

IUS COGENS RULES IN THE INTERNATIONAL TREATY LAW

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ABSTRACT

The freedom of the states to contract is one of the basic principles of international law that has emerged as a result of the principle of sovereignty of the states. On the other hand, it has been argued that exceptions from this corner principle may not exist, and it is argued that states should not have freedom to contract, or more precisely, to negotiate on those issues that concern the fundamental interests of the international community as a whole. Such rules are established as “ius cogens” with the 1969 Law on Treaties (known as “The Vienna Convention”) are referred to as “strict normative rules” or “provisions”.

The definition, extent, function and effects of these rules, which are introduced to international law by the 1969 Vienna Conventions are examined in the light of the provisions of the Convention and the main emphasis was given to the distinguishing characteristics of ius cogens norms rather than the “ordinary” ones. This paper examines the ius cogens rules in the context of peremptory rules issue as one of the main concerns of international law.

Keywords: Treaty Law, Jus Cogens, International.



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1. INTRODUCTION

The provisions, which are contrary to the counterparts functions, purpose, elements, and scope of the Convention, despite the fact of their existence within an international treaty, are open for discussion. The aim of this study is to keep in mind the question whether international law is appropriate for the existence of such “upper / priority” rules as required by its own structure, and to examine the existence of these rules, its elements, scope, functions and effects.

As mentioned above, the most important result of adopting the existence of Ius Cogens norms, undoubtedly is the limitation of the contractual freedom of states which are among the basic principles of international law and which are confronted as an extension of state sovereignty. In fact, according to this, as it is seen in domestic law, the freedom of contract of law suits is the fundamental principle, but this freedom is surrounded by the limitations imposed on the basic values of the society and the social interest rather than an unlimited quality.

Thus, in virtually all national legal orders, for example, when contradictory moral contracts are considered superstitious, it is desirable to avoid the implementation and implementation of contracts contrary to the core values of the international community in international law. (Verdoross, 1937: 574) More precisely, such rules open the way for both the national and international legal order to override the fundamental interests of the society to the interests of the individual and, in such circumstances, to override the individual will.

It is important to note that this type of norms may be applicable in exceptional cases, in particular to areas that are considered to be core values of the international community. The most important objections to the existence of the ius cogens rules in international law are focused on this issue and it is argued that the international society has a structure which is inevitably abusive of these rules as opposed to the rules as they are known by their current structure. (Schwarzenberger, 1971: 40)

In this context, the structure of international law constitutes the theoretical basis of the hierarchical ecole. (Weil, 1983:36)

On the other hand, such regimes are criticized by authors who do not accept the possibility of a treaty, which is likely to have restrictive consequences. (Schwarzenberger, 1971: 33).

The concept of the *ius cogens* norms, conceptually entered into the literature of international law by the 1969 Vienna Convention, is evaluated in the light of Articles 53 and 64 of the Convention, and although still not clear in practice, in the case law and even in the teaching, it is possible to see the signs of a genuinely structured, which is expressed especially by natural lawyers. As a matter of fact, a vertical structure similar to domestic law is opened in international law and introduces the basic principles (inferior rules) that dictate the framework of rules (superior rules) that are hierarchically lower (Rozakis, 1976:19).

Although the use of expressions such as the constitution of the international community for the UN Charter and the Article 103 of the treaty seem to support this view, it is clear that Articles 53 and 64 of the 1969 Convention, and Article 103, which rendered the UN Charter to gain an advantage over the clashing treaties (in practice) are of a very different nature

2. CONCEPTUALLY AND METHODOLOGICAL DETERMINATION

Research will be based upon inductive-deductive method, and methods of analysis and synthesis. Within the empirical research, in order to come to the identification of the core aspects, we will use the methods of quantitative and qualitative analysis combined with the comparative method

3. THE EXISTENCE MATTER OF *JUS COGENS* RULES

Before examining the *Ius Cogens* norms, it will be appropriate to determine their existence. As it is known, not all world states are involved in the 1969 Convention. For this reason, it is clear that the arrangements it contains will only bind the States parties, except for those parts that are already considered to become customary law so far. As noted at the beginning of the Convention (Verdross, 1966: 58), some of the Articles of Conventions exist before the Convention, and the Convention codified them. In short, these rules, which have an independence from the Convention, are binding for all States which are bound by the rules of procedure, whether or not they are parties to the Convention.(Danilenko, 1991: 42)

On the other hand, for the first time, some of the rules regulated by the Convention are likely to be new. Provisions that do not have these two qualities will be binding only on States which are party to the Convention.

In the meantime, the basic question is whether the regulations on *ius cogens* rules will be binding for states that are not party to the 1969 Convention. Regulations on the *ius cogens* rules in the 1969 Conventions may also be binding on States that are not party to the *ius cogens* regime, provided that the arrangements relating to the existence of the *ius cogens* rules are made before the Convention, together with the Convention.

