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EQUITABLE DEFENCES IN MODERN JURISPRUDENCE: APPRAISING THEIR NORMATIVE STATUS AND PRACTICAL APPLICATION

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ABSTRACT

This paper examines the nuanced role of equitable defences, particularly laches and acquiescence, within the merged legal framework of law and equity. The historical merger has led to ambiguities surrounding the normative status and practical application of these defences, raising questions about their classification: are they true defences or merely guiding principles within the legal system? By analysing these defences, especially their interaction with statutes of limitations, this paper investigates how equitable doctrines operate, focusing on their discretionary nature and the flexibility they offer courts in balancing fairness and justice. Equitable defences, rooted in the maxims of equity, traditionally sought to counterbalance the rigidity of common law by considering fairness-based factors. This work critically appraises whether equitable defences should be treated as substantive legal defences or remain principles that guide judicial discretion. It also addresses the ongoing scholarly debate regarding their function in private law, emphasising the courts' role in defining the circumstances under which these defences apply without statutory guidance. The paper ultimately argues that while the merger has afforded courts greater flexibility, it has also left equitable defences in a state of conceptual ambiguity, underscoring the need for clearer judicial principles to guide their application in modern legal practice.

Keywords: Equity, Common Law, Equitable Defences, Laches, Acquiescence, Statutes of Limitation, Judicial Discretion

INTRODUCTION

One of the dilemmas for students of law of equity in recent times is the idea of equitable defences. Are they actual defences so categorised, or mere principles developed to achieve the aim of the law of equity, i.e. justice and fairness, across various areas of substantive law?[1] One of the major reasons to evaluate this important question is to examine the effect, if any, of the merger of common law and equitable principles as a singular judicial system operating on a platform.[2] Largely, the concern relates to what principles exist or survive the merger, and which ones are not included

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1 Roscoe Pound, 'The Decadence of Equity.' 5 *Columbia Law Review* 20, 35 (1905).

2 The effect of the Judicature Act 1873.

and whether those surviving have distinct normative character, or at least are they deserving of such normative status, such as the defences? In the realm of law, equitable defences occupy a unique and often contentious position.[3] While these defences draw principles from various legal domains such as property law, contract law, and intellectual property law, their classification as true defences remain a subject of debate.[4] For instance, equitable doctrines like laches, acquiescence, and estoppel have long been employed to address issues of fairness and justice in legal disputes regardless of the system of law.[5]

However, the question remains: are these doctrines truly legal defences in the traditional sense, or do they operate more as equitable principles guiding judicial discretion of justice? This paper delves into this intricate question, using examples of laches and acquiescence, to examine whether these doctrines function effectively as legal defences. While they undoubtedly play a crucial role in shaping outcomes in legal disputes, the extent to which they can be classified as bona fide defences is a matter warranting closer scrutiny. They can be misused if not properly characterised.[6] So, one must not ignore at all times the primary function in preserving the integrity of the law.

Judicial interpretation remains a major factor in the application of equitable principles. Hence, an important role of statutes is to guide the application of a judge's discretion.[7] Consequently, without any direction from the language of the legislation, judges have exclusive discretion to define these defences and describe the circumstances in which they apply.[8] This can affect the nature of defences without statutory guidance. Then, their categorisation as defences remains a challenge. Should the application of defences be discretionary without a clearly defined characterisation? By exploring the operation of these doctrines within the framework of legal proceedings, we can gain deeper insights into their practical significance and their broader implications for the administration of justice. This is the focus of this paper, using laches and acquiescence as case analysis. I consider these concepts in turn after exploring experts' discussions and analyses on the nature of defences in equity. I argue that often forgotten equitable defences play an important role in the statutory application of law. Examining how these applications apply and modify equitable

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3 *See also* Henry Smith, 'The Equitable Dimension of Contract*',* 45 *Suffolk University Law Review* 897, 907 (2012).

4 Douglas Laycock 'The Triumph of Equity', 56 *Law and Contemporary Problems* 53-82 (1993); Thomas D Rowe Jr. No Final Victories: The Incompleteness of Equity Triumph in Federal Public Law, 56 *Law and Contemporary Problems* (1993); Melvin A Eisenberg, The Nature of Common Law, 118 (1988).

5 Walter S. Beck, 'Estoppel Against Inconsistent Position in Judicial Proceedings', 9 *Brooklyn Law Review* 245, 245 (1940); Herbert Broom, 'A Selection of Legal Maxims' 119 (4th ed. 1854).

6 Leigh Anenson 'Equitable defenses in the Age of Statutes'; *See* Guido Calabresi, A Common Law for the Age of Statutes (1982).

