RULE OF LAW OR RULE OF CONSCIENCE?

Introduction

The principle of conscience is a nebulous concept. It generally means a person's awareness of right or wrong with regard to his or her own thoughts and actions. Hence, conscience always involves a moral judgement. Nevertheless, the principle of conscience, as the foundation of equity, has been instrumental in many jurisdictions towards the development of law.

The purpose of this article is to examine the status accorded to the principle of conscience in equity, in the jurisdictions of England, Australia and Sri Lanka.

Law and Conscience

Law seeks to apply general rules to particular cases. These rules are generally assumed as fair. Yet there would always be cases, which it is not possible to cover in the form of a general rule[1]. Because of idiosyncratic case characteristics, the application of the general rule may result in unfair outcomes. Thus, the law is deficient in dealing with diverse and evolving situations. The principle of conscience could guide the law in its application to different and novel situations.

Justice demands certainty in law. The law relies on rules and precedents in order to achieve certainty. The strict view of the rule of law holds that unfair results incurred due to the operation of these rules are merely the price paid for a system of law. However, as Maitland properly observed, "certainty of law must not become certainty of injustice"[2]. Hence, justice also demands that inconvenient rules and precedents to be discarded and conscience to be applied.

Equity principles are capable of setting aside the legally required unfair outcomes, in order to arrive at just and fair outcomes based on the individualised circumstances of each case. By acknowledging the legitimacy of equity, legal systems incorporate within themselves conflicting impulses towards rigid and formal technicalities on the one hand, and discretionary and substantive common sense on the other.

Conscience in the Early Courts of Equity

Conscience of the judges was the driving factor of the equity courts, used in correcting injustice. The early chancellors were ecclesiastical men and their conscience was highly influenced by religion and morality. Thus, they were able to inject a form of morality in to the operation of the law, when they were left with the task of decision-making[3]. Moreover, conscience was the only principle that had to be adhered in making decisions, because the chancellors were unfettered by rules and precedents.

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[1] C. G. Weeramantry, **An Invitation to the Law,** New Delhi: Lawman (India) Private Limited, 1998 at p. 84.

[2] See, R. W. M. Dias, **Jurisprudence,** (2nd ed.) London: Butterworth & Co. Limited, 1964 at p. 170.

[2] See, A. W. B. Simpson, **A History of the Common Law of Contract: The Rise of the Action of Assumpsit**, Oxford: Clarendon Press, 1975 at pp. 396-398 where the writer says, "For a fifteenth-century ecclesiastic, sitting as a judge of conscience, in a court of conscience, to apply the law of conscience 'for the love of God and in way of charity', 'conscience' did connote, though it included, some principle of injurious reliance or good faith. It connoted what we now call the moral law as it applied to particular individuals for the advance of peril to the soul through moral sin".

The decisions of early chancellors did not vary largely, because their reasoning was based on similar standards. Hence, some sort of certainty prevailed in relation to the decisions of equity courts. However, when the legal men were appointed as the chancellors of equity, their decisions varied. Being selected from diverse segments of the society, one judge's perception of right or wrong deferred from another. By systematisation of equity, it was intended to remedy the problem raised by subjective approach of the courts.

Conscience in the Modern Courts

Even with precedent and legislation, there is still room for judicial discretion in the modern courts. Hence, courts could continue with applying conscience to develop the law and provide equitable results. This would give flexibility to the courts. However, judicial discretion should not be unfettered. Unrestricted application of conscience may bring about detrimental results such as inconsistency and subjectivity of law. Conscience based judgements do not play a decisive role in every decision. Moreover, judicial decision-making purely on the ground of conscience may, in certain instances, act as a strife to the concept of rule of law, which is preserved as fundamental to every jurisdiction. Thus, some sort of control is required over judicial discretion.

The religion based approach in applying conscience for judicial decision-making would not be feasible in the modern context. In the modern complex and plural society, there would hardly be any consistency of value judgements between various religions.

