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Elimination of Discrimination Against Women & CEDAW: to What Extent is it Jus Cogens?

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Abstract
The international community gathers on occasion to try and achieve specific purposes, through the development of a system of guidance, norms and regulations for States to observe, commonly called international law. There have been many achievements by the international community working together for the collective interests of the States, for example through the creation of human rights law. Many international treaties have been passed that bind the States to achieve the desired collective purposes. One of these is the Convention on The Elimination of All Forms of Discrimination Against Women, which departs from the fundamental norms set by the United Nations Charter as well as the Universal Declaration of Human Rights about equality between the rights of men and women for their dignity and freedom. However, several States that are party to the Convention have reserved some of the articles, and there is some controversy around it. Therefore, it is the purpose of this article to analyse whether the concept of eliminating discrimination against women and the values and norms contained in CEDAW can be categorised as Jus Cogens norms, in view of the fact that it is a manifestation of the human rights values agreed upon by the international community. Moreover, this article will also analyse the Convention's implications on domestic norms in States with significant reservations to the Convention.
Keywords: International Treaty; Jus Cogens; Human Rights; CEDAW.

Introduction

2022 marked the 43rd anniversary of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), a Convention that strengthened the prohibition of any form of sex-based discrimination, which is predominantly experienced by women. The Convention's preamble sets out the background of

the legislation.[1] First, the Convention aims to emphasise the inadmissibility of discrimination and the inherent equality of the rights of all human beings from birth. Second, building upon the first purpose, the Convention aims to promote the idea of equality between men and women in various aspects of life such as the economic, social, cultural, civil, and political spheres. Third, the Convention also seeks to establish positive international relations and interactions between the party States, through collective agreement founded on the shared ideals of the Convention.[2] CEDAW can therefore be categorised as a Human Rights Treaty.

The main elements of CEDAW have led to significant progress for equality rights. For example, in Article 7, the Convention emphasises that both men and women shall enjoy equal rights in political and public activities in the country.[3] This concept seems ground-breaking considering the lack of political rights for women in many countries, but the foundations of this idea existed before CEDAW was enacted, for instance in the United Nations Universal Declaration of Human Rights.

Building on the idea that the core values of CEDAW have been agreed upon as an embodiment of Human Rights in the international community, this article seeks to investigate whether the values of the Convention can safely be categorised as Jus Cogens. Jus Cogens is defined in the Vienna Convention on the Law of Treaties, which states that "*a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm which no derogation is permitted and which can be modified only by a subsequent norm of general law having the same character"*.[4] In other words, Jus Cogens is a universally accepted norm that becomes the highest obligation in the International Community. This raises the question of whether the values of CEDAW or CEDAW itself can be categorised as Jus Cogens norms. Many States have

[1] Dina Sunyowati and others, 'Can Big Data Achieve Environmental Justice?' (2022) 19 Indonesian Journal of International Law.[6].

[2] 'Preamble of the Convention on the Eliminations of All Forms of Discrimination Against Women'.

[3] 'Article 7 of the Convention on the Eliminations of All Forms of Discrimination Against Women'.

[4] 'Article 53 of the Vienna Convention on the Law of Treaties 1969'.

reserved some significant articles in the Convention, although it is not the number or the substance of these reservations that casts doubt on whether the Convention is Jus Cogens. The true argument relates to the existence of domestic norms and religious laws of the reserving parties. Most States that have reservations to the Convention are Middle Eastern countries, and the reason for their reservations is that some of the requirements of the Convention are contrary to either national legislation or, in many cases, Sharia law.[5]

This article further considers the effectiveness of CEDAW's values of equality between men and women as Jus Cogens norms, by considering: (1) The formal and substantial criteria for norms to be categorised as Jus Cogens norms; and (2) Analysis of the capability of this norm to be established as a Jus Cogens norm, and the obstacles to that. By answering these questions it will be possible to determine whether the concept of equality for men and women and the elimination of discrimination against women can be categorised as Jus Cogens, as well as explore the reasons why there has not been any firm establishment of this norm as Jus Cogens. This article will also provide an example of a party State whose laws and legal system contradict the norms in CEDAW, namely Egypt, in order to resolve these questions.

Deep Diving into Jus Cogens Norms

The definition from the VCLT of Jus Cogens as a peremptory norm has already been given, and this section will review the history of the concept of Jus Cogens, its origins and impetus. Following the thread back to the start of civilisation and the foundations of legal systems, it has been said that the Stoics developed a theory that States' laws had to be implemented on an international scale based on universal reasoning, and be based on the common interest.[6] We

[5] Amnesty International, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women: Weakening the Protection of Women from Violence in the Middle East and North Africa Region' (2004).

