English legal System KL11·E53

How does legislation differ from the common law and equity? Why is it convenient to change the focus of the law to legislation?

Distinguish between common law, equity and legilation as sources of law and consider the importance of these sources in the development of any legal system.

Intro

Common Law ,equity and legislation are all different sources which make help to make up our legal system. They are all very distinct in there operation but yet very complementary in nature. These three sources have played a vital role in our system. The common laws main principle is through the operation of stair decisis while equity has as its base various maxims by which it operates and is often called the most discretionary of the sources. However because of the Judicature Acts and the legal principles by such as separation of powers it will be seen that although these three componets of the law operates differently in nature the all necessary to the smooth running of our legal systems and have contributed greatly thereto.

Legislation means enacted law, the society through its representatives , the legislature and parliament ,decides on the status of the law and simply writes it down in statute. Parliament is the supreme legislative body, this power was confered on parliament by the constitution. Its enactments called legislation are absolutely building on the Courts and all the citizens. This make legislation the most important source of law in the Commonwealth Caribbean. Especially since more codification is taking place in the commonwealth Caribbean and elsewhere in the common law world. Infact in her book Commonweath Caribbean Law and Legal systems Rose-marie Bell Antoine stated that legislation is the main legal source of the future.
Legislation is most popular source of law for the future for a number of reason because unlike common law and equity (whose nature I will disscuss in detail later), Legislation looks inward to itself and does not need to refer to other legal sources.

Crabbe, reflecting on the role of legislation and drafters remarks that legislation is an instrument of change and innovation in any country. **(The Hon. Mr. Justice VRAC Crabbe, Visiting Professor of Law Faculty of Law and Director of Legislative Drafting Programme UWI:**

The common law is a significant source of law in the Common Wealth Caribbean. Its existence is directly linked to the experience of colonization in the region and consequence of the reception and transplantation of law from England the common law is really the outgrowth of historical custom and practices, consolidated by the Norman Conquest when these local customs were unified into one coherent system of law "common to all men" hence the term common law. Its unique characteristic as a source of law is its ad-hoc nature. Its original conceptualization was oral – essentially a body of unwritten legal rules which were formulated by the king' courts in an informal and flexible manner. As the body of common law developed the

common law became more rigid in that judges should only follow a binding precedent even if they though it was bad law or inappropriate, This can mean that bad judicial decisions are perpetuated for a long time before they come before a court high enough to have the power to overrule them. Common law for this reason, unlike Legislation is inherently limited. It can only create or develop new principles by building on the old and by manipulating case law.

It also became identifiable, in that the fact that binding precedents must follow unless the facts of th case are sigificantly diggerent cn lead to judges making minute distinctions between the facts of a precious case and the case before them, so thay they can be distinguished a pecedent which they consider in appropriate. This in turn leads to a mass of cases all establishing diggerent precedents in very similar circumstances, and further complicates the law.
The main advantage of Case law is that it is flexible and capable of infinite growth. It is forged on the anvil of reality and with its practical basis has a wealth of depth and detail. Case Law cannot be detached from the accompanying system of binding precedent which keeps the law free from arbitrariness.

Statute law is certain, though rigid and inflexible. In theory however, Statute law is concise, clear and simple but in practice it often needs the Upper House to declare what Parliament is thought to have intended, although it is possible for Parliament to pass an amending Statute removing difficulties which have arisen over construction and interpretation of a prior Statute .
Statute law is the work of Parliament made in the way of direct legislation. Statute law maybe expressed in general or abstract terms. On the other hand Case law is the name given to that great body of learning which is to be found in the decisions of the Courts. It is law made for the purpose of a judicial decision at common law or in Equity. Case law must be extracted from the cases in which it lies embedded.

Historically the common law courts provided only one remedy, namely damages thus another system of law was developed in an effort to kurb the short commings of common law

When we speak of the common law as a legal tradition we are not only referring to the body of law defined by the common law courts but must also include a body of law which developed in separate and different English courts known as equity. In lay persons language equity means fairness, justice or what is morally just but in a legal sense it is a much more specific concept commonly said to be based on rules of conscience. However, equity is a separate and distinct body of English law which grew up alongside but not together with the common law.

Equity exists to correct the deficiencies in the common law. It may grant remedies even if no strict legal right exists. The only remedy available under the common law was damages, which is payment in money as compensation for a wrong. In some instances a plaintiff did not want monetary compensation. Instead he wanted the defendant to return something such as land or to evict the defendant from the land. This

> propelled the advent of new equitable remedies. These new remedies that equity introduced included, injunctions decrees of specific performance and declaratory judgments. These new remedies are all discretionary. So too were the introduction of new rights and new procedures. Rights created by Equity include the concept of trusts; the equity of redemption in mortgages; the appointment of receivers; the recognition and enforcement of equitable interests in property. New procedures, unknown to the common law, which were developed by Equity included the use of subpoena, the disclosure of documents and interrogatories

However, equity is a discretionary remedy only granted if the court decides that the plaintiff deserves it where as common law remedies are available as of right regardless of the plaintiff's conduct once there is an infringement of his legal right.

