Judicial Rule-Making and the Role of Equity in the English Common Law Tradition: Historical and Contemporary Perspectives

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INTRODUCTION

The English common law tradition, which encompasses several distinct sub-traditions, is one of the two major legal traditions of the contemporary world. Like the civil law tradition, it too has had a remarkable influence around the world, having been adopted by a large number of countries, including countries that are socially and culturally very different from England. The development of the common law in England has occurred gradually over a long period of time. This law may be regarded as the law which developed from a central justice system, and which was common to the whole country. This is contrasted with the local or provincial laws which were unique to a particular area or region. The latter existed before the emergence of the common law and,

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in some instances, continued to apply alongside it. The common law was administered largely by the monarch and his or her representative courts. This law is typically identified with case-based law, a body of legal rules and principles developed through the decisions of judges. This system of judge-made law is dependent on a hierarchical court structure, where decisions of higher courts are binding on lower courts according to the principle of precedent (*stare decisis*). The common law, as it evolved in this sense, is distinguished from statute law, which is the law contained in legislative enactments. In more recent times, in England and other common law countries statute law has become not just an authoritative source of law, but the dominant source of law, especially where no cases can be found governing the issue at hand, or even where decided cases do exist. Furthermore, common law, understood as the body of law created by the royal courts, or the common law courts, and developed as case law in England, is distinguished from the body of rules and principles of equity, as established by decisions of the courts of equity, which began to be developed from around the fourteenth century. The first part of this paper offers a general overview of the historical origins of English common law tradition and identifies some of the principal factors that contributed to its development. The second and third parts of the paper consider in more detail the rise and growth of equity, assess its relationship with the common law and comment on its role in contemporary law.

TRACING THE HISTORICAL ORIGINS OF ENGLISH COMMON LAW: AN OVERVIEW

At the end of the eleventh century there was little to distinguish the law in England from that of Germany or northern France. Although England had been a Roman province for more than three hundred years, after the invasion of the Angles and Saxons Roman law was superseded by Anglo-Saxon law-a species of Germanic folk-law. The law codes of Ethelbert of Kent (*c.* 600)[1], Ina (*c.* 700)[2] and Alfred (c. 890)[3] were of largely the same character as the Continental ***leges barbarorum***, although, unlike the latter, they were written in Anglo-Saxon and not in Latin. In general, the substance of the law in England, like elsewhere in northern Europe, consisted mainly of unwritten customary law[4] that was supplemented or superseded in some particulars by canon law. The country was divided into shires (later referred to as counties), which were subdivided into hundreds and vills (small townships). There was a court for each shire and each hundred (these courts were known as communal courts), as well as seignorial courts held by local lords for their free tenants. The latter were 'private enterprise' courts running at a profit taken from

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1 This code, as preserved, contains ninety brief sections dealing with punishments for various wrongs.

2 This code consisted of seventy-six sections in the form of 'dooms' or penal judgments.

3 This compilation, known as 'The Laws of King Alfred', contained about 125 sections in all. It draws on earlier Saxon laws as well as on various biblical sources.

4 Customary law comes into being if particular norms and standards for behavior are traditionally used in a society and are experienced as binding. Customary rules are used by judges and other legal decision makers.

court fees, and providing justice that was backed by the lord's military force. The shire court was held periodically and was presided over by the sheriff, who acted as a representative of the king. The hundred courts had jurisdiction only over a particular locality and dealt with minor matters, as compared to those that fell within the jurisdiction of the shire courts.

The immediate effect of the Norman Conquest of England in the second half of the eleventh century (1066) was to intensify the trend towards particularism by increasing the number of franchise and manorial courts, and through the reintroduction of the old principle of personality of law in favour of the Norman element of the population. However, the strong interest of the Norman kings in administration and their efforts at centralization gradually led to the creation in England alone in the West of a strong central government that was capable of imposing a uniform legal system on the whole country. At first, the Norman kings used the existing courts, but soon they began to send their own judges around the country to hear cases locally. This practice enabled them to control the country more efficiently. Moreover, it allowed them to enter into competition with the local courts for the fees paid by litigants. To attract litigants from the local courts, the royal courts began to introduce new and better methods of trial, which proved so successful that eventually all law courts came under royal control. An important benefit of having a dispute adjudged by a royal court was that such court's judgment was more likely to be properly enforced than when a case was decided by a local court.

King Henry Ⅱ (r. 1154–1189), with a view to strengthening royal power, divided England into regional circuits and began regularly to send judges around the country to hear and decide cases. The king sought to

gain the trust of his subjects not by imposing laws on them, but by resolving disputes in accordance with local customs fairly administered by the circuit judges, who performed their duties, which included the supervision of local administration and the collection of taxes, in connection with certain commissions. There were three types of commission: *gaol delivery, Oyer and Terminer* and *assize*. The commission of gaol delivery empowered the judges to try all persons found in gaols.[5] Under the commission of Oyer and Terminer (literally 'to hear and determine' a case), the judges were authorized to try all criminal cases involving treason, felony or misdemeanour committed in the county. The commission of assize empowered the judges to try civil cases. As a general rule, civil cases were tried at Westminster but, as a matter of convenience to the parties, trial was allowed to be held in a local court.[6] The early judges were clerics but in the course of time, as the legal profession developed, the commissions were issued to lawyers. At first, the circuit judges decided cases by applying local customs, which they discovered with the help of a jury. However, the judges could refuse to apply customs which they considered to be unreasonable and would discuss the merits of the various customs in existence at Westminster, approving certain customs and condemning others. When a local custom was recognized as being valid by a court, it became a general rule of the law. Through this process, the judges eliminated customs deemed inappropriate or outdated and gradually brought about the unification of

5 It should be noted that at this time imprisonment was not regarded as a form of punishment.

6 A case would formally set down for hearing at Westminster 'unless before' (*nisi prius*) it came up for trial at Westminster, it had been heard locally.

customs, thus creating a new body of law common to all in application, the common law.[7]

As the common law began to take shape and the judges were beginning to travel the circuits, there came into existence the courts of the common law. The early Norman kings ruled with the help of an assembly of nobles and leading clergy called the *curia regis* (king's court).[8] The *curia regis* was a legislative, administrative and judicial body, the supreme central court that transacted all the business of the central government. It was from this body that the common law courts emerged in the thirteenth century to carry out certain duties. The first common law court to break away from the *curia regis* was the Court of Exchequer, which was principally concerned with taxation disputes.[9] The second court, the Court of the Common Pleas, was established at Westminster to carry out the same duties as the judges on circuit.[10] This court was

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7 Today, it is common to distinguish judge-made case law from customary law as a source of law. However, this distinction has not always been clearly made. The customary character of customary law consists partly in the fact that judges and other adjudicators follow the custom of applying these rules. Customary rules can come into being, or are confirmed, if they are actually used in legal decision making.

8 The Norman *curia regis* was similar in constitution and function to the Anglo-Saxon *witan*-the council of the Anglo-Saxon kings.

9 The Exchequer was the Treasury Department of the Monarchy. In the course of tax collecting many disputes would arise over feudal dues owed to the Crown, and it was from decisions given in connection with these disputes that the jurisdiction of the Exchequer gradually emerged.

10 King Henry Ⅱ appointed five members of his *curia regis* to hear disputes between the king's subjects. This measure was probably intended to relieve the *curia regis* from some of the burden of the judicial work, especially where it did not affect the king directly.

essentially the court for pleas between subject and subject. Whenever one subject sought a remedy for a wrong committed by another subject, and not involving a fine to the king, action lay only in the Court of the Common Pleas. The third court, the Court of King's Bench, the last of the three courts to break away from the *curia regis*, followed the king in his travels around the country. It was the only one of the three to have criminal jurisdiction and, in the course of time, it became the most important.[11] The bulk of English law as it developed during this period was not the product of legislation but of the work of the royal courts using their decisions as precedent.[12] In contrast to what happened in Continental Europe, where the unification of customs was realized through codification, in England the unification of customs was realized through the work of the courts.[13]

The royal courts, described above, developed a rigid system of rules and principles, not only in relation to legal procedure but also with

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11 Just as the new royal courts had competed with the local and feudal courts for business in earlier times, so the above-mentioned common law courts competed among themselves because the judges and other officials serving on these courts depended for their incomes on the fees paid by litigants.

