Role of Domestic Courts in Determining Customary International Law

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ABSTRACT:

The world today is a globalised world contrary to the world few years back. This leads to implementation of international law. The international law, today, is full of dissension. International law is derived majorly from customary law. Customs are unwritten sources of law. They have two main elements: opinion juris and state practice. This paper discusses the roleof domestic courts in determining customary international law. The Indian Judiciary and the Indian Constitution follow the customary law knowing its importance.The research paper begins with explaining the definition and core elements of customary law. Customary law is superior to treaty laws when there are no conventions based on treaty law. Life is changing at a rapid speed and customary law is taking the place of treaties. Customary law in 21st century is diverse. Even the drafters of international law had no clear idea before they framed it. This is the reason customs have become a major source of international law. The Indian Constitution moves in lines with the International Law. The International Law helps to safeguard the human rights. Also, theUniversal Declaration of Human Rights, Vishakha Guidelines and the Vienna Convention on Law of Treaties revolve around the customary law.
The paper is going to explore the notion of domestic application of international customary rules and important prerequisites for their application: domestic validity of a customary rule and its status with respect to other domestic norms. The paper will also discuss various cases of India where domestic courts applied international customary rules.

I. INTRODUCTION

In last few decades, implementation of international law has become controversial and subject to a lot of debate. In a normal understanding of sources of international law, a norm becomes a norm when it is formed by accepted processes of international law. The existence of norm goes in lines with existence of custom as source of international law. It is only acknowledged when sufficient evidence of state practice and opinio juris is adduced.[1] State practice can be considered as an important material of international law. It also helps in interpretation of treaties.

Customary international law becomes superior when the international treaty norms are missing. It has been noted that although the creation of customary law takes a lot of time but whenever a problem needs to be solved in international arena, customary rule is the foremost solution. Customary rules are now getting codified.Some issues are specifically assigned to customs like state immunity, state responsibility or status of foreigners.[2] The status of customary international law differs from state to state. If a state is not a party to any multilateral treaty or the treaties are not applicable, the domestic rule of customary law prevails. For example – the United States is cautious in becoming a party to human rights agreements and in these types of cases customary international

[1]Statue of the International Court of Justice, art 38.
[2]P Malanczuk, ,Akehurst's Modern Introduction to International Law (Routledge 2002).

law is applied.[3]

The paper ends with discussing landmark judgements and the recent developments in India. The domestic courts face problems while giving judgements as they have to move in harmony with unwritten customary international law. This involves a lot of intricacies. Lately, the customary law is gaining popularity and authenticity.

II. WHAT IS CUSTOMARY INTERNATIONAL LAW?

'Justice has emanated from nature. Therefore, certain matters have passed into custom by reason of their utility. Finally, the fear of law, even religion, gives sanction to those rules which have both emanated from nature and have been approved by custom.'

-Cicero

Fundamental aspects of customary international law have always been obscure, leading some commentators to suggest its elimination as a source of law.[4] For example, Kelly argues that customary international law should not be regarded as a source of international law on three grounds:

i. Many of the existing norms claimed to be a part of customary international law do not qualify as such;

ii. Customary international is undefined and indeterminate;

iii. Customary international law lacks procedural legitimacy as a process of norm creation.

Other commentators have suggested replacing customary international law with something else.[5]

An immediate difficulty with the traditional formulation of customary law is that it seems to require states to believe that a rule exists before their practice in fact creates the rule. One suggested solution to this problem is to eliminate the element of state practice as a requirement in creating international customary law, maintaining only the psychological element.[6] If this solution were adopted, state practice would be used as merely one way of proving this psychological element.[7] They retaliate against the states that launch them.[8] This approach clearly favours powerful states over weaker ones.[9] Others consider that any type of state behaviour, including statements and omissions, can constitute customary international law.[10]

[3] Barry E. Carter, Phillip R. Trimble & Curtis A. Bradley, International Law (2003).
[4] JP Kelley, , The Twilight of Customary International Law, 40 Virgina Journal of International Law (ed., 2000).
[5] A A.,, The Concept of Custom in International Law (Ithaca, N.Y. : Cornell University Press 1971).
[6] ibid
[7] B Cheng, , United Nations Resolutions on Outer Space: "Instant" International Customary Law?, Indian Journal of International Law (ed., 1965).
[8] Supra note 5.
[9] H Charlesworth, , The Fluid State (Federation Press 2005).
[10] Michael Akehurst, 'Custom as a Source of Law' (British Yearbook of International Law,1974).

