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پروفیسر ڈاکٹر نور محمد شاہد

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☆ طوطی قلبك من العسر ورفقه من العفر و اخرج منه البغضاء و ازل منه السمائم. ☆

While it is clear that Muslims are bound to fulfill their international commitments assumed under Treaties or agreements with other states the principle of *Pacta Sunt Servenda* is applicable only if the obligations assumed do not conflict with the basic norms and values established by the Qur'ān and the Prophet's *Sunnah*. Any treaty that is repugnant to the injunctions of the Qur'ān or comes into conflict with the *sunnah* of the Prophet would be void. It is, therefore, essential to examine the scope and the ambit within which Muslims can validly conclude treaties. This delineation of the ambit is important as the rules of Islamic Law relating to decision-making as well as decision-taking powers of the government, including their conduct of inter-state relations, differ from the practice in the West. Consequently, it is necessary to clarify the conceptual differences between the Islamic legal system and the western legal thought and methodology.

THE PROPHET OF EXCELLENT MORAL VALUES

An Anthology

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fulfillment of treaty obligations is, therefore, neither the organized will of the sovereign, nor even the obligations imposed by law, but the religious obligation which the contractual undertakings impose and also the belief in after-life and accountability on the day of judgment. This Islamic principle has been most lucidly stated by Abū Sulayman as follows:

“This principle is a natural extension of the principle of *tawhīd* ⁴¹.The genuine establishment of this principle in Islam is clearly in line with all other principles and values of Islam. Numerous Qur’ānic verses urging Muslims to fulfill their agreements leave no doubt about the positive moral attitude of Islam in this sphere. It allows no room for double standards. A Muslim decision-maker or statesman can find no refuge in the Islamic framework of thought or in its principles or values to justify violation of agreements either by intention or by deliberate action” ⁴².

It has also been eloquently stated that "in Islam the identification of law with religion is total. Indeed, in Islam, law is religion and religion is law, because both emanate from the same source and are of equal authority coming, as both do, from the same divine revelations. Being divine they are unerring and unchangeable. Obedience to the law is thus for Muslims not a matter of ethical duty or of social expediency, but is a matter of religion itself" ⁴³.

It is in this light that the Islamic concept of faithful application of treaties should be understood. Consequently, not only the rulers of the Islamic State but every individual of that State, is bound to see that, as far as it lies in his power, such obligations are faithfully discharged. Truth and fidelity are the two inseparable parts of Islamic faith in all relations of life.

Islamic people, the principle of *Pacta Sunt Servenda* has also a religious basis; Muslims must abide by their stipulations".³⁸

The rule "*Pacta Sunt Servenda*" was crystallized in Islam about fourteen centuries ago and if we juxtapose the Islamic principles and rules of contemporary international law we shall perceive that they, to a considerable extent, follow the same course. While compatibility is evident between the Islamic legal principles relating to faithful application of treaties and the modern concept of *Pacta Sunt Servenda* there is a difference regarding sanctions. Contemporary experience has revealed that in the absence of enforcement mechanism states are at liberty to interpret the treaties which may, at times, be at variance with each other. The angle from which facts can be regarded and presented may vary with the political, cultural, ideological and economic interests of states. There is no obligatory machinery which may interpret the treaty and adjudicate on the conflicting claims of nations. And even if there are mechanisms they are voluntary and depend on the will of the States concerned to invoke them.³⁹

The Qur'an urges Muslims not to break oaths after making them, and if the other party, including non-Muslims, do not break them, then "fulfill their agreements to the end of their term".⁴⁰ Thus we see that the principle of *Pacta Sunt Servenda* is inherent in the concept of 'aqd' and is recognized as such by the Muslim jurists and theologians.

In Islam obligation to faithfully apply the treaty is both personal as well as collective in nature and is imposed on all including those who are in a position to implement them. It enjoins the rulers of the Islamic states to fulfill their treaty obligations faithfully and if they fail they shall be accountable to God in the next world as "Ye have made Allah surety over you" and, therefore, a third party to every treaty the Muslims conclude. The real sanction for the Muslims regarding

The decisions taken by the Prophet in the two cases would indeed seem harsh in view of the then prevailing circumstances when life of every Muslim was considered invaluable for both the defense as well as propagation of the new faith but they also established equally invaluable *Sunnah* for the Muslim *Ummah* on faithful application of their treaty obligations. The *Sunnah* in these two cases also elaborate and interpret the following Qur'ānic injunction to which reference has already been made; namely:-

