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INTERPRETATION OF TREATIES: A COMPARATIVE STUDY BETWEEN INTERNATIONAL LAW AND THE SHARI`AH

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Albeit treaties are being legal documents that express the intentions of the parties in written form with precise words, they may still be subjected to disputes if the wordings used in the treaties are ambiguous or having multiple meanings. Accordingly, this article intends to explore methods and rules of interpretation of treaties under contemporary international law and the Shari'ah.

INTRODUCTION

Rights conferred and obligations imposed under the treaties - regardless of whether they are multilateral or bilateral - would be futile if every party interprets them differently. As a result, methods and rules of interpretation of treaties were developed by way of customary international law and later most of those rules were assimilated into the Vienna Convention on the Law of Treaties 1969 (VCLT).[1] Although there are numerous rules of interpretation,[2] commentators of international law commonly identified the following most recognised approaches in interpreting treaties, i.e. textual approach, contextual approach, theological approach, and historical approach.[3]

TEXTUAL APPROACH

In the textual approach, a word in a provision of a treaty is to be interpreted by its 'plain, ordinary or apparent meaning' as it is commonly understood by a reasonable man. This approach is crucial to be used mainly on the following grounds: first, the text

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is easily identifiable and accessible as it is usually straightforward, and second, the text limits the discretion of judges by considering the wordings adopted by the State parties. Hence, the texts in a treaty are to be given their ordinary meaning as it is reasonable to presume that the ordinary meaning is most likely to reflect what the parties intended.[4] On the other hand, the dispute of interpretation arose between the parties due to the very fact that the text in the treaty is vague in its ordinary meaning. Besides, there can be different methods of ascertaining the plain and ordinary meaning of the text if it has various meanings. Hence, it is submitted that the textual interpretation can be more effective if it is used together with other methods of interpretation of treaties.[5]

CONTEXTUAL APPROACH

In the contextual approach, the treaty is to be interpreted by looking into the whole context of it - including preamble and annexes, any agreement relating to the treaty made between all the parties, and any instrument which was made by one or more parties - in order to grasp the full content and thus it cannot be interpreted in isolation.[6] This is because a legal provision is also a part of a wider regulatory framework. In the process of interpreting a treaty, if the first step is to read the text carefully to get its plain, ordinary or apparent meaning, then the second step would well be drawing attention to its context. This approach ensures that the treaty does not impose contra-dictory obligations that are out of context. The Permanent Court of International Justice (PCIJ) considered that this approach avoids 'unreasonable or absurd results'. Besides, the International Court of Justice (ICJ) opines that the contextual approach - jointly with the textual approach - takes precedence over other methods of interpretation. It has a fair share of criticisms as this approach requires judges to exceed their powers by considering subsequent agreements and State practices in the context, they might contravene the original intentions of the drafters. Since judges are required to take other related elements into account, there is a potential for indeterminacy and judicial

cherry-picking. Nevertheless, although contextual interpretation might not answer all interpretative questions, it is still a good approach to consider in interpreting treaties.[7]

TELEOLOGICAL APPROACH

In the teleological approach, the treaty interpretation is done by looking into the 'object and purpose' intended to achieve by the State parties. This approach has been frequently used by international courts to interpret treaties. The PCIJ used it in the interpretation of consti-tutive treaties and legal frameworks relating to international organisations. It is also commonly used in interpreting the international human rights treaties by international courts. This approach provides avenues for evolutionary interpretation to judges by taking evolving social needs and circumstances into consideration without being held back by the original textual meaning of a treaty. Nonetheless, this approach is also subjected to criticisms for its enigmatic notion of object and purpose which are probable to be influenced by the personal views of the judges. Therefore, it has to be used with great caution not to disregard the original intent of the State parties.[8]

HISTORICAL APPROACH

In the historical approach, the treaty can also be interpreted by looking into the 'historically related documents' such as the *travaux préparatoires* (the preparatory work of the treaty) in order to avoid manifestly absurd or ambiguous results. The preparatory work of a treaty includes the records of the negotiations proceeding, the conclusion of the treaty, records of the committee of the conference which adopted the treaty and reports made to plenary sessions at the treaty-making conference.[9] Again, it does not mean that all kinds of *travaux préparatoires* will be taken into consideration. In this regard, the *travaux préparatoires* must be public and reflect the common intentions of the parties, but an isolated one or the one that was abandoned later. International courts, tribunals and States often relied on preparatory works for the purposes of the

interpretation of treaties. Jan Klabbers even opined that: "most international lawyers will almost automatically include a discussion of preparatory works in legal argument, and will consider it vital to do so".[10]

