THE DYNAMICS OF THE JURISPRUDENCE OF CONSUETUDINARY LAW AND INTERNATIONAL LAW

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Abstract

There has been an increased jurisprudential discussion on the nexus and disjunction between consuetudinary law and international law. This discourse is heightened by the complicity that exists based on their varied legal status, uncertain behavior, indeterminate structure and convoluted understanding of these concepts by scholars. One key problem is the right understanding of consuetudinary law which is linked to the uncertainty of its character unlike the composition and structural form of a statute. Another problem is the creation of consuetudinary law which is fundamentally formed by long usage and that makes its legal validity murky and nebulous. Related to the foregoing is the difficulty in the identification of the intrinsic rules of consuetudinary law as regards to how these rules manage and control the behavior of citizens and their States and whether States are legally bound by the rules of consuetudinary international law. This paper seeks to offer jurisprudential analysis of the dynamics of consuetudinary law and international law. This paper submits that jurisprudential postulations about the legal character, standards, and rationality of consuetudinary law and international law sometimes lead to only murky and obscure understanding of these laws.

Keywords: International Law, Jurisprudence, Consuetudinary Law, Dynamics, and Legal System

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1.0 Introduction

International legal discourse is yet to abate on whether jurisprudence is to be deplored in the understanding of the nature, effect, content and the obligations of consuetudinary law and international law.[1] This understanding is partly due to the argument that consuetudinary international law does not place any obligation on governments because of its extemporaneous nature. The general local effect of consuetudinary international law has to do with the emphasis a legal system gives to local and international law. This gives credence to the consummate relation that exists between international and local law which does not bother on the supremacy or mastery of consuetudinary international law.[2]

This paper discusses whether it is compulsory that consuetudinary international law must have any required local sanction to have the concomitant legal effect as regards its general supplication. This kind of assumption is based on the understanding that the local validity of consuetudinary international law is purely premised on the varied character of law which is generally taken to have local application when it has the required local mandate.[3] This also speaks of the binding character of law. What this means is that rules that are legally valid must have some form of mandate from State law.

Customarily, the power to make law by court has constitutional restraint. It is this kind of restraint that can restrict positive law in its general application. This kind of understanding elicits constitutional contemplation about positive law.[4] The foregoing understanding evokes certain issues including the fact it leads to some kind of obscure

[1] Lukeman Clinton, 'Thinking Radical Jurisprudence and International Law' Ladam Review of International Law, (2011) 6 (8) 45
[2] Christie Mark, 'The Evolution of Customary Jurisprudence and International Law' Criminal International Law Review, (2019) 6 (2) 38
[3] Wolfgane Kofi, 'Constitutional Jurisprudence and International Law' Folks International Law journal, (2021) 3 (6) 29
[4] Jonathan Williams, 'Jurisprudence of Public International Law' Dosh Comparative Global Law Review, (8) (9) (2020) 36

reasoning about the true position of consuetudinary law. A better way to explain this is to say that the power of legislature can be used to announce norms of consuetudinary law which restricts the power of courts to do same. It must be made clear that positive law as a concept of jurisprudence showcases some kind of holding about law in general which sounds plausible so long as positive law is concern in any legal system.

There is no dispute the fact that positive law is a jurisprudential concept which gives credence to the argument that every rule must meet certain threshold to become legal rules of law.[5] This does not affect the position that positive law can equally influence and regulate the status of legal norms which is in contradistinction of the position of natural law concept which incapsulates moral reasoning as the basis of law even though such an opinion may not be consistent with the reality of every legal system. The fact is that not all legal systems work that way. There are some justice systems that allow courts to generate norms in tandem with morality. This is made possible when such systems have the required constitutional backing and approval. This kind of architecture is only possible in legal systems where constitutionalism works effectively as regards the strict recognition of the authority to make law.[6] Sometimes there are conflicts in the application of positive law and natural law by courts and even by the legislature in a legal system. This kind of conflict can be resolved by judicial pronouncement by the highest court of the land or by a constitutional amendment by the right legislative organ. This kind of legal system recognizes the supremacy of the constitution which gives the various courts there jurisdiction and by the principle of stare decisis the decision of the highest court takes precedence over other courts that are generally seen as inferior courts. The fact is that such a decision by the highest court of the land is taken as the law of the land until amended by the relevant legislature.

[5] Moses Salome, 'Comparative International Law: Interaction of Comparative Jurisprudence and International Law' Bandah Review of Comparative Law, (2019) 5 (3) 73

[6] Goodhead Matthew, 'The Place of International Jurisprudence in the evolution of International Law' Crack International Journal of Comparative Law, (2018) 4 (3) 28

Sometimes the highest court can revise such a decision given by it previously.

