GROUTH AND DEVELOPMENT OF EQUIYT AS GOOD CONSCIENCE.

Equity historically was an important source and it still plays a part today with many of our legal concepts having developed from equitable principals. The word equity has a meaning of fairness and this is the basis on which our law operates, when adding to our law. Equity developed because of problems in the common law of which there were several: the main one being the method by which the cases had to be started in the common law courts. This was known by obtaining a document known as a writ. Before 1258 it was possible to ask for a writ to be drawn up to cover any situation, but the Provisions of Oxford 1258 restricted the issue of writs for new types of action. This meant that to start a case in the common law courts, they would be litigant had to be able to fit his claim into one of the existing types of writ – if this could not be done then there was little chance of justice. To get around this technical difficulty, the judges did develop 'fictions' which allowed some cases to proceed. In other words they assumed certain facts for the case, even though those facts were not true.

The historical creation of Equity arose from the need to mitigate the harshness of the decisions of the common law developed after 1066. Whilst the royal courts and assizes produced the benefits of a widely available legal system applying a consistent set of rules and procedures, they also became rigid and inflexible, ignoring justice in the quest for legal certainty. By the thirteenth century, aggrieved litigants began to petition the Chancellor, as the 'keeper of the king's conscience, in an effort to find a more just solution to their problem. As a consequence of the growth of these petitions, the Court of Chancery developed, where decisions were made on the basis of fairness and reason and so the notion of equity was founded. The body of rules and principles developed by the Lord Chancellors became known as equity because they were based on the concepts of fairness and justice. They were applied in a special court of the Lord Chancellor known as the Court of Chancery, which began to recognize and enforce new rights and duties thus providing an alternative system of justice to that of common law courts.

Initially, the two court systems operated in parallel, with equity being regarded as a gloss upon the common law. Where the law failed to provide remedy equity could operate to "fill the gap". However, as both systems become more developed, the situation became one of conflict rather than assistance. Equity began to be criticized by some for its unpredictability and it increasingly found a remedy opposing that offered by the common law. This culminated in the Earl of Oxford's Case (1615), in which James I decided in favour of equity as the prevailing rule in the case of conflict.

Equity was now free to develop. It created its own set of rights and remedies, which are still in force today. It was an equitable development, along with many other areas of property law such as the equitable mortgage, the rules of probate, will and succession. Remedies were also created to support these rights. The injunction has its foundations in the early development of equity. It served then, as now, as an addition to common law award of damages.

Alongside these developments, equity also created its own set of rules, the 'maxims of equity', to guide the judge in the use of his Discretion in matters of equity. Whilst one of the attractions of equity was that it was based on the judge's discretion and therefore flexible, the maxims led some to criticize equity for becoming as rigid as the common law. Nevertheless, the work of the

Chancery courts expanded as equity widened its scope through the late 1700s and 1800s. By the middle of the nineteenth century it was realized that the two systems could no longer operate as separate bodies and the review of the system was needed.

This reform was achieved by the Judicature Act 1873-75. This legislation provided for procedural fusion of the two systems into one court hierarchy, which is the basis of the modern divisions of today's High Court. Rather than eliminating equity, the Acts it is submitted, strengthened and confirmed its place in the future. A litigant could now bring his proceedings in one court which would apply both the rules of common law and equity and Judicature Acts confirmed that in the case of conflict, equity would prevail.

It would be easy to assume that having provided these foundations, the importance of equity as a developing body of law ceased after 1875. However, this is clearly not the case when one examines the many twentieth century developments of equity. The rights and remedies created before 1873 continue to operate today. Furthermore, they have been refined added to by modern judges and legal developments. The now established principle of "promissory estoppels" in contract owes its existence to the judgment of Lord Denning in the High Trees case10. The contractual license, constructive trust and doctrine of part performance are all creations of the judge's equitable discretion. The rights of the deserted spouse, an essential part of modern matrimonial property law are creations of equity, reinforced by statute.

