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**ARTICLE 38 OF THE STATUTE OF THE INTERNATIONAL COURT
OF JUSTICE: A REVIEW w.r.t. EQUITY AND EX AEQUO ET BONO**

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ABSTRACT

International law is a fascinating set of rules that governs the interactions of members of a society of nations. What's perplexing is that no single body is capable of enacting internal laws that are binding on everyone. The anarchic nature of world affairs and the intense clash of competing sovereignties have contributed to this perplexity. International law does, however, exist and can be found in the 'sources' from which the rules are derived. In addition, international law recognizes equity as a set of principles that incorporate the system's values. If not independently of that article, Article 38 of the ICJ statute declares that the Court has the power to appraise equity in international law that it must apply. The courts have repeatedly recognized equity's ability to mitigate inequities; however, this is not done at the expense of legal rules.

Introduction

Ex aequo et bono is a legal principle that stems from equity and is intended to resolve cases in accordance with equity, justice, and good conscience. According to Article 38(2) of the ICJ Statute, when the parties expressly request it, the Court may resolve the dispute using the ex aequo et bono principle. As a result, while the system of international law may appear perplexing at first glance, upon closer examination, we discover that it is well organized. There may appear to be some inconsistencies between the provisions, but the international legal system is different from the sources or origins of international law are stated in Article 38 of the ICJ Statute, as well as the means by which the Court will determine the rule of law. As a result, the most important requirement for a rule of international law to be binding is that its source be provided by Article 38.

ARTICLE 38(1) OF THE ICJ STATUTE

The ICJ Statute, in Article 38(1), distinguishes between various sources, including customary international law, treaties and conventions, and general principles of law recognized by civilized nations. Whereas clause (2) of the said provision gives the Court the authority to decide a case *ex aequo et bono*, or on the basis of equity, if the parties agree. The 'general principles of international law,' as defined by Article 38(1)(c) of the ICJ Statute, are one of the sources of international law used to resolve disputes between states. The 'general principles' and the 'civilized nations' requirements must be interpreted separately. The basic concept behind 'general principles' is that judges are justified in applying a solution that has been approved and accepted by the general public. According to distinguished scholar Verzijl, these principles are so fundamental to every well-ordered society that any reasonable deviation from accepting them as valid is impossible.

Unjust enrichment doctrine, estoppel, general principles of equity, and so on are examples. The correct test for identifying such principles is for judges to satisfy themselves that it is recognized in substance by all of the major systems of law, and that applying it would not violate any of those systems' fundamental concepts. General principles serve as a source of interpretation, a means of developing new norms, supplementary sources, and a modifier for conventional and customary international law. In his dissenting opinion in the West Africa case, Tanka J. Stated that recognition of a principle by civilized nations does not imply recognition by all civilized nations. Furthermore, it was proposed in the North Sea Continental Shelf Case that evidence of recognition should be sought in the behavior of the greatest number of States, preferably the majority of the interested States rather than all of them. The proposal to rewrite clause 2 of the provision to state that the Court would apply general principles only if the parties agreed was rejected during the drafting process.⁹ As a result, the *ex aequo et bono* principle was incorporated.

CONCEPT OF EQUITY UNDER PUBLIC INTERNATIONAL LAW (PIL)

Applying justice and fairness principles to the interpretation and administration of the law is known as equity. Equity can be used in international law as a corrective measure to close loopholes in the law or alter its implementation to produce just results. In several cases, the International Court of Justice (ICJ) has used equity where strict obedience to the law would lead to unjust conclusions. One such instance is the Court's consideration of equitable principles in defining maritime limits in the North Sea Continental Shelf disputes. The International Court of Justice (ICJ) highlighted that equitable principles are a way to achieve just outcomes within the confines of current legal regulations, not a replacement for the law.

The duty of the states to act in good faith is referred to as equity. International law jurisprudence incorporates the concept of equity, which is frequently applied by International Tribunals. The International Tribunal agreed in the Rann of Kutch Arbitration between India and Pakistan in 1968 that the principle of equity could be used to present a case.

stated in *Nicaragua v. United States of America* and *Cameroon v. Nigeria*, principles of equity serve as a savior when a dispute cannot be resolved through international customary law, treaties, or conventions. The British Venezuelan Commission's umpire recognized absolute equity as a solution to the dispute in the Aroa Mines case. It was also stated that where equity and justice differ, equity must yield due to the rule's superiority in justification. To paraphrase Aristotle, equity is the justice that supplements the law. "Equity has a character of simplicity". Its invocation enhances a choice based on other considerations, particularly specific technical considerations. Legal arguments are strengthened by equity. It may be demonstrated that a conclusion based on technical legal standards is consistent with notions of justice and fairness. This function is really important. It is in this way that the law's flexibility, which was addressed before in the context of equity *infra legem*, *praeter legem*, and *contra legem*, can be led to a just result. Flexibility is of little use unless there are criteria for selecting among the various options. the normative "weights" or "densities" of the numerous possibilities accessible are likely to differ: the weight of authority or principle, or the clarity of reasoning, may make one option more plausible than the others. This simply means that some arguments have a higher chance of succeeding than others. Those who are most likely to succeed, however, are not always those who will lead to the most equitable outcome. The use of equitable arguments can have a significant impact on enhancing the weight of arguments that would otherwise be unlikely to win and decreasing the weight of technically powerful arguments that would lead to unjust conclusion.

The Concept of Ex Aequo et Bono

"Ex aequo et bono," a Latin phrase meaning "according to what is equitable and good," refers to the authority granted to adjudicative bodies, such as the International Court of Justice (ICJ), to render decisions based on principles of "fairness and equity rather than strictly adhering to established legal norms." This concept allows for a flexible and discretionary approach, enabling a court to deliver justice by considering the broader context and moral considerations of a dispute.

