STATE OF EQUITY IN BANGLADESH: AN IDEALISTIC OVERVIEW

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1. Introduction

Born beyond the firmament of common law, equity grew in the closet of Chancellors. It is the product of discreet dispensation of justice by king's chancellors of England in days when the inflexible procedure, inadequate remedy and unavailable relief of common law put people in despair in matters of justice. Equity enriched English law over centuries; its principles traveled to this subcontinent along with the British administrators and accommodated themselves in our legal system under different Acts. This article contains a discussion of the equity situation in the subcontinent and consequently in Bangladesh. Although equity is no more a separate system of law anywhere, it still has a great persuasive and educative value; its principles are everlasting in juridical science. This article is mainly prepared for the use of law students and fresher in the Bench and the Bar who may refresh their memories about equity and its ramifications.

Most of the people are by nature a little criminally selfish, as mostly they want to enjoy everything at the cost of others. The necessity of law originated to control this selfish human behavior and protect rights and interests of others for a balanced development of society. At the beginning, socially recognized human habits and practices were considered binding on all members of society and their violation was followed by punishment. Thus developed customary rules. These customary rules were all unwritten and their acceptance had a binding force but it was dependent on social

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good and social happiness. English common law had its origin in these customary rules. This law started to grow in an unwritten form. In Course of time this unwritten character of this law changed and it began to be written down and preserved in codified form. But in diverse social situations it was unable to protect the rights and interests of the aggrieved parties owing to its inherent limitations. These limitations required to be supplemented by some other rules and principles, which came to be known in English legal system as principles of equity. These principles of equity were developed to administer justice and ensure good behavior in human being and provide remedies to aggrieved or injured persons. So the contribution of equity is very important in the history of law. In every system of law all over the world the growth and existence of equity are similar in some form or other; everywhere it played first a supplementary role and gradually it became merged with law.

The common law of England was the basis of modern equity; equity was applied as a supplement to common law. When the common law was not available to establish justice owing to its defective and inflexible procedure or where the remedy was insufficient or inadequate, the rules of equity came to be applied to grant relief to the aggrieved persons. Equity thus acts as the conscience of law. Equity without common law would have been 'a castle in the air, impossibility'. Bangladesh inherited this equity as a colony of the British Empire; all its civil courts applied this equity, which is percolated from English law. In the absence of specific law, the courts of Bangladesh follow the rules of equity, justice and good conscience for the administration of justice. It must, however, be remembered that all the rules of English equity are not applied, as they were, in Bangladesh. In this article attempts are made to define equity, assess its utility, locate its incorporation in different Acts and Statutes, examine courts' jurisdiction in its use and application, and indicate how its principles may guide, besides lawyers and judges, the lawmakers, law interpreters and law enforcers in today's technologically developed new social, political and economic situations.

2. Meaning:

Equity is equality goes the maxim. This maxim is the bedrock of a huge number of rules of law. Man's longing for equitable treatment and judge's

efforts to treat equitably in extra-legal situations produce what may be termed as judicial justice. Long arms of law become short when the existing law fails to cover a special situation; there it is the judge's discretion, which comes into play to meet the situation. Here the judge follows the principles of equity. Born out of the Chancellor's discreet application of discretion, equity brought people's faith in juristic justice. As a concept of jurisprudence equity literally means 'right' as founded on the laws of 'nature', 'fairness' and 'justice', and this is the most popular notion about this expression'.[1] Equity virtually stands closest to fairness, the meaning of which is derived from the Latin term *'acquitas"* that means equalization or leveling down any arbitrary preference of denial of justice[2]. However, in its most general sense we can call that as equity which in human transactions is founded on 'natural justice', 'honesty', and 'right'. In this sense it means that one should do to all men as he expects to be done to him. "Equity', in Roman law means a body of moral principles introduced by *Praetor Peregrinus* who developed it by the side of *'jus civiler'*. Maine says 'equity means any body of rules existing side by side with the original civil law, founded on distinct principles and claiming incidentally, to supersede the civil law by virtue of superior sanctity in those principles'.[3]

In English law equity is a system of rules originating in the English Chancery courts and comprising a settled and formal body of legal and procedural rules and doctrines that supplement, aid and override common and statute law, and is designed to protect rights and enforce duties fixed by substantive law.[4] In Islamic jurisprudence equity is called *'adal' and 'Istihasan.* The founder of Islamic jurisprudence, Imam Abu Hanifa said, applying *'qiyas'* or precedent for the want of specific rules in special circumstances for the preference of liberal justice, justice can be denied. In that case *'Istihasan'* comes to the rescue; it is equitable principle of juristic preference. In Hindu law, it has been laid down that in case of conflict

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[1] Aqil Ahmed, A *Text Book of Equity,* (12th edn. 1995), p.2.