As advocated in **Dudley v Dudley [1705] 24 ER 118** "Now equity is no part of the law, but a moral virtue, which qualifies moderates, and reforms the rigors, hardness and edge of the law and is an universal troth it does also assist the law where it is defective and weak. Equity therefore does not destroy the law, nor create it but assists it."

Today, equity is no longer viewed as being merely corrective of the common law but as having an independent existence. As stated in **Gee v Pritchard [1818] 2 Swan Ch 402, [1818] 36 ER** " The doctrines of this court ought to be as well settled and made as uniform almost as those of the common law. ... 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".

The rules of equity today do not reflect its original flexible characteristic. In **Re Diplock [1948] Ch 465** it was said "[If] a claim in equity exists it must be shown to have an ancestry found in history and in the practice and precedents of the courts administering equity jurisdiction. It is not sufficient that because we may think that the 'justice' of the present case requires it, we should invent such jurisdiction for the first time.

Thus one may state that although Equity has a discretionary history, like common law it is fast become very rigid in terms of its application since firstly it must find a case which is almost forunded on similar facts but the complainant must also make sure that he has hot offended one of the maxims of Equity.

Legislation sometimes intervenes to create or extend equitable jurisdiction where the court holds that none exists or it is restricted. **Re Vandevell's Trusts No 2 [1974] Ch 269** Lord Denning said "Every unjust decision is a reproach to the law or to the judge who administers it. If the law should be in danger of doing injustice, then equity should be called in to remedy it."

of his feet. However the Court of Chancellor was inundated with so much business that Vice Chancellors and Masters-in-Chancery had to be appointed. At the beginning of the eighteenth century the rules of the Equity were systematized based on precedent and thus the arbitrary nature of decisions from the Chancery Court was eliminated.

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The general principles upon which the courts of equity founded their decisions are known as maxims in equity. These maxims still express the spirit of equity, although they do not really cover all of the technical rules applicable today. The principal maxims are as follows:-

(a) Equity will not suffer a wrong to be without a remedy. An example of this is the enforcement of trusts, which were not recognized at common law. Another example is the appointment of a Receiver by way of Equitable Execution. The effect of such an appointment is that it does not create a change on the property but operates like an injunction to prevent the judgment debtor obtaining the income or dealing with the property to the detriment of the judgment creditor.

(b) Equity acts in personae. The essence of Equity is the enforcement of moral obligations owed by the defendant to the plaintiff personally. According where the trustee acquires property from the grantor by promising to use it for the benefit of the beneficiary. Equity will compel the trustee to carry out his bargain but the beneficiary's right is a personal moral right against the trustee only. Therefore if the trustee sell the property to X who has no notice of the trust, the beneficiary could not enforce action against trustee for breach of trust.

(c) Where equities are equal the law shall prevail. This means that where both plaintiff and defendant have equally sound moral claims, the strict legal rules will prevail.

(e) Equity follows the law. This really means that Equity will not interfere where a rule of common law applies unless that rule is unconscionable; and secondly equitable interests follows the model of legal interests. This we have equitable mortgages and assignments as well as legal mortgages and assignments.

(a) Equity imputes an intention to fulfill an obligation. This maxim is the basis for the doctrines of performance and satisfaction. Thus where a person is under a duty and does something capable of being construed as performance of that duty, Equity will presume that the person intended to be just before being generous. For example where X dies owing Y $5000.00 and in his will leaves a legacy of $5000.00 to Y, Equity will not allow Y both to take the legacy and also to sue X's executors for the debt.

(g) Where the equities are equal, the first in time shall prevail. Thus where two persons make equally good competing claims to property, Equity, Equity will usually decide in favour of the person who claim arose first.

(h) Equity looks to the intent rather than the form. This maxim lies at the root of the equitable doctrines of mortgages and forfeitures. Thus in determining whether any particular transaction is in the nature of a mortgage Equity looks at the substance of translation and not merely at the form. Although a conveyance is absolute inform it may nevertheless be shown in fact to be in the nature of a mortgage.

