States Parties to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.

Unsurprisingly, the proposal to enter a specific reservation to Article 2(f) met with stiff opposition from the Ministry of Women's Development, backed by legal academics working on the subject, women's groups and human rights activists,³⁶ who challenged the government's assertion that ratification without reservation was impossible. But, finding itself performing to different galleries, the government was obviously keen to emphasise its Islamic identity, both to the international community and in relation to its Muslim state counterparts. Reserving its position on Article 2(f), on the ground that it was inconsistent with Islamic law, would establish a point regarding the protection of Pakistan's Muslim identity. The fact that other Muslim countries had already entered substantial reservations was highlighted, and it was argued that this much was expected of Pakistan.³⁷ The hypocrisy of Western governments was also mentioned by the anti-CEDAW lobby, pointing as it did to their reticence to sign without reservations.³⁸

Supporters of ratification without reservation (including NGOs, members of civil society, academics and activists, some of whom were represented on the Prime Minister's Consultative Committee) reacted strongly to this proposal, arguing that Iraq, Egypt, Libya and other reserving states did not form the entire spectrum of Muslim countries: Turkey, Tunisia, Senegal, Mali, Indonesia and Yemen were equally 'Islamic' jurisdictions yet had ratified the CEDAW unreservedly. Pakistan, they argued, should come up with its own position regarding the CEDAW and women's rights

³⁶ The prime minister had constituted a Consultative Committee of concerned individuals and organisations to assist in the ratification process. The author was a member of the Committee as an academic specialising in the CEDAW and Islamic law. The APWA, HRCF, Aurat Foundation, Shirkat Gah, Simorgh, Applied Socio-economic Research and Behbood (being among the best known and reputable in the field of women's rights) were among the NGOs on the Committee (see *Comparative Study* (*supra* note 3) for a comprehensive list).

³⁷ *Working Paper*, *supra* note 26 at 6.

³⁸ The CEDAW is the most reserved human rights treaty in the catalogue, with national constitutions and domestic legislation the most-cited reasons for entering reservations. More than a dozen European states have entered reservations on the basis of national laws and constitutions.

and not blindly follow other countries over the specific issue of whether reservations ought to be entered.³⁹

It was to assess whether the CEDAW did in fact conflict with 'Islamic' values that, in 1995, I undertook a comparative study of the provisions of the CEDAW alongside the laws of Pakistan and of 'Islamic' law more widely.⁴⁰ The study, which was used as a campaign document in NGO seminars and workshops as well as by the government, noted that one-sixth of the CEDAW drafting committee comprised Muslim states, and that it was consequently hard to believe that a 'un-Islamic' document running counter to the spirit of Islamic law could have won their approval. Furthermore, although some Muslim states had entered reservations to certain Articles on the basis of their being repugnant to Islamic law and Shari'a, even these countries were not uniform in their opposition.⁴¹ The Consultative Committee ultimately proposed ratification without reservation.

4 Did the CEDAW conflict with domestic law?

The problem that then arose was how to address the fact that certain laws in force at the time were clearly discriminatory to women.⁴² The question was raised in the Prime Minister's Consultative Committee on Women as to whether these laws would require modification or repeal prior to ratification, or whether the process of review of domestic laws could continue thereafter. The view prevailed that the existence of certain provisions of domestic law that were incompatible with the substantive provisions of the CEDAW should not preclude Pakistan from becoming a State Party:⁴³

³⁹ *Comparative Study*, *supra* note 3 at 131–41.

⁴⁰ *Comparative Study*, *supra* note 3. The study demonstrated that, apart from a few laws informed by a literalist interpretation of the Qur'an and Sunna (including sections of the law of evidence, criminal law and inheritance laws), most laws did not conflict with the CEDAW.

⁴¹ For example, Algeria cited national laws; Indonesia has not entered reservations to the CEDAW's substantive Articles; Turkey's initial reservations (now partially withdrawn) cited the Turkish Civil Code and the Turkish Law of Nationality; Tunisia reserved on the basis of conflict with the Tunisian Nationality Code and Personal Status Code; Mali and Senegal ratified without reservations.

