NOTE

Enforcement of International Treaties by Domestic Courts of Iran: New Developments

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"Today, some of the decisions of a court are being distributed hand in hand in universities and cyberspace that are the honor of the judiciary and the Constitution. Let these judgments be publicized and discussed by legal scholars and students."[1]

President Hassan Ruhani
July 2, 2017

I. INTRODUCTION

Recently, some judicial decisions made Iranian headlines. In a recent speech, President Hassan Ruhani praised a judge for the sources of law he used in rendering judgments.[2] Ruhani was praising Justice Heshmet Rostemi, who, by invoking international human rights treaties, broke with a longstanding tradition of Iranian courts. Rostemi's are phenomenal decisions, because Iranian courts rarely invoke international treaties, especially human rights treaties.[3] Lack of transparency and resources,[4] judges' unfamiliarity with international law and treaties,[5] and judges' conservatism[6] are among the most important reasons which account for the scarcity of Iranian judges' references to international treaties. Moreover, when there is a relevant domestic law, the majority of judges resist invoking international treaties.[7] Some judges also believe that citing international treaties threatens their government, whose domestic laws are based on *Sharia* principles.[8] Others simply consider international treaties less important than domestic law.[9]

The structure and the quality of Iranian legal education also play a crucial part in practitioners' and judges' treatment of treaties. The Iranian

1. President Hassan Rouhani, *Speech at the Judiciary's Nationwide Conference*, ISLAMIC REPUBLIC NEWS AGENCY (July 2, 2017), http://www.irna.ir/fa/News/82582968.

2. *Id.*

3. Hamid Hashemi, *Implementation of International Obligations in Iranian Jurisprudence: Limitations and Capacities*, 15 LEGAL RES. J. 229, 235 (2009) (noting that "in light of the fact that a lack of enforcement of international treaties by domestic courts confronts no reaction by responsible entities in Iran, non-enforcement of international treaties by domestic courts should not come as a surprise.").

4. *See, e.g.*, Rouhani, *supra* note 1; Hamid Hashemi, *supra* note 3, at 239.

5. Iranian Students' News Agency, *Why Do Our Judges Not Cite Treaties?* (Feb. 2, 2017), http://www.isna.ir/news/95120100559/ (noting that "the unfamiliarity with international law has caused judges to not welcome invocation to international treaties by attorneys in statements of claims.").

6. *Id.*

7. Hassan Teymouri, *Heshmet Rostemi: A Legal Scholar for All Seasons*, MAZANDNUME (July 5, 2017), http://mazandnume.com/fullcontent/68359/1.

8. *Id.*

9. *Id.*

legal system is largely modeled upon *Sharia* law,[10] and by implication law school curricula consist mainly of courses covering *Sharia* law. State officials' call for and emphasis on the Islamization of social science, including legal studies, also likely influences the status of international law and human rights treaties in law school curricula and jurisprudence.[11]

Although the vast majority of State law schools offer courses in international law, they generally are not taught by qualified professors or do not deal with current developments in international law; this problem is even more acute in non-State law schools. Recently, some distinguished scholars empirically identified the drawbacks of legal pedagogical methods in post-revolutionary Iranian law schools.[12] Although the study is general in nature, its results may well be extended to explain the shortcomings of international law instruction in Iranian schools. One may even argue that the problems concerning international law instruction are more acute than the problems with legal instruction more generally.

The study addresses these shortcomings in various categories: the quality of law professors and oversight of their performance, law student admissions, law school pedagogical methods and law school curricula, and teaching resources. Among the most important factors that have contributed to the diminished quality of legal education are political considerations in law professors' appointments,[13] the lack of a strong system for promoting law professors,[14] and retirement of experienced professors, mainly for political causes.[15] Further factors are found in admissions policies, including the increase in admissions to non-State law schools without attention to student-faculty ratios[16] and the use of inappropriate admissions tests at the graduate-studies level that assess students' memory skills rather than their analytical capabilities.[17]

Nevertheless, it seems that the majority of problems arise from deficiencies in legal teaching methods.[18] The primary teaching method in all law schools, including the top schools, is based on law professors' lectures, so most students do not engage in class discussions. And if they

10. Principle 4 of the Iranian Constitution sets forth: "All laws and regulations in relations to civil, criminal, financial, economic, administrative, cultural, military, political and all other matters shall be based upon *Sharia* principles…." QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1979, art. 4.

11. *See, e.g.*, Nire Mirzababaei, *Social Science and Its Place from the Point of View of the Supreme Leader*, J. OF PAJUHESH VE ANDISHE 16, 27-44 (2010).

12. Hossein Safai & Mahmoud Kazemi, *The Challenges of Education and Research in the Field of Law in Iran and the Strategies to Address Them*, 5 COMP. L. R. 2, 650-84 (2015).

13. *Id.* at 652.

14. *Id.* at 653.

15. *Id.* at 655.

16. *Id.* at 657.

17. *Id.* at 656.

18. *Id.* at 658.

do, classmates and professors might treat their independent views with antagonism. This occurs not only at the undergraduate level but surprisingly also at postgraduate levels. This leaves most judges, who enter the judiciary following their undergraduate studies and the necessary exams, without independent analytical writing skills. In most cases, these judges limit their written opinions to brief evaluations of whether a claim is valid under the text of a statutory provision.[19]

The Socratic Method is foreign to Iranian law schools. Instead, students are encouraged to memorize materials offered by professors and are not taught to apply legal principles to facts,[20] which gives rise to current students' and future practitioners' inability to adequately analyze uniquely complex issues. Law schools do not take the study of comparative law seriously, and there is usually no connection between law school education and the judiciary's practice.[21] In fact, even though comparative studies of legal theories and international treaties have increased in recent years, due to a lack of connection between the judiciary and law faculties, judges are usually unfamiliar with these studies and thus do not make use of them in their judgments. In response, law faculties do not tend to give much weight to judicial decisions.

Moreover, lawyers' and judges' knowledge of international law and their references to international treaties are constrained by their lack of access to up-to-date international scholarship and jurisprudence. In fact, based on my own experience in the world of Iranian legal education, it appears that neither universities nor courts have access to worldwide legal databases such as LexisNexis, Westlaw, and HeinOnline. Even if they do gain access, the vast majority of judges and lawyers are not familiar with foreign languages, international legal instruments, or research methodology in international law.[22] Moreover, access to sensitive domestic decisions with possible national and international implications is limited; although a national database has recently been launched to collect courts' decisions, it is limited to only some of the decisions of courts in the Tehran Province.[23] The named factors have all had a significant impact on the frequency of Iranian domestic courts' usage of international treaties. The role of political considerations should also not be underestimated. One may reasonably assume that judges are afraid of citing international human

19. *See, e.g.*, Mohammadreza Mohammadi, *A Critical Look at Courts' Analysis in Civil Judgments*, JUDGMENT Q. 8, 18-32 (2014) (discussing judgments' shortcomings in terms of both reasoning deficiencies and writing style).

20. Safai & Kazemi, *supra* note 12, at 658.

21. *Id.* at 660.

22. *Id.*

23. The name of the database is the Judiciary's Research Center's Judgments Database, available at http://judgements.ijri.ir/SubSystems/Jpri2/Search.aspx.

rights treaties that are in direct conflict with statutory provisions with *Sharia* origins.

This Note examines the most important decisions I could access. In light of these decisions, I will address whether international treaties are directly applicable within the domestic courts of Iran and what rules of interpretation courts use to interpret the treaties' terms. The decisions show interesting developments, some of which are specific to Iran and others of which may generally provide good guidance for other domestic courts, especially with regard to treaty interpretation.

States make international treaties, but various channels, including international courts, international tribunals, foreign ministries, and domestic courts of contracting parties, enforce them.[24] Domestic courts particularly come into play with respect to implementing human rights and private law treaties.[25] Because international law, in most cases, does not regulate the way contracting States discharge their treaty obligations, contracting States' domestic laws determine how States comply with their international obligations.[26] International law scholars usually use theories of monism and dualism to explain the relationship between international law and domestic law.[27]

Monism states that domestic law and international law form a single body of law, but when the two conflict, international law should prevail much like a constitution prevails over a statute (radical monism).[28] On the other hand, dualist regimes consider domestic and international law to be entirely different bodies of law that regulate different actors and issues.[29] Under this approach, "each State determines for itself whether, when, and how international law is incorporated into domestic law, and the status of international law in domestic system is determined by domestic law."[30] Under either system, once international law becomes part of domestic law, courts must implement international treaty obligations. Enforcement of

24. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 179 (2nd ed. 2007).

25. THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 1 (David Sloss ed., Cambridge 2009).

26. JEFFREY DUNOFF, STEVEN RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 209 (4th ed. 2015); Yuji Iwasawa, *Domestic Application of International Law*, 378 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, THE HAGUE ACADEMY OF INTERNATIONAL LAW, at 24 (Brill 2016); Marc J. Bossuyt, *The Direct Applicability of International Instruments on Human Rights*, 15 (2) BELGIAN REV. OF INT'L L. 317, 317 (1980).

27. *See, e.g.*, DUNOFF, RATNER & WIPPMAN, *supra* note 26, at 210; Markus G. Puder, *Guidance and Control Mechanisms for Construction of UN-System Law–Sung and Unsung Tales from The Coalition of the Willing, or Not*, 121 PENN ST. L. REV. 143, 169 (2016).

28. ADEMOLA ABASS, INTERNATIONAL LAW: TEXT, CASES, AND MATERIALS 305 (2nd ed. 2014).

29. DUNOFF, RATNER & WIPPMAN, *supra* note 26, at 210.

30. *Id.*

international treaties requires interpretation of international treaties. Except when a treaty specifies interpretation mechanisms in the treaty itself, domestic courts are authorized to interpret treaty text according to their own principles.[31] Unfortunately, the courts do not all employ similar approaches in interpreting the treaties. Some read a treaty's provisions in accordance with the domestic rules of interpretation. Some ignore international treaties or make a very brief mention of them.[32]

This Note will examine three aspects of Iranian courts' approach in recent decisions. First, I will address general issues regarding the way Iran incorporates international treaties into its domestic law. In this discussion, I will address the relationship between international law and the Islamic Republic of Iran's Constitution and statutes. This discussion will show that Iran subscribes to the theory of monism, and that international treaties are directly applicable in Iran's domestic courts. The question of incorporation of customary international law is, however, beyond the scope of this Note. Following these general issues, I will address the enforcement of international human rights treaties and then the enforcement of private law treaties. The Note separates Iran's incorporation of other international treaties from its incorporation of human rights treaties because the Iranian domestic courts' enforcement of human rights treaties is in its infancy, and observations about the enforcement of human rights treaties in Iran may not apply to the enforcement of other treaties. I must also clarify that the decisions used in this Note are those that I could access through personal contacts, and, therefore, might not reflect the whole picture. Yet the data still show that domestic cases clearly invoking international treaties are few.[33]

II. IRAN'S INCORPORATION OF INTERNATIONAL TREATIES

In this section, I will examine the processes through which Iran gives its consent to be bound by international treaties and the requirements that must be met in order for a treaty to come into force domestically. This section will further address the hierarchy of international law and domestic

31. OLIVER DÖRR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 530 (2012).

32. *See, e.g., infra* notes 192 and 194.

33. *See, e.g.*, Hashemi, *supra* note 3; Teymouri, *supra* note 7; *see also* IRANIAN STUDENTS' NEWS AGENCY (Jan. 8, 2017), http://www.isna.ir/tag/%D8%AF%D8%A7%D8%AF%DA%AF%D8%A7%D9%87+%D8%AA%D8%AC%D8%AF%DB%8C%D8%AF%D9%86%D8%B8%D8%B1+%D8%A7%D8%B3%D8%AA%D8%A7%D9%86+%D9%85%D8%A7%D8%B2%D9%86%D8%AF%D8%B1%D8%A7%D9%86 (noting that, although there has been no study of the of use of human rights rules by the domestic court of Iran, one may reasonably assume that the number of uses is not so significant that one may speak of practice of the use of human rights treaties by domestic courts of Iran).

law and whether the Iranian Constitution subscribes to the theory of monism or dualism. This discussion will provide a framework for the analysis of the cases in parts II and III.

A. Treaties and the Constitution

International law generally does not regulate which authority or authorities are competent to give consent to a treaty on behalf of a State. This is usually determined by reference to the contracting States' constitutions or the terms of their agreement in the treaty itself.[34] The authority to ratify treaties might be vested solely in the executive, in the executive and the parliament together, or, depending on the nature of an international agreement, in either the executive or the parliament alternatively.[35] Iran falls within the latter group of States.

The general principle governing the relationship between treaties and the Iranian Constitution has been set out in Article 77. This principle dictates that all "treaties, conventions, contracts, and international agreements should be ratified by the House of Representatives."[36] The use of such strict language, justified in light of the concessions which granted certain rights to foreigners exclusively,[37] leaves no room for forceful domestic imposition of any international agreement by the executive's consent alone. This requirement, however, proved to be costly and impracticable.[38] As a result, the competent authority for the interpretation of the Constitution, the Guardian Council, started to construe Article 77 flexibly and excluded contracts between ministries of Iran, governmental organizations and State companies, and foreign State companies and institutions within the scope of Article 77.[39] In response, the Council of Ministers passed a Regulation on the Preparation and Conclusion of International Agreements on May 3, 1992.[40]

The Regulation defines an international agreement as an agreement that entails legal rights and incorporates sanctions for non-performance of agreements between the government of Iran and foreign States, foreign

34. Seyyed Hossein Enayet, *Conclusion of International Treaties in Accordance With the Law of Iran: A Comparative Study with Sharia Law and Contemporary International Law*, 9 INT'L L. REV. 21, 82 (1989).

35. *Id.* at 84.

36. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN 1979, art. 77.

37. Hossein Khalaf Rezaei, *Commentary on the Constitution: A Detailed Analysis of Principle 77 of the Constitution*, Research Institute of Guardian Council Research Paper No. 13950005, at 2 (May 1, 2016); 2 SEYYED MOHAMMAD HASHEMI, THE CONSTITUTION OF ISLAMIC REPUBLIC OF IRAN: SOVEREIGNTY AND POLITICAL INSTITUTIONS 178 (20th ed. 2008).

38. HASHEMI, *supra* note 37, at 179-80.

39. Rezaei, *supra* note 37, at 14.

40. Council of Ministers Decree, No. h91t112613 [3/5/1992].

State corporations, or international organizations.[41] The Regulation divides international agreements into two categories: treaties and executive agreements.[42] Treaties require ratification by the House of Representatives. Executive agreements do not require ratification by the House of Representatives, and the authority to conclude executive agreements has been vested in the relevant Iranian ministry or the highest executive officer of a relevant governmental organization or competent authorities on their behalf.[43]

Determining whether an international agreement is an executive agreement or a treaty depends upon the nature of the agreement's incorporated obligations.[44] Article 7 of the Regulation specifies subjects that must be concluded in the form of a treaty. They include, among others, agreements dealing with boundary delimitations and boundary dispute settlement methods; agreements focusing on economic, social, commercial, cultural, scientific, and technological cooperation and exchanges; and agreements regarding the establishment of and membership in international associations and organizations.[45] Should an international agreement's subject fall within one of these groups, for the agreement to domestically come into force, it must satisfy all constitutional formalities and statutes: the international agreement must include negotiation, temporary signature, ratification by the House of Representatives, confirmation by the Guardian Council, the president's final signature,[46] publication in the official gazette, and exchange of documents of ratification.[47] Thus, a treaty acquires domestic legal force once it is ratified and published in the official gazette (automatic

41. Regulation on the Preparation and Conclusion of International Agreements (1992). The Persian Text is available at http://rc.majlis.ir/fa/law/show/114276 (accessed 13 July 2017).

42. *Id.* at art. 1.

43. *Id.*, art. 2. The literature also defines a treaty as an agreement that is concluded between two or more States by the relevant authorities and comes into force after all formalities including ratification by the *House of Representatives* have been complied with. *See*, *e.g.,* Seyyed Hossein Enayet, *Conclusion of International Treaties in Accordance With the Law of Iran: A Comparative Study with Sharia Law and Contemporary International Law*, 6 INT'L L. REV. 73, 84 (1986).

44. Enayet, *supra* note 43, at 84.

45. Regulation on the Preparation and Conclusion of International Agreements, s*upra* note 41, at art. 7.

46. The effect of the president's refusal to sign a treaty is controversial among Iranian scholars. *See, e.g.*, MOHAMMAD REZA ZIAI BIGDELI [ZIAI BIGDELI], INTERNATIONAL PUBLIC LAW 115 (37th ed. 2009) (after alluding to the disagreement in the literature as to the effect of the president's refusal to sign a treaty, he concludes that the president signature is an indispensable part of the process of treaty making and without it the relevant treaty shall not become effective). *See also* Hashemi, *supra* note 37, at 177; MORTEZA GASEMZADEH, HASSAN RAHPEIK & ABDOLLAH KIYAEI, INTERPRETATION OF THE CIVIL CODE: DOCUMENTS, JURISPRUDENCE, AND SCHOLARSHIP 16 (Semt Publications 2009); Hamid Hashemi, *supra* note 3, at 246.