“.....if they seek help from you in matter of religion then it is your duty to help (them) except against a folk between whom and you there is a Treaty”³⁶

The Qur'ānic verses quoted earlier in the context of establishment of this principle and the *sunnah* of the Prophet adverted to in the same context, would reveal the basic ingredients for faithful implementation of treaties. The Islamic framework so established leave no doubt that a State's commitment to faithful application of the treaty is both a legal obligation as well as a religious duty. Islam will not tolerate any pretense or marginal gains as a ground for the violation of the international obligations voluntarily assumed under a Treaty. The Qur'ān is categorical on this point and states:

“And purchase not a small gain at the price of Allah's covenant”³⁷

It is clear from the above quoted the Qur'ānic verse that any gain by breaking the covenants in fact amounts to breaking Allah's laws and must necessarily be small as compared to obeying Allah's will and doing the right thing. As every gain in this world is small in comparison to the obligations towards God it leaves very little space for the Muslims to manoeuvre. For the Muslims faithful adherence to treaty obligations has a divine sanction and Wehberg was right when he stated that “for the

The obligation in question related to the extradition of any male fugitive from amongst the Quraish of Makkah who sought protection of the Prophet in Madinah, without the consent of his guardian. Such a fugitive had to be returned (extradited) to Makkah even if he was a Muslim. In view of the circumstances then prevailing this was without doubt an onerous and humiliating provision, particularly when there was no corresponding obligation on the Makkan Quraish to return fugitives from among the Muslims in Madinah who sought asylum in their city.

Abū Jandal was the son of Sohail, the representative of the Quraish who was deputed by them to negotiate and sign the Treaty of Hudiabiyah on their behalf. Abū Jandal, embraced Islam in Makkah and was being persecuted for that reason. Somehow he escaped from Makkah to the Muslim camp in Madinah and requested protection of the Prophet. The Makkans demanded his extradition in accordance with the provisions of the Treaty of Hudiabiyah. Despite the fact that many of the close friends and followers of the Prophet implored him not to accede to their demand and to grant asylum to Abū Jandal the Prophet handed him over to the Makkans as granting him protection would have been in breach of the treaty obligation.

In another similar case Abū Baseer, a Muslim in the custody of the Quraish, somehow fled from their incarceration and came to the Prophet to seek his protection. His request for protection was declined and he was handed over in the custody of the two persons who had been sent by the Quraish to apprehend him and bring him back to Makkah. On the way to Makkah Abū Baseer somehow managed to kill one of his escorts while the other escaped. Abū Baseer returned to the Prophet but was admonished by him (the Prophet) who accused Abū Baseer as "kindlier of war". The Prophet is also known to have stated that if there had been someone around to take him (Abū Baseer) back to the Quraish he would have handed him over to be taken back to Makkah. Abū Baseer then left Madinah voluntarily.

Legal Status of a Treaty in Islam

Jamshed A. Hamid

While the Prophet himself is reputed to have strictly adhered to the obligations incurred by him under a treaty, he is also known to have adopted extreme measures against those who betrayed that trust. This would explain the adoption of exceptional measures in dealing with the tribe of Banu Qurayzah for treacherous breach of their agreement with the Muslims. The Qur'an also contains rigid Ordinances on the faithful adherence to treaty obligations and recommended extreme punishments for those who break them. It states:-

“And if they break their pledges after their treaty (had been made with you) and assail you religion, then fight the heads of disbelief - LO! they have no binding oaths - in order that they may desist”.³⁴

And again the Qur'an questions:

“Will ye not fight people who violated their pledges.....”³⁵

Further, on several occasion in the Qur'an there is an explicit reminder to the effect that “LO! Allah loveth those who keep their duty” which, includes faithful observance of treaty obligations.

These Qur'anic injunctions and treaty making practice have been further reaffirmed by the Prophet's own traditions in his attitude towards the fulfillment of his treaty obligations. The most convincing example can be found in the implementation of the Treaty of Hudiabiyah.

The treaty of Hudiabiyah contained a provision which was extremely onerous and one-sided and considered by his companions as most disadvantageous and humiliating to them. This related to the extradition of the Makkans who fled to Madinah for refuge because of their persecution in Makkah by the Quraish. The two cases involving faithful application of the treaty obligations related to the decisions regarding Abū Jandal and Abū Baseer.

The Peace Treaty of Hudiabiyah was concluded in 628 AD between the Prophet (P.B.U.H.) and the tribe of Quraish.