
Equity and human rights

A commentary

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In his elegant and informative chapter (Chapter 20), Lord Walker covers a great deal of ground. I highlight two topics which emerge from it: (1) similarities in the legal reasoning involved in the application of equity and human rights law¹ and (2) areas where the law of equity draws on human rights law directly.² I also comment on a case study chosen by Lord Walker – *Pitt v. Holt*³ – which illustrates some of the points which arise.

Equity reasoning and human rights reasoning

Lord Walker emphasises two common features of equitable and human rights law: (a) ‘each is superimposed on an existing body of law as a modifying or ameliorating influence’; and (b) their use of ‘evaluative standards’ rather than ‘rigid counter-rules’.

Equity as a set of rules or principles grew out of the jurisdiction of the Lord Chancellor to modify and soften the stringent application of the common law to do justice in the circumstances of the individual case.⁴ This is a reflection of Aristotelian thinking, employing his concept of *epieikeia* (equity) to supplement and work partial modification of legal rules at their point of application.⁵

¹ R. Walker, ‘Equity and Human Rights’, Chapter 20 of this volume, text between nn. 3 and 38, and text between nn. 85 and 145.

² *Ibid.*, text between nn. 37 and 86. ³ [2013] 2 A.C. 108; [2013] UKSC 26.

⁴ *Earl of Oxford’s Case* (1615) 1 Ch. Rep. 1, 6; 21 E.R. 485, 486.

⁵ *Nicomachean Ethics*, V. 10. 1137b, 12–29; R.A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford University Press, 1961), ch. 10.

The need for a separate body of law to achieve this weakens as the common law itself has come to be seen as the direct bearer of justice values and as something amenable to correction and modification through judicial legislation,⁶ and also as increasing areas of activity come to be regulated by statute and by contracts subject to more purpose-oriented rules of construction.⁷ The old idea of the equity of a statute – the capacity for a statute to be interpreted according to its spirit, to accommodate unexpected situations or to avoid unwelcome consequences – itself drawn from Aristotle's *epieikeia*,⁸ has revived in this modern form. Something similar has happened with the common law. A sense of justice has increasingly come to be seen as something which infuses the law itself, and it has come to be accepted that the law can be adjusted to accommodate the perceived demands of justice without need to supplement it by appeal to separate doctrines of equity. Accordingly, the scope for development of distinct equitable doctrines has narrowed. Also, the relationship between equity and the common law has come under fresh pressure,⁹ as each area of doctrine seeks to develop its own conception of just responses to particular fact situations. For example,

⁶ In this regard, see, for example, the remarkable rediscovery of equity within the law itself as referred to by Lord Mansfield in *Moses v. Macferlan* (1760) 2 Burr. 1005; 97 E.R. 676 which has inspired the modern law of unjust enrichment and restitution and the protean, rights – and policy-infused development of the tort of negligence, among other areas: cf. R. Stevens, *Torts and Rights* (Oxford University Press, 2007). Compare *In re Hallett's Estate* (1880) 13 Ch. D. 696, 710 (Sir George Jessel M.R.):

... it must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time – altered, improved and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but they were still invented ... This now happens within the common law.

⁷ For statute, see, for example, N. Duxbury, *Elements of Legislation* (Cambridge University Press, 2013), ch. 6. For contract, see, for example, Lord Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 L.Q.R. 433; *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 W.L.R. 896; and the modern emphasis on interpretation in accordance with business common sense: *Re Sigma Finance Corp. (in admin.)* [2010] 1 All E.R. 571; [2009] UKSC 2; *Rainy Sky SA v. Kookmin Bank* [2011] 1 W.L.R. 2900; [2011] UKSC 50.

⁸ Duxbury, *Elements of Legislation*, 179–86. Plowden was the key figure who drew on Aristotle and developed this way of looking at statutory interpretation. See J.D. Heydon, 'Equity and Statute', Chapter 12 of this volume.

⁹ See, for example, A. Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 O.J.L.S. 1; and for an example of an integrated doctrinal account of an area of law which

the law relating to mistaken payments, recently addressed in the Supreme Court judgment in *Pitt v. Holt*, is discussed by Lord Walker in his chapter and commented on below.

At the same time, the availability of recourse to an active legislature, combined with the increasing normative force of democratic ideology from the twentieth century, has also reduced the perceived legitimacy of an active court of equity to amend the application of the common law.¹⁰

A further factor is that equitable principles tended to build up as accretions around the law of property. This is an area in which there is a particularly pressing demand for legal certainty and predictability, so that individuals know where they stand and can plan their affairs. Accordingly, after an initial period of freedom in the development of doctrine in the courts of equity, emphasis came to be placed on precedent and settled rules equity itself resembled more closely the common law it supplemented. Decisions according to the length of the Lord Chancellor's foot met with disapproval.