It is very important that, law needs to be flexible to achieve fairness. Society is ever changing as new circumstances arise. Attitudes and moral standards change as well. If the law lacks flexibility, it runs the risk of being eventually discarded when it is found to be irrelevant to the needs of a later stage[4]. Conscience, as a flexible principle, could be used to achieve fairness. However, courts should avoid "palm tree justice" in this regard.

The modern courts apply conscience through different principles, which are founded upon fairness. For instance, the "doctrine of unconscionability" mandates that a party in social or commercial relationship with another should not be allowed by equity to take unconscientious advantages[5]. The "doctrine of unjust enrichment", though having its roots in Roman law, stipulates the equitable principle, that no one should be enriched unjustly to the detriment of another[6]. However, the modern approach in many jurisdictions has been to apply the principle of conscience in a restricted manner.

Conscience in the English Judiciary

Modernisation of equity has resulted in rules being entrenched to assist the application of equity. Hence, the conscience of the individual judges has become less significant. Due to the merger of equity courts with the courts of law, the judges have been vested with powers of both law and equity.

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[4] C. G. Weeramantry, **An Invitation to the Law**, New Delhi: Lawman (India) Private Limited, 1998 at p. 139.

[5] See, A. Dunn "Equity is Dead, Long Live Equity!" [1999] 62 Mod. L. R. 141 at p. 141.

[6] See, G. L. Peiris, **Some Aspects of the Law of Unjust Enrichment in South Africa and Ceylon**, Colombo: Lake House Investments Limited, 1972.

Thus, they have the power to follow the law as well as the power to opt for fairness, instead of strictly following the law. However, many judges have found it uncomfortable to adhere to equitable principles. Since the fusion of equity and law, judiciary has been more concerned with pursuing certainty by strict rules and precedents. As a result, flexibility and freedom within the judiciary have been exceedingly restricted. Yet, in certain instances, some judges have departed from strict law and precedent in favour of fairness. Therefore, it could be seen that application of conscience still depends on individual attitudes of the judges and this is the case in other jurisdictions too.

English courts find place to the principle of conscience within the initiated maxims of equity. For instance, under the maxim "equity acts in personam", the court has the power to restrain a defendant from taking unfair advantage from the plaintiff[7].

Apart from traditional equitable principles, the English judiciary has created several doctrines such as, "doctrine of implied term" and "doctrine of presumed intent" in order to reach fair and reasonable solutions. These doctrines are mainly used when courts decide on issues relating to law of contract. Under the "doctrine of implied term", the court implies a term, even though there is no express term in the contract between the parties, in order to give effect to just and fair results[8]. Despite the cautionary approach towards the application of this doctrine by courts[9], Lord Denning had been an advocate of the doctrine in many instances[10]. The "doctrine of presumed intent" is utilised by courts to presume that parties to a contract have agreed upon a fair and reasonable solution, instead of searching whether parties have actually agreed on such terms. In the application of this doctrine too, the individual attitudes of the judges have been the determinant factor.

The "doctrine of unjust enrichment" is founded on the similar principles of equity in English law[11]. Nevertheless, the English Courts have considered this doctrine as alien to their legal system. Hence, there is much uncertainty attending the topic of unjust enrichment in England[12].

Conscience in the Australian Judiciary

The Australian Courts, in contrast to the English Courts, are commonly guided by the "doctrine of unconscionability" in equity jurisdiction. In recent years, they have emphasised more on the principle of conscience and prevention of unconscionable conduct, while returning to the moral basis of equity. Thus, denial of a beneficial interest to a respondent has been held as unconscionable, though, the respondent might have been awarded equitable interest on traditional equitable notions[13].

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[7] Stanley J. Bailey, "The Future of Equity" [1977] 93 L.Q.R. 529 at 532.

[8] See, ***Gardiner v. Grey*** [1815] 4 Camp. 144.

[9] See, ***Regigate v. Union Manufacturing*** [1918] 1 K.B. 592, where it was stated that court cannot imply a term simply because it is reasonable to do so, but could only when it is necessary. Also see, ***The Moorcock*** [1889] 14 P.D. 14

[10] Lord Denning, **The Discipline of Law**, New Delhi: Aditya Books, 1993 at p. 41.