Of course, this approach is also not without criticisms. It is being challenged for being indeterminate as ascer-taining the intentions of State parties from the *travaux* can be very subjective and a difficult task. Furthermore, the records of treaty negotiations may be inaccurate or incom-plete and thus there is a potential to be misguided as no agreement has yet been reached at the negotiations and drafting stage. Besides, the legislative history can be irrelevant in most case and it is especially true for subsequent parties those did not participate in the drafting process. Hence, although the preparatory work is a useful tool, it can only be used as the last resort as the records of treaty making negotiation is incomplete and do not adequately cover compromises arrived at during the final stage of the conference.[11]

According to Eduardo Jimenez de Arechaga, the former President of the ICJ: "Preparatory work is frequently examined and often taken into account. It may be difficult in practice to establish the borderline between confirming a view previously reached and actually forming it, since this belongs to the mental process of the interpreter. In any case, the importance of *travaux préparatoires* is not to be underestimated and their relevance is difficult to deny, since the question whether a text can be said to be clear is in some degree subjective".[12] Thus, the *travaux préparatoires* is still recognised as 'supplementary means' in interpreting treaties under international law.[13]

INTERPRETATION OF TREATIES UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES 1969

The VCLT adopts an integrated approach by giving legal effect to all the above mentioned basic methods and rules of interpretation of treaties under Articles 31, 32 and 33 respectively. Article 31 sets general rules of interpretation of treaty as follows:

1. A treaty shall be interpreted in good faith in accordance with

the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

It can be observed that Article 31 (1) obliges a treaty to be interpreted in 'good faith' under the rule of '*pacta sunt servanda*' enshrined in Article 26 of the VCLT which requires the parties to perform and observe their obligations under a treaty in good faith. It further stated that a treaty is to be interpreted in accordance with the 'ordinary meaning' to be given to the terms of the treaty 'in their context' and 'in the light of its object and purpose'. This expresses that the VCLT obliges to use textual approach, contextual approach, and theological approach in interpreting treaties.

Albeit the hierarchy of these approaches are not clearly mentioned in the VCLT, in practice, the ICJ in its Advisory Opinion on the *Competence of the General Assembly for the Admission*

of A State to the UN stated that: “The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in their context in which they occur”.[14] Hence, after considering the textual approach, the court may consider to applying the contextual approach.

Article 31 (2) specifies context of a treaty to include preamble and annexes; any agreement relating to the treaty made between all the parties; and any instrument which was made by one or more parties. Then, the court may adopt the theological approach by searching for the object or the purpose of the treaty.

Article 31 (3) recommends the court to take into consideration of any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty; and any relevant rules of international law applicable in the relations between the parties. An example of interpretation by subsequent practice is the way in which Members of the United Nations (UN) have interpreted and applied Article 27 (3) of the UN Charter.[15] Although the Article provides that substantive matters are to be decided by nine votes including the concurrent votes of the Five Permanent Members, the practice of the UN Security Council since 1946 was to interpret ‘concurring’ as meaning ‘not objecting’. Based on this practice abstention by Permanent Member does not amount to ‘veto’.

Interestingly, Article 31 (4) allows the State parties to give special meaning to a term if they intend to do so. In such a case, the court will have to interpret the term in accordance with the meaning provided by the parties in the treaty.

Article 32 provides that: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or

unreasonable.

This expresses that the VCLT supplements the historical approach in addition to the application of the textual approach, the contextual approach, and the theological approach in order to avoid manifestly absurd or ambiguous results. Eduardo Jimenez de Arechaga opined this provision by saying that: "The separation between Article 31 and 32 and the restrictions contained in the latter provision constitute a necessary safeguard which strengthens the textual approach and discourages any attempt to resort to preparatory work in order to dispute an interpretation resulting from the intrinsic materials set out in Article 31".[16]

In practice, the ICJ in its Advisory Opinion on the *Competence of the General Assembly for the Admission of A State to the UN* stated that: "The Court considers that the text is sufficiently clear; consequently it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to report to preparatory work if the text of a convention is sufficiently clear itself".[17] Therefore, despite the fact that the preparatory work of a treaty can be a useful tool, it should only be used as a supplementary means.

Article 33 outlines provisions for the interpretation of treaties authenticated in two or more languages as follows:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. 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 or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts

> discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

In the light of above provisions, it is prudent for the State parties to specify the text in which particular language should prevail in case of interpretation differences if the treaty has been authenticated in two or more languages. This would avoid predictable disputes among the parties with regard to the interpretation of the said treaty in the future.