⁴² Including the Child Marriages Restraint Act 1929, Offence Against Property (Enforcement of Hudood Ordinance) 1979, Offence of Zina (Enforcement of Hudood Ordinance) 1979, Offence of Qazf (Enforcement of Hudood Ordinance) 1979, Qanoon-i-Shahdat Order 1984, Citizenship Act 1951, Punjab/Sindh/NWFP/Baluchistan Muslim Personal Law (Shariat Application Act) 1962 and the Pakistan Penal Code 1860.

⁴³ The late Shehla Zia, director of the Aurat Foundation, and the author both advocated this viewpoint at the 4 June 1995 meeting of the Prime Minister's Consultative Committee on Women held in Islamabad.

it was argued that a number of European, African and Asian countries had found themselves in similar situations but were making an effort to overcome the problematic provisions in their respective domestic laws. What was required at that time was for Pakistan to demonstrate goodwill and genuine concern for promoting gender equality by ratifying the CEDAW.

It is uncertain what precise impact the lobbying of human rights groups and academics had on the government's final decision,⁴⁴ but one factor stands out clearly in its decision-making: the impending Fourth World Conference on Women, scheduled to be held in Beijing in September 1995, was an incentive to ratify, particularly as Prime Minister Benazir Bhutto was leading the delegation. The Cabinet's decision (less than two weeks before the Beijing Conference) to ratify the CEDAW came at a politically opportune moment and placed Pakistan in a favourable light. Yet contrary to the impression given by government spokespersons that there would be no reservations or declarations, the subsequent instrument of March 1996 included the following declaration: 'The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of Pakistan.' A single reservation was also entered to Article 29(1) (dealing with dispute resolution), stating that: 'The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention.'⁴⁵

The declaration led to a number of objections from states,⁴⁶ which argued that it undermined the Convention. At the domestic level, NGOs and civil societies, as well as some academics, were of the view that the declaration amounted to creating a hierarchy of laws, with the CEDAW ranked below the Constitution of Pakistan.⁴⁷

⁴⁴ In addition to lobbying the government, proponents of the CEDAW also campaigned through seminars and workshops to generate support and raise awareness of the substantive provisions of the Convention. For instance, from April to June of 1995 the Women's Study Centre at the University of Peshawar, of which the author was the director, held a series of seminars at Quaid-i-Azam University Islamabad on the subject; a similar one was held by the Sustainable Development Policy Institute and a third, with the support of the APWA, was held in Lahore in summer 1995.

⁴⁵ *Multilateral Treaties Deposited with the Secretary-General*, UN Doc. ST/LEG/SER.E/15 (1997) 175.

⁴⁶ Including Austria, Germany, Portugal, the Netherlands, Norway, Denmark and Sweden.

⁴⁷ Shirkat Gah, the HRCF, the Aurat Foundation, the Women's Action Forum and others were critical of the declaration and continue to record their disagreement in shadow reports and presentations on the subject. See e.g. *Discrimination Lingers on ... A Report*

5 Domesticating the CEDAW in Pakistan

While the pre-accession process presented an opportunity for a critical examination of formal and informal laws, customary practices and religious norms, accession brought its own challenges and highlighted tasks necessary for effective implementation and monitoring. Both the government and NGOs were required to develop a methodology for collaboration as part of the process of monitoring and reporting to the CEDAW Committee. Unfortunately, given economic constraints and limited human resource capacity, the institutional structures that in an ideal world might help domesticate the CEDAW into Pakistani law have not been put in place as part of governmental routine. In fact, since accession the CEDAW has been viewed as a 'project' to be taken up subject to available funding (which is mostly expected to come from foreign donor agencies) without becoming part of mainstream, budgeted government functions. Time and again, and with support from international donors, 'project' proposals have been written and funding received, and consultants have been hired at governmental and NGO levels to write Pakistan's country report as well as shadow reports on behalf of the country's NGOs and civil society.

But this project-like approach toward the CEDAW resulted in Pakistan missing the deadlines for submitting its initial, second and third Periodic Reports, which were finally entered in August 2005 and considered in May 2007.⁴⁸ As for NGOs and civil society, two shadow reports have been submitted thus far. The first (*Discrimination Lingers on ... A Report on the Compliance of CEDAW in Pakistan*) was, according to its authors, endorsed by over 900 Pakistani human rights organisations.⁴⁹ A second shadow report (*Talibanisation and Poor Governance: Undermining CEDAW in Pakistan*),⁵⁰ expressing the views and concerns

on the Compliance of CEDAW in Pakistan (Lahore: National Commission for Justice and Peace, 2007) and *Talibanisation and Poor Governance: Undermining CEDAW in Pakistan* (Lahore: Shirkat Gah Women's Resource Centre, 2007).

