



REBUS SIC STANTIBUS: A CRITICAL ANALYSIS

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Introduction to the Concept

International Law is based on a number of sources. One amongst them is treaties. One of the most authentic sources of Public International Law, the treaties constitute an essential factors in making the International Law, a proper and binding law. One of the provisions in the Vienna Convention on Law Of Treaties which gives a binding effect to the treaties is Article 26 which states that, “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” The article is embodied in the maxim of “Pacta Sunt Servanda”. Generally, treaty will prevail if the circumstances around it are relatively stable and do not go through significant change in accordance with what is promised. The parties of the treaty, in this condition, do not automatically have reasons to get away unilaterally from the agreement. The breach of a treaty as per this doctrine will have legal implications. However, certain exceptional situations may arise which may leave the continuation of treaties redundant for the signatory state/states. Contemplating such a situation, the International Law makers incorporated the doctrine of Rebus Sic Stantibus. The concept of *rebus sic stantibus* (Latin: “things standing thus”) stipulates that, where there has been a fundamental change of circumstances, a party may withdraw from or terminate the treaty in question. An obvious example would be one in which a relevant island has become submerged. Being an exception to the principle of pacta sunt

servanda, the doctrine was previously known as *clausula* due to its express assertion in many treaties.

The central figure in the formulation of *rebus sic stantibus* was the Italian jurist Scipione Gentili (1563–1616), who is attributed for coining the maxim *omnis conventio intelligitur rebus sic stantibus* ('every convention is understood with circumstances as they stand'). Another major contributor was the Swiss legal expert Emer de Vattel who advanced the view that 'everybody bound himself for the future only on the stipulation of the presence of the actual conditions' and so 'with a change of the conditions also the relations originating from the situation would undergo a change'. A major shift occurred during the 19th century, wherein the civil law came to reject the doctrine of *clausula rebus sic standibus*, but Vattel's thinking continued to influence international law, not least because it helped reconcile 'the antagonism between the static nature of the law and the dynamism of international life'. In the 19th century the clause passed through a period of remarkable influence which culminated in the Italian and German interpretations of the doctrine. These countries availed themselves of the tempting possibilities of a not too scrupulous application of the clause on their way to national unity, thus enabling themselves to excuse acts the legality of which would otherwise have been doubtful. However, the doctrine suffered a serious hitch with the rise of the positivist school of law.

PRESENT CONTEXT

This maxim is embodied Under Article -62 of the Vienna Convention on Law Of Treaties and states



“1) A fundamental change of circumstance which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless :

a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty and

b) The effect of the change is radically to transform the extent of the obligation still to be performed under the treaty”

2) A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) If the treaty establishes a boundary, or

(b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Let us now analyse the provision. It would be prudent to analyse the term “fundamental change in circumstances”. This term forms the very essence of the principle. This scope this term even though not directly was examined in the landmark case of *Gabčíkovo–Nagymaros Project case*¹, where the International Court concluded that:

¹ *Gabčíkovo–Nagymaros Project, Hungary v Slovakia* [1997] ICJ Rep 7

² 466 US 243 (1984)

“The changed circumstances advanced by Hungary are, in the Court’s view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty’s conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances should be applied only in exceptional cases.”

To understand the aforesaid provision better, it would be prudent to relate it with the Law of Contracts. In *Trans World Airlines, Inc. v. Franklin Mint Corp*², Madam Justice Sandra Day O'Connor of the Supreme Court of United States wrote³: *"A treaty is in the nature of a contract between nations. The doctrine of rebus sic stantibus does recognize that a nation that is party to a treaty might conceivably invoke changed circumstances as an excuse for terminating its obligations under the treaty."*

The above provision contemplates situations which would leave the performance of the obligations under treaties impossible. Similarly in the law of Contracts, the concept of frustration is incorporated, which gives a right to a party to terminate a contract if vital

³ *Rebus Sic Stantibus Definition* available at <http://www.duhaimelaw.com/LegalDictionary/R/RebusSicStantibus.aspx> (Visited on 15th October 2019)



change has occurred in circumstances under which the contract was entered into. The doctrine of frustration is recognised under the Indian Contract Act, 1872 under Section 56 which states the following:

“Contract to do act afterwards becoming impossible or unlawful: A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.”

For instance, A contract to act at a theatre for six months in a consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void. Coming back to the context of Public International Law, for instance State A and State B have entered into a treaty to make investments in each others trade. Later on the financial stability of the State A is jeopardised due to various reasons. The performance of treaty obligations on the part of State A would become impossible and hence the state would have the right to withdraw from the treaty.

The question now arises as to the effect of the termination of the treaty under this doctrine. As discussed above, this doctrine gives a right to the party/parties to withdraw from the treaty in case of changed circumstances. If interested parties in a treaty have similar perception that an underlying change has occurred and made it impossible to embody the treaty, consequently both parties can dispose the issue in an amicable manner⁴. If the parties fail to reach on a similar consensus

legal dispute will be inevitable. Disputes are a regular part of any legal system. If a dispute happens in the milieu of national law, the settlement is enforceable in two ways. First, legislative body may enact legislation or in other form of regulation that formulate fundamental change of circumstances with distinct limitations⁵. Disputing parties may refer to those regulations as a legal basis for dispute settlement. Second, if a dispute cannot be settled, the Judge of the Court will release a binding decision for both disputing parties as a dispute resolution⁶. In the milieu of international law, the circumstances are different. International community does not have a Central Government or a Legislative Body so may enact regulation that is generally accepted or a Court that requires State as international law actor to abide by the Jurisdiction of the Court⁷. Dispute settlement from a treaty is fully delegated to the State parties of the treaty.

