

The Hague Service Convention 1965: Is it *Shari'ah* Compliant?*

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Abstract: The issue of amenability of an international treaty, like the 'Hague Service Convention 1965', with the *Shari'ah* is crucial from a Muslim state perspective and it has to be settled before the State in question can ratify the treaty and thereby expressing her willingness to abide by its provisions. This is crucial in the sense that once a treaty is ratified and come into force the treaty shall be binding upon its contracting states under both contemporary international law and the *Shari'ah*. Muslim States or for that matter any other state, do not want to obligate themselves by a treaty that adversely affects their religious beliefs, national laws or sovereignty. In this paper attempt is made to determine whether the Hague Service Convention 1965 is *Shari'ah* compliant. In determining this it is important to study the Convention's objectives for if its objectives are align with the higher ideals and objectives of *Shari'ah* (*Maqasid al-Shari'ah*) then the treaty in question, which calls for judicial cooperation among its members, can securely be adopted by Muslim states without affecting their substantive laws or sovereignty.

Key words: Hague Service Convention 1965, judicial cooperation, *Shari'ah*, right, justice and removal of hardship.

INTRODUCTION

This paper examines the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Nov. 15, 1965, UNTS, 163—hereinafter The Hague Service Convention 1965) to see whether it is *Shari'ah* compliant. The issue of amenability of an international treaty, like the Hague Service Convention 1965, with the *Shari'ah* is crucial from a Muslim state perspective and it has to be settled before the State in question can ratify the treaty and thereby expressing her willingness to abide by its provisions. This is crucial in the sense that once a treaty is ratified and come into force the treaty shall be binding upon its contracting states under both contemporary international law and the *Shari'ah*. Muslim States or for that matter any other state, do not want to obligate themselves by a treaty that adversely affects their religious beliefs, national laws or sovereignty. In determining whether the Hague Service Convention 1965 is *Shari'ah* compliant it is important to study its objectives for if its objectives are align with the higher ideals and objectives of *Shari'ah* (*Maqasid al-Shari'ah*) then the treaty as a whole can securely be adopted by Muslim States subject to reservation (VCLT, art. 2 (1) (d)) to those provisions which are determined to be non-*Shari'ah* compliance, provided the treaty does not prohibit reservation (Vienna Convention on Law of Treaties 1969, art. 19) or at least silent on the issue of reservation.

This analysis is important due to globalization and the ever-increasing interdependence of national economies which give rise to international civil litigation. International service of process is not only an important issue in this litigation but it remains to a great deal disputed area of conflict between states. The Hague Service Convention 1965, as this paper explains, represents attempts to lessen this dispute by streamlining the mechanism for international service of process, where people need to serve 'judicial or extrajudicial documents' on individuals and business entities in other countries. A judicial document is any document relating to litigation, including summary proceedings or uncontested proceedings, such as a summons, a judgment, an order, or an application. An extrajudicial document is any other legal document.

Prior to the Hague Service Convention 1965, it was sometimes difficult to serve legal documents internationally. This resulted in situations like lawsuits moving forward without the awareness of the defendant, sluggish legal actions and frustration on the part of the legal community. To serve documents, it was necessary to use consular services to send documents to recipients but a lot of nations bar members of the diplomatic corps from providing service of process, as this could potentially create tensions and conflicts. Even if serving documents through consular services was possible, this could take an extended period of time and cause a lot of hardship. The convention attempts to remove this hardship by introducing the concept of 'Central Authority' through which documents can be reviewed, its accuracy and entirety determined and then timely served to the intended person in his home country, giving the person an opportunity to respond, without adversely affecting national sovereignty or the substantive laws of that country. Thus, removal of hardship, judicial cooperation and

opportunity to a foreign defendant to be heard are the main objective of the Hague Service Convention 1965. These objectives, as explained below, are in line with the objectives of *Shari'ah*. This paper concludes that so long the Hague Service Convention 1965 is not contrary to *Shari'ah*, Muslim States including Malaysia can safely adopt it without compromising their substantive laws or sovereignty.

Objectives of the Hague Service Convention 1965 and the Shari'Ah: Do They Match?:

As a multilateral treaty on judicial assistance, the Hague Service Convention 1965 simplifies service of court process from one contracting state to another, removes hardships by replacing cumbersome diplomatic or consular process, *Fyfeet.alsets* in place uniform methods for effecting service, (Hague Service Convention 1965, arts 2-10) and facilitates the process by which, for example, a plaintiff from State A may commence suit against a defendant in State B without A's attorney have to engage in an exhaustive exploration of a foreign country's civil procedure in his quest to ensure effective service. It calls for judicial collaboration and assistance (*DeJames v. Magnificence Carriers, Inc*) in certain procedural matters without affecting the substantive laws (Hague Service Convention 1965, art. 19) or sovereignty (Hague Service Convention 1965, art. 13) of the Member States. Its objectives, as derived from its preamble, are clear (Anne-Marie Kim, 1998). The Preamble of the Hague Service Convention 1965 declares:

The States signatory to the present Convention, [d]esiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time, [d]esiring to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure, [h]ave resolved to conclude a convention to this effect.