The Convention rights under the Human Rights Act 1998 (UK) also operate to influence existing standards of domestic law, but they operate in a more active way and do so by a significantly different process, through a double filter. First, one tests whether the domestic legal rule (statutory, common law or equitable) operates at its point of application in a manner compatible with Convention rights. Secondly, if it does not, one has to assess whether domestic law should be modified in its application by reference to those rights, by applying section 6 of the Act (imposing a duty on public authorities to act compatibly with Convention rights) and section 3 of the Act (imposing on courts an interpretive obligation). If it is not 'possible' to interpret legislation compatibly with convention rights, the remedy is a declaration of incompatibility under section 4.

These filters allow for practical compromise between democracy and human rights in a pan-European context at the first stage (in particular, through the operation of the doctrine of the margin of appreciation)¹¹

has arisen out of common law and equity, see B. McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 C.L.P. 267.

¹⁰ B. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 24, 60; Duxbury, *Elements of Legislation*, 33–5.

¹¹ P. Sales, 'Law and Democracy in a Human Rights Framework', in D. Feldman (ed.), *Law in Politics, Politics in Law* (Oxford: Hart Publishing, 2013), ch. 15.

and then for a balance between the authority of Parliament and the courts in a United Kingdom context at the second.¹²

At the second stage, the division between the use of section 3 and resort to section 4 is a sensitive one, which maps the courts' perception of the proper dividing line between law and politics specifically in the United Kingdom context. In broad terms, one can agree¹³ that reasons why resort to section 3 is not considered appropriate are that an amended, Convention-compliant interpretation would be contrary to a fundamental aim of the statute or that it would involve the court in an essentially legislative function. But both reasons are complex. In assessing whether a section 3 interpretation would go with the grain of the statute, difficult questions arise regarding how one identifies 'the grain of the statute' as a purpose separate from its wording.¹⁴ Issues arise regarding the level of abstraction at which it is appropriate to ask that question and the forms of evidence which are relevant. In assessing whether it is legitimate for the interpreting court to produce an amended, Convention-compliant interpretation, rather than leaving it to the government and legislature to produce a new compliant law, a range of factors come into play: democratic legitimacy, the range of persons who should have a right of access to the decision-making process, the polycentricity of the issues to be resolved,¹⁵ the expertise appropriate to the subject matter, and the need for detailed regulation and provision extending beyond the resolution of the particular case.

It is by no means always the case that the government will wish to argue for use of section 3 rather than section 4, where a problem of incompatibility is found to exist.¹⁶ To do so involves surrendering the initiative regarding the detail of the amendment required to render a statute compatible with Convention rights to the courts (which might be difficult to revise), rather than allowing the government to retain the power to produce a solution which satisfies its own policy objectives,

¹² P. Sales and R. Ekins, 'Rights-Consistent Interpretation and the Human Rights Act 1998' (2011) 127 L.Q.R. 217.

¹³ Walker, 'Equity and Human Rights', text after n. 101.

¹⁴ See, for example, the speech of Lord Nicholls in *Wilson v. First County Trust Ltd (No. 2)* [2004] 1 A.C. 816, [60]–[67]; [2003] UKHL 40; Sales and Ekins, 'Rights-Consistent Interpretation and the Human Rights Act 1998'; Duxbury, *Elements of Legislation*, 176–9, 233–40.

¹⁵ See L.L. Fuller, 'The Forms and Limits of Adjudication', reprinted in K. Winston (ed.), *Fuller's Principles of Social Order* (Oxford: Hart Publishing, 2001), 101–40.

¹⁶ Cf. Walker, 'Equity and Human Rights', text after n. 102.

using the Henry VIII power to revise legislation which comes with a declaration of incompatibility.¹⁷

It is also not really correct to say that a declaration under section 4 means that the claimant fails to obtain relief.¹⁸ First, in almost every case where a declaration of incompatibility is made, Convention-compatible amending legislation is brought forward. Secondly, even if it is not, or where the amending legislation is not fully retrospective,¹⁹ a declaration of incompatibility by the domestic courts provides a powerful platform for an individual application to the European Court of Human Rights. It is important to remember the international dimension, which lies behind and greatly increases the force of the Human Rights Act.

These differences mean that the parallel between equity and human rights as supplementary law can only really be drawn at a relatively high level of abstraction. The institutional and intellectual contexts in which they each operate are very different. What is common in their approach is that when the existing rules fail to give adequate respect to a set of values which may be partially reflected in them, but which in some sense provide a vantage point standing outside the rules themselves from which their application can be criticised, they provide in their different ways for modification of the existing rules by reference to that broader frame of reference. For equity, the framework is one of natural law or broad conceptions of justice, used to modify stricter, more rigid and reified common law norms. For human rights, the framework is that of formulated, partially determinate rights set out in the European Convention on Human Rights and informed in an increasingly specific

¹⁷ Hence, in several cases in which the courts either were or might have been asked to exercise their power of interpretation under section 3, the government argued that section 3 did not allow for production of an amended, Convention 'rights' compatible interpretation, and that a declaration of incompatibility should if necessary be made: see, for example, *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 A.C. 291; [2002] UKHL 10; *Bellinger v. Bellinger* [2003] 2 A.C. 467; [2003] UKHL 21; *R (Anderson) v. Secretary of State for the Home Department* [2003] 1 A.C. 837; [2002] UKHL 46; *R v. McLoughlin* [2014] 1 W.L.R. 3964; [2014] EWCA Crim 188.