[2] B. M. Gandhi, *Equity, Trusts and Specific Relief,* (2nd 2dn. 1993), p. 3.

[3] Aqil Ahmed, p. 2.

[4] B. M. Gandhi, p. 4.

between the rules of *'smritis'* and reasoning either may be followed, as reasoning is based on the principles of equity. *'Yukti vichar'* shall decide the solution'.[5]

Usually the word 'equity' is used in three different senses. It means morality, honesty, and uprightness.[6] But equity should not be identified with morality. A court of equity will not interfere on points of morals except when they are mixed up with the administration of civil rights in property. It cannot enforce the observance of obligations, which rest upon only moral grounds; there must be some wrong or injury to the party complaining to the court'.[7] In technical narrow sense it may be said to be "a portion of natural justice which though of such a nature as properly to admit of being judicially enforced, was for certain circumstances omitted to be enforced by the common law courts; an omission which was supplied by the court of Chancery".[8]

Besides the above, many jurists defined equity from different points of view. In primary sense it means fairness or natural justice. Jowitt says, "In its primary sense equity is fairness, or that rule of conduct which in the opinion of a person or class ought to be followed by all other persons."[9] In wider sense equity is called that section of law, which applies where there is a vacuum created due to insufficiency of common law; equity may then be taken to correct the decision as justice or fairness. Plato defined equity and used it in a broad sense. In his view "Equity is a necessary element supplementary to the imperfect generalization of legal rules."[10] According to Snell, equity is "a portion of natural justice which though of such a nature as to admit of being judicially enforced, was omitted to be enforced by the common law courts, an omission which was supplied by the court

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[5] Gazi Shamsur Rahman, *Equity and Trust Ain* (in Bengali), p. 51.

[6] N. H. Jhabvala, *The Elements of Equity,* (16th edn), p. 1.

[7] D. D. Basu, *Equity, Trusts and Specific Relief,* (6th edn, 1996), p. 3

[8] B.M. Gandhi, p. 3.

[9] Jowitt, *Dictionary of English Law*, p. 724.

[10] *Ibid,* p. 7

of Chancery".[11] Blackstone defines equity as the soul and spirit of all laws. Positive law is construed and natural law is made by it. In this sense equity is synonymous with justice in that it is the true and sound interpretation of the rule of justice. Aristotle described equity as eternal and immutable, and reiterated that "the equitable is just and better than one kind of justice, not better than absolute justice, but better than the error that arises from the absoluteness of the statement; it is a correction of legal Justice."'[12] Story, an American jurist, defined equity as "that portion of remedial justice which is exclusively administered by a court of common law."[13] Professor Maitland made an attempt to improve on Story's definition of equity. He says equity is now that body of " rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered to only by those courts which would be known as courts of equity."[14] He also says, "We ought not to think of law and equity as two rival systems, we ought to think of equity as supplementary to law, a sort of appendix added to our code".[15] Professor Underhill observed, "Equity was originally the revolt of common sense against the pedantry of law and trammels of the feudal system; it became a highly artificial and refined body of legal principles, and it is at the present day an amendment and modification of the common law."[16]

In *Dudley v. Dudley* [17] Sir Nathan Wright, L.K. observed:

> Equity is no part of law, but a moral virtue, Which qualifies, moderates and reforms the rigor, hardness and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak in the constitution and defends the law from crafty evasions, delusions and new subtleties invented and contrived to evade and delude the common law, whereby such as have undoubted rights are made remediless; and this is the office

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[11] *Snell's Principles of Equity*, (27th edn.), p. 7

[12] *Ibid*, p. 7

[13] Jhabvala, p. 1

[14] *Ibid*, pp. 1-2

[15] *Ibid*, p. 2

[16] (1705) 94 ER 118

> of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assists it.