⁴⁸ The *Fourth Periodic Report* (CEDAW Committee, 11 August 2011, UN Doc. CEDAW/C/PAK/4) was recently submitted and awaits consideration by the CEDAW Committee. The Ministry of Women's Development holds the mandate to prepare Pakistan's country reports, including engaging with civil society and government departments and Ministries in their preparation.

⁴⁹ *Supra* note 47. The lead organisations on this report were the National Commission for Justice and Peace and the Democratic Commission for Human Development.

⁵⁰ *Supra* note 47. The report was produced by Shirkat Gah with inputs from a number of other NGOs, and responds succinctly to the government's reports and to the prevailing atmosphere of militancy and lack of security in Pakistan at the time.

of twenty-three organisations, was submitted to augment *Discrimination Lingers on* and reviewed questions posed by the CEDAW Committee and the government's responses.

At a most basic level, Pakistan's Constitution requires that an international treaty, on ratification, does not directly become part of the domestic legal system. One of the first steps necessary to domesticate the CEDAW would therefore be to incorporate it into national legislation through an Act of Parliament, a step that the government has not so far taken. Following discussion of the government's *Combined Initial, Second and Third Periodic Report*,⁵¹ and prompted by questions raised by NGOs in Pakistan's two shadow reports, the CEDAW Committee expressed its concern that the Convention had not been incorporated into Pakistani law,⁵² to which the government responded in its *Fourth Periodic Report* by stating that: 'An International Convention or Treaty is not directly applicable in Domestic Law on Ratification in Pakistan. However, the provisions of such Treaties and Conventions are taken into consideration in formulating legislation and by Courts when interpreting the law.'⁵³ Since this is the government's latest position on the matter, it does not appear that any steps are anticipated to domesticate the CEDAW in the near future.

The government's position regarding its reservations to the CEDAW is also under close scrutiny at home and abroad. The position is reiterated in its *Combined Initial, Second and Third Periodic Report* as follows:

The Declaration facilitated Pakistan's accession to the Convention and represents the legal position on the matter ... The objective was not to go against the object and purpose of the Convention while assuaging the concerns of those who had misgivings about the Convention. Subjecting the implementation of the Convention to the Constitution of Pakistan was a sensible course of action ... Its authors had the benefit of studying [the UDHR, ICERD, ICCPR and ICESCR] the major international human rights instruments then in existence. Many of the principles contained in these documents are reflected in the Constitution. It can therefore be argued that in substance the declaration did not have a negative effect in the implementation of the Convention while at the same time enabling Pakistan to accede to the Convention. In practice also there do not appear to be any legislative, policy or administrative actions taken by the Government, which contravene provisions of the Convention on

⁵¹ CEDAW Committee, 3 August 2005, UN Doc. CEDAW/C/PAK/1-3; CEDAW Committee, 5 October 2006, UN Doc. CEDAW/C/PAK/Q/3; CEDAW Committee, 1 March 2007, UN Doc. CEDAW/C/PAK/Q/3/Add.1.

⁵² CEDAW Committee, 11 June 2007, UN Doc. CEDAW/C/PAK/CO/3 at 3.

⁵³ CEDAW/C/PAK/4, *supra* note 48 at 12.

basis of the declaration. The short comings in the implementation of the Convention, inevitable in any country, are not directly attributable to the declaration.⁵⁴

In other words, by ratifying the CEDAW but with a declaration and reservation, Pakistan was performing a difficult balancing act before international and domestic audiences demanding very different things of it.

