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JUS COGENS AND HUMAN RIGHTS VIOLATION

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ABSTRACT

The connection between jus cogens and human rights is the main topic of this study. For many years, human rights have been infringed all across the world. Starting the conversation on applying Jus Cogens standards as a safeguard for human rights is the first thing we need to do. Here, we first attempt to define and establish a connection between human rights and the Jus Cogens doctrine. The rules of international law known as jus cogen standards must be upheld by all nations, even those that have not ratified any treaties. Jus cogen standards have also been acknowledged by Indian courts. The concept of Jus cogens and how it relates to human rights is a relatively unexplored area. This paper aims to clear the muddled water of their relationship.

Keywords: *Human Rights, Jus Cognes, International Public Policy, UN Convention*

RESEARCH OBJECTIVE

This study paper's major goal is to offer an analysis of the Jus cogens norms. It seeks to comprehend how jus cogens came to be a source of law for international law. This paper will also clarify how applying jus cogens standards might prevent or lessen human rights violations.

RESEARCH PROBLEM

The focus of the research paper is on one of the most significant human rights issues. The primary research issues are:

1. Where did the Jus Cogens come from, and how did they develop?
2. What is Jus cogens' legal significance?
3. How may the jus cogens be used to uphold human rights?

HYPOTHESIS

[1] Lease Abstrator, MRI Software

The central claim of this essay is that the international legal theory of jus cogens can serve as a new safety valve for human rights all around the world. However, there is a significant obstacle in the way of doing this. The problem with jus cogens norms is their nebulousness.

INTRODUCTION

Human rights are the most basic rights which every human has without any differentiation. Even though these rights are the most basic in nature, they have been most violated in the world. In every nation, there is a fight for one or another human right is going on. In India only, we have human rights struggle to go on in all states. The struggle against the violations can be strengthened by the use of *Jus Cogens* norms.

An essential component of international law is jus cogens. Peremptory norms or "compelling legislation" are how these standards are expressed. These standards are regarded as principles or rules of international law from which there can under no circumstances be a deviation. Many academics have attempted to categorize and describe the jus cogens norms. However, there is still a debate about the distinction between what comprises and what does not constitute jus cogens.

WHAT ARE JUS COGEN NORMS?

Jus cogen is a term with which most international law students are familiar. If we go for the literal meaning of the word *Jus cogens*, it would mean that it is a "compelling law." It can be described as a technical term that is associated with norms that are considered to be superior[2]. By stating that they are supposed to be superior, these norms are peremptory in nature, and derogation from such norms is prohibited. In other words, it would not be wrong to suggest jus cogens as rules corresponding to the fundamental principles of international public policy. These norms cannot be altered unless a new norm of similar importance and standard is set by the said process.

EVOLUTION OF JUS COGENS NORMS IN INTERNATIONAL LAW

The earliest traits of discussion happening around the Jus cogens norms can be found in the nineteenth century. Oppenheim can be called the person who laid down the basic idea, giving birth to the concept. In the words of Oppenheim, several principles of international law exist

[2] REBECCA M.M. WALLACE, "*INTERNATIONAL LAW*," 33 (2d ed. 1994)

which are universally recognized, and their violation can render any treaty in conflict with them void. He goes on to state that these principles have a peremptory effect, and this effect was a customary rule of international law that was recognized unanimously.[3] To clarify his point better, he gave a brilliant example. By the time of the 19th century, it was already established in international law that piracy was bad and should not be promoted. Hence, any treaty which was in favor of piracy or which gave protection to piracy would be void ab-initio because this treaty would be against a widely accepted principle in international law. At the same time, there were two incidents where these norms were referred to in the judicial context. The first incident is the 1928 Pablo Najera Case.[4]. The said case dealt with an arbitral award between France and Mexico. The primary legal issue, in this case, concerned the registration of treaties and the ramifications of not registering them. Mexico had brought up the non-registration of a compromise between France and Mexico. To defend the responsibilities between the two countries as non-derogatory, the head of the Arbitration Commission used the jus cogens principle. The Oscar Chinn Case [5] the second incidence took place in 1924. But then, over the second part of the 20th century, several cases existed. Judge Lauterpacht presided over the 1933 case of Bosnia, which had a significant discussion on jus cogens.