7 *See also* Zygmunt J. B. Plater, 'Statutory Violations and Equitable Discretion', 70 *California Law Review* 524, 526 (1982).

8 Ibid. *See* Richard L. Marcus, 'Slouching Toward Discretion', 78 *Notre Dame Law Review* 1561, 1567, 5-74 (2003).

defences within a legislation should enhance understanding of these vague doctrines in a way that appreciates the law and equity as a coherent whole.

The paper discusses the substance of the defences and highlights the challenges likely to be faced if applied as an independent entity, and the commingling tendency with the well-established common law rules or defences. I also examine some opinions of scholars on the independent nature of equitable defences. Therefore, using laches and acquiescence, I explore whether the defence should remain. A tenable argument is that in the operation of the merged system of law into one system administered by the same court, the defence ought not to be treated as being normative but rather as a part of the principles to be applied as a whole by the merged common law system[9].

What are equitable defences?

In general terms, equitable defences typically serve as affirmative defences, principles, or doctrines seeking the equitable court's intervention to excuse an action due to the opposing party's inequitable conduct.[10] While historically confined to courts of equity, these 'defences' are now admissible in courts of law as well.[11] They come into play when seeking relief under legal remedies[12], known as "at law". Examples of equitable defences include mistake, fraud, illegality[13], failure of consideration, *forum non conveniens*, laches, estoppel, and unclean hands.[14] These defences play a pivotal role in legal proceedings, providing a means to address issues of fairness and equity within the framework of the law.

These defences stem from the foundational principles of equity, which are rooted in the maxims guiding equitable jurisprudence.[15] For instance, the maxims "He who comes to equity must come with clean hands"[16] and "Equity does not aid the

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9 There appears to be divergent opinions among scholars that distinguishes between the 'wide sense' of equity as opposed to its narrower 'legal meaning' where the legal meaning refers to the substantive principles applied and administered by the Courts of Chancery before 1873, in Hanbury and Martin's Modern Equity, 16th edn, 2001, London: Sweet & Maxwell, 3.

10 A Dyson, J Goudkamp and F Wilmot-Smith, Defences in Tort (Oxford, Hart, 2015); A Dyson, J Goudkamp and F Wilmot-Smith, Defences in Unjust Enrichment (Oxford, Hart, 2016); A Dyson, J Goudkamp and F Wilmot-Smith, Defences in Contract (Oxford, Hart, 2017).

11 Samuel L. Bray, 'The Supreme Court and the New Equity', 68 *Vand. L. Rev*. 997, 1001 (2015)

12 Doug Rendleman, 'Remedies: A Guide for the Perplexed*',* 57 *St. Louis University Law Journal* 567, 572 (2013); Ronald M. Levin, '"Vacation" At Sea: Judicial Remedies and Equitable Discretion in Administrative Law*',* 53 *Duke Law Journal* 291, 323 (2003).

13 *see also* John W. Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 *University of Paul Law Review*. 261, 268–82 (1947).

14 Zechariah Chafee, Jr., 'Coming Into Equity With Clean Hands', 47 *MICHIGAN LAW REVIEW* 1065 (1949); *See generally* T. Leigh Anenson, *'*Limiting Legal Remedies: An Analysis of Unclean Hands', 99 *KY L.J.* 63 (2010).

15 *See* Dan B. Dobbs, Dobbs Law of Remedies: Damages-Equity-Restitution 247-48 (2d ed. 1993)

16 The maxim 'he who comes into equity must come with clean hands' which has been invoked mostly in cases between private litigants, requires a plaintiff seeking equitable relief to show that his past record in the transaction is clean: Overton v. Banister (1844), 3 Hare 503, 67 E.R. 479; Nail v. Punter (1832), 5 Sim. 555, 58 E.R. 447; Re Lush's Trust (1869), L.R. 4 Ch. App. 591

indolent…"[17] underscore the principle that equitable relief is granted to those who approach the court with clean hands and diligence, and those who act timeously.[18] For instance, the doctrine of unclean hands exemplifies this principle by denying equitable relief to a party shown to have acted in bad faith.[19] Here, the defendant can assert this defence when a plaintiff engages in inequitable conduct. In essence, a plaintiff in an equitable claim must demonstrate innocence of wrongdoing, or risk dismissal of the case.[20]

Similarly, the doctrine of laches embodies the notion that a plaintiff should not delay in seeking remedies or "sleep on his or her rights." If a plaintiff delay bringing a suit despite knowing of the defendant's harmful actions, and this delay prejudices the defendant's rights, the plaintiff risks having the case dismissed. While these equitable defences are traditionally associated with remedies, they trace their origins to the unwritten rules of private law. Despite their historical roots, the courts have increasingly integrated them into modern legal frameworks, even without explicit legislative approval. However, a cohesive theory explaining the reconciliation of equitable defences within statutory schemes which provide private rights to public wrongs has yet to be articulated by the courts, hence this analysis.

