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Equity – law and idea

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Contents

Introduction

This free course, *Equity – law and idea*, is divided into two parts. To begin you will explore the background of equity. The discussion will focus on two interrelated perspectives concerning equity both as a body of laws and idea of justice. One example of why these might be considered 'interrelated' is that equity as an *idea* represents 'an ethic for imagining better law and better life' (Watt, 2012, p. 1), meaning *inter alia*, taking seriously equity's foundational principles in the practice of law, and (re)focusing on forms of equity that do not allow law to be 'fully in command' or morality to lose relevance (Fox, 1993, p. 101). The product of this 'refocus' is a juridical mode of thinking capable of challenging and holding to account opportunism in respect of property dealings within modern capitalist society. Opportunism thus represents negative, immoral or unethical aspects that arise under capitalism as the prevailing form of economic organisation in England and Wales. The second section will then develop this evaluation of equity further in terms of the contemporary economic context. This includes, for example, considering the argument that, contrary to a vision of equity as a form of defence or mitigation against opportunism, that it in fact promotes opportunism via, for example, trusts.

This OpenLearn course is an adapted extract from the Open University course W302 *Equity, trusts and land*.

Learning Outcomes

After studying this course, you should be able to:

- describe some basic features of the law of equity
- critically evaluate and describe tensions between legal and philosophical accounts of equity
- critically situate equity as both law and idea in contemporary socio-political and economic contexts.

1 A plurality of worlds

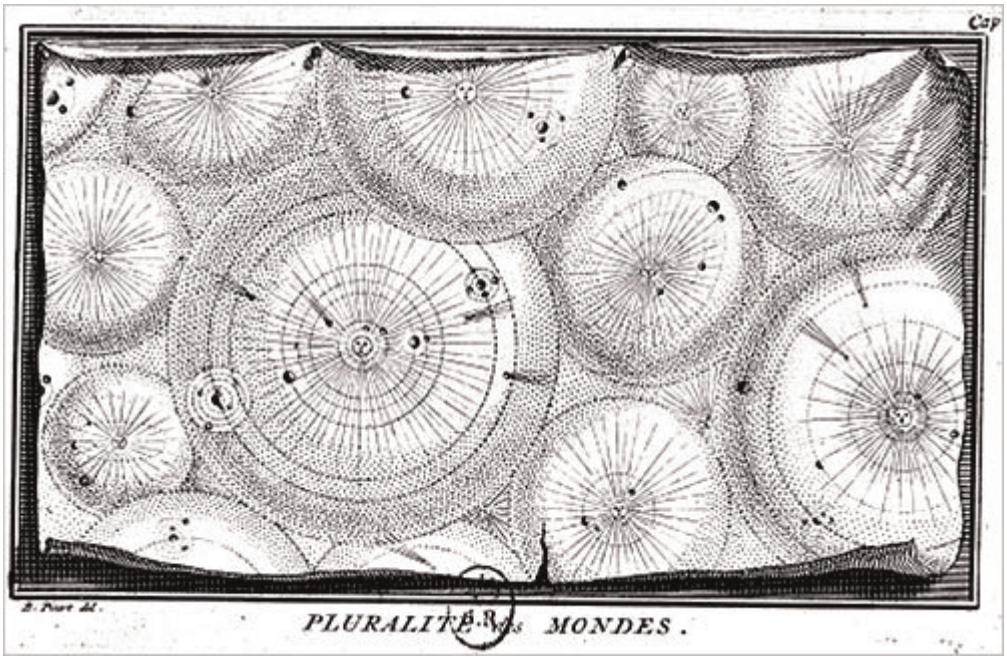

Figure 1 Equity as a plurality of worlds

Before looking at equity's foundations in contemporary law there is an important problem to address – namely, that there is no one definition of equity – it is not homogeneous. Rather, 'equity' incorporates different ideas and concepts, including justice, fairness and even equality. It is therefore heterogeneous and embraces a plurality of different legal and non-legal worlds. Important for the following discussion is that it is in part due to this diverse or heterogeneous character that equity is able to operate beyond narrow legal considerations and penetrate wider socio-political and economic discourse. But, as will be discussed in the later sections of this course, just because equity has traditionally represented a range of different and largely virtuous ideals such as fairness, does not mean it continues to do so.

To further explore definitions of equity and other words in the course, search for the term in the Oxford Reference collection.

Gary Watt claims that it 'is true that equity, like charity, cannot be wholly contained within the confines of systematic general law, but this is not because these ideas lack coherent meaning, it is simply that these ideas have meanings which go beyond meanings that can be categorised in general law' (2012, p. 8). In other words, something of equity – we may choose, for example, to refer to its 'essence' – escapes concrete or settled definitions. F. W. Maitland, who defined equity largely in terms of the historical development of its rules and doctrines, noted the variability of equity's character. In the opening pages of his famous course of lectures on equity delivered at the University of Cambridge at the turn of the twentieth century, he had this to say on the matter:

> What is Equity? We can only answer it by giving some short account of certain courts of justice which were abolished over thirty years ago. In the year 1875 we might have said 'Equity is that body of rules

> which is administered only by those Courts which are known as Courts of Equity.' The definition of course would not have been very satisfactory, but now-a-days we are cut off even from this unsatisfactory definition. We have no longer any courts which are merely courts of equity. Thus we are driven to say that Equity now is that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts [1873–75], would be administered only by those courts which would be known as Courts of Equity.
>
> This, you may well say, is but a poor thing to call a definition.
>
> (Maitland, 1909, p. 1)

How to deal with a lack of a concrete definition

It is proposed here that you embrace equity in all its heterogeneity, because to do so is to acknowledge equity as a manifold idea that will in turn provide richer meaning to both law and wider social discourse. There are two main forms of equity you are asked to consider.

First, equity as a division or branch of private common law (distinct from public and criminal law), comprised of rules, doctrines, principles and procedures that are largely occupied with matters relating to private and commercial property in its many and variegated forms. This will generally be referred to here as the 'law of equity'. This is the form of equity referred to, for example, in law reports. It is also the body of doctrine expected to help counter different forms of opportunistic behaviour using various remedial strategies – for example, injunctions.

Second, there is equity that enfolds a range of virtues such as fairness, equality and justice, as well as being associated with other broader idealised or utopian notions – that is, how individuals and communities ought to live in better, fairer and more equal ways. As a collection of virtues that expect or demand something better, this 'equity' will be considered in terms of its capability to disrupt normative social conditions and practices, including mainstream legal reasoning. This radical twist to equity equates in part to Davina Cooper's 'everyday utopias':

> Everyday utopias don't focus on campaigning or advocacy. They don't place their energy on pressuring mainstream institutions to change, on winning votes, or on taking over dominant social structures. Rather they work by creating the change they wish to encounter, building and forging new ways of experiencing social and political life.
>
> (2014, p. 2)

As with the law, equitable ideas often concern private property and how, for example, it is held (possessed, owned), used and (re)distributed in capitalist societies.

1.1 The foundations of equity

> There are more things in heaven and earth, Horatio,
>
> Than are dreamt of in our philosophy.
>
> (Shakespeare, 1603)

Following this famous quote from Shakespeare's *Hamlet*, it can be argued that the plurality theory of equity turns on what can ever truly be known or understood about the nature of equity as such. Furthermore, it maintains that there are irreconcilable contradictions between different forms and ideas of equity. One of the most trenchant is between equity as a contemporary body of law and the far older and arguably more idealistic conceptions of equity that Aristotle outlined in the *Nicomachean Ethics* as 'better than one kind of justice' (Aristotle, 5.10).

