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# RECONCILING THE RULE OF LAW WITH EQUITABLE REMEDIES

This article will confront equity with the rule of law and answer the fundamental question of whether equitable remedies are compatible with the standards usually ascribed to the two main theories of the rule of law. On one hand, equity's hallmarks of discretion, conscience-based adjudication and flexibility are a common feature of common law jurisdictions. On the other hand, the rule of law can be distinguished along two main theories: a formalist account where rules have to be certain and published in advance, or a substantive account where the content of the law itself has to meet certain standards, notably protection of properties, respect for human dignity and ability to live independent lives free from interference from the state. This article will argue that equity, in its remedial and "supplemental law" jurisdictions, can be reconciled with both accounts of the rule of law. In particular, equity does not infringe on the formalities required by the formalist version of the rule of law and equity performs multiple functions necessary for a more substantive version of the rule of law: it restrains unconscionable reliance on strict legal rights, it protects property through its expansion of tradeable rights, and it facilitates how people can organise their lives.

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## I. Introduction

1 Despite the tremendous development of equity in the past decades,[1] some academics argue that its hallmarks of flexibility, judicial discretion and focus on conscience afforded to the judiciary sits rather oddly with the rule of law. Indeed, for Peter Birks,[2] discretionary

1 John H Langbein, "The Secret Life of the Trust: The Trust as an Instrument of Commerce" (1997) 107 *The Yale Law Journal* 165; Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *Law Quarterly Review* 238; PJ Millett, "Equity's Place in the Law of Commerce" (1998) 114 *Law Quarterly Review* 214.

2 Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *University of Western Australia Law Review* 1 at 16–17 and 97–99.

remedialism is indefensible and amounts to "losing faith in the rule of law".[3] Roscoe Pound[4] describes the discretionary nature of equity as "anti-legal" and even academics largely sympathetic to equity qualify it as "subversive of law".[5] Although their views may be perceived as mostly relevant to a somewhat traditional or historical version of equity, the premise of their perspectives being based on a fundamental characteristic of equity, namely discretion and flexibility, is nonetheless still relevant today and worthy of an in-depth inquiry.

2 This article will answer the fundamental question of whether equity and the rule of law are compatible. Part II of this article will delineate the two main strands of the rule of law: the formalist theory and the substantive theory. Part III will explore the view that equity is conventionally perceived as not being entirely consistent with the norms traditionally associated with the doctrine of rule of law. Finally, Part IV will attempt to reconcile equity with both accounts of the rule of law. In particular, this article will emphasise the interplay between modern equity and the features of discretion and flexibility.

## II. The two strands of the rule of law

3 At the most general level, the phrase "rule of law" embodies the notion that governments should not only protect their citizens against Hobbesian anarchy and the "war of all against all",[6] but should also exert state power within a restraining framework and not in an arbitrary manner.[7] Beyond this uncontentious proposition, the notion is disputed.[8] There are broadly two opposite poles,[9] or theories, of the rule of law with a continuum in between: a formalist conception focusing on the form

3 Peter Birks, "Three Kinds of Objection to Discretionary Remedialism" (2000) 29 *University of Western Australia Law Review* 1 at 15.

4 Roscoe Pound, "Decadence of Equity" (1905) 5 *Columbia Law Review* 20 at 20.

5 Margaret Halliwell, *Equity & Good Conscience in a Contemporary Context* (Old Bailey Press, 1997) at p 6.

6 Richard A Epstein, "Beyond the Rule of Law: Civic Virtue and Constitutional Structure" (1987) 56 *George Washington Law Review* 149; Richard H Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 97 *Columbia Law Review* 1 at 7; John Rawls, "Equal Liberty" in *A Theory of Justice* (Harvard University Press, 1971) at p 240.

7 Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th Ed, 1915) at pp 184 and 198; Joseph Raz, "The Rule of Law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) at pp 219–220.

8 Lawrence B Solum, "Equity and the Rule of Law" (1994) 36 *Nomos* 120 at 121.

9 Stefan H C Lo & Wing Hong Chui, *The Hong Kong Legal System* (McGraw-Hill, 2012) at p 62.

of the law and a substantive conception focusing more on the content of the law.

### *A. Formalist theory*

4 Under the formalist theory, the conduct of citizens should be governed by their responsiveness to a set of rules; according to Joseph Raz, "the law must be capable of guiding the behaviour of its subjects. It is evident that this conception of the rule of law is a formal one … It says nothing about fundamental rights, equality, or justice".[10] In order to reach that goal, laws should be clearly promulgated and set out. This is what Lon Fuller calls the "eight demands of the law's inner morality":[11] generality, publicity, consistency, stability, prospectivity, congruence, intelligibility and practicability.

5 Of particular importance is that rules should be well known in advance to provide proper guidance to people, and that citizens must be put on notice on how they will be held accountable. This conception "emphasise[s] the importance of … predictability in the legal system, and it is these values that are often thought to be opposed to equity with its tolerance of indeterminacy".[12] Professor Richard Fallon, citing Solum,[13] said that formalist conceptions of the rule of law and equity can be incompatible to the extent that "legal decision makers sometimes ought to depart from the rules in order to do justice in particular cases".[14]

### *B. Substantive theory*

6 Substantive conceptions, however, go beyond that point and insist that a mere observance of formalism will not protect against government authoritarianism. Therefore, there should be, in addition to compliance with formalism, restrictions on the very content of these laws. Lord Bingham advocates for a "thick definition embracing the protection of human rights".[15] Arthur Chaskalson, former Chief Justice of South Africa, echoed this position when he said that "without a substantive

10 Joseph Raz, "The Rule of Law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) at p 214.

11 Lon Fuller, "The Morality that Makes Law Possible" in *The Morality of Law: Revised Edition* (Yale University Press, 1969) at p 46.

12 Matthew Harding, "Equity and the Rule of Law" (2016) 132 *Law Quarterly Review* 278 at 280.

13 Lawrence B Solum, "Equity and the Rule of Law" (1994) 36 *Nomos* 120 at 120.

14 Richard H Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 97 *Columbia Law Review* 1 at 50.

15 Thomas H Bingham, *The Rule of Law* (Allen Lane, 2010) at p 67. See also Lord Bingham, "The Rule of Law" (2007) 66(1) *Cambridge Law Journal* 67.

content there would be no answer to the criticism that the rule of law is an empty vessel into which any law could be poured".[16]

7 Ronald Cass[17] argues that "a critical aspect of … the rule of law is … the protection of property rights". He further explains that "societies that are relatively friendly to property, not only giving it security but also providing broad scope for the use of property according to its owners' desires, will have an advantage". The same notion of property protection being a central tenet of the substantive version of the rule of law was also advanced by Locke.[18] This substantive political theory of the rule of law brings us into the realm of autonomy and freedom, a notion that was developed and championed by the likes of Friedrich Hayek,[19] Raz[20] and Isaiah Berlin.[21] From this perspective, the rule of law is important because it promotes human dignity, which necessarily includes people's rights to plan their future, and it enables an environment conducive for liberty and value pluralism. This political ideal rooted in liberalism ensures that people have at their disposal a sufficient range of options to organise their lives and to make genuine choices in relation to their properties.

## III. Equity

8 This Part will attempt to define the characteristics of equity by going beyond the technical definition formulated by Maitland, *ie*, "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 only by [the] Court of Equity".[22] On this account, equity is a mere ragbag of matters meant to deal with defects of pre-19th century common law. Although Macnair claims that the "view of Maitland has become the current orthodoxy",[23] this article will nonetheless strive to identify broad

16 Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, *The World Justice Project Rule of Law Index 2011* (The World Justice Project, 2011) at p 9, available at <https://worldjusticeproject.org/sites/default/files/documents/WJP_Rule_of_Law_Index_2011_Report.pdf> (accessed 13 July 2021).

17 Ronald A Cass, "Property Rights Systems and the Rule of Law" in *The Elgar Companion to the Economics of Property Rights* (Edward Elgar Publishing, 2004) at p 222.

18 Sean Mattie, "Prerogative and the Rule of Law in John Locke and the Lincoln Presidency" (2005) 67(1) *The Review of Politics* 77 at 84.

19 Friedrich A Hayek, *The Road to Serfdom* (University of Chicago Press, 1944); Friedrich A Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960).

20 Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986).

21 Isaiah Berlin, *Liberty* (Oxford University Press, 2002) at pp 216–217.

22 Dennis Klimchuk, "Aristotle at the Foundations of the Law of Equity" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at p 32.

23 Mike Macnair, "Equity and Conscience" (2007) 27(4) *Oxford Journal of Legal Studies* 659 at 664.

principles of equity for comparison with the conceptions of the rule of law that have been delineated in the first part of this article. A quick word of caution is necessary at this stage though: the nature, boundaries and underlying rationales of equity are a hugely contentious and complex topic which would warrant a separate enquiry on its own and which are beyond the scope of this article. That being said, some broad and recognisable patterns nonetheless emerge so as to organise, classify and catalogue equitable remedies along some common fault lines. This section will develop two strands of equity: remedial equity and equity as supplemental law. Each of these categories will then be supported by examples.