Thus, the Hague Service Convention 1965 basically promotes interstate cooperation making sure that a defendant who lives abroad have an opportunity to be heard before judgment is passed. Passing judgment without giving an opportunity to be heard creates hardship to a foreign defendant – a hardship, which the Convention aspires to redress. Interstate cooperation for the purpose of removal of hardships, restoration of rights of a plaintiff and the realization of a foreign defendant's human rights including the right to be heard will lead to justice and social stability.

The concepts of 'cooperation', removal of hardship, human rights and justice are not alien concepts to *Shari'ah*. They are reflected in the two primary sources of *Shari'ah*, namely the Qur'an and the *Sunnah*. The Qur'an is the direct word of Allah (s.w.t.), and is the first most important source of guidance and rulings. The *Sunnah* of the Prophet (s.a.w) is the second source of guidance and rulings. The *Sunnah* is an inspiration from Allah (s.w.t), but relayed to us through the words and actions of the Prophet (s.a.w), and his concurrence with others' actions. The concepts of 'cooperation', elimination of hardship, human rights and justice are also implied in the higher ideals and objectives of *Shari'ah* (*Maqasid al-Shari'ah*). According to Imam al-Ghazzali: "The objective of the *Shari'ah* is to promote the well-being of all mankind, which lies in safeguarding their faith (*din*), their human self (*nafs*), their intellect (*'aql*), their posterity (*nasl*) and their wealth (*mal*). Whatever ensures the safeguard of these five serves public interest and is desirable" (M. Umer Chapra, 2000). Establishing justice, upholding morality, preventing oppression and hardships on individuals and societies ensure the well-being of humanity and therefore fall within the objectives of *Shari'ah*. These pervasive objectives include within them the concept of cooperation, judicial or otherwise, that leads to justice and fairness. Any sort of cooperation that is intended to promote the well-being of humanity or to establish justice is *Shari'ah* complaint.

Judicial Cooperation:

The Hague Service Convention 1965 exclusively applies in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad, calls for the transmission of documents from one State to another without affecting substantive rules relating to the actual service, intends to further international judicial cooperation among nations by providing simpler methods to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad. To achieve its cooperative objectives, the Convention, in its Article 2, requires each state party to establish a 'Central Authority' to act as an international service clearing house, receiving requests for service from courts abroad and then effecting service to a known address within its borders. This type of cooperation, that is, transmission of foreign judicial documents through a Central Authority or other alternative methods of service as provided for in Articles 8, 9, 10 and 11 of the Convention will defuse a potential diplomatic breach-of-sovereignty of Member States, as, for example, the country in which service is sought uses its own officials to effect service (Donald C., *et al.*, 1995). This explains the facilitative and cooperative feature of the Convention without affecting the legislative, executive or other aspects of sovereignty (Henkin *et al*, 1993) of the Member States. This type of cooperation establishes trust and confidence among different people of divergent nationality in dealing with each other in civil and commercial matters and ensures that in case of allegation of breach of obligation no matter where the defendant resides he or she will have an opportunity to be heard. Such a cooperation is good for nations as it promote international peaceful co-existence and thus undoubtedly *Shari'ah* complaint.

Shari'ah encourages Muslims to cooperate with one another, and by analogy with the international community on any matter that leads to justice, social stability and for the good of mankind. In this regard the Holy Qur'an provides: "Help ye one another in righteousness and piety, but help ye not one another in sin and rancor." [Al-Maidah, 5:2].

وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالتَّعَدُّوْنَ

Helping one another in righteousness and piety (devout or good) is something right or good and thus a lawful conduct that Muslims are required to do. In this regard the Holy Quran provides: "He will enjoin on them that which is right and forbid them that which is wrong. He will make lawful for them all good things and prohibit for them only the foul." [Al-Araf 7:157].

يَأْمُرُهُم بِالْمَعْرُوفِ وَيَنْهَاهُمْ عَنِ الْمُنْكَرِ وَيُحِلُّ لَهُمُ الطَّيِّبَاتِ وَيُحَرِّمُ عَلَيْهِمُ الْخَبَائِثَ

The *Shari'ah* allows what is good (pure) and prohibits from what is bad (and impure). Promoting what is good and prohibiting what is bad is what Islam teaches its followers. As the Holy Qur'an provides: "Ye are the best community that hath been raised up for mankind. Ye enjoin right conduct and forbid indecency; and ye believe in Allah." [Al-Imran, 3:110].

