

The Principle of Diplomatic Immunity Under Islamic Law

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Abstract

Diplomatic immunity under Islamic law is premised on the idea that a society could send a person on their behalf to negotiate and argue for their cause. Since the coming of Islam in the 7th Century, Islamic law has continually emphasized on the principles of diplomatic immunity. These principles derive their legal authority from the two principal sources of Islamic law, i.e. the Quran and the Sunnah. In addition, and as a secondary source, the consistent practice of Muslim heads of state also clearly establishes the privileges and immunities of diplomats in Islamic law and practice. This article analyses the different sources of Islamic law as it relates to diplomatic immunity and the various instances of its application in Islamic history. In this article, the doctrine of personal inviolability, freedom of religion and freedom from local court's jurisdiction were specifically discussed. Although, there have been tremendous changes in the way nations interact with each other, the basic functions of diplomacy and their machinery have not changed. Furthermore, the development of new concepts, especially under different International treaties, that have extended the principle of immunity, Islamic law has been shown to be dynamic and flexible to accommodate such new changes. It was also submitted that the provisions of the 1961 VCDR and 1963 VCCR, to the extent of their concurrence with the Quran and Sunnah, are applicable under Islamic law.

Keywords: Immunity, Islamic Law, International Law, Diplomats, Inviolability.

Introduction

Islamic law contains many references to the protection of diplomats, also usually referred to as emissaries, envoys, deputations, delegations and embassies in the writings of other scholars. The Quran and the Sunnah are the two principal sources of Islamic law, and these two texts

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contain the bulk of what constitutes diplomatic immunity under Islamic law. Throughout these sources, diplomats are entitled to immunity from persecution, freedom from arbitrary arrest and detention, and proper care and treatment. Furthermore, nothing in these sources precludes any other additional immunity or privilege that might be accorded to a diplomat under any treaty, as long as such is not contrary to the letters and spirit of Islamic law. It has been argued by modern Islamic law scholars that Islamic law has provisions for diplomatic immunity that are analogous with those spelt out in the 1961 Vienna Convention on Diplomatic Relations (hereinafter referred to as 'VCDR') and the 1963 Vienna Convention on Consular Relations (hereinafter referred to as 'VCCR') (Ismail, 2013). A diplomat’s functions, under Islamic law, are very much like those of today, except for differences brought about by modern technology (Bassiouni, 1980). This similarity is evidenced by the Prophet’s frequent practice of sending off diplomatic delegations to different parts of the world during his 10-year reign as the leader of the Muslims. His directives to his emissaries were to work patiently, avoid harshness towards others, give good tidings to other people, and not to incite hostility to themselves or their mission (Istanbuli, 2001).

Meaning and Nature

Ross (1989) defines diplomatic immunity as a situation where members of diplomatic missions are shielded from legal processes. According to Wilson (1984), this "shield"- diplomatic immunity - is broadly defined as the freedom from local jurisdiction accorded under International Law by the receiving state to foreign diplomats and to the families and servants of such officers.

The practice of granting diplomatic immunity is thousands of years old (Morris, 2007). Historians recognize that the practice of immunity was common to a wide range of states in ancient times, from classical Greece and Rome to both the near and far east, including the ancient Babylonians, Egyptians, Israelites, Indians and Chinese (David 2001). Kurizaki (2011) traces the development of diplomacy through history, from the Amarna diplomacy in the ancient Near East, to Greek, Roman, Byzantine and French diplomacy in the 17th and 18th centuries.

Indeed, diplomatic relations in Islam started since the very early age of Islam, as evidenced in the Quran 49:13:

O mankind, indeed we have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted.

Various theories have been advanced to explain the concept of diplomatic immunity. Most prominent among these theories are the theories of personal representation, extraterritoriality and functional necessity (Abba & Safiyanu, 2020).

The theory of personal representation is premised on the idea that the diplomat is a representative of the sovereign of a state, and that as the representative he is entitled to the same privileges as the sovereign (Groff, 2000). Under this theory the diplomat is viewed as the personification of the head of the sending state.

The theory of extraterritoriality suggests that the property and person of the diplomat are to be treated as if they exist on the territory of the sending state (McClanahan 1989). This implies that since the diplomat is considered to be living in the sending state, he remains immune from the criminal and civil jurisdiction of the receiving state (Wright 1897).