Figure 2 Aristotle (384–322 BCE), Greek philosopher

Activity 1 Aristotle's *epieikeia*

You should allow yourself 45 minutes to do this activity.

While Aristotle's ideas of equity (or *epieikeia*) have evolved over time – having been constantly re-imagined and reinterpreted by philosophers, ecclesiastics, jurists, political theorists and economists to name but a few – they nevertheless remain a touchstone and help to remind us of equity's enduring philosophical foundations.

Find a copy of either Aristotle's *Rhetoric* or *Nicomachean Ethics* online or in a local library – and look at one of the following sections:

- Section V 'Litigation' in *Rhetoric*
- Book V in *Nicomachean Ethics*.

Consider how Aristotle defines and discusses equity. Write brief notes based on your findings.

Discussion

While Aristotle defined equity in accordance with a very particular set of political conditions that applied during his lifetime, namely those that concerned city states in Ancient Greece (the *polis*), the enduring nature of his outline reveals that it touches upon fundamental truths concerning equity, law and legal reasoning. Even though equity as a 'better form of justice' appears to be a fairly abstract idea, it does not mean such ideas are without practical or real-world effects that we ought to take seriously. Equity, in that sense, has much in common with other powerful ideas or ideologies that describe particular indexes of human nature and conduct, such as the rule of law, democracy, capitalism or liberalism, for example. Each of these enfolds or contains a number of ideas or virtues that, should they be stripped away, would likely have profound social consequences. The same applies to equity, especially as it enfolds what are arguably two of the most important dimensions of social life: fairness and justice.

Aristotle addresses discrepancies between theoretical and practical forms of equity by suggesting that equity's inherent purpose or *nature* is to fill gaps found elsewhere in the law. Gaps exist, Aristotle maintains, due to law's innate generality or universality – that is, a universality that comes from the inability of the legislator, and other legal stakeholders such as judges and lawyers, to find solutions to each novel situation or problem that life presents. Equity exists therefore to serve a very singular purpose; one that draws on both theoretical and practical considerations in order to ensure that a better form of justice is achieved than that which the law alone can achieve. This 'partnership' with law is one of the main ways in which Aristotle situates equity in the general legal landscape (Majeske, 2014, p. 41). And via Maitland's notion of equity as a 'gloss' or 'supplement' to the common law (1909, p. 18), it has proven a popular view among jurists.

However, despite the potency of the partnership or supplementary view of equity, it still assumes rather than satisfactorily explains any connection between equity and justice. After all, equity does not simply appear and disappear as justice requires; and equity is not justice as such. Therefore the

two are not infinitely interchangeable, and equity cannot fully explain or describe what justice is and *vice versa*. Looking at how equity and law work together in order to produce forms of justice can arguably help to explain their relationship, at least to some extent.

If you would like to know more about Aristotle and his ideas, see the Very short introductions collection. You might find it helpful to look at this resource when considering other thinkers and concepts in the course.

In *Laws*, Plato, like Aristotle, relies upon metaphors in order to explain how equity and law work together in order to achieve a better form of justice. In other words, Plato views equity in deliberately fictive terms in order that it may, as Terry Eagleton suggests more generally in relation to metaphor, 'betray its own fictive and arbitrary nature at just those points where it is offering to be most intensively persuasive' (1996, p. 126). And where Plato (who predated Aristotle) wants us to see equity at its most intensively persuasive is as a compliment to and corrective of the law. One of Plato's more notable metaphors relates to fabric and weaving, and what is referred to specifically as the complementarity that exists in the interweaving between the 'warp' and the 'woof', where the warp, representing the law, 'must be of a superior type of material (strong and firm in character)', while the woof, representing equity, 'is softer and suitably workable' (*Laws*).

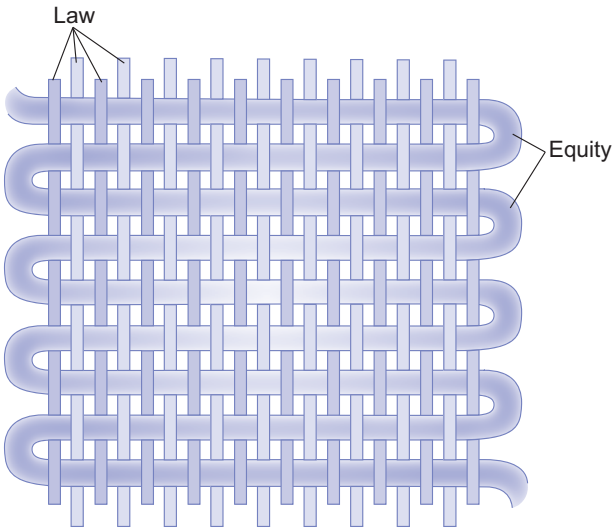

Figure 3 The warp and the woof

Both Aristotle's and Plato's accounts of equity remind us that there is nothing organic or natural about equity or the ways in which it contributes to and creates law. Rather, equity's various meanings and how these translate into how it functions in the real world are conjured and controlled by the 'reason' of stakeholders who demand it exists in a particular way. A clear example of this relates to the fact that equity was and to some extent still is closely allied with many different religious doctrines and embodied in transcendent concepts such as the 'Golden Rule' (Wattles, 1997). Because of this the meaning of equity has often been shaped by religious bias and reshaped by secular backlash. This has seen equity, much like the concept of natural law, directly attributed during significant periods of its

history to the will of God. The reality, of course, is that equity, like law generally, reflects or embodies a complex of human reasons, desires and needs, and this remains very much the case in the contemporary capitalist context.

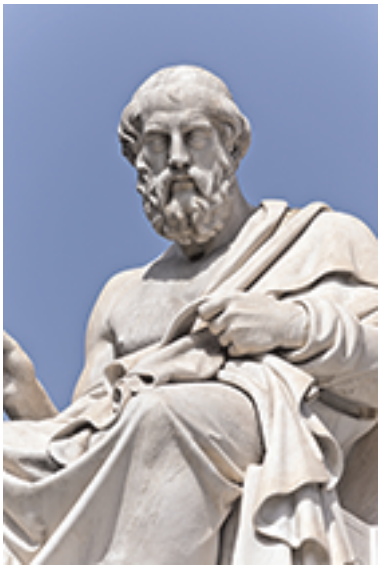

Figure 4 Plato (427–347 BCE), Greek philosopher

2 Equity at the dawn of modernity

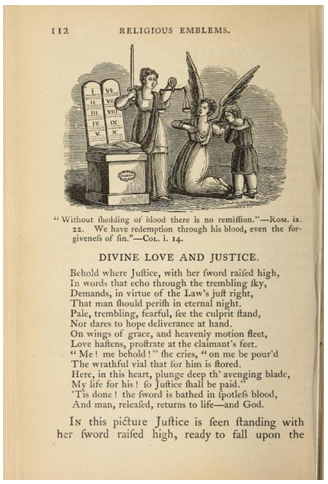

Figure 5 Divine love and justice

The relationship of equity to common law was defined, broadly speaking, by men of the Church, most notably Roman Catholics, during the early medieval period. Among other things this accounts for equity's association with conscience and why equitable courts were known during later points in its history as 'courts of conscience'.