### *A. Remedial equity*

9 According to the Greek philosopher Aristotle in *Nichomachean Ethics*, equity is an "invocation of justice where law fails on account of its generality".[24] The pupil of Plato further added that "all law is universal, but about some things it is not possible to make a universal statement which shall be correct".[25] Lord Ellesmere expressed a similar idea of equity in the *locus classicus* case of *The Earl of Oxford*[26] when he said that "it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances".[27] Hart[28] explains that the language of law (be it legislative or sourced in case law) is open-textured; the words do not have surgical precision to accommodate every types of situations that can occur in real life. Therefore, for the "penumbral" cases that invariably arise and where it is not clear how the law should apply, *ie*, when a court has to deal with a situation which does not squarely and neatly fall within the ambit of a point of law (in other words, some facts are present which were not envisaged by the legislator or by a previous judgment), the courts have a discretion to resolve the issue and come up with a judgment. To reach that final judgment, courts will often resort to a purposive approach to interpretation but will also have regard to considerations of fairness.[29]

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24 Henry E Smith, "Property, Equity, and the Rule of Law" in *Private Law and the Rule of Law* (Oxford University Press, 2014) at pp 224–246 and 242.

25 Dennis Klimchuk, "Equity and the Rule of Law" in *Private Law and the Rule of Law* (Oxford University Press, 2014) at p 252.

26 (1615) 1 Ch Rep 1.

27 Mark Fortier, "Equity and Ideas: Coke, Ellesmere, and James I" (1998) 51(4) *Renaissance Quarterly* 1255 at 1262.

28 H L A Hart, *The Concept of Law* (Oxford University Press, 3rd Ed, 2012).

29 Nigel E Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell, 5th Ed, 2018) at pp 162–163.

10 The remedial strand of equity is also apparent in public international law. In order to avoid the undesirable situation of *non liquet*, where an absence of clear legal rules applicable to a dispute would lead the court to decline to give judgment,[30] international courts refer to what is called the "general principles of law recognised by civilised nations".[31] These constitute a reservoir of principles which will fill gaps, or lacunae, in international law (*ie*, when no treaties or customary laws apply). John Finnis listed 13 of these general principles,[32] for example, the doctrine of estoppel, the principle that no judicial aid will be awarded to those who plead their own wrong (those who seek equity must do equity), the central tenet that fraud unravels everything, and the idea that no aid will be provided to those who abuse their rights. These principles bear a striking resemblance to equitable rules[33] and are at the disposal of international courts and arbitral tribunals in order to reach a fair decision whenever no positive law is available. The former Justice of the Supreme Court of Queensland Margaret White made that point clear when she referred to one of the *locus classicus* of international law, the *North Sea Continental Shelf Cases*,[34] where she noted that "the acceptance of equity [by the International Court of Justice in that case] rested on a broader basis, namely, that the decisions of a court of justice must be just, and in that sense equitable".[35] The key issue in the *North Sea Continental Shelf Cases* concerned a maritime boundary dispute between Germany on one side, and the Netherlands and Denmark on the other. The court eventually awarded a larger portion of sea to Germany on the basis of fairness, given the fact that its long coastline facing the North Sea was in a concave shape and that the Convention on the Continental Shelf 1958 (promoting the equidistance principle to set maritime boundaries) was not obligatory in the proceedings of that case (in other words, there was no treaty law applicable). The court therefore resorted to principles of fairness and equity, embedded in the general principles of law, and awarded more sea territory to Germany than it would have had the equidistance rule been applied.

30 Stephen Hall, *Foundations of International Law* (Lexis Nexis, 4th Ed, 2019) at p 81.

31 1945 Statute of the International Court of Justice, Art 38(1)(c) (entry into force 24 October 1945).

32 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2011) at p 288.

33 Stephen Hall, *Foundations of International Law* (Lexis Nexis, 4th Ed, 2019) at p 76.

34 *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (1969) ICJ Rep 3.

35 Margaret White, "Equity – A General Principle of Law Recognised by Civilised Nations?" (2004) 4(1) *Queensland University of Technology Law and Justice Journal* 103 at 111. See also *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (1969) ICJ Rep 3 at [88]. The same points were made in Michael Akehurst, "Equity and General Principles of Law" (1976) 25(4) *The International and Comparative Law Quarterly* 801.

11 The discretionary nature of remedial equity has two strands: on one hand equity amounts to a correction, which is a remedy arising from the universality of law; on the other hand equity will insist that statutes not be used as instruments of fraud,[36] hence statutory equitable interpretations are sometimes necessary to avoid an unwelcome consequence of following the letter of the law. This latter version is what Edelman[37] coins the "equity of the statute".

*(1) Discretion, anti-opportunism and unconscionability*

12 Equitable remedies, such as specific performance,[38] injunction, rescission and rectification[39] are discretionary. Although it can be argued that it is known beforehand the factors that the court will consider before exercising discretion, it is equally true that there is much leeway as regards their interpretation. Further, the factors are never set in stone; for example, Arden LJ developed a test of unconscionability in *Pennington v Wayne*[40] ("*Pennington*") and Hale LJ laid out a list of factors in *Stack v Dowden*[41] to take into account the entire course of dealings between parties before recognising the existence of a common intention constructive trust for the matrimonial home.

13 In respect of the interpretation of factors, the Hartian penumbral nature of law reaches an apex point that practicing lawyers are all very familiar with, to their delight it could be ironically said. Even though this competing pull between certainty and substantial justice is equally true to some extent of common law rules, as the House of Lords decision in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha*[42] epitomised in respect of the remedy of damages for breach of contract,[43] it remains true that the discretionary nature of equitable remedies is nonetheless a cornerstone of equity as a whole. We can see clearly here the potential for conflict between equity and the formalist concept of the rule of law.[44] In addition to their retrospectivity, equitable remedies operate according to "fuzzy", or nebulous, standards such as unconscionability

36 *Rochefoucauld v Boustead* [1897] 1 Ch 196.
37 James Edelman, "The Equity of the Statute" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at pp 352–370.
38 *Beswick v Beswick* [1968] AC 58.
39 *Craddock Brothers v Hunt* [1923] 2 Ch 136.
40 *Pennington v Waine* [2002] 1 WLR 2075.
41 *Stack v Dowden* [2007] 2 AC 432 at [69].
42 *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12.
43 Qi Zhou, "Damages for Repudiation: An *ex ante* Perspective on the *Golden Victory*" (2010) 32(4) *Sydney Law Review* 579 at 593; Lord Mance, "Should the Law be Certain?", speech at The Oxford Shrieval Lecture (11 October 2011) at paras 40–43.
44 Paul B Miller, "Equity as Supplemental Law" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at p 96.

and moral values. In this sense "equity is a mode of giving morality a juridical character".[45] Indeed, McLachlin (now a non-permanent judge of the Hong Kong Court of Final Appeal) expressed the view in *Soulos v Korkontzilas*[46] that "the concept of good conscience lies … at the very foundation of equitable jurisdiction" and Gummow and Hayne JJ, in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*, defined the term "unconscionable" as being "various grounds of equitable intervention to refuse enforcement of or to set aside transactions which offend equity and good conscience".[47]

14 To be fair, we note that some academics have argued a rise of common law good faith and reasonableness at the detriment of unconscionability,[48] in particular "with the recent decisions on good faith, judges are moving closer to the position where they will interfere with the exercise of rights or powers because of unreasonableness, rendering unconscionability unnecessary".[49] In fact, that line of reasoning feeds into the main argument of this article whereby the fault lines between common law and equity are blurred and therefore the apparent equitable transgression of the rule of law, based on a premise of uncertainty, is refuted (otherwise both common law and equity would transgress the rule of law).

15 A case in point is the overlap between the common law doctrine of duress and the doctrine of unconscionability, which operates as a barrier against outrageous and extreme behaviour. The recent landmark decision of the Supreme Court of Canada in *Uber Technologies Inc v Heller*[50] is a vivid example that unconscionability serves a much needed function to protect the weaker party. On the facts of that case, arbitration clauses in standard form contracts signed by Uber drivers were held not binding as these were unconscionable due to the unequal bargaining power between the parties to the contract. Abella and Rowe JJ held in their judgment that this equitable doctrine allows contracts obtained by the abuse of unequal

45 Philip A Ryan, "Equity: System or Process" (1956) 45(2) *Georgetown Law Journal* 213 at 217.

46 *Soulos v Korkontzilas* (1997) 2 SCR 217 at [27].

47 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 197 ALR 153 at [42].

48 Elisabeth Peden, "When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability" (Legal Studies Research Paper No 06/57, November 2006).

49 Elisabeth Peden, "When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability" (Legal Studies Research Paper No 06/57, November 2006) at p 28.

50 *Uber Technologies Inc v Heller* (2020) SCC 16.

bargaining power to be set aside by the courts.[51] This is reminiscent of the broad test of unconscionability laid out in another landmark decision of modern equity, in Australia this time: *Commercial Bank of Australia Ltd v Armadio*[52] ("*Armadio*"). Strictly speaking, Mason J clarified in *Armadio* that a mere inequality in bargaining power would not suffice, in and of itself, to trigger the doctrine of unconscionability;[53] it did come very close to that though. In the face of such a broad doctrine, the Singapore Court of Appeal settled in *BOM v BOK*[54] ("*BOM*") a middle-ground three-pronged approach of the doctrine of unconscionability based on: (a) the plaintiff's "infirmity"; (b) the defendant's "exploitation" of such infirmity; and (c) an evidential burden resting on the defendant to defend the particular transaction on fair, just and reasonable grounds.[55] In particular, the court said that "the broad doctrine of unconscionability looks very much like a broad discretionary legal device which permits the court to arrive at any decision which it thinks is subjectively fair in the circumstances – or, at least, does not provide the sound legal tools by which the court concerned can explain how it arrived at the decision it did based on principles that could be applied to future cases of a similar type".[56] It can be argued that this statement from the Singapore Court of Appeal, aimed at the broad doctrine of unconscionability (best exemplified by *Armadio*[57]), nevertheless encapsulates all the grievances stemming from "unrestrained" equitable and discretionary remedies at large.

