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Justice, Equity and Good-Conscience: Analysis of the Case Law in Pakistan

Usmat Batool[1]

[1] Assistant Professor/Post Doctorate Fellow, Department of Islamic Studies, Bahauddin Zakariya University Multan/Islamic Research Institute, IIU Islamabad, Pakistan. Email: batoolsyed2011@gmail.com

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ABSTRACT

The concepts of equity, justice, and good conscience have guided areas of the legal system not covered by statute law or personal laws since the early East India Company days. For instance, in circumstances where they were not otherwise expressly addressed, judges were to base their rulings on equity, justice, and good conscience, according to the regulations from 1781 and 1793. The idea was replicated from one regulation to another and from one statute to another. According to Derrett, this approach was initially applied by the Royal Charter of August 9, 1683, which considered other legal sources as "just" norms that applied to the case's facts in addition to English law. By the end of the nineteenth century, British Indian Courts preferred to apply English Law as residual law first, then equity, justice, and good conscience. Courts in Pakistan occasionally use this Common Law formula to fill in the blanks. This paper examines the history of equity in common law and analyse briefly the case law of Pakistan.

Corresponding Author's Email: batoolsyed2011@gmail.com

1. Introduction

1.1. History of the Concept of Equity

Equity is elusively defined. Many academics have tried to define it, but they have ultimately given in to the consensus. Equity can signify many different things. Equity was defined by David M. Walker. He gave three definitions for it, with the first meaning being fairness, justice, and occasionally being used as synonyms for natural justice. In a second sense, equity is used in situations where it would seem irrational and unfair to apply a rule of law. In the third sense, equity refers to the principles created and put into practice by the chancellor's courts and, since 1875, the high courts' chancery division (Walter, 1980). It is mainly conceptual in continental law, and the phrase is nearly identical to "natural justice. (Ronald Jack Walker, 1985)", A universal moral ideal known as equity is predicated on the notion that justice must be served even in cases where a rule that seems to be final really causes injustice. Equity as a legal doctrine cannot be studied in isolation from the other because the ancient and contemporary periods are intertwined. Mesopotamia in antiquity saw the founding of the oldest known civilization. King of Babylonia Hammurabi created the earliest system of law that has been fully deciphered. The diorite block, which had 2600 lines of writing and was completely decoded, was found in Susa in 1902. The complexity of the Hammurabi Code alarmed the progressive evolution of legal systems. Additionally, inheritance and property rights were covered by these regulations and clauses. Rules No. 42 and 48. Ronald Jack Walker (1985) are comparable to contemporary rules of law than equity, although they are grouped in a way that is more in line with righteousness than with arbitrary statutory law. However, Rule 42 and 48 can be compared to contemporary equitable remedy in various ways. The principle of equity was also written on numerous Sumerian, Assyro-Chaldean, and Nineveh tablets. It is comparable to the equity maxim used today.

"The judge will not listen to his right if he does not listen to his conscience"

Old Western law and lore originated with the Hebrews. When Abraham led them out of Ur and into Palestine, they encountered Hebrews, who became the wellspring of western old law and lore. They left Ur under Abraham's leadership and travelled via Palestine to Egypt. They developed their own rules and the Mosaic code, which serves as the foundation for all Western world legal systems. Oleck (1951), All of western tradition, culture, and law trace their origins to the Hebrews who saved their original legal systems from oblivion. The Bible became the foundation of all western tradition after the addition of the New Testament. It should suffice to mention that equity is its fundamental foundation.

The evolution of equity and law was not greatly aided by ancient Greece; Salon rewrote Draconian law, which was written in blood. Aristotle made a distinction between several kinds of justice, contending that justice is 'in equals' in proportion to their inequality and equals equally in treaties. The Etrusians, who introduced Mesopotamian rules to Italy, left a lasting impression on the Romans by infusing their judiciary with reason and order. Rome had a barbaric populace as a result of its strict rules, which did not equalise individual liberty or safeguard the material interest. Laws were created to safeguard the interests of a very specific set of people, especially property owners. (Kocourek & Wigmore, 1915),. A judge in extraordinary jurisdiction made his own decisions about a lawsuit, including factual and legal issues, free from the formal constraints of writs or forms. Oleck (1951), Equivalent to current practice, this is equitable jurisdiction and process. By applying the strict norms of "ordinary" jurisdiction, the extraordinary jurisdiction softened the harsh outcome. Later, the magistrate's role was enlarged. He now has the authority to create laws in addition to the authority to decide lawsuits. The concept of the judex was dropped around 300 A.D. The judge assumed a total role. In contemporary British and American courts of "common law" and "chancery," the Roman concepts of "ordinary" and "extraordinary" are still used. Jus gentium and Lex Naturae were combined to create Aequitas equity, which became the rule of law after Christianity. Emperor Theodosius and Emperor Justanian revised the legislation, which served as the cornerstone of Roman civilization. Derrett (2021), In addition to giving litigants denied rights under common law a remedy, the chancery courts also had the authority to send cases back to King's Bench in circumstances where injustice had occurred. Whether equity results from the chancellor's authority or from equitable principles is a topic of contention. Since the chancellor was the only judge in the court of chancery, he gave the Masters of Chancery authority over him. In the 19th century, Lord Eldon became leadership of the Chancery and used his position to restructure the legal system. The chancery courts obtained the authority to designate guardians for infants and to provide care for insane people. The saying "Equity varies as the lent of the chancellor's foot" by John Selden captures this (Ronald Jack Walker, 1985).

