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RELEVANCE OF *'JUS COGENS'* IN CONTEMPORARY WORLD OF GLOBAL TIES: AN ANALYSIS

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ABSTRACT

Broadband discourse of Jus Cogens by the academic philosophers has been much sharing the similar inference as to the universality of this norm in its applicability in the entire global legal system irrespective of its being experiencing differing ratio of its acceptance on one hand or the rejection at the other. Certainly, the norm of Jus Cogens has never been propounded bearing the intention to cause it a dead letter though there lies a need to ponder upon the relevance of this principle in the contemporary world of emerging global ties between the nations.

The major contribution of the present research study is to examine the global impact of Jus Cogens after the development of Vienna Convention and to analyze its relevance in the emergence of new legal challenges in the new world order. Also, present research focuses on analyzing the relevance of Jus Cogens in the implementation of Law of Treaties and its role in the realm of international disputes.

The major outcome of the study is the collective consensus of existing literatures on the said subject which provides that the appreciation of the norm of Jus Cogens rests on the symbolic value and the underlined vision of it in the entire international legal system. In this regard, the most suitable and richest suggestions are found significant place in the present study containing the discourse as to the claim regarding the violation of Jus Cogens.

I. Introduction

So long as the very inception of Vienna Convention which officially recognized the principle of Jus Cogens which could generally be realized by its article 53, has given birth to remarkable contradictions as to its very basis in the international legal framework. At an outset, it is pertinent to note that what does this term (Jus Cogens) signifies and what does it include. Basically, prohibitions against crimes against

humanity, genocide, as well as human trafficking are the examples of Jus Cogens and the norm of Jus Cogens means the principle which is having a binding mandate behind it which in turn postulates that a country has not been left privileged to sign or enforce a treaty if the latter is in derogation with the preemptory norm of international legal order. Similarly, it may easily be inferred from Article 53 the crystal clear intention of VCLT which forthrightly declares a treaty void if found not in consonance with the norms which are preemptory in nature amongst which Jus Cogens is the foremost. Anyhow, an in-depth analysis of practical aspect shows the failure of preemptory norms' application in recognizing and classifying the potential rights, duties and several privileges. The origination of comprehensive treatises pertaining to this norm has found its place in the beginning of year 1937 in an article written by Alfred von Verdross (Verdross, 1937). And similarly, it is argued by the author that "[n]o juridical order can ... admit treaties between juridical subjects which are obviously in contradiction to the ethics of a certain community" (Verdross, 1937), thereby emphasizing the natural law or moral foundation of jus cogens norms (Petsche, 2010).

II. STATEMENT OF PROBLEM

The present research study has been centric towards the relevance of Jus Cogens in the contemporary world. The question is always been pondered about why this principle has generally been taken for granted or like having no force of mandate behind it. It is worthwhile to note that the norm of Jus Cogens has the vigilant potentiality to bring about a reformative era in the global affair of emerging contrasts at the end of nations worldwide.

III. OBJECTIVES

The objectives of the present research are *twofold*:

a. To examine the relevance and significance of peremptory norm i.e. Jus Cogens
b. To analyze the impact of Jus Cogens on the validity of treaty

IV.HYPOTHESIS

H_0: Jus Cogens is not complementary for maintaining the order of challenges in the new world of emerging contradictions

H_1: Jus Cogens is complementary for maintaining the order of challenges in the new world of emerging contradictions

V.SCOPE AND LIMITATION

The scope of present study is to analyze the status of Jus Cogens norm in the present age of treaty implementation as well as the treaty interpretation. Owing to the difficulty of present times of coronavirus, the researcher has restricted means in using non doctrinal approach to conduct empirical research analysis. The only extent up to which the present study is restricted is to highlight the impact and relevance of this peremptory norm in the contemporary world.