3. Brief Background History of Equity

3. 1: Equity in England:

Prior to the Norman Conquest in the eleventh century there was no concept of equity jurisdiction in England. Even at that time there was no common law in the whole of England. However, certain customs and usages had become common to almost the whole of England and at times some of them were also recognized in the 'dooms' issued by Kings. In course of time judges applied these customs as having the force of law. Thus developed a body of rules which, as Professor Munro says, "had really never been ordained by any Monarch or enacted by any legislative body, but which merely represented the crystallization of usages and customs, and these gradually came to be known as the common law.[17]

By the time of Edward I, common law had taken a definite shape and by the middle of the 13Th century the law administered in England, were in part customary law and in part statutory law. At the end of the *13Th"* century three great courts viz., the King's Bench, the Court of Common Pleas and the Exchequer were definitely established. All of them administered the common law. The Exchequer was, however, something more than a court; it was also an administrative department of the government with the Chancery as its secretarial office. At the head of the Chancery stood the Chancellor, who was then not a judge, but the King's Secretary of State for all departments. Whatever writing had to be done in the King's name was done under the Chancellor's supervision.'[18] But on account of the narrowness, extreme rigidity and formalism of common law it often gave either inadequate remedy or no remedy at all. In such cases a petition was made to the King-in-Council to exercise his extraordinary

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[17] Munro, *Government of Europe,* (3rd edn. 1938), p. 298

[18] D. D. Basu, pp. 3-4

judicial powers,[19] as a matter of grace. These were referred to the Chancellor and in course of time they were addressed direct to him.

In the 14th" century the Chancery entertained petition where the petitioner had a moral right which the common law courts would not protect. Thus the Chancery undertook to enforce fiduciary obligations known as uses. By the end of the 14th century the Chancery became a permanent judicial tribunal having regular sittings[20]. The Chancellor used to act according to his judicial conscience or the principles of natural justice. The principles and rules thus arising through the administration of justice in the courts of Chancery came to be known as equity in contradistinction to common law. In the course of the 16th" century equity developed the rules by which it would administer justice; these rules are known as rules of equity and good conscience. In the 17th" century the Chancery struggled for its life against the common law courts and it survived by being recognized as a part of the law of the land from the time of Restoration. By the end of the 18th" century it became a definite system of rules as exact and binding as any other part of laws; and it began to be said that equity was an attempt to solve the riddles of law as a supplementary element to establish justice, where difficult and complex problems confront common law. Up to 1873 there remained in England two separate systems of courts, viz., common law courts and Chancery court to apply common law and equity respectively; but in 1873 both the courts were amalgamated and the three Divisions of the High Court of justice, viz., the Chancery, the King's Bench and the Probate and Admiralty Division were assigned with the power of enforcing all the rights and remedies legal as well as equitable.[21] In the words of Maitland, "Equity now is that body of rules administered by the English courts of justice which, were it not for the operation of Judicature Acts, would be administered to only by those courts which would be known as courts of equity". It may, therefore, be said that (i) equity is founded on natural justice; (ii) it is that body of rules and principles, which exist side by side of the common law, and (iii) it does not supersede the existing common law, but it is an addition to common law.

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[19] Aqil Ahmed, p. 2

[20] *Ibid*, p. 4

[21] Aqil Ahmed, p. 3

3. 2: Equity in the Subcontinent

Prior to the Anglo-Indian law, i.e. before 1600 AD equity was there in this subcontinent in its indigenous form in Hindu and Muslim law. Hindu legal system or Hindu jurisprudence is embedded in *dharma* as propounded in the *Vedas, Prams,* and *Smritis* and similar other epic works dealing with human *achar-vyavahar. Dharma* has wide varieties of meanings. It is used to mean justice, what is right in given circumstances, moral, religious, pious or righteous conduct, being helpful to living beings, giving charity, natural qualities or characteristics or properties of living beings and things, duty and usage or custom having the force of law and also a valid. Royal edict (*rajshasana*).[22] In Hindu law according to jurists like *Kautilya* and *yajnavalkaya* where there was a conflict between Dharma text and reason, the text had to give way and this was a principle of equity, which they named as *yuktivichar".*[23] Out of these *dharmashastra,* economics, practice or customs and King's fiats that which appear last, i.e. *Rajshasana* is the most authentic. This is evident from *Narad* Smriti, which explains the method of solving disputes regarding usufruct of the trees grown on boundary. The methods prescribed for settlement of boundary disputes were four, viz., by arbitration, by the residents of the locality, by the King on the basis of evidence, and on the failure of all these methods, by the King according to his best judgment which is equivalent to decisions given according to justice, equity and good conscience.[24]