12 Reference should be made here to the introduction of law reporting (probably in the 13th century). This was a significant development which enabled the opinions and decisions of the courts to be recorded for continued reference. Law reporting made possible the consistent development of the law by means of the doctrine of precedent. Through this doctrine legal rules and principles developed from cases and were applied to situations with similar facts.

13 It should be noted here that in addition to the central courts, there continued to be the local administration of justice within the different communities.

respect to the actions through which claims could be brought. An action at common law commenced by the issue of a document known as a *writ*.[14] This was obtained from the chancery office, which was headed by the Chancellor, the king's chief advisor and principal administrative officer. The writ was a formal document containing an allegation of a wrong and directing the sheriff to summon a jury to hear the dispute. It was, in other words, a kind of permission form entitling the common law judges to hear and determine a matter. Writs were at first issued only in special cases to meet exceptional circumstances. Something took place that led the king, through the Chancellor, to give a command in writing to a royal official or to some lord who held a franchise court, and this command in writing was the writ. Until the mid-thirteenth century the Chancellor was free to issue writs as needed and there was no restriction on their wording. However, this practice had come to an end by the fourteenth century, as it was considered that too many grounds for claim had been developed. From that time the Chancellor could issue writs only when the facts of the case were similar to those of a previous case for which a writ had been issued. There were different writs for different claims: e.g., the writ of right to recover land; the writ of debt, to recover money owing; and the writ of trespass, to complain of a breach of peace. The clerks of the chancery office kept precedents of the writs issued and unless a complainant could bring his complaint within one of the forms of writ recorded in the *Register of Writs* he could have no remedy. Since an action could not be brought without a writ, it became established that the only kinds of harm for which one could seek redress in law were

14 See in general, F. W. Maitland, *The Forms of Action at Common Law* (Cambridge University Press, Cambridge, 1976; first published 1936).

those that could be described within the narrow and unyielding language of some recognized writ.[15] If a plaintiff was successful in his action, he was usually awarded damages, in other words, the defendant had to pay him a sum of money fixed by the court. There was a limited right of appeal if an error occurred. The common law developed largely through argument by lawyers and judges about the nature and scope of the writs, the circumstances in which a writ should be issued and the remedies it should entail.[16] In general, however, the system of writs as a method of pleading was restrictive and the relevant rules, as derived from reported cases, were strictly applied without exception. The effect was that the common law resulted in much injustice.[17] As we will see

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15 A simple illustration of the difficulty caused by this highly technical system can be seen from the following example of writs available for wrongs against chattels: (a) A damages B's book: *writ of trespass to goods*; (b) A borrows B's book for two weeks but then informs B that he will not return the book until six months later: *writ of detinue*; (c) A borrows B's book and then sells it to another person: *writ of trover*. In each of these cases a wrong was done to B's property. In (a) B's enjoyment of his property was unjustifiably interfered with; in (b) B was deprived of possession of his property; and in (c) B's right of ownership was denied. Each writ had its own rules of procedure (e.g., time limits, rules of evidence, hearing requirements, etc.).

16 By the early fourteenth century the judges were appointed from among the senior advocates who argued cases before the royal courts. These advocates, called by different names at different times (serjeants-at-law, barristers), formed together with the judges an elite group of learned lawyers. The development of English law has been conditioned to a considerable extent by the political, economic and intellectual environment of this group.

17 As a commentator has remarked, "it was better said the judges to suffer a mischief in an individual case than the inconvenience which would follow from admitting exceptions to general rules." J. H. Baker, *An Introduction to*

later, it was in response to the common law's shortcomings that the system of equity was developed.

We might say, at this point, that three strands of influence can be traced in the early development of English law. The foremost place must be attributed to the function of the *curia regis*, the king's court that transacted all the business of the central government. There is nothing in the contemporary history of Continental European law that can be compared with the creative activity of this court in the fashioning of the writ system.[18] Second in importance is the Roman and canon law that came to England in the twelfth century. Thirdly, there is the customary law that survived the Norman Conquest and continued to be applied by local courts. These latter two sources were those that formed the substance of the private law in much of Continental Europe. The fact that above all others helps to explain why the common law as it evolved in England represents a distinct system from the civil law is the relatively slight influence that these sources had on the content of English law. The history of English law has been marked not by the reception of a foreign system of law and its fusion with native customs, but instead by the growth of a body of rules fashioned by the king's justices and developed by their successors in which neither Roman law nor the customary law was a decisive influence. The development of common law rules occurred largely through the creation of exceptions to

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English Legal History (Butterworths, London, 1979), 70.

18 The writ system was formally abolished around the middle of the nineteenth century (by the Common Law Procedure Act). However, the common law, as cast in the form of the writs, remains present through case law. The writ system and its formalism may have disappeared, but much of its content and spirit still exists.

existing rules, which themselves became fixed and rigid. The rigidity of the legal process, the need to conform to the framework that had been developed and the centralized court system, all helped to mould the diversity of local customs and practices into a common law, i.e. a law that was followed by the entire country.

It should be noted here, however, that for a century and a half after the Norman Conquest it was by no means obvious that England was destined to develop a distinct legal system. The effects of the revival of Roman law studies in Italy in the eleventh century were also felt in England. Indeed, it is not unlikely that Lanfrancus, a teacher of law at Pavia and subsequently Archbishop of Canterbury, contributed with his knowledge of Roman law to the administrative and legislative reorganization of the country. The first known teacher of Roman law in England was the Glossator Vacarius, who arrived in the country in the middle of the twelfth century. Vacarius taught at Oxford, where he composed for the instruction of his pupils his famous *Liber pauperum*, a nine-volume compendium of Roman law based on the Code and the Digest of Justinian.[19] Vacarius' success raised the fear that Roman law would be received as the law of the land and provoked a sharp reaction from the monarch, who was disturbed by the implication in Roman law of imperial sovereignty. The barons, too, opposed the prospect of Roman law reception since in their eyes Roman law provided a foundation for royal absolutism. Thus, King Stephen prohibited Vacarius from teaching at Oxford and in 1234 Henry Ⅲ forbade the teaching of Roman law in London. Two years later the barons, gathered in Merton, rejected a

19 See F. de Zulueta (ed), *The Liber Pauperum of Vacarius*, (Publications of the Selden Society 44, London 1927).

proposal by bishops to adopt the Roman law principle according to which children born before the marriage of their parents should be counted as legitimate, on the grounds that they did not wish to alter the laws of England (*Nolumus leges Angliae mutare*). The position that was finally adopted corresponded to the practice of the courts and encouraged the autonomous development of English law. Nevertheless, Roman law concepts continued to exert some influence on English legal doctrine. This influence is clearly reflected in the two most important legal treatises of this era, namely Glanvill's *Tractatus de legibus et consuetudinibus regni Angliae* (Treatise on the laws and customs of the Kingdom of England) of 1187, and Bracton's treatise of the same title, written about seventy years later.

Glanvill's work, which records the law of the time of Henry Ⅱ (1133–1189),[20] is partly based on the preface and introductory chapters of Justinian's Institutes, and various Roman legal institutions are referred to or contrasted with relevant English rules. More importantly, the work "shows that Roman law has supplied a method of reasoning upon matters legal, and a power to create a technical language and technical forms, which will enable precise yet general rules to be evolved from a mass of vague customs and particular cases."[21] Bracton's treatise, written in the reign of Henry Ⅲ (1216–1272),[22] was also clearly influenced by Roman

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20 Glanvill was at various times Sheriff of Lancashire and of Yorkshire, Justice in Eyre and a general in Henry's army. In 1180 he became Justiciar of England, or Chief Minister of the Crown.