2. Notion of Justice, Equity and Good-Conscience in India during British Rule

In Bengal, the concepts of justice, equity, and good conscience were first introduced around 1780. Later on, it was introduced into the mofussil of the Madras and Bombay presidencies. The dictum was gradually spread to other parts of India, and this was the time when the legal system was established. Section 5 of the Central Provinces Laws Act of 1875 stipulated that when it came to concerns concerning certain subjects, the Muhammadan law would be followed in situations involving Muhammadans and the Hindu law would be applied in situations involving Hindus. Section 6 states that in situations not covered by S-5 or any other currently enacted law, the proper course of action is to behave in accordance with justice, equity, and good conscience. The Worth-West Frontier Province Law and Justice Regulations applied in the North West Frontier Province when it came to legal matters. Decisions in specific cases were to be made in accordance with the North-West Frontier Province Law and Justice Regulation, as stated in S-27 of Regulation VII. Regulation VII, S-27, stated that decisions in specific cases will be made in accordance with the parties' respective laws. S-28 established that judges were to make decisions based on justice, equity, and good conscience in situations that were not otherwise specifically provided for. The Punjab Laws Act of 1872 introduced the concepts of justice, equality, and good conscience to Punjab. The Privy Council states that "the ultimate test for all the provincial Courts in India" is the principle of justice, equity, and good conscience. Pearl (1987), The idea served as the recursive foundation for law. The general rule of law stated that the court was to make a decision based on justice, equity, and good conscience if there was no parliamentary law or regulation pertaining to the specific issue at hand, or if it did not fall under the purview of Muhammadan and Hindu laws. As has already been observed, the Warren Hastings plan explicitly stated that the law would only be

implemented by the courts for a limited number of issues, such as caste, marriage, inheritance, and other religious practices and institutions. The range of civil litigation cases that the courts were formerly faced with was not limited to these subjects.

Neither the Warren Hastings plan nor the subsequent Regulations provided any particular guidance or instruction regarding the law that the courts were to apply to the remaining heads of litigation. As a result, the legal system had a significant hole. The courts were to exercise justice, equity, and good conscience in this vacuum. This idea gave judges a theoretical legal foundation on which to rule in instances for which there was no express legislation (Lau, 2005). However, the legal system—if one can even call it that—was far from adequate. What does it mean to be fair, just, and morally upright? The course had to decide where to get the foundational ideas of justice, equity, and moral conscience. There was nothing clear-cut and definitive about the idea. It did not refer to any particular body of law. The maxim did not provide the judges with any clear guidelines or instructions to follow when resolving disagreements. It simply meant that the judge's judgement was the only thing involved. Initially, there was no established method for the judges to use their discretion. To the best of their abilities and capabilities, they were free to resolve the issues that came before them in a fashion that seemed to do considerable justice between the parties involved. The idea made it possible for judges to enact laws based on individual cases. In the context of the factual circumstances surrounding the dispute he was asked to rule, a judge was free to apply any set of principles that he believed to be founded on justice and good conscience. Confusion and uncertainty in the nation's legal system were certain to result from such a flexible state of law. One's discretion may differ from another's. Judges differed in their interpretations of equity, justice, and good conscience. It was impossible for a litigant to predict which legal precepts a given judge would apply to a given set of facts in order to reach a decision. But throughout time, a number of rules were created to direct judges' discretion in this area. (Rankin, 1939). Those who handled the role of judicial dispensing throughout the early phases of the company's governance of the nation lacked any legal education. They were Englishmen with little knowledge of the languages or customs of the locals (Rattigan, 1989).