As will be discussed below, the Convention's regime for the *ius cogens* rules is limited to introducing the existence of overriding / priority rules that limit the liberty of contracts of states over contradictory treaties, and not a concrete *ius cogens* rule.

When we look at the case law and the doctrine, it is seen that there are important views on the existence of the supremacy / rule of the international community that extend far beyond the 1969 Convention. The *jus cogens* rules, which started in particular immediately before the Second World War and accelerated during the cold war era, have been widely accepted. (Ragazzi, 1997:98)

The quality of this new regulation introduced by the 1969 Convention should be assessed in the context of the characteristics of the rules of

implementation, because such a rule can only become possible if it is binding for all states. As a matter of fact, it is important for the states to be objectionable both in terms of decentralization of international rules of conventions and in the regulation of the Convention becoming a rule of conduct (progressive development of international law). When we look at the official interviews expressed by the representatives of states during the negotiations on the undecided design of the 1969 Convention (Travaux Préparatoires), as stated in the relevant interpretation, of the International Law Commission, no state has been found to appeal strictly outside Luxembourg to have superior / prioritized rules of international law.

Many states have expressed their views on the issue during the commission debate of the undeclared design of the Convention. Luxembourg has argued that there is no political and legal authority in the international community of sovereign states, and that these rules will lay the groundwork for the imposition of justice and morality by some states, and argued that such rules are not possible in the present state of international law (YbILC, 1966:21). Other states, which oppose the relevant items, that international law is based on the ration given to the sovereign states and that it is not possible to transfer such rules into international law without a hierarchy of resources as is the case in the national law. (Toluner, 1997: 186) It is also pointed out that the content of such proposed rules is ambiguous and that there is no adequate guarantee for the stability of the treaties.

On the other hand, a vast majority of states have supported the relevant regime, and it has been widely stated that such rules have vital prescriptions for the progress of the international community.

Some states have already stated that such rules exist already in the international community and some have regarded such rules as an inevitable consequence of the current development of the international community. (Hannikainen, 1998: 162)

Some of the states supporting the regime have opposed objections to ambiguity and lack of example, and in particular have considered the objectives and principles of Article 1 and 1 of the UN Treaty as the most

important examples of just cogens rules. As we have seen, a very important part of the states accepts the existence of just cogens rules (ie, the need to be codified in a contract) or necessity (ie, the codification of a contract must be gained in place).

As a matter of fact, England, which states that there must be some basic rules in every society and that no one will object to the evaluation of the ban of slave trade as a jus cogens rule, had explained that would not accept this substance because of the ambiguity of the content and the danger of the regulation would cause to some extreme examples. England, on the other hand has declared that majority of states are not carrying these worries stating that the mine is the key element of the contractual design to abstain rather than reject the matter (UN, 1970: 98).

In some international jurisdiction and arbitration bodies, in particular the jus cogens rule is referred to in separate or opposing opinions of judges and in the defense and disclosure of certain parties.

The International Court of Justice (ICJ), in its decisions, draws an image that makes a direct comment on the existence or content of ius cogens norms. However, statements such as “the basic norms of international society” or “the priority rules of the international community” can be made in the decisions of the ICJ and the attached opinions of the judges.

As an example of this, the ICJ refers to the Genocide Convention. The Court notes that the genocide, which threatens humanity, is contrary to moral law and the purpose and spirit of the UN Charter. The Court also emphasized that these principles are in the common interest of many international communities that are able to affect the interests of individual states.

According to the Court, a Treaty with such features, limits both freedom of appeal and freedom to object those aims. The Court has rejected the idea that in this framework states could be parties to the Convention

as a consequence of their sovereignty, for the sake of the Convention. This view of the Court requires that the basic and priority rules of the international community always exist, and it is an important proof that these rules prevail over the sovereignty of states (ie, the freedom of the will) (Lauterpacht, 1995 : 222)

ICJ in *Military and Paramilitary Activities In and Against The Nicaragua* case on June 27, 1986 concluded that The prohibition on the use of force as a *ius cogens* norm.

In fact, in the opinion of the ICJs president of that period Targic Singh, he affirmed that the Court was a *jus cognis* rule against the use of force through this expression.

In the *Legality of the Threat or Use of Nuclear Weapons Case*, (ICJ Reports, 1996), the prohibition on the use of force and the use of force was regarded as the intransgressible principle of international law (paragraph 76).

Although the prohibited rules of conduct here do not imply “irrefutableness”, this emphasis of the ICJ indicates both that the ban is related to one of the classical rules of international law, and points out to the nature of this difference (with the rationale underlying the *ius cogens* norms).