16 Building on an interpretation of equity operating on a remedial plane, Henry E Smith[58] developed a theory of equity as a safety valve, a second-order normative system, a type of meta-law.[59] To Smith, the "anti-opportunism safety valve corresponds roughly to a major strand of equity jurisprudence".[60] This position echoes the stickler theory adopted

51 Jodi Gardner, "Being Conscious of Unconscionability in Modern Times: *Heller v Uber Technologies*" (2021) 84(4) *Modern Law Review* 874 at 878.

52 *Commercial Bank of Australia Ltd v Armadio* (1983) 46 ALR 402.

53 Ashley J Black, "Unconscionability, Undue Influence and the Limits of Intervention in Contractual Dealings: *Commercial Bank of Australia Ltd v Amadio*" (1986) 11(1) *Sydney Law Review* 134 at 139. *Commercial Bank of Australia Ltd v Armadio* (1983) 46 ALR 402 at 413.

54 *BOM v BOK* [2019] 1 SLR 349.

55 Rick Bigwood, "Knocking Down the Straw Man: Reflections on *BOM v BOK* and the Court of Appeal's 'Middle-Ground' Narrow Doctrine of Unconscionability for Singapore" (2019) *Singapore Journal of Legal Studies* 29.

56 *BOM v BOK* [2019] 1 SLR 349 at [148].

57 *BOM v BOK* [2019] 1 SLR 349 at [132]–[133].

58 Henry E Smith, "Equity as Second-Order Law: The Problem of Opportunism" (Harvard Public Law Working Paper No 15, 15 January 2015).

59 Henry E Smith, "Equity as Meta-Law" (2021) 130(5) *The Yale Law Journal* 1050.

60 Henry E Smith, "Equity as Meta-Law" (2021) 130(5) *The Yale Law Journal* 1050 at 1050.

by Dennis Klimchuk.[61] According to Klimchuk, a stickler is someone who insists upon his legal rights in order to coerce the person subject to a liability or duty *vis-à-vis* these rights. This position fits the Aristotelian account of equity in the sense that "the equitable man … tends to take less than his share though he has the law on his side".[62]

17 For example, in *Hollywood Silver Fox Farm Ltd v Emmett*[63] ("*Hollywood Silver Fox*"), the defendant Emmett fired a gun on his own land in order to disrupt the breeding of foxes on a neighbouring land, because the presence of the foxes in the adjacent farmhouse would have negatively affected his property development plans. Klimchuk[64] argues that, in doing so, Emmett abused his rights. Eventually, the court ruled in favour of the plaintiff fox farm owner and held that "otherwise permissible use of land can become nuisances if the end is merely harming the interest of another owner". Katz[65] describes this situation as "illegitimate leverage" because Emmett's decision to fire his gun and to use his property rights is based solely on harming others. Emmett stood by his legal rights (indeed, he had the right to fire a gun) but he was not the "equitable man"; therefore, the court decided against him and granted relief to the plaintiff fox breeder from the inequity of the stickler (*ie*, Emmett) who had "acted badly and then sought immunity under a strict and narrow interpretation of his rights".[66]

*(2) Equity of the statute*

18 The process of correcting the defects of the law due to its generality necessarily involves statutory interpretation, Sir William Blackstone said in the *Commentaries on the Laws of England* that "from this method of interpreting laws … arises what we call *equity*; which is thus defined by Grotius [quoting him in *De Aequitate*]: 'the correction of that, wherein the law (by reason of its universality) is deficient'".[67] Blackstone added

61 Dennis Klimchuk, "Aristotle at the Foundations of the Law of Equity" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at p 32; Dennis Klimchuk, "Equity and the Rule of Law" in *Private Law and the Rule of Law* (Oxford University Press, 2014) at p 252.

62 Dennis Klimchuk, "Aristotle at the Foundations of the Law of Equity" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at p 38.

63 *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468.

64 Dennis Klimchuk, "Equity and the Rule of Law" in *Private Law and the Rule of Law* (Oxford University Press, 2014) at pp 257–258.

65 Larissa Katz, "Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right" (2013) 122(6) *The Yale Law Journal* 1444 at 1463.

66 Dennis Klimchuk, "Equity and the Rule of Law" in *Private Law and the Rule of Law* (Oxford University Press, 2014) at p 254.

67 William Blackstone, *Commentaries on the Laws of England, Book the First* (Clarendon Press, 1765) at p 61, available at the Project Gutenberg website: <https://

*(cont'd on the next page)*

that the equity depends "on the particular circumstances of each individual [case]" and that "there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted". This "equity of the statute"[68] that Blackstone was referring to in the 18th century was not a new idea back then; several scholars recognised its existence and its function. It can be mentioned, among the most prominent academics and legal historians backing this principle of equity of the statute, St Germain in *Doctor and Student*[69] in 1518, and even Lord Coke in *The First Part of the Institutes of the Laws of England*[70] who, despite writing the King's Bench judgment for the defendant in *The Earl of Oxford*,[71] nonetheless acknowledged the equitable construction of statutes. The necessity of statutory equitable interpretation was recognised as well in *Eyston v Studd*[72] where the reporter Plowden mentioned that "it often happens that when you know the letter [of statutes], you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. And equity … enlarges or diminishes the letter according to its discretion".[73]

19 A good illustration of the equity of statute is the American case of *Riggs v Palmer*[74] ("*Riggs*") where a grandson murdered his grandfather in order to inherit the old man's fortune. Earl J was facing the conundrum of a "statute regulating the making and effect of wills [which would], if literally construed and if [its] force could in no way and under no circumstances be controlled and modified, give the [grandfather's] property to the murderer".[75] After quoting Bacon and Blackstone, Earl J remarked that "the lawmaker could not set down every case in express terms" and that "if there arise … any absurd consequence manifestly contradictory to common reason … then the judges are in decency to conclude that the consequence was not foreseen by the parliament, and,

www.gutenberg.org/files/30802/30802-h/30802-h.htm#Page_38> (accessed 19 November 2021).

68 James Edelman, "The Equity of the Statute" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at pp 352–370.

69 Archibald Young, "Christopher St German's Doctor and Student: From Legal Debate to Religious Division" (2000) 37(143–144) *Moreana* 39 at 54.

70 Lord Coke, *Institutes of the Laws of England, Commentary upon Littleton* (William Rawlins, 10th Ed, 1703).

71 *Ie*, a defence of the common law against equity.

72 *Eyston v Studd* (1573) 2 Plowden 459.

73 James Edelman, "The Equity of the Statute" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at p 362. Dennis Klimchuk, "Aristotle at the Foundations of the Law of Equity" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at p 36.

74 *Riggs v Palmer* (1889) 115 NY 506.

75 *Riggs v Palmer* (1889) 115 NY 506 at 509.

therefore, they are at liberty to expound the statute by equity and only *quoad hoc* disregard it".[76] Eventually, the court found it "inconceivable" for the murderer's rights to be upheld by the statute and therefore held that the grandson could not inherit from his victim. Earl J concluded that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime", he added that "these maxims are dictated by public policy [and] have their foundation in universal law administered in all civilised country".[77]

*(3)* Cy-près

20 Express trusts must satisfy the three certainties (*ie*, intention, subject and object) in order to be established.[78] These are stringent requirements and failure to meet any will lead to the invalidity of the trust. However, for charitable trusts, if the object is not certain, the courts have "the power to order an application of the trust fund for alternative charitable purposes which are in accordance with the settlor's underlying intentions".[79] This doctrine of *cy-près* (from the old French meaning "as near as possible") reflects the societal importance[80] of charitable trusts but can also be read in light of equitable interpretation. Edelman[81] draws a parallel between this doctrine and that of the "equity of the statute" seen above. Of course, there is no statute involved here, but to the extent that charitable trusts help society as a whole[82] and are therefore a desirable thing, the courts' discretion to modify the settlor's intention in order to give effect to a general charitable intent may be read as being a necessary enforcement of the testators' altruistic goals. In turn, this doctrine feeds into a narrative where the state protects the autonomy of its citizens and therefore facilitates how people can organise their lives and their property.[83] Thus, the doctrine of *cy-près* may be construed as being the equivalent of a purposive interpretation of a statute but applied to charitable trusts. Courts will therefore go beyond a merely

76 *Riggs v Palmer* (1889) 115 NY 506 at p 509.
77 *Riggs v Palmer* (1889) 115 NY 506 at p 511.
78 *Knight v Knight* (1840) 3 Beav 148; 49 ER 58.
79 Alastair Hudson, *Equity and Trusts* (Routledge, 9th Ed, 2017) at p 1016.
80 Steven Gallagher, *Equity and Trusts in Hong Kong: Doctrines, Remedies and Institutions* (Sweet & Maxwell, 2017) at p 259.
81 James Edelman, "The Equity of the Statute" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at pp 369–370.
82 The four heads of recognised charitable trusts are set in *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 and include relief of poverty, advancement of education and religion and other purposes beneficial to the community.
83 Mathew Harding, "Equity and Institutions" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at pp 345–348.

literal approach of the testator's will (which would lead to an invalidity of the charitable trust if the object of the trust is not certain or does not exist) and give effect to the true intention of the testator. We can see this liberal and facilitative equitable approach in *Re Wright*,[84] where it was said that, despite a subsequent failure of the charity because the recipient organisation ceased to exist after the death of the testator, "once the funds are dedicated to charity they will have to be used for charity [and] will therefore be applied *cy-près*".[85] The same liberal approach was followed in *Re Harwood*[86] where, despite an initial failure of the charitable purpose (the organisation never existed at all), the courts nonetheless went through with what they construed as a general charitable intent of the testator and the gift was applied *cy-près*.