The functional necessity theory dictates that for diplomatic envoys to carry out their functions efficiently, without any interference, intimidation and fear of civil or criminal prosecution, they need to be guaranteed all necessary privileges and immunities in the country of their accreditation. This is the essence of functional necessity theory which became generally popular amongst legal scholars in the early twentieth century (Ismail, 2013). The popularity gained by this theory is reflected in the preamble to the 1961 VCDR to the effect that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States”. Proponents of this theory suggest that it is dynamic and contains safeguards preventing the needless expansion of privileges and immunities (Farhangi 1985-86 and Wilson 1984).

According to Ismail (2013), what appears to be predominant as the legal rationale for the practice of diplomatic immunity under Islamic international law is the functional necessity theory. In *Re: Islamisation of Laws Public Notice No. 3 of 1983* the Federal Shariat Court of Pakistan quoted a Hanafi jurist, Sarakhshi, as saying “if somebody claims to be an envoy and

has in his possession the necessary credentials, he shall be granted immunity till the completion of his ambassadorial duty and till he returns”. Zawati (2001) submits that in order to enable them to exercise their duties and functions, diplomatic agents must enjoy full personal immunity under Islamic international law.

However, some elements of personal representation theory cannot be completely ruled out under Islamic law. Ibn Ali (2002, p. 99) states that “whatever treatment is given to an ambassador, whether good or bad, it is as if it were done to the king who sent him, and kings have always shown the greatest respect to one another”. This implies that since diplomatic envoys are representatives of their sovereigns, diplomatic immunity must be accorded to them.

Sources of the Principles of Diplomatic Immunity Under Islamic Law

The principles of diplomatic immunity derive their legal authority from the two principal sources of Islamic law, i.e. the Quran and the Sunnah. In addition, and as a secondary source, the consistent practice of Muslim heads of state also clearly establishes the privileges and immunities of diplomats in Islamic law and practice. These sources are discussed hereunder;

a. The Quran

The Quran contains several references to the concept of diplomatic immunity. In *Suratul Naml* (27:23-44), the Quran describes the exchange of envoys between prophet Sulaiman (992-952 BC) and Bilqis, Queen of Sheba. Bilqis is described as having sent a delegation bearing gifts to Sulaiman, who considered it an insult (an attempt to bribe him). Sulaiman rejected the gifts and sent the delegation back. In the same Surat, it is stated (by Bilqis):

But I will certainly send him a gift and see what response my envoys will return with. When the chief-envoy came to him, Solomon said, “Do you offer me wealth? What Allah has granted me is far greater than what He has granted you. No! It is you who rejoice in receiving gifts. Go back to them, for we will certainly mobilize against them

forces which they can never resist, and we will drive them out from there in disgrace, fully humbled (27:35-37).

According to Bassiouni (1980), these verses clearly indicate that emissaries were contemplated as the ordinary means of diplomatic communications between Muslims and non-Muslims heads of state, and that the emissaries were immune from wrath of the host state and were not responsible for the acts or messages sent by their heads of state. Thus, even when Sulaiman was offended, he did nothing against the emissaries but send them back whence they come from.

Diplomatic arrangements, as we know, are also generally based on the efficacy of treaties consciously entered into by different States. It is most important that the terms of these treaties must be respected at all times (Ismail, 2013). The Quran, categorically provides in the following verses: O you who have believed, fulfill [all] contracts (5:1), Honour Allah's covenant when you make a pledge, and do not break your oaths after confirming them... (16:91), As for the polytheists who have honoured every term of their treaty with you and have not supported an enemy against you, honour your treaty with them until the end of its term... (9:4), ... So, as long as they are true to you, be true to them (9:7). Thus, under Islamic law, the obligation to fulfil all treaties when entered into is unequivocal as highlighted in the verses above. According to Bassiouni (1980), treaties take precedence over all laws except the Quran and the Sunnah.

There are, in practice, no sources of public international law which can be compared with the Quran attitudes entirely. This is based on the fact that it is self-conductive. This means its rules, principles, and obligations do not need authorization and are automatically applied in relevant situations by those who are faithful to its inspiration. It owns the virtue of self-conductivity, self-adaptation, self-confirmation, self-applicability and also self-enforceability.

b. The Sunnah

The Sunnah is the behaviour, collection of sayings and decisions of the Prophet of Islam concerning different situations (Malekian, 2011). There are several verses in the Quran that obligate all Muslims to follow the behaviors, manners and decisions of the prophet. For example: O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you truly believe in Allah and the Last Day. That is the best [way] and best in result. (4:59), ...and obey

Allah and His Messenger if you are true believers. (8:1), O you who have believed, respond to Allah and to the Messenger when he calls you to that which gives you life (8:24) etc. All these, and many others imply the importance of Sunnah as a source of Islamic international law.