In Muslim law the principles of equity are also clearly noticeable. In this law Imam Abu Hanifa who is considered as the father of equity, expounded the principle that the rule of law as based on analogy could be set-aside at the option of the judge on a liberal construction or judicial preference to meet the requirements of a particular case. These principles of Muslim law are known as *'Istihasan'* or ' juristic equity'.[25] This could be observed from the decision of the court in *Hamira Bibi v. Jubeda Bibi.* With

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[22] Rama Jois, *Legal and Constitutional History of India,* Vol. 1, p. 3

[23] B. M. Gandhi, p. 24

[24] R. Jois, p. 205.

[25] Aqil Ahmed, p. 9

regard to the Muslim law their Lordship of the Privy Council in *Hamira Bibi v. Jubeda Bibi* [26] observed:

> The chapter on the duties (a*dab) of* the Quazi in the principal works on Mussalman law clearly shows that the rules *of* equity and equitable considerations commonly recognized in the courts *of* Chancery in England, are not foreign to the Mussalman system, but are in fact often referred to and invoked in the adjudication *of* cases.

4. Necessity of Equity

The question may naturally arise why in spite of the existence of common law in English legal system equity came into being, what necessity it had in society. It has been noted above that the common law had as a part of English legal system some specific deficiencies or imperfections, viz., its rules were too strict, it did not cover the whole field of obligations, in its administration there had been no effectual means of' extracting the truth from the parties, its judgments were not capable of being adopted to meet special circumstances, and its rules were often unenforceable through the opposition of the defendant or were turned into a means of oppression. This mainly paved the way for the development and existence of equity. Actually, for the proper administration of justice its necessity was heavily felt by the Chancery, which was the bed of its birth. More precisely it may be said that because of the following three types of major deficiencies of common law, viz., (i) inflexible procedure, (ii) inadequacy of remedy, and (iii) absence of relief in certain cases owing to its defective procedures, the need of a legal system independent of common law was felt, and equity is the product of that need.[27]

Pomeroy observed (i) the rigidity of judicial precedents, (ii) the adherence to feudalistic institutions and technicalities of forms, (iii) the antipathy towards Roman law, and (iv) the defective and rigid procedure, were the outstanding defects of common law, and they led to the development of

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[26] 43 I A. 294

[27] Jhabvala, p. 5

equity.[28] Therefore, it may be said that for giving a complete shape to the common law and to make it perfect legal system equity is created. So, Maitland said, "Equity had come not to destroy the law, but to fulfill it". The relation between law and equity is not that between two conflicting systems; it is the relation between 'code and supplement, between text and gloss'. In every system of law it is found in every age that the rules of law do not cover all the diverse cases that arise with the progress of civilization and the development of science and technology in different social, political, cultural and economic situations; and in such cases judges apply equity to do justice according to their good conscience. Equity is thus the juristic recognition of impartial high reasoning made in cases, which are beyond the ambit of common or written law.

5. Application of equity in the Subcontinent

Born in England in early 14th century, equity is an old institution in this subcontinent. It traveled to British India in the seventies of the 18th century through the Judicial Plan of 1772 of Lord Hastings. The British rulers had left this subcontinent in 1947, but they left equity behind to ornate the administration of justice; as if dead is the queen, but her ornaments still glitter. Before the creation of Pakistan in 1947 and the liberation of Bangladesh in 1971 all over the undivided subcontinent, there was a uniform legal system, and this system applied uniformly the same statutory laws and rules of equity with similar system of courts. After 1947 Pakistan adopted the laws and legal institutions left by the British rulers; and in 1971 when Bangladesh emerged as an independent, sovereign state it adopted the pre-1971 laws. For this reason there is uniformity among the laws and legal institutions of India, Pakistan and Bangladesh. Equity has in this way come down to Bangladesh in the trammels of justice, but mostly as codified law.

