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The Role of Equity and Jus Cogens Rules in International Disputes Settlement

Soraya Rostami
Payam Noor University, Alborz, Tehran

Abstract: Due to increasing international disputes and variety environmental circumstances on them cannot be always recognized use of substantive regulations solution for lawsuit settlement. And so a degree of flexibility is necessary in disputes settlement system of international and achievement to this is not possible without use of equity. The presence of international community indicate the presence of international Jus cogens rules but logically to that international law is like a legal system, guide the international community to their real home, support from the essential and basic interests of the community should be more considered.

Key words: Jus cogens rules, equity, fundamental interests, the settlement of disputes, the international law commission

INTRODUCTION

Given that, according to the testimony of history, generic justice was not alone responsive and yet inequitable is a wound that will never heal, always (equity) as a tool to reducing the maximum distance between pure legal justice and real equity in the essential cases is considered. Needless to say that law is inspired by equity have will greater compliance and compatibility with nature of followers and magistrates and lawgiver of legal community. So, whenever detailed applying of substantive regulations to be considered contrary to justice, sense of being equity advocate of judge will avenge with implementation of existing legal rules. Despite, disagreements leading jurists throughout history about the justice and its related fields. In general, this notion as a undeniable component is identified in the legal community, especially in the international community as an element of dynamic and flexible in line with the power of convincing electors issued, easier execution of issued decrees, enhancement ease of use and references reliability been considered always acceptable and even necessary.

Because to be perfect international regulations that introduction of globalization is its have created shortcomings and justice has been proposed as a solution to solve this problem. Because the justice to warrant its nature cannot be from high accuracy and what in a case is considered to equity, it is possible in other cases appear to be contrary.

Already, within accurate framework of legal rules be not organized and this essence of equity forms in its efforts to sovereignty of real justice. Many of lawyers and experts in the field of international law today believed that Jus cogens rules, the most basic foundations is of modern international law. While this rule with such incomplete metamorphosis from internal law entered into the realm of international law and that is why from the beginning proposing it's during the formulation of the Vienna Convention on the Law of Treaties has been always the target of many serious criticism on behalf of lawyers and some of the countries. Today fewer jurist who does not think the rule of banning the use of force or the many of important rules of international law are not part of Jus cogens rules and in a sense it can be said that most the existence of this rule of international law consider a trivial matter and sometimes without any hesitation or rules that have very important as called Jus cogens rules (Convention de Vienne sur le droit des traits, 1969, Arts, 53). While concept of Jus cogens rules of the foundation, place is serious doubts of some lawyers and experts.

MATERIALS AND METHODS

The first part (equity)

Function of narrow concept of equity: Considering that basically being equity is including the most basic reasons for referring to a judicial court, authorities originally and essentially in all their proceedings are required to comply with justice and equity. But that the documentary what has always been debated. Previously in the literature of international law whenever speaking of equity was ex aequo et bono came to mind or at least a general and turbulent sense of equity took place. While separate

functions of two species of equity while separate functions of two species of equity in the modern literature on international law, these two concepts will be studied in isolation from one another.

Narrow concept of equity: Interpretation of international court of justice from concept of equity narrow (equity) is more eloquent than any words: (certain sense of equity as a legal concept is direct expression of an idea of justice and the court that its ultimate task is administration of justice, it is committed to its applying. In addition in when applying of the substantive international law a court from between multiple interpretations of a law may adopt an interpretation in the light of circumstances and conditions of the case under investigation seem to the justice closer. Equity is placed mostly against strict rules of substantive laws and to modification of this severity in order to achievement to justice is used and is a general principle that directly as a law is applicable. Equitable principles employing is distinct from decision based on paternalistic principles. The court such decision only if an agreement of parties can adopt. The court is obliged to applying equitable principles as part of international law as well as establishment of several interrelated considerations that is to create a equity result can be considered.