Furthermore, this source of Islamic law contributed to the practical development of the principles of the religion during the early revelation of Islam and consequently the enforcement of the principles of the Quran between various Arabic clans and groups (Guillaume, 1924). Thus, it is on the basis on the Sunnah that the practices of diplomatic relations, including immunity, are interpreted, regulated, and applied. According to historical record, Prophet Muhammad (pbuh) sent different emissaries to various places including Makkah, Byzantium, Egypt, Persia and Ethiopia either for religious or political reasons. He equally warmly received delegations and diplomatic emissaries in his mosque at a place designated as *Ustuwanaat al-Wufuud* (the pillar of embassies) (Zawati, 2001).

Malekian (2011) submits that the Sunnah in Islamic international law may be compared with that of customary international law. This is because Sunnah is custom and the habits of life of Muhammad. Similarly, customs in international law are habits which have long been practised by the subjects of international law and have not been objected to as a rule within the system. They are both the consequence of repetitions. A chief difference between these two systems of custom, however, is that the former largely emanates from the constitution of Islamic law and is consequently based on its own legal philosophy while the latter has essentially been developed from political considerations and been accepted by states as an obligatory rule binding in their international relations.

c. Consistent Practice of Muslim Heads of State

Flowing from the two principal sources, the generality of the Muslim heads of States (the Caliphs, Sultans and the current heads of the Muslim countries) also acknowledge and establish diplomatic protection and immunity in their international transactions. The clear instruction of Abu-Bakr (632-634 AD), the first Caliph after Prophet Muhammad (pbuh), to Yazid ibn Abi Sufyan that “in case envoys of the adversary come to you, treat them with hospitality” indicates the extent of the Prophet's companions' understanding of diplomatic privileges (Arjoun, 1981). In fact, the era of the first four caliphs, otherwise known as the rightly guided caliphs (632-661

AD), witnessed tremendous exchange of envoys between the Muslims and non-Muslim States. For instance, the year 651 AD also recorded the despatch of Muslim mission headed by Sa'd ibn Abi Waqqas to the Chinese Emperor, Gaozong of Tang, under the overall leadership of Uthman Ibn 'Affan (579-656 AD), the third Caliph (Lipman, 1998). The Umayyad and the Abbasid dynasties were both recorded to have attained the height of sophistication in their diplomatic intercourse with neighbouring Kingdoms. Muawiyah Ibn Abi Sufyan (602-680 AD), an Umayyad Caliph, was known for his preference for diplomatic methods which has been observed to be a reason behind the longevity of his reign (Istanbuli, 2001).

Today, the generality of Muslim states have come together under the Organization of Islamic Cooperation (OIC) (formerly Organization of Islamic Conference), which is currently comprised of 57 member states, to recognize the immunities of the diplomatic personnel of individual states under the 1976 Convention of the Immunities and Privileges of the OIC. This is in addition to member states being signatories to the 1961 VCDR and 1963 VCCR.

Application of the Principles of Diplomatic Immunity under Islamic Law

The inviolability of emissaries has been a pre-modern universal concept although with varying degree of recognition attached to it (Ismail, 2013). Bassiouni (1980) states that before the emergence of Prophet Muhammad (pbuh), inviolability of envoys was ill recognized in the Arabian Peninsula. Thus, the coming of Islam did not only widen the scope of diplomatic intercourse, but it also accorded the diplomatic personnel along with their family full personal inviolability (Istanbuli, 2001). This requires that diplomats are not to be killed or maltreated but should always be respected.

