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COMPARISON BETWEEN DISPUTE RESOLUTION MECHANISMS IN INTERNATIONAL LAW AND ISLAMIC LAW: PROBLEMS AND CHALLENGES IN THE REALISATION OF THE INTERNATIONAL ISLAMIC COURT OF JUSTICE

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ABSTRACT

At present, there are several dispute resolution mechanisms that are available to resolve disputes between states. International law regards all states to be standing at an equal footing that makes state consent to be required in the dispute resolution process. Meanwhile, Islamic law presents dispute resolution as one tenet to achieve justice which is in line with the Shariah and the Prophet Muhammad (pbuh) traditions. This article will describe and analyse the dispute resolution mechanisms in international law and Islamic law by focusing on the distinctive traits between these two. This is needed in order to evaluate suggestions on how to ensure the establishment of the International Islamic Court of Justice (IICJ) as a convenient forum for dispute resolution among Muslim States that was proposed by the Organization of Islamic Cooperation (OIC) in 1981 but has not been materialised until today. Using qualitative method and library-based research, primary and secondary sources from various sources are examined to provide a comparative analysis on the concept of dispute resolution in international law and Islamic law. The preliminary findings from this study suggest that in order to properly established the IICJ as a medium of settling the difference of views among the Muslim states, it must be encouraged that all Muslim states must ratify the Court's Statute. The OIC must organise inclusive dialogues to explain the working of the Court particularly to its member states to make it workable in resolving disputes and achieve considerable results in preserving peace as well as securing justice between Muslim states.

Keywords: *dispute resolution, Islamic states, Islamic law, international law, Organization of Islamic Cooperation (OIC).*

Introduction

The principle of peaceful settlement of international disputes as underlined in the United Nations Charter is promulgated to prohibit unilateral action in interstate dispute resolution, that is considered as one of the paramount goal of the international law (Merrills 2011). All means of peaceful dispute resolution such as negotiations, conciliation, mediation, arbitration, and adjudication are fully embraced by international law and organizations. In this sense, the Islamic law also has as similar view pertaining to dispute resolution as the rise of Islam was accompanied by a call for peace. As such, it is natural for Islam to call for settlement of disputes in an amicable manner. For the purpose of this article, a comparative analysis on the concepts of dispute resolution between Western and Islamic sources will be discussed.

It was recorded in history that Muslims have long enjoyed several methods of resolving their disputes. From informal method of reconciliation (*sulh)* by family elders to formal Shariah and secular courts, Muslims throughout the ages since the time of the Prophet (pbuh) have resolved their business and matrimonial disputes, established their rights to an inheritance and redressed their grievances. However, the modern world presents Muslims with a dilemma where the secular system has superseded the previous religion-based administration model. The shifting of the system has eventually affected the mechanisms for dispute resolution in which it is more formal and institutionalised such as through the establishment of courts which is generally based on the Western system.

From the paradigm of international law, Muslim states faced and are currently facing many kinds of international dispute. The types of international disputes vary from territorial dispute (*Indonesia v. Malaysia* 2002), interpretation of international agreements (*Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar* 2018), and others. In so far as these disputes are concerned, most of them were submitted to the International Court of Justice ("ICJ") which is the principal judicial organ of the United Nations. It is interesting to note that in 1981 the Organization of the Islamic Cooperation ("OIC") had put forward a proposal for the establishment of the Islamic International Court of Justice ("IICJ") envisaged as a judicial body of the organization. This effort however did not come into full realisation when only eight OIC member states namely the State of Kuwait, the Kingdom of Saudi Arabia, the Hashemite Kingdom of Jordan, the Socialist People's Libyan Arab Jamahiriya, the State of Bahrain, the State of Qatar, the State of Egypt, and the Republic of Maldives ratified the Statute of the Court while it requires the ratification from two-third of member states in order to set up the Court (Lombardini 2001).