What needs to be considered here is the relationship amongst the various courts in a State which also bothers on their jurisdictions. Which explains the uttermost regard other courts accord to the supreme court of the land in line with the constitutional provisions of a State. This judicial esteem amongst courts does not affect their institutional independence and ability to give independent decisions which is supported by both natural law and positive law. This kind of judicial practice is part of international custom practiced both by civil and common law countries.[7]

What the foregoing suggests is that the norm that stipulates that courts have the required regard for one another is a constitutional construction. In other words, the capacity of lawmakers is restricted by the mandate state donate to their courts to regulate laws of such States. Concomitantly, the constitutions of States also decide the conditions when courts can validly enact laws of States. What is however not clear is whether constitutions by states donate the power to enact law to courts. Unfortunately, constitutions by states hardly explicitly settle this matter which is why those who write and enact constitutions do not allude to the fact that courts can make law. What this means is that the power of court to enact law can only be interpreted by other means. The foregoing can be expressly stated in the constitutions to avoid any form of ambiguity which can lead to a wrong interpretation, and the way forward is to clearly create and mandate a supreme court which is seen as the highest court of the land with such law- making power.

Some scholars argue that this line of argument can suggest a murky understanding of the way to deduce the power of state courts to make law. They further argue that it can lead to a faulty historical calculation. One problem is how states that have more than one supreme courts can be rated and placed. This problem is exacerbated because those who

[7] Victory Julius, 'The Place of Customary Jurisprudence in International Law' American International Law Review, (2017) 5 (6) 36

write constitutions are used to thinking that judicial systems should follow a systemic structured pattern. The implication of the foregoing is a situation where supreme courts now make laws for states that are contradictory. The clear fact is that it is the duty of state legislatures to make laws for such states. What the courts do is simply to interpret such laws. This is the traditional duties of courts. The understanding is that some of those who make constitutions are of the opinion that courts delineate rules meant to advance dialectical legal equilibrium. This line of reasoning is burn out of the fact that some of these drafters are proponents of legalistic realism as opposed to positivism. The point is that the call and support for the establishment of a supreme court which is the supreme law of the land is not a sign post for any mandate given to the courts to enact laws for a state. What remains to be said here is that there may be some provisions of the constitution of a State that donate power to the supreme court to make laws but it does not require any extraordinary legal permutation.

2.0 The Jurisprudence of the Positivist vis-à-vis Realist Conceptualization of Consuetudinary Law

What needs to be discussed here is the jurisprudence of the positivist vis a vis realist conceptualization of consuetudinary law as it relates to international law.[8] In other words, it is about dissecting the influence of positivism on consuetudinary law and whether such ascendancy link will serve any significant purpose. The point is that jurisprudential concepts can have great influence on consuetudinary law.[9] This is because consuetudinary law in itself has legal roots on jurisprudential theories.[10] What is not explicit is the quantum of the expected influence. The proponents of positivism think that positivist theory has a great dominion on consuetudinary law even though this is debatable. What is very clear is the individual's jurisprudential belief on these concepts.[11]

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[8] Joseph Warm, 'Interface of International Law and Jurisprudence' British International Law Review, (2016) 4 (4) 58

[9] Job York, 'International Jurisprudence and Human Rights Application' Adams Review of Transnational Law, (2015) 6 (8) 28

[10] Wisdom Richard, 'The Jurisprudence of International Politics' Indian Review of International Law, (2016) 3 (6) 28

[11] *Ibid*, 35

There is no systemic mechanism to truly measure the quantum of this analysis. But it is safe to say that some form of measurement is still plausible. Some proponents of this belief still hold the view that some jurisprudential concepts support the view that there are attempts to restrict the mandate of courts to enact rules meant to create laws.[12] This may be seen by other legal scholars as a misapplication of these concepts notwithstanding the beneficial reasons inherent in this line of argument. Some proponents of naturalistic thinking may disagree with the foregoing argument. That does not take away the sanctity of this discussion.

A comment on whether there is any negative compact on consuetudinary law is necessary here.[13] This may equally depend on the belief system of who is making the argument. This is because a naturalist and a positivist may not make the same permutation. This is also true if the person is a realist who is oppose to natural or positivist theories. The same thing can be said of sociologist. The point is that all these categories of thinkers will be greatly influenced by their jurisprudential belief systems which most of the times are contrary to one another and accordingly may produce different results. For instance, contemporary jurisprudence punctures the position of John Austin about the concept of law from an almighty commander who does not obey the laws but compels other to perpetually do same.[14] This is because such a person cannot be easily found in any legal jurisprudence.[15] There appears to be a misapplication and misunderstanding of who this almighty uncommanding commander is.[16] Which is contrary to the postulation by John Austin. This concept by John Austin can be better described as highbrow narrative of positivism which sees laws as the orders of a sovereign being backed by sanction. Apart from John Austin,