The prelates were instrumental in weaving throughout common legal reasoning a mixture of dogmatic principles, doctrines, rules and equitable ideals that were drawn from sources including canon law, as well as the work of both St Augustine and St Thomas Aquinas, both of whom viewed equity largely on Aristotelian terms. As a consequence, equity's foundational principles were introduced to and to large extent came into conflict with the network of harder and harsher common law rules being established during the medieval and early modern periods, the legacy of which still exists today. However, the profound challenge to the authority of, in the main, the Roman Catholic Church caused by the Reformation also had a profound effect upon the ways in which equity would thereafter be viewed across the legal landscape. The Reformation, and in particular the mode of legal reasoning that would appear in its wake, signalled a significant change in how equity was considered vis-à-vis the law. In short, equity would begin to be seen more in terms of law – as a body of rules and doctrines – and less as a theoretical or philosophical counterpart to the law.

2.1 The Reformation and its impact

As a consequence of the Reformation, the Church's equitable influence on legal reasoning was greatly diminished, and in its place more secular, and increasingly scientific and rational methods took root. These methods signalled a greater demand for certainty in the law, and were based on testing and proof rather than the whims of individual Chancellors, judges and lawmakers, many of whom had previously been men of the Church. The new methods, moreover, defined rules incrementally and with seemingly greater transparency. Like cases were treated alike, for example, using the doctrine of precedent, and the recording and reporting of cases was significantly improved.

In sum this drive for greater certainty meant a corresponding reduction in the influence of wisdom as a form of discretionary judgement based largely on individual or subjective experience, as well as other modes of interacting with the world that did not comfortably fit the new objective, scientific methods which relied and insisted on certainty.

Two key figures who helped redefine legal reasoning in general during the period characterised by the turbulence of both the Reformation and Counter-Reformation, and in light of socio-political concerns in particular, were Thomas Hobbes and Matthew Hale. 'Hale, like Hobbes,' claims Stephen A. Siegel, 'gives certainty a more prominent position in his conception of law.

In the jurisprudence of [Sir John] Fortescue, [Christopher] St. German, and [Sir Edward] Coke, wisdom is the chief merit and value of the common law; they mention certainty, if at all, only in passing' (1981, p. 52). What this reveals is a definitive shift in legal reasoning, especially during the seventeenth century, influenced by an emerging scientific rationality that was sweeping across Europe and which contrasted and often contradicted the superstitious and relative uncertainty, or rather unknowability, attributable to religious ideals. Between the time of Coke and Hale in particular this shift in thought also captured political ideals, and eventually economic ones as well. Christopher St. German, who had endured many long debates over the nature of equity and conscience with Thomas More during and after his time as Lord Chancellor under Henry VIII, is of particular interest because of his hand in the relative secularisation of equity during this period. St. German was a lawyer rather than a scientist, but he has been credited by many with redefining equity and conscience for the modern age, most notably in his landmark text *Doctor and Student* published during the first quarter of the sixteenth century.

Contingent upon this drive in the early modern period for a new rationality and certainty more wedded to secular rather than religious aims, was that justice would be forged, for better or worse, on a basis of existing and definable rules and doctrines. As a consequence this meant justice was just as likely to derive from poorly decided cases as from seemingly good decisions. And while this concerned common law, which had relied upon precedent long before the law of equity, notably in the Court of King's Bench, from the late sixteenth century onwards it increasingly also applied to equity administered in the Court of Chancery. As such the drive for certainty that applied to the common law became a concern for equity as well, and with it all the positive and negative aspects relating to justice as it was found by judges with certainty forefront in their minds.

From the seventeenth century onwards, therefore, equity became an increasingly settled body of law. And while discussions of equity still contained a kernel of its ancient philosophical basis, with lip-service paid to Aristotle in considerations of justice, the overriding concern of lawmakers, Chancellors and members of the Chancery Bar was no longer with equity's inherent role being to forge a better form of justice than the common law alone. Instead the Court of Chancery became a popular alternative – perhaps even a competitor – to the common law courts for litigants, with the consequence that right up until Judicature in the latter half of the nineteenth century, equity, by virtue of its necessary association with Chancery, became a byword for injustice, delay and high costs – essentially the exact reverse of its basis in the ancient philosophical tradition.

So, what remained of equity in terms of philosophy as the mores of modernity tightened their grip from the seventeenth century onwards? Even though Aristotle represented ancient, pre-Enlightenment forms of legal reasoning, his thought was not systematically ousted from the new secular regime. In all likelihood this was because the teleological (purpose-based) deductive reasoning that was a central feature of Aristotle's metaphysics fitted to a large extent with the new scientific era. This was an era underpinned, in the main, by a strong belief in rationalism, and in particular the ideas and methods pioneered by René Descartes, which would lead

some jurists and judges, as Friedrich Hayek maintained, towards a belief in 'constructivist rationalism which regards all rules as deliberately made and therefore capable of exhaustive statement' (2013, p. 111).

Yet Aristotle has managed to remain a constant across the different domains of social consciousness and in the corresponding institutions, including equity. It must be noted, however, that even Aristotle's ideas did not generally fare well during the turbulent period of the Enlightenment, especially in light of the increasing influence that a truculent and newly independent America brought to bear on common law reasoning. As you shall shortly see, it was America's influence on the development of capitalism that would have an equally profound effect on the nature and function of law and equity.

2.2 The classical and decadent eras

To summarise this period of equity's development you can examine two distinct eras that Siegel has isolated, the classical (*c.*1450–*c.*1650) and the decadent (*c.*1650–*c.*1800). While both periods were characterised by 'an interlocking mosaic of ancient rules', Siegel further claims that:

> Nonetheless, subtle differences distinguish the basic conceptions of the two periods. In the classical era the validity of the law lay in its wisdom, and ancient rules were merely the primary source from which jurists debated and derived a case's just disposition. In the decadent era, however, the validity of law – at least the common law as opposed to statute – lay in its certainty, and ancient rules were seen as more directly determinative regardless of their wisdom.
>
> (1981, p. 21)

At the dawn of modernity, therefore, wisdom or what corresponded with forms of reasoning founded on human emotions, beliefs, practices and instincts was no longer viewed as an appropriate or tenable basis for legal reasoning. As a consequence the careful interwoven relationship of the 'woof' to the 'warp' in the fabric of law that Plato had so eloquently described many centuries before had once and for all been broken, and it was the broader ideals of equity that would prove to be the casualty.

Activity 2 Having gods, being Greek and getting better

You should allow yourself 3 hours and 45 minutes to do this activity.

Please read and make notes on the following article:

- Watt, G. (2012) 'Having gods, being Greek and getting better: On equity and integrity concerning property and other posited laws', *No Foundations: An Interdisciplinary Journal of Law and Justice*, no. 9, pp. 119–43.

Gary Watt makes a point of thinking about and discussing equity in cultural terms. In the article he cites a number of theatrical examples. Can you think of an example drawn from your own cultural knowledge – for example, film,

television or literature – that might help describe or explain equity in a similar way?

Discussion

Watt highlights a number of important concerns with regard to equity as both law and idea. For example, the concept of 'integrity' in contrast with equity, and in particular how equity can and does function both in and beyond legal systems, is a useful way of thinking about how equity features in the everyday. In other words, Watt reinforces the notion that equity does not have to be thought about only in terms of the law, but also in terms of how we all live our lives on a day-to-day basis.