21 Two requirements are necessary to open the door of *cy-près*: first, it must be impossible to carry out the purpose of the trust. Second, the testator's gift must express a general charitable intent. It is however interesting to note that the first requirement of impossibility of the initial charitable intent, which is necessary in order to trigger the doctrine of *cy-près*, is construed widely and in light of prevailing social and political norms. For example, the court in *Re Dominion Students' Hall Trusts*[87] approved a scheme where a charitable trust, initially set by the settlor along discriminatory lines (non-Caucasian students would be excluded from a hostel) could nevertheless be administered on a non-discriminatory basis.[88] In the Canadian case of *Canada Trust v Ontario Human Rights Commission*,[89] the court invoked through *cy-près* an equitable variation of the discriminatory terms[90] (the trust initially applied only to white protestants of British parentage) and allowed the trustees to administer the charitable trust on a non-discriminatory basis.

84 *Re Wright* [1954] Ch 347.

85 Steven Gallagher, *Equity and Trusts in Hong Kong: Doctrines, Remedies and Institutions* (Sweet & Maxwell, 2017) at p 261.

86 *Re Harwood* [1936] Ch 285.

87 *Re Dominion Students' Hall Trusts* [1947] Ch 183.

88 Mathew Harding, "Equity and Institutions" in Philosophical Foundations of the Law of Equity (Oxford University Press, 2020) at p 347; Alastair Hudson, Equity and Trusts (Routledge, 9th Ed, 2017) at p 1021.

89 *Canada Trust v Ontario (Human Rights Commission)* (1990) 69 DLR (4th) 321.

90 Bruce H Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (University of Toronto Press, 2000) at p 1050.

### *B. Equity as supplemental law*

22 Miller[91] argues that equity is a source of primary law by itself, in the Hartian sense.[92] These primary laws will govern conduct *ex ante*, and not merely by *ex post* discretion. Hohfeld recognised also that equity does supplement the law and observed that "from the time of the very earliest cases now available down to the present, equity has always recognised and vindicated what would now be called … exclusively equitable antecedent (or primary) rights".[93] Even though the ancestral power of the Chancery courts to issue new writs in order to deal with novel types of claims was curtailed by the Statute of Westminster in 1258,[94] that line of reasoning of "equity as supplemental law" does resonate with the argument that equity feeds the legal system with a wide range of rights. The notion of equity creating new rules is also supported by Sarah Worthington,[95] however, Lord Neuberger said in a speech delivered in 2010 at Hong Kong University that "[modern] equity, as a source of invention, has, in practice if not in strict principle, had its day".[96] Interestingly, this rather conservative English approach can be contrasted with the Australian position exemplified by the former Justice of the High Court of Australia Michael Kirby[97] who introduced the notion of "living equity" under which equitable remedies are developed to meet modern needs and consequently adapt to changing circumstances in society.

23 It is not, however, the intention of this article to overplay the inventiveness of equity. In fact, there is a line of arguments that the

91 Paul B Miller, "Equity as Supplemental Law" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at pp 101–106.

92 H L A Hart, *The Concept of Law* (Oxford University Press, 3rd Ed, 2012) at pp 79–99; Nigel E Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell, 5th Ed, 2018) at pp 154–155.

93 Wesley Hohfeld, "The Relations between Equity and Law" (1913) 11(8) *Michigan Law Review* 537 at 543, fn 7.

94 Simon Chesterman, "Beyond Fusion Fallacy" (1997) 24(3) *Journal of Law and Society* 350 at 352; David Hayton, "The Development of Equity and the 'Good Person' Philosophy in Common Law Systems" (2012) 4 *Conveyancer & Property Lawyer* 263 at 264; Steven Gallagher, *Equity and Trusts in Hong Kong: Doctrines, Remedies and Institutions* (Sweet & Maxwell, 2017) at pp 11–12.

95 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at p 18; Sarah Worthington, *Equity and Property: Fact, Fantasy and Morals* vol 4 (University of Queensland Press, 2009) at pp 12–34.

96 Lord Neuberger, "Has Equity Had its Day?" speech at the Hong Kong University Common Law Lecture 2010 (12 October 2010) at para 46. Available at: <https://webarchive.nationalarchives.gov.uk/20131203071235/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-hong-kong-lecture-12102010.pdf> (accessed 19 November 2021).

97 Michael Kirby, "Equity's Australian Isolationism" (2008) 8(2) *Law and Justice Journal* 444.

common law can also develop to meet new situations, and at times such developments mirror those of equity. For example, the common law doctrine of duress, originally targeting threats to the person, has been expanded to cover duress of goods and economic duress. Meanwhile, the equitable doctrine of undue influence is concerned with a party being pressured to sign a contract. These two doctrines, while sitting on opposite sides of the fence dividing equity and common law, are nonetheless very similar. It is this resemblance between common law and equitable developments which prompted Andrew Burrows to coin the phrase "we do this at common law and we do the same in equity".[98]

*(1) Right of redemption*

24 As an example of "equity as supplemental law", Miller[99] cites the right of redemption under a mortgage. This right entitles the borrower to reclaim a mortgaged property from a creditor as long as the debtor has enough funds to repay the loan and "even though the legal date of redemption has passed".[100] Sometimes, the lender incorporates conditions before the mortgagor can exercise his right to redeem; if these conditions (or "collateral advantages") are unconscionable they are deemed "clogs" or "fetters" (*per* Lindley MR in *Santley v Wilde*[101]) and render the right of redemption unenforceable. In that case, equity will intervene and strike out any collateral advantages that are unconscionable or oppressive because they are considered a penalty restricting the right of the mortgagor to redeem his property. Back in 1903, Sir Frederick Pollock observed that "the doctrine of clogging threatens to become an intolerable nuisance, an interference with the freedom of subject, … today it is an anachronism and might with advantage be jettisoned".[102] For example, in the House of Lords case of *Noakes & Co Ltd v Rice*[103] the condition that the mortgagor would only buy beer from the mortgagee (even after the mortgage had been repaid) was deemed a restraint of trade and therefore a clog. As *per* Lord Parker's test in *Kreglinger (G & C) v New Patagonia Meat and Cold Storage Co Ltd*,[104] a condition will be deemed a clog if it is "unfair and unconscionable, or in the nature of a penalty clogging the equity

98 Andrew Burrows, "We Do This at Common Law but that in Equity" (2002) 22(1) *Oxford Journal of Legal Studies* 1 at 16; Henry E Smith, "Equity as Meta-Law" (2021) 130(5) *The Yale Law Journal* 1050 at 1064–1065.

99 Paul B Miller, "Equity as Supplemental Law" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at pp 107–108.

100 SH Goo & Alice Lee, *Land Law in Hong Kong* (Lexis Nexis, 4th Ed, 2015) at p 808, para 13.28.

101 *Santley v Wilde* [1899] 2 Ch 474 at 475.

102 Frederick Pollock, "Notes" (1903) 19(4) *Law Quarterly Review* 355 at 359.

103 *Noakes & Co Ltd v Rice* [1902] AC 24.

104 *Kreglinger (G & C) v New Patagonia Meat and Cold Storage Co Ltd* (1914) AC 25 at 56.

of redemption, or inconsistent with or repugnant to the contractual and equitable right to redeem".

*(2) Relief against forfeiture*

25 Janet Bignell[105] writes that "the original power to grant relief was applied by courts of equity … where the landlord's insistence on the strict legal right to forfeit was considered unconscionable", this statement shows that relief against forfeiture (and equity of redemption) can also be read through the lens of remedial equity in the sense that the courts will deny landlords and mortgagees from insisting on their strict legal rights to the detriment of their tenants or mortgagors.

26 The need for such equitable right for the tenant was deemed "manifest" by Lord Templeman in *Billson v Residential Apartments Ltd*[106] because a tenant could lose his asset, *ie*, his tenancy, by a "breach of covenant which was remediable or which caused the landlord no damage, … the forfeiture of any lease, however short, may unjustly enrich the landlord at the expense of the tenant". Such "manifest" equitable right has translated into legislation in various common law jurisdictions[107] and has been reflected in recent decisions in Australia[108] where the COVID-19 pandemic was factored in by the court when deciding whether to grant relief to the lessee. This equitable jurisdiction of the court to grant relief from forfeiture is not only limited to breaches of covenant to pay rent[109] but can also be invoked even after the landlord has taken possession by peaceful re-entry, as long as this re-possession is not made under a court order.[110] Real estate property (commercial, industrial or residential), in the sense of the bundle of rights, is therefore protected by such equitable remedy.

