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Conflict between Customary Law and Treaty Law

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ABSTRACT

This paper examines the conflict between customary law and treaty law. The Conflict arises in derivative matters that arise when the provisions of customary law conflict with the treaty. ICJ Article 38(1)(a) refers to the treaty as a source of international law and Article 38(1)(b) refers to international custom as a source of international law. But some jurist believes that the custom is not a proper law and it is made on beliefs and other jurist opinions that the treaty is to be followed as it is written and bound the state to be followed in good faith. The paper also examines some cases on customs and treaties.

Keywords: *Custom, Treaty, Article 38(1)(a), Article 38(1)(b)*

I. CUSTOMARY LAWS

A customary rule of international law may be defined as *"a rule which the community of states has since long recognized as the right rule of conduct, and which have a force of law".* The International Court of Justice defines custom as, *"Evidence of a general practice accepted as law"*. The earlier custom was considered the sole origin of international law. Customary rules of international law have been developed by a long historical procedure, and they are also accepted by the international community. It is considered to be the oldest and original source of international law[3], although, it has lost its priority to international treaties. Article 38(1)(b) of the ICJ statute refers to international customs as one of the sources of international law. Customary international law composes of all the written or unwritten rules that form part of the general international concept of justice.

There are many disagreements about the value of customs in international law. One view is that Customs is a dynamic process of law and more significant than treaties as it applies to the whole world. The pre-eminence of custom in international law is due to the decentralized personality of the international community and there is no strong central system to regulate the relation. Another view is that the Custom is irrelevant today as a source of law, as it is too slow

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[3] Jennings,Arthur,Oppenheim's International law,25

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to accommodate the development of international law[4].

Essentials of Valid Custom

The ICJ in the "North-Sea Continental Shelf Case"[5] has laid down certain norms of customary international law;

1. Norm Creating Character: In the foremost place the provision concerned must at all be of fundamental standards creating attributes such as could be regarded as forming the basis of a general rule of law.
2. Uniformity and Consistency: It means that there are no intervals during the practice of the custom, if there are intervals then that user is not considered a custom. In the "**Asylum Case**"[6], "the ICJ observed that the rule invoked should be by a constant and uniform practice by the state and that this usage is the expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial State".
3. Generality of Practice: It is important that the tradition should have been generally observed or frequently followed by many states. A widespread acceptance especially by those states whose interests are especially affected is essential to constitute a practice into custom. In the case "**Fisheries Jurisdiction case**"[7], "the ICJ refer to the extension of a fishery zone up to a 12 miles limit which appears now to be generally accepted and to an increasing and widespread acceptance of the concept of preferential rights of coastal states in a situation of special dependence on coastal fisheries".
4. Time Element/ Antigutiy: In customs, time is considered to be an important ingredient. To consider a usage as a custom the user must be ancient and immemorial. If usage is not practised for years then it would not be considered a custom. In India there is no time duration is fixed but it is necessary that a usage followed by society for years then it is considered Custom
5. Opinio Juris et necessitates: Article 38 of the Statute of the ICJ state, "international custom should be the evidence of a general practice accepted as law". Customary practice, even when it is widespread and consistent, is not customary law unless an opinion Juris is present

[4] Professor Christopher Greenwood, Sources of International Law: An Introduction (Feb 15, 2022, https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf)
[5] German v. Denmark, ICJ (1969)3
[6] Columbia v. Peru; ICJ Reports (1950)266
[7] UK v. Iceland (1974)

II. TREATY LAW

Treaties are considered one of the main sources of international law as they required the assent of the parties to the agreement. Article 38(1)(a) of the ICJ statute, lays down that court while deciding any dispute shall involve the international treaties, whether common or specific, establishing rules accepted by the states.

In general, the treaty is defined as *"it is a written agreement between the two or more countries formally signed by the representatives, duly authorized and usually ratified by the law-making authority of the state"*.

Oppenheim defines a treaty as, *"International treaties are the agreement of a contractual character between states or organization of states creating legal rights and duties"*.

According to "Article 2 of the Vienna Convention[8]", A treaty is an agreement whereby two or more states established or seek to establish a relationship between them governed by international law". "Article 3 of the Vienna Convention, 1969", states that this does not mean that other subjects of international law such as international organizations cannot conclude treaties. In another word, a treaty is an agreement between the states which is made with the assent of the nations and they are bound to follow the same. In a treaty, not only the state but international organizations can also enter into a contract with the nation and other international organizations. But they are mainly concerned with relations between states[9].

Prof.Schwarzenberger gave a more exhaustive definition, *"Treaties are an agreement between subjects of international law creating a binding obligation in international law"*.

Kinds of Treaties

There can be two types of treaties;

1. "Law Making Treatise", lays down the general rules of the application. It means through international law can be modified by the changing times and conditions and the rules of the law among the nations can be strengthened. It can be of 2 kinds; (a) Enunciating Universal rules e.g. UN charter, and (b) Laying down general rules e.g. "Geneva Convention on the law of the sea,1958", "Vienna Convention on the law of treaties,1969", etc.
2. "Treaty Contracts", e.g., a treaty between two or more nations dealing with particular matters concerning the nation exclusively.

[8] 1969
[9] *ibid*

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Basis of Validity of Treaties (Pacta Sunt Servanda)

According to these principles, treaties are binding upon the parties and treaties must be performed in "good faith". When the nations entered into a treaty then they are bound to fulfil their obligations in good faith[10].