He opined that the Security Council was violating the prohibition on genocide and hence was violating jus cogens by its imposition of an arms embargo against Serbia and Bosnia. Then some 60 years later, the Security Council, vide its Resolution 713 in 1991, again imposed an arms embargo on some nations. It was argued that the resolution disregarded the state's right to self-defense. It was also said that there was a failure on behalf of the Security Council concerning maintaining peace and security in Bosnia. This violation and failure at the behest of the Security Council led to genocide and ethnic cleansing.

Hence, it can be said that the argument regarding an alleged violation of the norms is not weak.

The Vienna Convention on the Law of Treaties is the most well-known source for recognizing these standards. The rules of jus cogens were acknowledged in article 53 of the same convention. It states that:

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the present convention, a peremptory norm of general international law is a

[3] OPPENHEIM ET AL., "*OPPENHEIM'S INTERNATIONAL LAW*," VOL. 1 PEACE, Introduction & part I (1992)

[4] Pablo Nájera (of Lebanon) Case., 4 Annual Digest of Public International Law Cases 393–394 (1932)

[5] [1934] PCIJ 2

norm accepted and recognized by the international community of states as a whole." Then it proceeds to explain it as a norm from which no derogation will be allowed. Suppose one tries to derogate from the said norm. They have to keep in mind that the said norm should be replaced by another norm that is of the same standard and character. [6]

Another milestone in the evolution of *jus cogens* was its recognition in the Vienna Convention on the "*Law of Treaties between States and International Organizations or Between International Organizations.*"[7] A trend of applying jus cogen norms beyond the law or treaties acts as a confirmation of the importance of jus cogens. The International Law Commission has also suggested that it should be regarded as an international crime if something occurs as a result of the breach of a commitment that was crucial for safeguarding the core interests of the international community. So, if one reads carefully, one can discern the essence of the jus cogens idea. Jus cogens were once more recognized as a tenet of international law in the Nicaragua Case[8.] The ICJ used the ban on using force as the foundation for its argument since it serves as an illustration of jus cogens international law.

BUT WHAT COMES UNDER JUS COGENS?

By reading the above part of the paper, one can understand that *jus cogens* are one of the most important parts of international law. But the biggest problem with these norms is that nobody has been able to clearly define or segregate what falls under the term *Jus Cogens*. Who decides what is to be included as a peremptory norm or not? There will always be one set of government or people who will want something to be considered to be *jus cogens*, and there would be some who would not appreciate the same. The best example regarding this would be the process of negotiations under the United Nations Convention on the law of the Sea. The majority of the developing nations had a common objective of ensuring that their representation was in furtherance of the rights and safety of all mankind. But there were some Western nations that stood against this proposal. This opposition was mainly due to the legal status of the seabed. This problem was also solved by the concept of jus cogens. Developing nations claimed that as declared by the UN General Assembly's Resolution of 1970 regarding seabed was an extension of jus cogens. This argument was once again rejected by the western nations. However, most

[6] Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/ 27, 1155 U.N.T.S. 331

[7] United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, vol. II (United Nations publication, Sales No. E.94.V.5)

[8] ICJ GL No 70

nations (77 in strength) maintained their reliance on the principle of jus cogens for the imposition of normative solutions concerning the seabed. This group of majority nations also argued that the common heritage of humankind acts as a customary rule, and they have a force similar to that of a peremptory norm. Thus, it would be illegal to follow unilateral legislation and limited agreements. It was so because they were in violation of the said principles.

But a concept put out by German academic Ulrich Scheuner, helped to lessen this confusion.

According to him, there are three main types of jus cogens -

1. Rules which are for the protection of the foundations of international order
2. Rules that deal with the peaceful cooperation of states to ensure that the common interests of the society remain protected.
3. Rules which ensure the protection of human rights

From 1980, when the Vienna Convention went into effect with sufficient ratifications, there appears to be some consensus based on international custom that at least ten sets of prohibitions are recognized as jus cogens. Some of them are; enforced disappearance, Piracy, Genocides, Slavery, Torture, and Crimes against peace.

