Robert Kolb, *Peremptory International Law – Jus Cogens: A General Inventory*, Hart Publishing, Oxford/Portland: 2015, pp. xvii + 137

ISBN: 978-1-78225-727-1

The subtitle of the reviewed book well conveys its character. "Inventory" is more accurate than "introduction", because the main aim of the book is to present and discuss key problems within the international *jus cogens* phenomenon. Professor Robert Kolb seeks to fill two gaps that are present in the mainstream treatment of the concept of *jus cogens*, which he labels as the "value-orientedness" of peremptory laws. First, the book aims to explore this "value-oriented approach", which is not simply rejected by Kolb, in terms of a proper underlying legal construction. The author is convinced that it is not sufficient for a lawyer to speak about fundamental values. According to him, lawyers must proceed to give these values and the legal constructs that underlie them a precise setting in legal technique. The second gap explored by Kolb concerns the legal literature on *jus cogens*. The current literature limits the concept of *jus cogens* to so-called "public order" norms, that is, those embodying the fundamental interests of a given society. This explains, at least to some extent, the common limitation of the analysis of *jus cogens* to, at best, Articles 54 and 64 of the Vienna Convention on the Law of Treaties (VCLT), which Kolb assesses as "utterly narrow and therefore imprecise" (p. vi). His book is aimed at giving a full account of peremptory norms in international law beyond the usually-described "public order" phenomena rooted in the VCLT.

Professor Kolb attempts to define the concept of *jus cogens* so that it remains compatible with the legal certainty necessary for the proper functioning of the international legal order. At the same time, his book is neither a full-fledged treatment of the issue, nor a review of basic knowledge. Kolb underlines that it is a book aimed at reflection. This is why it is worth reviewing.

The book consists of eight parts. The first part concerns definitional issues and the functions of *jus cogens*. Part two presents views of the adversaries of peremptory norms. The third part offers critical comments on theories justifying *jus cogens*. The fourth part seems to be especially important, because it offers original views on the legal construction of international *jus cogens*. The author's disquisition deals especially with the types of peremptory norms, their extension, and the gist of peremptoriness. Sources of *jus cogens* are analysed in fifth part, whereas practical problems connected with effects of peremptory norms and conflicts between them are discussed in parts six and seven. The final part consists of a short conclusion.

Professor Kolb rightly underlines that perhaps only the concept of sovereignty is a greater source of uncertainty in international legal scholarship than the concept of *jus cogens* (p. 7). Indeed, there is a huge divergence of opinions on both concepts. For this reason, a clearly established core of *jus cogens* is a primary task for those who wish to present the practical effects of *jus cogens* within international law, and its legal

significance. The key issue of "peremptoriness" will be a point of reference for further remarks.

Kolb discloses his standpoint on the nature of *jus cogens* at the very outset of the book. According to him, the issue of "non-derogability" is the proper domain of peremptory norms because the common root of the *jus cogens* phenomena is exactly their non-derogability (p. 8). Thus, *jus cogens* is a legal technique which enhances the unity of a legal order by its refusal to apply the rule *lex specialis derogat legi generali*. As a legal technique, *jus cogens* protects against the fragmentation of the law, including international law, into a plurality of separately applicable legal regimes. In other words, the aforementioned collision rule is, in the case of *jus cogens*, replaced by an opposite rule: *lex specialis non derogat generali cogentis*. *Jus cogens* as a legal technique erases the conflicts between norms at their roots, since a particular norm which is in conflict with a peremptory general one is voided. Kolb strongly underlines that *jus cogens* is "only" the quality of a norm, not the norm itself. As such, it is neither a substantive provision nor a source of law in itself (pp. 2-3). These inspiring views on the nature of *jus cogens* shape, on the one hand, his arguments in further parts of the book, while on the other they raise some doubts. Thus they require critical examination.

Kolb rejects the "natural law" justification of *jus cogens* (pp. 31-32). He clearly posits that *jus cogens*, as a legal technique, should not be confused with natural law. He does not support the predominant theory today, namely, the "public order of the international community", because *jus cogens* cannot confine itself solely to public order. According to Kolb, there are different types of *jus cogens*, not limited only to those which protect the fundamental values of the international community. Besides, *jus cogens* as a legal technique is hierarchically neutral. Peremptory norms are concerned with the relationship *lex generalis/ lex specialis*, and not with the relationship *lex superior/lex inferior*, says Kolb (p. 35). He doubts whether the hierarchical argument is strong enough to justify *jus cogens*. Kolb considers this argument as misleading from the point of practice, since it is not true that a superior norm will enjoy priority of application simply because of its superiority. This is a rather controversial view and it does not sound convincing enough. Kolb partly supports the concept of *jus cogens* as rules of international constitutional law which amount to fundamental general principles and are the minimum necessary for the existence of the international legal order. However, he states that theories of international constitutional law themselves are too narrow to adequately explain *jus cogens*, because peremptory norms do more than just protect the most important principles of a legal system. First and foremost, they are a legislative tool that can be used on any normative plane to protect the integrity of a legal order (pp. 38-39). In this way, Professor Kolb comes back to his definition of *jus cogens* as a legal technique inherent in law, which can be defined by its effect, i.e. non-derogability. Thus, *jus cogens* is general law from which no derogation is permitted. This definition, based on effect, is a formal one, indicating rather the legal process of creation than the end product. The basic question which it raises here is namely: What is the normative status of *jus cogens* in the international legal reality? After all, Kolb emphasizes that it is not a substantive

