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Growth and Development of Compulsory Jurisdiction of the International Court of Justice

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Abstract

Jurisdiction has been a key point of discourse in almost all legal disputes. When we talk of disputes in international law, the issue of 'jurisdiction' becomes even more debatable. The Statute of International Court of Justice has provisions relating to compulsory jurisdiction of the Court, although critics say that it is not compulsory in true sense as there are various exceptions and reservations to the same. At the same time, this is also true that in a decentralised system, jurisdiction cannot be compulsorily imposed on the States when States have the trump card of their 'national sovereignty'. The States resist any kind of compulsory jurisdiction by the reasoning of the matter in dispute to be under the domestic jurisdiction. Accepting the jurisdiction of the Court would mean, for the States, to give the Court an authority to adjudicate over matters which may be important for national interest or national security. Further, declarations accepting the compulsory jurisdiction of the Court are diluted by way of including multifarious reservations by the declaring States. All these and others expose the fundamental weaknesses in the jurisdiction of the Court. To have the reassess the effectiveness of the compulsory jurisdiction of the Court, one has to look into the growth of the compulsory jurisdiction and its development. In the present article, an attempt has been made to trace and understand the growth as well as the development of the compulsory jurisdiction of the International Court of Justice. Doctrinal mode of research has been adopted for the present study.

Keywords: *Compulsory Jurisdiction, Optional Clause, State Sovereignty, International law, International Court of Justice.*

Introduction

As the nations developed and an international order could be established, there arose a need for a platform for organised justice. There could be felt a need for an impartial, unbiased platform for settling disputes among nations which can prevent nations from vindicating their rights and redressing their grievances amicably. In other words, a substitute for force and violence amongst the nations was to be found. International court of justice, established in 1946 by the United Nations (Statute of the International Court of Justice

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[ICJ Statute], June 26, 1945, 59 Stat. 1055, 3 Bevans 1179), comes as an answer to all these issues. It is the main judicial tribunal of the United Nations and is commonly often referred to as "World Bank". It replaced the former Permanent Court of International Justice, which had operated within The Hague, Netherlands, since 1922. Its main function is to redress and settle disputes amongst nations amicably so as to restore international peace and order. Disputes may be placed before the court by parties upon conditions prescribed by the U.N. Security Council. No state, however, may be subject to the jurisdiction of the court without the state's consent. Consent may be given by express agreement at the time the dispute is presented to the court, by prior agreement to accept the jurisdiction of the court in particular categories of cases, or by treaty provisions with respect to disputes arising from matters covered by the treaty. It plays a great role in dispute settlement in the international legal order and that is why, it is listed as one of the principal organs of the United Nations and is "principal judicial organ" of the UN (Article 92). Article 36(2), the so-called optional clause, was born amid controversy and has lived amid controversy. Historically, the clause is the product of political compromise accompanying the establishment of the Permanent Court of International Justice. The states have usually been reluctant and hesitant in submitting to the jurisdiction of International Tribunal. So, the jurisdiction of the Court becomes narrower. Since any Court would be effective in its functionality when it has cases before it to decide, the compulsory jurisdiction clause (i.e., arbitration taking place as a result of prior obligations assumed by states to arbitrate all or certain classes of disputes that might arise in the future) becomes debatable amongst the scholars.

Compulsory Jurisdiction of International Court Of Justice- Background and Meaning

"Jurisdiction is a word which must be used with extreme caution."

Michael Akehurst[1]

Brief Background

Many states have accepted the court's jurisdiction under the Optional Clause. A few states have done so with certain restrictions. The United States, for instance, has invoked the so called self-judging reservation, or Connally Reservation. This reservation allows states to avoid the court's jurisdiction previously accepted under the Optional Clause if they decide not to respond to a particular suit. It is commonly exercised when a state determines that a particular dispute is of domestic rather than international character, and thus domestic jurisdiction applies. Many jurisdictional declarations made under Article 36(2) of the Court's Statute -the 'Optional Clause'-are majorly restricted by the use of broad reservations[2]. If a state invokes the self-judging reservation, another state may also invoke this reservation against that state, and thus a suit against the second state would be dismissed. This is called the rule of reciprocity, and stands for the principle that a state has to respond to a suit brought against it before the ICJ only if the state bringing the suit has also accepted the court's jurisdiction.

Meaning of Compulsory Jurisdiction

After the initial difficulty of constitution of the ICJ has been dealt away with, there comes a serious issue of substantive jurisdiction of the Court. The concepts of 'sovereignty' and 'independence' of States posed significant problems in constitution of an international Court and the same gives

the birth to issues of submitting to the jurisdiction of the ICJ.

