

Advisory Opinion of ICJ: An Alternative Dispute Settlement Mechanism under International Law

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Abstract

Alternative but efficient dispute settlement mechanism is conventional under the International Law. International Court of Justice, International Tribunal of the Law of the Sea, Permanent Court of Arbitration and other Arbitration tribunals are the most prominent institutions that facilitate dispute settlement in international law by providing for an inclusive alternative mechanism. ICJ has Advisory jurisdiction over questions submitted to the court under Article 65 of the ICJ Statue. It states that the court may give an advisory opinion on any legal question at the request of body authorized by or in accordance with the Charter of the United Nations. Alternative dispute resolution [ADR] mechanism is supported because it is cost effective, efficient and efficacious. The foundation of ADR is consensus of the parties to the procedure and outcome of the dispute settlement. Under International law, where lack of implementation always challenges the reality of international law, advisory jurisdiction of international courts ipso facto represent the reality of international law and dispute settlement of International law. This research paper aims at addressing the following questions:

[1] Whether advisory opinion is an alternative dispute resolution mechanism?

[2] Which international courts and tribunals have advisory opinion jurisdiction? What is the nature and scope of this jurisdiction in each court respectively?

[3] What is the scope of advisory jurisdiction of ICJ?

[4] What has been the role of ICJ in advisory opinions pronounced by it?

[5] What role can the advisory jurisdiction of ICJ play in resolving dispute that may arise in the future?

Keywords: *Advisory Jurisdiction, ICJ, Alternative Dispute Resolution Mechanism.*

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INTRODUCTION

Advisory jurisdiction of the courts within the national and international legal system is not a new concept. It is not a traditional method of resolving disputes, but an alternative dispute settlement mechanism that developed particularly after World War II. While exercising its advisory jurisdiction, a court gives an advisory opinion on questions that may otherwise be outside the scope of the court's inherent jurisdiction.

The Constitution of India allows the President of India to refer a question to seek advice from the Supreme Court of India [1]. In Canada, the advisory jurisdiction is known as the reference question mechanism [2]. Under the federal system of the United States of America, there is a provision for case or controversy, which does not allow the federal Courts in the USA

to issue advisory opinion [3]. This prohibition exists because the power to give advisory jurisdiction is considered a violation of "doctrine of separation of powers". A similar prohibition on the power to exercise advisory jurisdiction is also found in the Constitution of Australia [4]. Australian Constitution only allows the apex court to exercise jurisdiction when the decision of the court will be binding between the parties [5].

The apex court's advisory jurisdiction is a matter of sovereignty of the nation to decide its national policies. A prohibition on apex court to give an advisory opinion is also not inconsistent with international law. Even international law recognized the need to include the power of the judiciary to give advisory opinions to strengthen the policy and legal framework of international law. There

are always questions or disputes which cannot be referred to a court directly [6]. Due to existing legal framework, dispute resolutions in complex disputes become impossible. In this situation of impossibility, advisory opinions can open doors and hopes of settlement of disputes in a more friendly and consensual way. This article begins with discussing the power of advisory opinion in the domestic legal framework; the underlying objective is to define the scope and nature of the advisory jurisdiction with the International Court of Justice (“ICJ”) and to understand the potential of this alternative dispute resolution mechanism.

While discussing various kinds of alternative dispute resolution mechanisms, advisory opinions form part of the broader concept of negotiations [7]. There are broadly two kinds of negotiations:

- (i) negotiations facilitated without advisory opinion; and
- (ii) negotiations facilitated with advisory opinion [8].

The main objective of any negotiation is to allow peaceful and consensual resolution of dispute. A neutral third party’s advisory opinion provides a broader perspective to the contesting parties in disputes and allows them to take amicable and progressive decisions. Solutions to most disputes and disagreements in international law are invariably based on negotiations, consultations and exchange of information. Advisory opinions are, thus, the tools that facilitate and strengthen these negotiations, thereby bolstering international law.