47. Enayet, *supra* note 43, at 84.

incorporation).[48] These requirements explain the relationship between the Constitution and treaties. That is to say, the House of Representatives cannot ratify a treaty that is inconsistent with the Iranian Constitution, because the Constitution trumps international treaties. However, once the treaty is ratified, one must assume that it is consistent with the Constitution.[49]

By contrast, executive agreements come into force once the relevant authorities sign them.[50] Executive agreements include, for instance, contracts concluded between a ministry or State-owned corporation and a foreign private company.[51] These agreements come into effect once a relevant authority signs them, subject to the requirements of specific statutes.[52] The relationship between international treaties and statutes, however, is an unsettled issue which this Note explores in the next section.

B. International Treaties and Statutes: A Question of Hierarchy

As noted, the Constitution does not address the status of international law in Iran's statutory domestic law. Article 9 of the Civil Code establishes the general rule that "treaties that have been concluded in accordance with the Constitution between the government of Iran and other States shall have the force of law."[53] The interpretation of the phrase "shall have the force of law" has given rise to enormous debate in scholarly writings.[54] The problem has become acute in light of other Civil Code articles[55] and specific statutes[56] that clearly speak to the superiority of international law over domestic law. By contrast, there are some treaties ratified by the

48. Iwasawa, *supra* note 26, at 24-25.

49. Mohammad Javad Shariat Bageri [Shariat Bageri], *The Superiority of International Treaties over Statutes*, 56 J. OF LEGAL RES. 279, at 291 (2011); Hajar Azeri and Nasrin Tabatabei Hesari, *The Iranian Legal System Challenges regarding Accession to the Human Rights Treaties from the Perspective of International Law*, 8.1 COMP. L. REV. at 9 (2017).

50. Enayet, *supra* note 43, at 81.

51. Guardian Council's Interpretation No. 3903 (28 October 1981); Rezaei, *supra* note 37, at 14.

52. Rezaei, *supra* note 37, at 4.

53. QANUNI MADANI [CIVIL CODE] Tehran 1307 [1928] [hereinafter CIVIL CODE], art. 9.

54. *See generally* Hamid Hashemi, *supra* note 3, at 238-40; Shariat Bageri, *supra* note 49, at 291-95.

55. *See, e.g.,* CIVIL CODE arts. 9, 974, and 1230. Article 974 sets forth that "the provisions of Articles 7, 962 and 974 of this Code are applicable as long as they do not conflict with international treaties that Iran has signed…." Article 7 reads that "foreign nationals in matters of personal status, legal capacity, and inheritance shall be, within the limits of treaties, subject to the laws and regulations of a state of which they are subject." The same approach has been taken in Article 1230 of the Civil Code.

56. *See, e.g.*, International Commercial Arbitration Act, art. 36(3); Registration of Patents, Industrial Designs and Trademarks Act of 2008, art. 62; Law of Enforcement of Civil Judgments of 22 October 1977, art. 171; Extradition Act of 4 May 1960, art. 1. The International Commercial Arbitration Act provides that "in the event that treaties between Iran and other states provides otherwise in respect of arbitrations falling within the ambit of this act, they shall be complied with." Similar language is found in the other Acts.

House of Representatives that expressly subscribe to the superiority of domestic law over international law when international law conflicts with domestic and *Sharia* law.[57] First, it is not clear whether Article 9 provides a conflict of law rule or not. If it does, it is also not evident whether domestic law or international law shall prevail. The relationship to other provisions and statutes is also far from clear.

The majority of scholars consider Article 9 as providing a conflict of law rule governing the hierarchy between domestic law and international treaties.[58]

One version of this view holds that "shall have the force of law" neither speaks to equality nor superiority of international law.[59] It does not endorse the equality of international law, because had the legislature intended that meaning, it could simply set forth that treaties *are* laws, not that they "have the force of law."[60] Under this interpretation, the phrase also does not indicate the superiority of international law.[61] This view is justified in light of the legislative history of Article 9, because under Iran's first Constitution dating to 1906, treaties were not laws and were of a different nature.[62] In this period, the Iranian Constitution followed a dualist theory.[63] However, at the time of the enactment of Article 9 in 1928, the importance of international law came to light and the Iranian legislature opted for a monist theory and the direct applicability of treaties within domestic law.[64] To avoid unconstitutionality of Article 9, the legislature made use of the phrase "shall have the force of law" to indicate that treaties are not laws, but have the effect of laws in terms of direct applicability. Under this view, although treaties do not have equal footing with statutes, they are treated equally in practice.[65] Moreover, this view signalizes that the phrase "shall have the force of law" has been abolished by subsequent statutes and the Iranian Constitution of 1979.[66] So, at the

57. *See, e.g.*, Law on Accession to United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 24 Nov. 1991, http://rc.majlis.ir/fa/law/show/91987, which allows the Government to accede to the Convention on the condition that in the event of conflict between the convention and domestic law and *Sharia* principles not to be bound by it; *see also* Law of Accession to The United Nations Convention on the Rights of the Child of 20 Feb. 1994, http://rc.majlis.ir/fa/law/show/92374.

58. *See, e.g.*, Hamid Hashemi, *supra* note 3, at 238-40; Ziai Bigdeli, *supra* note 46, at 90.

59. Hamid Hashemi, *supra* note 3, at 232-33.

60. *Id.* at 233.

61. *Id.*

62. *Id.* at 234.

63. *Id.*

64. *Id.*

65. *Id.* at 234-35.

66. *Id.* at 235.

most, this phrase equates international treaties with statutes.[67] As a result, when there is a conflict between domestic and international treaty obligations, the last-in-time rule shall determine which law prevails.[68]

In contrast, others have argued that Article 9 does not lay down a conflict of law rule; instead, a judge should look for a conflict of law rule in the Constitution.[69] In their view, the Civil Code as an ordinary law cannot logically determine the question of the superiority or inferiority of international law. Rather, the practice of the vast majority of States shows that it is a matter to be determined by States' constitutions.[70] But because the Iranian Constitution is silent regarding the issue, the question of hierarchy between international and domestic law must be resolved by relying on other norms.[71] Scholars who defend such a view argue that the superiority of a treaty over statutes stems from the nature of the treaty itself.[72] In their view, because international treaties are agreements between sovereign States, a State's unilateral intention cannot dictate the hierarchy between international treaties and statutes; therefore, a treaty as a reflection of a common intention of the parties takes priority over a statute as a reflection of the unilateral intention of a State.[73] However, this view seems merely to restate the conflict of law rule at an international level and thus oversimplifies the complexities inherent in the relationship of domestic law and international treaties.

Moreover, it has been argued that there are various treaties that Iran has ratified or acceded to with a clear reference to the superiority of international law over domestic law; thus, the equality of domestic and international law established in Article 9 of the Civil Code has implicitly been abolished.[74] Under this view, in the event of a conflict between domestic law and international law, the latter should prevail. This view is supported by the fact that, wherever Iran has wanted to give superiority to domestic law, it has made that condition explicit in its acceptance of the relevant treaty.[75] Accordingly, it is a reasonable conclusion that the general rule now is the superiority of international law over domestic law unless a treaty has been ratified that establishes the superiority of domestic law

67. Ziai Bigdeli, *supra* note 46, at 90; NASROLLAH EBRAHIMI, INTERNATIONAL PRIVATE LAW 74 (Semt Publication 2004); Farhad Khomamizade, *Interpretation and Enforcement of Treaties within Domestic Law*, 16 PRIV. L. STUD. 33, 47 (2010).

68. NASER KATUZIAN, THE CIVIL CODE IN THE LIGHT OF CURRENT LEGAL ORDER 31 (35th ed. 2012).

69. Shariat Bageri, *supra* note 49, at 290.

70. *Id.*

71. Shariat Bageri, *supra* note 49, at 291.

72. *Id.* at 284.

73. *Id.* at 292.

74. *Id.* at 285-95.

75. *Id.* at 293.

over international law. Recent decisions seem to support this interpretation of the general rule, though decisions dealing with human rights treaties have been cautious in explicitly endorsing it.[76]

III. ENFORCEMENT OF HUMAN RIGHTS TREATIES

As noted earlier, some of the decisions of Justice Heshmet Rostemi, a member of the Court of Appeal of Mazenderan, have given rise to much debate and discussion in Iran. These decisions rendered by Rostemi, who holds a degree in human rights from the University of Tehran,[77] amount to a revolution in Iranian domestic courts' practice in the decisions' use of and citation to international treaties of human rights since the establishment of the Islamic Republic of Iran. Unfortunately, because the practice has only recently begun, I could access only three of the handful of cases that have invoked international human rights treaties. In the following sections, I will address these three decisions and evaluate their strengths and weaknesses, if any. Before delving into the cases, it is necessary to give a brief description of the Iranian judicial system.