[6] Rafael Nieto-Navia, 'International Peremptory Norms (Jus Cogens) and International Humanitarian Law', *Man's Inhumanity to Man* (Brill Nijhoff 2003).

can see that this idea and the fundamentals of Jus Cogens have been established since the era of natural law. By the time States start to develop even more, civilisations began to realise that to achieve common interests, there need to be specific regulations since it is impossible to just hit everything with the same bat. A concrete example is the establishment of the United Nations and the Charter of the Nuremberg Military Tribunal, which updated the idea of Jus Cogens by establishing that States of the international community may be subjected to certain supreme and peremptory rules not necessarily as a result of their direct consent.[7]

The idea of Jus Cogens has been made even more specific by the existence of Article 53 in VCLT that defines exactly what it is, and the conditions under which it can arise. However, there are still no written regulations or agreements by the international community that explicitly state what types of norms can be categorised as Jus Cogens. Muhammadin argues that this is because Jus Cogens develops dynamically in response to the norms of the era, and if they are captured in a formal convention, the snapshot would only represent the moment where it was taken and would be left behind by the era's dynamic.[8] This opinion accords with the concerns raised by the International Law Community (ILC) which stated, "*The mention of some treaties void for conflict with a rule of Jus Cogens (even with the most careful drafting), lead to misunderstanding as to the position concerning rather not mentioned in the article. If the Commission were to attempt to draw up (even on a selective basis), a list of rules of international law which are to be regarded as having the Jus Cogens, it might itself engage in a prolonged study of the matters which fall outside the scope of the present article*".[9]

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[7] Yahya Berkol Gülgeç, 'The Problem of Jus Cogens from a Theoretical Perspective' (Ankara Universitesi 2017).[84].

[8] Fajri Matahati Muhammadin, 'Seputar Jus Cogens' [2015] *International Law* <https://fajrimuhammadin.staff.ugm.ac.id/2015/10/01/seputar-jus-cogens/>.

[9] Virgayani Fattah, 'Hak Asasi Manusia Sebagai Jus Cogens Dan Kaitannya Dengan Hak Atas Pendidikan' (2017) 32 Yuridika.[355].

The above opinions explain why Jus Cogens norms are hard to rigidly establish. However, there are consequences to the 'abstractness' of the Jus Cogens norms, such as those that are the topic of this article: whether the norms contained in CEDAW, which lead to the norm of eliminating any forms of discrimination towards women, are Jus Cogens norms or not.

In his book, Lon Fuller mentions some of the criteria for norms to be categorised as peremptory norms. Fuller divided the criteria into formal criteria and substantial criteria. Firstly, the substantial criteria are as follows:[10]

1. A peremptory norm has to set out general principles which are universal and not only ad hoc norms;
2. Peremptory norms have to be public so that States as the representatives of their people can know and adjust their policies and actions in accordance with the norms;
3. Jus Cogens norms have to be reasonably achievable and not impossible to do;
4. The subject and the purpose of the norms have to be clear and firm, because their purpose is to give general justice criteria, which are capable of guiding and limiting States' actions;
5. Peremptory norms must be consistent. When peremptory norms contradict one another, it will only create confusion for the States;
6. Jus Cogens norms shall be prospective and retroactive; and
7. Peremptory norms have to be stable.

Proceeding to the substantial criteria for norms to be categorised as peremptory norms or Jus Cogens, they are as follows:[11]

1. Jus Cogens norms are a form of integrity, and have to bring good results for the community;
2. Jus Cogens norms shall have the principle of formal moral equality, meaning that the norms shall treat people as equal beings;
3. Jus Cogens norms shall have the principle of solicitude, which means that Jus Cogens norms have to be attentive to the valid law subject's interest;
4. Jus Cogens norms shall have the principle of fundamental equal security;
5. Jus Cogens norms must comply with the Rule of Law, meaning that the norm cannot eliminate the capability of the States to guarantee or secure its legality for the common interest.

[10] AAA Nanda Saraswati, 'Kriteria Untuk Menentukan Hak Asasi Manusia Sebagai Â€ ŒJus Cogensâ€ Dalam Hukum Internasional' (2017) 10 Arena Hukum.[163].

[11] *ibid.*[169].

Elimination of Discrimination against Women & CEDAW: Jus Cogens Enough?

Moving on, this article shall proceed to analyse the norm of the prohibition of discrimination towards women. The Convention, CEDAW, is the embodiment of a very controversial idea from the human rights field, since we know that long ago, the world wasn't quite as good a place as now for women. Before stepping into the analysis, we will first reframe the topic as being about **sex-based discrimination.** If we take a look at the formal and substantial criteria, it's safe to say that the norm of prohibiting any forms of discrimination and the norm to promote **equality** have fulfilled the criteria very well, except for the fact that it's not sufficiently universally valued, as is shown by the huge number of reservations it received for its own merits, especially from Middle Eastern States.