"Jurisdiction is a State's right under International Law to regulate conduct in matters not exclusively of domestic concern.[3]"

Since all the States are sovereign in their own spheres, they cannot be compelled to the jurisdiction of an International Court. Further, there exists no body, above the States, which can compel the States to submit to the jurisdiction of the Court. The fact that States cannot be compelled to submit for jurisdiction was also enumerated by the Permanent Court of International Justice that no States can, without its consent, be compelled to submit its disputes with other states either to mediation or to arbitration or to any other kind of pacific settlement.[4] Jurisdiction of the ICJ can be derived from the consent or will of the States.

".....International Law governs relations between independent States. The Rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co existing independent communities or with a view to the achievement of common aims . Restrictions upon the independence of States cannot therefore be presumed ..."[5]

Based upon the State parties' consent, the jurisdiction of the Court can be broadly put under two heads:

Firstly, cases where, the States enter into an ad hoc arrangement or agreement to submit to the jurisdiction of the ICJ, when the dispute has already arisen;

Secondly, whereby, a number of States agree by way of a single general convention to confer jurisdiction on the Court in all the matters or disputes that may arise between them in future.

The first kind of jurisdiction is what is referred to as "*voluntary jurisdiction*" and, on other hand; the second one describes the "compulsory jurisdiction". This distinction, although, is restricted to theoretical purposes, as in reality, the interplay of various reservations is considered essential. In practice, there is certainly no custom of executing a compromis when a dispute arises. In fact, there has actually been a decline in the use of special agreements for jurisdiction. While the Permanent Court adjudicated eleven cases by compromis in twenty years, the ICJ has had only seven such cases in the last forty years.[6] Not only this, although there are currently 244 bilateral and multilateral treaties which confer some measure of jurisdiction on the Court,[7] relatively few cases have been brought using these treaties as a source of jurisdiction.[8]

Under Article 92, the International Court of Justice is an organ of the United Nations and is therefore part of the international organization itself.[9] This means that a State which ratifies the Charter ipso facto accepts the jurisdiction of the Court in at least three limited senses -the Statute confers jurisdiction upon the Court in regard to the decisions in interim measures, intervention and competence in particular case.[10] In reality, however, the States are exposed to very less jurisdictional constraints merely by virtue of their acceptance of the Court's statute. In practice, by becoming a party, a State merely accepts the Court's functioning under the Statute.[11]

Article 36(2)[12] of the court's statute, known as the Optional Clause, allows states to make a unilateral declaration recognizing "as compulsory ipso facto and without special agreement, in relation to any other state

accepting the same obligation, the jurisdiction of the Court in all legal disputes." This signifies that the States have to accept the jurisdiction of the Court expressly by way of submitting the same by an agreement to submit future disputes or an ad hoc compromise or special agreement in respect of a dispute already arisen.

Many thinkers have been critical of the word 'compulsory' in respect of the general jurisdiction conferred upon the Court. Judge Hudson, in this regard, remarks:

The term "*compulsory jurisdiction*" employed in the Statute is in some degree misleading. It means merely that a State which has accepted it is subject to the jurisdiction of the Court without the necessity of giving its consent in the particular case. In such a situation the Court will be competent to give a judgment whether the respondent "is present or absent", and the judgment will be binding on all States parties to the case. The term carries no implication as to the enforcement of judgment.[13]

Prof. Philip C. Jessup also opines that the term "compulsory" is misleading and there is always a danger that it will be deemed to refer to the possible use of compulsion to enforce the judgments of a tribunal. The word "*compulsory*", he thinks, is redundant when used in connection with jurisdiction accepted by Article 36, paragraph 2, and suggests that it would be more precise to speak of the "automatic" jurisdiction of the Court.[14]

On this point, Professor Kelsen suggests that the jurisdiction thus conferred under Article 36, paragraph 2, is not "compulsory" jurisdiction in the true sense of the word. He remarks:

"In order to establish the true compulsory jurisdiction of the International Court of Justice", he says, "the Statute would have to provide that any member of the judicial community, party to any case whatever, is obliged to recognize the jurisdiction of the Court if the other party refers the dispute to the Court. But it provides only for the possibility of entering into agreements for the establishment of the jurisdiction of the Court, in advance and in a general way." [15]

When this Court's Statute was being drafted, representatives of many of the smaller nations were enthusiastically in favour of giving the Court compulsory jurisdiction-not as sweeping perhaps as that of Professor Kelsen's suggested court, but with the same ultimate end in view. The Great Powers, particularly the United States and Russia, were, however, adamant in opposition, and, as has been noted, no significant changes were made in the jurisdictional provisions of the Revised Statute except to cut down the scope of the Court's advisory jurisdiction.[16] This opposition by great powers of compulsory jurisdiction could possibly be because in an international setup, it becomes difficult to conceive a scenario where, on a question of law, a less powerful or a smaller State is allowed to prevail over a more powerful or a bigger State on the basis that the less powerful State is 'right'- morally, economically or traditionally- and the more powerful State is 'wrong'.[17]