In view of the ultimate goal of proceedings process, equity as a combination of rights and moral board of judge and a justice creator component, regardless of the techniques of pure legal and in considering to all circumstances relevant to case in order to achievement to real justice is be considered.

However, despite being equity to law because its implies being different in different cases from before capability of versify have not in framework of legal rules. That is why that Schwebel, former judge the court has commented: (what is equity such as climate of Hague is variable). Based on what was said should not was make this common mistake that law and equity are at odds with each other to warrant of Judge equity consideration, procedural resources reflected in context should be contemplate them substantive resources-including religious roots, moral, geographical, economic and moral. And with the help of these considerations, the stringent and sharp angles compliance (Andreas *et al*., 2006). Despite all the differences of opinion most lawyers specific the concept of equity under paragraph (C), the first paragraph of Article 38 of the statute of the court, one of the (general principles of law recognized by civilized nations) (Nations general principles of law recognized by civilized) is considered and and thus they know it's as a major and needless source from consent of the parties (Janis, 1984).

In fact, although, from the beginning, the statute editors were complainant play a direct and mandatory role of equity in the court's decisions because of deep difference in perceptions from equity and also its political burden, it's as completely independent source in international law which have identified following of these principles (White, 2004).

Worth noting that justice belongs to the general principles of law can be examined from two perspectives: first, equity was inspired for some of the general principles of law and in spite of an independent life of these principles, the main essence are equity. Including these (principles of equity) can be noted to the principle of reciprocity and Ghaedi Astapl that of course the discussion does not consider this aspect of equity (White, 2004). Second, equity, itself as a general principle of law has directly cited capability. And even when no general legal principle extracted of equity does not applicable can be prevented with citing to itself equity from the injustice occurrence in international law. Of course, this issue also has opponents Rousseau, Visscher and Chemillier. In short (equity specific concept) through adjustment and adaption of principles and rules and concepts with the issues, facts and circumstances of each case for its circumstances has been assigned proper importance and can them to balance and it's not only not diminished justice but also it is caused by its amplification.

So, whereas equity is not a procedural independent source. It is cannot replace statute law and merely as inseparable criteria from its certain consequences and results, especially in the interpretation of legal rules imposes on them (Andreas *et al*., 2006).

In the end, stating this point that from the equity in applying this role to (spirit of the law) against deficiency of law is be interpreted (Nelson, 1990), it is worth mentioning that although in specific rule conflict (such as treaty or convention) and the general rule (such as general principles) will be preference a specific rule. But it seems equity as (case expression of justice) in the role of moderating, the result caused by applying a legal rule, simply by particular rule its own is retractable.

Modification and adjustment of legal rules: (Modification and adjustment of legal rules) (Infra Legem) as the first function of equity is adjustment of result due to the applying existing rules of statutory law (ne plus Rule) (Summun Jus) have foreign objectivity. Many lawyers have emphasized to consideration to cases in the light of environmental circumstances. Equity in conducting such performance can be seen mainly in when interpretation or

application of regulations that most prominent example of this case is principles and opinions concerning the delimitation of the sea (ICJ Reports, 1969, North sea continental shelf cases: ICJ Reports, 1989, Delimitaion of Maritime Boundary in the Gulf of Main Area: continental shelf).

Despite opposing theory (Hudson, 1943) to warrant judicial precedent and the dominant doctrine of applying and equity interpretation of international regulations is the duty of proceeding reference but about the needless to lawsuit parties consent in applying of equity this aspect there is a consensus (Akehurst, 1976). In adjustment process of result equity, first reference of dispute settlement pays to recognition of lawsuit case and the circumstances governing to it. Then is determined the ruling law and in its light and the ultimate result will be achieved, relative communication and value of all components circumstances highlights. At this point, given to circumstances, the environment on the case made the necessary adjustments as a result of the rule and it applies to hypothetically. Hypothetical enforcement of the rule in order to that the result caused by enforcement of legal rule and equity principles necessarily will not be equity and therefore it is essential that it result also is tested. If the result caused by hypothetical applying of the rule does not seem equity, this sense to be understood that legal justice and the real justice were not coincided with each other and it can not to this way action to vote issue. So, it should be according to governing law and principles of equitable, end result was adjusted in a way that seem be equitable. Of course international practice in response to that whether investigating authority is able to contemplation in practical implementation of its sovereign or not give a positive response (Rosenne, 2006).