In the decision in 1997 on the *Gabcikovo / Nagymaros* dispute between Hungary and Slovakia (paragraph 112), neither party argued that there was a priority rule of environmental law after signing the relevant 1977 Treaty, so it was not necessary to examine the scope of Article 64 of the Vienna Treaty. It has been accepted that “when the general international law becomes a new order of law, every act which is working with it becomes superstitious and ends up”.

The Court has implicitly acknowledged the existence of the *ius cogens* norms provided in Article 53 of the same Convention, arguing that the

existence of the newly emerged ius cogens norms does not need to assess the effect of an earlier treaty. It is clear that “the new ius cogens rule has to be evaluated in that frame,” the Court noted that there is no need to examine the existing treaty effect of the rules that have emerged for, if the Court is suspicious of the existence of the rules, then the Court could have been said “if any, to examine the existence of jus cogens rules and their effects “.

Especially in recent years, the ius cogens norms have more to do with the judicial opinions. For example, Judge Weeramantry, gave opposing opinion of the Fisheries Case between Spain and Canada (December 4, 1998) and in particular the Nuclear Weapons opinion (July 8, 1996).

Judge Koroma, in his opinion over Nuclear Weapons explains that the attacks that could harm the civilians are the primary rules, not even to be explained by the military necessity, but rather by the military requirements. Judge Sette-Camera stated that in his opinion dated June 27, 1986 attached to the decision of the Military and Paramilitary Activities in the Nicaragua Case, that the threat of using force and force itself was included in the decision, and at the same time, it was among the priority rules that obliged all states.

Some states have expressions based on the existence of the ius cogens norms in their application to the ICJ or in the defense and disclosure of their actions during the trial. For example, in the case of Military and Paramilitary Activities in Nicaragua Case both sides (Nicaragua and the United States) the ban of the threat of using force and the use of force and have seen as ius cogens norm.

During the Fisheries Case between Spain and Canada, the parties have stated that the ban was a ius cogens norm on the threat of using force, which is expressed in Article 2/4 of the UN Charter.

On the other hand, for example, the Draft Convention on the Responsibility of the States by the International Law Commission Article 33/2 states that “ The responsible State may not rely on the provisions of

its internal law as justification for failure to comply with its obligations under the international law”. International Law Review article “Enforcing the Multilateral Normative Treaties, including the Human Rights Treaties” states that *ius cogens* can not be brought into jurisdiction with the rules and *ius cogens* rules, stated that only those rules can be put in the relevant agreement because of the nature of these rules.

It was also emphasized that the *ius cogens* norms would not be affected by the treaty between the states and the drawbacks put on them would not be affected. These two examples are important indicators of the adoption of *jus cogens* rules to the extent that they are based on relevant new regulations in the international community.

The most important objection to the existence of the *ius cogens* norms based on the premise that there is a hierarchy between international legal norms comes from the view that there can not be a hierarchy between international norms of law as mentioned above. According to this view, the distinction between “rule” and “supra rule” would be impossible and all norms would be equal in terms of binding (ie, either binding or not) and it is not possible to place them on top of them with the ability to determine the frame of a set of others. (Weil, 1983:12)

On the other hand, it is argued that is impossible for the international community and international law to establish a hierarchy between the sources of international law rules, and argued that in this framework international law originates only from the wills of the sovereign equality states and that the creation of superior / priority rules can not be the case (Weil, 1983:13). However, *ius cogens* is a qualification attributed to the rule in which the rules are applied, not the superiority or difference of the source that created them .

In other words, *ius cogens* is the social value of the norm they contain, which gives superiority to the rule. As a matter of fact, the state of the

Constitutions is not much different in national law. Constitutions (in democratic systems) are very commonly prepared by the parliamentarians who create other “ordinary” laws. On the other hand, the adoption of Constitutions is either preferred by parliament, which is supposed to represent the society, by means of more majority votes than by other laws and regulations, or by methods that reflect the social value (more directly) of presenting to the people.

The only difference is that while accepting other “ordinary” laws, a simple majority is usually sought, and the majority of qualified subjects, such as the Constitution, are asked to vote for the majority. In short, the Constitution is not the difference of the source that creates these qualities, but the value attributed to them. For this reason, it is hard to say that the international community is not suitable for the creation of hierarchical rules because it is based on the equality of sovereign states.

4. CONCLUSION

As a result, it would not be wrong to say that the existence of the jus cogens rules, as expressed in the 1969 Convention, rules all States in a structured manner. On the other hand, it is not possible to say the same about which rules are jus cogens qualified rules, despite the very widespread recommendation of human rights, the prohibition of the use of force, the slave trade and the liberation of the open seas.

In short, talking about a concrete jus cogens rule is not as easy as talking about the existence of jus cogens rules. Nonetheless, it should not be wrong to consider the use of force, which is a very common consensus on which the basic system of the international system is constituted.

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