¹⁸ Walker, 'Equity and Human Rights', text to n. 102.

¹⁹ As in the case of claimants in *A v. Secretary of State for the Home Department* [2005] 2 A.C. 68; [2004] UKHL 56 (the *Belmarsh Case*) and *A v. United Kingdom* (2009) 49 E.H.R.R. 29. The system of administrative detention which was found to be incompatible in the *Belmarsh* case was replaced by the system of control orders, but no relief was given under the new regime for past periods of detention. See Sales and Ekins, 'Rights-Consistent Interpretation and the Human Rights Act 1998', 230; A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009); I. Leigh and R. Masterman, *Making Rights Real: The Human Rights Act in Its First Decade* (Oxford: Hart Publishing, 2008), 112–18.

and determinate way by the jurisprudence of the European Court of Human Rights.²⁰

Similarity in the practical operation of equity and human rights law may be illustrated in relation to actions for possession of land. In the case of a mortgage, the borrower will be protected by the equity of redemption; in the case of a lease, by relief against forfeiture. Even prior to the Human Rights Act, a public authority seeking to recover land could be restricted by public law norms.²¹ The duty under the Human Rights Act to act compatibly with Convention rights has opened up new scope for public law defences to be put forward against public authorities, based on breach of human rights in taking action to recover possession.²²

Turning to the issue of standards versus rules, this is a tension which underlies wide areas of law.²³ As Lord Walker points out, a preference for resort to standards tends to be prominent in both equity and human rights law.²⁴ The reason is essentially the same, a desire to remain open to balancing a range of often incommensurate factors and moral considerations in specific contexts before arriving at the appropriate or just solution in the particular case, which is entailed by appeal to wider, more abstract principles than are encapsulated in rigid legal rules. For equity, Lord Walker gives a range of examples to illustrate this approach.²⁵ The court is required to make an evaluative judgment in application of a broadly framed norm of assessment of conduct. In making such judgments, courts draw on what they identify as standards of inter-personal and commercial morality, while also seeking to avoid creating power for unmerited exploitative behaviour by the relief granted.²⁶

²⁰ See Sales, 'Law and Democracy in a Human Rights Framework', 231–2; G. Webber, 'Rights and the Rule of Law in the Balance' (2013) 129 L.Q.R. 399, 416–17.

²¹ See, for example, *Wandsworth London Borough Council v. Winder* [1985] A.C. 461 (the tenant of a public authority could seek to plead public law unlawfulness as a defence to an action for possession).

²² See, for example, *Kay v. Lambeth London Borough Council* [2006] 2 A.C. 465; [2006] UKHL 10; *Manchester City Council v. Pinnock* [2011] 2 A.C. 104; [2010] UKSC 45.

²³ Lord Reid, 'The Judge as Law Maker' (1972) 12 J.S.P.T.L. 22; F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991); K.M. Sullivan, 'The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards' (1992) 106 Harv. L. Rev. 22. For discussion of some of the institutional issues which underlie this choice in the human rights context, see P. Sales and B. Hooper, 'Proportionality and the Form of Law' (2003) 119 L.Q.R. 426.

²⁴ Walker, 'Equity and Human Rights', text after n. 110.

²⁵ *Ibid.*, text between nn. 121 and 124, and text to nn. 133–5.

²⁶ Cf. *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* [1998] A.C. 1; discussed Walker, 'Equity and Human Rights', text to nn. 124ff.

Although proportionality is a term which can be apt to describe what equity seeks to do in certain situations – in the sense that equity seeks to ensure that the remedies it gives are proportionate to the legitimate interests of the claimant – it is questionable whether this is comparable with proportionality in human rights analysis, which involves a structured method of seeking to balance public interest against private interest.²⁷ The proportionality framework of analysis employed in human rights litigation is directed to achieving a fair balance between collective public interests and private interests, and any attempt to introduce it into the operation of the law of equity (which is concerned with balancing competing private interests) would be likely to have a seriously distorting effect. So, again, the comparison between equity and human rights law can be made, but at such a high level of abstraction as not to provide helpful guidance for the development of doctrine to be applied in cases.