In our view, a combination of acts and statements/ omissions is required, and statements/ omissions alone cannot constitute sufficient state practice to generate a norm of customary international law. The legitimacy of customary international law – the notion of the consent. The general proposition in the international law is that the rules of international law do not bind the states against their will. This consensual theory was stated by the Permanent Court of International Justice: 'The rules of law binding upon States… emanates from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law'.[11]Unlike consent to treaties, which involves formalities such as signatures and ratifications, consent to customary international law is often inferred from the 'non-objection' of states – on the basis of acquiescence. Thus, a state that consistently objects to a developing rule of customary international law is exempt from the rules if the rule crystallises into customary international law.[12]

In olden times, the customary practices of states were enacted as the international law. Like there were Laws of War that are now codified into Geneva conventions. These codifications did not occur because of treaty. Customary practice over the years helped in the formation of Geneva Conventions. It is to be noted that even before the codification of the law, they were accepted in Geneva and became binding under customary international law. All this shows the importance of customs. Customs have now become a rich source to enact laws. Customs and treaties are two sources of which customs are gaining popularity. Customs are followed from time immemorial and it becomes easy to enact them as statutes.

Therefore, customary international law is an aspect of international law involving the principle of custom.

III. CUSTOMARY INTERNATIONAL LAW IN 21ST CENTURY

States value their reputation for compliance with legal agreements, rules of customary international law are one consideration among many that states take into account when deciding on their best course of action. However, unlike treaties and soft law, where states have explicitly bargained over their legal commitments, Customary International Law presents an informational problem. States can only respond to legal commitments to the extent that they are aware that a legal commitment exists.

Thus, although this model of Customary International Law allows us to understand how Customary International Law can affect state behaviour, understanding the depth of cooperation that Customary International Law can support requires an account of how states indicate to each other the rules that have legal status, and thus the violation of which will result in reputational sanction. Customary International law is a form of law retains vitality is that Customary International Law is interstitial, filling in the gaps in more explicit legal

[11]S.S.Lotus, France v Turkey,(1927), PCIJ.
[12] Anglo-Norwegian Fisheries (United Kingdom v Norway) (1951) ICJ Rep 131.

instruments such as treaties and soft law, and provides a basis for the operation of those legal instruments.[13]

The Vienna Convention on the Law of Treaties, for example, provides in its preamble that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present convention." The Convention thus contemplated that existing rules of Customary International Law would complement the convention in establishing states' expectations about the law of treaties. Given the increasing use of treaties and soft law agreements in the conduct of international relations, and the fierce criticism of traditional notions of Customary International Law, one might very well wonder if Customary International law has a place in international legal relations in the 21st century. Yet to dismiss Customary International Law, either because of the prominence of the treaty in modern international relations or because of the theoretical shortcomings of traditional Customary International Law doctrine, would be an error. States are not forced into an artificial choice between creating law through treaties or having no law at all. Instead, a variety of different legal modes are available to states when crafting their legal environment. While Customary international Law may be the weakest type of international law from a compliance standpoint, the fact that it is capable of altering state incentives makes it an important tool for adding to the value of the international legal order. More importantly, international law is a holistic system, in which different legal modes complement each other. To emphasize only explicit agreements at the expense of customary norms causes one to miss the effects of the significant interactions between custom and international agreements.

By focusing our attention on expectations as the source of legal commitments, Customary International Law can inform our study of international law and the myriad ways in which states craft their legal environment. Only by understanding how and why states use the different legal tools available to them can we truly understand the role of international law generally in shaping state conduct.

