JETIR.ORG ISSN: 2349-5162 | ESTD Year : 2014 | Monthly Issue
JOURNAL OF EMERGING TECHNOLOGIES AND INNOVATIVE RESEARCH (JETIR)
An International Scholarly Open Access, Peer-reviewed, Refereed Journal

UNDERSTANDING JURISDICTION WITH REFERENCE TO INTERNATIONAL LAW

Dr SK Bose, *Associate Professor, School of Law, Manav Rachna University*

Abstract:

Jurisdiction and issues relating to it have always been a subject that engages scholastic debates. It is because of its subjective nature when it comes to application and interpretation. Experts' opinion in this regard has often been polarized. The word jurisdiction, though in legal parlance conveys something to do with sovereignty, equality, rights and power of the state, it does bring different meanings in different situations, and one can often experience predicament while interpreting and applying this concept. In the context of international law, issues of jurisdiction are quite complex. This article attempts to bring some amount of clarity by keeping it as simple as possible in terms of explaining its meaning, application and interpretation, touching upon some fundamental aspects of the subject. Its relevance with regard to international law, issues involving some principles, territorial concerns and jurisdictional dichotomies has also been discussed.

Key Words: Jurisdiction, international law, domestic jurisdiction, territorial jurisdiction, executive jurisdiction

Introduction:

The term 'jurisdiction' has been defined differently and has multiple meanings. This often creates subjective dilemma while interpreting law or applying it as a principle. The ambiguity involved in it more often than not leaves one utterly confused. Perhaps, because of these multiple connotations that lead to ambiguity, the Supreme Court of the US has adopted what amounts to a clearly statement rule. In his 2017 article, *Jurisdiction and Its Effects*, Professor Dodson argues that jurisdiction is a 'definitional law' that binds Congress. We all know that jurisdiction is a salient feature of state sovereignty, equality of states and non-interference in domestic affairs.[1] Under international law, jurisdiction involves the authority of the state to regulate people, property and circumstances. It is an exercise of power and authority which can impact, create or terminate legal relationships and obligations.

[1] See e.g. C. E. Amerasinghe, *Jurisdiction of International Tribunals*, The Hague, 2003; *Universal Jurisdiction*: *National Courts and the Prosecution of Serious Crimes under International Law* (ed. S. Macedo), Philadelphia, 2004

Meaning & Definition:

'Jurisdiction' as defined by Merriam Webster, "is the power, right or authority to interpret and apply the law. It deals with the authority of sovereign power to govern or legislate."It further connotes the limits or territory within which authority may be exercised.
Collins dictionary defines it as the power that a court of law or an official has to carry out legal judgments or to enforce laws. Jurisdiction can be synonymous to authority, say, power, control. A jurisdiction is a state or other area in which a particular court and system of laws has authority.
Black's Law Dictionary defines it as "the power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts." A court must have both subject matter jurisdiction and personal jurisdiction to hear cases properly.[2]

Jurisdiction can be attained by means of executive, legislative or/and judicial action. In the UK and India the Parliament passes binding statutes, the courts make binding decisions and the administrative machinery of the government has the power or legal authority (jurisdiction) to enforce the rules of law.(*International Law, 8th edition*, Malcom N Shaw, pg 483)
Let me give you an example, if a man kills somebody in Britain and then manages to reach the Netherlands, the British courts have jurisdiction to try him, but they cannot enforce it by sending officers to the Netherlands to apprehend him. They must apply to the Dutch authorities for his arrest and dispatch to Britain. If, on the other hand, the murderer remains in Britain then he may be arrested and tried there, even if it becomes apparent that he is a German national.

In Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) it is held that in cases removed from state court to federal court, as in cases originating in federal court, there is no unyielding jurisdictional hierarchy requiring the federal court to adjudicate subject-matter jurisdiction before considering a challenge to personal jurisdiction. Pp. 583-588. It further observed that the Fifth Circuit erred in according absolute priority to the subject-matter jurisdiction requirement on the ground that it is non-waivable and delimits federal-court power, while restrictions on a court's jurisdiction over the person are waivable and protect individual rights. Although the character of the two jurisdictional bedrocks unquestionably differs, the distinctions do not mean that subject-matter jurisdiction is ever and always the more "fundamental." Personal jurisdiction, too, is an essential element of district court jurisdiction, without which the court is powerless to proceed to adjudication.[3] The Court rejects Marathon's assertion that it is particularly offensive in removed cases to rule on personal jurisdiction without first deciding subject-matter jurisdiction, because the federal court's personal jurisdiction determination may preclude the parties from re-litigating the very same issue in state court. See *Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522,524-527. Issue preclusion in subsequent state-court litigation may also attend a federal court's subject.

Issue of Jurisdiction: Quite Complex:

In the context of international law, the issues of jurisdiction are enormous which engage gamut of complexities and dichotomies. Notwithstanding its unquestionable utility in the matters of constitutional considerations, there

[2] https://www.bergerandgreen.com/

[3] https://supreme.justia.com/cases/federal/us/526/574/

arise issues pertaining to private international laws also. While International law always makes efforts to lay down various rules relating to the restrictions and exercise of executive functions, private international law otherwise known as conflict of laws strives to regulate matters involving a foreign element whether the particular country has jurisdiction to determine the question, and, secondly, if it has, then the rules of which country will be applied in resolving the dispute. The fact that international law permits the exercise of jurisdiction in any particular case is only the first stage. The state in question must also have adopted the domestic measures required actually to exercise such jurisdiction in the relevant circumstances. The grounds for the exercise of jurisdiction are not identical in the cases of international law and conflict of laws rules. In the latter case, specific subjects may well be regulated in terms of domicile or residence (for instance, as regards the recognition of foreign marriages or divorces) but such grounds would not found jurisdiction where international law matters were concerned.[4]

Although it is by no means impossible or in all cases difficult to keep apart the categories of international law and conflict of laws, nevertheless the often different definitions of jurisdiction involved are a confusing factor. One should also be aware of the existence of disputes as to jurisdictional competence within the area of constitutional matters. These problems arise in federal court structures, as in the United States, where conflicts as to the extent of authority of particular courts may arise.

The Principle of Domestic Jurisdiction:

An immediate difficulty with the concept is the determination of its boundaries. In fact, the nature and scope of term 'Domestic Jurisdiction' has generated a lot of controversy in international law. Nevertheless, it is generally accepted that the concept of sovereignty cannot be absolute, given the progressive development of international law. [5]Domestic jurisdiction is a relative concept, in that changing principles of international law have had the effect of limiting and reducing its extent,[6] and matters of internal regulation may well have international repercussions and thus fall within the ambit of international law.

This latter point was emphasized by the International Court of Justice in the Anglo-Norwegian Fisheries Case[7] when it stated that: Although it is true that the act of delimitation [of territorial waters] is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law. [8]The concept of domestic jurisdiction does not appear to have been explicitly formulated prior to its articulation in Article 15(8) of the Covenant of the League of Nations. The question therefore arises as to the reason for the non-appearance of such a concept. In the classical era of international law, the law of nations was viewed as a body of principles that permeated all states. No explicit distinction was drawn in that era between the *jus gentium* and the common law, except in so far as the subject matters to which they related were often but not always different. p. 132 8 ICJ. Reports, 1955, p. 4 3 As the positivist conception of international law made headway into the 19th century, there was again no need for a concept of domestic jurisdiction apart from international law, for under positivism the reach of international law

[4] See generally, G. C. Cheshire, P. M. North and J. Fawcett, *Private International Law*, 14th edn, Oxford, 2008. See also a5 to the relationship between public and private international law, A. Mills, *The Confluence of Public and Private International Law*, Cambridge, 2009.Questions may also arise as to the conditions required for leave for service abroad: see e.g. Al-Adsani v. Government of Kuwait and Others 100 ILR, p. 465.