It is also difficult to regard the presence of an equitable overlay for the common law as contributing in itself to satisfaction of the fair trial obligation in article 6.²⁸ Generally, article 6 is neutral regarding the content of rights in domestic law, requiring only that there be a fair trial to apply such rights as domestic law provides.²⁹ Article 6 does not itself require that equitable standards be applied in domestic law.

For human rights law, it is primarily the margin of appreciation and proportionality which, in combination, provide for solutions which are sensitive to both institutional factors³⁰ and the precise balance of moral or social factors between claimant, state and third persons.

²⁷ Cf. Walker, 'Equity and Human Rights', text to nn. 121ff. Compare the account of proportionality analysis in K. Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012), ch. 7, and see H. Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law', in H.-W. Micklitz (ed.), *The Constitutionalization of European Private Law* (Oxford University Press, 2014).

²⁸ Cf. Walker, 'Equity and Human Rights', text between nn. 3 and 4, and text after n. 135. Lord Walker does not expand upon this point. No doubt at some level aspects of equitable doctrines contribute to satisfaction of article 6 requirements, such as by ensuring that remedies are prompt and effective, but it is difficult to see that substantive equitable rules are required to satisfy article 6.

²⁹ *Z v. United Kingdom* (2002) 34 E.H.R.R. 3; *Matthews v. Ministry of Defence* [2003] 1 A.C. 1163; [2003] UKHL 4. The experience of English law in seeking to adjust substantive rules by reason of article 6 has not been altogether happy: see the adjustment of the law of negligence in response to *Osman v. United Kingdom* (2000) 29 E.H.R.R. 245 before correction in *Z v. United Kingdom*, discussed in C. Booth and D. Squires, *The Negligence Liability of Public Authorities* (Oxford University Press, 2006), 121–31.

³⁰ Has the legislature created a rule within its margin of appreciation?

The complexity of these factors can lead the courts into decisions involving very fine-grained balancing of different factors.³¹

Use of standards rather than rules places a premium on the judgment in court, that is, at the point of application of the norm. A price is paid in terms of predictability when people plan their affairs; the ability of the parties to resolve their dispute without going to court; and the shifting of practical decision-making power from a legislature which promulgates clear rules to judges. Therefore, both systems of law face pressures in the opposite direction, in favour of a more rule-based approach, in the interests of rule of law values.

In the context of equity, the tension is particularly acute at the interface between commercial law (with its traditional emphasis upon the value of certainty) and equitable doctrine. There is a desire not to allow equity to create undue disruption of bargains freely made or settled property rights, around which persons have planned their affairs.³²

The standards approach favoured by equity often has a particular association with the way in which the conscience of a defendant may be found to be affected in the context of a long-term relationship. Here again the connection with a sense of Aristotelian *epieikeia* comes through. The more remote a decision-point is from the particular circumstances plainly contemplated and legislated for by the parties to a contract or relationship, the easier it will be to say that a particular matter to be decided falls outside their real intentions and foresight and that the outcome should be governed by a more flexible, open-textured standard of justice or fair-dealing and that judgment is to be exercised by the court in light of all the circumstances of the case at the point its decision falls to be made.

The pressure for an outlet for *epieikeia* in a long-term relational context is such that in the paradigm case of the relationship between members in a company (especially a company which is characterised as a quasi-partnership), a standard-based control against exploitative behaviour and abuse of rights within the relationship amounting to unfairly

³¹ See, for example, *Evans v. United Kingdom* (2008) 46 E.H.R.R. 34.

³² *In re Goldcorp Exchange Ltd (in receivership)* [1995] 1 A.C. 74, 98; P.J. Millett, 'Equity's Place in the Law of Commerce' (1998) 114 L.Q.R. 214; Lord Neuberger of Abbotsbury, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' [2009] C.L.J. 537, esp. at 543; *Vercoe v. Rutland Fund Management Ltd* [2010] EWHC 424 (Ch), [352]; cf. Lord Cottenham's weighing up of the maxim that equity follows the law against broader fairness standards in *Sturgis v. Champneys* (1839) 5 My. & Cr. 97; 41 E.R. 308; Walker, 'Equity and Human Rights', text to nn. 16–18.

prejudicial behaviour has been created in various forms by the legislature.³³ Legislative intervention has expanded the narrow scope for relief in equity, based on the concept of fraud on a power³⁴ and fraud on the minority.³⁵ But in this context, again, one sees familiar pressure to try to constrain within reasonable limits what might otherwise be an overly wide and unpredictable judicial discretion.³⁶

In the human rights context there is a similar tension between the values advanced by favouring a rule-based approach and a standards approach, but here it is also strongly affected by institutional factors relating to the proper balance of authority and practical decision-making power between the courts, the executive and Parliament.³⁷ The human rights provisions used to assess the acceptability of existing domestic law themselves use standards for evaluation. The application of those standards tends to require domestic law itself to use standards allowing for flexible application by the courts. But sometimes it may be found to be legitimate and compatible with Convention rights for Parliament to legislate to create a 'bright line' rule, notwithstanding that its application may produce harsh decisions at the margins.³⁸ In this way, the tension between rules and standards is sometimes manifest in the rhetoric of argument regarding the acceptability of a particular statutory rule as a 'bright line' rule (good) or a 'blanket' rule or prohibition (bad).