Neither civil society in Pakistan nor the CEDAW Committee was convinced by this statement.⁵⁵ Pakistan's delegation was queried on the subject and Pakistan was urged to withdraw its declaration.⁵⁶ The Committee also sought clarification over which law would prevail in the event of a conflict of laws, to which the Pakistani delegate responded that: 'the Constitution guaranteed the equality of rights of men and women and banned discrimination based on race, religion, caste or sex. It was also true that no law could stand if it were found to be inconsistent with the basic law in the Koran, which provided the basis for Pakistan's traditional respect for women and protection of their rights.'⁵⁷ Another member of the delegation also made the point that Pakistan had ratified the Convention in 1996 but 'its basic law as stipulated in the Constitution remained in force ... There was no need to be concerned about any conflict between the Convention and Muslim principles, as Islamic law provided even more effective protection of women's rights than the Convention.'⁵⁸

Such differing responses offered to the CEDAW Committee by the Pakistani delegates highlight yet again the varying perceptions between and among government circles over where the CEDAW is placed in the legal pluralities of the country. One thing stands out clearly: the government has no intention of modifying its position, stating that the matter is still under review.⁵⁹

6 Legal obstacles to full domestication

Further obstacles in domesticating the CEDAW, and a constant point of issue in country and shadow reports as well as in Committee deliberations,

⁵⁴ CEDAW/C/PAK/1-3, *supra* note 51 at 8.

⁵⁵ See shadow reports, *supra* note 47.

⁵⁶ CEDAW/C/PAK/CO/3, *supra* note 52 at 3.

⁵⁷ CEDAW Committee, 19 July 2007, UN Doc. CEDAW/C/SR/781 at 4.

⁵⁸ *Ibid.* at 4-5.

⁵⁹ The delegation had indicated in its *Combined Initial, Second and Third Periodic Report* as well as at the meeting to consider the country report that the NCSW had been given the mandate to report back on whether Pakistan ought to withdraw the declaration. The *Fourth Periodic Report* does not share the outcome, if any, of the NCSW report.

are those laws that are explicitly discriminatory to women and in direct conflict with the CEDAW. These include the Citizenship Act 1951, the Law of Evidence Act 1984 and the Hudood Ordinance of 1979.⁶⁰ The Pakistani delegation at a meeting to consider its reports to the CEDAW Committee in 2007 expressed the government's commitment to abolish 'not only the 1979 Hudood Ordinance but also all discriminatory legislation'.⁶¹ The *Fourth Periodic Report* therefore dealt at length with developments in this area and described the various steps that had been taken to address discrimination. Yet, although some progress was reported, the discriminatory laws remain in force.⁶²

Finally, an indicator of domestication would be a level of awareness, discussion and use of the CEDAW's substantive provisions among civil society, academics, communities and individuals as well as the judiciary. In short, how far has its implementation percolated down through Pakistani society?

Although the personal skills and exertions of Salma Waheed, Secretary of the Ministry of Women's Development from 1993 to 1996, were crucial to effective cooperation between the government and wider civil society in the pre-accession process, the relationship between the two regarding the CEDAW is, in general, erratic at best and hostile at times. The first shadow report, *Discrimination Lingers on*, complained of an absence of cooperation post-accession: 'Despite that NGOs were ignored in preparation of the government report, as civil society organisations we pledge ourselves for a meaningful collaboration in the implementation of the human rights standards and commitments in CEDAW.'⁶³ The government, nevertheless, reiterated its commitment to collaboration with civil organisations, and noted that it had followed the harmonised reporting guidelines and engaged in an inclusive process for preparing the country report.⁶⁴

The processes leading to accession had provided an opportunity for individuals, groups and NGOs to raise the discussion of women's rights, and the CEDAW became the subject of campaigns.⁶⁵ In the post-ratification

⁶⁰ The Hudood Ordinance sets out punishments for, inter alia, extramarital sex. See the discussion in CEDAW/C/PAK/CO/3, *supra* note 52 at paras. 5, 16 and 17.

⁶¹ CEDAW/C/SR/781, *supra* note 57 at 6. The Women Protection Act 2006 has to an extent 'disabled' the Hudood law on extramarital sex.

⁶² See CEDAW/C/PAK/4, *supra* note 48 at paras. 43–64 for details of discriminatory provisions.

⁶³ *Supra* note 47, at 6.

⁶⁴ CEDAW/C/PAK/4, *supra* note 48 at 10–11. The guidelines are set out in Annex I.