Article 38(2) of the ICJ's Statute establishes "the body's authority to consider matters ex aequo et bono. According to this clause, the Court may only use this authority with the express consent of the parties to the dispute. By requiring a consensual deviation from strictly legal standards, this condition assures that the states are ready to put a fair and equitable resolution ahead of the rigorous implementation of the law." In international jurisprudence, the application of ex aequo et bono is rather uncommon since governments are often reluctant to let courts depend exclusively on fairness considerations because they may be viewed as subjective. Fundamental principles of international law include legal clarity and predictability; judgements based on ex aequo et bono may inject an element of uncertainty. This is because the concepts

of justice and equality might be more ambiguous and context-dependent than legal standards, which are often defined and unambiguous. Ex aequo et bono plays a significant part in the international legal system, despite its rare application. It offers a method of settling conflicts in situations when applying the law strictly might have unfair or inequitable results.

Ex aequo et bono is noteworthy for going beyond the corrective role of equity, which usually entails changing the law to accomplish justice. Rather, it permits choices to be decided only on the basis of justice, disregarding the current legal regulations. This makes it a more expansive and all-encompassing vehicle for attaining justice, yet one that is utilized with caution because of the possible hazards connected to its discretionary character.

"Ex aequo et bono" describes the "International Court of Justice's ability to make decisions based more on what is just and fair than on rigidly adhering to the law as it now exists. The parties' consent is required for this clause to apply. "Ex aequo et bono" permits the Court to base decisions only on fairness considerations, as contrast to equity, which alters how the law is applied. States are frequently reluctant to deviate from accepted legal standards, which is one of the main reasons why this term is rarely used in ICJ practice. Nonetheless, the fact that it is included in the Statute shows that justice and flexibility are crucial in international adjudication."

THE DIFFERENCE BETWEEN EQUITY AND EX AEQUO ET BONO IN ICJ JURISPRUDENCE

In ICJ jurisprudence, equity and "ex aequo et bono" have distinct but complementary functions. "Ex aequo et bono" permits choices to be made solely on the basis of fairness, even though equity functions within legal parameters. Generally speaking, the Court has applied these ideas cautiously because it understands the necessity to strike a balance between flexibility and legal clarity. The Gabčíkovo-Nagymaros Project case and the Fisheries Jurisdiction case are two notable examples of how these ideas interact. The Court negotiated the intricate interplay between legal requirements and fairness concerns in these instances.

The ICJ Statute, in Article 38(2), implies a distinction between the concepts of equity and ex aequo et bono. Decisions made in accordance with traditional equity principles are still legal. Ex aequo et bono, on the other hand, is strengthened to operate outside or even against the law. As a result, the latter does not contribute to filling in legal gaps or making existing laws easier to understand. While acting ex aequo et bono, judges have a free-floating discretion to disregard legal rules in order to achieve equity.

The distinction between equitable legal principles and ex aequo et bono is embedded, at least implicitly, in Article 38 of the ICJ (International Court of Justice) Statute. Article 38(1) defines "international law" to include "general principles of law recognized by civilized nations." Time honored equitable maxims

that have been historically and routinely recognized and applied by courts in most common law countries certainly fall within general principles of law.

Although achieving justice is the goal of both equity and *ex aequo et bono*, there are notable differences in their applications and consequences in ICJ law. When it comes to making sure that the law is administered justly, equity serves as a complement, whereas *ex aequo et bono* permits decisions to be made solely on the basis of justice, unhindered by the letter of the law. While the latter is an uncommon mechanism that requires express cooperation and results in conclusions based on larger concepts of justice, the former is a common and acknowledged aspect of the Court's decision-making process, used to interpret or improve legal norms.

Equity is used in ICJ jurisprudence to guarantee that the law changes and adapts to new situations while remaining fair and relevant. It does, nonetheless, continue to be bound by legal standards, offering a compromise between legal certainty and flexibility. *Ex aequo et bono*, on the other hand, provides the most freedom at the expense of legal consistency and predictability, which is why it is a less used instrument.

Conclusion

The dynamic changes in international relations and the ever-evolving character of international law will probably continue to influence the future of equity and "ex aequo et bono" in ICJ practice. The harmony between justice and legal certainty will continue to be a major focus of the Court's jurisprudence as it negotiates these difficulties.

A thorough foundation for the Court's decision-making is provided by Article 38 of the ICJ Statute, which combines fairness principles with legal requirements. By providing the ICJ with essential flexibility in case adjudication, the notions of equity and "ex aequo et bono" enable it to reach just conclusions in circumstances when rigid legal norms would not be sufficient. These ideas are nonetheless essential to the Court's mission to administer justice in the international legal system, notwithstanding their restricted and often controversial implementation.

Article 38(2) of the Statute of the International Court of Justice has purposefully limited the scope of the concept of equity by restricting its application in two ways: first, by incorporating the concept of ex aequo et bono rather than the more general concept of equality; and second, by stating that the same applies when the parties have agreed to it. If the same had not been done, the entire legal system would have been unstable at various points. In exceptional circumstances, Article 38(2) of the aforementioned statute is invoked to achieve justice. The importance of limiting the scope to "when the parties agree to it" is that the principles sometimes require a departure from the conventionally established rules of law, which can be risky and dangerous. Thus, Article 38 of the International Court of Justice's Statute has two aspects, both of which are equally important in delivering justice on a case-by-case basis.

In ICJ jurisprudence, equity and ex aequo et bono are two separate ideas that function differently and serve different goals. Ex aequo et bono gives the Court a way to settle conflicts based only on fairness, disregarding the law, whereas equity enables the Court to reach just decisions within the confines of the law. Though they do so in different ways and with distinct consequences for international law and state relations, both ideas highlight the ICJ's dedication to justice.