The balance between flexibility and predictability in application of a legal norm can be struck in different ways along a spectrum. In the human rights context, for example, the minority in *Kay* argued for a defence to possession actions on human rights grounds which would apply only in exceptional cases, while the majority held that there should be no scope for such a defence. Even the minority, therefore, wished to

³³ See now section 994 of the Companies Act 2006 (UK).

³⁴ See, for example, *Vatcher v. Paull* [1915] A.C. 372, 378 (Lord Parker of Waddington): the court will intervene if a power in a trust instrument is 'exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power'.

³⁵ *Allen v. Gold Reefs of West Africa Ltd* [1900] 1 Ch. 656; *Greenhalgh v. Arderne Cinemas Ltd* [1951] Ch. 286.

³⁶ *O'Neill v. Phillips* [1999] 1 W.L.R. 1092, 1098C–1099A: fairness depends on context and should be assessed primarily having regard to agreements made by the company members.

³⁷ See, for example, Sales and Hooper, 'Proportionality and the Form of Law'.

³⁸ P. Sales, 'The General and the Particular: Parliament and the Courts under the Scheme of the European Convention on Human Rights', in M. Andenas and D. Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, 2009), ch. 12.

avoid a high degree of disruption of ordinary property rights of local authorities. In the dialogue with the Strasbourg court mapped in *Pinnock*, the European Court of Human Rights favoured the view of the minority in *Kay*, and that is where the domestic law has now ended up, through the operation of the Human Rights Act.

Equity appeals to moral standards worked out in a determinate way over time with an increasing degree of predictability. The format of reasoning for deciding whether, say, specific performance should be granted has become largely settled, with clearer identification of relevant factors. It still requires an evaluative judgment to be made by the court, but the specification of relevant factors makes it easier to predict the outcome. A broadly similar process of articulation of relevant factors is occurring in the human rights jurisprudence, but the sheer variety of situations in which human rights law falls to be applied and the wide range of incommensurable considerations which fall to be accommodated means that outcomes often remain more uncertain.

There is also a sense in which an appeal to broad standards of justice or fairness can contribute in some ways to rule of law values, in making the general operation of the law perhaps more accessible and predictable than might be the case if left to highly detailed, but hard to understand, rigid rules. As Jeremy Waldron notes in his essay, 'Thoughtfulness and the Rule of Law',³⁹ flexibility and appeals to widely shared moral standards may promote a level of general predictability of the operation of the law which allows individuals to plan their affairs with more confidence.

Ultimately, provided the standards of commercial and inter-personal morality that the courts will apply are reasonably determinate and are generally understood by those entering relationships, this sort of approach can provide greater practical support for predictability of likely outcomes as at the point of contracting or establishing binding legal instruments, and hence for party autonomy and ability to legislate for themselves which is at the heart of contract and the law of trusts. If there

³⁹ [2011] British Academy Review (issue 18), 1, 10–11. A similar point is made in R. Posner, *The Problems of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1990), 48, and in R.H. Fallon Jr, 'The Rule of Law' as a Concept in Constitutional Discourse' (1997) 97 Colum. L. Rev. 1, 48–50. See also R.E. Goodin, 'An Epistemic Case for Legal Moralism' (2010) 30 O.J.L.S. 615: the best way for the law to provide guidance for citizens is to track broad moral principles understood by them. As Fallon observes, 'In contexts marked by normative consensus, there might be broad agreement about how standards should be applied, and standards would permit both citizens and officials to be ruled by law ... [T]he greater the normative consensus, the less the realization of Rule-of-Law values depends on the law being a law of rules' (97 Colum. L. Rev. 1, 49–50, citations omitted).

is rigid adherence to the literal text of a contract or trust instrument at a later point in time when action under the contract or trust is required or litigation occurs, there is a risk that capricious, unpredicted and (judged at the time the contract or trust was actually established) unintended outcomes might occur, simply because the parties did not foresee the way in which events happen to have turned out. So recourse to equity and business common sense/equitable interpretations is itself an appeal to a conception of legal certainty and predictability.

Waldron refers to Hayek's view, late in life, that he may have been wrong to think that clear codified legislation would always increase the predictability of the law. Rather, Hayek came to think that

[J]udicial decisions may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law.

Waldron comments:

Thinking through the abstract issue of what a fair order of mutually-adjusted intentions would involve so far as the settlement of the instant case is concerned may enable the judge to come up with a result more congruent to the expectations of the parties than his application of some enacted rule according to its terms.⁴⁰

The same reasoning applies in relation to private legislation in the form of contracts and trust instruments.