⁶⁵ Including the 1993–5 campaign for CEDAW ratification (above).

period the CEDAW became part of training programmes run by governmental and non-governmental bodies, and translations of the CEDAW into national and minority languages made its contents more accessible at the grass-roots. The treaty also became a tool for women's rights, forming part of human rights education in NGO advocacy training sessions. Yet the fact remains that indigenising the CEDAW's substantive provisions and taking ownership of this 'bill of women's rights' remains at a superficial level.⁶⁶

7 Using the CEDAW model to advance women's rights in Pakistan

From 1999 to 2001 I held the portfolio of Cabinet Minister for Health, Population Welfare and Women Development in the government of what was then the North-West Frontier Province. As an academic and activist whose training and interest was human rights and Islamic law, my policy initiatives were motivated and informed by the ideas within the CEDAW. In the years after accession, there was a rare opportunity when I, as an academic activist, was able to put research findings into practice and test the CEDAW as a supportive tool and strategy for women's rights in Pakistan. More importantly, as a Cabinet Minister I considered it an obligation to implement Pakistan's CEDAW undertakings. Suffice to say that I encountered stereotypical perceptions of what needs to be done to 'take care' of the 'women question' at play at every level of government, and beyond in civil society.

Yet it is noteworthy that a government then led by a military general (Pervez Musharraf) had a total of 7 women Ministers out of 28 in its provincial and federal Cabinets, while many a democratically elected government has far fewer (this step in itself was in keeping with the spirit of the CEDAW, although the CEDAW was not the motivation behind these appointments). Soon after taking office, all women Ministers met in Islamabad to set up an informal Women Ministers Forum, laying out an agenda, both legislative and at policy and institutional levels, to take up women's issues and address problems confronted by women in the public and private spheres. The Forum's first initiative was, having studied similar bodies in India, South Africa, the UK, Egypt and other countries, to establish a statutory National Commission on the Status

⁶⁶ As one NGO activist remarked: 'CEDAW has been confined to a module in a human rights training programme; nothing more!' Personal communication.

of Women (NCSW), an autonomous watchdog for policies and actions insofar as they affected women, to monitor implementation of women's rights under national and international law, including the CEDAW.⁶⁷ The process of setting up the NCSW (of which the author was appointed first chair), provided a number of lessons in the manner in which the women's rights agenda might be advanced, and in how deep the conviction runs within government.

The first draft produced used the CEDAW and its Optional Protocol as a template,⁶⁸ the idea being that there would be the NCSW at the national level and individual complaints mechanisms in the provinces. Women ombudspersons would entertain petitions and provide decisions that would be implemented through government departments and Ministries. This draft met with stiff resistance from officials who felt that the NCSW replicated the role of the Ministry of Women's Development (MWD).⁶⁹ The approach of some officials had been to hive off anything to do with 'women's issues' into the MWD's lap, thereby absolving other Ministries of any further obligation. 'What is the need for two Women's Ministries?' one official asked the author. 'We already have one!' Another argument raised against the proposed NCSW and its complaint mechanisms was that we were planning a parallel 'government' for women.⁷⁰ But the most potent argument was one of finance: the NCSW as envisaged in our draft was said to be too expensive. The statute that finally won approval from the Cabinet and President was a negotiated document: the Women Ministers Forum had had a choice between a watered-down version without the individual complaints bodies in the provinces, or nothing at all. This is the version that went on the statute book, and the National Commission on the Status of Women came into being in 2000.

⁶⁷ The first of these meetings was held in Islamabad on 26 December 1999 with Dr Atiya Inayatullah in the chair. Those present included Zubaida Jalal, Shahida Jameel, Shaheen Atiqurrehman and the author. My ideas on national machineries for women was also informed by the work of Shirin Rai, including S. M. Rai (ed.), *Mainstreaming Gender, Democratising the State. Institutional Mechanisms for the Advancement of Women* (Manchester University Press, 2003).

⁶⁸ The 1999 Optional Protocol to CEDAW (OP-CEDAW) created a mechanism whereby a CEDAW Committee could hear complaints and make inquiries into abuses. The adoption of the CEDAW/OP-CEDAW model as a template meant that women would be able to use the NCSW to complain against violations of their rights within a domestic ambit.

⁶⁹ The eighteenth constitutional amendment has delegated Ministries of Women's Development to the federating units, i.e. the provinces, and the role of implementing the CEDAW has now been assigned to the Human Rights Ministries in the provinces.

⁷⁰ Personal communication with relevant civil servants.