21 W. S. Holdsworth, *Some Makers of English Law* (Cambridge University Press, Cambridge, 1938), 15.

22 Bracton became a Justice in Eyre in 1245 and, three years later, one of the judges of the Curia Regis. Like many other royal judges of that time,

law, which came to him through the Glossator Azo. The scope of his work was similar to that of the French works on customary law, which were being published at the same period. Just as the French writers filled out the customary law with importations from Roman law, so Bracton supplemented the meagre and inadequate rules of the common law in fields such as the law of personal property and the law of contract by borrowings from Roman sources. Furthermore, Bracton used Roman concepts and distinctions to describe, classify and explain the writs and actions through which the royal courts administered justice.[23] His work is a testament to how far the common law of England had progressed: new writs and forms of action had been introduced, and the common law had gone far towards displacing local customs.

The two centuries following Bracton's death saw a sharp decline in the influence of Roman law in England. Though it continued to be studied at the Universities of Oxford and Cambridge, it had little effect on the common law itself. Undoubtedly, the causes were manifold and, in part, political. But one of the principal factors was the fact that English judges and lawyers received their professional training at the Inns of Court and not at the universities. The Inns of Court were self-governing societies, products of the medieval spirit of corporate organization that

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he was an ecclesiastic and at the time of his death in 1268 he was Chancellor of the Exeter Cathedral.

23 As S. E. Thorne observes, "[Bracton] was a trained jurist with the principles and distinctions of Roman jurisprudence firmly in mind, using them throughout his work, wherever they could be used, to rationalize and reduce to order the results reached in English courts." See ***Bracton on the Laws and Customs of England*** (Belknap Press of Harvard University Press, Cambridge Mass. 1968), 33.

had manifested itself in the trade guilds. Much about their origins is unclear, but they probably began as hostels in which those who practiced in the common law courts lived. These hostels gradually evolved a corporate life in which benchers, barristers and students lived together as a self-regulating body. The student members were required to take part in moots, attend lectures and study law under the supervision of their seniors.

The common law exhibited two characteristics in this period: in the first place, it tended to become more fixed and rigid in substance; and, secondly, the rules governing legal procedure became more complex and technical. The legal works of this period consist almost exclusively in commentaries on the writ system, and the legal education imparted in the Inns of Court was concerned primarily with giving to students an accurate knowledge of the procedural law in whose interstices substantive law was still firmly embedded. Such Roman law as was introduced came not through the courts of common law, but through the ecclesiastical and admiralty courts, and through the Court of Chancery, which owed its origin to the growing rigidity displayed by the common law. At the same time, the growth of the forms of action around which the law of tort and contract later crystallized meant that the fields of law that on the Continent succumbed most readily to the influence of Roman law were secured to the common law.

The sixteenth century was probably the most crucial period in the history of the common law. In the early part of that century the common law came under increasing attack. Many influential voices were raised against it, and there were calls for a wholesale reception of Roman law such as was taking place at the same time in Germany and other parts

of Continental Europe.[24] But the common law stood its ground. Four key factors contributed to its survival. First was the character of the Tudor monarchs, who preferred to refashion the medieval institutions of the country and adapt them to the altered conditions of the age rather than to root them out altogether.[25] Second was the fact that new courts, especially the Court of Chancery and the Court of Star Chamber,[26] addressed many of the deficiencies of the common law.[27] Thirdly, the continuity of the common law was secured by Coke's restatement and

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24 F. W. Maitland has brilliantly related the story of the sixteenth century pressure of Roman law in England in his *English Law and the Renaissance* (Cambridge University Press, Cambridge, 1901; rep. 2000 by The Lawbook Exchange Ltd, Union, N.J.).

25 This may be explained by the fact that the principles of the common law constituted at the same time principles of the constitution, and to abolish them entirely would have amounted to a revolution rather than a resettlement.

26 The Court of Star Chamber evolved from the king's Council. In 1487, during the reign of Henry Ⅶ, this court was established as a judicial body separate from the Council. The court, as structured under Henry Ⅶ, had a mandate to hear petitions of redress. Although initially the court only heard cases on appeal, Henry Ⅷ's Chancellor Thomas Wolsey and, later, Thomas Cranmer encouraged suitors to appeal to it straight away, and not wait until the case had been heard in the common law courts. In the Court of Star Chamber (as in the Court of Chancery) all questions were decided by the court itself, and the granting or withholding of relief was in the discretion of the court and not regulated by rigid rules of law. The Court of Star Chamber was abolished in 1641, but its better rules were taken over by the King's Bench and became a permanent part of the law of England.

27 As F. W. Maitland noted, "were we to say that equity saved the common law, and that the Court of Star Chamber saved the constitution, even in this paradox there would be some truth." *The Collected Papers of F.W. Maitland* (Cambridge University Press, Cambridge, 1911), 496.

modernization of its principles in the early seventeenth century. And, finally, there was the vital role played by the Inns of Court, and by what Maitland has described as 'the toughness of a taught tradition'.

Since the time of Edward Coke (1552–1634) the common law has never been under serious threat in England. However, the absence of a formal reception did not result in a total absence of impact of Roman law on English law. For instance, Roman law was of some assistance to Lord Mansfield (1705–1793) in the development of English commercial law, and judges have occasionally relied on it, whether in equity or at law, when an analogy was in point. Moreover, elements of Roman legal terminology were incorporated in English law. Nevertheless, although Roman legal concepts and doctrines have been woven into the fabric of English law, neither the corpus nor the structure of the latter can be said to be Roman.[28]

THE RISE AND DEVELOPMENT OF EQUITY

Legal systems often begin with general rules formulated to deal with the

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28 As H. E. Holdsworth has remarked: "We have received Roman law; but we have received it in small homoeopathic doses, at different periods, and as and when required. It has acted as a tonic to our native legal system, and not as a drug or poison. When received it has never been continuously developed on Roman lines. It has been naturalized and assimilated; and with its assistance, our wholly independent system has, like the Roman law itself, been gradually and continuously built up by the development of old and the creation of new rules to meet the needs of a changing civilization and an expanding empire." *A History of English Law*, 7th ed. (Sweet and Maxwell, London, 1956–1966), Vol. Ⅳ, p. 293.

majority of society's disputes most of the time. In England in the period following the Norman Conquest, the body of rules known as the common law developed to serve this function. As previously noted, these rules were non-statutory, of a general nature and common to the whole country. By the end of the thirteenth century, the central authority had established itself in England—a development in which the centralization of the legal system and the common law courts that grew out of the king's council (*curia regis*) played a significant part. In the course of time, the common law courts assumed a distinct institutional existence. However, with this institutional autonomy there emerged also an institutional sclerosis, reflected in the reluctance of the courts to deal with matters that were not or could not be processed in accordance with a recognized form of action. Thus, it was often not possible for a wronged person to obtain help from the courts because no suitable writ was available, or because the remedy offered by the common law was inadequate. Such a refusal to address substantive injustices because they did not fall within the prescribed parameters of procedural and form constraints led to injustice and, at the same time, gave rise to the need to remedy the perceived weakness of the common law system. In England the development of equity responded to this need. The equity system was erected to address the gap "whenever the common law might seem to fall short of [the] ideal in either the rights it conceded or the remedies it gave."[29]

Equity, in a general sense, is understood to mean fairness or justice and, as such, it is regarded as having a central place in law in so far as

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29 F. Kitto, Foreword to *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed. (Butterworths LexisNexis, Sydney, 2002), at v.

the principal attribute of good law is that it is just. In a narrow sense, the term 'equity', as used in legal philosophy, is contrasted with strict law (*ius strictum*). Once a legal rule has been settled, it is the task of the judge to apply it, but not to question it, for justice demands certainty in the application of the law. However, no system of law can provide rules capable of achieving justice in all circumstances, because all the possible variations of circumstances can never be foreseen. The essence of a legal rule is that it should be of general application, i.e. binding in all cases within its scope. But as a society grows and becomes more complex, cases inevitably arise which the general rules of the system are unable to address. One method of dealing with this problem is to enact new legislation. However, changes in law are not always readily achievable by legislation, especially when a legal system is at an early stage of its development. In such circumstances, resort to equity, as distinguished from strict law, becomes necessary. As Sidney Smith explains:

> A legal principle, in whatever period, aims at establishing a generalisation for an indefinite variety of cases. Uniformity and universality must characterise it and these are essential qualities in it. [The Greek philosopher] Aristotle, in calling attention to the fact, stated that legal rules are necessarily general while the circumstances of every case are particular, and it is beyond the power of human insight to lay down in advance a rule which will fit all future variations and complications of practice. He concluded that law must be supplemented by equity, there must be a power of adaptation and flexible treatment sometimes resulting in decisions which will even be at variance with formally recognised law and yet will turn out to be

intrinsically just.[30]

Aristotle described equity (*epieikeia*) as not different from justice, but as a better form of justice and as "a correction of the law where [the law] is defective due to its universality."[31] An equitable decision is considered just because it is what the lawgiver would have decided under the particular circumstances of the case, if he or she had been present. The conception of equity (*aequitas*), in contrast with strict law (*ius strictum*), occupied an important place in the history of Roman law[32] and there are several striking similarities in the English and Roman approaches to equity. Interpreting legal rules in a liberal and humane spirit, modifying the strict and formal law in the interests of justice, supplementing and expanding the scope of existing rules, preventing the abuse of legal rights and remedies are all fundamental requirements of equity that must have a place in every system of law. In England, when the common law was only beginning to take shape, the law was itself capable of modification to meet the needs of justice and, therefore, there was no need to resort to equity as an independent source. Furthermore, even after many rules of the law had become settled, early common law judges at times administered a general equity concurrently with the law

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30 S. Smith, "The Stage of Equity" (1933) 11 (5) *Canadian Bar Review*, 308 at 310.

31 Aristotle, *Nic. Ethics*, Bk. 5, chap. 14.

32 Cicero's definition of the *ius civile* as 'the equity constituted for those who belong to the same state so that each may secure his own' (*Top.* 2. 9.), and the renowned aphorism of the jurist Celsius '*ius est ars boni et aequi*': 'the *ius* is the art of the good and just' (Digest 1. 1. 1. pr.), are obviously inspired by the concept of equity as an abstract ideal of justice and as a touchstone of the norms of positive law.

by mitigating the strict legal rules in particular cases. However, as the legal system grew in complexity, the difficulty which was experienced in the common law courts in relation to the use of writs and the forms of action led to increasing dissatisfaction with the system.

Four main shortcomings of the common law system can be seen as the principal stimuli for the rise of equity.[33] First, as previously observed, a plaintiff could only sue at common law if his or her complaint was covered by an existing writ or form of action. However, as the writs that were available addressed only a relatively narrow range of situations, a wronged person was often unable to obtain help from the common law courts because no suitable writ existed and therefore no action could be brought. Even if the plaintiff's case fell within this range, the absence of a discretionary power on the court's part meant that in some cases justice could not be achieved. Secondly, the general and inflexible nature of the common law meant that it could be employed to obtain unconscionable or unjust results.[34] Thirdly, to many medieval people the common law courts seemed easily influenced by the powerful or wealthy. And, fourthly, plaintiffs were often deprived of a remedy on account of a defendant defying the court or intimidating the jury, an injustice to which the common law had no response. Faced with one or more such difficulties, a wronged person's only option was to petition the monarch, who was regarded as 'the fountain of justice', to exercise his

33 P. M. Perell, *The Fusion of Law and Equity* (Butterworths, Toronto, 1990), 4.

34 According to some commentators, people deliberately employed the common law to achieve unconscionable outcomes. This may not in fact have been the case, however. It seems more likely that unconscionable outcomes were simply the unfortunate result of the strict application of the common law.

extraordinary judicial powers and provide him with a remedy. Such petitions would state that on account of a deficiency of the type above-mentioned the petitioner was unable to obtain a remedy at law. The petition would then appeal to the king for a remedy on the grounds of 'conscience' or 'for the love of God and by way of charity'. Some petitioners specified the desired remedy, such as, for example, the discharge of a mortgage, the enforcement of a trust, or the restraint of a stranger proposing to interfere with an executor's possessory rights.

At first, the majority of petitions were heard by the King himself.[35] In the course of time, the king began to refer these requests for help to the Lord Chancellor, his chief secretary and a leading member of the royal council. The early Chancellors were usually senior ecclesiastics and, although they were not professional lawyers, their prominent position in the royal court must have given most of them some acquaintance with the rules of English law. The Chancellor's department, the chancery, was closely connected with the administration of the law, and it was from this office that the writs were issued. In the course of the fourteenth century it became customary for petitioners to go directly to the Chancellor and, in time, the Chancellor came to be considered as

35 Certain classes of petitions were however referred to the king's most important official, the Chancellor. One such class was those where the alleged wrongdoer was the King himself such as, for example, where the king had possession of land that had been seized as an escheat (the term escheat refers to the reversion of property to the king or the state in the absence of legal claimants) but in fact the late tenant of the land had left an heir. The common law failed to provide the heir with a means of recovering the land. To recover it, the heir had to petition for it, and such petition was addressed to the Chancellor.

conducting a court. In the Statute of 1340[36] a Court of Chancery was mentioned alongside other courts of the time and, in a petition presented in or about 1400, the Chancellor is acknowledged as holding a court.[37] By Tudor times, the Chancellor's court was a firmly established institution and an integral part of the English legal system.[38] From that time onwards the large majority of chancellors were lawyers. The Chancellor did not act like a common law judge, but instead developed his own type of law called equity. It should be noted here that in earlier times, when Chancellors were ecclesiastics, the notion of equity meant fairness or justice in a broad sense; in later times, when Chancellors were lawyers, equity acquired a more technical meaning and came to refer to the body of rules and principles created by the Chancery court. However, the fundamental distinction between equity and the common law remained unaffected by this development. In the course of time, a number of Chancery courts were set up so that for several centuries two systems of law existed side by side in England: the common law, which was administered by the common law courts, and equity, which was administered by the Chancery courts.

It is important to stress at this point that the Chancellor had jurisdiction both in equity and the common law. However, with respect to the latter his jurisdiction was limited to: (a) certain types of writ; (b) cases which directly concerned the king; and (c) personal actions brought by or against offices of the Court of Chancery. The Chancellor's equitable

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36 14 Ed Ⅲ St 1 c 5.

37 See R. P. Meagher, W. M. C. Gummow & J. R. F. Lehane, *Equity: Doctrines and Remedies*, (2nd ed., Butterworths, Sydney, 1984), 4.

38 It should be noted that until the nineteenth century the chancellor was the sole judge in the Court of Chancery.

jurisdiction was considerably greater. It involved, among other things: (a) the recognition of uses and trusts; (b) the enforcement of contracts on grounds not recognised by the common law; (c) relief for unfairness resulting from the strict enforcement of legal rights; and (d) the granting of remedies non-existent or existent but unavailable at common law. Proceedings in the Chancery court were considerably different from trials in common law courts. Common law proceedings were initiated by the issuing of a writ and the issues of fact were tried by a jury, without any evidence being heard by the parties themselves. If the verdict of the jury was for the plaintiff, the judgment usually awarded him damages. In the Court of Chancery, on the other hand, proceedings were not initiated by a writ, but by a petition to the Chancellor. The Chancellor then issued a *writ of subpoena*, which was a command to the defendant to appear before him to answer the allegations made. When the defendant and the plaintiff appeared before the Chancellor, the latter questioned them closely and at length in order to arrive at the truth.[39] If the Chancellor felt that one party was acting against his conscience, he would order him to put matters right by doing or abstain from doing something. If the party refused, he was confined in the Chancellor's prison until such time as he decided to clear his conscience and abide by the Chancellor's order.