In this regard, this article will describe and analyse the dispute resolution mechanisms in international law and Islamic law by focusing on the similar and distinctive traits between these two. This analysis is pertinent in order to identify challenges and suggesting the work plan for the proper establishment of the IICJ. First, we will describe the nature of Islamic dispute resolution and compare that with the Western models. Second, we will explain on the role of OIC in dispute resolution, paying particular attention to issues, problems and conflicts that has arose previously during the proposal for the establishment of IICJ. Third, we will provide suggestions on what can be done to properly establish the IICJ as the dispute resolution forum for the OIC member states.

Dispute Resolution in Islam

In Islam, the prime approach to conflict resolution is based on religious values, traditional rituals of reconciliation and principle of coexistence (Irani and Funk 1998). Over the year, a number of practices of conflict resolution have come which can be categorised based on tribal laws, Islamic law, and traditional practices recognised by the Shariah (Abu-Nimer 2003 and Maffettone 2016). All of these practices were utilised interchangeably by the Muslim communities. It is also apparent that third party intervention seems to be a steady characteristic in majority of the practices (Abu-Nimer 2003).

It is believed that dispute resolution has religious sanctity in Islam because its practice is originated from the Quran and was embraced from the time of the Prophet (pbuh) (Levi-Tawil 2010). All forms

of dispute resolution mechanisms are allowed in Islam except where it makes a thing haram as halal and halal as haram, which means any action which tends to turn a permitted work as prohibited or prohibited work as permitted (Rashid 2008).

The promotion of dispute resolution in Islam can be derived from the verse of Quran, which says:

> *"The believers are but a single brotherhood, so make peace and reconciliation (sulh) between two (contending) brothers; and fear Allah, that ye may receive mercy."* (Quran 49:10)

In the same line another ayat of the Quran says:

> *"If two parties among the believers fall into a quarrel, make ye peace between them...with justice, and be fair; for Allah loves those who are fair and just."* (Quran 49:9)

In another verse Allah states in the holy Quran:

> *"If you judge in equity between them, for Allah loves those who judge in equity"* (Quran 5:42)

The emphasis on dispute resolution in Islam also can be found in the practice of the Prophet (pbuh) in which it was reported that he expressed his desire to even condone the exaggeration or misstatement if it is made for the purpose of *sulh*. The hadith is as follows:

Narrated Um Kulthum bint Uqba that she heard the Prophet (pbuh) saying, *"he who makes peace or sulh between the people by inventing good information or saying good things, is not a liar."* (Khan n.a.)

Further, Islam views conflict as something negative that breaks harmony and should be avoided. Thus, the objective of the third party is to preserve the harmonious relationship rather than change power relationships. The process is carried out based on the established norms that include honor restoration, face saving, avoiding shame, saving dignity. This is because in Islam relationships or *ukhwah* are key and their restoration is paramount.

Following that idea, restoring individual and communal harmony through the authority of the third party (mediator or arbitrator) is the primary objective rather than offer an opportunity for disputing parties to openly express their grievances. To achieve its objective, the third-party role tends to be occupied by community leaders, mostly elders, whose standing in society demands respect from the parties and can pressure them to reach an agreement. Thus, power imbalances on the part of the third-party are key in these processes that can be used as a catalyst for the effective dispute resolution (Abu-Nimer 2003).

From the above discussion, it can be summarised that Islamic culture reflects a very plausible consideration on the role of dispute resolution as a part of its teaching. Modern perspectives on the traditions of amicable settlement through the process of mediation or conciliation known in Islam as *sulh* and the process of arbitration commonly known as *tahkim* are evident and their contribution to Islamic justice is increasingly acknowledged (Ann Black et al. 2013). Thus, it is argued hereby that this concept is also applied in terms of international dispute settlement between Islamic states. Before going further on the substantive discussion on the methods to realise the establishment of the IICJ, the following topic will address on the comparison of dispute resolution in the perspective of Islamic law and the Western based International in order to get a clear picture on the need of having a dedicated forum for dispute resolution among the Islamic states such as the IICJ.