[11] ***Fibrosa Spolka Akoyina v. Fairbain Lawson Combe Bobour Ltd.*** [1943] AC 32 at p. 61.

[12] See, ***Reading v. Attorney General*** [1951] 1 All. E.R. 617, where Lord Potter stated, "My Lords, the exact status of the law of unjust enrichment is not yet assumed. It holds the place in law of Scotland, and I think, of the United States, but I am content for the purpose of this case to assume that it forms no part of the law of England". See also, ***Orakpo v. Manson Investments Limited*** [1978] AC 95, where Lord Diplock said that there is no general doctrine of unjust enrichment recognized in English law.

[13] ***Baumgartner v Baumgartner*** [1987] 164 C.L.R. 137

The approach of the Australian Courts in applying "doctrine of unconscionability" does not seem to be subjective. Apart from the moral considerations, they have paid attention to many other factors in favour of an objective approach. When determining the nature of unconscionable conduct in the area of family law, courts would examine the financial contributions made by claimants of beneficial interest. On this ground, it has been held that a defendant's assertion of the sole legal title was not unconscionable where the plaintiff had made no monetary contribution to the acquisition of property[14]. The "doctrine of unconscionability" is considered as the pivot to many areas of equitable jurisdiction in Australia. It has been submitted that this doctrine could be more successfully utilised as one key principle upon which equity operates[15].

The "doctrine of unjust enrichment" finds a place in Australia. The courts have applied the doctrine, even in instances where an agreement has been rendered unenforceable by operation of statutes[16].

Conscience in the Sri Lankan Judiciary

The law of Sri Lanka has been greatly influenced by Roman and English jurisprudence. Equity finds a place in both English law and Roman law systems[17]. English equitable principles have been introduced in to Sri Lanka through legislation[18] and judge made law[19]. English principles relating to rectification of documents drawn up under a mistake, equitable relief against forfeiture in a lease, the tort of passingoff, undue influence in contracts and specific performance of contracts form part of the Sri Lankan law[20].

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[14] ***Arthur v. Public Trustee*** [1988] 90 F.L.R. 203. Asche C.J. stated "Darwin may be truly blessed with a colourful array of palm trees. But they are not here for the judges of this court to sit under." The court was not even prepared to accede to arguments based on generalized notions of fairness and justice, which were unrelated to contributions. See also, ***Hibberson v. George*** [1988] 12 F.L.R. 735, where the court applied the unconscionability rule in ***Baumgartner's Case*** in consideration of the financial contributions made.

[15] See, A. Dunn "Equity is Dead, Long Live Equity!" [1999] 62 Mod. L. R. 141 at p. 141.

[16] ***Pavey & Mathews Private Limited v. Paul*** [1987] 69 A.L.R. 577. The matter, which the court had to decide in this case, was whether a licensed builder who had renovated a cottage under an unenforceable oral contract could sue for quantum meruit. By section 45 of the New South Wales Building Licensing Act 1971, a contract to carry out building work by the holder of the license was not enforceable against the other party to the contract, unless the contract was in writing, sufficiently describing the building work and signed by the parties. Wilson J. and Deand J. held that such claims are independent restitutory claims based on unjust enrichment arising from the acceptance of the benefits accruing to the defendant from the plaintiff's execution of the work for which the ineffective contract provided.

[17] L. J. M. Cooray, **An Introduction to the Legal System of Sri Lanka**, (2nd ed.) Colombo: Lake House Investments Limited, 1992, at p.197

[18] See, for instance, Trusts Ordinance [Chapter 96, Legislative Enactments 1980, Revised Edition – Unofficial], Industrial Disputes Act [Chapter 152, Legislative Enactments 1980, Revised Edition – Unofficial] and Civil Procedure Code [Chapter 105, Legislative Enactments 1980, Revised Edition – Unofficial].