International Advisory Jurisdiction

Alternative but efficient dispute settlement mechanism is conventional under the International Law. ICJ, International Tribunal of the Law of the Sea, Permanent Court of Arbitration and other Arbitration tribunals are the most prominent institutions that facilitate dispute settlement in international law by providing for an inclusive alternative mechanism. ICJ has Advisory jurisdiction over questions submitted to the court under Article 65 of the ICJ Statute, which stipulates that the court may give an advisory opinion on any

legal question at the request of body authorized by or in accordance with the Charter of the United Nations.

Alternative dispute resolution (ADR) mechanism is supported because it is supposed to be expeditious, cost effective, efficient and efficacious. The foundation of ADR is consensus of the parties to the procedure and outcome of the dispute settlement. Under International law, where lack of implementation always challenges the reality of international law, advisory jurisdiction of international courts *ipso facto* represents the reality and dispute settlement mechanism of International law.

ICJ has the power to give advisory opinion to the states on questions of international law that are referred to it [9]. Similarly, Inter-American Court of Human Rights can also give advisory opinion on questions related to human rights [10]. International Tribunal of the Law of the Sea, Seabed Disputes Chamber is also empowered to exercise its advisory jurisdiction on legal questions that are within the Scope of the Assembly or the Council of the Authority [11]. European Convention on Human Rights bestows authority on the European Court of Human Rights to exercise advisory jurisdiction on matter relating to the content and scope of the rights which are already considered by the court [12]. Thus, international law has specialized agencies that can give advisory opinions on special subject-matters.

Nature and Scope of Advisory Jurisdiction

The general scope of advisory jurisdiction if ICJ is to give advice on a question referred to it. This is an additional capacity of ICJ [13]. ICJ may give an advisory opinion on legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request [14]. The primary scope of advisory jurisdiction of ICJ is to enunciate the fundamental elements of law [15]. This power does not allow ICJ to conclude a dispute or a case, however, the opinion by ICJ allows the parties to draw their own conclusions [16]. ICJ’s reasoned but nonbinding advisory opinions on submitted questions of

international law provide important guidance to the parties to settle the disputes amicably.

The submitted question needs to be a dispute in question between the parties [17]. The question could also be absolutely abstract or hypothetical in nature [18]. ICJ is also competent to advice on questions that are political in nature [19]. The question which ICJ addresses should be an exact statement [20]. The scope of the advisory jurisdiction is broad in respect to the kind of questions or concerns that can be addressed by the ICJ. However, the nature of these advisory opinions can make a huge difference in respect to customary international law and emerging jurisprudence of international law. It is because even though, the advisory opinions do not have a binding effect upon the parties, the opinion of the ICJ serves as a source of International law [21]. ICJ decides questions of international law by applying judicial decisions of ICJ [22]. Even if a party believed that advisory opinions are not judicial decisions for the purpose of interpreting international law, these advisory opinions will definitely form the corpus of *ex aequo et bono*, if the parties agree thereto.

Apart from addressing certain questions of international law, ICJ, while exercising its advisory jurisdiction, can also address questions that have never been addressed in international law before. These matters are known as *res integra*. This could mean a point of law on which neither a decision nor *obiter dicta* has been pronounced before [23]. This aspect of advisory opinion widens the scope of advisory powers of the ICJ.

Under the domestic laws of India, *Cauvery River Water Dispute* was sent to the Apex Court of the Country for Advisory Opinion by the President of India [24]. This advisory opinion was an outcome of a bar on the national judiciary to address the dispute. This bar arose out of an agreement between the States who were party to this dispute. These States agreed not to submit any dispute to the judiciary of the country, but to a special tribunal for arbitration. Even though the arbitration proceedings concluded fairly, the States refused to adhere to the tribunal's

decision. This is one of those cases that showcase lack of implementation mechanism.

While assessing whether ICJ will deliver an advisory opinion on a question, it takes into consideration, the nature and scope of the question, the object and purpose of the question and the adequacy of the evidences or documents submitted before the court [25]. Though, there have not been cases, where ICJ has refused to exercise its advisory jurisdiction. However, the use of words “may” exercise in the ICJ statute, allows ICJ to exercise its discretion with certain cases, while considering the above factors.