The development of new and more complex remedies has been as active as that of rights. The order of specific performance is still vital. The injunction is perhaps more widely used than ever before, having a place in many areas of modern, such as intellectual property rights, as well as more traditional role. Anton Filler orders and Merava injunctions have only been created in the last thirty years and they are now an essential part of many legal proceedings11. The appointment of receivers and orders to account are similarly important parts of modern legal practice which owe their existence of equity.

So the significance of equity in the modern legal system can be clearly illustrated. However one concept that has perhaps changed is the historic notion of equity as flexible and fair. Whilst the reasoning behind many modern developments is the need to provide a solution, which is appropriate to the facts and the changing demand of society, the wealth of guidelines that go with the discretion can be as rigid as any common law rules. For example, to be granted an injunction one must satisfy the complex requirements of the American Cyanamid Rules12. Anton Filler orders and Merava injunctions have been criticized by some judges as harsh and draconian and a set of rigid procedures aimed at safeguarding against abuse has developed alongside these two injunctions.

Therefore, equity as a source of law remains as current and as vital a part of the English Legal System as ever, although the conscientious Lord Chancellors who first gave life to the idea may wonder at its role today.

So the result of this was that the common law tradition of relying previous decisions gradually brought about systematization in the application of conscience and the introduction of the idea of equity as a body of set of rules and doctrines existing side by side with the common law.

2.2 Relationship between Common Law & Equity:

Common law and equity developed to some extent in conflict with one another until 1875 when the Judicature Act finally resolved the conflicts. The difficulties arose out of the fact that the courts of equity would provide a remedy where the common law courts would not. This had the effect of omitting the common law courts jurisdiction. In the Earl of Oxford's case13, James I decided in favour of equity as the prevailing rule in case of conflict. Gradually the courts of equity became undisputed courts of law and a clear body of rules emerged which were applied there.

At last the Judicature Act 1873-75 finally fused the two systems of law, common law and equity, and provided that both were available in all law courts. Thus today both common law and equity are English law, both rely on the doctrine of precedent, both are applied in all courts and both have been partly embodied in statutes. Where a principle of equity conflicts with one of common law, equity prevails under Judicature Act. In fact the Judicature Act helped to stop the conflict between common law and equity and definitely express the supremacy of equity and a lawful and definite relationship between the two.

Among the historical differences of common law and equity it is well seen that common law system was founded mainly by Henry II in the twelfth century but the notion of equity was founded in the thirteenth century by the Lord Chancellor of king. Early common law was totally depend on writ system and soon became very rigid but equity had not such system, it was developed basing upon fairness and good conscience. Common law failed to give a justified result very often and as a result to ensure justice equity originated.

In the early time the popularity of common law was decreasing but the popularity of equity was increasing rapidly. Besides, common law system was expensive and burdensome in comparison with equity. Equity developed with many remedies which the common law failed to make .Even today the judges first try to give the result basing upon common law and if it is not justified and the litigant asked for equity then he goes on to equity. Though there are some differences they have more similarities today. They both are now English Law.

3.1 Introduction

The Sub continent subcontinent consists of several countries with a total population of over one billion, making up 20% of the population of the world14. The first British outpost in Sub continent subcontinent was established in 1619 on the northwestern coast. Later in the century, the East Sub continent Company opened permanent trading stations at Madras, Bombay, and Calcutta, each under the protection of native rulers. The British expanded their influence from these footholds until, by the 1850s, they controlled most of present-day Sub continent, Pakistan, and Bangladesh. In the late 1800s, the first steps were taken toward self-government in British Sub continent with the appointment of Sub continent councilors to advise the British viceroy and the establishment of provincial councils with Sub continent members; the British subsequently widened participation in legislative councils. Beginning in 1920, Sub continent leader Mohandas K. Gandhi transformed the indian National Congress political

party into a mass movement to campaign against British colonial rule. The party used both parliamentary and nonviolent resistance and non-cooperation to achieve independence. On August 15, 1947, Sub continent became a dominion within the Commonwealth, with Jawaharlal Nehru as Prime Minister. And create East and West Pakistan, where there were Muslim majorities. Sub continent became a republic within the Commonwealth after promulgating its constitution on January 26, 1950. On 26th March 1971, East Pakistan became a independent country named Bangladesh within the Commonwealth.