The basic tenet on which the Chancellor conducted his court was "conscience". Relief was therefore given on the basis of the Chancellor's individual perception of justice and how the parties' consciences should

39 From the time of King Henry Ⅵ (1421–1471) written answers were allowed, and in the sixteenth and seventeenth centuries a regular course of procedure based on written pleadings was adopted.

be bound by it.[40] However, the notion that the Chancellor's task was to correct the rigidity of the common law, guided only by a moral ideal, was obviously incompatible with the development of settled rules. The absence of any controls on the exercise of this discretion in administering justice led equity to be described as "a roguish thing". In the words of John Selden,

> Equity is a roguish thing; for law we have a measure, know what to trust to. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. [It is] as if they should make the standard for the measure we call a foot a Chancellor's foot; what an uncertain measure would this be ! One Chancellor has a long foot, another a short foot, a third an indifferent foot. [It is] the same in the Chancellor's conscience.[41]

However, although the Chancellor had without doubt a very wide degree of discretion, it would be incorrect to suppose that there were no limits to his powers. Especially from the sixteenth century onwards, the sphere of the Chancellor's discretion became steadily less extensive and the arbitrary and discretionary nature of equity was mitigated by adherence

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40 As stated by Lord Ellesmere in 1615: "The cause why there is a Chancery is for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every act and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs, and oppressions of what nature soever they be, and to soften and mollify the extremity of the law." *Earl of Oxford's Case* (1615) 1 Ch Rep 1; 21 ER 485, at 486.

41 F. Pollock (ed.), *Table Talk of John Selden* (Selden Society, London, 1927), 43.

to precedent and principle. This process is referred to as 'the systemisation of equity'.

The relationship between common law and equity

Records show that in the thirteenth century many of the remedies awarded by the courts of equity were remedies that were being awarded by other courts too, including those of the common law. Moreover, it appears that it was not uncommon for the Chancellor to sit with or seek the advice of common law judges.[42] However, this cooperation between the courts of common law and equity was not destined to last. In the course of the fourteenth century, the courts of common law adopted a strictly normative approach to the resolution of legal disputes (*rigor juris*), discarding notions of conscience and equitable discretion.[43] With this change in direction, the separation between equity and the common law became marked and conflict inevitably arose. This conflict developed because with respect to certain matters common law and equity had different ideas as to how the problem should be resolved. An arrangement known as the *use* offers an example of how a dispute could arise between common law and equity. In some parts of England, the rule prevailed that when a tenant died the land passed to his eldest son,

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42 See R. P. Meagher, W. M. C. Gummow and J. R. F. Lehane, *Equity: Doctrines and Remedies* (2nd ed., Butterworths, Sydney, 1984), 5–6; D. Roebuck, *The Background of the Common Law* (Oxford University Press, Oxford, 1988), 73.

43 By the time of the Tudors and Stuarts, the Chancellor's power to give common law remedies had been removed.

but the son in turn had to give some money or a farm animal to the landlord. However, if the tenant gave away his rights over the land, nothing had to be given to the landlord. Therefore, some tenants, before they died, gave away their rights over their land to a friend who promised to permit the son to use the land after the tenant died, so that the son would get the benefit of the land without having to surrender anything to the landlord. This arrangement was referred to as a *use*. The common law courts refused to recognize the existence of uses and thus, from the viewpoint of the common law, the friend had rights over the land in question, whilst the son had nothing. However, the Chancery courts adopted a different approach to the matter: they recognized the common law rights of the friend, but stated that such rights had to be exercised in accordance with his conscience. This meant that if the friend refused to let the son benefit from the land, the Chancery court would confine him to prison until he decided to clear his conscience by allowing the son his rights. Furthermore, if the son was successful in an action in a common law court, this would be of no benefit to him, as a Chancery court would imprison him if he sought to take advantage of it. Therefore, the friend had to fulfil his promise to the deceased father. In these circumstances, it was said that the friend had a 'legal interest', whilst the son had an 'equitable interest'.

At the close of the sixteenth century the conflict between common law and equity came to a head in connection with the Chancellor's practice of issuing injunctions, an equitable remedy awarded to prevent successful but dishonest plaintiffs at law from enforcing unconscionable judgments given in their favour in common law courts. Chief Justice Edward Coke of the common law courts attempted to assert the supremacy of the common law by holding that imprisonment for

disobedience to a common injunction was unlawful.[44] In reply Lord Ellesmere, Chancellor at the time, declared in the *Earl of Oxford's Case*[45] that injunctions interfered with the common law in no way at all. Rather, their effect was *in personam*, directing the individual concerned that on equitable grounds the action at law should not proceed or the judgment at law should not be enforced. A personal dispute sprang up between Coke and the Chancellor, who finally appealed to the King, James I. The latter, acting on the advice of Bacon and others experts in the law, decided that where equity and the common law were in conflict, equity was to prevail. As a result of this decision, the supremacy of the Court of Chancery was established and the importance of equity increased.

Whilst the role of equity remained unchallenged, its application became increasingly regulated through a system of rules and principles based on precedent and gradually developed by a series of Chancellors, all of whom were lawyers as opposed to the ecclesiastics of the earlier era. This so-called 'systemisation of equity' is reflected in, among other things, the classification of trusts, the development of the modern rule against perpetuities, the formulation of the doctrine of specific restitution and the creation of the doctrine of the equity of redemption. In 1673 Lord Nottingham declared that "the conscience of the Chancellor is not his natural and private conscience but a civil and official one."[46] By the nineteenth century, the period of systemisation was complete. As Lord Eldon, the last of the great Chancellors involved in the systemisation

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44 *Heath v Rydley* (1614) Cro. Jac. 335; *Bromage v Genning* (1617) 1 Rolle 368; *Throckmorton v Finch* (1598) Third Institute 124, 125.

45 (1615) 1 Ch Rep 1; 21 ER 485.

46 Quoted in S. Smith, "The Stage of Equity" (1933) 11 (5) *Canadian Bar Review*, 308 at 315.

process, pointed out in 1818:

> The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.[47]

In his *Commentaries on the Laws of England*, written in the middle of the eighteenth century, Blackstone remarked:

> The systems of jurisprudence in our courts both of law and equity are now equally artificial systems, founded in the same principles of justice and positive law; but varied by different usages in the forms and mode of their proceedings: the one being originally derived (though much reformed and improved) from the feudal customs; the other (but with equal improvements) from the imperial and pontifical formularies, introduced by their clerical chancellors.[48]

The relationship between common law and equity was now one between distinct but not opposing systems of rules, even though differences

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47 *Gee v Pritchard* (1818) 2 Swan 402, 414.

48 W. Blackstone, *Commentaries on the Law of England* (Garland Publishing, London, 1978) Ⅲ, 429 ff.

between the two systems, most notably procedural, remained in place. The following statement by Maitland can provide a useful starting-point in understanding this relationship as perceived in the nineteenth century:

> We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient system, [for] at every point it presupposed the existence of common law. Common law was a self-sufficient system. I mean this: that if the legislature had passed a short Act saying "Equity is hereby abolished", we might have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one's good name, the rights of ownership and of possession would have been decently protected and contracts would have been enforced. On the other hand, had the legislature said, "Common Law is hereby abolished", this decree, if obeyed, would have meant anarchy. At every point equity presupposed the existence of common law.[49]

As this statement suggests, the relationship was such that equity acted as a supplement to the common law—"[A] sort of appendix added on to our code, or a sort of gloss written round our code"[50], as opposed to a competing or opposing system of law. According to Megarry and Wade, "equity, although it followed the inevitable course towards fixity and dogma, remained in general a more modern and flexible system than the

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49 J. Brunyate (ed.), *Maitland's Equity* (2nd ed., Cambridge University Press, Cambridge, 1936), 18–19.

