

Q (2017) Explain the basic difference between Primary and Subsidiary sources of International law?

Introduction

Sources of international law are the means by which International law came into being. According to the Statutes of ICT, article-38, The sources of the law are the treaties, customs, general principles of law recognized by civilized nations, decisions of judicial organs and juristic research. These sources are further categorized into Primary and subsidiary sources.

Primary Sources of International Law

1- Treaties or Conventions

Treaties are the first and basic sources of law. Since International law in modern times is mainly influenced by the positivists school of thought, it prioritizes consent in the form of treaty. Law making treaties are the direct source because they perform the function of the legislature and adapt with changing times and circumstances.

2- Customs

Customary laws are developed with a great span of time. Customs are recognized and accepted state practices throughout history. Not every habitual practice is recognized as a custom but a habitual practice accompanied by universal *opinio juris* tends to become a customary law. Generality of practice and

consent of the majority shape the future customary laws.

General principles of law recognized by civilized states

General principles of law helps International law to adopt with the changing circumstances. They are usually recognized by both municipal and international laws. For example, principles such as Res Judicata, Pacta Sunt Servanda, Estoppel are recognized almost universally and are followed by the judicial organs of the world.

Subsidiary Sources of International Law

1. Judicial decisions

Judicial decisions are the secondary and indirect source of International law because ICJ does not follow the doctrine of precedence. Advisory opinion of ICJ and award of PCA are non-binding in nature. Sometimes when both the parties to the dispute settle out of court then ICJ cannot give a decision against it called Ex aequo et bono.

2. Juristic work

Jurists view help in the development of International law. Their research and publications are subsidiary means for the legislation

of international law. They also contribute to the dynamics of law and adapting according to the modern times.

6. Decisions of the organs of International Institutions

Decisions of the international institutions may become customary rules if they fall into generality of practice. The resolutions of UN and the decision of ICJ are binding upon its parties and their advisory opinions also have importance. These institutions mainly help in the interpretation and application of international law.

Other Sources

Other sources of international law may include reason, equity and flexibility. If there is no previous reference of the dispute then decisions can be given on the basis of reasoning. It is also upon the judges discretion and their equity to apply justice according to law.

* Notable differences in the Application of these sources.

→ Binding Nature:

Primary sources of law are binding upon the subjects of international law including individuals, states and non-state entities.

Whereas, Secondary sources such as judicial decisions and institutional decisions are binding upon its parties.

* Statement of law

Primary law consists of sources that help in the direct legislation of law. In other words, these sources state the actual law.

On the contrary, secondary law consists of sources that explain, criticize, discuss and help in the implementation of the primary law.

* Consensus in the development of Primary law

Primary sources such as treaties, customs and general practice recognized by civilized states are developed on the basis of the consent of the majority. On the other hand judicial decisions, ^{and} juristic work does not need to be necessarily accepted or consented by the majority.

* Secondary sources can be biased.

There is a slight possibility that judicial and arbitral decisions can be diplomatic and political. It is also not ~~correct~~ ^{necessary} that juristic publications are unbiased and indiscriminatory but primary sources such as treaties ^{and} customs which are accepted universally have little or no chance of discrimination because they are developed with consent and generality of practice.

* Order of Use of Sources

According to Article - 38 of the Statutes of ICJ, Primary sources should be prioritized over the secondary sources. If a dispute comes before the court, the court should determine if there is a relevant treaty between the parties at first. Secondly, the court shall identify if there is a practiced custom of both the parties. Third comes the general principles recognized, followed by the past judicial decisions and lastly if there are any juristic publications regarding the matter.

Conclusion

These primary and subsidiary sources of international law help the judicial organs in the development of law according to the modern times. It helps is a great contribution to the dynamic nature of the international law. With the emergence of new states and scientific developments, the definition of offence is changing so should the law change.