كُنْتُمْ خَيْرَ أُمَّةٍ أُخْرِجَتْ لِلنَّاسِ تَأْمُرُونَ بِالْمَعْرُوفِ وَتَنْهَوْنَ عَنِ الْمُنْكَرِ وَتُؤْمِنُونَ بِاللَّهِ

The above verses are broad in meaning and without limiting the field encourage cooperation in all areas including social, economic or even judicial matters. Cooperation that leads to the good of humanity and justice is a righteous conduct that Muslims should do. The Muslims, however, are forbidden to contribute in any deed that harms humanity, violates its values, forms an obstacle in its path, and spreads aggressiveness and violation of human rights.

The Right to be Heard:

The Hague Service Convention 1965 intends to afford a defendant living abroad the right to be heard. This right can be realized when the defendant is notified service of court process. Service of court process is the formal delivery of documents that are legally sufficient to charge the defendant with notice of a pending action. Generally, this is essential before any significant step in a lawsuit, such as entry of judgment against a party, may be taken. This means that a party be given notice and an opportunity to be heard before he can be deprived of a legal claim or defense.

The right to be heard is also well established in *Shari'ah*. The Prophet (s.a.w.) has said: "Oh Ali, if two people come to ask you to judge between them, do not judge in favour of the first until you hear the word of the second in order that you may know how to judge." Hearing both the plaintiff and the defendant ensures the clarity of evidence. Both are required to give evidence in support of their claim neither they can refuse or conceal the evidence (*Al-Baqarah*, 2:282&140). Upon the clarity of evidence court can reach to a just solution to the case before it.

Justice:

The right to be heard is an essential requirement of due process of law, consistent with the fundamental principles of justice, and enables a party to a court proceeding to present his evidence, to cross examine witnesses called, be appraised of the evidence against him, so that at the conclusion of hearing, he may be in a position to know all the evidence on which the matter is to be decided. A hearing cannot be said to be fair or just if any of the parties is refused a hearing or denied the opportunity to be heard, present his case or call witnesses. By providing a foreign defendant the right to be heard the Hague Service Convention 1965 ensures him access to justice.

Establishing justice is a fundamental principle in *Shari'ah*. This is evident from the following Qur'anic verse: "O ye who believe! Stand out firmly for justice as witnesses to God even as against yourselves or your parents or your kin and whether it be (against) rich or poor: for God can best protect both. Follow not the lusts (of your hearts) lest ye swerve and if ye distort (justice) or decline to do justice verily God is well-acquainted with all that ye do." [An-Nisa, 4: 135].

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ أَنفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ إِن يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللَّهُ أَوْلَىٰ بِهِمَا فَلَا تَتَّبِعُوا الْهَوَىٰ أَن تَعْدِلُوا وَإِن تَلَوُوا أَوْ تَعْرَضُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا

Islamic nations should be a role model for humanity in the promotion of justice, righteousness and piety (good deeds), which include, inter alia, assistance and cooperation in all fields that benefit mankind. This is

what the Holy Qur'an teaches us: "Thus We have appointed you a middle nation, that ye may be witnesses against mankind, and that the messenger may be a witness against you." [Al-Baqarah, 2:143].

وَكَذَٰلِكَ جَعَلْنَاكُمْ أُمَّةً وَسَطًا لِتَكُونُوا شُهَدَاءَ عَلَى النَّاسِ وَيَكُونَ الرَّسُولُ عَلَيْكُمْ شَهِيدًا

Muslim states deal with other nations, even if they are unbelievers, objectively, respectfully and with honour. There is no objection against inter-state cooperation in *Shari'ah* provided no conspiracies are involved and the cooperation does not lead to undermining the sovereignty of Muslim states or cause injustice or lead to the violation of the rule of law including that of Islamic law.

The *Shari'ah* promotes rule of law, respects international agreements, encourages cooperation for the betterment of humanity or the achievement of a harmonious world order or that leads to social and economic justice. Anything that leads to ambiguity, deceit or injustice is prohibited by the *Shari'ah*. The *Shari'ah* concept of world order works towards the realization of a world that is filled with justice, fairness, constructive cooperation and rule of law.

Removal of Hardship:

Strict adherence to the rule of law ensures protection of human right including the right of a defendant to be heard. Any hurdle or hardship in the way of due process of law has to be removed so as to ensure justice. This is exactly what the Hague Service Convention 1965 aims to achieve. The Convention removes the difficulties on the path of serving judicial or extrajudicial documents on a foreign defendant by introducing a Central Authority through which such documents can easily and timely served to the defendant enabling the defendant to defend the plaintiff's claim without suffering a default judgment in the plaintiff's country (*DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (US Court of Appeals, 1981)).