IV. INDIAN CONSTITUTION AND CUSTOMARY INTERNATIONAL LAW

"It is almost an accepted proposition of law that the rules on customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law."

-Justice Kuldeep Singh[14]

Before we apply the international law in the Indian context, a brief introduction of the constitution would be useful. The drafters could not define the status of international law with Indian context.[15]Our constitution is also not able to serve full purpose. Our constitution is not able to provide full guidance on the relationship between

[13]A T., , How International Law Works (Oxford University Press 2010).
[14] Vellore Citizen Welfare Forum v. Union of India, (1995) 6 SCC 647 at p. 660.
[15] M N., , International Law (Cambridge University Press 2008).

international law and municipal law. This is because there was no debate on this specific topic in the Constituent Assembly.

Apart from the provisions of the Constitution, we also need to rely on state practice.[16] Article 51(c) (which falls within the realm of Directive Principle that are non-justiciable in character) of the Constitution mentions international law and imposes duty on the state to respect it. But the implementation of it has been given to Article 37.[17] A reading has suggested that India is still in the same position as before but trying to implement these laws. Therefore, India will have the same legal practice for enforcing customary international law as any other statutory provision.

International law was implemented even before India gained independence. During that period India followed British system of advocating International law. India was a member of League of nations and eventually became one of the founding members of United Nations. Britishers treated the customary rules as part of their domestic law. The customary rules were consistent to their local laws. The implementation of the customary law changed after India gained independence. A preamble was enacted by the Constitution makers. They also laid down articles in the Indian constitution. The most important article is Article 51. The article mentions that it is the duty of the state to promote international peace and security. It does not expressly mention to make it a vital part of domestic laws.

In Keshvanand Bharti v. State of Kerala[18] , it was mentioned by the Honourable CJ AK Sikri that when there arises a situation where the language of municipal law is vague and unclear then the courts may take help from international authority. Article 253 of the Indian Constitution mentions this. Similarly, in the case Krishna Sharma v. State of West Bengal[19], the Calcutta high court mentioned that in case of dispute between two laws i.e. international and municipal law, a harmonious approach should be adopted to ascertain which law will prevail.

In India, the most debated topic is whether customary International law a part of state law.[20] Indian constitution does not explicitly mention about the relationship between international law and municipal law. Indian Courts do not have any provision or laws dealing directly with the relationship of international and municipal laws. Indian Courts have taken the help of American laws as well as English laws for guidance in some judgements. Indian courts call the international law as 'comity of nations.'[21] International comity means the rules of state

[16] R.P Anand, Asian States and the Development of Universal International Law (1986).
[17] H.M. Seervai, The Position of Indian Judiciary under the Constitution of India, 53 (1978).
[18]Keshvanand Bharti vs State of Kerala, (1973) 4 SCC 225.
[19] (2007) 3 CHN 406.
[20]HH Koh, , Is International Law really state law, Yale Law School (ed., 1998)
[21]Tractoroexport v. Tarapore @Company,(1969) 3 SCC 562.

behaviour which are followed to show courtesy and this does not bind them. On the other hand, international law refers to principles which are followed as matter of legal obligation.

> *"Lawyers don't make it [the argument that Customary International law is supreme ... law], judges don't consider it, and scholars have not thus far intervened to ask for explanation."*[22]

The main question that arises is whether Indian courts have to apply customary laws. There is nothing expressly mentioned in the Indian constitution. Indian practice of international law is different from English practice of International law. When Indian courts apply International law, they never do a detailed study for the interpretation of International law. Their approach is lackadaisical while applying international law in the municipal law. This unjustified omission on the part of Indian Courts have created various anomalies in the relationship of international law and municipal law. It rarely happens that the issue has been covered with reference to international law principles.[23] Indian courts only take support of international law to justify a principle. They have previously applied this in Vishakha Guidelines.