The importance of equity is illustrated by Watt via a number of cultural sources. It is not hard to find examples in all forms of culture that help describe and explain equity's concern for tempering harsh rules. For example, the popular 1990s US TV show *The X-Files* provides a perfect illustration via the contrasting yet complimentary nature of the two main characters, Mulder and Scully. On the one hand there is an inflexible adherence to rules (Scully), and on the other the desire to bend those rules as far as possible in order to find the truth (Mulder).

If you wish to know more about *The X-Files*, you may like to read the following:

> Bellon, J. (1999) 'The strange discourse of The X-Files: what it is, what it does, and what is at stake', *Critical Studies in Mass Communication*, vol. 16, no. 2, pp. 136–54.

3 The burden of justice, the burden of equity

> [M]en of law have certain scruples and are unable to eliminate justice from the law completely without twinges of conscience. But it is not possible to retain it because of the difficulties it involves, the uncertainty of operation and unpredictability it entails. In a word, judicial technique implies that bureaucracy cannot be burdened any longer with justice.
>
> (Ellul, 1964, p. 295)

In this powerful statement the French sociologist Jacques Ellul focuses on the shifts that he saw occurring during the twentieth century, due, in large part, to an increasingly central role played by machines and technology. While the specific arguments that Ellul makes with regard to technology continue to be important if somewhat dated in the twenty-first century, his more subtle arguments relating to 'techniques' and the corresponding shifts they cause in, most notably, justice as it is understood within a capitalist context, remain relevant.

Figure 6 Jacques Ellul (1912–1994), French sociologist

To be more precise, Ellul's ideas offer an explanation or account of opportunism that is a notable and often problematic product of an increasingly financialised world. That is, a world where human life and endeavour is only considered in terms of money, markets, business, etc. Opportunism as it appears in this context engenders fraudulent behaviour that is considered criminal in nature, thus something that the state must root out and punish. But fraud or rather fraud-like behaviour transcends both criminality and even behaviour that is explicitly 'illegal'. As such it is also a major concern for private law and equity more specifically. As Henry Smith (2012) suggests: 'Opportunism is different [from fraud]. It often consists of behavior that is technically legal but is done with a view to securing unintended benefits from the system, and these benefits are usually smaller than the costs they impose on others' (pp. 10–11). Moreover, 'opportunism is behaviour', claims Smith, 'that is undesirable but that

cannot be cost-effectively captured – defined, detected, and deterred – by explicit ex ante rulemaking' (p. 10).

3.1 Equity, capitalism, justice and opportunism

How can the necessarily complicated relationship between equity, capitalism, justice and opportunism be explained? This relationship can be seen, broadly, from two positions, both of which start from the same basic aim (countering opportunism), but involve very different ends or outcomes:

- equity counters opportunistic behaviour and secures justice in order to support and maintain the legitimacy of capitalism
- equity counters opportunism, but in securing justice reveals capitalism to be the cultivator of opportunism.

While a plural equity, a combination of law and idea, is able to achieve both outcomes, it is arguably the route which ultimately maintains and supports capitalism that explains contemporary equity better, and follows the account given by Smith. The second outcome is of particular interest here, however, because on the one hand it provides contrast to mainstream accounts of equity and on the other it crucially advances the arguments made by the likes of Smith further, to a point of political and economic significance. This is important because Smith does not seek to question what is ultimately at stake beyond narrow legal and equitable concerns for tackling opportunism. This is a problem when dealing with a subject that is explicitly socio-economic in nature. In other words, lawyers and legal commentators, such as Smith (although he is not an overly bad example), will often focus on rules and doctrines to the exclusion of the ideological significance as well as the wider socio-economic political impact and effect those rules and doctrines have. This is a mistake. While opportunism is arguably born of more deep-seated and far-reaching aspects of the human condition, it unquestionably thrives under the more recent phenomenon of capitalism. More to the point, law and equity play an important and highly questionable role in the relationship between opportunism and capitalism. This notion resonates with many critics of capitalism such as Ellul, but also those who have attempted to understand the psychological effects of capitalism such as Hebert Marcuse (1998, 2002).

Returning to Ellul: faced with capitalism's demands for increased efficiency and the economic rationalisation of systems and institutions such as those of law and equity, Ellul's claim is that justice will wither and die because it is too uncertain and unpredictable to effectively meet those demands without being perceived as excessively burdensome or costly. This has long been the story faced by institutions under capitalism. For example, efficiency savings were a key reason that the Court of Chancery, equity's home since the Middle Ages, was subsumed into the new High Court system during the latter half of the nineteenth century just as the Victorian 'Great Depression' took hold (in the 1870s). In other words, cost is a dominant consideration when it comes to justice to the extent that justice is subject to, even if not

explicitly, forms of cost–benefit analysis that determine, among other things, whether or not those who engage in opportunistic behaviour are able to secure or evade justice.

3.2 Laissez-faire capitalism

Like equity, capitalism cannot be fully explained simply by reference to something called 'capitalism'. It is far more nuanced than that. The type of capitalism referred to in the present discussion is so-called laissez-faire capitalism, which in conjunction with broader liberal ideals such as freedom has had a profound impact on how law and equity are expected to function. That the forces and vagaries of this type of capitalism have for a long time determined the nature, function and complexion of social institutions is uncontroversial. What is more problematic, however, is how social institutions such as those of the law operate under laissez-faire capitalism, and who benefits in both the short and long term from an increasingly financialised 'justice' system. That is, a justice system geared towards financial concerns and influence, including those of business, set within a free-market and competitive context.

One expression of how legal institutions function under the type of conditions suggested here is given by John Rawls, who claims that capitalism, 'secures only formal equality and rejects both the fair value of the equal political liberties and fair equality of opportunity. It aims for economic efficiency and growth constrained only by a rather low social minimum' (2001, p. 137). In other words, a high-status is given to those systems or institutions able to function most efficiently (cost effectively), that operate in a business-like way and thus, ultimately, in the service and promotion of capitalist ideals. That is, whether a system or institution functions in a way that secures financial savings – for example, State agencies under austerity, or in order to guarantee a profit, for example, a private contractor of civil services, the respective evaluations of success or failure of that system or institution, and any other considerations that might subsequently flow from that evaluation – will be based on strict financial considerations, needs or demands. As a consequence, whichever direction the economic winds are blowing will invariably determine the direction of travel of institutions such as those of law and equity.

It has long been clear that economic or financial crises are part and parcel of capitalism, and key economists have been quick to note the problems and inefficiencies, as much as the strengths, of capitalism in light of this fact (Keynes, 2015, pp. 60–1). And while crises produce what may crudely be called winners and losers, they also produce a number of casualtiesboth directly and indirectly, intentional and unintentional ('collateral damage') in the form of broken institutions and systems that need subsequently to be reformed, rebuilt or re-imagined. As such, after a crisis it is arguably more likely to be those things – people, beliefs, institutions, etc. – that appear counter or surplus to primary economic demands and needs that are forced to change or adapt in order to survive. For Ellul, justice represents such a casualty, one that never remains intact or the same post-crisis.