From the beginning of the British rule the courts of this subcontinent applied both codified common law and rules of equity for judgment in cases appeared before them. The Regulation Act of 1827 required the East

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[28] B. M. Gandhi, p. 5

India Company courts to act according to justice, equity and good conscience in the absence of specific law and usages. Under clause 36 of the Supreme Court Charter of 1823, the Supreme Court of Bombay was expressly made a court of equity, and was given an equitable jurisdiction corresponding to that of the Court of Chancery. The provision of the rule of 'justice, equity and good conscience' was expressly laid down nearly in all subsequent Acts for the guidance of judges.[29]

In the subcontinent there was never any separate system of courts as were in existence in pre-1873 England for administering equity. The greater part of the law applied by courts was codified. In the absence of specific law or usage in any matter, the courts had to act according to the principles of 'equity, justice and good conscience'. Every court thus combines law and equity jurisdictions in administering justice.[30] The same situation is still persisting in Bangladesh. If the codified law fails to solve any problem, the principles of 'justice, equity and good conscience' come to the rescue. In the exercise of inherent jurisdiction the courts apply the principles of 'justice, equity and good conscience'. It is to be mentioned that the laws of Bangladesh do not recognize any distinction between law and equity as understood in English law. All rules of English equity are not applicable in this subcontinent. The expression 'equity and good conscience' has been interpreted to mean rules of English equity as far as they are applicable to cases of this sub continental society and circumstances. About this matter Lord McCauley who spoke in the parliament on codification, reiterated this simple principle: "Uniformity when you can have it; diversity when you must have it, but in all cases certainty."[31]

6. Statutory recognition of equity in the Subcontinent

In this subcontinent the principles that were exercised by the Chancery courts in England under their equitable jurisdiction have been copiously applied by the judiciary.[32] As in India so also in Bangladesh the equitable

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[29] Aqil Ahmed, p. 9

[30] D. D. Basu, p. 9

[31] B. M. Gandhi, p. 26

[32] *Ibid*, pp. 9-10

rules and doctrines are incorporated to a substantial extent in its various Acts. Most of the principles of equity are found to have statutory recognition in the following codified laws of Bangladesh:

> (I) The Specific Relief Act, 1877, (ii) The Trust Act, 1882, (ii) The Contract Act, 1872, (iv) The Transfer of Property Act, 1882 and (v) The Code of Civil Procedure, 1908.

The Specific Relief Act, 1877, contains in a major way the following equitable rules:

(a) Rules regarding mandatory injunction in section 55

(b) Rules regarding permanent injunction in section 54

(c) Rules relating to specific performance in sections 12 to 30

(d) Rescission of contract in sections 35 to 38

(e) Rules relating to cancellation and rectification of fraudulent instruments in sections 31 to 33.[33]

Banerjee in his Tagore Law Lectures observed:

> The Specific Relief Act is admittedly based on doctrines of equity jurisprudence, which were originally developed in England. The guidance afforded by the decisions of the foreign courts in interpreting and applying the provisions of the Indian Acts is therefore of peculiarly valuable character."[34]

In the Trust Act, 1882, there is the largest contribution of equity. Trust is the most distinctive achievement of English equity jurisprudence. Prof. Maitland said, "*Of* all the exploits of equity the largest and most important is the invention and development of the trust."[35] He further observed:

> Equity has added to our legal system, together with a number of detached doctrines, one novel and fertile institution, namely, the trust, and three novel and fertile remedies. Namely, the decree for specific performance, the injunction and the judicial administration of assets.

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[33] Gazi Shamsur Rahman, p. 7

[34] Aqil Ahmed, pp. 9-10

[35] D. D. Basu, p. 103

The courts of Bangladesh apply equity jurisdiction to protect the interest of property according to the provisions of Trust Act, 1882, on the basis of equitable principles. This Act embodies in a concise form the whole structure of trusts built up by the courts in England.

The Contract Act, 1872, contains quite a large number of equitable principles in its different sections. There are certain equitable doctrines, which have been imported in the Contract Act. Doctrines of penalties and forfeiture, stipulation as to time in the performance of a contract, equitable relief on ground of misrepresentation, fraud and undue influence are examples of some such doctrines. Besides them, sections 64 and 65 are found to contain in modified form the equitable maxim: "He who seeks equity must do equity".[36] According to section 64 the party rescinding a avoidable contract shall, if he has received any benefit there under from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received. According to section 65 when an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or make compensation for it, to the person from whom he received it.[37]

The Transfer of Property Act, 1882, has included many doctrines of equity originated in the Court of Chancery in England. Some of them are as follows:

(a) Rules relating to clog on redemption in section 60, (b) Doctrine of election in section 35, (c) Doctrine of part-performance in section 53A[38], and (d) Rules relating to marshalling and contribution in sections 81 and 82.