It is clear that legally, dispute parties to the are free who are do whatever they want under the circumstances related to cite fair considerations. The relevant authority shall all relevant circumstances, even in the absence of the parties cite as far as it could see and consider. After consideration of all the circumstances, reference only pay its attention to those circumstances that thinks in terms of achieving a fair outcome related to the case were contentious and are useful and opinion of reference, determinant this will be a which set of circumstances as relevant equitable considerations must be effective. After determination of relevant circumstances should each value of them it varies from case to case-that by specifying of their importance in comparison with other cases ascertained. Therefore, since every rule have tolerance different interpretations of acceptable in terms of its legal basis, the basic applacation of equity this role in the interpretation of the legal rule becomes clear. Equity can be used to determinant of the interpretation which best protection from the purpose laws. In this regard, investigating authority in light of the circumstances of the case must resort to equity nearest interpretation to the demands of justice, adopt. Of course provided that beyond a rational interpretation process has not been placed for example, modification, updating in the law of statutory not count (Andreas *et al*., 2006).

In response to the question whether in adjustment process to reach a equitable result can exceptionally refuse from applying the principle or rule governing there is no single opinion. But overall on contingency, conscious the nature of international law and priority of requirements of international security based on justice, it can be said the final result must still be drawn from the rule itself because (the issue is not only finding a equitable solution but also is finding equitable caused by of Governing Law. Otherwise, even if the result is equitable at least in terms of achievement to it's would be the rule contrary. In this regard, if the parties have agreed in advance on how to interpretation, the board of dispute settlement cannot be heed equitable solution against the them explicit will (Schwarzwnberger, 1971). In response to critiques (Lauterpacht, 1977), it is evident that according to legal principles govern on settlement of international disputes and status of jurisdiction, none of the subjects were told not imply that the board of dispute settlement could reach the conclusion that it is incapable from explaining its logical foundations (Nelson, 1990). Goodwill and respect for the dignity of dispute settlement jurisdiction, they are bound and obliged to that refrain from expressing of reasons for their decisions and them decisions are well reasoned are reasonable adopt and declare (Schewarzenberger, 1957).

RESULTS AND DISCUSSION

Jus cogens rule: Article 53 of the Vienna Convention on Law of Treaties of by saying the fact that international community entire of countries should accepted and recognized Jus cogens rules and any attempts to resort to the doctrine of natural rights as a source of Jus cogens rules is sterile and this point has been confirmed that: (Natural laws and moral principles of international can not a form source of Jus cogens rules unless the in form of substantive rules have been replaced) (Akehurst, 1976).

In fact, Jus cogens rules are substantive rules and this common will of the international community countries that will determine countries allowed be to a violation of a specific rule (this will also have to its positive that such a rule is a rule of general international law and that this rule

is the countries international community generally are recognized as indispensable rule. In essence, the concept of Jus cogens rules requires additional consent) (Hannikainen. Lauri, "Peremptory).

Although, no one has claimed that the list of sources of international law embodied in Article 38 of the statute of the court is monopolistic, despite the Jus cogens rules nature and in terms of necessity of additional satisfaction in the formation of its (as a distinct source of international law had not independence of intrinsic and occur through other resources). These rules like other rules of international law result from the side will of governments, (such a rule could be the result of the evolution of a former rule a rule that was already possessed such a trait and on the other hand at the Vienna conference also about the fact that Jus cogens rules can be from sources other than contractual rights and customary law as a source of Jus cogens rules limit as it Article 53 of the Vienna Convention (acceptance) refers to aspect of the contractual and identification to customary aspect of Jus cogens rules.

