
Pacta Sunt Servanda: Islamic Perception

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Pacta sunt servanda - agreements must be obeyed - is a peremptory principle of modern international law of treaty. What are the origin and nature of this doctrine? Some say, its Latin wording indicates that it is of Roman origin. And this doctrine is a must for the social good; without it the society will be a chaos. But how does Islam perceive the notion? This paper finds that this doctrine came into being with the very beginning of the creation of human souls by Allaah Whom they accepted as their Sole Lord and made a commitment to follow His commands. And it is a principal tenet for Muslims to adhere to because it is an inseparable part of their faith (Iman), a command from their Lord and a practice (Sunnah) of their Prophet Muhammad (peace be upon him). It is, therefore, obligatory not merely because it is good for the society, but is also rooted in the teachings of Islamic doctrine and a Muslim's accountability in the life hereafter.

Keywords

Pacta Sunt Servanda, Shari'ah, Siyar, Treaty Obligation, Hudaibiyah

1. Prologue

The principle of reciprocity is the very backbone of both *Siyar* and international law. It posits that unilateral acts by any State cannot create a law for another State unless the other State willingly agrees to it either explicitly or implicitly. The reason behind this is that States are sovereign entities which are not subject to any mundane superstate authority.¹ International treaties are an example of express agreement between States

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¹ L. OPPENHEIM, I INTERNATIONAL LAW 119 (H. LAUTERPACHT ED. 1955).

and international customs are typically an example of their implicit agreement. Both treaties and customs are two important sources of *Siyar* and international law with one fundamental difference that for *Siyar* these two sources must be friendly with *Shari'ah* fountain sources such as the Qur'an and *Sunnah*. International law is, however, not bound by this qualification because of its secular character. However, it is an interesting question to ask: why should the States obey laws made by treaty or custom? The answer is - because States have agreed to make them. In other words, agreements must be obeyed, which is well-known in Latin terms as *pacta sunt servanda*. (Popularly known as the *pacta* doctrine). Though theoretically relevant to both treaties and customs, in practice this doctrine is called into application with respect to treaties.

Over time the *pacta* doctrine attained the status of an international customary law principle. In the present world it has become a peremptory principle of treaty law, especially by its entrenchment into the Vienna Convention on the Law of Treaties²—“every treaty in force is binding upon the parties to it and must be performed in good faith.”³ According to this provision, not only States, also other subjects of international law like multinational companies, which are parties to a treaty or an agreement, must obey it. All jurisdictions of the world have accepted this doctrine because without giving effect to it, treaty obligations cannot be enforced. In the international community, State parties themselves are the chief enforcers of their own responsibility. Why? As said above, because they have bound themselves by giving their consent or promise to the agreement. But a further question may arise- should all promises be kept? The answer depends on what conception of ‘promise’ or ‘agreement’ is held. According to common law, all promises (*pacta*) are not to be kept; only promises that create legal obligations should be kept.⁴ A Civil law system would typically believe that all promises must be kept for social good.⁵ What does Islamic law say in this respect? This paper is an attempt to answer this question. This answer is being sought to find a way and means to check the violations of treaties, such as bilateral investment agreements (“BITs”). In the contemporary world BIT violation is ever on rise. In a span of 37 years (1972-2009) there have been 299 disputes filed with the International Centre for the Settlement of Investment Disputes (“ICSID”), an arbitral facility affiliated with the World Bank.⁶ Of them, 238 have been registered in the last ten years (1999-2009). As of

² IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 83 (1984). See also Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT'L L. 405, 426 (1984).

³ Vienna Convention on the Law of Treaties, art. 26.

⁴ Hyland, *supra* note 2, at 429.

⁵ *Id.* at 425-426.

⁶ See ICSID, *ICSID Cases*, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases> (last visited on Nov. 5, 2009).