The effects of the termination of treaty are further contemplated under Article 70 of the Vienna Convention provides that:

“1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a state denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that state and each of the other parties to the treaty from the

⁴ D. Sidik Suraputra, “Doctrine Of Rebus Sic Stantibus And Law Of International Treaty” Jurnal Hukum Internasional 462(2014)

⁵ Ibid

⁶ Ibid

⁷ Ibid



date when such denunciation or withdrawal takes effect.”

Further Article 72 provides that:

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

WHETHER THIS DOCTRINE IS USEFUL TODAY OR NOT?

Such a question is difficult to answer and depends largely on the conduct of the states. Nations dissatisfied with the status quo continue to regard it as a welcome device for escaping from burdensome treaties, while others fear it as a threat to stability and to their interests. Notwithstanding the fact that the fundamental change of circumstances principle is yet to be discussed in a case and International Court of Justice is yet to take a stand, it needs to be cognized by the interested parties. However the usefulness of the doctrine has been analysed in the past by many jurists. Legal experts like Oppenheim and classical scholars like Fauchille and Bonfils believed that every international accord like every contract includes an implied condition, according to which, it is permanently presumed that in an

international agreement as long as everything is in its normal state, the agreement is valid and enforceable. On the other hand jurists like Lord Me Nair, Anzilotti and Burkardt hold a different opinion and discuss the aspect of will in the doctrine. According to Anzilotti an agreement is the product of exercising rights and performing obligations according to the wills of the parties to the contract. In the other words, it is the opinion of the parties according to their will, that they have undertaken and fixed the limits which they wanted. Thus, with the passage of time, the core circumstances under which the parties exercised their will and entered into the treaty are bound to change. Such a shift in the fundamental circumstances gives both the parties the right to withdraw from the treaty. Such explanations seem to hold validity in the present context as well. In a time where states are becoming increasingly conscious about their own growth, the invocation of the doctrine of *rebus sic stantibus* becomes valid. However, this doctrine does not come without its own limitations. There are jurists who have propounded against the use of this doctrine. Hans Kelson has negated the doctrine absolutely. As a jurist he held great respect for the doctrine of *Pacta Sunt Servanda* and hence advocated that the clause of “*Rebus*” or the “*Rule of Changed Circumstance*” is harmful for the ultimate goal of international law which is the continuation of the judicial stability or equilibrium of the laws. In his 1929 treatise on international law, Henry Wheaton noted that there were several ways in which a state



claim to be free of treaty obligations⁸. Many treaties contain opt-out mechanisms.

But as to *rebus sic stantibus*, treaties:

"... are liable to dissolution on demand of one of the parties on a vital change of circumstances, on the principle *conventio omnis intelligitur rebus sic stantibus*.

"It is clear that (*rebus sic stantibus*) is a very dangerous factor and that it cannot be misused but, on the other hand, the principle that no treaty can be broken is equally dangerous. It is fair to say that each state contracts in the belief that it is not endangering its national life and development, and if a treaty in fact proves to threaten these essentials, it can insist on revision or cancellation. Yet there must be grave cause; mere loss or inconvenience is not enough...." This doctrine was widely used from the period towards 1914, to escape from burdensome treaties, and it continued to the period between the First and the Second World War. *Rebus Sic Stantibus* principle has been applied by Austria – Hungary in 1908 as a justification for annexation of Bosnia and Herzegovina based on the Treaty of Berlin 1878 and the Convention of Constantinople which granted rights to Austria – Hungary to occupy or run the government. Also on the basis of this principle, Switzerland laid claim to plea for the 1909 treaty with Germany and Italy in regards to the rail road of Saint Gothard and in respect of this, Germany had granted its approval. The application of *Rebus Sic Stantibus* principle by States in the European region continued after the First World War ended. The application of the *Rebus Sic Stantibus* doctrine came to an end in April

1924. Russian government, at that time, was at the opinion of that the treaty between Russia and other European powers, despite it needed to be ceased to be current, were not automatically expired although since the signing of the treaty there was a variance in international situation and affected the continuity of the validity of the treaty. Before judgment was taken to terminate the treaty, the validity of those treaties had to be seen, in the first instance, from the *Rebus Sic Stantibus* point of view. The rapidly ongoing change of circumstances in international community may induce the possibility of demand from interested party to amend provision laid down in a treaty, even to terminate the validity of a treaty which is attributed to the conditions in the treaty that have prevailed for long are no longer suitable for the current condition, therefore such treaty is no longer operational. However, till date the ICJ is yet to formulate a concrete stand pertaining to the doctrine which the Permanent Court of International Justice refused to take in the case of *Free Zones of Upper Savoy and the District of Gex, France v Switzerland*⁹.

In conclusion, the researchers are of the opinion that though the doctrine of *rebus sic stantibus* comes with its own limitations, its usage is but inevitable in the present context. The researchers are of the opinion that signatory states of the Vienna Convention on the Law of Treaties need to take an initiative and approach the International Court of Justice to take a concrete stand on the issue.

⁸ *Rebus Sic Stantibus* Definition available at <http://www.duhaim.org/LegalDictionary/R/RebusSicStantibus.aspx> (Visited on 15th October 2019)

⁹ 1929 P.C.I.J. (ser. A) No. 22 (Order of Aug. 19)