Besides these, sections 48 and 51 of the Transfer of Property Act are also based on the principles of equity.[39]

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[36] Aqil Ahmed, pp. 9-10

[37] D. F. Mulla, *Indian Contract Act* (10th end.), pp. 167-171

[38] Gazi Shamsur Rahman, p. 7

[39] Aqil Ahmed, pp. 9-10

In the Code of Civil Procedure, 1908, provisions are also found based on equitable principles. The courts of Bangladesh, specially the civil courts, are always found abiding by the principles of equity. Different sections, orders and rules of the Code of Civil Procedure have been imported from equitable doctrines. The following are some of the most prominent among them: (i) Rules relating to temporary injunction in Order 39; (ii) Rules relating to appointment of receiver in Order 40[40]; (iii) Rules relating to inherent powers in section 151.

The Sale of Goods Act, 1930, the Partnership Act, 1932, the Succession Act 1925, the Guardian and Wards Act, 1890, the Negotiable Instruments Act, 1881, are also based on equitable principles.

Though an important part of equitable principles of English law is accommodated in the codified laws of this subcontinent, it is not said that there is no area left for applying equity besides these codified laws. Everyday new legal problems are being created in this subcontinent by constant changes in society, and for solving those problems new laws are enacted. Yet, rarely such a situation is created where statutory laws are solving all problems and the rules of equity have become totally useless or superfluous. Probably, so long the human society will stay; the situation of no-need for equity will never arise in the application of judges' discretion. Every judge has to exercise the principles of equity in the mind of his mind when he is required to decide a case affecting his discretion. That is why courts can never refuse any case on the ground of non-availability of law. In a no-law situation equitable jurisdiction is exercised in solving current extra-legal problems. In these circumstances courts invariably apply its inherent power for natural justice. Under section 151 of the Code of Civil Procedure the principles of equity are fully recognized.[41] According to this section:

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[40] Gazi Shamsur Rahman, pp. 7-8

[41] *Ibid*, p. 9

> Nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of powers of the courts."[42]

It is hardly possible to do justice in all diverse situations and prevent the abuse of power without the help of equity. Wherever a judge is required to exercise discretion, he does it by the application of equity rules. Section 561-A of the Code of Criminal Procedure, 1898, may also be referred to here. The application of equity beyond the codified law is however done very cautiously in this subcontinent. But wherever and to whatever cases judges are required to apply equity; they have to consider mostly the following maxims: (i) He who comes to equity must come with clean hands, (ii) Equity acts *in persona,* (iii) Equity follows the law, (iv Equity will not suffer a wrong to be without a remedy, (v) Equity looks to the intent rather than to the form.[43]

7. Equity situation in Bangladesh

In all common law countries law and equity are so much so mixed up in their legal systems that in the words of Maitland "we ought not to think of law and equity as two rival systems. We ought to think of equity as supplementary law, a sort of appendix added to our code". Equity is now a collection of appendices. It must not be forgotten that though some laws are copiously glossed by it, others are quite free from equitable gloss. Equity keeps clear of the province of the law of crimes like assault, battery, malicious prosecution and the like. Equity acts on the conscience of the parties or *in persona;* the equitable remedies are discretionary, i.e., courts having regard to the conduct of the parties would award them. Courts exercise their equity jurisdiction on the foundation of three assumptions, viz., (a) that equity is a matter of grace, (b) that equity is a matter of conscience, and (c) that equity is enforceable by the process of contempt. In the administration of justice, the utility of equity is everlasting. Equity

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[42] Abdul Matin, *The Code of Civil Procedure, 1908,* (1st edn.) Vol. I, p. 608

[43] Gazi Shamsur Rahman, p. 9

must not, however, be confused with natural justice. Snell observes, "It would be a mistake to suppose that the principles of equity as administered in the courts ... are co-existensive with the principle of natural justice". In the application of equity, courts only seek to enforce the legally enforceable principles of natural justice only where common law or statutory law does not give relief. This position of equity persists even today in Bangladesh. As the youngest heir of the legal system of the subcontinent Bangladesh has inherited the above law of equity. Equity seems to control judiciary from grave; it educates the people concerned with law.