Another criticism is that the Indian judges are unversed with the international law. Most of them are not really aware of the judgements and procedure of international law. This created set of problems in determining the issues of international law. It is to be noted that 'International friendliness' under Article 51(c) makes us believe that neither constitution nor Parliament wants us to violate any principle of International law. The jurists should try to amend the existing provisions or to create more provisions for a better understanding of the relationship between International and municipal law. Also, it should be noted that the new provisions adhere to the international guidelines. Also, the court must act with all wits when applying international law in domestic cases.

a) Indian Judiciary and International Law

Indian Judiciary plays a vital role in implementation of India's international obligation under international treaties. The Indian Judiciary implements international treaties in areas of environmental law and human rights. In the case Jolly George Verghese v. Bank of Cochin[24], Justice Krishna Iyer said that to accommodate the treaty law in the domestic law, we need to modify the domestic law unless it is changed, domestic law prevails.

In another judgement, Neelabati Behera v. State of Orissa[25], the court gave the judgement relying upon the Article 9(5) of the Covenant on Civil and Political Rights. The court advanced the compensation through this covenant. The court in Chairman Railway Board v. Chandrima Das[26], took help from the principles of

[22] H Law Review, , Harvard Law Review, 131 Harvard Law Review (ed., 2018).
[23] Krishna Ranjan v. Union of India, AIR 1954 Cal. 623 (India).
[24] AIR (1980) 2 SCC 360.
[25] AIR (1993) SC 1960.
[26] AIR (2000)2 SCC465.

Universal Declaration of Human Rights and Article 21 of the Indian Constitution for providing security to foreign nations who are rape victims. Indian Judiciary does not directly accept the customary rules framed by the international law. India follows a dualist approach, so in case of any dispute the municipal laws prevail.

Fundamental Rights and Fundamental Duties also run in accordance with the international law. The Fundamental Rights enshrined in the Part III of the Indian Constitution is inspired from the Universal Declaration of Human Rights. The Fundamental Duties or the Article 51A gives effect to the Article 29(1) of the Universal Declaration of Human Rights. This mentions that duties of citizens towards the state which help to build the nation. "The constitution is the supreme law of the land." The application of many articles has made the international law treaties and customs which is strengthening India's legal background and increasing the position in the international arena.

V. WHY CUSTOMARY INTERNATIONAL LAW MATTERS

Customary international law not only helps in solving dispute between two states but also it helps in protecting Human Rights. Customary international law can also contribute in the protecting the rights of minority. The International Law Weekend that took place in New York in 2018 had a similar theme. International Law matters in all the aspects of life. The Universal Declaration of Human Rights, 1948 has helped immensely in the development of International Law. The set of principles laid down in international law has contributed in the development of UDHR. The International Covenant on Economic, Social and Cultural Rights, 1966 has the corpus of customary international law.

However, international law binds only the states that have ratified it. Article 13 of the U.N. Charter says that resolutions are binding only on the states member to it. This creates questions on the formation of customary human rights and how U.N. contributes to it. Customary international law arises from the element of *opinion juris*. Though it is difficult to apply the doctrine as one cannot ascertain whether states believe it to be a punitive norm as law. Despite the deficiencies, national and international courts are applying customary human rights norms to their laws.

Some jurists argue that there is no importance left of customary international law. But research by scholars suggest that customary international law is playing a vital role in protecting human rights. Of course, the customary international law is more useful than the treaties in certain cases. The treaties formed can have hidden self-interests as compared to customary laws. Customs are of long duration and cannot be altered according to self-interest. Thus, customs are authentic and can serve as a better source for protection of human rights.

VI. CONFLICT BETWEEN TREATY AND CUSTOMARY INTERNATIONAL LAW

In Nicaragua v. United States, the court held that customary law exists independent of treaty law. Even if both the form of law deal with the same subject, still they are different from each other. This judgement is a remarkable one for distinguishing treaty law from customary international law. In case of customary law, the court held that opinion juris and state practice are necessary. The same was held in North Sea Continental Shelf Case.