Finally in this section, turning to the married woman's equity,⁴¹ it is doubtful whether this history of equity's protection for women's property interests really represents an infusion of equity with human rights thinking. It appears more to have reflected the developing mores of the propertied classes, particularly in the context of the transition of a woman from the dominion of her family of birth to the dominion of her husband.⁴² One strains to see a human rights dimension in this. Despite the agitation of J.S. Mill, to which Lord Walker refers, the rights afforded by equity to a married woman were not given in virtue of her status as a human being. Nor does this development of the law appear to have contributed to a wider acceptance of the rights of women in society or the

⁴⁰ Waldron, 'Thoughtfulness and the Rule of Law', 11.

⁴¹ Walker, 'Equity and Human Rights', text between nn. 3 and 38.

⁴² Hence the focus of the equity upon safeguarding her property in the marriage by reference to a test of 'what a prudent parent would probably have done in giving a portion to a daughter': *Tidd v. Lister* (1853) 3 De G. M. & G. 857, 869; 43 E.R. 336, 340; Walker, 'Equity and Human Rights', text to n. 8.

law. However, what this history does illustrate is the relative openness of equity⁴³ to social influences and arguments by appeal to wider social standards in fashioning its doctrines and their application. This indicates a pattern of reasoning in the same family as that in relation to application of human rights standards, as human rights came increasingly to be accepted as legitimating social standards in the period after the Second World War.

Human rights as a ground for development of equity

There are three distinct processes by which human rights can provide a basis for the development of legal and equitable doctrine. First, section 6(1) of the Human Rights Act imposes an obligation on public authorities to act in a manner which is compatible with Convention rights. This obligation applies to courts pursuant to section 6(3). So if a court finds that to enforce legal rights in a particular way would involve a violation of Convention rights,⁴⁴ the court is obliged to refuse to enforce those rights. This is straightforward when the person seeking to enforce the rights is a public authority, where there is vertical enforcement of Convention rights by citizen (defendant) against public authority (claimant). Is there scope for horizontal enforcement of Convention rights between private persons, in such a way as will defeat the ordinary legal rights of one party?

I suggest that the answer lies in the law of positive obligations under the European Convention on Human Rights.⁴⁵ The court is a state authority, which is being asked to intervene in a dispute regarding the respective rights in private law of two private parties. If what is said to make the difference to the outcome of that dispute is the Human Rights

⁴³ At a time when the idea of legislation by judges to develop the common law, as opposed to the idea that they discovered and applied the common law as something already given and incapable of development, was not recognised, at any rate explicitly.

⁴⁴ And the case is not one in which section 6(2) disapplies the obligation under section 6(1).

⁴⁵ See, for example, Möller, *The Global Model of Constitutional Rights*, 5–10, 35–8, 147–9; M. Pitkänen, 'Fair and Balanced Positive Obligations – Do They Exist?' [2012] E.H.R.L.R. 538; D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, *Harris, O'Boyle and Warbrick: The Law of the European Convention on Human Rights*, 3rd ed. (Oxford University Press, 2014), 21–4, 504–5; *R (Sheikh) v. Secretary of State for the Home Department* [2011] EWHC 3390 (Admin), [74]; and the detailed discussion of positive obligations by reference to each article of the European Convention on Human Rights in C. Grabenwarter, *European Convention on Human Rights: Commentary* (Munich: Hart Publishing, 2014).

Act, it seems reasonable to frame the conditions under which it *should* make a difference by reference to the jurisprudence of the European Court of Human Rights on positive obligations, where it holds that the state has a positive obligation to intervene in relations between private persons. A useful way of looking at this is to ask whether the values and interests protected by a Convention right are so strong as to justify disruption of ordinary patterns of rights and property in domestic law. Since property and contract rights are themselves protected interests under article 1 of Protocol 1, the margin of appreciation to refuse to override those rights is often likely to be wide, and where this is so the courts do not have legitimate authority to act to disrupt those rights. Therefore, in general, the scope to intervene may be expected to be narrow.

Where the court does intervene, relying on its obligation under section 6, does this involve development of ordinary domestic law, or just simple compliance with a supervening statutory duty? There is a curious ambiguity in the authorities about this. In *A v. B plc*,⁴⁶ the Court of Appeal responded to what it perceived to be a deficiency in protection of Convention rights under ordinary domestic law by modifying the action for breach of confidence to incorporate the requirements of articles 8 and 10. So perhaps the best analysis is that the courts have used human rights as external standards to inform and legitimate a change in domestic legal rules, inferring from section 6 that they have been given special licence by the legislature to modify the general common law.