[5]Besides, it is international law and not the whims and caprices of states that determine the sphere of state activity which international law cannot interfere with.

[6] whether a matter is or is not within the domestic jurisdiction of states is itself a question for international law: See *Nationality Decree in Tunis and Morocco* case, PCIJ, series B, No. 4 1923 pp. 7, 28-24

[7] ICJ. Reports, 1951 p. 116

[8] Ibid at p. 132

depended upon a state's consent. Since the state had the sovereign power, under this theory, to consent to anything, there could be no *a prori* barrier to the range of consent. At about the time of World War 1, however, a new question surfaced that helped pave the way for the need for a concept of domestic jurisdiction. This is the question of monist and dualist conception of international law. [9]The dualist theory was a logical extension of positivism. It presupposes that if each sovereign state is the source of law, international law is not 'law' to the extent that each state explicitly incorporates it and gives it domestic effect. In contrast, the monist theory holds that international law defines the areas of sovereignty of each state, and that no state can be sovereign in defiance of an international norm. Clearly, as between monism and dualism, the latter would render international law inoperative, as its extent would vary with the consent of separate states and it would have no ability to hold illegal.

Legislative, Executive and Judicial Jurisdiction:

Legislative jurisdiction [10] refers to the supremacy of the constitutionally recognised organs of the state to make binding laws within its territory. Such acts of legislation may extend abroad in certain circumstances.[11] The state has legislative exclusivity in many areas. For example, a state lays down the procedural techniques to be adopted by its various organs, such as courts, but can in no way seek to alter the way in which foreign courts operate. This is so even though an English court might refuse to recognize a judgment of a foreign court on the grounds of manifest bias. An English law cannot then be passed purporting to alter the procedural conditions under which the foreign courts operate.
International law accepts that a state may levy taxes against persons not within the territory of that state, so long as there is some kind of real link between the state and the proposed taxpayer, whether it be, for example, nationality or domicile.[12] A state may nationalize foreign-owned property situated within its borders,[13]but it cannot purport to take over foreign-owned property situated abroad. It will be obvious that such a regulation could not be enforced abroad, but the reference here is to the prescriptive jurisdiction, or capacity to pass valid laws. How far can the court enforce foreign legislation is a question that involves complications within the field of conflict of laws but in practice it is rare for one state to enforce the penal or tax laws of another state.[14] Although legislative supremacy within a state cannot be denied, it may be challenged.

Territorial Jurisdiction:

The remainder of this article considers challenges which have arisen to the traditional idea of jurisdiction as a matter of right and power of states under international law, based principally on connections of territoriality or nationality.[15] These challenges have come from developments in both public international law and private international law, particularly through the increased recognition given to individual actors in both (closely related) fields. In order to highlight the connection between developments in public and private international law, the focus of the remaining sections is largely on adjudicative jurisdiction – as discussed above, the sense in

[9] Early treatises on these theories include: J. Brierly, "*International Law in England*" (1935) L.Q.R. at p. 51; H. Kelson, *General Theory of Law and State* (Cambridge: Harvard University Press, 1945); H. Kelson, Principles of International Law 2nd Edition (New York: Hon, Rine, Hark & Winson, 1966); L. Kung "*The Nature of Customary International Law"* (1953) AJIL at p. 47; D. O' Connell, International Law 2nd Edition (London: Stevens & Sons, 1970) and J. Starke "*monism and Dualism in the Theory of International Law*" (1936) BYIL at p. 16.

[10] See e.g. Akehurst, 'Jurisdiction', pp. 179 ff.

[11] See further below, p. 496.

[12] Akehurst, 'Jurisdiction', pp. 179-80.

[13] See below, chapter 13, p. 626.