Comparison Between Dispute Resolution in Islamic Law and Western Based International Law

Islamic law sets out and regulates the relationship between man and God. That relationship is stipulated in the Quran and has been further explained and detailed out in the Sunna. At the same time, Islam also

provides on the man's relationship with other men both individually and in the society. In the purview of dispute resolution, Islam lays down general principles and a specific set of guidelines. It steers and limits the dispute resolution process (Johnston et al. 2000).

Even if the Western concept of law vary little from those of Islam in terms of the ethical and moral foundations, the are some differences in these two concepts. For example, in Western law, the linkage between "ethics and the law has been overlaid and obscured by secular ideas of right and wrong" (Johnston et al. 2000). This can be found in Western legal documents which are perceived to address the 'will of the people' and which envisage human rights and obligations as well as the essential needs of society (Johnston et al. 2000). Incompliances are investigated and punished as offences against social order.

Conversely, the traditional Muslim concept lies on the theory that Shariah is the law of God created and relevant for all period of time in the sacred revelation. Muslims are therefore have submitted a positive responsibility to seek and apply God's will and live in compliance with that law regardless of the conduct of others. The emphasis is obligatory in nature rather than upon rights and founded upon the sacred origin of the law. Therefore, Shariah is not a 'law' in the Western's accepted sense of the term where it can generally be said that "it contains an infallible guide to ethics. It is fundamentally a doctrine of duties, a code of obligations. Legal considerations and individual rights have a secondary place in it" (Johnston et al. 2000).

On the other note, the Western approach to conflict resolution put forward that the problems to be abstracted and resolved. In this context, Islamic take the approaches to frame conflicts as matters of societal and not just individual concern and underline the importance of rectifying and preserving social relationships. Muslim approaches to conflict resolution draw on religious values, social networks, rituals of reconciliation (Irani and Funk 1998). Relationships between personal and group identity is stressed along with individual and collective responsibility for wrongdoings. It also includes the relationship between attentiveness to reputation-related issues (public status and shame) and the achievement of restorative justice within a context of continuing relationship (Said and Funk 2002).

Under Islamic law, 'the purpose of *sulh* (compromise, settlement or agreement between parties to a dispute) is to end conflict and hostility among believers so that they may conduct their relationships in peace and amity. Hence, in Islamic law *sulh* is a form of contract, legally binding on both the individual and community levels' (Iqbal 2001). Although the concepts of compromise, settlement, reconciliation, and agreement as involved in *sulh* are known to the modern Western intellect, the process through which *sulh* is established is different in Western and Islamic systems. In the West, this process would involve the alternative dispute resolution ('ADR') mechanism in which regular courts are not involved and other forum is set up for their service in resolving the dispute. Meanwhile, in the Islamic tradition, regular courts and ADR mechanisms are essentially co-related and the legal systems that have applied this traditional model have exercised justice much more efficiently than those who did not appreciate the Islamic spirit (Iqbal 2001).

Furthermore, the Islamic system of resolving disputes stresses on duty to the community. The benefit of the community is prioritised than that of the individual. Relationships is Islam are governed by the principles of mutual respect, interdependence, harmony, reciprocity and holism, as opposed to individualism, confrontation and competition (Russell 1999).

The other important aspects of differences between Western and Islamic dispute management techniques are on the requirements on the qualifications of the third-party. In Western perspective, mediators are expected to be formally certified professionals who provided their services as neutral, unaffiliated outsiders. As opposed on that, the Islamic approach preferred any third party as long as he is an unbiased insider with ongoing connections to the disputants as well as a strong sense of the common good, and standing within the community, for example age, experience, status, and leadership (Irani and Funk 1998).

Other significant differences were in relation to the goals of the Western process. The Western dispute settlement process were steered toward the existence of a 'win-win' scenario which could make the parties forget the past and move on. In contrast, the objectives of the Islamic process primarily concern on preserving and cultivating the established nobility of the community. The focus was considered a source of stability and guidance that provided lessons for determining a common future. While the Western approach opted to enable individuals to settle their own problem without submitting themselves to adversarial legal system, the Islamic approach was intended to enable the society to be involved in matters of common concern (Irani and Funk 1998).