Secondly, human rights may be treated as a type of a wider class of what Eisenberg calls 'social propositions',⁴⁷ that is, social standards which are capable of informing the development of the common law and equity as they adapt to changing demands and expectations in society. This seems to be the best explanation of what occurred in *Campbell v. MGN Ltd.*⁴⁸ The Human Rights Act's reference to human rights standards might be said to have unblocked a log-jam in the development of equity and the common law to recognise privacy interests as protectable in their own right apart from confidentiality. Some

⁴⁶ [2003] Q.B. 195, [4]; [2002] EWCA Civ 337.

⁴⁷ M.A. Eisenberg, *The Nature of the Common Law* (Cambridge, Mass.: Harvard University Press, 1988); cf. D. Oliver, *Common Values and the Public-Private Divide* (London: Butterworths, 1999).

⁴⁸ [2004] 2 A.C. 457; [2004] UKHL 22.

might say that this was a long over-due development of domestic law.⁴⁹ But this sort of approach is capable of wider use, as recent case law makes clear.⁵⁰ Convention rights can be used to inform the content of standards and rules in ordinary domestic law.

Thirdly, as a weaker form of the second point, human rights may be regarded as relevant considerations for the courts in the exercise of more discretionary choices or in the application of broad evaluative standards.⁵¹ This is as yet an under-explored area of the law in relation to equitable doctrines, despite their relative openness to influence by wider social standards.

The case of *Pitt v. Holt*

This case⁵² involved analysis of the controversial so-called 'rule in *Hastings-Bass*' (concerning the extent of legitimate equitable intervention for failure by trustees to take into account relevant considerations) and of the equitable jurisdiction to rescind a voluntary transaction for mistake. The Supreme Court corrected a mis-development of the law in relation to the former (significantly restricting the scope for transactions to be unwound on the grounds of mistake by trustees) and elucidated the ambit of the latter.

⁴⁹ Cf. the recognition of privacy interests in US law. See G. Phillipson, 'Privacy', in D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011), ch. 7; *Michael v. Chief Constable of South Wales Police* [2015] 2 W.L.R. 343, [124]; [2015] UKSC 2.

⁵⁰ See in particular *R v. Lord Chancellor, Ex p. Witham* [1998] Q.B. 575 (article 6 of European Convention on Human Rights used to inform the domestic principle of legality in interpreting the width of the power to make subordinate legislation requiring payment of court fees); *R (Osborn) v. Parole Board* [2014] A.C. 1115; [2013] UKSC 61 (article 5 of the Convention used to inform domestic judicial review standards of fairness in relation to access to rehabilitation programmes so as to have the opportunity of seeking release on probation); *Kennedy v. Charity Commission* [2015] A.C. 455, [45]–[47]; [2014] UKSC 20; cf. the possibility of naturalisation of human rights standards into ordinary domestic law referred to by Lord Reed J.S.C. in *R (Faulkner) v. Secretary of State for Justice* [2013] 2 A.C. 254, [29]; [2013] UKSC 23. This is part of a wider phenomenon, not unique to the United Kingdom and its relationship with the Convention: cf. the speech delivered by the Chief Justice of the High Court of Australia, the Hon. R.S. French A.C., 'International Law and Australian Domestic Law', speech to the Supreme Court of New South Wales Annual Conference, 21 August 2009, 33–5, at www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21aug09.pdf.

⁵¹ Cf. *John v. MGN Ltd* [1997] Q.B. 586 (assessment of damages for libel informed by article 10).

⁵² *Pitt v. Holt* [2013] 2 A.C. 108.

On the first issue, the decision is itself a salutary warning against over-ready recourse in private law to public law style analysis, which the statement of the rule in *Hastings-Bass* appeared to draw upon. The contexts are in fact very different. Unlike public officials, trustees are not charged with acting in the public interest,⁵³ but with acting within the scope of their duties to private persons; and unlike public officials, trustees have obligations to pay compensation or restore a trust fund if they have breached their duty. So the balance of interests is different in the two situations, and one cannot simply transpose the public law standard to the private.

On the second issue, an important feature of Lord Walker's judgment in *Pitt v. Holt* is his unwillingness to close off the cases in which equity might intervene where a mistake has been made in making a voluntary disposition by a rigid rule. Instead, very much in line with the traditional equitable approach, he leaves the question to be governed by an evaluative standard: a voluntary transaction will only be rescinded if the mistake is of sufficient gravity to make it unconscionable to deny relief.

This is an area where equity now finds itself in competition with the equity of the common law. The common law has developed its rules for reversing payments made by mistake, balancing an expansion of the basis for a claim in unjust enrichment⁵⁴ with a defence of good faith change of position to create what is perceived overall to be a just balancing of competing interests. The following question now comes into focus: what is the relationship between the equitable jurisdiction to set aside a voluntary transaction for mistake and common law claims in unjust enrichment, grounded on mistake?⁵⁵ Perhaps, it is the effect on third parties (in *Pitt v. Holt*, the tax authorities) which provides a basis for reverting to the (in some respects) narrower equitable jurisdiction: when what is sought is not just a repayment of money paid by mistake, but a more complete unwinding of the transaction so that it is treated as never having been made at all (to avoid a tax liability in that case), a narrower doctrine of mistake may be appropriate. But as in many areas, the relationship between equitable doctrine and common law rules continues to be hazy and unclear. A principled integration of equity and a dynamic common law remains elusive.