For present purposes it is more precise to talk about the various institutions of law that function in the name of justice, rather than justice alone, and thus how equity is or can be rendered an economic casualty on these terms. Moreover, how opportunism, when framed as the deliberate exploitation of certain financial conditions, is able to take advantage of shifts that occur within the capitalist context. After all, crises do not result exclusively in either injustice or a lack of justice as such, whether it is defined in the form of a specific event such as the Wall Street Crash of 1929 or a more sustained economic downturn such as that experienced during the first quarter of the twenty-first century. Rather, when justice is remodelled during or after a crisis it assumes a new form that is ultimately made to fit a new emerging socio-economic landscape. This is arguably done, in part at least, as a response to opportunistic behaviour that has either created or exacerbated a crisis.

3.3 Imagining better law and better life

Can equity transcend this socio-economic landscape? There certainly appears to be something enduring about equity, and the notions of justice and fairness it enfolds, that suggests it can. Recall, for example, equity's association with the Golden Rule; that powerful moral and ethical measure mentioned earlier. Furthermore, Ellul says that 'men of law have certain scruples and are unable to eliminate justice from the law completely without twinges of conscience' (1964, p. 295). So, does this suggest that capitalism and its stakeholders, or whatsoever seeks to reshape the socio-legal landscape for its own ends at a given moment in time, cannot hope to have everything their own way? Does it mean that justice or equity are able to effect a real influence over capitalism?

If you consider opportunism as not just symptomatic of capitalism, but actually paradigmatic of all that is rotten about capitalism, what does this reveal about equity and its relationship to capitalism? Smith, for one, believes equity holds the key to dealing with opportunism (2012, p. 12). And it may be assumed that this belief extends to large-scale crises, as much as it does to small-time frauds that bear the hallmarks of opportunism. Smith, moreover, notes equity's philosophical foundations in achieving this outcome. 'Equity', Smith maintains, 'seeks individualized justice in which opportunism has no scope for exploiting the defects of the law that stem from its generality (Aristotle's concern again)' (2012, p. 27). Equity, in this sense, still demonstrates something of the notable flexibility or elasticity that Aristotle first highlighted via the image of the lesbian rule, that is it bends to fit the exact contours of a given situation. However, as noted earlier, Smith does not concern himself with equity as a mode of capitalist critique. Therefore following Smith's optimism to a logical conclusion may only lead to the further entrenchment of capitalist values freed from or unperturbed by the threat of opportunism.

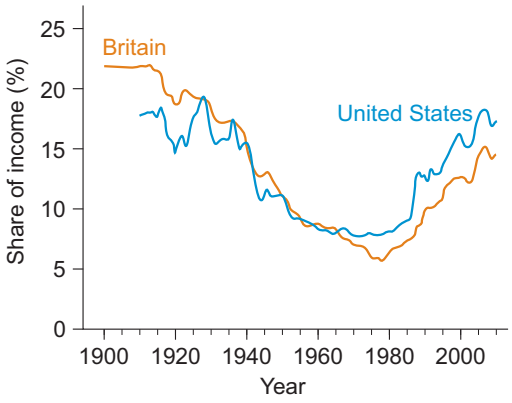

Figure 7 The increased income of the top 1% in the US and Britain (Source: Atkinson, 2015)

3.3.1 Equity's purpose reconsidered

Yet the reason for equity's flexibility now is only insofar as it aids the development and progress of capitalism. And evidence for this can be determined by considering Smith's account of the role equity plays in countering opportunism. Thus you return again to the tension between what equity's purpose ought to be: should it counter opportunism in the name of capitalism, i.e. help secure a better and more efficient domain of property rights (albeit an increasingly unequal and elitist one); or should it reveal and criticise precisely these types of inequalities fostered by capitalism on behalf of the many and not the few? Use the box below to answer this question.

Exercise

What do you think equity's purpose should be? Choose one of the two responses below and type it into the box underneath.

- To reveal and criticise precisely the types of inequalities fostered by capitalism on behalf of the many and not the few.
- To counter opportunism in the name of capitalism, i.e. help secure a better more efficient domain of property rights (albeit an increasingly unequal and elitist one).

Answer

Some may argue that there is no need to recount equity's Aristotelian and Platonic roots because equity has drifted so far from such points of view that they are no longer relevant to its modern day application, and whether it helps or hinders capitalism is purely a functional matter. The counter argument, however, is that preserving the philosophical and idealised basis of equity is one way in which it is possible to maintain a viable mode of critique of capitalism that would otherwise succeed in transforming law and legal reason in its entirety to meet its own ends. It ensures equity remains that which causes men of law to have, in Ellul's words, 'twinges of conscience' (1964, p. 295). This highlights not only a significant and important political role that equity has, but also that equity need not simply

bow to capitalism. Instead equity remains capable of questioning and challenging those aspects of capitalism that can be seen and said to reject fairness and justice for the many and for the commonwealth. As Dennis Fox has stated: 'To the degree that a legal system endorses equity, it recognizes the principle that community notions of fairness and discretionary justice may appropriately outweigh legal logic narrowly used in pursuit of other goals' (1993, p. 103).

Since at least the nineteenth century the financialisation of socio-legal institutions has resulted in the definitive and definitional transformation of modes such as equity. As a consequence, other than the form of equity that supports and maintains economic domination – namely the law of equity – all other forms of it, and most notably those that recall conscientious practices associated with communal and social life not rooted in financialisation, have been attenuated or repressed. These forms of equity do not after all suit ideologies such as capitalism because they are uncertain and unknowable to some degree. 'A law created as a function of justice', Ellul claimed, 'has something unpredictable in it which embarrasses the jurist' (1964, p. 292). This has produced a legal system that dispenses forms of justice that are rarely if ever defined beyond managed and measured economic considerations that benefit a particular class of economically privileged individuals. Thus, it is argued, equity today is leached of any tangible conscientious moral or ethical content, despite the fact judges in court, as well as the mainstream narratives of legal education more generally, continue to pay lip-service to these characteristics. A key question when posed with such fallacies, therefore, is: whose ideas and experiences of fairness and justice are actually defining contemporary equity?

3.3.2 Utopians and anarchists

Other than forms of equity tailored for the needs of laissez-faire capitalism there remain 'utopian' counterparts, which focus instead on forms of equity that recall Gary Watt's idea of something with the 'power to provide an ethic for imagining better law and better life' (2012, p. 1). Equity understood as something good relates to the long-held association that it has with certain modes of being that in themselves aim for good or virtuous ideas and ways of living – that is, modes of being based on moral and ethical considerations. This challenges narrow doctrinal and somewhat amoral views of equity, especially in terms of countering opportunism, because, as Smith maintains, 'the notions of right and fairness are not totally free-form – they are supposed to be cabined – but equity is by necessity open-textured, receiving much of its substance from everyday moral disapproval of deceptive behavior' (2012, p. 29).

Dennis Fox considers equity in much the same way, and believes that equity on these terms is able not simply to act as a critique of capitalism, but also to inform a whole anarchic jurisprudence that aims for alternative ways of organising society. 'If equity stands for values such as individual and social justice, brotherhood, individualized consideration, flexibility, and reasonable

accommodation to others' misfortune', says Fox, 'then perhaps equity is the principle upon which to hang an anarchist-inspired rejection of legal domination' (1993, p. 104). What Fox favours in equity is, however, precisely that which makes it appear out of place in, or a 'burden' to, legal systems underscored by capitalism. Equity on these terms is referred to pejoratively as 'utopian' because it engenders and takes seriously law's impact on a wider variety of definitely human aspects: emotions, beliefs, practices and instincts. In short, equity on this account is an embodiment of conscientious social practices that often provides an inconvenient reminder of the importance that moral and ethical considerations have for legal reasoning.