VI. ANALYSIS

Several scholastic works argue and challenge the nature of Jus Cogens as a norm of international legal order which has largely been perceived. Jus Cogens is a widely

presumed notion of being devoid of the quality as a stringent rule in the international legal order. Therefore, in support of this view, Petsche relied on the observation that the norm of Jus Cogens is universally been considered as irrelevant in the realm of actual practice (Carnegie Endowment for International Peace, 1966) specifically in international law (Vicuna, 2003). This norm has universally not been accepted to be applied uniformly to all the international disputes due to the various flaws existing in its purview which can be categorized as follows:

Theoretical Flaw in the Principle of Jus Cogens

Prior to the Vienna Convention in 1969, Jus Cogens has its roots deeply wedged in the workings of various scholars during the initial stages of 20th century, under the form of debatable controversies without specifying the notion and nomenclature of Jus Cogens. Notable thinkers like Hyde, McNair (McNAIR, 1961) who raised the opposition to let the treaties' implementation on the moral basis (McNAIR, 1961; Fitzmaurice, 1957) and Hall had profoundly extended their discourse as to the prevalence of the superior norm, referring to the claims under treaties would become void if found in derogation with that superficial norm of Jus Cogens under the umbrella of fundamental rules of international community (Haimbaugh, 1986). In an academic session pertaining to the Jus Cogens by the end of 1953, Besides citing numerous examples to clarify the violations of norm of Jus Cogens (International Law Commission Report ,1966) International Law Commission (ILC) permeated the quorum with a solid view of this fundamental norm supporting its very basis by asserting that there prevails a positive international law which the states have not been privileged to validly contract in derogation with such international public order (International Commission, 1963) and which gets more strengthen by the subsequent Jus Cogens norm by the collective consensus of state members (Vienna Convention, 1969). All the while, such perceptions and adoptions had paved the way to build the tomb for concretizing the norm of Jus Cogens via the Vienna Convention, yet the controversies remained unresolved with respect to its validation and enforceability like oppositions rage over on submission of treaty to moral base.
Amidst all such controversies, two remarkable provisions regarding the Jus Cogens had been laid down in the draft for treaty law by the International Law Commission. These provisions were intended to place Jus Cogens at a superior hierarchy as against other ordinary international rules and treaties which might be entered into bearing the inconsistency with the principle of Jus Cogens which in turn are bound to declared void. Even though, the draft had contemplated to posterize the Jus Cogens as a definitive norm that would have the potentiality to vanguard its fidelity; the drafters were at that moment not much confident. Consequently, they seemed to express their hopelessness in stating the vagueness and ambiguity as to the sufficiency of definition of Jus Cogens. From a more theoretical point of view, they expressed dissatisfaction with the lack of anchorage of Jus Cogens in actual State practice (positivism) and an unclear distinction of the legal concept of Jus Cogens from purely moral rules (Petsche, 2010).
Uncertain definition (Lagonissi Conference, 1966) of Jus Cogens provided by the Vienna Convention has led to the immeasurable flaws that are widely been considered as being much difficult in its applicability in practice & to make it bound in nature (Paulus, 2005) owing to the 'Conceptual Weakness' of Jus Cogens

pertaining to the determination of its substance & procedure by which it's been originated as well as the 'Theoretical Weakness' pertaining to the consensus of the scholars as to the principle and approach on which Jus Cogens is based.

Narrow relevance of Jus Cogens touching on the international disputes for validation of Treaty

With an eye towards the application of Jus Cogens by the tribunals for the purpose to challenge the validity of a treaty, various experiential research studies have raised the issues of the comprehensiveness of the Jus Cogens potentiality. Though such possibility could never be thought of expressly in international treaties or any other instrument; discourse as to the conceptualization of Jus Cogens has been permeated in different contexts and, to some greater extent, reliance is placed upon in those diversified categories. Moreover, it is pertinent to note that the tribunals always do not confront with the concept of Jus Cogens as a major contradiction in the concerned case before it, rather international or national tribunal may, at several times, have recourse to the alike fundamental principles or even obligations like erga omnes. This latter category of norms was established by the ICJ in its 1970 decision in Barcelona Traction (Barcelona Traction case, 1970) in which the Court defined obligations erga omnes as those that are owed "towards the international community as a whole; although both the concepts i.e. Jus Cogens as well as Erga Omnes, are undoubtedly be considered as correlated, at times, overlapping (Byers, 1997). Notwithstanding the fact that International Court of Justice (ICJ) suggested both the terms identical with the each other; even so, ICJ often hesitatingly avoid to use such controversial term as it undertook in Nuclear Weapons case, having submitting its advisory opinion referred to the in-transgressible norms of international customary law in spite of Jus Cogens norms (ICJ Advisory Opinion, 1996).