[12] Strawson Bill, 'The Jurisprudence of Non -Alignment and Law' Hokins Journal of International Law, (2013) 4 (6) 26
[13] Kofi Andrew, 'Negative Jurisprudence and International Law' Jobinson Comparative International Law Journal, (2019) (6) (5) 37
[14] Martins Loveday, 'African Jurisprudence and International Law, Indian Review of International Law, (2016) 3 (7) 37
[15] *Ibid*, 42
[16] *Ibid*, 46

some other scholars have similar views but with some kind of derivative amendment. For instance, some think it is the semi-sovereign that can be recognized. Some other scholars even try to alter and re-write this version to suit contemporary analysis. Austin's postulation is premised on the fact that the mandate to generate law must necessarily have a sovereign constitutional origin.[17] What this means is that no law can be alife without such valid power.

3.0 Whether States in their Governance is Constrained and Controlled Rules of Consuetudinary Law

What remains to say here at least in passing is whether states in their governance is constrained and controlled by rules of consuetudinary law. The first thing to say is the concept of sovereignty as regards the relationship amongst countries. It is trite that no country is inferior to the other. Which means one sovereign nation cannot control another sovereign nation for whatever reason.[18] Nations are generally advised to have high regard for the sovereignty of others.[19] This is well established in the UN Charter and other international treaties. The general thinking is that state government cannot draw enforceable duties from the power and rules of consuetudinary law. Such proponents of positivism see consuetudinary law in that sense as anachronistic and misleading.[20] This does not strictly speak mean that such rules of consuetudinary law are not to be obeyed. What it means is that they cannot be equated to have the status of law because any disobedience of such rules cannot attract any legal sanction.[21]

Some scholars have problems with the murky nature of rules of consuetudinary law as well as their discursive and scattered disposition as regards to the way these rules are obeyed. This kind of reservation is

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[17] Faith Markson, 'Constitutionalism and International Law' Upstream Journal of International Law,(2012) 5 (5) 39

[18] Raymond Harrison, 'The Dynamics of Sovereignty and International Law' Troomy International Law Review, (2015) 8 (6) 37

[19] *Ibid*, 42

[20] Trust Harry, 'Modern Jurisprudence of Legal Theories' Hummy Comparative Law Journal, (2014) 4 (4) 29

[21] *Ibid*, 32

premised on the origin of consuetudinary law which is not legally enforceable as it relates to sovereignty of nations.[22] The attitudinal character that exists amongst these differing class of nations, so long as they are encouraged to respect the concept of sovereignty, will likely lead to a better relationship and development.[23]

Another problem is the issue of biformity and duplexity of consuetudinary international law and domestic law. Consuetudinary international law and domestic law are an integral proportion of recognizable legal systems.[24] What this means is that consuetudinary international law becomes a segment of domestic law only by constitutional execution. In other words, consuetudinary international law will no longer be seen as law on the basis of the sanctity of the sovereignty of nations.[25]

4.0 Some Circumstances that Law is expected to validate Rules that involve Social Application

One point that needs discussion is the argument that the circumstances law is expected to validate rules that involve social application. The issue is how to calculate the structure of this application as it relates to conventional social character. One way is to radically ensure that the convention includes orders that have effective mechanism as regards sanctions.[26]

The point has been considered as it relates to consuetudinary international law were rules of norms in which office holders and those they superintend are in some kind of conflict. Consuetudinary international law is equally not a practice that has structural mechanism meant to validate the rules of norms that bind nations partially or

[22] John Brown, 'The Dynamics of International Criminal Law and Jurisprudence' South African Review of International Law, (2017) 3 (6) 43
[23] *Ibid*, 52
[24] James Tom, 'The Sociology of Jurisprudence and International Law' Germany Journal of Comparative Law and Policy, (2018) 5 (9) 27
[25] *Ibid*, 34
[26] *Ibid*, 37

completely. [27]The frequency in this kind of system amongst nations only generate contrasting norms of consuetudinary international law. This is premised on the basis that international law does not create any form of legal system that contrasts its own legal norms.[28] This does not mean that international law does not promote a system of law that favours domestic legal systems. International law rules are binding on nations because of their treaty -based character.[29] This kind of analogy negatively affects some consuetudinary international law. [30] What this suggests is that legal systems that do not realize such rules are not treated as legal norms. It is trite that some norms of consuetudinary international law have moral dynamics.[31] That is why only norms that are internationally accepted are admitted as part of international law. It is equally trite that the human authority that generates consuetudinary international law is the international community as a whole.