(i) He who seeks Equity must do equity. This maxim is applied in the doctrine of election. This principle on which the doctrine of election is based is that a man shall not be allowed to approbate and reprobate at the same time. The doctrine applies both to with and deeds. For example, where a donor gives his own property, to E and in the same instrument purports to give E's property to X, E will be put

From the casic idea of stare decisis, a hierarchy of precedents grew up, in fo that in general a judge must follow decisions made in court which are higher up the hierarchy than his or her own . This process was made easier by a system of publication of reports of cases in the higher courts. The body of decisions made in the higher courts which the lower ones must respect is known as case law. To date the common law is still developing our legal system bringing in what seems to be new principles. Some authorities consider that judges merely declare the law while others hold that judges actually make law. It should also be stated that the judges role in interpreting statutes(another form of law to be discussed later) has given rise to a larger body of case law. the bulk of common law has been developed through the centuries by the judges applying established or customary rules of law that new situations and cases as they arise.

Moreover proceedings in the Common Law Courts had to be commenced with the original writs which were obtained from the Chancellor and which were quite separate from the judicial writs subsequently issued to bring parties before the Court. Apart from these form of actions, no action lay and no remedy could be acquired. Persons who were unable to obtain redness for a wrong therefore started presenting petitions directly to the King who was regarded as the fountain of justice. The King in turn passed these petitions to the Chancellor for a report. Later these petitions were formalized and sent directly to the Chancellor on whose sold authority decisions were given. Herein was born the Court of Chancery. The Chancellor, since was normally an ecclesiastic, granted remedies in the name of reason, right and conscience.

The modern law of property contracts torts, and crimes is all based on ancient common law. And today when we speak of common law as a source we are really referring to judicial precedent.

Through common law that is in this context judge made law, letigants can assume that like cases willl be treated alike, rather than judges making their own random decisions which nobody could predict. In this respect people can plan their affairs.

In its broadest and most general sense, the term equity denotes the spirit and the habit of fairness, justice and right dealing which would regulate the interrelationships of being with one another. It is the rule of doing to all others as we desire them to do to us; or as it is expressed by the Roman Scholar Justincan " to live honestly, to harm nobody, to render to every man his due." Equity is therefore synonymous with natural right of justice. However in this sense we are concerned more with ethics rather than the sanction of positive law.

In a restrictive sense, Equity denotes equal and impartial justice as between two parties whose rights and claims are in conflict. It is that practice that justice as acknowledge by natural reasons and ethical insight but independent of the formulated body of law. The Courts which administer Equity seek to discover it by applying the rules of fairness beyond the strict lines of positive laws.

Even in a much more restricted sense Equity is a system of jurisprudence or a branch of justice administrated by certain courts, distinct from the common law courts. In this sense the term Equity, as used in English law, refers to that part of the law which evolved in and was administered by the Court of Chancery prior to 1875 and arose as a result of the premature rigidity of the Common Laws. Equity this became a complex of well settled and well understood rules, principles and precedents.

This type of justice came to be known as Equity and at the outset there were us binding rules with each Chancellor giving judgment to the manner that satisfied his own conscience. The saying was that the Chancellor dispensed justice according to the length

to his election since he will be unable to claim the gift to him unless he allows the gift to X to take effect.

(j) Equality is Equity. It has long been a principle of equity that in the absence of sufficient reasons for any other basis of division, those who are entitles to property should have the fairness of equal division. For example after a divorce and there is a joint bank account into which the husband and wife had both paid their incomes and from which they had also made withdrawals the Court has divided the remaining balance between the husband and wife.

(k) Equity aids only the vigilant or delay defeats Equity. A court of equity always refused its aid to state claims, where a plaintiff has slept upon his rights and acquiesced for too great a length of time.

(l) He who comes to equity must come with clean hands. This maxim applies to the plaintiff's past conduct. In the case of Overton V. Banister (1844) 3 Hare 503 a woman, who was entitled to trust money when she came of age, had previously obtained the money from the trustees by fraudulently misrepresenting her age and so when she did come of age she could not receive the money again.

On the other hand the common law is important because it provided much greater detail than is possible with a purely inactive law system. Statutes assume the existence of the common law and are addenda and errata to the common law. However, when Statute and common law conflict, it is the former that prevails.

Equity was that law which evolved through the Court Chancery but which presupposed the existence of the Common Law and the importance of Equity can be clearly seen when one examines the earlier threefold jurisdiction of Equity, namely the exclusive, concurrent and auxiliary.

Chancery had an exclusive jurisdiction in those cases where the common law gave no relief such as the enforcement of trusts. Equity too had a concurrent jurisdiction where the common law recognized there was a right but did not provide an adequate remedy, as in the case of damages. The auxiliary jurisdiction of Equity becomes important where the common law, although it recognized the right and cloud give an adequate remedy, was unable, owing to a defective process, to enforce it.