Why are Equitable Defences not Recognised?

Equitable defences have been criticised as anachronistic after the 1873 merger of the two systems.[21] The under-recognition of equitable defences within the framework of equity and law raises significant questions regarding the conceptual organisation of the legal system. Despite being integral components of legal analysis in any branch of law, especially private law, equitable defences are often overlooked within the realm of law. This oversight is particularly puzzling considering the conceptual alignment between equity and common law, as highlighted by scholars.[22] Scholars' argument suggests that liability in equity mirrors liability arising from common law wrongs, implying that equitable wrongs should be governed by similar rules.[23] A scholar emphasises this viewpoint by asserting that there are no irreconcilable differences

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17 Armitage v Nurse [1998] Ch 241, 255, Barraclough v Mell [2005] EWHC 3387 (Ch); [2006] WTLR 203, [90] See, Berryman, Jeffery "*The Law of Equitable Remedies"* (Irwin Law) at p.18.

18 *See,* James W. Eaton, Eaton on Equity (1901), 122 at 47.

19 *See generally* T. Leigh Anenson & Gideon Mark, 'Inequitable Conduct in Retrospective: Understanding Unclean Hands in Patent Remedies', (2013) 62 *American University Law Review* 1441; *See generally* T. Leigh Anenson & Gideon Mark, 'Inequitable Conduct in Retrospective: Understanding Unclean Hands in Patent Remedies', 62 *American University Law Review* 1441 (2013).

20 David S. Schoenbrod, 'The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy', 72 *Minnesota Law Review* 627, 631-33, 665 (1988)

21 After the Judicature Act 1873, the old courts of chancery were replaced by the High Court of Justice, although it could be said that the spirit of the old courts of chancery lived on in the Chancery Division of the High Court which was created by that Act.

22 *See* Peter Birks, 'Three Kinds of Objections to Discretionary Remedialism', 29 *University of Western Austartlia Law Review* 1, 3 (2000)

23 P Birks, 'The Concept of a Civil Wrong 'in DG Owen(ed), Philosophical Foundations in Tort Law (Oxford, Clarendon , 1997)

between common law and equitable defences.[24] In light of this conceptual alignment, it follows logically that equitable defences should receive the same level of attention and consideration as their common law counterparts.[25]

Moreover, equity itself acknowledges and employs rules that bear the hallmarks of traditional defences in other areas of private law.[26] For instance, concepts like illegality, limitation, and consent, which are widely recognised as defences in other legal contexts, find application within equitable jurisprudence.[27] Furthermore, equity boasts a plethora of rules specific to its domain that readily lend themselves to the characterisation of defences:[28] for instance, the rule outlined in section 61 of the Trustee Act 1925 (UK)[29], which grants the court a discretion to relieve a trustee from personal liability if they have acted honestly and reasonably in a breach of trust.[30] This provision embodies principles akin to those of traditional defences, although the terminology and conceptual framing remain different.

Equitable doctrines and remedies are largely discretionary. The failure to accord equitable defences the recognition they deserve not only challenges established conceptual distinctions within the legal system but also hampers the coherent development and application of equitable principles.[31] A major concern which questions the independence of the equitable defences is the discretionary nature of its application by the judges, contrary to the substantive nature that such principles must embody to be applied.[32] Due to the existence of alternative systems or rules under the various areas of law aimed at remedying the wrongs and offering relief, it seems their application as independent defences that are not just amorphous by rather rely on the personal idiosyncrasies of the individual judges. Besides, law and equity should not have different standards of morality[33]; a natural effect of judicial idiosyncrasies, especially as relates to reliefs. Separate equitable defences produce double standards of morality and are incapable of alleviating hardship or discouraging sharp bargaining of parties to a dispute in seeking justice. As judges, practitioners and scholars continue to grapple with the interface between equity and common law, it becomes increasingly

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24 Andrew Burrows, 'We Do This at Common Law But That in Equity' (2002) 22 *OJLS* 12.

25 A Burrows, 'Remedial Coherence and Punitive Damages in Equity 'in S Degeling and J Edelman (eds), Equity in Commercial Law (Sydney, Thomson Reuters, 2005) 386.