Iran is a unitary State that is composed of various divisions, all subordinate to the center. The Law on the Definitions and Rules of State Divisions specifies elements of State divisions, which include "villages, rural districts, cities, districts, counties, and provinces."[78] The divisions are defined by the size of the population; a village is the smallest division and a province is the biggest division, consisting of several counties.[79] Establishment of the courts with various ranks is based upon these administrative divisions at the discretion and determination of the head of the judiciary.[80]

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76. *See, e.g.*, The Public Court of Tehran, Branch 12, 9409970227201292 [03/14/2016], in INTERNATIONAL TRADE LAW IN IRAN'S JURISPRUDENCE 99 (Farhad Piri ed., Javdaneh Publication 2017); The Public Court of Tehran, Branch 12, 9409970227200872 [12/20/2015], in Piri, *op. cit.*, at 77.

77. *See* Teymouri, *supra* note 7.

78. Law on the Definitions and Rules of State Divisions, art. 1, http://rc.majlis.ir/fa/law/show/90769 (last visited Aug. 25, 2017).

79. *Id.* at arts. 2-7.

80. Law on the Establishment of Public and Revolutionary Courts of 6 July 1994, art. 2, http://rc.majlis.ir/fa/law/show/90416. "The head of the judiciary" must not be confused with the Iranian Supreme Court; the Constitution vests distinct functions in each of them. The Supreme Court is primarily charged with overseeing the proper enforcement of the laws and regulations by the lower courts and securing uniformity of jurisprudence (Iranian Constitution art. 161). By contrast, one of the primary duties of the head of the judiciary is to oversee and to make sure that the properties of the Supreme Leader, the President and his deputies, ministers, and their wives and children do not increase illegally (Iranian Constitution art. 142). The current head of the judiciary is Sadeq Ardeshir Larijani, more commonly known as Ayatollah Amoli Larijani.

The Supreme Court of Iran is the highest judicial authority in the country.[81] It is primarily charged with overseeing the proper enforcement of the laws and regulations by the lower courts and securing uniformity of jurisprudence.[82] The Supreme Court may have as many branches as needed; some branches handle criminal cases and some other legal issues.[83] The branches are mainly located in Tehran, the capital city; however, they might also be set up in other provinces should the head of the judiciary consider it necessary and appropriate.[84] When a branch of the Supreme Court issues a uniform decision, it is, subject to conformity with *Sharia* principles, binding on all branches of the Supreme Court and all other lower courts.[85]

The Courts of Appeal, or appellate courts, are the second instance courts competent to review cases decided by public courts, also known as first instance courts or courts of general jurisdiction. (For the sake of consistency, I will use the term "public courts" in this Note.) Appellate courts are established in the central county of each province.[86] They might have as many branches as needed, and they have jurisdiction to hear appeals from decisions of the public courts located in the same province. If the number of branches exceeds one, they will be divided into legal and criminal branches.[87] However, not all cases may be appealed; rather, cases qualified for appeal must involve certain types of disputes and certain amounts in controversy.[88]

The public courts have general jurisdiction to hear all civil and criminal disputes unless the issue falls within the jurisdiction of special courts, such as Revolutionary and Clerical courts.[89] Public courts are set up in districts, counties, and specific areas of large cities. The authority to establish these courts and determine their territorial jurisdiction, and the number of branches has been vested in the head of the judiciary.[90]

In the next section of the Note, I will address cases in which the courts made reference to international treaties.

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81. ABDOLLAH SHAMS, 1 CIVIL PROCEDURE: AN ADVANCED COURSE 98 (22nd ed. 2010) [hereinafter Shams].

82. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN 1979 art. 161.

83. Shams, *supra* note 81, at 91-92.

84. *Id.* at 93 para. 123.

85. *Id.* at 98 para. 133.

86. *Id.* at 70.

87. *Id.* at 70 para. 77.

88. *See, e.g.*, AINI DADRASSII MADANI [CIVIL PROCEDURE CODE] Tehran 1379 [2000], art. 331, which lists situations under which an appeal from the judgments of public courts will be available. Generally speaking, all non-financial judgments are appealable, whereas financial judgments are appealable if the amount of claim exceeds three million *Rials*.

89. SHAMS, *supra* note 81, at 64, para. 65.

90. *Id.* at 58-64.

A. Right to Choose an Occupation[91]

1. *The Public Court.* The dispute arose out of a marriage where a husband brought an action before the Public Court asking the Court to order his wife to stop working as a driver for schools of female students. The legal basis for the husband's claim was Article 1117 of the Civil Code, which sets forth: "A husband may preclude his wife from engaging in an occupation if he considers it inconsistent with his family interests or his or his wife's dignity."[92] The Public Court decided in favor of the husband, arguing that because the wife had not presented any evidence that she obtained permission to work from her husband, she must follow her husband's order and stop working as a driver.[93] The wife appealed the decision.

2. *The Court of Appeal's Holding.* The Court of Appeal annulled the Public Court's decision and held that everyone has a right to engage in work and to pursue a freely chosen or accepted occupation and that a core principle of human rights includes the equality of men and women without sex-based discrimination.[94]

3. *The Court of Appeal's Arguments.* The Court of Appeal cited various domestic and international instruments of human rights. The Court stated that although Iran has not yet ratified the Convention on the Elimination of All Forms of Discrimination against Women, other instruments of human rights oblige Iran to recognize a right for women to engage in an occupation of their choice.[95] The Court first invoked Articles 20, 22, and 28 of Iran's Constitution and Article 6 of the Labor Law[96] and then recognized the relevance of Article 23(1) of The Universal Declaration of Human Rights (1948), Article 13 of the Cairo Declaration on Human Rights in Islam (1990), ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, and Article 3 of the International Covenant on Economic, Social, and Cultural Rights (the ICESCR).[97] In the Court's view, because Iran has ratified these instruments of human rights without reservation, they have the "force of law" in accordance with Article 9 of Iran's Civil Code.[98] However, the

91. The Court of Appeal of Mazenderan Province, Branch 12, 940 [12/20/2016] [hereinafter Case No. 940].

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Ganuni Kar [Labor Law], Tehran 1336 [1957], art. 6.

97. *See* Case No. 940, *supra* note 91.

98. *See* Case No. 940, *supra* note 91.

Court did not clarify how domestic and international laws interact and which law should prevail when they conflict with each other.

Moreover, even though Iran had signed some human rights treaties before Iran's Islamic Revolution, the Guardian Council[99] has not ruled against the compatibility of these instruments with *Sharia*. Rather, the general policy of the regime has always been based upon cooperation with the monitoring committees of human rights treaties.[100] The Court particularly emphasized Article 26(1) of the Vienna Convention on the Law of Treaties (the VCLT) which states that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[101] Therefore, the Court held that Iran is bound to implement ratified human rights treaties.[102]

In the Court's view, all Islamic schools recognize the principle of equality of men and women as a core principle of human rights.[103] This principle also applies to women's activities outside the home and financial activities.[104] Nevertheless, this does not mean that women may exercise this right without limitation; rather, there are certain restrictions on women's right to choose an occupation in terms of the type of job they may choose. For instance, Article 1117 of Iran's Civil Code authorizes a husband to prohibit his wife from engaging in an occupation which he considers to be incompatible with his family interests or his or his wife's dignity.[105] Similarly, Article 18(3) of the Passport Law subjects issuance of a passport to a woman to written consent by her husband.[106] However, in the Court's view, restrictions of this nature do not distort the equality of men and women because other statutes recognize the same right of restriction for a woman. For example, Article 18 of the Law of Family Protection grants a wife the right to prohibit her husband from engaging in an occupation which she considers inconsistent with her family interest or her or her husband's dignity.[107]

The Court stated that "it is self-explanatory that the wife had engaged in the occupation with her own private car after obtaining the necessary

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99. The Guardian Council is a council composed of six legal experts and six Islamic experts (Faqīh). The parliament chooses and appoints legal experts and the supreme leader chooses and appoints Islamic experts. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN 1979 art. 91. The council has various duties, including but not limited to ensuring compliance of treaties and statutes with Islamic principles and interpreting the. *Id.* at arts. 4, 72, and 96.

100. *See* Case No. 940, *supra* note 91.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. CIVIL CODE art. 1117.

106. *See* Ganuni Gozarnameh [Passport Law], Tehran 1352 [1972], art. 18(3).