Sharia'h too is all about ease and the removal of hardship for people. It facilitates things for every sphere of people's lives making sure that their welfare is catered well. In fact, peoples' welfare is one of the core objectives of the *Shari'ah* and this objective can successfully be realized by providing facilities and removing hardships for the people. Consequently, practicality, balance, ease and removal of hardship are all valid principles that have always been used as the criteria for providing rulings for people, according to changing times and circumstances. To this effect the Holy Qur'an provides: "Allah desireth for you ease; He desireth not hardship for you." [Al-Baqarah, 2:185].

يُرِيدُ اللَّهُ بِكُمْ الْيُسْرَ وَلَا يُرِيدُ بِكُمْ الْعُسْرَ

To the same effect the Holy Qur'an further provides: "He hath chosen you and hath not laid upon you in religion any hardship." [Al-Hajj, 22: 178].

وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ

In another verse the Holy Qur'an provides: "Allah would not place a burden on you, but He would purify you and would perfect His grace upon you, that ye may give thanks." [Al-Maidah, 5: 6].

مَا يُرِيدُ اللَّهُ لِيَجْعَلَ عَلَيْكُمْ مِنْ حَرَجٍ وَلَكِنْ يُرِيدُ لِيُطَهِّرَكُمْ وَلِيُنِيمَ بِنِعْمَتِهِ ' عَلَيْكُمْ لَعَلَّكُمْ تَشْكُرُونَ

Thus, everything, which is facilitative of people's life is within the spirit of Islam and causes no hardship upon them is permitted under the *Shari'ah*. Since the Hague Service Convention 1965 is a facilitative legal instrument and aims for the removal of hardship for the people in this highly globalised world, it is considered as *Shar'iah* compliant unless proven otherwise. This means there is no harm for Muslim nations to adopt the Hague Service Convention 1965.

The Binding Effect:

The Hague Service Convention 1965 is a multilateral treaty and as per the principle of *pactasuntservanda* and Article 26 of the Vienna Convention on the Law of Treaties 1969, came into force on Jan. 27, 1980, 1155 UNTS 331 (Vienna Convention on Law of Treaties 1969) Member States, be they Muslim States or otherwise, are bound to abide by the obligations created under the treaty (Mourice Mendelon, 1990; Louis Henkin, 1989; J.L. Briery, 1963; Josef L. Kunz, 1959). It is not only contemporary international law that recognises the sanctity of treaty obligations but also *Shari'ah*. In fact the sanctity of treaty obligations is the most fundamental rule of the *Shari'ah* (Mohamed Hosny Mohamed Gaber, 1983). Muslim States are required by the *Shari'ah* to fulfil their obligations under treaty to which they are parties and try to interpret its provisions in good faith because the sacredness of treaties, faithfulness to covenants and refraining from deceit are stressed in the Qur'anic text (see *Al-Isra*, 17:34 & *Al-Maidah*, 5:1).

Thus, once a Muslim State adopts any treaty, including the Hague Service Convention 1965 it is bound to abide by the obligations created under this treaty so long the obligations in question do not contravene the *Shari'ah*. The obligations created under the Hague Service Convention 1965 are in line with the spirit of *Shari'ah* as the Convention merely promotes interstate cooperation making sure that a defendant who lives abroad have an opportunity to be heard before judgment is passed. Judgment without giving an opportunity to be heard creates hardship to a foreign defendant – a hardship, which the Convention as well as the *Shari'ah* aspires to redress. Interstate cooperation for the purpose of removal of hardships, restoration of rights of a plaintiff and the realization of a foreign defendant's human rights including the right to be heard will lead to justice and social stability and this surely fall within the broad objective of *Shari'ah*.

Conclusion:

The Hague Service Convention 1965 intends to further international judicial cooperation among nations without affecting the substantive laws of its Member States or harming in any way their sovereignty. Since the Convention does not affect substantive laws of its Member States, there is no reason to worry. If the substantive law of a country is based on *Shari'ah*, that law will still be in operation as it will not be affected by the implementation of the Hague Convention. What the Convention calls for is cooperation among Member States as regard to the procedural aspects of civil or commercial matters. If the Convention has any effect, it would be on the procedural aspect of the *Shari'ah* relating to civil or commercial matters. *Shari'ah* in no way opposes cooperation between States or individuals. In fact the *Shari'ah* promotes cooperation that leads to justice, social stability and for the good of mankind. If this is also advocated by the Hague Convention, it can be concluded that it is *Shari'ah* compliant.

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