

# Fusion of equity and the common law

[Law](#), [Common Law](#)



Since the administrative fusion of the Common Law and Equity Courts after the 1873 and 1875 Acts, there has been a lot of controversy over whether to fuse both equity and common law. There are valid arguments both for and against fusion. Those arguing for the fusion of Equity and Common Law at a substantive level often comment on the inconsistency created by equity's intervention in law.

' There would sometimes be arbitrary gaps in the common law that is situations where the common law refused a claim despite allowing claims in other situations which were materially similar.

1. With both Common Law and Equity offering different solutions to the same legal issues, it is argued that for justice there must be consistency with judicial rulings.
2. The current system means that in certain cases the right to an equitable remedy is more valuable.

An example of inconsistencies between case verdicts due to Equity and Common Law having different principles is that of having legal and equitable title to the property. If a person has the legal beneficial title to a house and the deeds are stolen and sold to a third party they can only claim the value of the house back. Whilst with the equitable title the person could use Equity to get the house back. Examples like this reinforce the argument for fusion because everybody would get the same remedies.

Some might also argue that rather than the facts of the cases being used to determine the outcome of a case, with Equity the fact that different people made the decisions at different times had an influence on the rulings. Using

Equity to bypass the Common Law rather than amending the Common Law. Another reason for fusion is that Equity allows judges to depart from common law and statutes in order to create new law. With Parliament being sovereign the idea of unelected judges creating law is undemocratic.

Without the power to use Equity to depart from Common Law judges would be more accountable to parliament. If Equity and Common Law were both fused then the discrepancies between cases would disappear. A mix of Equity and Common Law principles would be applied and the same conclusion would be found in each case. Although Equity and Common Law have already fused the courts in which they apply the substantive law has not been fused yet. There is a good case against the fusion of the two on a substantive level.

Many argue that the purpose of the Judicature Acts was only to fuse the administrative aspects of Equity and Common Law. Those who argue for a substantive merger are often accused of committing a 'fusion fallacy'.

Equity has often supplemented Common Law where the interests of justice and of social and economic change arose. Equity's trust concept and the modern law of mortgages would not exist if it was not for the intervention of equity. Although it may seem that the day of equity establishing legal principles before their time has passed, one-day equity may be needed again.

However 'there is a danger that we will have elevated equity to the status of free-standing moral guardian of society'<sup>4</sup>. If equity is still allowed to have the power of extending the boundaries of the law. This is dangerous because

there would be no legislative body to check the power of equity. Despite all this, it would be extremely difficult to actually integrate the two, let alone compare them because they are entirely different. ' Equity accordingly gives the common law a much-needed injection of morality.'

If Equity was merged with Common Law it wouldn't be able to express its identity and intervene in cases of unconscionability, due to the rigidity of common law. The two are so ideologically distinct that one of the two would be dominant over the other. They ' are working in different ways towards the same ends, and it is therefore as wrong to assert the independence of one from the other as it is to assert that there is no difference between them.

However, it would be wrong to say that the two have not mingled. Many believe it is better to view the two as distinct and mutual dependent of each other.

With the fusion of Equity and Common Law would come the destruction of equitable concepts; ' Equitable concepts like trusts, equitable estates and consequent equitable remedies must continue to exist apart, if not in isolation, from common law rules.

These concepts have been formed in areas where Common Law would not allow suitable solutions to be created. Equity and common law might well be merged one day but the harmonization process required to allow them to integrate with one another would probably change the two so much that they are no longer as they started as.

This would mean one would likely become dominant over the other. I believe that the two should be kept distinct and separate from one another,

Equity's sole purpose is to supplement the Common Law where it would operate harshly. If the two became fused together Equity would no longer be able to deviate from the strict rules of law to deliver an equitable solution for those in need. It is said that Equity works on discretion, though some might believe the common law now works on a degree of discretion, and so the need for them to be fused together is not even necessary never mind more desirable.