Modification and change of Jus cogens rules: The dynamics of the legal system is undeniable necessity a necessity which the existing rules to keep pace with developments in advance and prevent from them rigidity and obsolescence. Although, Jus cogens rules have utmost stability. Despite, this being mandatory of a rule will not be in contradiction with the dynamics and evolution of certain channels. For this reason, because laws cannot stay away from the realities of a society, obsolete rules have to be modified or non-woven to cope with the new requirements (Moussa, 1956).

Articles 53 and 64 of the vienna convention on the law of treaties confirmed that the Jus cogens rules have character dynamic and such as the all legal rules be transformed. In this Article 53 stipulates that Jus cogens rules only one next rule with characteristics same can modify (the international law commission with the purpose of having (conduit international law) (in Article 19 of the draft state's international responsibility, demonstrated that such a situation may change in the future) (Rosenna, 2006). But how change to Jus cogens rules? The Vienna convention without that answer to this problem is given, only declares that change of a peremptory rules only through a next rule that have the same characteristics can be achieved. Because of the silence of the Vienna Convention and being poor of international precedent in these cases, this context has been arena of international lawyers. Some believe that (theoretically as far as are concerned to modifications of Jus cogens rules through customary, procedural that in order to make such a change takes steps, itself contrary to Jus cogens rules was available and is invalid). It is clear that the invalid cannot be origin of the rule). However, practically realization of such subject an in decentralized the realm and relationship of countries an area that international community consists of the members its also in the current substantive international law has no legal personality of independent from its members does not seem impossible (if a country or group of countries to adopt a procedure that contrary to the contents of a Jus cogens rules is established, it procedure dose not protest or punish member states of the international community, on the contrary, if most countries resort to its, then a new general customary rule rather than the previous Jus cogens rules is placed and the nature of its peremptory terminate the previous rule) (Moussa, 1956). In the field of resorting to general assistance to modification and change of Jus cogens rules, some to believe that: because such of treaty at the time of the conclusion would be in conflict with of Jus cogens rules that is seeking to its change from this aspect would be invalid. Hence treaties cannot change technically Jus cogens rules) (Sinclari, 1984). But let us not forget that can conclude practically general treaty and previous Jus coven's rules eliminated. Because basis of previous Jus cogens rules has been general consensus between member states of the international community and if attribution of such consensus to new rule, previous rule become without basis and deos not play an inhibitory role in against new rule because the will of the international system followers have been placed on end of life previous rule or modification (it is worth noting once this assumption is very unlikely that a new peremptory norms conflicts one shot 180 degrees with the previous peremptory norms because according to the nature of peremptory norms that support the vital interests of the international community's, the idea that these benefits are subject to change at any moment is very improbable. Vienna Conventions to introduce possibility of conflict outbreak between international peremptory norms have created this concept that international public order is not fixed. It is clear that in order to obviation of peremptory norms have to be changed discipline and transformation of the discipline requires structure transformation of international community. Otherwise as long as sovereignty of states is suchlike taken root in the structure of the international community, the international community has the capability and capacity of the current peremptory norms). Article 53 of the Vienna Convention which provides: Jus cogens rules of general international law is a rule by which international community whole as a inevitable rule has been accepted and recognized,

