The positively in many jurisdictions towards the development

Business, Decision Making

The principle of consciencecan be an unclear view. Typically it means a persons awareness of right andwrong with regards to his or her own thoughts and actions . 1Therefore conscience always includes a moral decision.

Yet, the principle ofconscience, as the basis of equity, has been contributed positively in manyjurisdictions towards the development of law. The purpose of this article is toCritically evaluate thenature of equity's role as ' court of conscience' and analyse whether itsflexibility ensures a more just legal system. The law requests to use generic rules to exact cases, inwhich usually expected to be fair.

But however there will always be an exceptionto this which will make it impossible to cover in form of the generic rule dueto idiosyncratic case characteristics, the request of the generic rule mayresult in unjust results2. Therefore, the law is undersupplied indealing with various and developing circumstances. The principle of consciencecould monitor the law in its request to changed and fresh circumstances. Justice demands certainty in law. in order to attain firmness, the law relieson rules and precedents. The harsh view that the law holds is that unfairresults occur due to the operation of these rules are merely the price paid fora system of law. 3On the other hand Maitland accurately spotted " certainty of law must not becomecertainty of injustice" 4.

Henceforward, justice too stresses that problematic rules and precedents to berejected and conscience to be applied. In order to arrive at just and fairoutcomes, principles of equity are efficient in setting aside the

legallyrequired unfair outcomes. By recognising the lawfulness of equity, legalsystems integrate within themselves disputing desires towards rigid and formaltechnicalities on one hand and discretionary and common sense on the other 5 The motivating influence ofthe equity courts used in amending injustice was the conscience of the judges. The early chancellors were religious men in which their conscience wasextremely prejudiced by religion and morality.

So, they where able to add asense of morality into the process of law when decision-making . 6Furthermore, the only practise that had to be followed in decision making wasconscience, as the chancellors were unregulated by rules and precedents. thejudgments of early chancellors did not differ greatly due to the fact theirperceptive was founded on alike standards.

Hence, some sort of certainty succeededin regards to the results of equity courts. However, going in further it couldbe seen when legal men were appointed as chancellor, decisions varied due tobeing selected from diverse sections of society, one judge’s perception may bedifferent to another. By organisation of equity, it was planned to remedy theproblem.

There is still space forjudicial discretions within the modern courts, even with laws and precedents. Consequently, courts can endure requesting conscience to grow the law and offer equitableresults, this gave flexibility to the courts. However, should be noted thatjudicial discretion should not be unrestricted, as unrestricted application ofconscience can bring harmful results such as discrepancy and prejudice of law. Furthermore, judicial

decision making merely on the basis of conscience may inundeniable aspects act as a friction to the idea of rule of law which iswell-maintained as central to every jurisdiction. So a certain amount ofcontrol is compulsory over judicial discretion.

The religion founded method inapplying conscience for judicial decision making would not not be viable inmodern context. In the modern era there would barely be any uniformity of valuejudgements between various religions. It is crucial that law need to beflexible in order to achieve a more just legal system. Society is forever changing as new conditionsdevelop. If for whatever reason the law lacks flexibility, then may face withthe issue of being rejected once found to be unconnected to the requirements oflater stage. 7 Ifconscience is used as a flexible principle this could aid in achievingfairness.

Modern courts do apply conscience via different principles which arebased upon fairness. For example the “ doctrine of unconscionability” ordersthat a party in social or commercial relationship with another should not beallowed by equity to take unconscientious advantage. 8 Themodernisation of equity has developed in rules being embedded to help theapplication of equity.

Hence, the conscience of separate judges has become lessmeaningful. Because of the joining of equity and common law courts the judgeshave been bestowed with powers of both law and equity. Hence giving them thepower to follow the law as well as the option to choose fairness, instead ofrigorously adhering to the law.

However, numerous judges have found it awkwardin applying new equity law which hasn’t beforehand been applied. Pettit viewsthat “ though there is no fiction in equity as there has beensaid to be at common law that the rules have been established from timeimmemorial, and though ‘ it is perfectly well known that they have beenestablished from time to time—altered, improved and refined from time to time. In many cases we know the names of he Chancellors who invented them’, yet, itis in principle doubtful whether a new right can now be created” 9 Judiciary has been more apprehensive infollowing certainty by firm rules and precedents since the fusion of equity andlaw. The outcome was that flexibility and freedom have been exceptionallylimited. 10Nonetheless in certain aspects judges have left from strict law and precedentin favor of fairness.

So, as would be seen later, the application of consciencestill hangs on specific attitudes of the judges and the same inspection isalike appropriate the case of other jurisdictions. Lord Denning commenting onthe state if equity in 1984 states, “ Now, thirty years later in 1984, I can say that in my time the courts havediscovered the new equity. It is fair and just and legible, but not as variableas the ‘ Chancellor’s foot.’ It is a great achievement. If I were setting anexamination paper for students, I would ask them to give examples of the truthof that statement. They would find them in the doctrines of promissory estoppels, proprietary estoppels, constructive trusts, licenses of land, granting ofinjunctions, and so forth.” 11English courts locateresidence to the principle of conscience, within the introduced maxims ofequity. For example, under the maxim “ equity acts in personam” the court

hasthe control to confine a defendant from taking unfair advantage from theappellant 12The attitudeof conscience assigns equity with great amount of flexibility to guide the lawin its application to evolving needs of the society.