MAXIMS OF INTERPRETATION

The methods and rules of interpretation of treaties provided under the VCLT are none exhaustive. There are also other interpretative methods reflected in some of the following maxims of interpretation. The legal maxim '*ut res magis valeat quam pereat*' which loosely means 'a text should be given legal effect rather than destroying it' - also known as 'Principle of Effectiveness'[18] - denotes that an interpretation that makes a provision of a treaty meaningless or ineffective is not admissible. Nevertheless, the principle of effectiveness does not allow a liberal interpretation going beyond what the text of the treaty justifies.[19]

Next is the '*ejusdem generis*' rule which loosely means 'of the same kind'. Under this rule, the interpretation of general words of a treaty must be confined to things of the same kind as those specifically mentioned in the said treaty.[20]

The legal maxim '*expressio unius est exclusio alterius*' which loosely means 'the inclusion of the one is the exclusion of the other'.[21] This rule is applicable in a situation where there are more than one admissible meanings of a text of a treaty. Normally, the court would choose the meaning that is least beneficial to the party that prepared and proposed the provision.[22] It should be noted that these maxims and rules discussed above can only be used as a supplementary means in relevant cases with great caution.

INTERPRETATIVE DECLARATION

'Interpretative declaration' is a unilateral statement made by a negotiating party to a multilateral treaty with regard to the interpretation of a particular provision. If such a statement is recorded, it becomes part of the negotiating history (*travaux préparatoires*). The reason for making such as a declaration is mainly to establish an interpretation of the treaty which is consistent with the domestic law of the declaring State. If other parties do not make conflicting declaration or indicate their disagreement, they may be regarded as having tacitly accepted it. If it is not a disguised reservation, then the declaration becomes a rule of interpretation. Thus, interpretative declarations, like reservations, are unilateral acts in nature.

However, it should be noted that interpretative declarations are different from reservations as it does not intend to derogate from legal effect of provision of the treaty while reservation is capable of modifying or abrogating the legal effect of the reserved provision. Furthermore, an interpretative declaration can be made at any time whereas a reservation must be formally confirmed by the State at the time of expressing its consent to be bound by a given treaty.[23] Nonetheless, the VCLT does not explicitly deal with interpretive declaration.[24]

In the case of *Belios v. Switzerland*, the European Court of Human Rights had the opportunity to consider the nature of a declaration made by Switzerland with regard to the European Convention on Human Rights. Switzerland argued against a finding of the Commission that the declaration was a mere interpretative declaration which did not have the effect of a reservation.[25] The Court found that the declaration was a reservation and stated that: "The question whether a declaration described as 'interpretative' must be regarded as a 'reservation' is a difficult one, particularly - in the instant case - because the Swiss Government have made both 'reservations' and 'interpretative declarations' in the same instrument of ratification. More generally, the Court recognises the great importance, rightly emphasised by

the Government, of the legal rules applicable to reservations and interpretative declarations made by States Parties to the Convention. Only reservations are mentioned in the Convention, but several States have also (or only) made interpretative declarations, without always making a clear distinction between the two. In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content".[26] Hence, the title mentioned by the State parties can be a distinguishing factor in considering whether a unilateral declaration is an interpretative declaration or a reservation.

ISLAMIC PERSPECTIVE

In Islam, legal rulings are deducted from primary sources of *Shari'ah* such as the Quran and *Sunnah*, and secondary sources, i.e. *Ijma*, *Qiyas* and so on. The Quran obliges Muslims to fulfill the promises that they made in every engagement and agreement in the following verse by stating that: "… and fulfill (every) engagement, for (every) engagement will be enquired into (on the Day of Reckoning)".[27] In another Quranic injunction, observing agreement is acknowledged as one of the characteristics of a faithful Muslim as it states that: "Those who faithfully observe their trusts and their covenants".[28]

In addition, the Prophet Muhammad (*s.a.w.*) emphasised on this aspect in his *Sunnah*. In a *Hadith*, he said: "The person who has no covenant has no faith".[29] In another *Hadith*, he mentioned: "Whoever has faith in Allah and the Day of Reckoning, should fulfill his promises".[30] The Prophet Muhammad (*s.a.w.*) recommends fulfilling promises made even to children in the following *Hadith* by narrating that: "Love the children. Treat them with kindness and if you make a promise to them, fulfill it without fail. The children think that you are the provider of sustenance for them".[31]

From the above mentioned Quranic verses and *Ahadith* of the Prophet Muhammad (*s.a.w.*), it can be observed that Islam strongly commands Muslims to keep their promises after being

made and observe their obligations under the agreements after being concluded. Those who do not keep their promises and observe their agreements cannot be recognised even as a faithful Muslim. Accordingly, the basic ruling that can be deducted from the aforementioned primary sources of *Shari'ah* is that every Muslim has to observe a valid agreement.