While the NCSW experience was unquestionably informed by the CEDAW/OP-CEDAW model, another major development was not so directly informed: the constitutional amendment creating reserved seats for women at all levels of government and electoral laws facilitating this change. The Women Ministers Forum pressed for one-third representation of women in local bodies as well as in the Parliament (although at the Parliamentary level the proportion was in the end lower). The views within various constituencies were diverse, ranging from approval of women's political rights to complete disapproval on the basis that this would distort and tear the fabric of society. The constitutional amendment leading to women's reserved seats could not have been achieved without the almost unanimous support of male ministerial colleagues and, most of all, General Musharraf himself.

8 Domesticating the CEDAW within the superior judiciary

As touched upon above, one indicator of the CEDAW's domestication would be the use of its provisions in judicial contexts.⁷¹ The judiciary is, of course, potentially an effective vehicle for implementing human rights norms. Yet in the reported case law of Pakistan's superior judiciary (five high courts and the Supreme Court) from accession in 1996 through to 2010, there are only four judgments where the court specifically alluded to the CEDAW, two delivered by the same judge, Justice Tassadaq Hussain Jilani of the Lahore High Court.⁷² The third is a judgment of the High Court of Azad Jammu and Kashmir, citing the Jilani judgment, while the fourth is a Federal Shariat Court judgment in 2007 where the court took *suo moto* notice of section 10 of the Pakistan Citizenship Act 1951, declaring it discriminatory as it 'negates gender equality and is in violation of Articles 2-A (Objectives Resolution) and 25 (equality of citizens) of the Constitution, also against international commitments of Pakistan and, most importantly, is repugnant to Holy Quran and Sunnah'.⁷³

The most widely cited case is *Mst. Humaira Mehmood v. The State*,⁷⁴ a case of alleged *zina*⁷⁵ and abduction registered by a father (a sitting Member

⁷¹ I draw more widely upon the case law of the superior judiciary where human rights principles and instruments have been invoked, in 'Interpretative strategies', *supra* note 1.

⁷² Since elevated to the Supreme Court.

⁷³ *Suo Moto* No. 1/K of 2006 at para. 28.

⁷⁴ PLD 1999 Lah 494.

⁷⁵ Sexual intercourse outside marriage. In 1979 Pakistan adopted six laws through a so-called 'Islamisation' process in which laws were supposedly brought into consonance

of the Punjab Provincial Assembly) against the husband of his daughter, sparked by her having married of her own choice. The father knew, at the time of his complaint, that his daughter and the accused were lawfully married but went ahead and filed a case of *zina* nonetheless, as a result of which they fled. The police took the daughter home against her will, and her family faked a 'suitable' marriage ceremony, which they filmed and later produced in court as evidence of a prior marriage. The judgment against the father was a landmark decision in several ways, drawing as it did on a combination of Islamic law, the Constitution, and human rights instruments emanating from the UN and comparable documents from Islamic forums. The judge emphasised the duty of state institutions to respect, protect and promote the fundamental rights of every person, reminded the parties that Pakistan was a UN Member and a Party to the CEDAW, and drew attention to Article 16, which enjoins all Member States to respect the right of women to family life on a basis of equality with men. Justice Jilani also referred to Article 5 of the Cairo Declaration on Human Rights in Islam to reinforce his argument of women's rights within an Islamic framework. He condemned in no uncertain language the 'alliance' of state, society and family in undermining women's rights.

The second case where the CEDAW was specifically cited is the case of *Mst. Saima and 4 others v. The State*,⁷⁶ in which a Christian woman contended that she was lawfully wedded to her husband with her full consent and that the marriage had been performed by a Methodist minister. This was challenged by her mother, who argued that the minister did not hold a valid licence. As a consequence, the mother argued that her daughter was committing *zina*, and invoked the Hudood Ordinance 1979. Justice Jilani ruled that where a couple believe themselves to be married, a *prima facie* case of *zina* does not arise, even within the reading of the Hudood Ordinance. Quoting in particular Article 16 of the CEDAW, he also stated that:

The Court is also conscious of the protection given to marriage and the institutions of the family under the Constitution of the Islamic Republic of Pakistan and the UN Convention on the Elimination of all Forms of Discrimination Against Women. Article 35 of the Constitution enjoins the State to protect the marriage and the family.⁷⁷

with Islamic law. Of these the Hudood Ordinance 1979 made *zina* an offence punishable with stoning to death and whipping. The Women Protection Act 2006 has disabled its application to some extent but the law remains in force.