8. Difference between the equitable principles of England and of the subcontinent

Equity which is so much so important in the administration of justice in Bangladesh and which has been imported from the legal system of a far off country does not comprise all the English equitable principles. Many of the rules of English equity have either not been followed in Bangladesh or imported in a modified form in view of the special circumstances of Bangladesh. About this matter the Indian Law Commission reported: "We have departed from the English law where its provisions appeared to us to be objectionable in them or especially inapplicable in India".[44] Thus there are differences between the equitable principles of England and those of Bangladesh. Some points of difference are listed below:

(1) In England equity is the product of the efforts of Lord Chancellors. Inflexible procedure, inadequate remedy and absence of relief of common law helped the development of equity in English law before the passing of the Judicature Acts, 1873-75. Equity courts and not the common law courts applied the principles of equity in England. Equity is not the product of any such separate courts in Bangladesh; it is developed on the basis of the English principle of 'justice, equity and good conscience' where statutory laws could not cover the case.

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[44] *Ibid*, p. 8

(2) Unnecessary delay is against English equity. 'Delay defeats equity' is the basis of English equitable principle on delay. But this stiff rule of delay is not acceptable exactly on similar grounds of equitable principle in Bangladesh. In England, in the absence of a statutory law of limitation, equity courts on grounds of latches refuse equitable relief like specific performance. In Bangladesh however, mere delay is no ground for refusing specific performance.

(3) In England an equitable right or estate is recognized as something different from a legal right or estate. The interest of a beneficiary in trust property is in England an equitable interest, while the legal interest in the estate is in the trustee.[45] In Bangladesh there can be only one owner of a property, and he is the legal owner. When a property is vested in a trustee, he becomes the owner of the property; and the beneficiary cannot be said to have an equitable ownership. For the same reason, it has been held that the *cestique trust* (beneficiary) cannot maintain as owner a suit for possession against a trespasser, the ownership being vested in the trustee. [46]

(4) The distinction between legal and equitable rights and interests does not exist in the law of Bangladesh since the passing of the Transfer of Property Act. The right of redemption of a mortgagor is not an equitable right in Bangladesh, but a legal right conferred by statute. A mortgagor in Bangladesh retains a legal interest before and after the expiry of the date of payment, and a transferee from him by way of sale or mortgage gets a legal interest. Further, in Bangladesh the rights of redemption and subrogation are not equitable forms of relief to be given on such terms as the court considers equitable, but they are rights conferred and defined by statute, viz., the Transfer of Property Act, available only upon terms stated therein. Again, a mortgage by deposit of title-deeds is as good a form of mortgage as any other, and does not create a mere agreement giving rise to an equitable interest as in England.[48]

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[45] B. M. Gandhi, p. 26

[46] D. D. Basu, p. 10

(5) The equitable presumption of satisfaction and ademption are not applicable to Bangladesh. They are, however, included in equitable law of England. (6) In Bangladesh there is no room for application of the English equitable doctrine that "a contract for sale of real property makes the purchaser the owner in equity of the estate". Section 54 of the Transfer of Property Act expressly enacts that "a contract for the sale of immovable property does not of itself create any interest in or charge on the property.[47]

(7) Laws of Bangladesh allow conditional assignment, but in English law it should be absolute.

Despite the above differences between the equitable principles of England and those of Bangladesh equity is fairly embedded in the statutory laws, and they can hardly be weeded out. Equity has enriched the legal system of Bangladesh and made provisions for justice in complicated cases. It helps the judges in widening the horizon of their juristic mind to decide cases, which are coming before courts in an ever-changing society with new appearance. It helps put off the straight jacket of law and apply the mixed rules of law and equity to changed circumstances. The judges will, therefore, get a wide arm in dispensing justice taking recourse to equitable rules.

9. Conclusion

More than thousand years ago after the Norman conquest in 1066, equity started to grow in England, it worked well in the dispensation of justice and till now it has not lost its utility and demand in different countries wherever English law travels and exists; it guides the people of judiciary in the performance of their day to day judicial business. It is such a branch of jurisprudence that it helps all legal systems update them and fit to the changing situation by filling up the deficiencies of the relevant statutory laws. In England though the common law was there, equity came into being when common law failed to grant relief to the people because of its procedural rigidity and remedial deficiencies. Because of its judicial

[47] *Ibid*, p. 10

sublimity and adoptability equity was exported to the various colonies of the British Empire; where it adjusted itself to local laws and customs; and contributed in a major way to the development of the laws of the concerned colonies. Though equity was merged with common law by the Judicature Acts of 1873-75 and its independent entity was lost, its educative value has become all the more important for all countries with common law based legal systems. Its power of educating judicial personnel, its manner of molding their conduct in the application of judicial discretion and its process of giving them scope to develop law through just interpretation is enormous. Judiciary would have become barren without it. People's confidence in judiciary and justice would have been greatly shaken, had there been no equity-trained judges, lawyers and executives. Its greatest contribution lies in its enabling judges to decide cases not covered by any existing statutory laws through the application of their discretion, which is the product of equity learning and equity consciousness.