107. *See* Case No. 940, *supra* note 91.

licenses from Mazenderan's Department of Education."[108] The appellee had argued that the engagement of his wife in the driving occupation was inconsistent with his family interests and his and his wife' dignity in accordance with Article 1117 of Iran's Civil Code and had also caused disturbing effects on their day-to-day life including the upbringing of their children.[109] In response, the Court noted that "the burden to prove these claims rests on the appellee and he has failed to provide sufficient evidence."[110] The Court further opined, "Although a mere presentation of a child's transcripts by the appellant showing that the child has obtained excellent grades is not conclusive of good family condition, it is a very good indication that the appellant's engagement in driving has not had a disturbing effect or at least has not affected the quality of children's education negatively."[111]

Moreover, the Court stated that "the husband's right to prohibit his wife from engaging in an occupation is conditional and is limited to cases where it is inconsistent with his or his wife's dignity, which should be evaluated based on the compatibility of the occupation with a society's usages and ethics."[112] The Court opined that "the burden rests on the appellee to prove that the occupation was inconsistent with the society's usages and ethics and thus the Public Court was wrong in holding that the wife's failure to obtain her husband's permission was sufficient to prove the case."[113]

Further, the Court stated that "the engagement of the wife in the driving occupation for female students is not only consistent with the family's dignity and the society's usages but also in today's Iranian society people warmly welcome women drivers to avoid dangers and protect their individual and family privacy, especially with respect to the women and children's commutes, which indicates the society's openness to and trust in women's engagement in the driving occupation."[114] The Court thus held that "the creation of such prohibitions and limitations, that is engagement of women in the driving occupation, runs contrary to the principles of the constitution of the Islamic Republic of Iran and other national and international instruments of human rights and thus the judgment of the Public Court is overturned."[115]

108. *Id.*
109. *Id.*
110. *See* Case No. 940, *supra* note 91.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

B. Husband's Right to Enforce Temkin[116]

1. *The Public Court*. This dispute similarly arose out of a marriage when a husband brought an action before the Public Court to enforce his so-called *Temkin*[117] right. The husband's claim was legally based on a number of the Civil Code's provisions, especially Article 1105 which places the husband as head of the family and Article 1114 which requires a wife to live in a house chosen by her husband.[118] The Public Court dismissed the claim on the grounds that the husband had attacked his wife's honor and reputation in public.[119] The husband appealed the decision.

2. *The Court of Appeal's Holding*. The Court of Appeal, affirming the Public Court, held that the decision had been rendered in accordance with legal principles. When the evidence shows that the wife's reputation, honor, and physical integrity are at risk, she no longer needs to comply with the husband's right to *Temkin*.[120]

3. *The Court of Appeal's Arguments*. The Court held that the appellant, by attacking his wife's reputation and honor in public, had failed to provide a good living condition for his wife, and thus had failed to live up to the mandate of Article 1103 of the Civil Code, which requires couples to establish good companionship.[121] Because the appellant himself had confessed that he had attacked his wife's reputation and honor in public,[122] the Court exempted the wife from her duty to comply with *Temkin*, since it could have exposed her to further "reputational loss."[123] The Court reasonably could have ended its arguments here because Article 1103 of the Civil Code resolved the dispute at hand. However, the Court continued its arguments and held that Islam also places great emphasis on the husband's duty to create physical and psychological security in a family environment and to respect his wife's personality in the society.[124] The Court then held that "national and international instruments of human

116. The Court of Appeal of Mazenderan Province, Branch 12, 950 [2015] [hereinafter Case No. 950].

117. *Temkin* is a term adopted from *Sharia*. In a general sense, it means that a wife must live up to her duties toward her husband, obey him as it is customary or as it has been provided in the statutes, and accept him as a head of family. In the special sense, it means that a wife must have sexual intercourse with her husband and unless there is a reasonable excuse, she may not refrain from doing so. *Temkin* in its special sense also holds true for the husband. *See* HOSSEIN SAFAEI & ASADOLLAH AMAMI, FAMILY LAW IN A NUTSHELL 131 (26th ed. 2011).

118. *See* Case No. 940, *supra* note 91.

119. *See* Case No. 940, *supra* note 91.

120. *See* Case No. 950, *supra* note 116.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

rights including Article 22 of Iran's Constitution, Article 12 of the Universal Declaration of Human Rights (1948), and Article 17 of the International Covenants on Civil and Political Rights (1966) have stressed the prohibition on attacks on one's honor and reputation."[125] Therefore, the Court rejected the appellant's action.[126]

C. Right to Visit a Child After Divorce[127]

1. *The Public Court*. The dispute arose when a husband (the claimant) refused to accommodate maintenance of his ex-wife's personal relationship with her child, bringing a claim to reduce her visits from once a week to once a month. The claimant's action rested on provisions of the Law of Family Protection that, among other rules, provides rules for the custody of children [128] The Public Court ruled in favor of the ex-wife, finding that the mother's visits were necessary for her child's interests.[129] The ex-husband appealed from the decision of the Court.[130]

2. *The Court of Appeal's Holding*. The Court of Appeal held that the decision of the Public Court was well-reasoned and accorded with the legal principles and statutory provisions; thus, the ex-husband's appeal to reduce the visit hours was not acceptable.[131]

3. *The Court of Appeal's Arguments*. The Court of Appeal held that, in addition to the sources relied on by the Public Court, Article (9)(3) of the Convention on the Rights of the Child (1986), which applies indirectly through Article 9 of the Civil Code, also supported the Public Court's decision.[132] Article (9)(3) provides: "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."[133] Because the right to visit a child has also been recognized in Article 45 of the Law of Family Protection and because the ex-husband had not presented any evidence that the relationship between the child and the ex-wife ran contrary to the interests of the child, the Court of Appeal found that the mere fact of the

125. *Id.*

126. *Id.*

127. The Court of Appeal of Mazenderan Province, Branch 12, 951 [2015] [hereinafter Case No. 951].

128. *See, e.g.*, Article 45 of the Law of Family Protection, which states: "All juridical and administrative officials should take into account youth's and children's interests in rendering decisions."

129. *See* Case No. 950, *supra* note 116.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

ex-wife's remarriage did not prove the ex-husband's claim.[134] Therefore, in accordance with the national and international instruments of human rights, the ex-wife's right to visit her child once a week not only does not put the interests of the child at risk but also is to be considered crucial for the improvement of social character of the child, especially taking into account the child's age (he was seven years old).[135]

D. Evaluation of the Decisions

The mentioned decisions neither deal expressly with the status of international treaties in domestic law nor apply directly to international human rights treaties. In fact, although the Mazendaran Court of Appeal held that international human rights treaties have the force of law through Article 9 of the Civil Code,[136] this fact does not shed light on that expression's meaning and thus leaves the literature's debate unresolved.

The Court is evidently quite cautious in invoking international instruments of human rights, as seen by its attempts to highlight the compatibility of these instruments with Islamic principles and the statutes in various situations. The Court seems to presume compatibility between these instruments and statutory provisions and *Sharia* law, although the propriety of such an assumption is questionable. Article 3 of the ICESCR, for instance, says that "the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."[137] This Article seems to recognize the equality of women and men as an absolute principle, whereas the Court recognized some restrictions on women's right to work based upon domestic law. However, the Court attempted to reconcile this by pointing out that the same restrictions might be imposed on men's right to work. Therefore, the Court arguably does not use human right treaties as the source of an enforceable right and instead uses them as interpretive guides alongside constitutional and statutory provisions, as well as *Sharia* law, to underscore or support a particular interpretation.

The Court could reach the same conclusion should it decide these disputes based only on domestic law. In the visitation rights case, for instance, the Court of Appeal upheld the decision of the Public Court and added that the Court's decision also agreed with Article (9)(3) of the

134. *Id.*

135. *Id.*

136. *See* Case No. 940, *supra* note 91.

137. International Covenant on Economic, Social and Cultural Rights art. 3, Dec. 16, 1966, 993 U.N.T.S. 3, 5.

Convention on the Rights of the Child. The Court of Appeal simply could have upheld the decision of the Public Court without making a reference to international treaties of human rights. The question then becomes why the court invoked the Convention on the Rights of the Child. One possible answer is that the court is trying to convey the message that individuals may directly invoke these instruments to vindicate their rights and use international human rights treaties as a direct source of rights and obligations.