⁷⁶ PLD 2003 Lah 747.

⁷⁷ *Mst. Saima and 4 others v. The State* PLD 2003 Lah 747 at 751–2.

In *Mst. Sarwar Jan v. Abdur Rehman*,⁷⁸ the Court referred to the *Humaira* case approvingly, quoting the Cairo Declaration on Human Rights in Islam and the CEDAW and arguing that the government is under obligations to honour the Qur'an and Sunna and international conventions to ensure the rights of women during marriage and at its dissolution. This case concerned a Muslim wife who applied for dissolution of marriage on the basis of cruel and inhuman behaviour. The Court, discussing women's right to divorce under Islamic law, declared that equality is maintained between the spouses by allowing the wife this right through intervention of the courts.

In the fourth case, *Suo Moto No. 1/K of 2006*, civil society organisations including the Human Rights Commission of Pakistan (HRCP) and Aurat Foundation, as well as the National Commission on the Status of Women, made submissions and became parties in view of the case's implications for women's rights. The Federal Shariat Court took objection to the Citizenship Act 1951, under which Pakistani men could obtain citizenship for foreign wives but not vice versa, observing that gender inequality violated the Constitution and 'most importantly is repugnant to the Holy Qur'an and Sunnah'.

The Court, invoking its jurisdiction to examine laws regarding their Islamic legitimacy, declared it a basic principle of Islamic law to fulfil obligations and noted that Pakistan had made commitments to the international community by becoming a signatory to the Universal Declaration of Human Rights (UDHR), as well as the Convention on the Nationality of Married Women and the CEDAW.⁷⁹ The judgment followed Justice Jilani's style of drawing upon plural legal norms: the Constitution, Islamic law and international human rights law. A fascinating aspect is how its use of both Islamic law and the CEDAW supports a key argument of this chapter – that Islamic law may be used *for* as well as against women's rights to equality and non-discrimination.

Whilst in these cases the CEDAW was specifically cited in arriving at a woman-friendly decision, there is a wider body of case law where human rights in general have been used to support a judgment where women's rights have been threatened and/or violated, but in which no specific

⁷⁸ 2004 CLC 17.

⁷⁹ *Suo Moto No. 1/K of 2006* para. 23. The Court also cited Oppenheim's definition of international law as the 'body of customary and treaty rules which are considered legally binding by civilised States in their intercourse with each other'.

reference has been made to the CEDAW.⁸⁰ Why is this? It would appear that judges employ what they perceive as the most relevant laws and legal norms to support their decisions; an invisible ‘hierarchy’ of laws seems to be at play. Constitutional provisions, Islamic law and other statutory laws are placed above international human rights laws, including the CEDAW. It also appears that using human rights in general, and the CEDAW in particular, is an individual choice dependent upon the values and preferences of any given judge. In the Pakistani judiciary the CEDAW’s ‘champion’ seems to be Justice Jilani, but his decisions, though widely cited abroad in human rights circles,⁸¹ do not find a similarly enthusiastic following at home.

9 The impact of the CEDAW in Pakistan: concluding thoughts

Pakistan’s decision to accede to the CEDAW was a complex one politically and legally, dependent upon champions within government as well as among the public. The processes and discourse of CEDAW ratification clearly demonstrate that the Pakistani government found itself having to play simultaneously to two very different ‘galleries’. Accession to a women’s rights treaty within Pakistan’s pluralist Muslim polity was complicated by the plurality of views regarding what constitutes ‘Islamically’ and culturally acceptable human rights and the question of whether international rights instruments are compatible with rights in the Islamic legal traditions. At a governmental level, acceptance of the CEDAW was a top-down process driven by a conscious desire to acquire a place among the international comity of nations. Striking a balance between the domestic and the international was always going to be a challenge.