Native law enforcement personnel, pundits, and qāḍīs were provided to them to help them do justice. These individuals explained to them the rules of Hindu and Muslim law, respectively, and assisted the judges in resolving contested problems. In this arrangement, it became customary for judges to apply the personal laws of Muslims and Hindus in court, even in situations when doing so was required of them by the 1772 plan, but they were still free to act in the interests of justice, equity, and conscience. The formula can also be used in situations where native judges differing opinions have left the personal law doctrines unclear. It was decided in Aziz Bano v. Muhammad Ibrahim that the competing ideas in Islamic law might be chosen in a way that was most consistent with justice, equity, and sound science. In Rakhalraj v. Debendra, this same judgement was expressed with reference to Hindu law (Ali, 1912). One specific aspect of "justice, equity, and good conscience," as it is termed in South Asia, has to be discussed. Advocates frequently try to claim that a personal law provision—or even a statute—must be followed out of equity and good conscience. They have never been successful. It is interesting that this argument should be made given that the Privy Council vigorously and strongly rejected the idea that a specific personal law rule could be invalidated in Moonshee Bazloor Ruheen v. Shamsoonnissa Begum because it conflicted with the courts' interpretations of justice, equity, and good conscience. Says Sir James W. Colive:

If the previously cited verses are taken literally, they suggest that decisions about cases of this nature should be made based on "equity and good-conscience" rather than the Mahomedan law (Moonshee Bazloor Ruheen v. Shamsoonnissa Begum) i.e., in accordance with what the judge may determine the natural justice principle requires in the specific case. Their lordships disagree strongly with that decision. They believe it to be against the entire legal policy in British India, especially the enactment (Reg IV of 1793, S, 15). This instructs judges to consider the following guidelines when making decisions in marriage-related lawsuits: nothing could possibly be more likely to alarm the Mahomedan community than a judicial ruling that overturns their law, the application of which has been thus guaranteed to them, on a matter that so directly affects their domestic relationships. The judges were not considering a situation where a Muslim man had demanded the right to kill his adulterous wife, or where the Mahomedan law was obviously at odds with the general municipal law or the norms of a more

developed and civilized society. There are numerous cases in our ecclesiastical court's reports where a human judge, acting in accordance with his or her own interpretation of what is right and fair without consulting affirmative law, would have freed the wife. However, because the evidence did not demonstrate legal cruelty, the judge felt compelled to order the woman to return to her husband. This gave rise to the theory that the personal rules might be superseded if they were in line with the demands of a more morally grounded and advanced society. Colonial Judges made decisions in numerous cases based only on this formal.

3. Case Law Regarding the Notion of Justice, Equity and Good-Conscience in Pakistan

Application of Islamic Personal The new Anglo-Muhammadan Legal System was formed as a result of British judges applying the ideas of the English legal system to the requirements of Islamic law without fully comprehending them. This system was built on the pillars of justice, equity, and conscience. British Indian courts employed this approach in the 18th century to close the legal gaps left by the absence of statutory law. Its origins were not in the legitimate, traditional English judiciary. The concept of fairness, justice, and good conscience is frequently applied by Pakistani courts, regardless of whether the legislation is founded on natural law, Hindu law, Muslim law, or any other type of law. The Pakistani judiciary attempted to maintain this tendency. In his dissenting opinion in *Seth Chitor Mal v. Sahib Lal,* Mr. Muhammad Afzal Zullah, the then-Judge of the Lahore High Court, drew on the theme of Syed Mahmood. The Judge noted that by filling in the gaps, the courts must not adhere to any foreign concept of justice, equity, or good conscience rather than Islamic norms on the matter (PLD 1976). He draws the conclusion that, when called upon to fill any legal void, judges' judgement shall be guided by Islamic principles, jurisprudence, and philosophy, drawing significantly from the nation's pre- and post-partition judicial histories. While considering this matter, the Pakistani Constitution's Islamization of Laws programme had an impact on the courts that followed. The country's current legal system may be Islamized, according to a number of clauses in the constitution. Article 2, 2A, 31(1), 227, and 268(6), among other constitutional articles, impose an obligation on state agencies to adhere to and implement Islamic legal provisions over foreign legal principles. (Pakistan Law Commission Report No 11).

The Pakistani legal system truly incorporated equity, allowing judges to exercise their discretion. When statutory law is unavailable, fairness, justice, and moral conscience are the only standards that can be used to close the gaps and provide justice. Equity is the recognition of each person's inherent worth and dignity. The Pakistani legal system applied Islamic principles to fill in the gaps left by statutory law, using the English concept of "equity, justice, and good conscience."(Lau, 2005) For the first time, Justice Afzal Zullah explicitly replaced the provisions of the Defence of Pakistan Ordinance 1965 and the Defence of Pakistan Rule 1965 with Islamic principles and the ratio of case laws. Following the start of the 1969 war, an artificial person of the enemy filed a lawsuit against the custodian of evacuee property through State Bank of India. The court held that the enemy's ability to pursue civil litigation was only suspended during the ruler's reign and could not be entirely prohibited on the grounds of equity, justice, and good conscience. When Justice Zullah decided Hajji Nazim Khan's case in 1976 about the maintenance of a poor kid by an affluent grandpa, he created the impression that a foreign judicial system was just. provided the ideas of justice, equity, and conscience, along with an allusion to Islam (PLD 1976).