The doctrine of personal inviolability was demonstrated by the Prophet when Musailima bin Habib, a notorious liar nicknamed *al-Kadhab* (the Liar), sent two emissaries - Ibn Al-Nawwaaha and Ibn Aathaal – with the message that he, Musailima, and not Muhammad, was the true prophet of God. Upon receipt, the Prophet asked the emissaries whether they agreed with the content. They replied that they did, and the Prophet responded: By God, were it not that envoys are not be killed, I would have beheaded the both of you (Iqbal, 1975). The Prophet also followed this practice in the case of Wahshi, the Abyssinian ambassador who had previously killed one of the Prophet's uncles. When Wahshi presented his credentials, the

prophet made it known that non-Muslims would judge Islam by its treatment of foreign envoys, and consequently foreign envoys should be afforded the same treatment as Muslim envoys (Bassiouni, 1980). In another instance, this principle was yet applied by the Prophet in his reception and treatment of envoys from Ta’if in 631 AD. In earlier times, the prophet had been ill treated by the people of Ta’if, but his courteous treatment of their delegation further affirmed that envoys were to be received in accordance to their privileged status. Irrespective of the sending country or its past relations with its people, envoys remained inviolate (Istanbuli, 2001). The inviolability of diplomatic envoy was deemed so important that its violation either by way of detention or arrest could result in a *casus belli* (Ismail, 2013). Tabari (1989) recounts that only under extraordinary circumstances may envoys be detained or imprisoned. The case in point is the Prophet’s detention, but without physical harm, of the envoys of Mecca during the negotiation of the Treaty of Hudaibiyah because the Meccans had detained his emissaries. Bassiouni (1980) submits that he did so only to secure the release of the detained emissaries, and when they were released, the Meccans were, too.

Envoys also enjoyed freedom of religion. One of the most important and significant principles of Islamic international law is that it prohibits all types of compulsion in international relations of states. The Quran has particularly emphasized that there is no compulsion in religion (Quran 2:256). This simply means that the Quran prohibits the imposition of Islam on anybody. Indeed, one of the conditions for accepting the religion of Islam is freewill. There must not be any sort of force, threat or fear of threat against the person accepting Islam. Thus, Islamic law has granted the freedom to pray and involve in other religious practices by non-Muslim envoys. Again, this was demonstrated by the Prophet when he allowed a delegation from of Christians from Najran to hold their services right inside his mosque (Istanbuli, 2001).

The doctrine of immunity from local courts’ jurisdiction was also upheld under Islamic law (Ismail, 2016). In other words, a diplomat is not answerable to the court of his host for the offence he must have committed during his ambassadorial responsibility. The case of the two emissaries sent by Musailima is instructive on this point. Their reply after being asked if they agreed with their message could be constituted as a direct contempt of Prophet Muhammad. But the prophet did not charge or try them for contempt as they are recognized as only a means of diplomatic communication.

Lastly, Islamic law recognizes and guarantees other principles of diplomatic immunity as may be required for the effective transaction of diplomatic matters. This is based on the

jurisprudential principle of Islamic law that nothing will be considered prohibited except it is categorically mentioned as such in a sound and explicit *nass* (i.e. a clear verse of the Quran or an authentic hadith of the Prophet) from Allah (Al-Qaradawi, 2001). In addition, the Quran has emphasized on the sanctity of treaties and agreement entered into by Muslim states. Thus, today, as most Muslim states today are signatories to various international treaties such as the VCDR 1961 and VCCR 1963, other principles of diplomatic immunity such as freedom of movement, freedom of communication, protection of diplomatic bags and couriers, exemption from taxation, and inviolability of diplomatic mission and archives are equally guaranteed under Islamic law.

Conclusion

The principles of diplomatic immunities such as personal inviolability, immunity from the jurisdiction of domestic courts and freedom of religion as are contained and codified in the 1961 VCDR and 1963 VCCR, representing the foundation of international law today, can be seen to be very similar to the Islamic principle of diplomatic immunity, firmly established since the 7th Century. Furthermore, other protections/privileges such as freedom of movement, protection of diplomatic bags and couriers, freedom of communication, inviolability of mission's archives and inviolability of mission premises and private residence, although not explicitly mentioned in the primary sources of Islamic law, are covered by the Islamic law maxim that whatever is not specifically prohibited either in the Qur'an or in the Sunnah will be deemed permissible. Furthermore, Islamic law has emphasized on the importance of fulfilling obligations under a treaty (be it with a Muslim or non-Muslim country), as long as the terms under such a treaty does not derogate from the spirit of the Shariah. In conclusion, it can be said that Islamic law has formulated strong foundations and rules to protect diplomats from any sort of harm, killing, damaging their properties instead they must be given privilege and protocol to perform their duties as diplomats in host countries without any fear.

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