The questions of to what extent and at what levels the CEDAW has found a place within national structures and institutions and within civil society are thus difficult ones to answer. The first point to make is that from a governmental level down to the grass-roots, the conflict between Shari’a and international human rights law in general, and the CEDAW in particular, has tended to be overstated. Significantly, there has been little systematic discussion of those Articles of various treaties that clearly fall within

⁸⁰ See for instance *Shirin Dokht v. Pakistan International Airlines Corporation* 1995 PLC (C.S) 251; *Sameena Masood v. Pakistan International Airlines Corporation* PLD 2005 SC 831; *Shrin Munir v. Government of Punjab* PLD 1990 SC 295.

⁸¹ For example, The Centre for Women’s Research, *CEDAW. A Manual* (Colombo: Cenwor, 2006) at 35; Asia Pacific Forum on Women, Law and Development, *A Digest of Case Law on the Human Rights of Women (Asia Pacific)* (Chiangmai: APWLD, 2006 reprint) at 22.

the *norms* of Islamic law and Shari'a. Education, for example, which is an issue for the CEDAW, is also considered an obligation of every Muslim under interpretations of Islamic law, a Muslim state being in theory accountable for any lapses in providing this right to its entire people. But this theme does not find a place on the government's agenda and it is still not held accountable by those individuals and groups who subscribe to an 'Islamic' human rights agenda. Had those many provisions within the CEDAW that resonated with an 'Islamic' human rights agenda formed the starting point of the ratification debate, and had compliance with these been demanded of the government by Islamists, the outcome for domesticating the CEDAW in Pakistan would have been quite different.

In fact, 'playing the Islamic card' to trump women's rights may be a strategy on the part of those in positions of authority to deflect attention from a range of social and legal shortcomings that have little to do with religion. For example, the government has an obligation to ensure adequate provision for spending on basics that impact on the quality of life of all citizens, male and female. The Qur'an and Sunna demand implementation of these entitlements for all Muslims, but 'cultural Islam', especially in the sphere of the family, tends to undermine the rights of women in respect of health, education and economic empowerment. If women are to be kept from going to school for their own 'protection', the need to provide schools for girls – and the cost of so doing – is removed.

There has also been a process of resistance to ideas of women's rights from some religious-political parties and sections of society who perceived (and still perceive) the CEDAW as an alien, Western imposition. The present socio-political environment in Pakistan is pushing women back into their traditional, disadvantaged roles, and a rising tide of Islamic fundamentalism in recent years has put women's place in the public and private spheres under pressure. Armed conflict in the north-west of the country especially has had as one of its central agendas women's place in an Islamic society, as defined by a literalist, patriarchal reading of religious texts. The burning of girls' schools and threats against health professionals, for example, have led to parts of society demanding of females that they stay at home. Genuine security concerns have meant that even those sections of society who do not subscribe to keeping women at home and restraining their activity in the public sphere have been obliged to do so in the interests of safety. How state and society will respond to this latest challenge to women's rights, and whether the CEDAW is used as a mobilising vehicle, remains to be seen.

More positively, we find individuals and groups at the NGO, academic and civil society levels making robust demands for the use of the CEDAW as a reference point and lobbying to advance the women's rights and development agenda. Unlike India's CEDAW story,⁸² demands for accession to the CEDAW were initiated and strongly articulated by civil groups as well as by some governmental and political quarters. The accession process also opened up spaces for mounting challenges to fossilised notions of customary as well as religious laws. Advancing women's rights and the CEDAW at a national level will, however, require a critical mass of dedicated individuals in the right place at the right time. The National Commission on the Status of Women and the Women Ministers Forum may be looked upon as first steps on the road to internalising the equality paradigm in a state and society not naturally inclined to non-discrimination.

In conclusion, there is not in Pakistan at the present time a distinct trend toward effectively domesticating the CEDAW and women's rights instruments more generally. In many ways, the actors are lone persons or groups of persons committed to the CEDAW, playing specific roles at various moments in time. Initiatives by such actors might have made their mark upon the national landscape of women's rights, but the first shoots of equality are yet very fragile. The minimal implementation of the substantive provisions of the CEDAW is as much an issue of governance as it is of divergent ideological, political and socio-economic positions on women's rights and entitlements. The way forward includes a multiple approach of challenging the status quo of male–female inequality in the name of religion, culture and tradition; of accountable and transparent governance where men and women are equally facilitated and empowered; and of the opening up of discursive space to engage with varying interpretations of women's human rights in Islam.

⁸² See Madhu Mehra's chapter in this book.