[19] Sri Lankan Courts are courts of equity and law. .See, ***Gravin v. Hadden*** [1871] 17 E.R. 247 (P.C.), ***Dodwell & Co. v. John*** [1918] 20 N.L.R. 206 (P.C.) and ***Kapadiya v. Mohamed*** [1918] 20 N.L.R. 314

[20] L.J.M. Cooray, **An Introduction to the Legal System of Sri Lanka**, (2nd ed.) Colombo: Lake House Investments Limited, 1992, at p.200.

[21] See, ***Marik Cangany v. Karuppasamy Cangany*** [1906] 10 N.L.R. 79 & ***Mohamadu Marikar v. Ibrahim Naina*** [1910] 13 N.L.R. 187.

In applying conscience through the "doctrine of unjust enrichment" Sri Lankan Courts have acceded to the Roman law perception, "it is inequitable that any person should be enriched to the detriment and injury of another"[21]. This doctrine is mainly applied by our courts in areas such as, property, restitution, compensation for improvements, and contracts.

The "doctrine of unjust enrichment" envisages a very broad spectrum. In jurisdictions governed by Roman-Dutch law, this doctrine is unfettered by technicalities. However, in Sri Lanka, courts insist on proof whether the doctrine has been previously applied in similar situations. Hence, the approach seems to be to proceed upon a consideration of the actual form of action, rather than on the general basis, that relief will be granted against a person, who has been unjustly enriched at the expense of another[22].

Certain court decisions have suggested that the "doctrine of unjust enrichment" should be confined to cases where there is an antecedent relation between the persons concerned, if the doctrine is to be kept within reasonable limits[23]. Such restriction would however, hamper the evolution of the doctrine towards the maturity, which would be vital in the development of law.

The "doctrine of unjust enrichment" in Sri Lankan law, does not supersede the provisions of a statute. The doctrine remains silent in the application of certain personal laws[24]. Moreover, the aptitude of our courts to exercise discretion is very limited. Conversely, in Australia, the courts have proceeded even to the extent that when there is a conflict between a statute and an equitable right, the equitable right prevails unless it is extinguished by express and clear statutory language[25].

Conclusion

The principle of conscience vests equity with great amount of flexibility to guide the law in its application to evolving needs of the society. Therefore, it could be stated that conscience has been the driving factor in the equity jurisdiction, which enabled equity to enhance justice and fairness. However, in the modern context, equity has become a rigid system.

Judicial discretion is essential to remove rigidities and technicalities of the law. Principle of conscience is capable of granting wide discretion to judges. However, unfettered discretion may erode objectivity and certainty of the law, which are the fundamentals in any legal system. The jurisdictions, which were considered in this article, have employed the principle of conscience different from each other, in order to make a balance between flexibility on one hand and, objectivity and certainty of the law on the other. Hence, the application of the principle has fostered a divergence of judicial approaches in these jurisdictions.

The law, after all, must respond to human needs and aspirations, even if it seeks only to confine them. Legal systems must contain remnants of earlier forms of social life that render control more palatable to the public. Hence, twinges of conscience are unfeasible to be eliminated from justice, and until such time, law and conscience will cohabit.

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[22] See, ***Don Cornelis v. De Soysa & Co. Ltd.*** [1965] 68 N.L.R. 161 and ***Dodwell v. John*** [1918] 20 N.L.R. 206.

[23] See, for instance, ***Ismail v. Ratnapala*** [1920] 22 N.L.R. 374

[24] Under the concept of "Thediathettam" in Tesawalamai law, the husband has a legal right to one-half of the wife's property acquired after marriage, immediately when it has been acquired. Upon husband's death, the wife cannot be the husband's heir. Thus, in this context, there would be unjust enrichment of the husband's heirs to the detriment of the wife. However, the law does not remedy this. See, ***Sivagnalingam v. Suntheralingam*** [1986] 1 S.L.R. 86.

[25] See, ***Minister for Lands and Forests v. McPherson*** [1990] N.S.W.L.R. 687