

Approaches of Domestic Legal Systems to Customary International Law with an Emphasis on the Practice of the Islamic Republic of Iran (Original Research)

Gholamali Ghasemi *
Javad Arab Shirazi **

Persian Text pp. 55-74

(DOI) : 10.22066/cilamag.2025.2041554.2637

Date Received: 10 Oct.2024

Date Accepted: 4 Jan.2025

Extended Abstract

Introduction

Customary international law has always held a prominent and undeniable position as the foundation of the international legal system. These rules, formed on the basis of State practice and *opinio juris*, are not only the oldest but also the most dynamic source of international law, with their influence being ever-present. States' approaches to customary international law may vary depending on the provisions, considerations, and limitations of their domestic legal systems. The primary question of this article is: What is the fundamental position of customary international law within the domestic legal system of States?

Research Problem

Customs, as the primary and principal source of international law, encompass numerous topics and issues. Customary international law—as a collection of legal rules and principles formed on the basis of the customs and long-standing practices of States—plays a crucial role in the domestic legal systems of countries. These rules, independent of international treaties, govern the international relations of States and have gradually entered their domestic legal system. The connection between customary international law and domestic legal systems has various dimensions and depends on many factors. Some countries explicitly recognize and accept customary international

* Associate Professor of International Law, Faculty of Law, University of Qom, Qom, Iran: g.ghasemi43@gmail.com

** Corresponding Author, MA Student in International Law, Faculty of Law, University of Qom, Qom, Iran: javadarabshirazi@gmail.com



This is an Open Access article distributed under the terms of the Creative Commons Attribution License (<http://creativecommons.org/licenses/by/4.0/>); which permits unrestricted reuse, distribution, and reproduction in any medium, provided the original work is properly cited.

law in their domestic laws, whilst others do so conditionally, yet there are States that remain silent on this matter. Generally, customary rules exist within the body of domestic legal systems—even in the absence of direct references in laws, State inaction, or constitutional silence. A complete denial of the role of international custom in domestic legal systems is not possible, but the extent of its influence and impact varies in different legal systems, and depends on various factors including the legal and political structure of each country. Customary rules remain dynamic and influential; in fact, they assist domestic systems in implementing laws.

Methodology

This research employs an analytical, descriptive, and comparative approach to examine the position of customary international law in the legal system of the Islamic Republic of Iran. By employing the content-analysis method, relevant documents and laws including the Constitution and statutory laws have been examined. Additionally, by comparing Iran's legal system with other legal systems, the position of customary international law in this system has been analyzed.

Key Findings

Given that States generally refer to international treaties as a higher-priority source than international custom in their foundational documents, such as constitutions, this research also examines whether Iran's legal system follows this approach. The research findings indicate that although the Iranian Constitution does not explicitly refer to customary international law, various principles and laws implicitly emphasize the position of this legal source. However, the principle of the “primacy of treaties over international norms” is clearly observable in the Iranian legal system. Additionally, the article points out that the absence of an explicit reference to the phrase "customary international law" in the Constitution and statutes, or the existence of a legal gap or silence on this matter, can allow legal authorities to adopt a flexible approach to customary international rules, depending on the circumstances and subject matter. This indicates that the Iranian legal system's approach to international custom is variable and may differ in various cases.

Contributions to the Field

This article contributes to the existing body of knowledge in the field of international law in several ways:

Completing Existing Studies: By thoroughly examining the position of customary international law within the Iranian legal system, particularly in comparison to international treaties, this research fills a gap in the legal literature. Many previous studies have addressed the general status of

customary rules in various legal systems, but this research, with its focus on Iran, provides a more detailed and comprehensive analysis.

Offering New Insights: By demonstrating the variable and flexible nature of the position of customary international law in the Iranian legal system, this research offers new insights into this topic. The findings reveal that the status of customary rules in Iran cannot be considered fixed or uniform, and it may change depending on various circumstances.

Emphasizing the Importance of Comparison: By comparing the Iranian legal system with other legal systems, this research highlights the importance of aligning different legal systems with international standards and customary rules.

Implications and Applications

By carefully examining relevant laws and documents, this research helps to determine the precise position of customary international law within the Iranian legal system. This information is highly valuable for legal professionals, judges, and policy-makers in making informed decisions. The research demonstrates that in the Iranian legal system, international treaties generally take precedence over customary rules. This finding is crucial for the interpretation and implementation of international laws and treaties in Iran. The Iranian legal system adopts a flexible approach when dealing with customary rules. This indicates that the Iranian legal system is dynamic and can adapt to changes in the international environment. The research highlights the role of institutions such as the Guardian Council in accepting and interpreting customary rules, which reveals the complex interaction between domestic institutions and international law. This research can serve as a starting point for further research in the fields of international law and Iranian domestic law.

Applications of this research: In general, by providing a detailed analysis of the position of customary international law within the Iranian legal system, this research enriches the Iranian and international legal literature and can influence important legal and political decisions.