Broadly, the norm of Jus Cogens has long been categorized having two different aspects with respect to the application of it by international and domestic tribunals. One aspect deals with the cases wherein the tribunal usually calls its attention to a particular rule as being the species of Jus Cogens without even hindering the actual result or conclusion of the case. In all probability, the best suited example of this category is the Nicaragua-US controversy decided by ICJ in 1989 which often been known for the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua Case, 1986). In the said controversy, US had severely been criticized and argued against by the Nicaragua for the allegations of extending supportive remarks by it to the ongoing operations carried through the involvement of paramilitary rebel group in the Nicaragua region. Referring to the disobedience of international norm of Prohibition on use of force between the nation state, Nicaragua raged over. On evaluating this issue, ICJ concluded by relying upon the fact that this principle of prohibition of force amongst the states forms the substantial part of international legal order by asserting that this constitutes the norm of international law and thus, ICJ *in Obiter dictum*, counted upon the Jus Cogens character of the said prohibition, as an a fortiori argument establishing its status as a rule of customary international law (Petsche, 2010). Yet not crystal clear whether besides the norm of prohibition of use of force amongst states, there exists others norms too or not under the aegis of Jus Cogens or even decided by ICJ?

(Haimbaugh, 1987). Second category of cases concerning the norm of Jus Cogens highlights the nuances wherein the treaty validity or even some of its provisions are challenged on the ground of violation of Jus Cogens principle. And in the early stages prior to the Vienna Convention, the case (S.S. Wimbledon case, 1923) witnessed the invalidity of some of the provisions of Peace Treaty of Versailles, 1919 for the alleged breach of third party right, considerably been held as the substantial part of Jus Cogens (Schwelb, 1967).

Post the Vienna Convention, only one case has been recorded yet that has reported the invalidity of treaty on the sole basis of Jus Cogens violation. In the controversy of armed activities between Rwanda & Democratic Republic of the Congo (ICJ decision, 2006), ICJ held invalid the Rwanda's reservation to Article IX of the Genocide Convention being in violation of Jus Cogens. After the Schwelb's count, inestimable time has gone by, since then no case has been recorded by any of the tribunals (domestic or international) to make any of the treaty void for the violation of peremptory norms i.e. Jus Cogens. Consequently, the relevance of Jus Cogens has largely been ignored in today's era of emerging global ties between the nations. And the uncertainty, emptiness (Weisburd, 1995-96), counterproductive (Amato, 1990-91), political of abuse to the notion of Jus Cogens, inadequacy (Danilenko, 1991) and vagueness (Schwarzenberger, 1964-65; International Law Commission, 1967) about the concepts and the source of Jus Cogens evidently provides the rationale behind the reluctant behavior of international and domestic tribunal to hesitate or even avoid the application of Jus Cogens rule for the treaty interpretation as well as the treaty implementation.

Unsuccessful Outreach of Jus Cogens beyond the Law of Treaty

Due to the lack of any potential impact of Jus Cogens on the treaty law, numerous attempts have been made so far with a view to apply the notion of Jus Cogens to other key areas of international law, by analogy. To be more precisely, such attempts to apply this norm can be perused in three categories i.e. First, controversy as to universal jurisdiction; Second, rationale behind formation of specific rules for the regulation of state's responsibility; Third, circumstances for waiver of defense of State's sovereign immunity.

The analysis by the present research provides that such attempts have been proven as being the unfruitful call owing to the insufficient source for Jus Cogens and its theoretical flaws. Therefore, the illogical extension of Jus Cogens to other areas of international disputes would unfailingly leave this peremptory norm devoid of all mandating or regulating features. This can be witnessed with the controversy of principle of universal jurisdiction in case of Jus Cogens' violation. But this could be tolerable only in exceptional cases to ensure that the heinous crimes are not left apart without punishing its aftermath. However, the dispute as to the principle of universal jurisdiction arises in the probable case of offences falling outside the purview of particular state's sovereignty or wherever the crimes are being noticed, not to be prosecuted against in the territory where it's been occasioned.