The Court of Appeal also seems willing to treat international treaties as superior to domestic law, although the treaties may come into the decision through a back door. In the case dealing with women's occupation in driving, the Court invoked Article 26(1) of the VCLT and stressed the importance of the Article. It provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."[138] This Article expresses the general principle of *pacta sunt servanda*. One arguable consequence of this principle is that in the event of a conflict between international law and domestic law, the former shall prevail.[139] If the Court accepts this reading, the Court implicitly endorses the superiority of international law over domestic law, although such a conclusion might be dubious considering the significant emphasis the Court places on the compatibility of human rights treaties with *Sharia* law.[140] The assumption of the compatibility of international human rights treaties with the *Sharia* principles and domestic laws of Iran without digging deep into the articles also makes such a conclusion doubtful since it is unclear whether the Court would have been so open to international human rights treaties if there were an obvious conflict between international treaties of human rights and domestic laws or *Sharia* principles.

In response, one may argue that Article 26 must be read in conjunction with Article 27 of the VCLT, which arguably provides a conflict of law rule at the international level. Article 27 states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty …."[141] This interpretation of Article 27 suggests that, by contrast, Article 26 is addressed to States as subjects of international law and thus has nothing to do with the hierarchy between international law and domestic law. The question then becomes, why did the Court cite Article 26 if it intended to note the superiority of international over domestic law, which seems to be more fitting with the context of the judgment than the *pacta sunt servanda* principle? Had the

138. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339.
139. ABASS, *supra* note 28, at 311-12.
140. *See* Case No. 940, *supra* note 91.
141. Vienna Convention on the Law of Treaties, *supra* note 138, at art. 27.

Court wanted to note the international conflict of law rule, it could have simply cited Article 27.[142]

Still, the Court's cautiousness is justified given the reasons that I addressed in the introduction and the fact that human rights issues are quite sensitive for the Islamic Republic of Iran. An explicit endorsement of international human rights instruments, seen as Western products, might be regarded as threatening to the Islamic government's human rights policies. In fact, the Court appreciates the political implications of explicitly recognizing the superiority of human rights treaties over domestic law, which may result in the nullity of many statutory provisions that conflict with international human rights treaties. The Court's caution is obvious from its strong and repeated emphasis on the compatibility of the relevant provisions of the human rights treaties with *Sharia* principles.

In sum, the Court intentionally invokes international treaties, but the Court's cautiousness in relying on them must be understood in light of the reasons I mentioned in the introduction. Citing international human rights treaties is a new development in Iran's domestic courts. The practice should be appreciated but not exaggerated, since it is not clear how other courts and domestic judicial and political organs will react to this development.

IV. ENFORCEMENT OF PRIVATE LAW TREATIES

The scarcity of invocation of international treaties also holds true with regard to private law treaties. Two of the most recent decisions from the Public Court of Tehran, Branch 12, appear to speak clearly to the superiority of international treaties over domestic law and provide very interesting holdings regarding rules that a domestic court must consult in construing treaty provisions. In the following sections, I will summarize the cases and then evaluate them.

A. Recognition and Enforcement of Foreign Judgments

1. *Issue.* In a dispute between Saderat Bank of Iran (the claimant) and a company (the defendant), the claimant sought to enforce a foreign judgment rendered in Dubai. The defendant argued that the Dubai judgment requiring him to pay interest ran contrary to the public policy of Iran and thus the judgment was not enforceable.[143]

142. I thank Professor Steven R. Ratner and the editors of VJIL for this.

143. The Public Court of Tehran, Branch 12, 9409970227200872 [12/20/2015] [hereinafter Case No. 9409970227200872], in Piri, *supra* note 76, at 77.

2. *The Relevant Treaty*. The relevant treaty was one signed on December 21, 2010, between the government of Iran and the United Arab Emirates regarding Legal and Judicial Cooperation in Commercial and Civil Matters.[144]

3. *The Public Court's Arguments*: The Court commenced its analysis by holding that "the general rule is that treaties trump domestic laws."[145] In accordance with the Court's statement, Article 171 of Iran's Law of Enforcement of Civil Judgments also speaks to this point.[146] Nevertheless, as the treaty itself provided that each party to the treaty shall recognize and enforce foreign judgments in accordance with its own laws,[147] the Court pointed out that the Law of Enforcement of Civil Judgments provisions are applicable to the procedures to enforce the judgment as long as they do not conflict with the provisions of the treaty between the government of Iran and the United Arab Emirates.[148]

The Court rejected the defendant's claim regarding the incompatibility of the Dubai judgment with Iran's public policy. The defendant argued that because the Dubai judgment required him to pay interest, it ran contrary to *Sharia* principles prohibiting *Riba*[149] and therefore violated Iran's public policy. In response, the Court distinguished between domestic and international public policy and held that the violation of domestic public policy does not necessarily give rise to the violation of international public policy.[150] The Court argued that violation of international public policy also may bar recognition and enforcement of foreign judgments, but the number of matters requiring non-recognition and non-enforcement is narrower in international public policy than in domestic public policy.[151] In the Court's view, international public policy should be a bar to enforcement of foreign judgments only when recognition or enforcement of a foreign judgment will "severely put fundamental principles of justice, legal conscience, fundamental public interests or good behavior at risk."[152] Therefore, the Court did not consider recognition and enforcement of the Dubai judgment to be in

144. Judicial and Legal Cooperation Agreement in Civil and Commercial Matters between the Government of Iran and the United Arab Emirates, proclamation no. 73568/454 (2010).

145. *See* Case No. 9409970227200872, *supra* note 143.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 79. *Riba* is an Islamic legal concept that refers to the prohibition of "accumulation of wealth from interest." Although the exact meaning of *Riba* is controversial among Islamic jurists, it literally means an increase or addition that is asked by a lender. *See generally* Hesham M. Sharawy, Note, *Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation between the Islamic and Western Worlds*, 29 GA. J. INT'L & COMP. L. 153, 161-63 (2000).

150. *See* Case No. 9409970227200872, *supra* note 143, in Piri, *supra* note 76, at 79.

151. *Id.* at 80.

152. *Id.*

violation of Iran's public policy in international relations.[153] In fact, the Court, by narrowly interpreting public policy, favored compliance with international treaty obligations over adherence to domestic values. The Court did not provide examples of situations that would give rise to violations of public policy, but examples would likely include cases where one party commits a fraud. In any case, the threshold appears to be very high. Despite the fact that prohibition of *Riba* is one of the fundamental principles of the Iranian legal system, the Court did not consider the Dubai judgment's order for interest a violation of Iran's public policy. Most likely, part of the reason was the Court's explicit endorsement of the superiority of treaties over domestic law.

In order to increase uniformity in the application and interpretation of the treaty between the two States, the Court ordered that the judgment be submitted to the judiciary of the United Arab Emirates.[154] This order was in accordance with Article 3 of the treaty, which required the contracting States to "exchange information pertaining to the statutes and decisions that relate to the enforcement of the treaty at hand."[155]

B. Non-Enforceability of an Arbitration Agreement

1. *Issue.* The Public Court of Tehran, Branch 12, had to decide whether a breach of a confidentiality obligation may give rise to the non-enforcement of an arbitration agreement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[156] The legal basis for the claim was the contract itself.

2. *Facts.* The dispute involved different parties and various issues, but the relevant part for the purpose of this Note arose from a software and service contract between an Iranian branch of a Chinese company (the claimant) and an Iranian company (the defendant). The claimant sought, among other things, to terminate the contract, arguing that for the contract to have force, certain conditions must be satisfied which had not been satisfied.[157] The defendant disputed the Court's jurisdiction and argued that the contract expressly required the settlement of disputes by an arbitration tribunal in accordance with the arbitration rules of the International Chamber of Commerce (ICC).[158]

153. *See* Case No. 9409970227200872, *supra* note 143, in Piri, *supra* note 76, at 80.

154. *Id.*

155. *Id.* at 81.