LEGAL EFFECTS OF JUS COGENS

Jus cogens are the opposite of the concept of jus dis positivum. This means that they are compelling in nature. It is a technical term that is used to describe substantial unique norms of international law which pose hierarchical superiority. They are a set of rules which are peremptory in nature and have a prohibition form derogation.

The Vienna Convention states that if a treaty does not follow the rules of jus cogens, it is null and void. Typically, a state's ability to enter into treaties or contracts with other sovereigns cannot be limited. However, jus cogens serve to limit a sovereign state's authority. Every time there is a conflict between the treaty and the prevailing standards of jus cogens, the state's authority is constrained. This is the jus cogens' initial result. It forbids any state from entering into any agreements that might be or would be harmful to jus cogens-recognized human rights.

Jus cogen is a persuasive legal principle. Therefore, much like any other international standard that gets its foundation from any custom or treaty, there is no way for a state to opt out. The state's ability to alter regulations or laws is constrained by these principles since doing so would violate the jus cogens. A state will violate an established international legal order if it adopts a

law or policy that goes against jus cogens standards. Every country continues to struggle with and worry about the idea of jus cogens.

HUMAN RIGHTS AND JUS COGENS

If one explores the books on human rights, it would be clear to them that scholars don't have a fixed definition of human rights. It can be described as an umbrella term. But most people agree that human rights are needed to provide society the ability to demand and enjoy a life that has freedom from interference and provides for justice, equality, and the chance of realizing the basic needs of a person.

The concept of human rights has evolved a lot. Philosophers like Aristotle and Plato are known for writing books on topics that can be said to be the cornerstone of the modern-day concept of Human rights. In the present time, there are three generations of human rights have been identified. These generations are:

A. Civil and political rights (first-generation rights): The concept of civil and political rights first evolved in the eighteen century. They were mostly a result of the political concerns of the masses. These rights led to the recognition of the fact that there were certain things that should be kept outside the purview of the rulers. Also, the people who were going to be regulated by the said policies should have a say in their formation. This political revolution gave birth to the idea of personal liberty.

B. Social, economic, and cultural rights (second-generation rights): The said rights deal with the issues revolving around how people live and work together. They also deal with the necessities of life of the masses. These rights can be said to have found their origin in the demands for equality and access to resources.

C. Solidarity rights (third-generation rights): The idea that gave birth to the third generation of rights was that of solidarity and that a person should get a right because they belonged to society. It was the origin of collective rights such as the right to peace, and a safe and healthy environment. Their need and origin could also be understood by the condition of the world at the said time.

If one reads the list of 10 topics that have been internationally consolidated as jus cogens since 1980 can be divided into these three generations. Most of the topics covered in the list are essential for living and enjoying a human life. For example, slavery, the slave trade, prostitution, forced disappearance, and racial discrimination go against the basic right to life. Rules which are

in violation of the rights or topics which have been mentioned above will violate the human rights of the people.

By the end of his analysis, Maritn has produced a list of human rights that have become or can still qualify as *jus cogens*. He reaches the said conclusion by exploring the various treaties that have been signed by the states where derogation from certain human rights is not allowed, even in the state of exceptions. In his opinion, he has found that there exist regional *jus cogens*, which include the "freedom from arbitrary detention; the right to participate in government."[9]

CONCLUSION

In the above paragraphs, we have been able to learn what jus cogens norms are. These norms are hierarchically higher than other international laws of the world. However, there exist some problems in identifying these jus cogens norms. However, we have seen that since the evolution of the concept in 1980, we have been able to establish a list of 10 major topics which fall under these norms.

These norms are not to be violated at any cost whenever any treaty is made. These rights act as a check on the sovereignty of the state. Whenever a state which is a party to any treaty which contains jus cogens norms creates a law that violates these norms, the law will be void ab-initio. These norms are a safety valve that will help in protecting human rights in the state. But it is difficult to establish what norms will be considered as *jus cogens*. For this, law or principle needs to be recognized by a lot of countries. Doing this is tough, but basic human rights like no torture or ban on privacy have already been identified. It seems that there is some chance that we might be able to develop this topic.

[9] F.F. Martin, et.al, International Human Rights and Humanitarian Law, Cambridge University Press, New York, 2006