105 Janet Bignell, "Forfeiture, A Long Overdue Reform? A Discussion of Some of the Deficiencies of the Law" (2007) 11(5) *Landlord and Tenant Review* 140 at 143.

106 *Billson v Residential Apartments Ltd* [1992] 1 AC 494 at 535B.

107 For example, in Hong Kong: section 21F of the High Court Ordinance (Cap 4), section 69 of the District Court Ordinance (Cap 336), section 58(2) of the Conveyancing and Property Ordinance (Cap 219); in Singapore: section 18A of the Conveyancing and Law of Property Act 1886 (2020 Rev Ed).

108 *Sneakerboy v Georges Properties Pty Ltd* (2020) NSWSC 996. In this case, the New South Wales Supreme Court noted at [65] and [66] that the lessee's default in payment was caused to some degree by the initial stages of the COVID-19 pandemic and that this was relevant to the entitlement to relief against forfeiture.

109 SH Goo & Alice Lee, *Land Law in Hong Kong* (Lexis Nexis, 4th Ed, 2015) at p 694, para 10.106.

110 SH Goo & Alice Lee, *Land Law in Hong Kong* (Lexis Nexis, 4th Ed, 2015) at p 694, para 10.107.

*(3) Equity and property rights*

27 The commonality between the two examples mentioned above (right of redemption under a mortgage and relief against forfeiture) is that equity protects property rights. Sarah Worthington explains that equity has "pursued a dramatically expanded notion of property".[111] Two strategies were instrumental for this expansion: on one hand, equity enabled a development of commercial law and tradeable rights via equitable assignments and on the other hand, equity created new forms of property interests, the two prime examples being the trust and the equitable charge.

(a) Equitable assignments

28 Clarke *et al* wrote that "in the early days of the common law, all rights were unassignable [with some exceptions, notably the assignment of shares through statutory enactments], however since the 17th century the courts of equity have always permitted and given effect to assignments of choses in action".[112] Assignments in equity do not insist on the formalities (under s 9 of the Law Amendment and Reform (Consolidation) Ordinance[113] ("LARCO")) demanded for a legal transfer of a debt. The three conditions for such legal assignments of a chose in action (*eg*, debt), are:[114] (a) an absolute assignment (*ie*, no assignment by way of a charge, no conditional assignments where there might be strings attached, and no assignments of only part of the whole debt[115]); (b) in writing; and (c) with express notice in writing given to the debtor. By contrast, under an equitable assignment, it is sufficient to establish a clear intention to transfer the intangible property (*eg*, debt, share or contractual claim) to the assignee. Lord Macnaghten explained in *Brandt's (William) Sons & Co v Dunlop Rubber Co Ltd*[116] that an equitable assignment "does not always take that form [of a document] … it may be couched in the language of command, it may be a courteous request, … the language is immaterial if the meaning is plain, all that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person". Sarah Worthington concludes that, as a matter of commercial law, the ease of equitable assignments (lack of formality, can be by gift or contract) expanded the class of tradeable

111 Sarah Worthington, *Equity and Property: Fact, Fantasy and Morals* vol 4 (University of Queensland Press, 2009) at p 7.
112 MA Clarke *et al*, *Commercial Law: Text, Cases, and Materials* (Oxford University Press, 5th Ed, 2017) at p 870.
113 Cap 23 (HK).
114 *China Gold Finance Ltd v CIL Holdings Ltd* (2014) HKCU 2948 at [357]–[358].
115 *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81.
116 *Brandt's (William) Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462.

rights, which in turn was converted into new wealth for the society as a whole.[117]

(b) New forms of property interests: Trusts

29 Under trust law, ownership of an asset can be subdivided between the trustee (legal owner) and the beneficiary (owner in equity). Worthington[118] explains that equity gradually allows beneficiaries to trade their rights under a trust, turning an originally personal right (against the trustee) into a proprietary right. The consequence is that the beneficiaries were protected in case of insolvency of the trustee, and could remove their assets in the general pool from which the trustee's creditors would get paid. The beneficiaries also received protection in equity in the case of knowing receipt[119] and dishonest assistance[120] and could trace their assets into a new, substituted property (*ie*, tracing). As a result of these new property rights, the trust, as an institution, has been celebrated as "equity's greatest contribution to the common law"[121] and the legal historian Professor Maitland lauded it as the "greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence".[122]

30 The various forms of trusts enable the protection of property and give effect to the intention of the person settling the trust (*ie*, the settlor). Express trusts are declared intentionally by the settlor and the legal title in the property is passed on to the trustees, whereas implied trusts (in their various forms, *ie*, constructive and resulting) are imposed by the courts in certain circumstances. Resulting trusts arise in two situations:[123] either when the settlor fails to identify the beneficiary who will take the equitable interest in the property (in that case the property will be held by the trustee on a resulting trust for the settlor), or when a person contributes to the purchase price of a property (typically a family home), then that person acquires an equitable interest in the property under a resulting

117 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at pp 58–63.
118 Sarah Worthington, *Equity and Property: Fact, Fantasy and Morals* vol 4 (University of Queensland Press, 2009) at p 20.
119 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] EWCA Civ 502; *Thanakharn Kasikorn Thai Chamkat v Akai Holdings Ltd* (2010) 13 HKCFAR 479; *Ho Ko Shing v Ho Chee* (2015) HKEC 2507 at [95].
120 *Royal Brunei Airlines v Tan Kok Ming* [1995] UKPC 4; *Ho Ko Shing v Ho Chee* (2015) HKEC 2507 at [96].
121 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at p 67.
122 Steven Gallagher, *Equity and Trusts in Hong Kong: Doctrines, Remedies and Institutions* (Sweet & Maxwell, 2017) at p 93; Alastair Hudson, Equity and Trusts (Routledge, 9th Ed, 2017) at p 36.
123 *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669; Alastair Hudson, Equity and Trusts (Routledge, 9th Ed, 2017) at p 42.

trust in the same size as the contribution in proportion to the total price of the property.[124] Constructive trusts are imposed by operation of the law and can arise in many different situations but the main thread is that these help to combat unconscionable behaviour. For example, when a defendant steals something, he or she will hold the stolen property on a constructive trust for the victim, thereby enabling the victim to recover that stolen item or to recover the substituted property (*eg*, if the thief sold the property, the victim would be able to recover the money received by the thief).

(c) New forms of property interests: Equitable charges

31 As a matter of commercial law, equitable charges enable the debtor company to remain the legal owner of the assets while at the same time offering security to the creditor. The "floating" version of these equitable charges, as exemplified by Romer LJ in *Re Yorkshire Woolcombers Association Ltd*,[125] allows the debtor company, or chargor, to deal with these assets in the ordinary course of business (until the charge crystallises when there is default in repayment of the loan), thus enabling the chargor to generate more wealth while at the same time using the value of the asset under the equitable charge as security for a loan. Lord Millett explained in the Privy Council case of *Agnew v Commissioner of Inland Revenue*[126] that "the critical feature which distinguished a floating charge from a fixed charge lay in the chargor's ability, freely and without the chargee's consent, to control and manage the charged assets and withdraw them from the security".[127]

32 By contrast, the common law security devices such as pledges, liens and mortgages do not provide such flexibility and, crucially for this article, do not provide new forms of proprietary interests; these only amount to modified common law rights of ownership and/or possession. Indeed, pledges (or pawns) rely on the pledgor debtor giving possession of the pledged asset to the pledgee creditor. Common law liens give to the creditor the right to retain the assets until the debtor clears the debt owed. Unlike pledges, liens are only indirect security interests because the giving of possession of the property is not initially meant as security. The prime example of such common law lien is the garage owner being able to keep the car that was entrusted to him for repair until the car owner settles the repair fee to the garage owner. Lastly, common law mortgages involve the passing of the legal title to the creditor "on the understanding

124 *Dyer v Dyer* (1788) 2 Cox Eq Cas 92.
125 [1903] 2 Ch 284 at 295.
126 *Agnew v The Commissioner of Inland Revenue* [2001] UKPC 28.
127 *Agnew v The Commissioner of Inland Revenue* [2001] UKPC 28 at p 710F.

that [the] title will be retransferred if the debt is repaid".[128] In light of the advantages of the floating charge as opposed to these common law security devices, Sarah Worthington concludes that equitable floating charges "illustrate the flexibility of equitable concepts of property and the commercial motivations which compel this flexibility",[129] they are "valuable equitable additions to the property firmament".[130]

33 This section concludes by highlighting the age-old academic debate of the nature of a beneficiary right under a trust: is this a proprietary right enforceable against the whole world, a personal right enforceable against a given individual, or a *sui generis* right against a right as per the theory proposed by McFarlane and Stevens?[131] According to the latter theory, the right of the beneficiary does not attach to the trust property itself but is simply a right against the right of the legal owner, *ie*, the trustee.[132] It is noted that the Singapore Court of Appeal recently endorsed by way of *obiter* the "right against a right theory" in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar SA*.[133] It is beyond the scope of this article to explore in more depth the nature of trust property, but suffice to say, for the purpose of this inquiry, that the modern equitable expansion into property rights represents a key feature of equity as opposed to mere legal ownership.

34 Having delineated the two strands of the rule of law and attempting to categorise equity along some broad and recognisable patterns, this article now turns to the gist of the issue by confronting these issues together.