While it is recognized that international law is a fact and implementation of international law may vary with the intention of the parties and the will of the parties to execute international law. Advisory opinions are a reality check on the exactness and position of the parties on specific disputes or questions within the international law. One of such questions was raised in the *legality of the threat or use of nuclear weapons Case* [26]. The two fundamental questions that were addressed by the ICJ was (i) whether use of nuclear weapons is prohibited under the international law? and (ii) whether use of nuclear weapons will amount to threat or use of force under international law? This case does not have any binding implications on the parties. However, this case has asserted the international jurisprudence on use of nuclear weapons. It is because of this case, that international law is settled on the principle that in “extraordinary circumstances”, use of nuclear weapons will not violate international law and, therefore, will not amount to use of threat or use of force under the international law.

Similarly, in the *Reparations Case* [27], the General Assembly referred this case to determine reparations for injuries suffered while serving the United Nations [28]. The Court unanimously held that United Nations could bring an international claim against a state to reparations. ICJ also dealt with the aspects of diplomatic protection and granted the United Nations to proceed with claims on behalf of persons working as the staff of the United Nations.

These advisory opinions have served as the backbone of questions which would have been otherwise left answered in the absence of an adjudicating or implementing agency. These advisory opinions have also opened the gates for future claims and questions which will be answered practically and with solutions. Moreover, the objective of these opinions has been to promote equity and serve justice, while also promoting the international human rights. Though these opinions are not legally binding, the ripple effects created by these opinions have far reaching effects.

The Future of Advisory Jurisdiction

As discussed earlier, an advisory jurisdiction does not conclude a dispute, it rather lays down the foundation of the most peaceful and amicable method of dispute settlement and policy making within international law. Presently, there are various issues that are recommended by the scholars of international law to be taken as an option of advisory opinion. These include Transboundary harm [29], Climate Change [30] etc. These issues will allow the global actors, including United Nations, states and nongovernmental organizations to take a step forward and take effective action plans for unanswered issues like climate change, human trafficking, transboundary harm, responsibility of the states, etc. It is also true that ICJ is restricted with the provisions of contentious jurisdiction while giving an advisory opinion. However, an exact statement of the question on which countries seek an advisory opinion, will allow development of international jurisprudence, law and policy as well as domestic laws.

If a country seeks an advisory opinion against another country without its consent, then ICJ is restricted by the provisions of the contentious jurisdiction to give away an advisory opinion. Similar issues were raised at the *interpretation of Peace Treaties Case* [31] and the court did not apply the principles related to consent in this case. ICJ stated that due to nonbinding nature of the advisory opinion, the principle of consent does not apply. This allows a greater flexibility to the organs of the states to request an advisory opinion.

Another limitation to the advisory opinion of ICJ is the power of the authorized body to bring a case of advisory opinion. The question whether a body which is not authorized by the United Nations can bring questions before the ICJ remains unanswered. Moreover, whether an individual state can seek an advisory opinion on certain questions without involving any other party is also not answered by ICJ yet.

The municipal jurisdictions which allow an advisory opinion, also intend to develop jurisprudence on *res integra* questions. A development of jurisprudence empowers the authorities or parties who have interests in the questions. A legal answer to disputes or questions allows the parties involved in such questions to correct their actions or abstention which are not according to the developing jurisprudence.

CONCLUSION

Therefore, it may be concluded that role of ICJ to facilitate negotiation between the international actors is vital. This role is further broadening and becoming important because of the authority and power of ICJ to deliver advisory opinions. While the global community is trying to progress towards a more peaceful world, negotiations will only strengthen such efforts. Only negotiations can facilitate the actors to reach mutually acceptable propositions. The actors also feel in control of the situation and can always keep the power to re-negotiate terms, in the event of change of circumstances. However, there is one major challenge to this process. The challenge is submissions of evidences by the parties. Due to the broadness of this jurisdiction, ICJ may invite all the stakeholders to submit their opinions, agreements, disagreements and views on the question involved in a particular advisory opinion. This is a voluntary process and stakeholders may choose not to submit any expression. In such an event, the advisory opinion becomes a constrained opinion and fails to take into consideration the widest possible views. This, although, does not discredit the legality and fundamental elements discussed by ICJ.

Thus, to conclude, it can be asserted that ICJ's power to exercise advisory jurisdiction is the most favorable path to allow effective negotiations and peaceful settlement of international disputes.

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