Conclusion

States generally refer to international treaties as a higher priority source than customary international law in their foundational domestic documents, such as constitutions. This trend stems from the differing nature of these two sources of law; Treaties, as formal written agreements between States, possess characteristics such as clarity, precision, enforceability, and create specific legal obligations for the parties. In contrast, customary international

law, which is formed based on the behavior and practices of States, is an unwritten source that may be subject to ambiguities and disagreements in interpretation and application. Most legal systems prioritize treaties over customary international norms, and the Islamic Republic of Iran is no exception. Although the Iranian Constitution does not explicitly mention international custom, Articles 77 and 125 of the Constitution, Article 9 of the Civil Code, and Article 9 of the Islamic Penal Code implicitly emphasize the stance of the Iranian legal system with regard to international law. These legal provisions, while referring to the need to comply with international obligations, indirectly indicate the status of treaties in the country's legal system and emphasize their priority over other sources of international law. One reason why the exact phrase "customary international law" is not included in the Iranian Constitution and statutory laws is to allow legal authorities the flexibility to adopt a flexible approach to customary international rules, based on their discretion and in line with national interests, depending on the circumstances and subject matter of the rule in question. Therefore, it can be argued that the Iranian legal system's approach to international custom is variable and may change depending on the subject matter, interests, and circumstances. As a result, a customary rule may be explicitly rejected in one instance, fully and unconditionally accepted in another, or conditionally accepted in yet another.

Keywords

Customary International Law, International Treaties, Lacuna, Non Lique, Domestic Legal System, Custom

References

- Books

1. Ziaee Bigdeli, Mohammad Reza. *Public International Law*. Tehran: Ganj-e Danesh Publication, 1392 (In Persian).
2. Zarneshan, Shahram. *Formation and Identification of Customary International Law*. Tehran: Ganj-e Danesh Publication, 2nd ed., 1392 (In Persian)
3. Garner, Bryan. *Black's Law Dictionary*. 7th ed. West Publishing Company, 1999.
4. Higgins, Rosalyn. *The Development of International Law through the Political Organs of the United Nations*. England: Oxford University Press, 1963.
5. Higgins, Rosalyn. *Problems and Process: International Law and How We Use It*. England: Oxford University Press, 1995.
6. Dixon, Martin. *Textbook on International Law*. 7th ed. England: Oxford University Press, 2013.

7. Bederman, David. *Custom as a Source of Law*. England: Cambridge University Press, 2010.
8. Friedman, Wolfgang. *The Changing Structure of International Law*. England: Cambridge University Press, 1965.
9. Shelton, Dinah. *International Law and Domestic Legal Systems*. England: Oxford University Press, 2011.
10. Fennelly, David. *International Law in the Irish Legal System*. Ireland: Round Hall, 2014.
11. Crawford, James. *Brownlie's Principles of Public International Law*. England: Oxford University Press, 2019.
12. Dubinsky, Paul. In Dinah Shelton's *International Law and Domestic Legal Systems*. 1st ed. England: Oxford University Press, 2011.

- Articles

1. Kadkhodaei, Abbas-Ali, and Shahram Zarneshan, "The Evolution of International Judicial Approach in Process of Identifying Customary International Law in Iran". *The Law Quarterly, Journal of Faculty of Law and Political Sciences* 43, no. 1 (1392) (In Persian).
2. Mahmoudi, Seyed Hadi, and Mohammad Setayeshpur, "Role of Passage of Time in Formation of Customary International Law: An Analysis of Legal Doctrines and Practice of the International Court of Justice". *Journal of Comparative Law* 15, no. 1 (1398) (In Persian).
3. Bazzar, Vahid, "Scope of Article 9 of Civil Code Concerning International Obligations of Iranian Government". *Judgement Quarterly* 43, no. 97 (1397) (In Persian)
4. Isaeian, Jabbar, "Article 9 of the Islamic Penal Code, A Void Rule for Addressing International Crimes". *Quarterly Journal of Comparative International Criminal Law* 1, no. 4 (1402) (In Persian)
5. Piri, Heidar, "An Analysis of Non-Liquet in Iranian Legal System and International Law, with Focus on Remedial Mechanisms". *Comparative Law Review* 14, no. 2 (1402) (In Persian)
6. Tobin, Brendan, and Emily Taylor, "Across the Great Divide: A case study of complementarity and conflict between customary law and TK protection legislation in Peru," *Initiative for the Prevention of Biopiracy Research Documents*, Year IV,11. (2009).
7. Swiderska, Krystyna, Alejandro Argumedo, , Yiching Song, Jingsong Li , Ruchi Pant, Heraclio Herrera, Doris Mutta, Peter Munyi, and S. Vedavathy, "Protecting Community Rights over Traditional Knowledge: Implications of customary laws and practices," *Key findings and recommendations*, London (2009).
8. Seneviratne, Wasantha, Thilakarathna, KAN, "Implementing Customary International Law in Domestic Contexts: A Comparative Study with Special Reference to Sri Lanka", *Sri Lanka Journal of International*

Relations (2021).

9. Clancy, Pearce, “Customary International Law in the Irish Legal system”, *Irish Judicial Studies Journal* (2023).

- Online Sources, Instruments, and Documents

1. Statute of the International Court of Justice (<https://www.icj-cij.org/statute>)
2. <https://www.irishstatutebook.ie/eli/cons/en/html>
3. United States v Fawaz Yunis (1991 30 I.L.M)
4. The full statement of the Representative of Iran before the 6th Committee, 2013.
5. Comparative Constitutions Project, CONSTITUTIONMAKING.ORG OPTION REPORTS (2009).