How India has approached Customary International Law

What is the issue?

Supreme Court hasn't been consistent about the position of CIL in Indian law.

What is Customary International Law (CIL)?

- Customary international law consists of rules derived from "a general practice accepted as law" and exist independent of treaty law.
- Customary **International humanitarian law** (IHL) is fills gaps left by treaty law and strengthens the protection offered to victims.
- It can be found in official accounts of military operations, national legislation and case law.
- States recognize both treaties and CIL as sources of international law.
- CIL being accepted as law is termed as "opinio juris".

What is the position of CIL in Indian law?

- India follows the principle of “dualism”
- International law does not automatically get incorporated into the domestic legal regime.
- As per Article 253 an act of Parliament is necessary to transform international law into municipal law.
- In practise India has moved away from the principle of dualism towards monism by judicially incorporating not just CIL but also international treaties including those treaties that India has not signed.

What is Supreme Court stand regarding CIL?

- Report on “India and international law” by the parliamentary committee on external affairs discusses how Indian courts have dealt with international law.
- The committee believes that the Supreme Court has digressed from the principle of dualism and moved towards monism
- It holds that customary international law (CIL), unless contradictory to domestic law, is part of the Indian legal regime even without an enabling legislation enacted by the Parliament.

Is Supreme Court consistent in its stand?

- Supreme Court hasn't been consistent about the position of CIL in Indian law.

Decisions in favour of incorporating CIL in India’s domestic law -

- **Vellore Citizens Welfare Forum v. Union of India -** The Supreme Court held that, CIL which is not contrary to the municipal law shall be deemed to have been incorporated in India’s domestic law.
- This principle has been affirmed in subsequent decisions.

- **Research Foundation for Science v. Union of India -** Relying on the Vellore Citizen case, SC declared that the precautionary principle (an environmental law concept) which is part of CIL is a part of Indian law.

Decisions not in favour of incorporating CIL in India's domestic law –

- **Mohamad Salimullah v. Union of India -** In this case (2021) the court refused to rule against the deportation of Rohingya refugees to Myanmar
- This is despite the principle of non-refoulment being part of CIL.
- The principle of non-refoulment prohibits a country from returning refugees to countries where they face a clear threat of persecution. But curiously the court did not incorporate this principle into Indian law.

How it is viewed?

Arguments in favour:-

- CIL as part of the domestic legal regime is **consistent with the practice of other common law countries.**
- The bright side of judicial incorporation is the progressive development of law when the executive and the parliament for ideological or political persuasions fail to enact laws transforming a liberal international legal norm into domestic law.
- India's spectacular failure to enact a refugee law incorporating the principle of non-refoulment is a classic example of this.
- The apex court squandered the terrific opportunity in the Mohamad Salimullah case.

Arguments not in favour -

- Determination of whether a particular provision indeed constitutes a binding customary norm under international law requires the double requirement of state practice (the actual practice of the states) and opinio juris (belief that the custom is part of the law). The apex court **rarely conducts such an analysis.**
- Parliamentary committee feels that Judiciary incorporating international law without parliamentary scrutiny constitutes a democratic deficit.
- This could become a bone of contention between the judiciary and the other organs of the state.

What needs to be done?

- Executive should take note of the vacuum in domestic legislation on customary norms in international law and develop adequate domestic laws is an important one.
- However, this should not mean expanding domestic law that rejects binding customary norms in international law.
- On the contrary, India should enact domestic laws that are harmonious with CIL.
- The judiciary, on its part, should demonstrate greater analytical rigour in interpreting and applying CIL as part of the Indian legal regime.

Reference

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