Early Practice: The Hague System and the League of Nations

Early System

This so-called compulsory jurisdiction has emerged in the evolution of international judicial processes as a means of overcoming the difficulties attendant upon the reference of disputes to tribunals by ad hoc agreements.[18] The idea of submitting the interstate disputes to a third unbiased party can be traced back to Greek- city states where existed a well developed system of referring the dispute to Delphic

Amphictyonies[19] for dispute settlement. Thinkers have described that this process of dispute settlement was based on law and customs of correct and righteous behaviour.[20] Some of its traces are also found in Islam.[21] Grotius, on the subject of arbitration, wrote in 1625:

"Christian Kings and States are bound to employ this method of avoiding war. . . And for this reason and many other purposes, it would be helpful-as a matter of fact, necessary-for the Christian powers to hold conferences where those whose interests were not involved might settle the disputes of the rest, and even take measures to compel the parties to accept peace on fair terms." [22]

To support his views, Grotius cited few examples in his writings. For instance, the Kings of Castile and Navarre had concluded a treaty to submit their differences for resolution by Henry II of England, in the year 1176.[23] Also, during the Renaissance period, the Catholic Church in Rome was reposed with the responsibility to adjudicate over disputes by the Italian city states. [24] Later, this tradition remained alive as many countries started following it. The 1794 John Jay Treaty (officially titled "Treaty of Amity Commerce and Navigation, between His Britannic Majesty; and The United States of America,"), for example, was signed between United States of America and the Great Britain with an aim to resolve the disputes between two nations that had been left unsettled since the American Independence.[25] Many outstanding issues, including the Canadian-Maine boundary, compensation for pre-revolutionary debts, and British seizures of American ships, were to be resolved by arbitration under this treaty. Jay was only partially successful in getting Britain to meet America's demands and opposition to the treaty in the United States was intense.[26] In 1834 and 1844, the Massachusetts legislature passed resolutions requesting for the creation of an international procedure for the amicable, third party settlement of disputes. Similarly, this was done by Vermont in 1852. [27]

Treaty of Washington, 1871

Not only this, Treaty of Washington was signed and ratified by United States of America and United Kingdom in 1871 that had provisions for settlement of disputes between countries, in particular the Alabama Claims. The treaty provided a solution to a wide range of outstanding irritants between the U.S. and U.K. including territorial and fishery claims, reparations for the Fenian Raids and the Alabama claims. The Alabama claims were claims made by the U.S. government against Great Britain for the damage inflicted on Northern merchant ships during the American Civil War by the Alabama and other Confederate cruisers that had been built, fitted out, and otherwise aided by British interests. Charles Francis Adams for the United States, Alexander J. E. Cockburn for Great Britain, and three members from neutral countries constituted the tribunal, which met at Geneva in 1871–72. The arbitrators applied specified rules of international law[28] and threw out American claims for indirect losses, but they awarded the United States $15.5 million for all the direct damage done by the Alabama and the Florida and for most of the damage caused by the Shenandoah. The British were absolved of blame in the cases of several less important cruisers.[29] The Treaty's preference for solving diplomatic disputes through arbitration was remarkable in the growth of pacific dispute settlement methods. The scholar of international law John Bassett Moore even called this treaty *"the greatest treaty of actual and immediate arbitration the*

world has ever seen."[30] After this, about 235 members of the British Parliament sent the United States a communication asking that a permanent arbitration treaty be negotiated between the two states.[31]

So, by the 1890s when the focus grew on the establishment of a permanent international body for disposal of disputes amongst nations through amicable means, the nations had already experienced dispute resolution through an independent third body in one or the other form. And this experience made it clear that 'voluntary arbitration' was not an adequate, impartial means of settlement.[32]

The First and Second Hague Conferences

The countries entered into various international treaties that included compromise clauses on various subjects, e.g., the Universal Postal Convention of 1874.[33] And this trend could come to a discontinuation only after the Hague Conferences of 1899[34] and 1907.[35] At this conference, two different standpoints emerged regarding dispute settlements, which were-

The first view favoured the establishment of a standing international court which could serve as a platform for effective, amicable dispute settlement, as per the nations pleased;

The second viewpoint also urged for an international court for dispute resolution, but along with, it was thought necessary to make the state parties bound by some obligations to arbitrate in certain types of disputes.