4.1 Application of Consuetudinary International Law without Domestication

One poser is the application of consuetudinary international law with any necessary domestication. One example readily comes to mind. Assuming Mr Lumba Ebimobowei and Mr Lucky Ogbolo enters a local agreement with a specified clause that states that the law of Mr Lumba Ebimobowei controls the agreement. This special contractual clause is implementable under the law of Mr Lumba Ebimobowei but unlawful under consuetudinary international law.[32] This dissension is often seen as one involving two different ways of perceiving the relationships between domestic and international legal system. The argument is that

[27] Friday Dickson, 'International Law and its cosmopolitan nature' South Korean Law Review, (2014) 4 (9) 27
[28] *Ibid*, 36
[29] Consider Lucky, 'The Dynamics of International Law and Domestic Legal Systems' Success International Law Journal, (2018) 4 (3) 53
[30] *Ibid*, 59
[31] *Ibid*, 63
[32] Monday Nestor, 'International Law and its Evolving nature' Fulmo Journal of International and Comparative Law, (8) (3) (2011) 27

domestic and international law constitute a single legal order. It is further argued that International law is superior to domestic law.[33]

5.0 The Ligality of Consuetudinary International Law

There is no doubt that the existence of the tradition and custom in States is premised on the contextual pontification and standardizing normative nature of such tradition and custom.[34] These are generally seen as tradition based and oriented.[35] What is important is the answer about consuetudinary law posed by the relevant courts. This cuts across the concomitant duty inherent in the legal system and the legal implication of the national law. It is important to relate tradition and consuetudinary law.[36] It is equally relevant to find out the extent to which consuetudinary law affect other national laws. There is no need to dwell on the validity of consuetudinary law in international jurisprudence.[37] One puzzle is how international law can be implemented without a formal traditional policing that exists as it is in a domestic legal system.[38]

It is the legal system in existence that determines the position of consuetudinary law in any state. The ingredient of consuetudinary international law is considered as it relates to international law itself. Norms are generated by rules of custom in any legal system. It is the general character, habit and life style of any given people that define the customary deposition of such people.[39] This line of understanding differs from one legal system to another.[40]

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[33] Andrew Williamson, 'The Modern Scope of International Law' Joham Comparative International Law and Policy, (5) (5) (2013) 52
[34] Bright Newton, 'Evolution of Customary Law and International Law' Hummy Comparative Law Journal (7) (5) (2017) 26
[35] *Ibid*, 34
[36] Bisi Kehinde, 'Customary Jurisprudence and Law' Malian International Law Review, (3) (5) (2013) 48
[37] Ibid, 56
[38] Ibid, 59
[39] Patterson Michael, 'The Relationship between Law and Customs' York International Law and Policy, (4) (6) (2018) 45
[40] Ibid, 56

It needs to be noted that custom does not take precedent over other rules and norms.[41] Consuetudinary law generates legally actionable duties.[42] It is the form of the custom that determines the level of operation.[43] A national legal system does not need to identify consuetudinary international law before any duty is generated. The fact that international and national law are part of an identical or divergent legal system does not give international law precedent over national law. Before consuetudinary international law can become legally effective it must be assimilated into national law which is why it is generally said that consuetudinary international law is regulated by domestic law.[44]

6.0 Conclusion

This paper has shown that jurisprudential conceptual pontifications do not clearly reveal the needed understanding about consuetudinary law. The questions about consuetudinary law asked by the court systems cannot be answered by mere jurisprudential postulations.[45] These questions by way of legal arguments as they relate to theories of jurisprudence rooted on consuetudinary law need more than superficial legal answers.[46] What this means is that consuetudinary law gets its vitality from the customs, rules and norms of society which are in daily usage by the people. The application of consuetudinary law is not only widespread but endemic and tied to the tradition of the people.[47] This is clearly linked to the character, structure and doctrine of consuetudinary international law and its dynamic application. The other issue is that of consuetudinary international law and that of constitutional necessity as

[41] Ibid, 59
[42] Michael Theophilus, 'Criminalizing Harmful Customary Practices' Malian International Law and Policy, (6) (8) (2015) 28
[43] Ibid, 32
[44] Friday Richard, 'Linking International Law with Customary Law' Indian Review of International Law, (6) (5) (2012) 38
[45] *Ibid*, 43
[46] Thursday Tynnyson, 'The Modern Nature of Jurisprudence' Classic Comparative International Law Journal, (8) (6) (2016)38
[47] Steve Wolfgang, 'The Modern Understanding of Customary International Law' Tonson Law Review, (6) (6) (2015) 39

well as their interdependency.[48] The issue of the supplementary role between international law and national law has equally been settled. The point is that the conflict of superiority between international law and national law is not only unnecessary but misplaced.

[48] *Ibid*, 45