Other differences include the role of third parties or mediators in disputes. In some Muslim cultures, the mediator is perceived as someone having all the answers and solutions. This is a position that holds a great deal of power and responsibility. It also has been perceived that "If [the third party] does not provide the answers, he or she is not really respected or considered to be legitimate." (Irani and Funk 1998). The Western dispute resolution on the other hand only requires the meditator to play a facilitative role to guide the disputing parties in reaching an agreement in the dispute settlement process.

It was found that several aspects in both models of dispute resolution are different mostly in terms of the main idea of foundation. As such, it is proper to have a dedicated forum for Islamic states to resolve the dispute as what has been proposed during the proposal on the establishment of IICJ. This is important in order all intrinsic values of the Islamic model of dispute resolution are preserved towards a more familiar and intimate forum for all Islamic states. Therefore, the following discussion will focus on the roles of the OIC in dispute resolution by focusing on the proposal of the establishment of IICJ that has been done in principal but is yet to be realised in practical.

The Role of Organization of The Islamic Cooperation in Dispute Resolution Between Islamic States

The OIC is an international intergovernmental institution which become the platform of cooperation between the Islamic states. The main goals under the Charter of the OIC are to foster and promote Islamic friendly relationship and cooperativeness among Member States besides safeguarding the image of Islam and prevent from any misrepresentation on it. It also aims to promote dialogue among different members of societies and religions to achieve unified and continuous human development and ensure the prosperity of the Member States. Furthermore, the Charter provides on the right to self-determination and non-interference in the internal affairs of Member States as well as their sovereignty, independence and territorial integrity in consonance with the Charter of the United Nations.

The OIC has long played an important role in mediation and conflict resolution, in particular taking action in countries that are members of the OIC or intervening when a Muslim community is part of a conflict. There are four cases that can become examples of the OIC's involvement in mediation to resolve the disputes which are in the Philippines (Santos Jr. 2013), Thailand (Ashayagachat 2016), Somalia (Svoboda et al. 2015) and Iraq (Abdul Ghafour 2011).

Since its establishment, the OIC has witnessed many conflicts among member states. OIC often plays the role as the mediator in those conflicts. Despite of numerous challenges, the OIC has already scored notable successes in mediating deep-rooted conflicts, especially within member states. However, OIC has not established a dedicated formal institution for such mediation function just like any international courts or tribunal. As such, the Organization has not yet reached its full potential in terms of mediating and resolving international conflicts and disputes when it still could not establish any formal institution to carry out that function.

In fact, to strengthen its role in facilitating the dispute resolution between OIC member states there was a suggestion by Kuwait for the creation of the International Islamic Court of Justice ('IICJ') in 1981. It is to serve as a judicial body of the organization entrusted with the responsibility of peacefully settling the disputes arising among member states. The necessity, whether real or symbolic, to foresee the creation of a judicial body capable of peacefully solving the conflicts arising among them through the application of the Islamic Shariah. Should the Islamic Court eventually be set up, it would have a secular

character and would consider a religious local code as the law to be applied for the resolution of international disputes. To elaborate this further, the following chapter will discuss on the background on the proposal for the establishment of the IICJ and the challenges that involved in realisation of its establishment.

Background on The Proposal for the Establishment of the International Islamic Court of Justice

The idea to establish the IICJ was pointed out during the emergence of the first Gulf War between Iraq and Iran (1980–1988) and before the Iraqi armed campaign against Kuwait which sparked to the second Gulf War in 1991. These two conflicts brought opposition among the Islamic states. By looking at this, it is apparent that the first Gulf War could have shown the dire need of a judicial organ for the peaceful settlement of international disputes between the OIC member states. Meanwhile, the attack against the country where the Court should have its seat i.e. the City of Kuwait (Organization on Islamic Cooperation 1987) could easily signify the lack of strong basis of co-operation and support for the establishment of the Court and for the recognition of its functions (Lombardini 2001).