immediately in order to remove the thought that such a rule is eternal expresses the opinion that: a Jus cogens rules having next rule of general international laws is adjustable with characteristics same. In fact not being permissible of violation from Jus cogens rules allocated to non-mandatory rules and is not generalize to Jus cogens rules Jus cogens rules (This important point also to note that the effect of Peremptory Norms is not limited to treaties. In fact, if we can not violates from peremptory norms with treaty, thought first way can not be by imposed unilaterally or acts leave, it violated. This come back to basis of peremptory norm that is same maintenance of public order. For example, the rape of a country more than a mere conclusion of a treaty for mass destruction, international public order the disrupt. Being invalid of treaties conflicting with peremptory norms is mainly due to the adverse effect of the implementation its treaties and otherwise a treaty itself before implementation is a piece of study. Article 53 of the Vienna Convention, however, pointed out that peremptory norms in general and has not been attention to violation. For these reasons peremptory norms after their introduction in the treaties laws, developing and qualifying into international international criminal affairs arena where the actual executive guarantee and effective will be granted to peremptory norms. However, to achievement to this end is still a long road ahead). It is enough that new Jus cogens rules (in terms of time) subsequent to the former Jus cogens rules and in terms of material and thematic) have unity with the previous rule (Moussa, 1956).

In lawsuit relevant to America military and paramilitary operations against Nicaragua, the united states argued that the customary law, considered be Jus cogens rules (Jaenicke, 1984). Hence, court vote should in this way interpret that the difference between content of the two rules is not such an extent to basis of rule reaches but also the difference is more in how to implement the rules. The court also pay attention to this point and lyrics that: differences that there is between the content of these resources, according to the court is not so that a warrant based on customary international law has no effect or makes inappropriate or is a warrant that is not enforceable that followable. It seems that the court purpose from such phraseology in addition to note to relatively similar basis of principle of non-use of force in the realm of of customary law and contractual, obviation of this doubt that despite the united state's reservation toward to multilateral treaties, mechanisms of implementation of the Tribunal order namely paragraph 2 of Article 94 of the charter is still adducible. This is result of distinction between the applicable rules of international law and scope of jurisdiction of the court because there is no evidence that with the disputes arising from multilateral treaties excluded from jurisdiction territory of the court, exception that due to conflict with the statute of the court deemed to be therefore, affiliated with to united nations Charter without credit. Moreover, with the consent to the arbiter (consent in object) has been accepted mechanism of execution of the arbiter (consent of in object apparatus).

Procedures international court of justice regarding Jus cogens rules: International law commission by entering the Jus cogens rules of international in Vienna conventions in 1969, 1986 years, practically determination of the content and meaning of this rule has entrusted the to government performance and judicial procedures. Especially given that in paragraph one of Article 66 of the 1969 Vienna Convention, this recognized that about implementation or interpretation of Articles 53 or 64, any party can to cause a written plea a dispute pose in order to take decisiones in the international court of justice. Despite the fact that judicial procedures and governments procedure were poor and is not much decisive and clear, we believe that the absence of cases that are pergnant of cite to Jus cogens rules can not be considered due to the absence of these rules. However, there are cases that can be our decongestant to extract the comments that are equitable reasonable. In Treaty of Amity between the soviet union and Iran, dated February 26, 1921 that to soviet union has been granted the right to military intervention in Iran after the Islamic revolution by the Iranian government in part concerning to the military intervention right was nullified due to a fundamental change of the circumstances of time conclusion of the treaty, however some believe that Iran is beyond this words taken into account Jus cogens rules. In 1979, legal adviser of Foreign Minister of America in the draft document that presented had said that Treaty signed between the USSR and Afghanistan dated 1978 has been in conflict with Jus cogens rules contained in paragraph 4 of Article 2 of the charter and are invalid (Cassese and Weiler, 1988). Well as national tribunals courage in this case has been considerable. Sometimes, domestic courts have recognized existence of Jus cogens rules in public international law: for example, the federal court of Germany Constitution in 1965 explicitly noted to the rules that are essential for the existence and life international law and deeply rooted in legal consciousness of countries (Frowein, 1984). Clearly, It is known that governments and tribunals of national in cited to the Jus cogens rules of international have shown little hesitation but the international court of justice in this arena to have spent conservatism and cautiously has stepped. This court

caution is justified more for this reason that the proposed dispute by resorting to the existenace rules of customary and contractual have been solvable and the court due to ambiguity in the concepts and examples of Jus cogens rules is not seen need to resorting of them. In fact, the court entry of the window despite being open, it is irrational. However, if we follow coherently the court procedures we will realize that the court has a certain elegance and slowly has stepped towards acceptance of the doctrine of Jus cogens rules (Anonymous, 1969, 1984, 1985, 1991, 1993)