As the matter of fact, it is in the common interest of States as well, as it is included in every article of the United Nations Declaration of Human Rights. Even the preamble states that sex-based equality should be manifested.[12] Although in CEDAW it is explicitly applied to women, it is still universal, as CEDAW is merely another convention to make sure that the principles in the UNDHR are well applied, because women have historically and currently experienced significant discrimination. This is similar to the establishment of the International Convention on the Elimination of All Forms of Racial Discrimination, and the prohibition of discrimination on the basis of race has been established by the international community as a Jus Cogens norm.[13] Moving on, it's better to see first why the prohibition of any forms of discrimination towards women, which is a form of sex-based equality that is also contained in the CEDAW, is not universal enough.

As has been mentioned previously, there are plenty of States that have entered reservations against crucial articles in CEDAW that carry the spirit of elimination

[12] 'Preamble of the United Nations Declaration on Human Rights'.

[13] Warwick McKean, *Equality and Discrimination Under International Law.* (Oxford; Clarendon Press 1983) [271-277] in the fight against racism 'Principles of Non-Discrimination and Equality, Australian Human Rights Commission' (2000).

towards discrimination against women. In the Middle East and North Africa alone, there are eight countries reserving mostly Articles 2 and 16 of the Convention, based on their religious laws.[14] Alongside that, there are also 5 other States reserving the articles, mostly Articles 2, 7, 9, and 15, based on their national regulations or law.[15] However, this is not the main problem. In fact, based on the research and analysis done by Amnesty International,[16] when the reasonings and the explanations of some of the reserving States are considered, there has been a lack of strong arguments and rational reasonings as to why some of them reserve few articles in the Convention, to the extent that several UN Special rapporteurs and treaty bodies have raised concerns about the usage of religious law as a pretext for the States to not implement the treaty.[17] From the analysis done by Amnesty International, it could be seen that some States even reserved the main core of the Convention which is not compatible with the reservation requirements in the Convention and the VCLT.

For example, Egypt entered a very general reservation for article 2 of the Convention, in which it says, "*The Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic Sharia*".[18] Based on VCLT and also the content of the Convention), this is legally impermissible. The second article of the Convention is very general yet it covers the essential parts of the Convention. The reservation entered to this article is fairly ambiguous and reserving it, even on the basis of religious laws, indicates that the state just doesn't want to partake in the Convention. At the same time, Egypt also reserved Article 16 of the Convention that sets out the equality of men and women in marriage. This specific reservation is an open window to add our perspectives on the internal situation of a state. Once Egypt had laws that operated

[14] Amnesty International (n 5).

[15] *ibid.*[9].

[16] Mochamad Kevin Romadhona, Bambang Sugeng Ariadi Subagyono and Dwi Agustin, 'Examining Sustainability Dimension in Corporate Social Responsibility of ExxonMobil Cepu: An Overview of Socio-Cultural and Economic Aspects' (2022) 3 Journal of Social Development Studies.[130].

[17] *ibid.*[12].

[18] Anna Jenefsky, 'Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (1991) 15 Md. J. Int'l L. & Trade.[199].

in harmony with Article 16 of the Convention while still being compatible with Sharia law, called Law No. 25 and Law. 44.[19] These regulations have changed as the political situation in Egypt has repeatedly transformed throughout the years, and it went through many complicated processes, to the extent that the regulations contrary to Article 16 of the Convention are now dominant. Egypt is not the only state that is experiencing such a phenomenon; other States, especially those reserving the Convention may have had the same situations. The purpose of the explanation of Egypt's reservation and historical situation above shows that it is indeed normal to reserve one or more aspects of the Convention if it is not possible to execute in the respective state. However, the implementation of these reservations has clearly gone wrong when many States began to reserve the fundamental purpose of the Convention itself, which is a very general provision in the Convention, yet it is the core of the Convention.

Rather than blaming the overwhelming situation faced by CEDAW and the rights of women to have equality on the number of reservations made by the States, as the cause of why the prohibition of discrimination against women is still 'lowkey' and not established as a Jus Cogens norm, the following explanations will instead turn the table around. As has been seen, the number of reservations made by plenty of States to the core of the Convention is caused by the lack of acknowledgement of this type of norm as Jus Cogens norm. To re-emphasise, the reason why CEDAW, as a very strong movement to eliminate any forms of discrimination against women, is highly reserved especially at its raison d'etre, is because there has not been any strong establishment nor acknowledgement of the prohibition against discrimination towards women as a Jus Cogens norm. Moreover, some literature that provides information about what types of norms are categorised as Jus Cogens norms get their basis on the number of ratifications of the treaties. Somehow it is frankly peculiar to see that since CEDAW, which carries the norm of prohibiting any form of discrimination against women and promotes sex-based equality, has reached 189 States ratifying the Convention.