From the twelfth to the sixteenth centuries principles and rules of Roman Law spread over Western Europe and influenced, in different degrees, the legal systems all over the world. Similarly in subcontinent, the concepts, principles and rules of the English Law initially spread over a few provinces and gradually over all the states in Sub continent, and influenced the whole of subcontinent. As is well known, the British came to Sub continent, to advance themselves, to establish themselves as traders and acquired power and having acquired power, to consolidate themselves as rulers of the whole country. Some of those who were sent out from England to guide the destinies of Sub continent were actuated by the loftiest of motives while others were disinterested in the petty squabbles between individuals. They, in effect; evolved an efficient system of administration of justice in as we shall see, was always pragmatic even in their own country and necessarily so in Sub continent.

Instructions were given to the English administrators and judges to decide cases according to justice, equity and good conscience, for which no rule was clearly laid down in the Acts of Parliament or regulations or customary law of Sub continent. “Under the name of justice, equity and good conscience, the general law of British Sub continent, save so far as the authority of native law was preserved, came to be so much of English law as was considered applicable or rather was not considered inapplicable to the conditions of Sub continent society.”15 According to Rankin, “the influence of the Common law in Sub continent is due not so much to a “reception”, though that has played no inconsiderable part, as to a process of codification carried out on the grand scale…”16 But in fact the English law in Sub continent subcontinent like the Roman law in Mediaeval Europe, “enjoyed a persuasive authority as being an embodiment of written reason, and impressed its own character on a formally independent jurisprudence.”‘7

As pointed out by Professor Holdsworth the English Law was “received” in Sub continent subcontinent, exactly for the same reasons as the Roman law was received in Europe. These reasons are, firstly to solve the problems of the more advanced stage of civilization and secondly to adapt it to new environment. As observed by Setalvad “the expectation has come true.”19The manner in which this permeation of English law took place was altered, but its extent was in no way diminished when in the nineteenth century the law was codified in Sub continent subcontinent.

It is a paradox in history that the law and judicial system which the British had fostered in Sub continent should have helped Sub continents to obtain their freedom from Britain. This strangely fascinating story of the transformation of the English Common law into indian subcontinent jurisprudence forms the main theme of this chapter.

3.2 Reasons for the development of Equity and equitable Principles in Sub continent:

The system broke down in subcontinent due to various causes and so there was an opportunity for English Law to influence Sub continent Subcontinent Law. It will not be out of place to have a review of the causes of this failure. Causes of failure of above attempts are:20

(a) Difficulty of ascertaining the Native Law for various religions.

(b) Defects in the Native Law where they were ascertainable.

These defects had to be supplied by English Judges and Magistrates from their remembrance, often imperfect, of principles of English Law which were supplied under the name of Justice, Equity and Good Conscience.

(c) Native Laws often embodied rules repugnant to the traditions and morality of the ruling race. An English Magistrate could not enforce, and the English Government could not recognize, the degenerate criminal law in Sub continent Mohammedanism.

Thus the Native Law was beaten at every point by English case law and by Regulations of the Sub continent Legislatures.

3.3 Maxims of equity and their application and recognition in South Asia subcontinent:

“Maxims are the proverbs of the law. They have the same merits and defects as other proverbs, being brief and pithy statements of partial truths. They express general principles without the necessary qualifications and exceptions, and they are therefore much too absolute to be taken as trustworthy guides to the law. Yet they are not without their uses. False and misleading when literally read, these established formulae provide useful means for the expression of leading doctrines of the law in a form which is at the same time brief and intelligible.” According to Justice Stephen: “They are rather minims than maxims, for they give not a particularly great, but a particularly small amount of information. As often as not the exceptions and qualifications are more important than the so-called rules, which while they mostly serve as good indexes to the law, are mostly bad abstracts of it.” There are twelve such maxims but the overlapping is so much so that “it would not be difficult to reduce them all under the first and the last”. The maxims give a clue to just and reasonable interpretation.