Despite this fact, a resolution numbered 11/3-P adopted by the Third Islamic Summit Conference held in Taif in 1981 marked the establishment of the IICJ as one of the organs of the OIC to peacefully resolve the disputes arising among member states (Lombardini 2001). A working group consists of experts was convened by the Secretary-General of OIC to draft the Statute of the IICJ in January 1983 (Lombardini 2001). The final version of the Court's Statute was finalised on 29 January 1987. In the same year, the Fifth Islamic Summit Conference held in Kuwait decided to adopt Resolution No. 13/5-P on the establishment of the IICJ and the Court's Statute (Lombardini 2001).

In making the Court's Statute to become in force, Article 49 provides that the Court will be set up upon securing a sufficient number of ratifications i.e. a two-third majority of member states. However, up until this date only eight member states have ratified the Court's Statute which are the State of Kuwait, the Kingdom of Saudi Arabia, the Hashemite Kingdom of Jordan, the Socialist People's Libyan Arab Jamahiriya, the State of Bahrain, the State of Qatar, the State of Egypt, and the Republic of Maldives. Therefore, mathematically there 34 more instruments of ratification that is needed in order for the Court's Statute to become operative. Since OIC is the largest Islamic international organization, the IICJ will become one of the most sophisticated forums for the resolution of international disputes involving many states with various cultural and social backgrounds. However, there should be a widespread agreement between majority of the OIC member states to ratify the Court's Statute that is quite problematic given that the political instability among them. In the light of this, it could be beneficial if the challenges on the establishment of the IICJ and the suggestions to realise its establishment are addressed in which will become the focus of the next chapter.

Challenges to The Establishment of The International Islamic Court of Justice

It was discovered that there are several challenges that need to be overcome in the establishment of the IICJ. The challenges revolve around cultural, political and technical factors that often can be found within OIC member states as well in the operation of international law in general. These challenges will be addressed accordingly in this chapter.

i. Court Litigation is Not Favourable Among the Arabic Countries

The Arab countries which made a significant part of OIC Member State disfavour the adversarial process of court litigation. In fact, the Arabic tradition has always favoured *sulh* which combines the concepts of settlement and reconciliation apart from formal litigation (Iqbal 2001). This is because negotiations and compromises are the traditional path of dispute settlement among the Arab countries (Tirados 2010). This is as a result from the reflection of larger social and cultural perceptions of conflict that makes *sulh* is more preferable. Further, in Arab countries, the notion of conflict typically carries a

highly negative connotation (Abu-Nimer 1996). As such, this perception makes formal litigation with is adversarial in nature becoming an unpopular dispute resolution mechanism in Arab countries.

ii. Lack of Political Will Among the OIC Member States

The Arab countries have faced with many conflicts the in the last few decades. This includes the Gulf War waged between Iraq and an international coalition headed by the United Nations following the invasion of Kuwait in August 1990. Following this, the Arab countries have been separated into a few factions. This separation has resulted to difficulty in making any collective decision. In the context of the establishment of the IICJ, the separation of countries has made it almost impossible for the OIC member states to reach a collective decision in ratifying the Court's Statute. To make it more difficult, the proposal for the establishment of the Court has been brought by Kuwait which is one of the parties in the Gulf War. As such, this has affected the political will of the OIC member states in ratifying the Court's Statute which hinders the proper establishment of the IICJ.

iii. Possible Duplication with Other International Dispute Settlement Institutions

Under international law, the International Court of Justice of the United Nations is regarded as the highest authority. In furtherance of this, the introduction of IICJ would somehow involves the cases that share the same subject matters with the International Court of Justice for example territorial disputes and any disputes originating from international agreements. As the International Court of Justice has already being regarded as the authority under the international law, many OIC member states favoured to submit their disputes to it. This will bring the possibility of duplication of claims in the International Court of Justice with the IICJ since under international law States are free to submit their disputes to the any dispute resolution forum. Consequently, there is a possible duplication with other dispute settlement mechanism that will eventually make it difficult for the OIC member states to accept the jurisdiction of the IICJ.