This discussion came to grew and then centred on the issue of compulsion to submit the dispute. The idea of an international court with a non-compulsory jurisdiction was preferred to that with a compulsory jurisdiction by majority of the states.[36] Even the states that proposed compulsory jurisdiction during the First Hague Conference, did not want a truly compulsory jurisdiction. For instance, United States Secretary of State John Hay instructed his delegation to push for a permanent court with compulsory jurisdiction, but at the same time to make sure that disputes affecting political independence or territorial integrity be excluded from arbitration.[37]

The Permanent Court of Justice came into existence as a result of the 1899 Hague Conference. This court was not an institutional body in real sense: it was a list of seventy-five to one hundred names of arbitrators from which the states could choose, only when they wished to.[38] The decision to arbitrate was purely voluntary, and states were still free to choose their own nationals as arbitrators.[39]

The Current Status of Judicial Settlement: From the United Nations Charter to Present

Like arbitration under the Hague Conventions, judicial settlement under the League of Nations framework had been purely optional. States were not bound to accept the Permanent Court's Statute. If they did accept it, they were by no means obliged to make declarations under the Optional Clause or bring cases before the Permanent Court for resolution.

The United Nations Charter changed this status of judicial settlement in only one significant way. Under Article 92, the International Court of Justice is an organ of the United Nations and is therefore part of the international organization itself.[40] This change means that a state ratifying the Charter automatically accepts the jurisdiction of the Court in three limited ways. The Statute gives the Court jurisdiction with regard to decisions concerning interim

measures, intervention, and competence in a particular case.[41] However, states are in reality subject to very few jurisdictional constraints merely by virtue of their acceptance of the Court's Statute. They are still totally free to refrain from making declarations under the Optional Clause and to ignore the Court as a means of dispute settlement.

Upto April 1959, there were only 38 states[42] bound by the compulsory jurisdiction clause of the new Court including 13 states that were bound by virtue of their declarations under the old Statute and Article 36, paragraph 5, of the new Statute. After the Second World War, the first years showed some level of tendency in favour of accepting the Optional Clause, but this tendency soon faded away.

The structure of the Statute of the Court and its optional clause provide evidences of the weakness of the compulsory jurisdiction. States that have accepted to submit to the jurisdiction of the Court under the optional clause under Article 36(2) have restricted the court's functionality by resorting to broad reservations. Moreover, the issues of non-appearance (in which the states feel free to disregard their obligations under compulsory jurisdiction) and self-judging reservations make the compulsory jurisdiction a mirage. And analysing the present tendency of the states towards this compulsory jurisdiction, it is highly unlikely that this clause would attain its end in near future.

Conclusion

Jurisdiction, in international law, is an important point of discussion. Binding the sovereign States by a court's jurisdiction is a debatable issue. The State's apprehensions are flooded with their traditional conceptions of Sovereignty due to which they either forbear from adhering to the compulsory jurisdiction of the court or, if have submitted to the court's jurisdiction, then later on, withdraw from it. In case of International Court of Justice, the provision relating to compulsory jurisdiction is met with various shortcomings in its practicality. States usually are pretentious of the compulsory jurisdiction of the International Court of Justice, when they accept it they do it with various reservations and exceptions and also, they withdraw it sometimes. For instance, United States has modified its declaration accepting the compulsory jurisdiction of the International Court of Justice in 1984. And in the following year, United States informed the Court that it would no longer participate in the famous Nicaragua v. United States[43] case. These instances and many others expose some fundamental weaknesses in the 'optional clause' jurisdiction of the Court.

These weaknesses as regards the jurisdiction of the Court can be analysed once one tries to re-evaluate and reassess the historical evolution of the compulsory jurisdiction of the Court. At the time of drafting of the charter, the provision relating to jurisdiction was debated to have non-compulsory jurisdiction. For this reason of the will of the states and for the sake of their absolutist conception of national sovereignty and other political reasons, compulsory jurisdiction was made optional in essence. Compulsory jurisdiction is not 'compulsory' in true sense. This makes the compulsory jurisdiction of the Court ineffective in adjudication in international cases.

Nations have seldom declared the International Court of Justice to have jurisdiction over their matters. The World Court which was established with one of the ends of upholding the rule of law on an

international plane now seems to be blurred now. States have largely been unwilling to submit to the compulsory jurisdiction of the Court.

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law may have pronounced upon it. ... This is true of Hampden's Case... and of the Dred Scott Case.... . [Each of these cases had its sequel in a civil war which was fought in part to determine afresh the very issues which the courts had decided. "Further, it ought never to be forgotten that law is not merely a convenient device for the settlement of disputes; it is not something that can be made an effective instrument at a crisis and left out of account at other times; it is useful as a means of settlement only when, and so far as, a society has accepted the rule of law as its way of life. . . . In fact the example of the state . . . is discouraging to the view that all disputes ought to or can be settled on the basis of existing law, for international disputes find their nearest analogy not in the disputes of individuals at all, but in a class of disputes which the practice of states itself tends to treat by political rather than judicial methods. By their very nature they are differences between large associated groups; and when such a group of persons within the state is discontented with its existing legal rights, a wise government does not merely refer them to the courts of law; it considers the arguments for and against a change of the law." See also Brierly, The Outlook for International Law (1944) 118 et. seq. 40.

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