A good example of how this 'inconvenience' plays out is in equity's continuing relation to conscience. And much like the problem of still legitimately associating fairness and justice as broad social virtues with the law of equity in the context of capitalism, viewing conscience as anything other than a platitude arguably no longer holds. That is, conscience can no longer be understood in terms of an equitable means or defence mechanism for the powerless against the powerful, and as a mode of selfless moral consideration that emphasises acting in common together rather than for individual gain (De Silva, 2000, p. 10); nor as a true countermeasure against opportunism. This is because the type of conscience invoked in equity today is, as Margaret Halliwell maintains, preserved only 'within the confines of technical learning' in an 'artificially ordered' state (2004, p. 158).

There is a further way to consider conscience in this context: that individualised justice derived from an observance of one's conscience also corresponds with the individualising basis of capitalism – in spite of Fox's enthusiasm for that part of equity that provides individual justice alongside social justice. That might seem a crude mapping of one account of individualism atop another, but it is arguably realistic and accords with the type of egocentric human behaviour highlighted by the likes of Marcuse as a feature of modern capitalist societies, of which a type is opportunism. Moreover, factors such as wealth, as a key variable that dictates who is able to access courts and legal services, ensures that conscience is increasingly defined only in accordance with a narrow social class – namely, that of the economically privileged few. As such, conscience as it applies to equity is becoming more homogenised, impoverished and impotent under capitalism.

Activity 3 Word cloud

You should allow yourself 50 minutes to do this activity.

Construct a word cloud relating to the themes: equity and capitalism. Word clouds are a useful visual tool for creating, sharing and discussing subjects and themes.

In order to do this you will need to write a summary of no more than 200 words based on the material that you have just read, or simply try to build a list of all the terms and definitions that you believe inform your understanding of a relationship between equity and capitalism.

Once you have written a summary or compiled a list you can simply cut and paste the text into a word cloud creator:

- TagCrowd
- WordItOut

You might find it helpful to first cut and paste some of the text from the Annual Mansion House speech by the Chancellor of the Exchequer (Osborne, 2015) into one of the word cloud creators to see what happens with the piece of text and which words are emphasised in the word cloud.

Discussion

Once you have completed the activity you ought to have a word cloud that looks something like the one below:

Figure 8 Word cloud example

4 Equity as a wealth generator: the background

So far this course has examined the tension between equity as idea and law. Central to this so-called tension is the argument that there is a growing divide between these two approaches caused by equity's role in and exposure to capitalism. This section of the course will argue that the transformation of equity that corresponded with the rise of capitalism reveals a body of law that was not so much dragged away from its foundational principles by capitalism, but was instead well-placed to meet the demands of capitalism and maximise individual benefits under it. In other words, in stark contrast to its philosophical 'utopian' foundations, equity, and in particular the mechanisms that it helped create and administer, namely trusts, became indispensable tools for capitalism through a combination of accident and, more importantly, design.

This course will only talk about trusts generally. However, within the capitalist context two main things can be said about the relationship between opportunism and trusts that also reveal why equity might be said to be complicit in opportunism and not just a counter-measure to it:

- Insofar that trusts offer individuals a significant means of tax avoidance, they arguably correspond at some level with Smith's notion that opportunism 'often consists of behavior that is technically legal but is done with a view to securing unintended benefits from the system, and these benefits are usually smaller than the costs they impose on others' (2012, pp. 10–11).
- Trustees who breach a trust by, for example, treating trust property as if it were their own personal property clearly demonstrate opportunistic behaviour, much in the same way that a thief or fraudster does.

So how did equity go from being capable of restraining, if not entirely preventing or countering, an individual's opportunistic tendencies under capitalism, to a law that, to all intents and purposes, creates the very conditions in which opportunistic behaviour is able to occur and even thrive?

4.1 The roots of equity's changing role

Equity's correspondence with capitalism began in earnest during the early modern period, and is arguably connected to the same changes in social institutions highlighted by R.H. Tawney in *Religion and the Rise of Capitalism* (1990). In short, there are identifiable parallels between the relationship of capitalism with religion and religious institutions, and the relationship of capitalism with equity. Equity's 'legal' concerns during this period were much as they are today – namely those involving property. And it was property and money, and the later demands placed on institutions by a capitalist, free-market society that needed both of these things to operate

"He heapeth up riches and knoweth not who ſhall gather them."—Ps. xxxix. 6. "The covetous, whom the Lord abhorreth."—Ps. x. 3.

SELFISHNESS.

Look at the ſelfiſh man! See how he locks
Tight in his arms his mortgages and ſtocks!
While deeds and titles in his hands he graſps,
And gold and ſilver cloſe around him claſps.

Figure 9 Property, wealth and capital

and grow, which meant that the law of equity, in one form or another, became crucial to the legal system under capitalism.

The further encroachment of ideas that would prove to be the building blocks of capitalism from the early modern period onwards, meant the legal system required an element capable of creatively dealing with property and property rights. Thus equity became an important body of law put to work less for the benefit of the broader commonwealth, and more in the service of political and private economic masters interested in growing and maintaining power initially via property, and later via capital, i.e. money. During the course of the eighteenth and nineteenth centuries, thanks in large part to trusts, equity also became increasingly important commercially, as much as, if not more than it already was, for smaller personal and private family interests. As such, equity increasingly became the framework that helped facilitate commercial activity. And this reliance on equity, so to speak, was a trend that would gather pace from the nineteenth century onwards, especially following the Victorian fashion for trusts as vehicles for commercial investments (Stebbings, 2002).

In contrast to the status of the law of equity as a facilitator of commercial activity during the eighteenth and nineteenth centuries, many noted the further decline of equity as a 'utopian' idea – a decline which, by manifesting itself in many different ways, speaks to another dimension of the plurality of equity. The philosopher David Hume (1742), for example, noted how the court system (and Chancery in particular) no longer afforded the lawyer room to display 'eloquence', essentially because it, like the rest of law, relied on strict law, statutes and precedents (§I.XIII.10). 'How shall a modern lawyer', asks Hume, 'have leisure to quit his toilsome occupations, in order to gather the flowers of PARNASSUS?' (§I.XIII.10). Another philosopher, and a pioneer of political economy, Adam Smith (1759), takes a different tack, although not one that necessarily results in a wholly different view of equity from Hume's. For Smith, equity must remain a central idea insofar as it speaks to justice defined in and by the law. Where equity remains a lumpen virtue, a treatment of it that he accords with, among others, Aristotle, it will remain an imperfectly enumerated rule of justice (Smith, 1759, §VII.IV.37).