[19] *ibid.*[217-219].

Historically even in 2006, Allain Pellet of ICJ stated that, "*whether the international legal norms are the result of elitist masculine bias rights theories or not, they will keep their status of positive norms as long as they are not superseded by better, more people-oriented and gender-neutral norms vested with a peremptory character"*.[20] Furthermore, Pellet also stated, "*The condemnation of gender discrimination is still limited to certain parts of the world, which prevents it to be considered a norm accepted and recognised by the international community*".[21] From the second opinion, it is true and it is undeniable that international law and international common interest are not the only sources of law and guidance for every state. Looking back to the example given previously within this article about the case of Egypt's reservation and the state's internal politics and law situation, it's clear that every state around the world surely has their own principles, ideology, beliefs, and political situations with which international law cannot interfere. However, this does not mean that the raison d'etre of a convention that emphasises the prohibition of discrimination towards women in general is something 'to be reserved' since it is a part of human rights. The question is, does validation play a huge role? Yes. Throughout the years, there have been many ICJ Advisory Opinions, ILC Opinions, and many other opinions or reports that help to establish certain norms as Jus Cogens norms. On the other hand, in an update in 2022, the ILC once again provide a list of peremptory norms but the prohibition of sex-based discrimination and freedom from gender discrimination, which leads to the manifestation of CEDAW's values, is still not included.[22]

Another point of debate is whether the norms and values that CEDAW carry still cannot be categorised as Jus Cogens, since even though it has been ratified by high numbers of States, there are so many reservations against it since there are parts of it that are contradictory to the domestic norms of some party States.

[20] Patricia Viseur Sellers, 'Jus Cogens: Redux' (2022) 116 American Journal of International Law.[281].

[21] *ibid*.

[22] *ibid*.[286].

Taking a look back to the main idea of reservations itself, the VCLT in Article 53 has established the regulations for it. It means that reservations can always happen to any form of treaty within the allowed situations based on VCLT and the treaties themselves. Even the Convention on the Prevention and Punishment of the Crime of Genocide has some party States reserving the Convention, and its values are established as Jus Cogens norms. The number of reservations that party States have made is not the key determinant of whether the party States acknowledge and accept the raison d'etre of the Convention. As is stated in Article 11 of VCLT, "*The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed".*[23] Therefore, it is safe to say that CEDAW, and most importantly, the norms it carries, are widely accepted and acknowledged.

To support this idea, this article shall turn back to the arguments from Lon Fuller about the criteria for Jus Cogens. First, Jus Cogens norms must take the form of integrity and have positive outcomes for the community. Clearly, there are no violent and wicked intentions in the norm of prohibiting discrimination against women, or in promoting sex-based equality. This aims to stop any discrimination from happening since it is a very common global issue, sufficiently so that the system has neglected the urgency to tackle it. Second, Jus Cogens norms shall have the principle of formal moral equality, which means the norms shall treat people as equal beings. That is clearly applicable to the norms in this case. Third, Jus Cogens norms shall have the principle of solicitude, which means that Jus Cogens norms have to be attentive to the valid law subject's interest. In this case, it must be noted that the subjects of international law are not just international organisations or the 'chairmen', but also include the individuals for whose benefit these discrimination norms are directed. Next up, Jus Cogens norms shall have the principle of fundamental equal security, which is the main point of the Convention. It is to emphasise that this shall be seen as a basic human right which is a bare necessity for all human beings.

[23] Article 11 of the Vienna Convention on the Law of Treaties 1969.

Conclusion

Based on all the arguments and the analysis above, it is still unclear as to why there has not been any validation and establishment of the prohibition of sex-based discrimination towards women. However, it is clear that after this article has dissected all the core problems, it is possible to state that these norms are Jus Cogens norms, theoretically and also practically. However, specific parts such as the specific regulations in CEDAW may not be classified as Jus Cogens, since some specific mechanisms within it can't be manifested yet due to the various complicated situations of some party States. Still, the norm of prohibition of discrimination towards women, in general and as a whole, shall be categorised as Jus Cogens. It can also be concluded that even when there are States holding on to certain religious laws and national laws which are contradictory to the main ideas of the Convention, this does not really indicate that the party States do not accept the idea of eliminating discrimination towards women, since they have shown their acceptance by the ratification and signature process. As for the high numbers of reservations against the raison d'etre of the Convention, clearly it is just the party States not really implementing what the law is regulating.

Even now, society has been even more aware of the issues, and they have been brought to the surface in society, although mostly they do not really touch the legal aspect of this problem and mostly focus on the social aspect. However, the very rapid dynamic raised towards the issue should actually wake the people in the systems up, to finally realise that this issue is not something to be thrown under the bus.

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