Customary international law also helps to modify treaties. These two are the primary sources of international law. Both of these have lacunas. They both contribute to fill the gaps of each other. This has helped in strengthening their relationship which has made it more prone to conflicts. The customary international law is stable as compared to flexible treaties. Treaties can be amended but the customary law is static. In the complicated modern world, both serve as a purpose for providing basis for dealing with cases around the globe. The need for international law is increasing in leaps and bounds. Fifty years back, we needed international law only for the purpose of solving simple dispute of two states whereas now new branches have developed. International human rights, intellectual property, environmental law have emerged in the previous years. There is also a Nuclear Deal revolving around customary international law.

There are cases when there is no relevant treaty. Customary law also helps in these cases. This form of law is developing at a faster pace. Jurists and scholars are working to form this as proper emerged field of law. Now, states are the only one that form law. Developments in the field of technology; both interstate and intra state are contributing to it. There is a broad line between treaties and customary law. States, these days, are depending more upon customary international law because of its authenticity.

VII. CASE LAWS

1) Asylum Case- (Colombia v. Peru)[27]

Facts:

A Peruvian citizen who was accused of taking part in a military rebellion in Peru was provided asylum in Colombia. Peru issued an arrest warrant against Victor Raul Haya de la Torre "in respect of the crime of military rebellion."[28] This event took place on October 3, 1949, in Peru. After 3 months of the rebellion, Victor fled to the Columbian Embassy situated in Peru. The Columbian Embassy confirmed that Victor was granted diplomatic asylum.

[27](1950) ICJ Rep 266.
[28]ibid.

They followed the Article 2(2) of the Havana Convention on Asylum of 1928. They requested safe passage for Victor to leave Peru. Also, under the Montevideo Convention on Political Asylum of 1933 they requested safe passage and Columbia had qualified Victor as a political refugee. However, Peru refused to accept this and refused to grant safe passage.

Court's Decision:

The question to be considered was whether Columbia was legally capable enough to unilaterally declare the offence committed by the refugee. Also, was it allowed to decide on the type of crime. The Court stated that in the normal course of granting diplomatic asylum a diplomatic representative has the competence to make a *provisional* qualification. In this particular case, Colombia declared that they are granting asylum that itself qualifies it to be binding on Peru. The court held that the convention was not binding on Peru and considering the low numbers of ratifications the provisions of the latter Convention cannot be said to reflect customary international law.

Colombia further argued that regional or local customs support the qualification. Court in this matter held that the burden of proof on the existence of an alleged customary law rests with the party making the allegation:

"The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party… (that) it is in accordance with a (1) constant and uniform usage (2) practised by the States in question, and that this usage is (3) the expression of a right appertaining to the State granting asylum (Colombia) and (4) a duty incumbent on the territorial State (in this case, Peru). This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law."[29]

The court also ordered that granting of asylum was against the Havana Convention. On the day on which the Court delivered the judgement, Colombia filed a request for interpretation, asking or the reply to the question, the court declared the request inadmissible.

2) Right of Passage over Indian Territory Case – (Portugal v. India)[30]

Facts:

Portugal had several small enclaves of territory within India. They had one coast and others inland. Till 1954, Portugal had the right of passage through Indian territory which was in between Dadra and Nagar Haveli and Daman. The right was however subject to control and regulation by India. Certain disputes started taking place

[29] Ibid.
[30] 1957 ICJ 125.

and the relations between India and Portugal worsened. Portugal claimed that India was exercising excessive control. On the other hand, India contended that it was necessary because of special circumstances.[31]

Court's Decision:

The International Court of Justice had to decide that whether Portugal have a customary right over Indian territory? Also, whether India was allowed to exercise control over the disputed passage and whether Portugal entitled to send its military or armed forces through this passage?