The reorientation – if indeed that is a suitable term – of equity, which gathered pace during the eighteenth and nineteenth centuries, was further developed during the twentieth century parallel with the economist Hayek's suggestion that true free-market capitalism required a particular type of legal system. In relation to his particular and highly influential brand of free-market, competitive capitalism, Hayek (2013) believed that the common law, which necessarily included equity in spite of the fact that he neither talks of equity nor Chancery expressly, as well as other modes of law-making, namely legislating, ought to maximise the freedom of individuals in order to allow them to fully realise themselves as liberal economic subjects – a view that became hard-and-fast government policy towards the end of the twentieth century under Margaret Thatcher in the UK and Ronald Reagan in the US. Equity was, in short, complicit, as part of this type of legal system, in helping to promote and guarantee the type of aspiration that had become a characteristic of contemporary capitalism; that

is, a type of aspiration that was, among other things, born of fierce competition and spurious notions of freedom. Hayek stated:

> The functioning of competition not only requires adequate organisation of certain institutions like money, markets, and channels of information —some of which can never be adequately provided by private enterprise—but it depends above all on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make it operate as beneficially as possible.
>
> (2001, p. 39)

As mentioned earlier, the 'reorientation' view of equity parallels in large part the experience undergone by religious institutions during the last 300 years. Indeed, as the foundational tenets of religion were increasingly called into question, the various institutions, both pre- and post-Reformation, were forced to change position and alter traditions in order to maintain a semblance of authority and power in the brave new socio-economic world defined both by the Enlightenment and capitalism. However, according to a number of commentators, religions also changed willingly in order to support the growth of capitalism. R.H. Tawney, John Maynard Keynes and especially the US jurist Roscoe Pound viewed Protestant Puritanism in particular as a major force that both defended and promoted capitalism, especially in the early socio-religious life of European settlers in what is now the United States. By virtue of the close relationship between equity in the US and the old British common law system, this fostered a powerful dialogue between the jurisdictions of the new and old worlds that would further help harmonise equity jurisprudence with capitalism.

In explaining the conditions that led to changes in key social institutions such as the church and law, Tawney describes, in two separate passages, the impact and influence that capitalism and capitalist ideas brought to bear on them. While Tawney does not talk explicitly of equity in terms of its status as legal institution, both its popularity and significance during the eighteenth and early nineteenth centuries mean that any discussion of capitalism and its impact on social institutions ought reasonably to consider equity. The first passage raises an issue already discussed: the struggle of the church to evolve in order to survive the demands of capitalism.

> The Christian is bound by his faith to a rule of life which finds expression in equity in bargaining and in works of mercy to his neighbours. But the conception that the Church possessed, of its own authority, an independent standard of social values, which it could apply as a criterion to the practical affairs of the economic world, grew steadily weaker. The result, neither immediate nor intended, but inevitable, was the tacit denial of spiritual significance in the transactions of business and in the relations of organized society.
>
> (Tawney, 1990, p. 191)

In the second passage Tawney focuses on the ideas of philosopher and political theorist John Locke, and describes the monumental shift in political thinking that occurred during the middle to late seventeenth century – a period dominated by the English Civil War, Restoration of the monarchy,

and Glorious Revolution. The basis of Tawney's argument, however, is that amid such massive social upheaval the nature of politics evolved a greater emphasis on individualism relegating notions of community in favour of commercial or corporate associations:

> Society is not a community of classes with varying functions, united to each other by mutual obligations arising from their relation to a common end. It is a joint-stock company rather than an organism, and the liabilities of the shareholders are strictly limited. They enter it in order to insure the rights already vested in them by the immutable laws of nature. The State, a matter of convenience, not of supernatural sanctions, exists for the protection of those rights, and fulfils its object in so far as, by maintaining contractual freedom, it secures full scope for their unfettered exercise.
>
> (Tawney, 1990, p. 192)

4.2 Equity as opportunism: creating the 'right place and the right time'

Key to understanding equity's role and place vis-à-vis laissez-faire capitalism relates to forms of individualism that manifested not only in equity's supposed ties to justice, but more importantly in its ability to create individually tailored property rights. In particular, it was mechanisms for creating property rights and generally administrating and managing property in ways that guaranteed benefit that were too tantalising a prospect to overlook for stakeholders.

As maintained earlier, it is largely as a consequence of the trust that equity ought to be considered the capitalist's juridical tool par excellence. Again, in stark contrast to its philosophical and idealised utopian foundations, equity, and in particular those that rely upon it to manage property within the capitalist free-market context, have demonstrated that the trust is more than capable of circumventing equitable concerns for fairness or justice, equality or egalitarianism. More precisely, by association with the trust, equity has allowed individuals to circumvent what is just and fair to society as a whole in terms of how wealth is (re)distributed via the tax system. In accordance with the rules of equity, trusts provide a means for, for example, opportunistic individuals or companies to make the rules work in their favour to reduce their tax liability and thus diminish an important mode of social welfare provision. Of course, by definition this type of tax avoidance is perfectly legal as it adheres to the rule of law. The question is, is it just and fair for individuals and companies to be able to exploit complex financial arrangements in order to avoid paying into a tax system that they may ultimately benefit from, and which others are unable to avoid?

Charitable trusts that facilitate tax avoidance – the extreme end of what Garton (2015) refers to as the 'privileges' of charitable status – and do so with little evidence of any necessary attendant public benefit, are a prime example of this type of circumvention. Further, it may be considered one of the more insidious methods of tax avoidance if exploited unjustly because

of the general expectation that charity is a force for social good. This abuse of charity is, as Thomas Piketty argues, just one of the ways that confirms the idea 'that there is a certain porosity between public and private uses of these legal entities' (2014, p. 452), and thus something capable of contributing to growing social inequality, rather than being a remedy for it. While some individuals or companies may deliberately abuse or exploit the fiscal privileges of charitable status for their own ends, there has nevertheless long been a question-mark over whether charities should enjoy such privileges at all. These include, for example, the dissenting judgements of Lord Halsbury LC and Lord Bramwell in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891–94] All ER Rep 28 and, more recently, Lord Cross in *Dingle v Turner* [1972] AC 601. Lord Cross stated that:

> [T]he courts – as I see it – cannot avoid having regard to the fiscal privileges accorded to charities […]. Charities automatically enjoy fiscal privileges which with the increased burden of taxation have become more and more important and in deciding that such and such a trust is a charitable trust the court is endowing it with a substantial annual subsidy at the expense of the taxpayer.
>
> (*Dingle v Turner* [1972] AC 601 at 624)

While somewhat damning, it is nevertheless reasonable to claim that under the influence and authority of capitalism equity has stretched and expanded the definition of what is fair as much as it once stretched and expanded the concept of property rights. It has helped the wealthy both create and maintain the very conditions required to facilitate greater wealth. The consequence of this has been growing inequality throughout the twentieth and twenty-first centuries. But it has also led to spurious forms of aspiration held largely by a debt-ridden majority who can only hope of one day becoming wealthy; a hope that has ultimately led to individuals increasingly relying on credit to support their aspirations. Equity has, in stark contrast to the discussion earlier, therefore become a facilitator of 'legal' opportunism. Keynes claimed:

> Profit accrues to the individual who, whether by skill or good fortune, is found with his productive resources in the right place at the right time. A system which allows the skilful or fortunate individual to reap the whole fruits of this conjuncture evidently offers an immense incentive to the practice of the art of being in the right place at the right time.
>
> (2015, p. 51)

Keynes was not referring to trusts or equity specifically in this quote, but the system to which he refers is one which includes the legal and 'equitable' mechanisms discussed.