156. The Public Court of Tehran, Branch 12, 9409970227201292 [3/15/2016], in Piri, *supra* note 76, at 99.

157. *Id.*

158. *Id.*

The claimant argued that it had submitted the dispute to the ICC, but the communication between the parties showed that an arbitration tribunal could not settle the dispute because the ICC's letter provided that the tribunal might be required, in discharge of its obligations to implement international sanctions legislation, to disclose information to French and/or the US authorities.[159] The letter had clarified that the implementation of international sanctions legislation might also prevent payments between the parties and to the arbitrators.[160] In light of the letter, the claimant argued that the arbitration clause had become incapable of being performed.[161] The claimant also argued that in accordance with Article 36 of the contract, the content of the contract was confidential and its disclosure to the French or US authorities was against national interests and could have given rise to punitive measures by the United States and European Union against the claimant.[162] The claimant, invoking Article 8 of the International Commercial Act of Iran, asked the court to reject the defendant's claim and exercise its jurisdiction as the arbitration clause had become incapable of being performed.[163]

3. *The Public Court's Arguments.* The Court began its analysis by stating that "the rule is the superiority of international treaties over domestic laws."[164] It said that "Article 1230 of Civil Code and Article 171 of the Law of Enforcement of Civil Judgments allude to this point."[165] In light of this rule, the Court concluded that "because Iran is party to [the New York Convention], the Court cannot apply Iranian International Commercial Code or Civil Procedure Code."[166] The Court, however, enumerated circumstances under which a court might apply domestic law along with treaty law. "These include, among others, situations where the New York Convention is silent about an issue."[167] The Court argued that in such cases, "the court may apply domestic laws in order to supplement the New York Convention."[168] But the Court went on to say that "it may not impose stricter conditions compared to those that apply to domestic arbitration agreements."[169]

Regarding interpretation of the New York Convention, the Court made some interesting observations. The Court pointed out that

159. Case No. 9409970227201292, *supra* note 156, in Piri, *supra* note 76, at 100.
160. *Id.* at 105.
161. *Id.*
162. *Id.* at 103-4.
163. *Id.* at 105.
164. *Id.* at 107.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*

> "in the interpretation of the provisions of the New York Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade and in this regard the court can take into account the jurisprudence of contracting parties to the treaty."[170]

The New York Convention itself does not envisage any rule with regard to the interpretation of the treaty, but the court argued that "this is a general principle that is deductible from the Convention."[171] The Court also said that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based."[172] This principle, in accordance with the Court, gives rise to the following conclusions.

First, "a treaty must be construed in the light of its object and purpose."[173] The Court opined that "the goal of the New York Convention is to promote international trade and settlement of disputes through arbitration."[174] Moreover, "the Convention seeks to facilitate recognition and enforcement of arbitration agreements and foreign judgments. Therefore, the Court, in interpreting the Convention, must take these goals into account and read the Convention in a way that gives effect to these goals. In cases where different interpretations are available, a meaning must be preferred that gives effect to the goals mentioned."[175]

Second, the Court explained that "it must interpret the Convention independently since the terms used in the convention have in principle an independent meaning." It is "self-explanatory that the terms used in the convention must be interpreted in light of its context, object and purpose. The Court should not interpret the terms used in the Convention by consulting with domestic law. As a matter of fact, the convention must be interpreted similarly in all contracting States in order to ensure a uniform application of the convention in all contracting States."[176]

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170. *Id.*

171. *Id.* at 107.

172. Case No. 9409970227201292, *supra* note 156, in Piri, *supra* note 76, at 107.

173. The Court cited the decision of the ICJ in the case of *Mexico v. United States of America* where the Court in para. 83 held that "the Court now addresses the question of the proper interpretation of the expression 'without delay' in the light of arguments put to it by the parties. The Court began by noting that the precise meaning of the expression…. is not defined in the convention. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Article 31 and 32 of the Vienna Convention on the Law of Treaties". *Id.* at 108 n. 1.

174. Case No. 9409970227201292, *supra* note 156, in Piri, *supra* note 76, at 107.

175. *Id.*

176. *Id.* at 109.

Third, taking into account Article 33(2) of the VCLT, "A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides."[177] Thus, "considering that the New York Convention does not enumerate the Farsi language as one of those languages, the court is not bound by the translation of the Convention by the House of Representations of Iran."[178]

At the time of accession to the New York Convention, Iran made a reservation stating that Iran shall apply the Convention exclusively to disputes, either contractual or non-contractual, that constitute commercial disputes under the statutes of the Islamic Republic of Iran.[179] The Court, in spite of this language in the accession documents, and by copying part of a decision of the Supreme Court of India, held that while construing the expression "commercial," it must be borne in mind that the aim of the Convention is to facilitate international trade by means of facilitating suitable alternative ways of settlement of international disputes, and therefore any expression adopted in the Convention should receive, consistent with its literal and grammatical sense, a liberal construction.[180] The expression "commercial" should therefore be construed broadly, having regard to manifold activities which are an integral part of international trade today.[181]

The Court, in reading Article 2(1) of the Convention ("the term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams"), held that "this Article stipulates a maximum standard which requires the contracting States not to introduce a higher standard by invoking their domestic law."[182] As a result, the Court opined that "the Article should be construed in such a way that examples of a written arbitration agreement must be regarded not as conclusive but as exemplary."[183]

With respect to the validity of the arbitration agreement, the Court invoked Article 2(3) of the Convention, which states that "the court … shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[184] The Convention is, however, silent

177. *Id.*
178. *Id.*
179. *Id.* at 111.
180. Case No. 9409970227201292, *supra* note 156, in Piri, *supra* note 76, at 112.
181. *Id.* at 111-12.
182. *Id.* at 113.
183. *Id.* at 113-14.
184. *Id.* at 116.

about the law applicable for determining the causes of the non-enforcement of an arbitration agreement.[185] Therefore, the Court held that "it shall determine the conditions for the formation and validity of the arbitration agreement in accordance with Iranian law."[186] It then defined the expression "incapable of being performed" as a defense that comes into play "where the arbitration cannot proceed due to physical (such as the death of an arbitrator named in the arbitration agreement or the arbitrator's refusal to accept the appointment, when replacement was clearly excluded by the parties) or legal (such as where the arbitration clause has been drafted so badly as to legally impede the commencement of arbitration proceedings) impediments."[187]

The Court then ruled that "the ICC letter which required disclosure of the content of the contract to French and US authorities amounted to a breach of the principle of confidentiality as envisaged in Article 6 of ICC's arbitration rules."[188] The Court further stated, "The principle of confidentiality is an implied term of every arbitration agreement and the applicable law of it is the applicable law to the arbitration agreement (in this case Iranian law). The ICC's letter thus has made the arbitration agreement incapable of being performed and therefore the Court is not able to recognize the arbitration agreement and refer the parties to the arbitration."[189]

C. Evaluation of the Decisions

Both decisions explicitly endorse the idea of the superiority of international treaty law over domestic law. However, it is not evident whether the Public Court of Tehran in both cases is declaring a general rule that is applicable to the relationship between treaty and domestic law in all matters or if the rule is only applicable to the subjects of the treaties at issue. Because the superiority of international law over domestic law has been specified regarding the subject matter of both cases in the relevant statutes, the ruling of the Public Court of Tehran might not be extended to all cases including the relationship between human rights treaties and domestic statutes. Nevertheless, one may reasonably conclude that the Court recognizes the superiority of international law over domestic law as a general rule that is applicable for the treaty-statute relationship in all matters for the following reasons.

185. Marike R. P. Paulsson, *The 1958 New York Convention in Action*, at 91-92 (Kluwer 2016).
186. *See* Case No. 9409970227201292, *supra* note 156, in Piri, *supra* note 76, at 116.
187. *Id.* at 120.
188. *Id.* at 119-20.
189. Case No. 9409970227201292, *supra* note 156, in Piri, *supra* note 76, at 121.

First, the Court explicitly and immediately pointed out that the general rule is superiority of international law. Had the Court wanted to limit the scope of the rule to the enforcement of foreign judgments and recognition of arbitration agreements, there was no need to draft the judgment in this way because the relevant statutes recognize the superiority of international law.[190] Second, should the rule of superiority of international law over domestic law be intended to limit the subject-matter of the disputes, it was not necessary to invoke Article 171 of the Law of Enforcement of Civil Judgments and Article 1230 of the Civil Code, which address the superiority of international treaties pertaining to different issues. In fact, if the Court wanted to limit the scope of the superiority rule, it could have simply invoked Article 36(3) of the International Commercial Act of Iran, which clearly endorses the superiority of international law over domestic law regarding recognition and enforcement of foreign arbitration agreements and awards.[191] By not doing so, the Court pronounced a general rule regarding the superiority of international law that is applicable regardless of the subject of dispute. Moreover, the Court did not make any reference to Article 9 of the Civil Code; thus, it seems that the Court has considered that Article to be abolished by other provisions of the Civil Code and statutes.

The Court also seems to endorse a direct applicability of international treaties in the sense that the rights and duties envisaged in the relevant treaty might be directly invoked by individuals. The Court said that because Iran is a party to the New York Convention, the Court shall not apply the domestic laws unless the Convention is silent about an issue. This means that a treaty might be a direct source of rights and obligations capable of being invoked by individuals. Moreover, because a domestic court is obliged to apply a treaty rather than relevant domestic laws, the question of conflict between international treaties and domestic law becomes irrelevant. In other words, where a treaty deals with an issue, the court must apply it and cannot apply domestic laws that deal with the same issue either similarly or differently. Nevertheless, the Court said that domestic laws may be used to supplement a treaty where it is silent regarding an issue.