There was a great controversy amongst the jurist regarding the necessary force of international law. According to Strake, "The object of the treaty is to impose binding obligations on the states who are parties to it". In the view of Anzilotti, "the binding force of international treaty is on account of the fundamental principles known as Pacta Sunt Servanda". According to many writers, there is a binding force on treaties and the binding force is present in nature, other believes that it is present in religion and moral principles. ICJ in its advisory opinion of 1951 on the "Reservation to the Genocide Convention" stated, "None of the contracting parties is entitled to frustrate or impair using unilateral decision on particular contract".

Formation of Treaties

Treaties may be made by the parties in any manner they wish. There is no prescribed procedure for formulating the treaties. It can be drafted between the States, government and heads of states. But certain regulations apply in the making of treaties[11]. They are as follows;

1. Accrediting of persons by the contracting nations: The first step in the making of the treaty is to appoint representatives, having necessary authority by the state.
2. Negotiation: Then the representatives of the contracting states enter into the negotiations. After the negotiation, the treaty is adopted.
3. Signature: After the negotiation, the representative of the state signed the treaty.
4. Ratification: It is the essential step in the making of the treaty. Unless the treaty is approved by the head of the state or by the state authority, it does not come into existence. When the ratification is done the states to the contract become bound by the treaty.
5. Accession or Adhesion: Accession is a traditional procedure by which the state may become a party to a treaty of which the state is not a signatory. On the other hand, Adhesion refers to the state's acceptance of either only some aspects of the treaties.

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[10] Lukashuk, I. I. "The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law." *The American Journal of International Law*, vol. 83, no. 3, 1989

[11] S.k. Kapoor,International Law,Human Rights,Central Law Agency(21st edn,2020)

6. Registration and Publication: A treaty is required to be recorded with the Secretary General of the UN after it came into force[12].
7. Application and Enforcement: After a treaty is approved, recorded then only it came into existence.

Termination of Treaties

Section 3 of Party V of the Vienna Convention lays down the different ways by which a treaty can be terminated. These are as follows;

1. According to Article 54(6), a treaty may be terminated with the assent of all the states.
2. Treaty can be terminated by the processes of denunciation. Article 56(2) states that a nation to the treaty shall give not more than 12 months' notice of its intentions to withdraw from the treaty.
3. A treaty came to end when the parties to states made another treaty relating to the same subject matter.
4. A treaty may be terminated if the events occurring make the performance of the treaty impossible then the treaty is terminated
5. A treaty may be invoked in conformity with the provision of the treaty.

III. Conflict between Customary Law and Treaty Law

Customs and treaties are two methods for the creation of legally binding rules in international law. In both of the methods consent of the state is required but they do not impose any obligations on the states who do not want to bind themselves by the treaties and customs. But there are some conflicts between them, those conflicts are, in the customary law the consent to follow any custom is implied and the consent to follow treaties in the international community is written. So many jurists considered that the treaties are a more accurate form of international law as they are written and bound the states to follow them in good faith and not like customs which are based on the beliefs of the states.

Another area of the conflict between the custom and treaty is; that the transformation of the usage to the customer is a long process. While the growth of international law through the processes of custom is very clumsy and slow, the treaty makes the process rapid. In other words, the development of international law through treaties is beneficial as it helps in the

[12] Article 102 of the UN Charter

development of international law at a faster rate[13].

If any user is to be considered a customer then it has to be followed for years to be called a custom and changing the custom is sometimes a very difficult process and may arise problems while making customary laws. But in the case of treaties, there is no such problem but the states while entering into the agreement with the other states have to look that the terms of the treaties are not violating the custom if they violate then they cannot enter into that treaty[14].

Many times, the customary rules are not precise and adequate and the states have to face difficulties while making laws on them. But in the case of the treaties, they are precise and adequate as they are made with the mutual consent of the states.

The custom of international law cannot be regarded as having ceased to exist if they have been changed into treaty rules. If the customs are changed into treaties and the areas covered by two sources are the same and the contents of both are the same, then the court cannot say that the operation of the treaty must necessarily deprive the custom. In the "Continental Shelf case"[15], the ICJ held that "*the customary law continues to exist and apply, separately for international treaty law, even where the two categories of law have been identical".* The customs are those rules and regulations which ate binding on the whole community and the same has to be followed by them, but in the case of the treaties, it binds only those states which came into the contract and the state can also terminate the treaty at any time, but it is not possible in the case of the custom.

The customary laws are not codified as the treaties, so it makes it difficult for the community to lay down the rules for its violation but it is not in case of the treaty the states can agree and make the rules in the treaty. The dispute between the customary law and the treaty law may arise but the customs and a treaty both play an important role in forming the laws in the society. Some jurist believes that customs are more important and it is essential because they help in prevailing the culture in the society. On the other hand, some believed that a treaty is essential for the origin of international law and it helps in the growth of international law and it develops the relationship between the states.

IV. Conclusion

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[13] *ibid*
[14] Christoph Schreuer," Source of International Law" (https://www.univie.ac.at/intlaw/sources.pdf)
[15] Libya v Malta, Merits, Judgment, [1985] ICJ Rep 13, ICGJ 118 (ICJ 1985)

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I would conclude that both customary law and treaty laws are important as they help in maintaining a good and peaceful relationship between the states. Customs are the belief of the peoples which cannot violate so a treaty can be implemented. Both the customs and treaty play an important role in society.

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