In her discussion of equity's relationship to property, Sarah Worthington outlines ways in which the rules and doctrines of equity have ultimately proved capable of satisfying the demands of capitalism on this basis, and

Figure 10 John Maynard Keynes (1883–1946), English economist

allowed wealthy individuals to ensure that they are 'in the right place at the right time':

> Equity 'created' new forms of property by changing the boundaries between personal rights and proprietary rights. It did this by contradicting the Common Law and permitting certain 'personal' rights to be transferred to third parties. These limited personal rights were thereby converted into transferable, usable wealth. The legal regime – and the social and economic regime – immediately became more sophisticated. Of course, these new forms of property needed legal protection, and so there was pressure on the legal system to evolve still further to deliver this protection.
>
> (Worthington, 2006, pp. 62–3)

In the twenty-first century equity continues to facilitate all manner of profitable property dealings via the rules and doctrines that have been developed meticulously over many centuries, therefore leaving the door open to opportunism. This includes a number of the financial products and strategies that led to or were a central feature of the 2008 financial crisis. So-called 'securitisation', for example, involves 'the provision of cash in exchange for a right to a future income stream from assets' (Garton, 2015, p. 456). In essence securitisation involves taking a right associated with a future obligation (for example, the discharge of a loan or mortgage) and translating that right into property that can then be bundled up with other similar rights and traded on the open market. While securitisation and other financial mechanisms like it are far more complex and varied than this simple definition allows for, inherent to the ability of these mechanisms to function is a consideration of property devised in equity.

4.3 Is it still possible to reconcile law and idea?

In the years following the 2008 financial crash, one thing seems clear: the division between the two types of equity discussed throughout this course continues to grow. There is, in short, less concern for equity in terms of

countering inequality; and where equity remains concerned with what is either just or fair, or where it seeks to counter opportunism, it is only within the very narrow context of existing wealth. Perhaps this is unsurprising when mapped across the general trend for increased inequality highlighted by commentators such as Thomas Piketty (2014) and the Nobel Prize-winning economist Angus Deaton. Moreover, the notion that equity can exist as a single coherent body of law that at once promotes wealth proliferation via mechanisms of 'legal' tax avoidance/evasion (one of the many 'benefits' of trusts), while continuing to talk about conscience as a central tenet for achieving justice and fairness seems all the more absurd.

At heart the matter here mirrors far bigger issues, including those relating to democracy, rule of law and whether opportunism, the profit motive, or individualism in capitalist societies are compatible with notions of justice and fairness for the many and not just the few. There may be a post-financial crash fashion for so-called corporate social responsibility and even *conscious capitalism* (Mackey and Sisodia, 2014), but these are only papering over the cracks left by the retreat of other moral and ethical frameworks. But there is perhaps an even more disturbing issue on the horizon. There is a growing sense that capitalism's inherent incompatibility with broader social and democratic ideals means that its collapse and end may not be far away, as it becomes, to all intents and purposes, unsustainable. As Wolfgang Streeck maintains: 'The capitalist system is at present stricken with at least five worsening disorders for which no cure is at hand: declining growth, oligarchy, starvation of the public sphere, corruption and international anarchy' (2014, p. 64). Not all of Streeck's suggestions are directly relevant here, but there is certainly a case to be made on the connection between corruption and opportunism. And one thing can be sure: the end of capitalism will not be something positive for the majority of people who presently live under it, even those for whom capitalism bears no fruit at present.

It is also important to note the impact that neoliberalism is having on equity, including any possibility of recovering forms and ideas of equity that exist outside of or beyond economic or financialised considerations. Neoliberalism, which can be defined briefly as the radical extension of free-market ideology to all areas of human life, not just those directly concerning finance, ought not to be confused with capitalism as such, and the two are not directly interchangeable, although the two are certainly related inasmuch as they flow from classical economic forms of liberalism. In many ways neoliberalism is far more insidious than the laissez-faire capitalism discussed thus far. For example, neoliberalism does not simply promote a false sense of aspiration or freedom, but actively encourages individuals to sustain an illusion that freedom is available for all when it is clear, among other things, that increased economic inequality means freedom, if that is defined, for example, as being unencumbered by debt, is something that can only be achieved by a select few. To sustain the illusion, therefore, goes to the heart of what it means to aspire, while aspiration itself fails to support any material or concrete outcomes.

How does neoliberalism affect equity? In the following passage by Wendy Brown that touches on some of the themes discussed throughout this course, it is possible to make some important connections:

> Neoliberal reason, ubiquitous today in statecraft and the workplace, in jurisprudence, education, culture, and a vast range of quotidian activity, is converting the distinctly *political* character, meaning, and operation of democracy's constituent elements into *economic* ones.
>
> …
>
> As both individual and state become projects of management, rather than rule, as an economic framing and economic ends replace political ones, a range of concerns becomes subsumed to the project of capital enhancement, recede altogether, or are radically transformed as they are 'economized'. These include justice (and its subelements [*sic*], such as liberty, equality, fairness), individual and popular sovereignty, and the rule of law.
>
> (Brown, 2015, pp. 17, 22)

Thinking about equity in these socio-economic terms may seem pointless to some people. For example, some may ask how this has anything to do with law. It may seem overly provocative to others to drag law into such a contentious debate, such as the end of capitalism and rise of neoliberalism. But, in order to take the future of equity, as both law and idea, seriously, it must be considered in light of these radical socio-economic shifts. Mainstream, doctrinal perspectives rarely if ever provide a sense of what is at stake regarding contemporary equity. An average textbook on the subject will, for example, tell you simply that equity remains a flexible body of law, based on conscience, able to guarantee fairness and justice in the legal system. And yet, as you have seen, it is not that clear cut. This is the view that lawyers are expected to take; one which does not question what ends the legal system ultimately serves and to whose advantage. Not all lawyers or those wishing to study the law need to accept this.

Conclusion

By taking seriously a pluralist or heterogeneous interpretation of 'equity', you have seen how it emerges as both law and idea, and more importantly that there is a tension between the two. This free coures, *Equity – law and idea*, followed a research-based analysis that comprised two contrasting albeit interrelated arguments relating to equity as law and idea, you were invited to consider the tension inherent to definitions of equity and given a counterpoint to the mainstream view of equity that some may hopefully have found provocative.

The first argument maintained that equity ought not to be thought of only as a body of rules and doctrines, but as an idea of equity that represents and seeks to apply 'an ethic for imagining better law and better life' (Watt, 2012, p. 1). A key role envisaged for this type of 'equity' was as a juridical mode of thought and as being capable of challenging and holding to account, among other things, 'negative', immoral or unethical aspects of modern capitalist society, notably opportunism. The second argument maintained that, as a body of law with long associations with property, equity can be considered ideally suited to the needs and desires of capitalism, and via mechanisms such as the trust can help facilitate or promote opportunism. No explicit conclusions or rather solutions are offered to this analysis. The importance of the material is in the analysis as such, and more precisely in unveiling and questioning both the inherent tension within equity and the associations between equity and capitalism that in turn offer an explanation for that tension.

You should now be able to:

- describe some basic features of the law of equity
- critically evaluate and describe tensions between legal and philosophical accounts of equity
- critically situate equity as both law and idea in contemporary socio-political and economic contexts.

If you are unsure about any of these, go back and reread the relevant section(s) of this free course, *Equity – law and idea*.

This OpenLearn course is an adapted extract from the Open University course W302 *Equity, trusts and land*.

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