In the case about enforceability of an arbitration clause, the Public Court of Tehran's approach regarding a treaty's interpretation is also very instructive. As noted, enforcement of a treaty will require enforcing

190. Article 36(3) of the International Commercial Arbitration Act of Iran of 17 Sept. 1997 provides that "in the event that treaties between Iran and other states provides otherwise in respect of arbitrations falling within the ambit of this act, they shall be complied with." Article 171 of the Law of Enforcement of Civil Judgments of 22 Oct. 1977) has similar language.

191. International Commercial Act of Iran, art. 36(3).

channels, including domestic courts, to construe the treaty's terms. However, domestic courts' interpretive approaches are not necessarily uniform. Some domestic courts only briefly state that their judgments comply with the relevant treaty, like Israel's Supreme Court decision in *Public Committee v. Israel*.[192] The decisions of the Court of Appeal of Mazenderan also belong to this group of cases, where the Court simply assumed the compatibility of Iranian statutes with the relevant treaties.[193] In other instances, domestic courts' interpretive approaches may give way to the application of domestic rules of interpretation or favor the political structure of the domestic legal system, like the United States Supreme Court's decision in *Medellín*.[194] The possible consequence of this is that a single treaty may be subjected to varying understandings.

By contrast, in the case on enforceability of an arbitration clause, the Public Court of Tehran's interpretive approach gave full effect to the treaty's superiority. In interpreting a treaty, a court must be mindful of "its international character" and "the need to promote uniformity in its application."[195] The Public Court of Tehran has borrowed this language from treaties that have explicitly set out the rule in their texts. Article 7 of the United Nations Convention on Contracts for the International Sale of Goods (the CISG) is a clear case in point.[196] In fact, the Public Court of Tehran stated that this is a general rule that is deductible from the New York Convention, though it does not explicitly set forth the rule. The application of the rule requires a satisfaction of four conditions.

First, to secure uniformity in the relevant treaty's enforcement, a court must take into account the jurisprudence of other contracting States. In this connection, the Public Court of Tehran, in the case of enforcement of an arbitration clause, cited India's Supreme Court's decision to define the term "commercial," but the likely reason that the Public Court of Tehran only invoked India's Supreme Court's decision had to do with Iranian courts' limited access to legal databases and up-to-date international legal

192. HCJ 769/02 *The Public Committee against Torture in Israel v. The Government of Israel*, PD 62(1) 507, para. 20 (200); English translation available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.htm.

193. *See* Case No. 940, *supra* note 91.

194. *Medellín v. Texas*, 128 S.Ct. 1346 (2008). The dispute was concerned, among other things, with the question of whether the ICJ's decision interpreting the Vienna Convention on Consular Relations had a binding effect within the United States. Although the Vienna Convention was itself self-executing within the United States, the Supreme Court opined that the ICJ's decision interpreting the treaty was not self-executing, thus favoring the United States' federalist system over international law. *See generally* Taryn Marks, *The Problems of Self-Execution: Medellín v. Texas*, 4 DUKE J. CONST. L. & PUB. POL'Y Sidebar 191, at 195-210 (2009).

195. *See* Case No. 9409970227201292, *supra* note 156, in Piri, *supra* note 76, at 107.

196. Article 7(1) of the CISG sets forth: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

scholarship. Regard to contracting States' jurisprudence will not necessarily secure uniformity in the treaty's interpretation and enforcement because those respective States' jurisprudence might be different with regard to the treaty's terms. Nevertheless, attention to contracting States' jurisprudence will push a court to come up with convincing arguments; this in the long run may cause the demise of bad precedents.

Second, a court must interpret a treaty in light of its object and purpose to promote uniformity in its application. In other words, the need to promote uniformity will also require a court to follow the interpretation rules envisaged in Articles 31-34 of the VCLT.

Third, a court must interpret a treaty independently and without relying on domestic rules of interpretation.

Finally, a court must interpret a treaty only in accordance with the treaty's authentic language or languages. Should a court observe these requirements, there will be rare instances in which a treaty's interpretation will be incorrect. Only when a court follows these requirements may one speak of the rule of treaty superiority over domestic law. Otherwise, and even with the acceptance of the treaty superiority rule, a court may change the treaty's meaning by interpreting its terms in light of domestic rules of interpretation. In contrast, the application of the rule requiring attention to a treaty's international character and the need to promote uniformity will restrict a judge's ability to get off the hook easily by ignoring the text and spirit of the relevant treaty. Domestic courts will be aware that other contracting States' courts watch their performance and will critically analyze their decisions; this will put reputational pressure on domestic courts not to interpret the terms of a treaty in violation of its text and spirit. It will also require courts to look into the four corners of the relevant treaty to find answers for questions that the treaty has not expressly addressed. Further, it will avoid the question of conflict of law between domestic law and a treaty, because the treaty will always preempt a conflicting domestic law.

Nevertheless, the vast majority of treaties, including human rights treaties, do not incorporate this interpretation rule, and domestic courts' interpretations of those treaties also fail to take the rule into account. However, the application of the rule to human rights treaties and treaties which directly have to do with individual rights seems to be most appropriate. These treaties are more subject to varying understandings and interpretations. Domestic courts tend to have detailed systems of domestic human rights law, and in the absence of the rule requiring attention to the international character of a treaty and the need to promote uniformity, domestic courts may interpret the treaty's terms in light of their domestic understandings of the treaty's terms. States show little interest in assuring that other contracting States live up to their human rights obligations.

Moreover, the political and legal environments of some States may negatively impact domestic courts' treatment of human rights treaties; this was actually the most important reason that made Iranian cases come out the way they did.

Cases dealing with the enforcement of private law treaties were explicit in pronouncing the superiority of international treaties over domestic law and establishing a rule requiring attention to the international character of a treaty and the need to promote uniformity in its application. By contrast, cases dealing with the enforcement of human rights treaties were quite cautious in endorsing these rules. Aside from the reasons that I mentioned already, it appears that political considerations had a significant impact on why these two groups of cases came out the way they did. Apparently, judges in both groups of cases were familiar with the treaties[197] they dealt with, but the fact that cases pertaining to human rights treaties are so ambivalent in comparison to cases dealing with private law treaties is simply due to the fact that judges work in an environment where the head of the judiciary explicitly denounces human rights treaties.[198]

Nevertheless, it appears that in both groups of cases there is an attempt by the courts to engage Iran with international law, though in human rights cases the courts' fears are vivid. One may expect that the three human rights decisions discussed in this Note will have some effect on future cases. However, I do not think that effect will be significant, because institutional limitations, judges' resistance to dealing with unfamiliar sources of obligations, and limited resources all diminish the influence of decisions that refer to international human rights treaties.

Therefore, an incorporation of the same rule as the one introduced by the Public Court of Tehran, requiring attention to the international character of a human rights treaty and the need to promote uniformity in its enforcement, will likely depoliticize enforcement of human rights treaties and increase uniformity in their application, interpretation, and enforcement.

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197. This Note in the introduction addressed that Iranian judges' familiarity with international law and foreign languages and their access to international resources are limited. However, this rule does not encompass all judges. There are certainly judges who have been trained in foreign countries and/or who have specialized in specific areas of law that require them to master at least primary international law scholarship.

198. *The head of the judiciary's meeting with high-ranking judicial officials*, IRANIAN STUDENTS' NEWS AGENCY (May 29, 2017), available at https://www.isna.ir/news/96030804793/ (noting that "human rights are merely a means at the hand of superpowers" to put pressure on other States). Moreover, the head of the judiciary in his speech in the Judiciary's Nationwide Conference IRIB News Agency (July 2, 2017), http://www.iribnews.ir/fa/news/1699147, stated that "the Islamic Republic of Iran is the true representative of human rights." He also pointed out that "we accept human rights within the framework of Islamic values."

V. CONCLUSION

Enforcement of international treaties by Iranian courts is a new phenomenon; despite the fact that Iran formally subscribes to monism and regards international treaties as equally enforceable with domestic law, citations to international treaties have been almost nonexistent since the establishment of the Islamic Republic of Iran. Recently, however, some courts have invoked international private and human rights treaties, which amounts to a breakthrough both nationally and internationally. Although Iranian courts have been very cautious in invoking human rights treaties and have generally used them as interpretive guides alongside constitutional, statutory, and *Sharia* law to underscore or support a particular interpretation, there is a cautious attempt to institutionalize the status of human rights treaties in Iranian domestic law. In contrast, the approach of courts dealing with private law treaties has been less scrupulous. Among other pronouncements, the Public Court of Tehran has explicitly endorsed the superiority of international law over domestic law and stressed the prohibition on the use of domestic rules of interpretation to interpret treaties.

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