26 *see* Henry Smith, 'The Equitable Dimension of Contract', 45 SUFFOLK U. L. REV. 897, 907 (2012)

27 See John Norton Pomeroy, A Treatise on Equity Jurisprudence as Administered in the United States of America at 802.

28 T. Leigh Anenson, 'The Triumph of Equity: Equitable Estoppel in Modern Litigation', 27 *Rev. Litig.* 377, 388 (2008).

29 S. 61 of Trustee Act 1925

30 See J Lowryand R Edmunds, 'Relieving the Trustee-Solicitor: A Modern Perspective on Section 61 of the Trustee Act 1925?' (2017) 133 LQR 223; P Davies, 'Section 61 of the Trustee Act 1925: deus ex machina?' [2015] Conv 379.

31 *See generally* Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and the Unwritten Law*, 80 U. Chi. L. Rev. 657 (2013)

32 *See* Peter Birks, 'Three Kinds of Objections to Discretionary Remedialism', 29 *U.W. Austl. L. Rev*. 1, 3 (2000).

33 Raz, J, The Morality of Freedom, 1986, Oxford: Clarendon.

imperative to reassess the treatment of equitable defences and integrate them more seamlessly into the broader legal framework.[34]

Additionally, the classification of defences within equity poses a significant challenge, one that has been extensively explored in some branches of law, such as criminal law.[35] Yet, this systematic approach to classification has been notably absent in the realm of private law. While efforts to categorise defences in several areas of law, including tort law, have been ongoing for centuries, similar endeavours have not been undertaken in other areas of private law.[36] This lack of comprehensive classification hampers a thorough understanding of equitable defences.

Nature of Equitable Defences

Historically, equitable reliefs are developed on the moral and religious inclinations of the judges rather than legal principles, and therefore makes it difficult for a wholesome recognition as a substantive defence.[37] This approach is contradictory, as a judge might have different moral standards in adjudication, with a dilemma of whether a plaintiff or defendant ought to alternate the pleading of both equitable and legal defences.[38] If anything, it complicates and makes the application of the law unpredictable, contrary to the goals of equity. Because the principles of equity are not designed as a separate normative category, defences in equity introduce a nuanced and multifaceted dimension to legal analysis, drawing upon a wide array of principles and doctrines that are not unique to equitable jurisprudence.[39]

While some defences within equity, such as equitable set-off, laches and acquiescence, and release, may be considered standard, equity encompasses numerous rules that bear resemblance to defences recognised at law. However, they complicate the process of determining the types of remedies that parties can seek in courts since the two can exist side by side.

Nevertheless, a fundamental challenge to the traditional understanding of defences emerges, particularly regarding the assertion that equitable wrongs do not substantially differ from common law wrongs.[40] If pursued to its logical conclusion, this viewpoint suggests that equitable defences should be considered alongside common law defences within each respective branch of law, rather than as a distinct category.[41] This perspective prompts a re-evaluation of the distinctive nature of

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34 See Spry, I, Equitable Remedies, 6th edn, 2001, Sydney: LBC; Snell, Equity, 1868, 1st edn; Virgo, G, Principles of the Law of Restitution, 1999, Oxford: Oxford University Press

35 See. GP Fletcher, Rethinking Criminal Law (Boston, Little, Brown & Co, 1978) chs 7, 9 –10; PH Robinson, Criminal Law Defenses (St Paul, Minn , West Publishing Co , 1984)

36 J Goudkamp, Tort Law Defences (Oxford, Hart, 2013).

37 See, Chafee, Coming into Equity with Clean Hands (pt. 2), 47 MiCH. L. Rav. 1065, 1096 (1949); Dawson, Specific Performance in France and Germany, 57 MiCH. L. REv. 495, 535-36 (1959)

38 Rotherham, C, Proprietary Remedies in Context, 2002, Oxford: Hart; see Farnsworth, Legal Remedies for Breach of Contract, 70 Columbia Law Review 1145 (1970).

39 See Z. Chafee, Some Problems of Equity 28 (1950).

40 Rotherham, C, Proprietary Remedies in Context, 2002, Oxford: Hart

41 Ibid.

equitable defences and their impacts on legal proceedings across various branches of private law, and it underscores the need for further examination and scholarship to elucidate the role and significance of equitable defences within the broader legal landscape.