rule, but "only" a legal technique inherent in a general rule. But what does this mean? Is it a formal procedural rule or a necessary consequence of legal thinking, or maybe a mandatory presupposition of that thinking? Is such an understanding of *jus cogens* really grounded in positive law? One can look for answers to these question in parts four and five of the reviewed book.

Professor Kolb explains that *jus cogens* as a legal technique does not have an absolute and monolithic nature. On the contrary, it remains highly contextual, variable, and multi-faceted (p. 45). Indeed, it is a variable and quite open explanation. Non-derogability is the "unifying umbrella" of Kolb's construction of *jus cogens*. But what is the source of non-derogability, and thus of *jus cogens* itself? Kolb indicates three formal sources: treaties, customs, and general principles. However, another question arises concerning the source of those formal sources, or – so to speak – the 'meta-source' of *jus cogens*. Kolb does not give a convincing response to this principal question. While he seems to be right in positing that Article 53 of the VCLT can hardly be considered an exclusive expression of all international *jus cogens*, his other views on the sources of *jus cogens* and their justifications are rather incomplete. In this way he himself confirms his view that the question of what sources of international law underlie *jus cogens* norms is the vague and confusing one (p. 89). In my opinion, Kolb's position leads to a fragmentation of normativity of *jus cogens*. According to him, *jus cogens* can be based on sources of both general and particular international law. The "public order" aspect of *jus cogens* will, he accesses, more often be embodied in the sources of general international law, whereas its "public utility" aspect is based on particular international laws. Besides, Kolb emphasises the relativity of *jus cogens* in the domain of legal technique, which means that a given norm can be technically *jus cogens* and yet not bind all States (p. 95). This raises some doubts; namely, whether the relativity of *jus cogens* does not injure their peremptoriness?

Kolb singles out three types of *jus cogens*, or three reasons which may lead to a norm being non-derogable (pp. 46 ff). The first comprises "public order *jus cogens*", that is, fundamental norms which protect basic values for the international community and which as such are non-derogable. The second comprises 'public utility *jus cogens*' which are not linked to basic values or fundamental norms but to norms where the legislators have a common interest in maintaining an unaltered, integrated and efficiently functioning legal system. The best examples of this type of *jus cogens* are the constitutive treaties of international organisations or organs. In this context special attention is given to the Statute of the International Court of Justice. The third type of *jus cogens* consists of "logical *jus cogens*". These encompass, according to Kolb, the principles *pacta sunt servanda* and good faith (p. 56). Yet, the distinction between these three types of *jus cogens* seems to be artificial, and, as a consequence, the actual justification for non-derogability rather unclear. In particular, there is no need to distinguish between logical *jus cogens* and the other two types. Neither *pacta sunt servanda* nor *bona fides* can be derogated without falling into a contradiction in every legal order, since they are primary general principles of law. By this I mean, firstly, "meta-principles" which

are tantamount to Hart's secondary rules and, secondly, general collision rules. Such an understanding of general principles lies at the core of peremptoriness in law, including international law. It follows that *jus cogens* is primarily embodied in general principles. The non-derogability of any rule or principle cannot be justified without *pacta sunt servanda*, *bona fides* and *estoppel*. In other words, *jus cogens* as a quality of a norm is something more than a mere legal technique and logical *jus cogens*. It is more than just a tool for international legal rules and principles.

In this context one may ask why some substantive rules and principles connected with fundamental values are recognised as peremptory norms, while others are not. Kolb does not delve into detail on this crucial problem, which concerns the issue of legitimacy of international law, and especially the significance of the consent of States within it. At the same time however, his book inclines readers – in fact it "forces" them - to rethink rudimentary problems of international law. Indeed, Kolb's work is a real book for reflection in every sense of the word. It proves that one can put much into a short book.

*Roman Kwiecień**
DOI 10.7420/pyil2016q

* Full professor of law at Cracow University of Economics, Faculty of Finance and Law (Kraków, Poland), Chair of Public International and European Law (e-mail: roman.kwiecen@uek.krakow.pl).