50 Ibid, 18.

common law. Originally it provided the means, needed in every legal system of adapting general rules to particular cases, and this character was never entirely lost."[51]

In the previous paragraphs, we have seen that the English common law was built as a complete and independent system of law. Equity, on the other hand, developed as a means to remedy the shortcomings of the common law and so it presupposed the existence of the latter system. As has been noted, in its earliest days, equity was understood to refer to fundamental requirements of justice and fairness. However, by the nineteenth century it had become a rigid set of rules standing side by side with the rules of the common law, but administered by a different set of courts.

The Judicature Acts of 1873 and 1875 and the administrative fusion of law and equity

The nineteenth century was the century of law reform in England. There were many unsatisfactory features in the administration of justice system at this time. The jurisdiction of the various courts overlapped; the procedure used in the common law courts was out of date; and the Courts of Chancery were overburdened with cases and very slow in carrying out their work. In the 1850s the Parliament endeavoured to ease the position by legislation, but the relevant measures achieved limited success.

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51 R. Megarry and H. W. R. Wade, *The Law of Real Property* (5th ed., Stevens and Sons, London, 1984), 111–112.

One of the main difficulties arising out of the division between the common law and equity was equity's lack of jurisdiction to resolve disputes about legal rights, titles and interests. This lack meant equitable relief could not be obtained until or unless: (a) a legal right was admitted; (b) a legal right was already established by a judgment at law previously obtained; or (c) the case had been sent to the common law courts to be tried by a jury.[52] Another difficulty arose from the fact that equity had no power to award damages in the sense in which they were awarded at common law. It could award monetary compensation on a restitutionary basis for the infringement of an equitable right. However, a plaintiff could not get an award of damages where he or she failed to establish title to an equitable remedy sought. This also meant that it was unclear whether the Court of Chancery could award damages in aid of a purely legal right.[53] It should also be noted here that the common law did not have the interlocutory remedies available in equity. Accordingly, to get an order for discovery, interrogatories or any other interlocutory steps in a suit that had been commenced at law, a litigant had to go to the courts of equity. Furthermore, the common law courts had no powers to award

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52 This difficulty was remedied by legislation: The Chancery Regulation Act 1862 (25 & 26 Vict., c. 42), also known as Rolt's Act. Consequently, in an action for specific performance a court of equity could decide whether there was a contract or not. In an action to restrain a trespasser it could determine who had title to the land. Furthermore, in an action for an injunction to prevent an infringement of copyright, the courts of equity could decide whether or not copyright existed.

53 The Chancery Amendment Act, also known as Lord Cairn's Act of 1858 (21 & 22 Vict., c 27) granted the courts of equity the power to award damages in lieu of or in addition to an injunction or an order for specific performance.

specific performance, declarations or common injunctions. The Common Law Procedure Act of 1854 gave the common law courts the power to grant injunctions in addition to damages for breaches of contractual obligations or torts. But it did not give the common law courts power to grant injunctions against infringements of equitable rights. Hence there was still no remedy for the common law's refusal to recognize equitable interests.

In addition to the above-mentioned difficulties, there was a real danger of litigants commencing their action in the wrong court. For example, if a contract contained a mistake, that mistake may have been able to be remedied through a process of legal construction and so a plaintiff could safely sue for damages. On the other hand, it may have been necessary to resort to equity in the first instance for rectification and law in the second instance for damages. Similarly, where a public body failed to perform a statutory duty, it was often unclear whether to request a writ of mandamus at law[54] or an injunction in equity. Moreover, parties often had to go to the common law to determine liability and then to equity for any equitable defences. This was the case for the breach of a contract for the sale of land for which equity provided the remedy of specific performance.[55] This was also the case where the breach was of a stipulation as to the time at which the contract had to be performed. The common law required strict adherence to such

54 This is a prerogative order from a higher court instructing a lower tribunal or other public body to perform a specified public duty relating to their responsibilities, e.g. to deal with a particular dispute.

55 But it was not the case for contracts for the sale of goods, for equity did not provide the remedy of specific performance in respect of such contracts.

stipulations. Equity, on the other hand, alleviated such stipulations as to time unless time had been made the essence of the contract.

The difficulties surrounding the division between law and equity eventually led to recommendations for reform of the English court system. Following a series of minor legislative reforms (regarding, for the most part, matters of procedure) in the mid-nineteenth century,[56] major changes were recommended by the UK Judicature Commission in 1869. This body proposed the establishment of a single Supreme Court in which the jurisdictions exercised by the superior courts of law, equity, probate, admiralty and divorce would be vested. The recommendation was based on the changes that had occurred in the State of New York twenty years before. There, in 1848, the separate systems of law and equity had been combined into one system of procedure and one system of courts. No substantive changes to the law were made.

The recommendation of the Judicature Commission led to the enactment of the Supreme Court of Judicature Acts of 1873–1875. This legislation reorganized the existing court structures completely and, in the process, formally brought together the common law courts and the Chancery courts. In the place of the old courts, a Supreme Court of Judicature, comprising the High Court of Justice and Court of Appeal, was authorized to administer both the common law and equity jurisdictions. In the Supreme Court of Judicature, the three original royal courts became three divisions of the new High Court of Justice; the Court of Chancery, which administered equity, became the fourth division of the High Court; and a fifth division, dealing with matters that

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56 The Common Law Procedure Acts 1852–1852 and the Chancery Amendment Act 1858.

fell outside the ambit of the common law or equity, namely Probate, Divorce and Admiralty, completed the new arrangement. By Order in Council in 1880, the three royal courts were merged to form the Queen's Bench Division, thus leaving the three divisions of the High Court, i.e. Queen's Bench, Chancery and Probate, Divorce and Admiralty.

The Judicature Acts placed on a statutory foundation the old rule that where there is a conflict between the rules of equity and the rules of the common law in relation to the same matter, the rules of equity shall prevail. At the same time this legislation gave power to all the courts to administer the rules of common law and equity and to grant the remedies they provided, as the case before them demanded. This meant that litigants who needed help from the common law and equity could henceforth obtain both kinds of help in one and the same court. This arrangement led many people to believe that the two systems had merged. As commentators have remarked, however, the enactment of the Judicature Acts did not entail the elimination of the distinction between equity and the common law, or between equitable and legal rights, interests and titles.[57] The fusion of law and equity achieved by the passing of the Judicature Acts may be described as procedural, as no substantive merger between the two bodies of rules was effected.[58]

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57 See, e.g., R. P. Meagher, W. M. C. Gummow and J. R. F. Lehane, *Equity: Doctrines and Remedies* (2nd ed., Butterworths, Sydney, 1984), 45 ("there was nothing in the Judicature Act which attempted to codify law and equity as one subject matter or which severed the roots of the conceptual distinctions between law and equity"); P. V. Baker, "The Future of Equity", (1977) 93 *Law Quarterly Review* 529, 531.

58 As has been pointed out, "The two streams of jurisdiction [that is, law and equity], though they run in the same channel, run side by side and do not mingle their waters." D. Brown (ed.), *Ashburner's Principles of Equity*

Nevertheless, subsequent developments in the law have been such that, according to some commentators, there has been a gradual coalescence of the two streams over time and on matters of common concern. As Sir Anthony Mason has observed, "by providing for the administration of the two systems of law by one system of courts and by prescribing the paramountcy of equity, the Judicature Act freed equity from its position on the coat-tails of the common law and positioned it for advances beyond its old frontiers."[59] The first point to be made in this regard is that the abolition of the distinction between law and equity and legal and equitable rights, interests and titles need not be absolute. Lord Selborne, in the course of introducing the Judicature Act to Parliament, appears to have recognized this, when he described the distinction between law and equity as "real and natural" only "within certain limits."[60] The above statements appear to lend support to the school of thought which believes that, increasingly, common law and equity are fusing and mingling their remedies and procedures. It has been argued, for example, that common law remedies, in the form of damages, may be awarded for the violation of an equitable obligation. Alternatively, a common law

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(Butterworths, London, 1993), 18. This approach appears to gain support from the exclusive jurisdictions left to the Queen's Bench and Chancery divisions. As a matter of fact, the work formerly conducted by the Court of Chancery is exactly that dealt with in the Chancery division. A Chancery case remains something quite different from a common law case, and the same can be said with respect to procedure.