In the North sea continental shelf cases the court when examining the relationship between the rules of general international law and contractual rights stated that without being have intention for enter in to topic of Jus cogens rules in practice, it is clear that can be from the rules of international law violate through agreements.

Interestingly, the court in this paragraph from the its vote to offer examples concerning to the obligations erga omnes, articulates instances (aggression the prohibition of mass destruction the prohibition of slave dealing-prohibition of discrimination) that they can be considered international Jus cogens rules without which the court has made clear boundary between the two concepts. In principle, the only rules that impose general obligations can become a Jus cogens rules.

This means that any Jus cogens rules entact necessarily kind of general obligation of violation that it is not permissible. But any erga omnes obligations were not necessarily Jus cogens rules and can be violated through agreement of international law founction two. The Vienna Convention also in forms of in Article 53 among the generality of obligation and its being peremptory is distinguished. In the case about united states diplomatic and consular staff in Tehran, the court stated that: inviolability principle of agency staff and diplomatic missions places have a fundamental characteristic and the Iran government legal obligations in this case have nature of imperative. Certainly, the court practically avoided from applying the infrangible obligations term, although its using were not essential. While the majority of writers and procedures for countries confirms that the principle of non-use of force is a peremptory rule, however, itself the court should not be this issue review and approve. This the court conservatism has not been immune from criticism. Judge Singh believes that: the court should be emphasized this that principle of non-use of force belongs to the realm of Jus cogens rules and is cornerstone of effort to create peace in a world full of controversy and chaos. In addition, the fact that to the Court was given this opportunity that sources of international law mentioned in Article 38 of the Statute of the legal principle adapt by non-use of force which the international community view was clearly intended in 1946 (I.C.J. Reports in 1986). Kamara judge also believes that the principles of non-use of force, non-intervention as a result of the equality of states, the right of nations self-determination are not just the obvious principles of customary international law but also are including jus cogens rules. However, the court found did not mandatory in cite to peremptory norm and with the handling to customary international law and their laws general principle under the burden of obtaining being peremptory principle of non-use of force, saved. But the mere mention the peremptory norm in the court vote to debate those who have strongly denied this doctrine will end. And it is not unlikely that the court in its subsequent rulings to identification and independent establishment of their rules (Schwarzenberger, 1957).

CONCLUSION

Equity is one of the main requirements of a modern systematic society that has been always played roles in the international arena laws adjustment, completion and correction in the form of a legal source. Existence of equity in international disputes settlement system for many reasons such as elimination of the generalities weakness of substantive laws, development of international law and grant freedom of action to address authorities are legitimate. And objections are incur also on its such as arbitrary exercise of subjective judgment and fear, reluctance and mistrust of followers towards the implementation of decisions the possibility of rape to international security as well as the unpredictability of votes.

Jus cogens rules that have basis of customary, contractual or customary-contractual that ensure compliance with the general interests of the international community and as such violations instead of by the international community is prohibited. And in this respect a violation of them by the international community is prohibited. Necessity additional satisfaction in the formation and development of these rules prove their substantive. In fact, there is not special and independent source other than the existance sources of international law to establishment of principles and fundamental or peremptory rules does not exist. And on the other hand still have not been ordered legally independently. Because (no society can not be without existance at least the basic principles that superior value in its legal system, continue to existance) the presence of the international community indicates the existence of international jus cogens rules but logically to the fact that international law

is like a legal system, the international community will lead to his real home, the protection of fundamental and critical interests of the community should put more than before focus.

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