128 Sarah Worthington, *Equity and Property: Fact, Fantasy and Morals* vol 4 (University of Queensland Press, 2009) at p 31, note 21.

129 Sarah Worthington, *Equity and Property: Fact, Fantasy and Morals* vol 4 (University of Queensland Press, 2009) at p 32.

130 Sarah Worthington, *Equity and Property: Fact, Fantasy and Morals* vol 4 (University of Queensland Press, 2009) at p 29.

131 Ben McFarlane & Robert Stevens, "The Nature of Equitable Property" (2010) 4 *Journal of Equity* 1.

132 Elena Christine Zaccaria, "The Nature of the Beneficiary's Right Under a Trust: Proprietary Right, Purely Personal Right or Right against a Right?" (2019) 135 *Law Quarterly Review* 460 at 461.

133 [2018] 1 SLR 894 at [145]: "It is for this reason that beneficial ownership has been described as 'a right against a right', i.e. a right to constrain or control the way another person exercises his right to deal with a thing, rather than a right against the thing itself."

## IV. Reconciling equity with the rule of law

### *A. Equity and the formalist version of the rule of law*

#### *(1) Discretion*

35 *Prima facie*, the argument against equity is that its intervention is discretionary (therefore infringing the certainty necessary for the formalist rule of law theory) whereas the remedies at common law are *as of right*. Indeed, the court will grant specific performance, an injunction or disgorgement (all being equitable remedies) only *if* the judge allows it. The picture that emerges is therefore one where equity is the conscience of the law, and it can only achieve justice by "creating exceptions to established rules",[134] while the common law is perceived as objective, neat and rational.

36 Is the discretion afforded by equity inherently repugnant to the rule of law, especially its formalist account? In equity's early days, it probably was. John Selden's jibe that equity was a "roguish thing" and varied with the Chancellor's foot[135] was a response to the uncertainty of individualistic judgments given by early Chancellors. However, modern equity is not all about discretion. In its function as supplementing the law, equity assumes a legal role in a principled way that is very much welcomed by commercial lawyers.[136] To this extent, fears that equity's uncertainty is offensive to the certainty required by commercial law are very much overstated. Indeed, Lord Millet wrote that "equity's place in the law of commerce, long resisted by commercial lawyers, can no longer be denied".[137] For example, equitable proprietary remedies expounded in Part II of this article (under the heading *equity and property* rights) are not granted on a discretionary basis, otherwise the law of insolvency would not countenance them. This being said, it is noteworthy to acknowledge the existence of the remedial constructive trust, as opposed to the institutional trust. Lord Browne-Wilkinson drew the distinction between these two species of trust in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* when he said that the

134 Nigel E Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell, 5th Ed, 2018) at p 201.

135 Steven Gallagher, *Equity and Trusts in Hong Kong: Doctrines, Remedies and Institutions* (Sweet & Maxwell, 2017) at pp 17–18.

136 Mark Leeming, "The Role of Equity in 21st Century Commercial Disputes – Meeting the Needs of Any Sophisticated and Successfully Legal System" (2019) 47 *Australia Bar Review* 137.

137 PJ Millett, "Equity's Place in the Law of Commerce" (1998) 114 *Law Quarterly Review* 214 at 214.

remedial constructive trust "operates retrospectively",[138] it is an award by the court at the date of judgment and is therefore very much a product of discretion, as a relief from fraudulent or wrong-doing behaviour. This discretionary remedy is recognised in Australia,[139] Canada,[140] the US and Singapore but neither in England nor in Hong Kong.[141] It is noted, however, that the doctrinal details of remedial constructive trusts are in no way uniform across the various common law jurisdictions.

37 In addition, where the courts exercise discretion, former Chief Justice of the High Court of Australia and former non-permanent judge of the Court of Final Appeal Sir Anthony Mason[142] explains that the initial indeterminacy of new equitable rules will eventually mature into more determinate principles as they are constantly refined by judges through subsequent judgments. This is an ongoing process which reflects the constant adaptation of the law to modern societal needs. For example, the rule of incomplete gifts underwent a potential sea change with the English Court of Appeal decision in *Pennington*,[143] where the concept of unconscionability was used in order to make a finding of complete gift in a somewhat inchoate situation. In that case, the donor (of shares in a private company) did not do everything in her power, as the traditional doctrine in *Re Rose v Inland Revenue Commissioners*[144] requires, but did only part of it. In line with the argument by Mason, Matthew Harding argues that "the emphasis on donee reliance might crystallise into a more determinate principle".[145] Arguably, the factors that went into the "unconscionability" test in *Pennington* were vague and uncertain, and some commentators argued that this case was a harbinger of equity on the move.[146] Indeed, by offering so little guidance for further applications of the legal principle, the English Court of Appeal basically left later courts to "flesh out this rule for themselves, making their own determinations as to how the rule should be understood and applied".[147] Lord Denning's

138 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714.
139 *Muschinski v Dodds* (1985) HCA 78.
140 *Sun Indalex Finance LLC v United Steelworkers* (2013) SCC 6.
141 Ying Khai Liew, "Proprietary Estoppel Remedies in Hong Kong: Lessons from Singapore, England and Australia" (2020) 50 *Hong Kong Law Journal* 109.
142 Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *Law Quarterly Review* 238 at 258.
143 *Pennington v Waine* [2002] 1 WLR 2075.
144 *Re Rose v Inland Revenue Commissioners* [1952] Ch 499.
145 Matthew Harding, "Equity and the Rule of Law" (2016) 132 *Law Quarterly Review* 278 at 287–288.
146 Sean Sutherland, "Defying Easy Explanations – The Case of *Pennington v Waine* 18 Years On" (2020) 26(5) *Trust & Trustees* 404.
147 Charlie Webb, "The Myth of the Remedial Constructive Trust" (2016) 69(1) *Current Legal Problems* 353 at 368.

aspiration to create new rights in equity where the needs of justice demand it[148] found echo in Arden LJ's strive to temper the wind to the shorn lamb.[149] *Prima facie*, therefore, *Pennington* eroded the equitable maxim that equity will not perfect an imperfect gift. Eighteen years after the decision was made, courts in the common law world have yet to come to terms with its potential far-reaching implications. Two lessons can be drawn from this development: first, the sheer uncertainty inherent in the test of unconscionability in *Pennington* is *prima facie* an affront to the thin rule of law doctrine, and second, the case offers an opportunity for later courts to develop the judgment into a more mature legal principle through specific guidelines, either to confine *Pennington* to its peculiar set of facts (thereby rendering the case almost an outlier), or to rationalise it by treating it as a case of proprietary estoppel, or to use its ratio to expand the grounds of fairness and intention. Since the release of the decision in *Pennington* in 2002, several judgments have followed suit, such as *Curtis v Pulbrook*[150] in England (where Briggs J arguably rationalised *Pennington* into a case of proprietary estoppel) and *Yeung Luk Lin v Chau Sing Wai*[151] in Hong Kong. While the state of development of *Pennington* has not yet crystallised into a more mature and certain principle, quite far from it in fact, it is nonetheless argued that this ongoing process of refinement and perfection lends support to the argument that equitable remedies are in constant flux to adapt to the needs of substantive justice, a key foundation of the thick rule of law doctrine.

38 Further, the discretion inherent to remedial equity does not seem to be that different from discretion at common law. For example, judges do need to apply an element of individualised discretion when assessing, at *common law*, various issues such as self-defence or provocation (in criminal law), whether a duty of care has been infringed by a negligent defendant (in tort law), or whether a common law estoppel has been created (in contract law). Therefore, at *law*, courts rely on the standard of reasonableness (very often the test is that of the "reasonable man"), that margin of appreciation inherent in the common law test can arguably be approximated to the equitable standard of fairness and conscience. Thus, Sarah Worthington concludes that "both the common law and equity employ discretion in adjudication".[152]

148 Mark Pawlowski, "Is Equity Past the Age of Childbearing?" (2016) 22(8) *Trust & Trustees* 892 at 892.

149 *Pennington v Wayne* [2002] 1 WLR 2075 at [54].

150 *Curtis v Pulbrook* [2011] EWHC 167 at [43].

151 *Yeung Luk Lin v Chau Sing Wai* (2012) HKEC 365.

152 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at p 334.