59 "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World", paper delivered at the *Second International Symposium on Trusts, Equity and Fiduciary Relationships*, University of Victoria, British Columbia, 20–23 Jan. 1993, at 10.

60 Hansard, 3rd Series, vol. 214, 339.

defence may be raised against an equitable claim. It is important to point out here, however, that the notion that law and equity are fused or merged remains highly controversial in some common law jurisdictions.[61]

EQUITABLE PRINCIPLES AND REMEDIES

As previously noted, in many cases it was not possible for a wronged person to obtain redress for a wrong from the courts of the common law. This might be so because the law was flawed in that no remedy existed, or because the form of remedy the common law provided (damages) was unsuitable. Equity emerged to meet these needs. Equity is said to be more flexible than the common law. It is based on a series of basic principles expressed in general terms, in contrast with the common law, whose rules are couched in a very rigid and relatively narrow manner. Because of the general character of equitable principles, and the underlying philosophy drawing on concepts such as conscience, justice and fairness, there is very rarely conflict between equitable principles. From the large number of equitable principles developed by the Court of Chancery to provide guidelines as to how the equitable jurisdiction

61 For example, in Australia the position prevails that the doctrines and remedies of equity are clearly distinct from those of the common law. Indeed, some authors call the notion of the fusion of law and equity the 'fusion fallacy', See on this matter R. P. Meagher, J. D. Heydon, M. L. Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, (4th ed., Butterworths/LexisNexis, Sydney, 2002), 54. In New Zealand, by contrast, the Court of Appeal has adopted the view that, with respect to remedies, it is now settled that equity and the common law are merged. See, e.g., *Mouat v Clark Boyce* [1992] 2 NZLR 559.

should be exercised, a few will be mentioned here:

(i) *A person who seeks equity must do equity*. A claimant must act fairly towards the defendant and abide by any reciprocal orders issued by the court.

(ii) *Equity will always allow a remedy for a wrong*. This principle makes it possible for equity to intervene where a legal technicality prevents a right from being enforced at law. This principle is in effect the basis of the development of law through judicial interpretation.

(iii) *A person who comes to equity must come with 'clean hands.'* This means that equity, in dealing with a claim, will consider whether the claimant has acted fairly in the matter for which he or she is seeking relief. If the claimant has acted maliciously, he or she will not be granted a remedy.

(iv) *Equity acts in personam*. Proceedings and remedies based on equity are directed against a particular individual. Rather than an object or property item. If a defendant fails to comply with the remedy, he or she may be prosecuted for contempt of court or have his assets confiscated.

(v) *Equity looks on that as done which ought to have been done*. If the parties have created an enforceable obligation, equity will treat them as being in the position they would be when the obligation is discharged. For instance, if two parties enter into an agreement for the sale and purchase of house, the purchaser will be considered to hold an equitable interest in that house, even if the house has not yet been transferred. This principle provided the basis for an important remedy, namely specific performance.

(vi) *Delay defeats equity*. An equitable remedy may not be granted unless it is requested as soon as possible. This principle is intended to discourage unreasonable delays regarding presentation of claims and enforcement of rights.

(vii) *Equity follows the law*. Equity was never intended to replace the common law or statute law. It will depart from the established law only in exceptional circumstances.

(viii) *Where equities on both sides are equal, the law prevails*. The rules of the common law will be given priority where claimants in equity are able to establish equal rights in the same property.

(ix) *Equity looks to intent rather than the form*. In determining whether a remedy should be granted or not, attention is to be given to the substance rather than the form of the relevant transaction. Intended transactions that do not meet formal requirements will be enforced where the justice of the circumstances requires it.

(x) *Equity is equality*. There is a presumption of equal division where wo or more people are able to establish that they have an interest in the same piece of property.

(xi) *Where equities are equal, the first in time prevails*. Equitable interests are ranked in order of time of creation.

(xii) *Equity will not decree a vain thing*. Equity is concerned with making a practical contribution to substantive justice and not with making judgments that cannot or will not be implemented.

The above maxims emphasize that equity has its foundations in fairness and natural justice. Although they have lost much of their earlier significance, judges may still rely on them when determining whether or not to exercise equitable jurisdiction.

In light of our discussion so far, a number of important qualitative differences between the common law and equity can be identified:

(1) The flexible and discretionary nature of equity's doctrines and remedies.
(2) Equity's ability to impose terms and conditions.
(3) Equity's dominance over the common law.

Equitable doctrines and remedies are flexible and discretionary in the sense that judges will consider all the circumstances of the case according to established criteria and on this basis decide whether the equity of the case calls for a remedy. The corollary is that while a plaintiff may satisfy the basic requirements of an action, they may nevertheless be denied a remedy on account of the operation of an equitable maxim or defence. An example of the discretionary nature of equity arises in the context of an alleged breach of contract for which the remedy of specific performance is requested. It may be that although the requirements necessary to show a breach of contract are met, the equitable defence of laches (inordinate delay) prevents an order for specific performance being made. The laches defence operates when the plaintiff has delayed in bringing their action to the point where they are taken to have: (a) acquiesced in the defendant's conduct; or (b) caused the defendant to alter his or her position in reasonable reliance on the plaintiff's acceptance of the status quo; or (c) otherwise permitted a situation to arise which it would be unjust to disturb. Further, it may have been that the conduct of the plaintiff in the matter has been improper. If so, the equitable maxim "He who comes into equity must come with clean hands" will prevent an order for specific performance

being made. On the other hand, the common law in general contained no such discretionary criteria in respect of the remedies it could award and thus it could be employed to produce results that were less than equitable.[62]

The ability of equity to impose terms and conditions on both the plaintiff and the defendant when granting a remedy is the natural corollary of the aim of equity to achieve justice in the particular circumstances of each case. An example of equity's ability to impose terms and conditions is the equitable remedy of rescission: the setting aside of a contract, which is thereby treated as if it had never existed. In these circumstances *restitutio in integrum* requires the parties be restored to their pre-contractual status. To achieve this end, equity is able to order an account of profits with terms and conditions that make allowance for the deterioration of the property transferred under the contract. As Goff and Jones note, the application of this doctrine was much stricter at common law prior to the passing of the Judicature Acts in the late nineteenth century.[63]

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62 It should be noted here, however, that the common law has developed to permit some discretion as to the remedy in certain cases. An example arises in the context of the judicial review of administrative action. The common law remedy of certiorari (a remedy in which the High Court orders decisions of lower courts, tribunals and administrative authorities to be brought before it and quashes them if they go beyond the limits of the powers conferred on them or show an error of law on the face of the record) may be denied on the basis of misconduct by the applicant. For example, in the English case of *R v Stephens, ex parte Callendar* ([1956] CLY 2160, The Times, October 26, 1956) an infant's application for the writ of certiorari was refused on account of serious misrepresentations in the mother's affidavit.

63 R. Goff and G. Jones, *The Law of Restitution*, (3rd ed., Sweet and Maxwell,

A third distinctive qualitative difference between equity and the common law was the dominance of equity over the common law in the areas of the common law in which equity had concurrent jurisdiction.[64] The term concurrent jurisdiction comes from Justice Story's division of equity's jurisdiction into three categories: exclusive, concurrent and auxiliary.[65] The exclusive jurisdiction refers to cases where equity alone has jurisdiction to grant relief. Examples are in respect of trusts and fiduciary relationships. The concurrent jurisdiction pertains to matters in which both the courts of common law and equity have jurisdiction to grant relief. For example, cases involving fraud and error. The auxiliary jurisdiction relates to matters in which equity enables parties claiming legal rights to establish those rights more effectively or conveniently than they would otherwise be able to in a court of common law.[66] Examples of such aids are *quia timet* injunctions issued to prevent irreparable damage pending a decision at law. Other examples are bills for discovery or for the perpetuation of testimony designed to facilitate proceedings at law. The dominance of equity over the common law entails that equity would grant common injunctions in certain circumstances to restrain an action being brought or a judgment being executed at common law.[67] Equity's dominance is attributed to the fact

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London, 1986), 169.