Indeed, some experts argue that divergence between the theory and reality of equitable defences creates confusion for both the courts and litigants, as there is no clarity in the process of choice from the pool of available remedies that serve the interest of justice[42] Douglas argues that equitable remedies have contributed to substantive remedies through injunctions and specific performance and have become routine even in texts. They have contributed to both substantive, procedural and contemporary attitudes towards discretion and formalism. Although its application in courts is controversial, considering the declining use as it consumes time and resources. Often, litigants and courts struggle to find reasons to apply the doctrine to the facts of every case due to its uncertainty.[43]

EQUITY v LAW: Laches and Statute of Limitation

As stated earlier, equitable defences border on the question of the application of equity and law in the administration of justice, after fusion of the two concepts. Statute of limitations highlight the complex relationship between notions of fairness in equity and the rigidity of common law regarding limits for actions.[44] While laches exemplifies the essence of equity, urging parties to seek timely redress and prevent undue delay, statutes of limitations introduce a strict framework within which legal claims must be pursued, regardless of equitable considerations.[45] A path towards a more equitable legal framework is feasible, however. Perhaps, an interplay of laches and statutes of limitation could chart a course that shows potential positive possibilities in the right direction.

The relevant equitable maxim that ‘equity follows the law’ has two meanings; the first is that equity complements the common law only when it goes against conscience, and second, that it reflects the way that equity models some of its doctrines on similar common law doctrines such as laches being given the same time as the corresponding statute of limitation. This has, in some cases, even required that the statutes be amended and repealed, including the recognition of equitable principles through statutes as well as bodies of law.[46] Consequently, the operation and application of equitable doctrine should tend more towards justice for parties where the application of statutes could result in absurdities.

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42 J Frank and J Endicott “Defences in Equity and Legal Rights” 14 Louisana Law Review (1954).
43 Douglas Laycock “The Triumph of Equity”, 56 Law and Contemporary Problems 53-82 (1993).
44 Ibid.
45 Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitations and the Doctrine of Laches*, 1992 B.Y.U. L. Rev. 917, 948.
46 See examples of Restitution and Unjust Enrichment, Injunctions etc.

This principle has been given international recognition by international tribunals between member states.[47] There are a plethora of cases where this doctrine vitiates the claims of petitioning states, although the doctrine of acquiescence tends to be more applicable and established than the doctrine of laches. This doctrine of laches and acquiescence has been applied across most branches of law, as the legal system tends to swing from the common law and statutory provisions to the discretionary application and interpretation of judges.

Laches and acquiescence offer flexibility, which requires the defendant, despite the lapse of time, to be able to proceed with his cause of action if he is able to prove that his delay is not unreasonable. This doctrine originates from the Latin maxim "*Vigilantibus non dormientibus uitas subvenit,* meaning "Equity aids the vigilant and not the indolent". In this case, a claimant is required to establish his ignorance of the cause of an action, incapability and steps toward reconciliation or negotiation as grounds for his delay in bringing the action.[48] To balance the contrasting interests of the parties, equity imposes an additional condition on the claimant to establish that a defendant will not suffer any form of prejudice. i.e., evidential prejudice and economic prejudice.[49] The defendant may establish that he will be prejudiced evidentially for loss of memory of the event constituting the breach of rights, being unable to call his witnesses, and the security of documentary evidence. He may also establish that he has taken steps which change his economic position on the reliance that no cause of action has arisen from his actions.[50] Laches can be disaggregated into cases where delay amounts to a representation that the claimant holds no rights, and cases where there is no representation, but the defendant suffers an irreversible prejudice. Acquiescence can similarly be split up between cases where the silence amounts to a promise not to sue and a representation that the claimant holds no cause of action against the defendant.

Jurisprudentially speaking, therefore, the doctrine seeks to re-examine the relationship between equity and statutes of limitation. The analysis is motivated mainly by the fact that equity sometimes 'follows' limitation statutes even where those statutes do not apply in terms.[51] The doctrine of laches and acquiescence embodies the concept of rights and obligations which courts will enforce, and entails that a party should not sleep on his rights when he realises such rights have been or are being infringed on.[52] The claimant is expected to seek redress promptly and

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47 International Court of Justice (ICJ) judgements in Continental Shelf Cases on Maritime Boundaries, Judicial Powers and Customary Law, International Tribunal on the Law of the Sea (ITLOS). See Walid Fahmy 'Equitable Principles from the Perspective of International Law' Economics, Law and Policy, (2018) 1:1.; L B Sohn, 'Equity in International Law, American Society of International Law (1988).

48 J. R. Swartz, 'When the Door Closes Early: Laches as an Affirmative Defense to Claims of Copyright Infringement' (2007) 76 *University of Cincinnati Law Review*.