Therefore, it could besaid that conscience has been the influential factor in the equityjurisdiction, which has enabled equity to promote justice and fairness. However, in the modern context, equity has become a rigid system. The law, after all, must reply to human needs and ambitions, even if it seeks only todetain them. Legal systems must contain fragments of earlier forms of sociallife that judge control more pleasant to the public. Hence, twinges of conscience areimpracticable to be eradicated from justice, and until such time, law andconscience will share. Thedecision in Re Rose13primarily changed equity’s method to imperfect transactions. The decisioninterests the composition of trusts, when a trust is built the courts helpbeneficiaries by enforcing their rights14even if they are a volunteer. 15Inorder to evaluate the principle of Re Rose, previous and advanced case law mustbe examined.

It has been argued that case law prior Re Rose was somewhat frank16, the reasonable starting point is the leading authority Milroy v Lord17. Thedecision in Milroy serves to irritate incomplete transactions rather than giveeffect to the donor’s intention18and has established disapproval for denying main principles of fairness andjustice. The narrow approach has been admired for creating a clear legal stanceon imperfect transfers. It also indicates defense of formalities, which givesdonor’s many chances to change their mind and safeguard they are certain abouttheir transaction.

ReRose19shaped an exclusion20to the principle in Milroy, and understood Milroy to mean that while equitywill not perfect a gift where the donor was unsuccessful to do everything inlaw to transfer his title, it will give effect to an tried transfer if thedonor has done everything which he ought to do to perfect the gift. 21Ina nutshell the necessities set out in Re Rose are that the settlor must use theprecise technique of transfer and have done all that he could to complete thetransfer, which includes delivery of the documents. Theresult was a step away from Milroy, and steps towards upshotting the donor’sintention rather than unsatisfying the transaction. The process of the ruleinvades the general principle in Milroy by aiding volunteers permitting equityto consider a transfer complete in equity before legal title has passed.

22Mascallv Mascall23is an illustration of the process of the rule in Re Rose. Browne-Wilkinson LJunderstood that ‘ a gift is complete as soon as the settlor has done everythinghe has to do… as soon as the transferee has within his control all thingsnecessary to enable him to complete his title’. Similar to Re Rose the donorheld the property on trust for the donee until the registration of title. 24. Theflexibility offered by Re Rose was protracted in T.

Choithram25where Lord Browne-Wilkinson held that the case did not upset the values inMilroy and ‘ though equity will not help a volunteer it will not endeavoroverbearingly to overthrow a gift’. This case is unique and only applies wherethe settlor is himself a trustee26. Itemerged that an effort to transfer shares would only be thorough if therequirements of Re Rose were satisfied. The belief in Re Rose is no longerabsolute27, the CA28in Pennington29prolonged the territory of the rule by presenting the concept

ofunconscionability which if satisfied, equity will announce a transfer completebefore all procedures are finished30. The settlor must have permanently put the transferee in a position to broad thetransaction, here the donor had planned to make an abrupt gift and the doneehad been knowledgeable and agreed to it.

It is disturbing thatbeforehand authoritative procedures such as delivery were not satisfied inPennington, but still the transfer was believed actual in equity, Mitchellargues that although delivery was compulsory in Re Rose it does not mean thatthe obligation for delivery can be distributed with in certain circumstances31. Theresult in Pennington judges it nearly awkward for experts to positively counselclients undertaking property transfers in order to evade court action or toguide clients if they are confronted with an imperfect transfer. Morris agreesand argues that Pennington has made it ‘ difficult to know where you and yourclient stand’32. Overallagreement between academics such as Morris and Halliwell is that Pennington hasoverstrained the limitations. Furthermore, Arden LJ did not speak of anyrestrictions of the court’s discretion and used an umbrella term of ‘ mustdepend on the court’s assessment of all appropriate thoughts’ the use ofsubjective insights and conscience has uncertain consequences. This hasstartled academics and experts, the judiciary has not endeavored to produce adefinition or test. This gives the court a wide discretion to perfect imperfecttransactions.

33 Halliwell calls this an ‘ unruly beast’34indicating the legacy of Pennington is possibly risky if not subject torestraints. Itis reasonable to conclude that

Pennington extremely weakens the maxim thatequity will not aid a volunteer by perfecting imperfect gifts. The currentvalues need many formalities to be satisfied which allows donors to changetheir mind at various stages in the transfer. It is monotonous to allow thecourts an unrestricted discretion on what it believes to be unacceptable tocontrol the efficiency of attempted transfers. Primafacie, the law in Re Rose should be a greeted program in equity as it moderatesversus the harshness of Milroy. From analysis of the outcome of case law it isclear that the rule set in movement a series of case law running to Pennington.

There are presently no suggestions for reform of this area by the LawCommission, though a Scottish debate35has taken place. To conclude, the normin Re Rose ‘ diluted’36the harsh method in Milroy without producing the concrete and theoretictroubles which surfaced from Pennington. Equity’s position seems more equitablebut is certainly complex. It is arguable whether the policy reasons behind theprinciples discussed should be commanded by fairness offered by the recent caselaw, or by certainty and ease for experts offered by Milroy.

The law in ReRose, seems to provide a mode between the two and consequently it should bewell-preserved but not prolonged to the extent in Pennington. 1 A. S.

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