The same rule can be applicable to the Islamic States in concluding and fulfilling their international obligations under treaties they entered into at the international arena.[32] Nevertheless, it should be noted that rules available in the *Shari'ah* are not equivalent to details methods and rules of interpretation of treaties under contemporary international law. Therefore, in Islam, the court may adopt any of those approaches or even combination of those approaches - such as textual approach, contextual approach, theological approach, and historical approach - so long as the intention is to interpret the treaty in 'good faith' in order to deliver justice between the disputing parties.

CONCLUSION

In a nutshell, the spirit of Islamic perspective in interpreting treaties has already been reflected in interpreting treaties under customary international law. It is similar to the rule of '*pacta sunt servanda*' enshrined in Article 26 of the VCLT which requires the parties to perform and observe their obligations under a treaty in 'good faith'. Thus, it submitted that Article 31 (1) of the VCLT which obliges a treaty to be interpreted in 'good faith' under the rule of '*pacta sunt servanda*' is in harmony with the *Shari`ah*.

Notes

1 Mohammad Naqib Ishan Jan, Principles of Public International Law: A Modern Approach (IIUM Press: 2011), pp. 201-202.

2 Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points", BYIL, 1951, Vol. 28, p. 1.

3 James G. Apple, Katherine Brantingham and Andrew Solomon (Eds), "General Principles of International Law: Treaty Interpretation",

International Judicial Monitor and the American Society of International Law, 2006, Vol. 1, No. 4, available at <http://www.judicialmonitor.org/archive_0906/generalprinciples.html> (accessed on 30 November 2021).

4 Mohammad Naqib Ishan Jan, n. 1, at p. 203.

5 Odile Ammann, Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example (Brill/Nijhoff: 2020), pp. 198-199.

6 Abdul Ghafur Hamid, Public International Law: A Practical Approach (4th Edn) (Sweet & Maxwell: 2019), p. 219.

7 Odile Ammann, n. 5, at pp. 202-208.

8 Ibid, pp. 208-213.

9 Mohammad Naqib Ishan Jan, n. 1, at p. 205.

10 Jan Klabbers, International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation? (Cambridge University Press: 2004), p. 268; Odile Ammann, n. 5, at p. 216.

11 Mohammad Naqib Ishan Jan, n. 1, at p. 205.

12 Eduardo Jimenez de Arechaga, International Law in the Past Third of A Century (Vol. 159) (Collected Courses of the Hague Academy of International Law: 1978), pp. 42-48.

13 See also Odile Ammann, n. 5, at pp. 213-219; Abdul Ghafur Hamid, n. 6, at pp. 221-222; Mohammad Naqib Ishan Jan, n. 1, at pp. 203-205.

14 [1950] ICJ Rep 8.

15 Article 27 (3) of the UN Charter: "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting".

16 Eduardo Jimenez de Arechaga, n. 12, at pp. 42-48.

17 [1950] ICJ Rep 8.

18 Ulf Linderfalk, On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties (Springer: 2007), p. 218.

19 Mohammad Naqib Ishan Jan, n. 1, at pp. 203-204.

[20] Thomson Reuters, "Ejusdem Generis", Practical Law, available at <https://ca.practicallaw.thomsonreuters.com/8-621-0050?transitionType=Default&contextData=(sc.Default)&firstPage=true> (accessed on 30 November 2021).

[21] Oxford Reference, "Interpretation, Rules and Principles of Statutory", available at <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100008301> (accessed on 30 November 2021).

[22] Abdul Ghafur Hamid, n. 6, at p. 222.

[23] See Article 23 (2) of the Vienna Convention on the Law of Treaties 1969.

[24] Mohammad Naqib Ishan Jan, n. 1, at pp. 195-196.

[25] Ibid.

[26] Belilos v. Switzerland, Admissibility, merits and just satisfaction, App No 10328/83, Case No 20/1986/118/167, A/132, [1988] ECHR 4, available at <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57434%22]}> (accessed on 30 November 2021).

[27] The Quran, 17:34.

[28] The Quran, 23:8.

[29] Bihar al-anwar, Vol. 75, p. 96. As cited in Ibrahim Amini, "Chapter 48: Keeping Promises", in Principles of Upbringing Children, Al-Islam.org, available at <https://www.al-islam.org/principles-upbringing-children-ibrahim-amini/chapter-48-keeping-promises> (accessed on 30 November 2021).

[30] Usul al-Kafi, Vol. 2, p. 364. As cited in Ibrahim Amini, n. 29.

[31] Wasail al-shiah, Vol. 15, p. 101. As cited in Ibrahim Amini, n. 29.

[32] See also Emilia Justyna Powell, Islamic Law and International Law: Peaceful Resolution of Disputes (Oxford University Press: 2020), pp. 118-123.

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