Ghulam Muhammad sought adverse possession of government land in Kacehi Abad that he had owned for more than thirty years in a case before the Sindh High Court called *Ghulam Muhammad v. Province of Sindh*. Justice Arshad Noor Khan denied the relief, arguing that adverse possession is based on the idea that "might is right" and could lead to destruction. Additionally at odds with the ideas of justice, equity, and conscience are the aforementioned concepts . In 2007, a mother named Louis Anny Fairley invoked constitutional jurisdiction when her father disregarded foreign court rulings and violated the court's custody orders in order to regain custody of her minor kid. By granting the petitioner (mother) custody of the youngster through a discretionary power order, the high court determines that the father's actions were against fairness, justice, and good conscience. Respondent in a lawsuit filed by Ghous Muhammad Khan seeking particular execution of a contract neglected to submit a cross-objection and appeal after a decision was made against them. In that instance, the high court directed the appellate court to grant the respondents' cross-appeal and object in order to give him an opportunity to defend himself on the grounds of fairness, justice, and conscience . The

issue of maintenance for a grandson of a deceased person's predeceased son was brought before Haji Nazim Khan for resolution. Since no substantive law could address this issue, the Supreme Court resolved the dispute regarding the meaning of social justice in Islam and thoroughly examined how the concepts of "equity, justice, and good conscience" emerged in the subcontinent and were applied under the Pakistani government. It was also decided that the principles of Istislah and Istiḥsān, which essentially mean equality, decisions based on public policy and good conscience, must be adopted in situations where the Qur'ānic text, Ḥadith, Ijma, and Qiyās are not available for decision-making. It was also decided that courts would not be allowed to apply equity principles when there was an Islamic legal system in place. In Pakistan, all other laws ought to be Islamic laws. Thus, it was determined that every relative, to the extent that it is banned, is entitled to maintenance if he is blind, destitute, or a child. (PLD 1976). The question of whether a childless widow can inherit from her deceased husband when he persuades the Shia sect arose in a recent judgement of Khalida Shamim Akhtar v. Ghulam Jaffar before the Lahore "High" Court. This issue has not been decided by the judiciary, nor has any codified legislation been enacted in Pakistan regarding it. Respondents, the deceased's brothers, countered that a widow is not entitled to any inheritance under the Shīah sect. In the lack of any legislative provisions, Justice Ibad-ur-Rehman Lodhi determined, in the interest of equity, justice, and good conscience, that a Muslim widow without children is entitled to one-fourth of her husband's estate (PLD 2016 Lah 865).

In the *Ghulam Murtaza v. State case*, the Lahore High Court's Full Bench rendered a definitive ruling that clarified the court's policies regarding notice recovery and sentencing, taking into account the social, legal, and economic aspects of the sentence that was given. "Quintessence of civilization's history and growth in the legal area is a transition from dispensing justice according to the principle of "equity justice and good conscience to justice according to law," according to Justice Asif Saeed Khosa's equity principle in that particular case. To such territory, but the underlying ideals of equity, justice, and morality apply. (PLD 2009 Lah 362). The Supreme Court established a standard for use in the *Muhammad Hussain v. Dr. Zahoor Alam* decision that was not specifically stated in the statute for resolving a claim for specific performance of a contract between parties. These restrictions were established by the Supreme Court using the equity doctrine, which is unknown to our co-defined legislation. When giving orders, the Supreme Court adheres to three well-known equity maxims.

1. Those who establish equity must do so with clean hands.
2. Those who are aware of their rights are favoured by law.
3. Enforcing the return of justice in accordance with the principles of equity and moral rectitude is the goal of exercising authority (2010 SCMR 286).

4. Conclusion

By the late eighteenth century, British judges were already citing the Roman law formula of justice, equity, and good conscience. They meant British laws by this. "if they could apply to the Indian society and circumstances," though there were differing views on its applicability and whether it could take precedence over clear Islamic norms. Hastings believed that the British should intervene with a solution where the application of the law appeared to be at odds with good governance and common sense. Adoption of "equity, justice, and good-conscience" as a standard for decision-making on many issues in every legal system of society demonstrates how inadequate it is for us to codify a successful legal remedy founded on both justice and the principles of law. The common and equitable legal systems in colonial India were merged to the early rules made by British rulers that permitted equity to fill in the vacuum in the procedural law. In Pakistan, equity serves as a residuary legal system. Whether it is a civil, criminal, corporate, or service concern, it offers an escape route in all parts of the legal system. Even though some jurists suggested substituting the Islamic concept of *istiḥsān* in its place, their suggestions were not very effective. In Pakistan, equity is a tool used to reach decisions on justice.

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