49 Ibid.

50 Ibid.

51 Note, *Application of Laches in Public Interest Litigation*, 56 B.U. L. Rev. 181 (1976)

52 Citation rights infringement and delay

diligently because "delay defeats equity"[53] and "equity aids the vigilant, not the indolent."[54] This is what evolves into the doctrine of laches and acquiescence, a creation of equity. The doctrine as an equitable defence serves to prevent a plaintiff from proceeding with claims against a defendant who relies on a lengthy delay that makes it inequitable to permit the plaintiff to subsequently pursue his or her claim.

Whether in law or equity, it involves a person refraining from /or substantially delaying in asserting a right or its breach in a way that prejudices the party against whom relief is sought.[55] It presupposes a passive acceptance of the breach of right with full knowledge of the breach of such rights, and therefore, such a claimant will be prevented from acting contrary to his actions after keeping quiet on his right, or in a sense, delay in bringing such rights within the statutorily specified period.[56] As an equitable doctrine, Lord Cranworth in *Ramsden v Dyson*[57], captures the essence of the doctrine when he says:

> If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own.

Acquiescence therefore operates by way of estoppel, for instance, preventing the original owner from asserting their right to the property.[58] It does not necessarily involve the element of time, but involves conduct suggestive of fraud or unconscionability.[59] Laches, on the other hand, involves substantial delay in asserting one's right. It involves standing by, delaying or being indifferent while one's right is being infringed. The Court of Appeal in *Gidado v Lawal* [60]states thus: '…laches essentially consists of substantial lapse of time coupled with the existence of circumstances which makes it inequitable to enforce a claim.'

Consequently, a claimant's failure to enforce his rights in a timely fashion can result in the claim being barred by laches. Some courts in Nigeria have also established it as a form of waiver. *In Kayode v Odutola*[61], the court relies on the English case of *Lindsay Petroleum Co v Hurd*[62] thus:

> The doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be

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53 *See Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (2002) 804-05
54 Ibid.
55 Blacks Law Dictionary 14th Ed.
56 *See, e.g.*, John L. Garvey, *Some Aspects of the Merger of Law and Equity*, 10 Cath. U. Am. L. Rev. 59, 63 (1961).
57 (1866) LR 1 HL 129.
58 See Nsiegbe v Mgbemena (2007) LLJR-SC.
59 See Adebo v Omisola (2005) 2 NWLR (pt 909) 175.
60 (2014) JELR 366, 56.
61 (2001) LLJR-SC; (2001) LPELR-1682(SC) at 34-35.
62 (1874) L.R.S.P.C. 221.

> practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waived that remedy, yet put the other in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most essential… Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy…"[63]

For laches, time is not the determining factor but the lack of a reasonable explanation for the delay in the institution of an action or bringing a claim to court. Therefore, a mere lapse of time is insufficient to ground the defence of laches. Where a plaintiff can make a reasonable explanation as to the cause of his delay in asserting his rights, the defence will not be upheld.[64] Similarly, the defence will not avail a defendant where there is no excessive delay on the part of the plaintiff in enforcing his rights after becoming aware of such infringement.[65] In other words, laches offers the flexibility required to give the claimant the opportunity to be heard in contrast to a statute of limitations. The court considers not only the length of the delay but also the nature of the acts done, which might affect either party and result in injustice to the defendant.[66] Acquiescence, on the other hand, focuses on the claimant and seeks to prevent him from presenting a situation contrary to his legal right, like the defence of estoppel examined in the next section. Justifications for a Plaintiff may be excused even where laches and acquiescence have been established on the following grounds:

i. Ignorance of the plaintiff of the breach: a ground for a successful plea of laches and acquiescence is that the plaintiff must be aware of his rights. Hence, the defence of laches and acquiescence will not avail a defendant where the plaintiff delays, refrains from asserting his rights because he is unaware of his legal rights.[67]

ii. Defendant's fraud: "he who seeks equity must do equity" and "he who comes to equity must come with clean hands".[68] Laches and acquiescence may be excused if it is established that a defendant is fraudulent in his dealings. For instance, if it is proved that the defendant has been informed of the plaintiff's

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63 Ibid at 8-9.
64 See Fagge v Amadu (2015) LPELR-25 920(CA).
65 See Salako v Dosunmu (1997) 8 NWLR (pt 517) 371.
66 Ibid at 372.
67 See *Salako v Dosunmu* (supra); *Gidado v Lawal* (supra).
68 Z Chafee, Jr., *Coming Into Equity With Clean Hands*, 47 Michigan Law Review 1065 (1949)

rights to the property in question by a reliable third party, and so he is not mistaken as to his title, but still goes ahead to expend money, the defence may not avail him.[69]

iii. Legal disability or incapacity of the plaintiff: The defence of laches and acquiescence may not be sustained if it is established that a plaintiff lacks the legal capacity to exercise his legal rights. Where the plaintiff is a minor or is suffering from mental illness or physical ailment at the time the acts resulting in laches and acquiescence occur, the defence may not be sustained.[70]