To conclude, all of the factors mentioned above have contributed to become the impediments to properly establish the IICJ. Hence, it is of a great importance to suggest the mechanisms in realising the establishment of IICJ which will be underscored in the subsequent chapter.

Suggestions to Materialise the Establishment of The International Islamic Court of Justice

All OIC member states can agree on one thing that all states prefer to resolve the disputes in a just and peaceful manner that gives the sense that we can preserve dignity and mutual respect. To achieve that, it needs to be understood that in order for the dispute to be resolved, agreements must be carried out between all member states to agree on the institution that will carry out the justice process. For the establishment of IICJ, we can see that the problem lies on the refusal of majority of the OIC member states to ratify the Court's Statute. Thus, the draft Court's Statute is not binding unless there is a means to secure the ratification to it. As such, a number of suggestions are pointed out below to suggest on the methods of securing ratification to the Court's Statute.

i. Clarifiying on the Nature of International Court's Litigation to the OIC Member States

In persuading the OIC member states to ratify the IICJ Statute, it is important to explain on the nature and working of international court's litigation. Unlike private litigation, consent of the States is paramount in the justiciability of the dispute in the international court. The states can draw any kind of terms and conditions in settling the dispute in a special agreement. Even if the dispute is still going to be decided by way of adversarial process, the state can still preserve its own interests by such terms and conditions in the special agreement. Dialogues within OIC is also needed in order to explain to the states that both *sulh* that is preferable among the Arab countries and international litigation share the same objectives which are to secure justice and preserve the relationship between the disputing parties. On top of that, the institutionalized and formality in an established Islamic international court system that

recognizes Islamic law should be highlighted in the dialogues to further feed the OIC member states' expectation pertaining to the IICJ.

ii. Conduct Negotiation Series that are Spearheaded by Neutral States

It is to be noted that, among the problem with the initial suggestion for the establishment of the IICJ is the lack of political will among the OIC member states to ratify the Court's Statute. One of the factors of the lack of political will is because the proposal of the establishment of the IICJ was brought by Kuwait that also will become the location for the seating of the IICJ. This is not favourable among some Arab countries that had some feud with Kuwait during the previous Gulf War. As such, it is suggested that other OIC member states that have no conflict of interest or neutral state should bring a new motion on the establishment of the IICJ and conduct series of negotiation towards the ratification of the Court's Statute. It is also suggested that the seating of the court also needs to be moved to a neutral state and not Kuwait to further symbolise the independence of the IICJ which will subsequently provide assurance to the OIC members in ratifying the Court's Statute.

iii. Addressing on the Substantial Difference between the International Islamic Court of Justice with the other International Dispute Settlement Institutions

It is argued above that one of the problems that is against the idea of establishment of IICJ is the possible duplication with other international dispute settlement institutions. In answering this concern, the OIC must explain on the substantial difference between the IICJ and other international dispute settlement institutions. One of the most exponent difference is the recognition of Islamic law as the main source of law in IICJ apart from the general international law. Besides, the IICJ will also promote the effect of uniting the Islamic states and of contributing potential consequences for the political and diplomatic balance between Islamic states particularly in the Arab region which will be another unique feature of the IICJ as compared to the other international dispute settlement institutions.

Conclusion

The absent of a hierarchical structure in international legal system gives does provide the opportunity to many international actors to leave their mark on international law. The OIC as an international organisation can also play a role in leaving the mark by introducing the IICJ that will further develop the international Islamic legal system. Having a broad membership, the OIC can potentially play an influential role in securing to this end. However, there are aspects in which the OIC needs to do in order to realise the establishment of IICJ as what has been discussed in the previous chapter. The establishment of IICJ will not only serve as the medium to achieve justice but it will also mark the advancement of paramount cooperation between the OIC member states.

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