64 As previously noted, equity's dominance with respect to the concurrent jurisdiction was settled in the *Earl of Oxford's Case*.

65 J. Story, *Commentaries on Equity Jurisprudence*, (2nd ed., Stevens and Haynes, London, 1892), 19–20.

66 The court will only grant such a remedy if the applicant can show that there is imminent danger of a substantial kind or that the injury, if it occurs, will be irreparable.

67 For some examples see W. J. Jones, *The Elizabethan Court of Chancery*,

that equity's jurisdiction is *in personam* and its origin was as a court of conscience.

Other differences between equity and the common law pertain to equity's treatment of property ownership and other property-related interests. Acting *in personam*, equity recognises property ownership in certain individuals beyond those recognized by the common law. An example is the *bona fide* purchaser of a legal title in property where a third party holds an equitable interest in the property. Provided the purchase is made for valuable consideration and without notice of the equitable interest, the *bona fide* purchaser's rights are upheld.[68] In contrast, the common law acts *in rem*, only providing the *bona fide* purchaser with protection by exception to the general rule that legal ownership is a universal and general right of ownership enforceable against everyone Examples of equitable property interests that were not fully recognized at common law include restrictive covenants[69] and the mortgagor's equity of redemption.

Equity has contributed a large number of alternative actions, principles and remedies to the legal system. One of the most significant legal creations that evolved from the equitable jurisdiction of the courts was the *trust*, which has become an important part of property law. It pertains to a special situation where one person (a *trustee*) holds property on behalf of and for the benefit of one or more other persons (called *beneficiaries*). As a result of the special nature of this relationship, the law

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(Clarendon Press, Oxford, 1967), 442–443,

68 See e.g. *Pilcher v Rawlins* (1872) LR 7 C App 259.

69 A restrictive covenant in an obligation created by deed that curtail the rights of an owner of land. An example is a covenant not to use the land for the purposes of any business.

places very strict duties on the trustee (fiduciary duties), which require that the trustee must always act in the interests of the beneficiaries and should avoid conflict between his or her own interests and those of the beneficiaries. Since, in a trust the trustee is effectively dealing with property belonging to another, there are also restrictions as to the manner in which the relevant property is handled. The powers of the trustee are usually set out in a document called a *trust instrument*. These powers normally include the right to sell, buy, repair and invest the property. A trustee is not allowed to take risks (as he or she might with his or her own property), and if he or she fails to carry out any of the duties laid down in the trust instrument commits a breach of trust and is answerable for any resultant loss.

Furthermore, equity recognized the use of the mortgage as a method of borrowing money against the security of real property. The borrower who offers the security is referred to as the *mortgagor*; the lender who provides the money is called the *mortgagee*. Equity introduced the previously mentioned, 'equity of redemption', that is the right of the borrower/mortgagor to redeem the mortgaged property at any time on payment of principal, interest, and costs, even where there was default under the strict terms of the mortgage deed.

Of the new remedies developed by equity, the most important are considered to be injunction and specific performance. At common law the principal remedy for breach of contract was damages, a money payment given as compensation for the loss suffered. Equity realized that, for many claimants, monetary compensation did not provide adequate relief, and therefore proceeded to introduce the equitable remedies of injunction and specific performance. An injunction is a court order that is granted to prevent a party from acting in breach of his or

her legal obligations, in other words from doing some wrongful act such as breaking a contract or committing a tort. For example, if Thomas sells his business to Alice and promises not to compete, but then opens us a shop next door, Alice will probably not be satisfied with monetary compensation, especially as the amount of her loss would be hard to prove. In equity, she could obtain an injunction (enforceable by the threat of imprisonment) compelling Thomas to close his shop.[70] The remedy of specific performance is an order of the court that commands a party to carry out his or her side of a contract. For instance, at common law where a seller of land refused to convey the purchaser could only get a money award; in equity, on the other hand, he or she could get an order of specific performance compelling conveyance of the relevant land. The remedy of specific performance is granted only if monetary compensation cannot produce the desired result, under the principle 'equity follows the law'. Furthermore, this remedy is not available in the case of donations, under the principle 'equity will not assist a volunteer.'[71]

There are a number of other remedies developed by equity that are regarded as having a significant effect on substantive rights. These include the right to have a contractual document corrected by a process known as 'rectification'; and the right to rescind or withdraw from a

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70 A distinction is drawn between ***prohibitory injunctions***, prohibiting a person from doing or continuing to do a certain act, and ***mandatory injunctions***, ordering a person to carry out a certain act. A person who fails to abide by the terms of an injunction can be found guilty of contempt of court.

71 As a result of the Chancery Amendment Act 1858, s. 2, if the court grants an equitable remedy, it can still decide on damages instead of performance or damages in addition to performance.

contract. Written contractual documents were considered to be conclusive of the parties' legal rights; however, if convinced that such a document misstated the parties' true intentions, the court of equity would 'rectify' the document, that is, put it right. Furthermore, whilst at law it was considered irrelevant that an agreement was unfair or harsh, the courts of equity would 'rescind', that is, annul, an agreement for 'unconscionability'—a degree of unfairness that affected the Chancellor's conscience. Moreover, an innocent misrepresentation leading to the conclusion of a contract was irrelevant at law, but equity would grant rescission for misrepresentation on the grounds that it was unfair for a person to profit by a statement that he or she at the time of litigation knows to be false. Notwithstanding the rigidity that had entered the system of equity by the nineteenth century, one can still detect the operation in contemporary common law systems of the general principles of fairness and good conscience cutting through the complexities of legal rules and procedures.

CONCLUDING REMARKS

The role that equity has played in the development of the English common law tradition cannot be overstated. Here we have an example of a system of general rules and principles, developed organically and over time by courts, which was able to address successfully many of the manifest injustices that arose in the common law legal system. Moreover, these general rules and principles developed from a system that at first appeared to be too vague to be able to administer objective justice to a system of principles, which while flexible, were nonetheless sufficiently

concrete to support a system of justice that became increasingly predictable and uniform. Every system of law must embody elements of certainty, stability and predictability on the one hand, and elements of flexibility, fairness and justice in the individual case on the other. It is a peculiarity of the English common law tradition that these two often competing sets of values were 'institutionalized' in the two systems of law and equity. However, one cannot lose sight of the fact that the system of equity proved unable to maintain its flexibility. The search for stability and order led to rules, principles and guidelines that sought to limit equity's discretion and to make it certain and predictable. In reality, in England, as in other common law jurisdictions, while the import of general principles and maxims of equity has remained, their explicit invocation has gradually waned. This may be attributed to the increasing complexity of the legal system and the fact that the great number of court precedents employing equity and equitable principles to temper the letter of the law has enhanced the quality of legislative output. Lawmakers, wishing to ensure that the letter of the enacted laws is respected, endeavor to ensure coherence with equitable principles, and thus laws are drafted with such principles in mind. However, when clashes occur, as they still do, equitable principles are endowed with the same normative force.

Society requires certainty in the law in order that its individual members may sensibly organize their behavior around the prescribed standards of conduct. However, adequate development of substantive law does not require a rigid application of legal rules. While the virtue of legal certainty cannot be ignored, the objective of having an adequate body of substantive law must be of equal concern. Accordingly, although the principle of precedent must be adhered to, such adherence should

not restrict the ability of the courts to examine the real object and function of the law in a particular area. The law should be developed upon a principled basis and in line with the precedents that have been laid down before. In this respect, historical distinctions between the common law and equity that serve no useful purpose or detract from the real issues at stake in a particular field of the law should not be seen as obstacles. Where rules traditionally classified under different categories may appear to be in conflict or compete, an essential function of the legal system as a whole is to avoid, resolve or rationalize such conflict or competition, not to induce or perpetuate it. It is submitted that, in this respect at least, a case for the substantive fusion of law and equity can certainly be made.