It must be established that "both defences" are coterminous and are typically pleaded as a defence by claimants. It is hard to see a claimant claiming one instead of both. There appears to be a conflation regarding such applications, almost implying they are one and the same, substantively and procedurally. The burden of proof for laches and acquiescence is on the person asserting, and generally is as follows:

i. That the Respondent is in fact mistaken as to his own rights over the land.
ii. That he has, in reliance on the mistake, expended his money on the land
iii. The plaintiff must have known of the existence of his own right, which is inconsistent with the right claimed by the Respondent over the land.
iv. That the Plaintiff must have known of the mistaken belief of the Respondent
v. The Plaintiff must have encouraged the Respondent in his expenditure of money.

The courts in Nigeria have in a plethora of cases, upheld the defence without equivocation. In *Akanni & 7 Ors. v Makanju & 2 Ors,*[71] the Supreme Court establishes the requirement of the doctrine when it holds that in determining whether or not to uphold a defence of laches, the Court does not only consider delay by the plaintiff but must also consider the acquiescence on the plaintiff's part, and any change of position that occurs on the defendant's part. The Nigerian courts have maintained the doctrine that if the Plaintiff by his conduct has done what may be regarded as a waiver, or by his conduct and neglect has put the other party in a position in which it would be unreasonable to place him if the remedy were afterwards to be asserted, the doctrine of laches will apply.[72] What is obvious is the lack of distinction between the defences when courts apply them either for equitable reasons or as a substantive defence in law. This might appear deliberate or a misapplication, that they are aiming at the same goal or justice for the relying party.

Effect of Laches and Acquiescence, and Limitation Statutes

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69 See, e.g., T. Leigh Anenson, Beyond Chafee: A Process-Based Theory of Unclean Hands, 47 AM. BUS. L.J. 509, 510 (2010).
70 Ibid.
71 (1978) LCN/1971 (SC).
72 Fagbemi v Aluko (1968) 1 All NLR 233 at 237, (1968) LLJR-SC .

Some experts claim that equitable defence in this regard is broader than the law's and would not deny claimants remedies in cases that the law would[73]. Some scholars argue that equitable and legal defences are in practice identical in merged judicial systems, and that a plaintiff denied specific relief will fail to obtain any other remedy for the breach[74]. Therefore, the idea of interchangeability does not apply to these two defences. Suffice it to say that failure to establish this defence under any of these systems could mean that no relief for the claiming party. Claimants cannot have alternative expectations in instituting their action or in claiming a particular relief before the court. By the nature of the remedies, they are usually different in approach. Using the examples of damages and restitution, damages (law) are designed to put the injured party in the same position as if the contract had not been made, by reimbursing for any loss caused by reliance on the contract, while restitution (equity) is designed to prevent unjust enrichment by requiring the party in breach to restore any benefit conferred by the injured party in part performance or reliance on the contract.[75] Therefore, one cannot expect a party to alternate the advantage of these doctrines since the underlying requirements/focus of the defences are fundamentally different. The effect of the defences, therefore, in some cases, is proprietary. In property law, the original or true owner of the property loses their title to the property.[76]

This effect follows the provision of statute that prescribes a limitation period[77] which must have accrued, and the cause of action arose since the cause of action begins when the action accrues.[78] The foundation of both cases is such that claims are brought within a reasonable period so that witnesses and evidence can be found easily, and that no party has acted contrary to the state of affairs. An important question is, therefore, whether the existence of a statute limiting the period to bring a claim against a defendant is a condition for the activation of the defence of laches in equity. Some experts have argued that equitable reliefs can only operate where there is no statutory limitation in place, as "equity follows the law". Thus, if there is a statutory bar operating either expressly or by way of analogy, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable. However, the foundational principle of equity, as established, is that it ameliorates the harshness of common law. This purpose will be defeated if the defence can only be activated in the absence of a

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73 Bray Samuel 'A little bit of Laches Goes a Long Way: Notes on Petrella v. Metro-Goldwyn-Mayer Inc.' Vanderlit Law Review en Banc (2014) 67: 1-18; Ibrahim Ashraf Ray, 'The Doctrine of Laches in International Law' (1997) *Virginia Law Review* 83:3, 647-692.