*(2) Conscience and morality*

39 Worthington challenges the view that equity is the sole repository of conscience-based adjudication. The fuzziness inherent to an equitable standard of unconscionability would *prima facie* indicate a potential violation of the formalist version of the rule of law, precisely because rules would not be certain and would vary on a case by case basis. The image that emerges is one where *equity* follows natural law and morality (Nussbaum[153] goes as far as equating the tradition of equity with mercy) whereas *law* is seen as positivist and "imposing a set of mandatory rules … less tightly tied to any notion of morality".[154] A first response was provided by Lord Nottingham, the "father of equity", who made the crucial distinction in *Cook v Fountain*[155] between private conscience ("*naturalis et interna*"), which equity is not concerned with, and public or civic conscience ("*civilis et politica*") which is instead what equity is all about. This divide between two strands of conscience enables Nottingham to "reconcile conscience with the construction of a ruled system of equity".[156] Thus, the behaviour of the defendant is not judged by the individual morality of the Chancellor, but by the standard of the conscience of the society at large. Sarah Worthington further argues that the divide between *equity* following conscience and *law* following rules free from morality is simply not true. The prime example of *common law* rules infused with morality is the *neighbour principle* introduced in the landmark case of *Donoghue v Stevenson*[157] where the Christian, and undeniably moral, precept "thou shalt love thy neighbour as thyself" inspired Lord Atkin to craft the modern test of duty of care at *common law*.[158] Lord Atkin drew from the moral and philosophical themes of the Good Samaritan[159] to pen this monumental judgment which would eventually become one cornerstone at *common law*, thereby instrumentalising morality to reorganise the power relationship between consumers and manufacturers.[160] Another example of *legal* rule built upon conscience is the common law tort of defamation which arguably has a

153 Martha C Nussbaum, "Equity and Mercy" (1993) 22(2) *Philosophy & Public Affairs* 83.
154 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at p 329.
155 (1733) 3 Swan 585 at 600.
156 Dennis R Klinck, "Lord Nottingham and the Conscience of Equity" (2006) 67(1) *Journal of the History of Ideas* 123 at 126.
157 *Donoghue v Stevenson* [1931] AC 562.
158 Richard Castle, "Lord Atkin and the Neighbour Test: Origins of the Principles of Negligence in *Donoghue v Stevenson*" (2003) 7(33) *Ecclesiastical Law Journal* 210.
159 Erika Chamberlain, "Lord Atkin's Opinion in *Donoghue v Stevenson*" (2010) 4(1) *Law and Humanities* 91.
160 Honni Van Rijswijk, "Mabel Hannah's Justice: A Contextual Re-Reading of *Donoghue v Stevenson*" (2010) 5 *Public Space* 1.

normative foundation, according to some scholars,[161] based on morality. Thus, the fault line of morality does not neatly follow the common law–equity divide.

40 Further, the tort of deceit is the archetype of a common law doctrine rooted in moral foundation. From both a deontological theory and from a Kantian perspective the very act of lying undermines any subsequent contractual relation;[162] "fraud unravels everything" as Lord Denning famously said.[163] A lie distorts the reasoning of the person lied to and subverts the autonomy of the victim. David Strauss went as far as arguing that lying is even worse than coercion because it is more insidious, he said that "lying is a kind of mental slavery that is an offence against the victim's humanity".[164]

*(3) Overlaps between equity and common law*

41 In addition, the doctrines of duress (at *law*) and undue influence (in *equity*) bear resemblance in their underlying moral rationale. Hence the effort, albeit unsuccessful, by Lord Denning in *Lloyds Bank Ltd v Bundy*[165] to find a unifying thread between these two doctrines.[166] Some scholars go even as far as suggesting to jettison the equitable doctrine of actual undue influence precisely because of its confusion and overlap with the common law doctrine of duress.[167] It is often argued that the moral purpose of the common law doctrine of duress is to protect the autonomy of the weaker party but also to avoid the oppressing party from benefitting from his own wrongdoing.[168] This was emphasised by Lord Scarman in *The Universe Sentinel*,[169] where he expounded the two

161 Lawrence McNamara, "Moral Judgment and Conceptions of Reputation" in *Reputation and Defamation* (Oxford University Press, 2007) at pp 37–59 and 192; Kim Treiger-Bar-Am, "Defamation Law in a Changing Society: The Case of *Youssoupoff v Metro-Goldwyn Mayer*" (2000) 20(2) *Legal Studies* 291 at 319.

162 Larry Alexander & Emily Sherwin, "Deception in Morality and Law" (2003) 22(5) *Law and Philosophy* 393 at 396.

163 *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712.

164 David Strauss, "Persuasion, Autonomy, and Freedom of Expression" (1991) 91(2) *Columbia Law Review* 334 at 354.

165 [1975] QB 326.

166 Marcus Moore, "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 *Law Quarterly Review* 257.

167 Anja Kantic, "How a Clarification of Duress Renders the 'Equitable' Doctrine of Actual Undue Influence Futile" (2015) 26(3) *New Zealand Universities Law Review* 642.

168 Stephen Smith, "Contracting Under Pressure" (1997) 56(2) *Cambridge Law Journal* 343 at 344.

169 *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 400.

elements for the wrong of duress: (a) pressure amounting to compulsion of the will of the victim; and (b) the illegitimacy of the pressure exerted. As a matter of morality, the principle that one shall not be able to enforce an obligation obtained by wrongdoing is uncontroversial. There is clearly an overlap here with the reasoning grounded in equity in *Riggs v Palmer* seen above.

42 Similarly, it is arguable that the common law test of *Wednesbury*[170] unreasonableness for judicial review (in administrative law) and the equitable test of good faith for fiduciaries (*eg*, *Howard Smith Ltd v Ampol Petroleum Ltd*[171] in the context of company law and directors) are the same.[172] The commonality between these two doctrines is that they both regulate a decision making power, in administrative law for the *Wednesbury* test and in company law or trust law for the test of good faith for fiduciaries. Further, the factors which will enter into the equation are more or less the same for both tests, indeed, both doctrines place a premium on whether the decision making power was exercised by the person duly authorised to do so[173] and whether that power was exercised legitimately, *ie*, for the reasons under which the power was conferred in the first place.[174] This analogy was discussed explicitly in *Edge v Pensions Ombudsman*[175] and Lord Woolf himself wrote in the House of Lords case of *Equitable Life Assurance Society v Hyman* that there is a "similarity between the role of the courts on judicial review and in relation to a fiduciary duty".[176] In addition, the Chief Justice of the High Court of Australia Robert French delivered a keynote speech on the same topic.[177]

43 In conclusion, neither equity's discretionary remedies nor its moral foundation affords compelling ground for the suggestion that equity frustrates the rule of law in its formalist version. Otherwise, both *law* and *equity* would do so.

170 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
171 [1974] AC 821.
172 Evan Fox-Decent, "The Constitution of Equity" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at p 126. Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at p 144.
173 Factors include fettering of discretion or not, non-delegation, *etc*.
174 Factors include relevant or irrelevant considerations taken into account, good faith, proper or improper purposes, *etc*.
175 [2000] Ch 602 at 628–630.
176 [2002] 1 AC 408 at [20].
177 Chief Justice Robert French, "The Interface between Equitable Principles and Public Law", speech at The Society of Trust and Estate Practitioners (29 October 2010), available at: <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj29oct10.pdf> (accessed 19 November 2021).

## *B. Equity and the substantive version of the rule of law*

### *(1) Protection of property*

44 While Peter Birks[178] argues that constructive trusts do not arise on a coherent basis, Alastair Hudson[179] objects that they "come into existence as a response to various categories of unconscionable behaviours"; this is to ensure that an "ethical notion of good conscience is maintained in English law". To be fair, Birks's argument gains some traction when considering the various types of constructive trusts. Indeed, the tests for the doctrines of knowing receipt,[180] dishonest assistance,[181] unlawful profits acquired by fiduciaries,[182] common intention constructive trusts in the field of land law and conveyancing,[183] liability to prevent conflict of interest and breach of trust[184] or to prevent fraud[185] are all phrased differently. However, what matters from a jurisprudential perspective is not the mechanics of each and every single constructive trust, it is instead the high-level principles that underpin their rationales. Lord Browne-Wilkinson said in the landmark case of *Westdeutsche Landesbank Girozentrale v Islington Borough Council* that "equity operates on the conscience of the owner of the legal interest".[186] This statement reminds us that the moral purpose of equity is to "correct men's consciences for fraud, breach of trusts, wrongs and oppressions", as *per* Lord Ellesmere in the *Earl of Oxford Case*. In the US, Cardozo J wrote in *Beatty v Guggenheim Exploration Co*[187] that "a constructive trust is the formula through which the conscience of equity finds expression" and Lord Denning said in *Gissing v Gissing* that a common intention constructive trust would be established "wherever the trustee has so conducted himself that it would be inequitable to allow him to deny to the *cestui que* trust [the beneficiary] a beneficial interest in the land".[188]

178 Peter Birks, *An introduction to the Law of Restitution* (Clarendon Press, 1989) at p 89.
179 Alastair Hudson, Equity and Trusts (Routledge, 9th Ed, 2017) at p 580.
180 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] EWCA Civ 502; *Ho Ko Shing v Ho Chee* (2015) HKEC 2507 at [95].
181 *Ho Ko Shing v Ho Chee* (2015) HKEC 2507 at [96]; *Royal Brunei Airlines Sd Bhd v Tan* [1995] UKPC 4; *Twinsectra Ltd v Yardley* [2002] 2 AC 164; *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37.
182 *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45. See also Lionel Smith, "Constructive Trusts and the No-Profit Rule" (2013) 72(2) *Cambridge Law Journal* 260.
183 *Jones v Kernott* [2012] 1 AC 776; *Stack v Dowden* [2007] 2 AC 432.
184 *Boardman v Phipps* [1967] 2 AC 46.
185 *Binions v Evans* [1972] Ch 359; *Peffer v Rigg* [1977] 1 WLR 285.
186 [1996] AC 669 at 705C.
187 (1919) 122 NE 378 at 380.
188 [1971] AC 886 at 905C.