Thus, so far as these legal violations are concerned, the prepositions as to the linkage of such peremptory norm of universal jurisdiction with that of the heinous commission of offences have broadly been supported by the uncountable scholastic works. But basing the sight over the actual practice, it could unfailingly be inferred

that since a long decade back, there has not yet recorded any case in which an international tribunal or the domestic one would have resorted to the application of this peremptory norm of universal jurisdiction by the states.

Jus Cogens: Vision for International Legal Order

In the earlier portion of the study, the researcher has streamlined the limited impact of Jus Cogens concerning the actual practice in the field of international legal system. From the perspective of treaty implementation, this norm has remained a mere theoretical context which is inappropriate in the practical phenomenon. But this does not mean that the norm of Jus Cogens is meaningless or substantially useless in its entirety. It is pertinent to note that this norm has been considered that turning wheel which has the potential to set out the vision for the international law. For setting the node to a particular legal order, a normative system is presumed to possess the value which is the foundation of legitimate exercise of international legal order.

Protection of individual rights (e.g. prohibition against the use of force on one hand protect the state's sovereignty & independence whereas on the other hand it protect the life and health of state's citizens), regulatory check over the intervention of on one state into the domestic affair of other, prohibition of colonialism, etc. are the remarkable instances to protect and regulate the global affairs between the international entities.

VII. FINDINGS

- After the Vienna convention, only one case has been recorded yet that has reported the invalidity of treaty on the sole basis of Jus Cogens violation. However, the uncertainty and vagueness about the concepts and the source of Jus Cogens evidently provides the rationale behind the reluctant behavior of international and domestic tribunal to hesitate or even avoid the application of Jus Cogens rule for the treaty interpretation as well as the treaty implementation.
- Undue reliance on the norm of Jus Cogens by the tribunals might lead them to cause the detrimental impacts to the potential predictability of the adjudicating authorities which in turn may give birth to the arbitrariness in the hands of tribunals if uncertain node of Jus Cogens would be allowed to get signaled to approach the cases, involving the political nature.
- Even though Jus Cogens has gone through the several harsh phases of strong criticism by the international society at large, it's all set to serve as the vision for the international legal order that would have potential to bring the masses at par worldwide. That's why the alternate hypothesis i.e. '*Jus Cogens is complementary for maintaining the order of challenges in the new world of emerging contradictions*' has been proved.

VIII. CONCLUSION

Owing to some inbuilt ambiguities that are appended to the notion of Jus Cogens, the latter is considered to be the one which does not has the potential to carve out a productive tool to establish a protective legal norm that could persist without any contradiction. But all the more, the principle of Jus Cogens cannot be said to be devoid of any practical essence and significance in its entirety; rather it is

worthwhile to point out that the significance of Jus Cogens might not be fitted for being applied in the concerned question or situation before international or domestic tribunals. This is not denying the fact that this norm has been hold good in the acceptance by the international bodies and organization. Thus, justifying the very existence of Jus cogens, it must be marked for eternity that this norm has not been expounded just for the sake of introducing a novel terminology in the dictionary of international legal order but to make it a basic idea that has prevailed and has been prevailing over the entire international legal order influencing it enthusiastically in a pragmatic manner.

IX. SCOPE FOR FURTHER RESEARCH

The scope of research work is unrestricted which could be stretched till infinity. But it is prudent on the part of one scholar to discuss a specific issue that would suit the cotemporary need of the hour. Therefore, the present research is confined to the study of relevance of Jus Cogens in the contemporary global affair between nations. Having said this, there also exist numerous research gaps onto which the scholastic discourse ought to be done with an in-depth analysis. With the closing words, the researcher suggests (if any) further study to be done with regard to an in depth and a comparative analysis between the status of Jus Cogens in the pre as well as post Vienna convention.

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