[14]See e.g. Cheshire and North, Private International Law, chapter 8. English courts in general will not enforce the penal laws of foreign states. It will be for the court to decide what a foreign penal law is. See also Huntington v. Attrill [1893] AC 150, and Marshall CJ, The Antelope 10 Wheat 123 (1825). As far as tax laws are concerned, see Government of India v. Taylor [1955] AC 491 ; 22 ILR, p. 286.

[15] https://academic.oup.com/bybil/article/84/1/187/2262836

which the term jurisdiction is used in private international law – and on the prescriptive rather than enforcement components of judicial proceedings. To understand the background to these developments, it is first important to note another challenge to the traditional approach to jurisdiction in international law – the growing recognition that in some circumstances the exercise of national jurisdiction may, under international law, be a question of duty or obligation rather than right or discretion. To put this another way, the regulation of jurisdiction in international law needs to be reconceived as not merely a 'ceiling', defining the maximum limits of state power, but also (in some contexts) as a 'floor', reflecting minimum requirements for the exercise of regulatory power by states in order to satisfy their international obligations.

Jurisdictional duties of states: Executive Jurisdiction

States have increasingly agreed to various obligations under international law under which they have constrained their traditional jurisdictional discretion – either by prohibiting or mandating certain forms of regulation. This is particularly the case in the context of obligations to criminalise certain conduct and to submit individuals to prosecution which exist across a range of international criminal law treaties, and perhaps even (albeit more controversially)[16] as part of customary international law. These treaties also (expressly or implicitly) require states to pass domestic laws permitting or facilitating the exercise of such jurisdiction, similarly fettering the discretionary nature of national prescriptive jurisdiction.

Executive jurisdiction relates to the capacity of the state to act within the borders of another state. [17]Since states are independent of each other and possess territorial sovereignty,[18] it follows that generally state officials may not carry out their functions on foreign soil (in the absence of express consent by the host state) and may not enforce the laws of their state upon foreign territory. It is also contrary to international law for state agents to apprehend persons or property abroad.[19] Similarly, the unauthorised entry into a state of military forces of another state is clearly an offence under international law.

Judicial Jurisdiction:

Judicial jurisdiction concerns the power of the courts of a particular country to try cases in which a foreign factor is present. There are a number of grounds upon which the courts of a state may claim to exercise such jurisdiction. In criminal matters these range from the territorial principle to the universality principle and in civil matters from the mere presence of the defendant in the country to the nationality and domicile principles. It is judicial jurisdiction which forms the most discussed aspect of jurisdiction and criminal questions are the most important manifestation of this.

[16] The International Court of Justice elected not to comment on the customary status of the obligation to extradite or prosecute in reference to crimes against humanity, in Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) [2012] ICJ Reports 422. For the view that it is not customary, see e.g. the Separate Opinion of President Guillaume, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) [2002] ICJ Reports 3, at [12]; for the view that it is, see e.g. 'Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging', Appeals Chamber, Special Tribunal for Lebanon, STL-11-01/I/AC/R176bis, 16 February 2011, at [102]. See further Kimberley N Trapp, State Responsibility for International Terrorism (OUP 2011) 84.

[17] See Akehurst, 'Jurisdiction', p. 147.

[18] See e.g. Lotus case, PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, p. 153;and the Island of Palmas case,2 RIAA, pp. 829, 838 (1928); 4 AD, p. 103.

[19] See as to the Eichmann case below p. 502

Civil Jurisdiction:

A number of international treaties[20] and soft law instruments suggest or require the exercise of civil jurisdiction and the granting of compensation or damages in response to international crimes or gross human rights violations. All of these instruments, however, provide for civil remedies in addition to criminal remedies. The obligations in these international instruments require states to exercise criminal jurisdiction – universal or otherwise – and also to allow for civil remedies. Similarly, several examples of municipal statutory instruments and judicial decisions have been in place, and all of these do effectively exercise universal civil jurisdiction, but they do so by predicating the exercise of civil jurisdiction upon the prior and foundational exercise of universal criminal jurisdiction.