As a supplement to common law, equity worked independently of common law for over five centuries until the passing of the Judicature Acts of 1873-75. Equity was never in confrontation with statutory law; rather it acted as a supplement to common law. In Bangladesh there are no separate courts to practice equity; same courts apply law as well equity as in England. Although equitable principles are mostly codified in Bangladesh in different enactments, whenever judges face situations where statutory laws are helpless or unable to provide remedies for one reason or another, they take the help of equity as their considered conscience. Knowledge of equity may help everybody whoever is concerned with the administration of justice. Lawmakers, law interpretaters and law enforcers, all must have the basic instruction and information of equity for justly making, interpreting and applying law. In recent years Bangladesh judiciary lost its past glory. Nature, character and erudition of judges, lawyers and executives badly affected justice. Partisan behavior of judges and lawyers, and the influence of the executives over the Bench and the Bar have tarnished the judiciary of Bangladesh. Very recently Bangladesh judiciary has been separated from the executive to reach justice to the doors of everybody. It is yet to be seen how much this separation will fulfill the

expectation of people, since there is a tradition in this subcontinent that good things are made bad through the dishonest ingenuity of people who lack good grooming in law and equity. Law grows, develops and works well with people having respect for law and its knowledge. Over-politicization of a society can hardly afford any fair field for law and justice to grow. Today most of the people who are connected with law in either this or that way have little or no knowledge of law, equity and justice. Equitable principles have, as stated above, an advantage of molding the character of people; they help develop some juristic morality in them. Since law and equity are heavily interwoven in producing justice, knowledge of law only will be insufficient to provide justice. In the present social perspective the members of parliament who frame laws, of judiciary who interpret laws and of executive who apply laws must have knowledge of equity and its principles so that good laws may be passed, interpreted fairly and applied justly.

Equity shapes and supplements law even from its grave. No effective legal system can be developed without it. Equity has an everlasting effect on law and justice. The number of litigations would have been much minimized, the quality of justice much developed, and the faith of people in justice and judiciary would have been increased, had there been proper teaching of equity. Equity should not be ignored; rather people of the Benches and Bars in Bangladesh should culture it more liberally. The contribution of equity to jurisprudence is immeasurable; the major enrichment of jurisprudence is done by equity. Equitable principles invisibly accompany law in every legal system. No society can be best served with proper law and justice unless its legislators and executives are also oriented with the knowledge of law and equitable principles. Some devices are to be introduced to arrange for the orientation of these people. Current social, economic and political ills of Bangladesh could have been avoided had the people of legislature, judiciary and executive had proper teaching of basic law and principles of equity. To speak frankly, the legal education in Bangladesh is also in a shamble. The existing two streams of legal education ---2-year LL.B. pass course and the 4-year LL.B. (Hons.) course --- are creating two types of law graduates. The former with almost no knowledge

and the latter with moderately sufficient knowledge of law are crowding various Bars and Benches of the country. Unless this people are trained with some effective courses before they go for law practice or any law related job, there will happen almost a disaster in law profession and legal service. Probably apprehending this Bangladesh Bar Council has arranged for the training of our junior judges and lawyers. Before obtaining *sanad* from the Bar Council fresh lawyers and Barristers are to undertake some exam-courses arranged by this council, and judges are to undergo a training programme at the Judges Training Institute established by the government. In the course materials of all these training programmers' principles of equity are to be specially included. Undoubtedly, it will meaningfully increase the quality of the trainees and the society will be greatly benefited by it. In the present situation this training programmed of judges and lawyers will be sufficient to remove the ills of judiciary, some measures are also to be adopted for helping the legislators and executives to have some basic knowledge of law and equity so that standard laws are framed and justly applied. Thus measures are to be adopted to create awareness among the people to know and learn rules of law and principles of equity. The pernicious existing tendency that he who makes the law violets it needs to be urgently removed from our society and it can be done in a major way by imparting knowledge of law and equity to all law concerned people. Thus the utility of equity has not come to an end; rather its necessity is felt anew.