45 The conclusion to be drawn from all these examples is that, notwithstanding the different tests inherent to the variety of trusts, constructive trusts arise from a situation where the defendant knows some factors which affects his conscience in relation to the property in question. Alastair Hudson argues that this is a "perfectly viable underpinning principle on which to base a legal concept like the constructive trust".[189] Ultimately, and to draw the link with a substantive rule of law theory, this is to serve a morally informed conception of justice designed to protect property. To this end, the courts apply different tests to shield property from all types of dishonest and fraudulent behaviour. The substantive rule of law of a modern liberal and democratic society where property is a cornerstone of its foundation[190] requires the safety valve of equity in order to deal with unconscionability, fraudulent, opportunistic and stickler behaviours.[191]

46 However, the rule of law should also empower people to live autonomous lives and let them decide how to arrange their affairs freely. The expanded notion of property expounded in Part III.B. of this article[192] where equity plays a crucial and decisive role in creating the equitable assignments, equitable charges and various trusts (including the straightforward express trust) brings a measure of rule of law to private relations. Finally, to the extent that housing is property (in the sense of bundle of rights), the equity of redemption and the right of relief from forfeiture can be understood as "inchoate version of contemporary social rights"[193] where people have the right to adequate housing.

189 Alastair Hudson, Equity and Trusts (Routledge, 9th Ed, 2017) at p 581.

190 Ronald A Cass, "Property Rights Systems and the Rule of Law" in *The Elgar Companion to the Economics of Property Rights* (Edward Elgar Publishing, 2004) at p 222; Sean Mattie, "Prerogative and the Rule of Law in John Locke and the Lincoln Presidency" (2005) 67(1) *The Review of Politics* 77 at 84.

191 Henry E Smith, "Property, Equity, and the Rule of Law" in *Private Law and the Rule of Law* (Oxford University Press, 2014) at pp 224–246 and 242; Dennis Klimchuk, "Equity and the Rule of Law" in *Private Law and the Rule of Law* (Oxford University Press, 2014) at p 252.

192 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006); Sarah Worthington, *Equity and Property: Fact, Fantasy and Morals* vol 4 (University of Queensland Press, 2009).

193 Evan Fox-Decent, "The Constitution of Equity" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at p 142.

*(2) Abuses of rights*

47 For Klimchuk and Smith, "prevention and rectification of abuses of right is the very essence of equity".[194] Harding[195] also ascribes to equity this fundamental function. He takes the example of a hypothetical society in which the legal system invariably upholds legal rights on which abusers and sticklers rely (in that world, the defendant in *Hollywood Silver Fox* would have won). He then shows that confidence in contract law will start to erode and people might begin to think that the legal system is unjust and biased towards the powerful and unscrupulous. As a result, Harding explains that citizens would "cease to engage with the law of contract and, to this extent, the rule of law is likely to be compromised, the normative guidance that contract law once gave to citizens … is likely to be frustrated".[196] This line of argument demonstrates that equity, while tolerating discretion in its remedial jurisdiction, may nonetheless support the rule of law by "mitigating the potentially harsh effect of primary legal rules and contributing to conditions under which citizens are likely to form and maintain a disposition to engage with law".[197] As a result, Klimchuk's and Smith's stickler theory is very much consistent with the rule of law because a legal system should not countenance abuses of right which, if tolerated, would invariably "undermine [the law's] underlying values, including the value of independence and equality".[198]

48 For Dworkin, "*Riggs v Palmer* shows that the law does not consist entirely of rules: it also includes principles".[199] *Riggs* therefore represents the paragon of a morally informed judgment grounded in the principle that murderers should not benefit from their crimes,[200] which means, in turn, that a decision founded on equitable construction fulfils a socio-moral goal of achieving justice. A finding in favour of the grandson

194 John C P Goldberg & Henry Smith, "Wrongful Fusion: Equity and Tort" in *Equity and Law: Fusion and Fission* (Cambridge University Press, 2019) at p 318.

195 Matthew Harding, "Equity and the Rule of Law" (2016) 132 *Law Quarterly Review* 278.

196 Matthew Harding, "Equity and the Rule of Law" (2016) 132 *Law Quarterly Review* 278 at 299.

197 Ben McFarlane, "Avoiding Anarchy?: Common Law v. Equity and *Maitland v. Hohfeld*" in *Equity and Law: Fusion and Fission* (Cambridge University Press, 2019) at p 349.

198 Paul B Miller, "Equity as Supplemental Law" in *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) at p 100.

199 Nigel E Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell, 5th Ed, 2018) at p 200.

200 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) at pp 28–29.

would have allowed him to be a stickler for his rights in a bad way,[201] which would be unconscionable and would have gone counter to public policy. *Riggs* therefore stands for the proposition that Aristotelian equity is fundamentally anti-opportunistic and that "the courts will not aid people in profiting from their own wrongs".[202] In a similar vein, the English court in *Re Crippen*[203] found that the man who had murdered his wife "held any property which he acquired from his unconscionable act on constructive trust so that he could not take a benefit from it for himself".[204] Sir Evans commented in that case that "no person can obtain, or enforce, any rights resulting from his own crime".[205] Other examples which follow the same principles can be mentioned, such as *Scotching v Birch*,[206] *Cleaver v Mutual Reserve Fund Life Association*,[207] and *R v Chief National Insurance Commissioner, ex p Connor*[208] where the court held that the "murderer will not be entitled to take a beneficial interest under the widow's pension entitlements of his murdered wife".[209]

49 To the extent that this ideal of doing justice is deeply seated into the normative foundation of a substantive rule of law, equity in its remedial form performs a much needed function in our modern societies. Anthony Mason celebrated "the underlying values of equity centred on good conscience" which, according to him, "will almost certainly continue to be a driving force in the shaping of the law unless the underlying values and expectations of society undergo a radical alteration".[210]

*(3) Autonomy*

50 *Cy-près* interventions show two salient features: on one hand these help people to realise their altruistic goals, in a self-determining way. Indeed, to the extent that the *cy-près* doctrine, and trust law in general, assist people in realising their wishes, it can be concluded that equity fulfils a political ideal of autonomy and freedom from interference

201 Dennis Klimchuk, "Equity and the Rule of Law" in *Private Law and the Rule of Law* (Oxford University Press, 2014) at p 255.
202 Henry E Smith, "Property, Equity, and the Rule of Law" in *Private Law and the Rule of Law* (Oxford University Press, 2014) at p 243.
203 (1911) P 108.
204 Alastair Hudson, Equity and Trusts (Routledge, 9th Ed, 2017) at p 518.
205 Steven Gallagher, *Equity and Trusts in Hong Kong: Doctrines, Remedies and Institutions* (Sweet & Maxwell, 2017) at p 387.
206 [2008] EWHC 844 (Ch).
207 [1892] 1 QB 147.
208 [1981] 1 QB 758.
209 Alastair Hudson, Equity and Trusts (Routledge, 9th Ed, 2017) at p 518.
210 Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *Law Quarterly Review* 238 at 258.

from the state. In short, it respects human dignity, and this is one core foundation of the substantive rule of law. In addition, one of the prerequisites to activating the *cy-près* doctrine is the impossibility to carry out the purpose of the charitable trust in the first place. As a matter of general trust law, when a private trust fails, the funds left by the settlor simply go back to the settlor's estate. In the case of testamentary failure, this can have serious consequences because the funds will pass to the residual legatee or the testator's next of kin. It is therefore argued that, far from interfering with the settlor's autonomy, the *cy-près* doctrine is actually the last bulwark protecting the original intention of the settlor or testator. Indeed, in a situation where the charitable trust cannot be fulfilled, the *cy-près* doctrine offers at least the possibility that the funds left by the testator will be used for a charitable purpose similar to what was originally conceived, instead of simply be diverted to the common pool of assets.

51 On the other hand, the tendency of the courts to alter terms which are discriminatory, while still upholding the underlying general charitable intent, reflects the need for the judiciary to follow prevailing social and political norms. Stephen Hall said that the common law "adapts to the changed social realities … by incremental doctrinal changes"[211] and is therefore essentially a customary system. Thus, on a macro level, the rule of law values embodied in a particular society and at any particular point in its history resonate in equitable decisions and *cy-près* judgments are evidence of that.

## V. Conclusion

52 This article challenged the view that equity undermines the rule of law. It reviewed different equitable doctrines and measured these against both accounts of the rule of law. Against the substantive rule of law, equity performs multiple functions: it restrains unconscionable reliance on strict legal rights, protects property through its expansion of tradeable rights, and empowers people to live autonomous lives, free from interference. Finally, it was demonstrated that the conventional wisdom of holding equity's hallmarks of indeterminacy, discretion and conscience as being repugnant to a formalist account of the rule of law, does not hold up to scrutiny. Indeed, the divide between common law doctrines and equitable doctrines is blurred on a number of accounts; there are some overlaps spanning the realms of discretion and conscience

211 Stephen Hall, *Law of Contract in Hong Kong: Cases and Commentary* (LexisNexis, 5th Ed, 2017) at p 50.

or morality which do not warrant the suspicion that equity infringes the formalist theory of rule of law.

53 In short, equity is not only compatible with the rule of law, taken in its widest sense and encompassing both theories, but is also a shining beacon of liberal democratic societies which uphold the plural versions of the rule of law. This article concludes with the words of Anthony Mason who lauded the "onward march of equity" and for whom equity's "concerns with standards of conscience, fairness, equality and protection of relationships of trust and confidence … equip it better to meet the needs of liberal democratic society".[212]

212 Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *Law Quarterly Review* 238 at 239.