74 Fort Kathryn, 'The New Laches: Creating Title Where None Existed'George (2009) *Mason Law Review* 16:357.

75 K. Didwania, Note, The Defense of Laches in Copyright Infringement Claims, 75 U. CHI. L. REV. 1227 (2008).

76 See Igbum v Nyarinya (2000) LLJR CA.

77 See Tobi JCA in Mercantile Bank of Nig. Plc v. FETECO (Nig.) Ltd (1998) 2 NWLR (540) 143 at 156-157.

78 See INEC v. Ogbadibo Local Government & Ors.(2015) LPELR 24 839; Okenwa v. Military Governor of Imo State(1997) 6 NWLR (pt 507) 154 at 167.

statute of limitation, or simply put, where there is no limitation for the cause of action at law. This implies that equitable laches is only available where the law is not applicable, a form of intervention to prevent a lacuna, like a statute of limitation.

Can statutory limitation trounce equitable intervention?

What happens when a court rejects an equitable remedy of laches? Does it return to common law rules, or is the claimant left with no remedy at all? It appears that the court would resort to common law rules backed substantively by case laws and other legal provisions. This implies there is no need for a separate demand for equitable defence. This position can have a negative effect on parties who are willing to explore, especially by agreement, the relief that equity offers. Thus, if a legal system adopts unified defences to legal and equitable remedies, those risks would change, and the outcome of bargaining between the parties in certain cases might be considerably different.[79] Abolishing separate equitable defences may also affect the original negotiations between parties in setting the terms of their agreement.[80] Experts raise several concerns over the doctrine in relation to the statute of limitations. But a key issue is the circumstances in which equity should deny its assistance in view of a relevant statute of limitation, even though the statute does not, properly construed, apply directly.

Complexity in this area of defences is not merely a product of the interaction between case law and statute but also a consequence of the multiplicity of defences that are closely related to limitation bars. The effluxion of time seems to form the basis of, in addition to limitation bars, several other defences, including laches, estoppel, acquiescence and release. These defences overlap to a considerable extent. For instance, a promise not to sue on a past breach might in one particular case be pleaded as a release, acquiescence, and even laches. This can be a source of confusion. One possible way of reducing the complexity of the law in this regard, which is alluded to in some cases, is to roll the various defences into a single principle of estoppel. By delaying bringing a claim, the argument goes, the claimant represents to the defendant that he will not stand upon his rights, and the defendant might then rely upon this representation to his detriment.

In essence, laches and acquiescence, while often categorised as equitable defences, defy strict classification as such due to their inherent reliance on equitable principles rather than a concrete formulation or systematisation within legal frameworks. These doctrines, rooted in notions of fairness and justice, operate under principles of equity rather than fitting neatly into the traditional framework of defences recognised under the law. Unlike more clearly defined defences, laches and acquiescence serve to mitigate the harshness of common law and statutes, but their

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79 Douglas Laycock "The Triumph of Equity", 56 Law and Contemporary Problems 53-82 (1993).
80 Ibid at 1224.

application varies across jurisdictions and lacks the general nature typically associated with recognised defences. Instead, they represent a flexible and discretionary approach aimed at addressing inequities in specific factual circumstances, making their contours difficult to establish within a purely equitable context.[81] While these doctrines undoubtedly serve a remedial purpose, their unique nature and reliance on equitable principles distinguish them from traditional defences, highlighting the continuing and complex interplay between equity and common law in modern legal systems.

CONCLUSION

This paper engages the misapprehension of legal and equitable defences and the commonality in their operation by judges of law and equity. The historical merger of common law and equitable defences into one single legal system has been a major reason for the situation. Although the merger of both systems is important because they operate to allow the judges a more flexible option to secure justice and prevent the parties to a claim in the case of laches and acquiescence to prevent opportunistic tendencies and therefore maintain equity's primary cleansing function in preserving the integrity of the law. But they can be misused and misapplied because they have separate foundational understandings and legal features. Without any clear direction from the courts on the substantive application or legislation, the misapprehension remains since judges have unfettered discretion to define equitable defences and describe the circumstances in which they apply. Equitable defences are not created by statute. Courts must inevitably build and develop coherent principles with the aim of legal certainty, equity and fairness. These warrants identifying the blurring lines in the application of the defences, including laches and acquiescence. Courts have an overriding interest in justice as against legislators, notwithstanding their equally important interest to resolve the controversy affecting their operation as a standalone defence without normative considerations as in substantive defences in law.

[81] *See also* Zygmunt J. B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 526 (1982)