The court ordered that India did not act to its obligations. Though Court ruled that the Treaty of 1779 was a valid treaty and Portugal was entitled to get passage through Indian territory in consequence of the provisions of the treaty. The court also observed that the State gets the right to passage through the treaty of another state and if it continues for a long time, then it is equivalent to law and thereby imposes the obligation upon the State affected to continue to give right of such passage. A treaty was signed between India and Portugal which gave Portugal full right over Goa, Daman and Diu, Dadra and Nagar Haveli.

> "For these reasons, may it please the Court To adjudge and declare - - that India has not complied with the obligations incumbent upon it by virtue of Portugal's right of passage."[32]

These are the statements given against India. Hence, the court claimed that in 1954, Portugal had the right over passage.

3) West Rand Central Gold Mining Company Ltd. V. King[33]-

In this case, England judge bench ruled that succeeding state is entitled to decide whether it would accept the financial obligations of the former state.

West Rand Central Gold Mining Co. Ltd. was a registered company in England. It had the work of digging gold mines in Transval. In October 1899, two parcels which had gold were seized by the officers of the South African Republic. According to the law, it was responsibility of the latter to return the parcels. But a war broke out between Britain and South African Republican.

The company filed a petition to claim the obligations of Britain. It was contended that British government was liable to return either the parcels of gold or either pay its value in money. However, the court rejected these contentions and said the other state is not liable to fulfil the private contractual obligations of the conquered state. This case was a test regarding the rule of custom. This case particularly dealt with the concept of recognising customary practice as an element of international law.

[31] https://www.icj-cij.org/files/case-related/32/032-19600412-JUD-01-00-EN.pdf.
[32] Ibid.
[33] (1905) 2 K.B. 291.

The court ordered that for recognition of custom it should be supported with satisfactory evidence. Also, it should be of such nature that it has received consent from all the states and no states should oppose it.

VIII. LATEST DEVELOPMENTS

In 2016, The Wire published an article in the Law column. This article focused on showing the misunderstanding that happened in the apex court of country. The Supreme Court could not decide on the relationship between international law and domestic Indian law. The Supreme Court in its judgement *Jeeja Ghosh v. Union of India*[34]affirmed the right of persons with disabilities to live with dignity. In this decision, the court referred to the International law to underline the rights of persons with disabilities.

The para 13 of Vienna Convention says, "The Vienna Convention on the Law of Treaties, 1963 requires India's internal legislation to that a "State party… may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

Custom is a formal source of international law apart from treaties. In *Vellore Citizens' Welfare Forum v. Union of India*[35], 1966, the court said there is no difficulty in accepting customary international law. It can be accepted as a part of Indian legal system. A norm becomes a part of customary international law only if states follow that norm from a sense of legal obligation. international legal norms are not directly enforceable in Indian courts till there is a domestic legislation giving effect to these norms.[36]

In the case of Vishakha v. State of Rajasthan, 1997[37], a landmark judgement on sexual harassment was passed. This case also took help of international conventions. It will prove for India's apex court to expand domestic law in relationship with international law but the Supreme Court has to double the efforts.

IX. CONCLUSION

This study shows the role of domestic courts in applying international law depends heavily on the subject matter of the international legal rule at issue. States are not forced to implement customary international law in their territories. Instead, various types of modes are available for states to settle any matter. We should lay emphasis on the fact that international law is a law in whole and different legal methods complement each other. Customary international law helps to expand our knowledge of international law and how states implement it in their legal environment.

The study of different tools to settle dispute can only help us to understand the role of international law in

[34]Jeeja Ghosh v. Union of India, (2016) 7 SCC 761 (India).
[35]Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647.
[36] P Ranjan, & F Ahmed, Is the Supreme Court Confused About the Application of International Law? (Sep. 28, 2016), https://thewire.in/law/supreme-court-international-law.
[37]Vishakha vs State of Rajasthan, MANU/SCOR/39067/2018.

shaping state conduct. Therefore, customary international law is an important part of the international legal system that ought to be given a stronger role in domestic law. Although various jurists have made valid criticism of customary international law still its role cannot be neglected. We hope that Indian courts show more interest in the role of customary international law in domestic sphere, both amongst practising lawyers and in three branches of government.