Criminal Jurisdiction:

The difference between civil and criminal sanctions that has been developed here begs the question of whether civil sanctions can effectively be used to remedy criminal behaviour. Arguably, a large enough fine could serve the purpose of criminal sanction, and would perhaps even be preferable. International law permits states to exercise jurisdiction upon various grounds.[21] There is no obligation to exercise jurisdiction on all , or by any particular one of these grounds. This would be a matter for the domestic system to decide.

Conclusion:

This article has primarily sought to touch upon some basic understanding concerning 'jurisdiction' with reference to international law. The emerging influence of individual rights and power has brought forth multiple angles while analyzing the concept of jurisdiction. It reflects the fundamental principle of state sovereignty as much as equality of states. It has been found repeatedly that jurisdiction chiefly is a question of territorial control.Apparently, the very concept of jurisdiction at the international level is a matter of obligation between states.

Taking the opinions of the experts it is concluded that jurisdiction may be conferred on states and withdrawn from states, by private parties in civil or commercial matters, through the exercise of party autonomy. All these developments appear to signify a shift in the status of individuals in relation to jurisdiction at both international and national levels, from passive objects of international law regulation to active rights-holders. The rules on jurisdiction in international law should thus be rethought as concerned not only with state rights but also with state responsibilities – a combination of state rights, obligations and prohibitions as well as individual rights which reflects the more complex reality of modern international law.

Jurisdiction can be attained by means of executive, legislative or/and judicial action. In the UK and India the Parliament passes binding statutes, the courts make binding decisions and the administrative machinery of the government has the power or legal authority concerning this.

In practical terms, it has become difficult for any state wishing to engage with the international community to ignore individual rights of access to justice, or the powers of commercial parties to choose the laws and forums under which their relationships are regulated. Individual personality and autonomy has become entrenched in reality, if not yet entirely in theory.

These phenomena suggest an important development in the conception of jurisdiction, and the limits of state sovereignty, but one which has received insufficient attention in the international law literature. The issues

[20] *International Convention for the Protection of all Persons from Enforced Disappearance* Art. 24(4) (20 December 2006), 14 IHRR 528 (2007) (hereinafter Enforced Disappearances Convention); Convention (IV), Respecting the Laws and Customs of War on Land and its Annex Art. 3, 36 Stat (18 October 1907) 2277*; Rome Statute of the International Criminal Court* Arts. 5, 75 2187 UNTS (17 July 1998) 90; ICTY Rules of Procedure and Evidence Art. 106(B) IT/32/Rev.46 (20 October 2011).

[21] It was noted that in the *Wood Pulp* case that the two undisputed bases on which state jurisdiction is founded in international law are territoriality and nationality(1998)4 CMLR 901at 920; 96 ILR, p.148.

which arise in the context of jurisdiction are in many ways one of the great challenges facing international law – how to move beyond the traditional dominance of states, to the reconciliation of a range of normative interests, from individual, to state.

References:

1. Malcom N, Shaw, *International Law*, 8th Edition
2. Akehurst, M. *Jurisdiction in International law* (1972-3) 46 *BYIL* at p. 145
3. Akehurst, M. *A Modern Introduction to international Law*, (Delhi: George Allen & Unwin (publishers) Ltd. 1987)
4. Duru, Onyekachi Wisdom Ceazar, *The Shrinking Scope of The Concept of Domestic Jurisdiction In Contemporary International Law*
5. Abhimanyu George Jain , *Universal civil jurisdiction in international Law*, *Indian Journal of International Law* (2015) 55(2):209–237
6. John F. Preis, *Jurisdiction and "Definitional Law*" William & Mary Law Review Online, Volume 60 (2018-2019)
7. Alex Mills, *Rethinking Jurisdiction in International Law*, *British Yearbook of International Law*, Volume 84, Issue 1, 2014, Pages 187–239,,