⁵³ A responsibility which is undermined if there is a failure to take into account relevant considerations, calling into question the effectiveness of the rule of law in the public sphere.

⁵⁴ To cover all forms of mistake, of law as well as of fact.

⁵⁵ See the case note on *Pitt v. Holt* by S. Watterson, 'Reversing Mistaken Voluntary Dispositions' [2013] C.L.J. 501.

Perhaps we should be referring more explicitly to the idea of *epieikeia* as a potential important organising criterion across both common law and equity. From this perspective, there is a continuum across the two systems. The need for some sense of flexibility in application of rules to meet the particular justice of a case, while taking into account the institutional reasons why rules laid down by the law-giver (whether contracting parties, legislature or superior court) should be respected, is general across law. Where the parties have made a clear (private) legislative choice in a contract or other instrument, their decision governs.⁵⁶ But the further one moves from that paradigm case, the greater the scope there is for the law to supplement what the parties have provided for in order to do practical justice between them and to meet (in a residual and generalised sense) their expectations that fair outcomes will be achieved. So, the more open-textured and unspecific the language used in a contract, the more contractual interpretation will allow for operation of business common sense (according to norms of commercial expectations of fair-dealing). In relation to implied terms in contract, the scope for implication is narrower the more clearly the parties have made explicit provision to cover the situation which has arisen.⁵⁷ Where a contract governs a long-term relationship and provides for discretionary powers for one or other party to enable adaptation within the scope of the relationship to unforeseen events, good faith and reasonableness standards may be implied to govern the exercise of those powers.⁵⁸ Flexibility in the availability of equitable remedies,

⁵⁶ So, for instance, contractual agreement generally prevails over the background default law of unjust enrichment: see, for example, *Pan Ocean Shipping Co. Ltd v. Creditcorp Ltd (The Trident Beauty)* [1994] 1 W.L.R. 161, 166 (Lord Goff of Chieveley).

⁵⁷ See, for example, *Philips Electronique Grand Public SA v. British Sky Broadcasting Ltd* [1995] E.M.L.R. 472, 481–2. This is not to say that there is a wide role for implication of terms, just on grounds of reasonableness: that would detract too much from party autonomy.

⁵⁸ See *Socimer International Bank Ltd v. Standard Bank London Ltd* [2008] Bus L.R. 1304, [66]; [2008] EWCA Civ 116 (Rix L.J.):

... a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria ...

especially for particularly powerful ones such as injunctions and specific performance, allows for factors which may not have been foreseen or provided for to be taken into account in producing a just result overall. Where a contractual arrangement may have significant effects on third parties who have not had an opportunity to bargain for protection, a reasonable standard of care will be imposed.⁵⁹ Where a fiduciary relationship is created, so that a principal's property or affairs are managed by the fiduciary according to his discretion and outside specific rules stipulated in the governing instrument, the justification for equitable control according to open-textured standards becomes stronger still, but on a continuum from controls of contractual discretions according to these other techniques.⁶⁰

At the same time, the law of unjust enrichment and equity operate to produce just outcomes where party agreement is subverted or incomplete in important respects. Here again, one is remote from or there is good reason not to treat as binding a rule legislated by the parties. *Pitt v. Holt* is illustrative of one dimension of this. Another area of equitable intervention is in relation to imperfect agreements concerning property, where the device of the constructive trust is important.⁶¹ It is because both the law of unjust enrichment and equity have important roles to play in protection of property rights and reasonable expectations outside rules laid down in a contract that the relationship between them is somewhat fraught at the moment, and why their coherent amalgamation and integration is a pressing issue for the courts.

See also *Mid-Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd* [2013] B.L.R. 265; [2013] EWCA Civ 200; G. Newey, 'Constraints on the Exercise of Trustees' Powers', Chapter 2 of this volume.

⁵⁹ Cf. *Henderson v. Merrett Syndicates Ltd* [1995] 2 A.C. 145.

⁶⁰ Cf. J. Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 L.Q.R. 302; *F&C Alternative Investments (Holdings) Ltd v. Barthelemy* [2012] Ch. 613, [222]–[225]; [2011] EWHC 1731 (Ch).

⁶¹ Agreements may be imperfect because of a failure to comply with legal formalities, or because of vagueness about the agreement made: see in particular *Jones v. Kernott* [2012] 1 A.C. 776; [2011] UKSC 53.