FACTA UNIVERSITATIS
Series: **Philosophy, Sociology, Psychology and History** Vol. 12, N°2, 2013, pp. 145 - 159

THE TRUST IN COMMON LAW SYSTEMS: FUNCTIONS AND PHILOSOPHICAL CORRESPONDENCES

UDC 347.4:17.036.2

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Abstract. *Locating the origins of the thought on equity in European Antiquity (Aristotle) and pursuing its development from the 17th century to the present in countries with Anglo-Saxon civil law, the author offers a contemporary post-structural context to the application of the legal instrument of the trust, which has no equivalent in any other legal system. Already Aristotle recognized the potential of equity to act as a corrective of the general law. The trust is the applied form of equity in Anglos-Saxon Common Law systems. As doctrine, the trust eliminates the gap between property law and obligation which exists in Civil Law and thus propels itself into the domain of ethics. Functionally, the trust serves many diverse purposes, which extend from the care for the disabled, corporate finance, charitable giving and tax avoidance. In this article, anti-formalism and Pragmatism frame the theoretical basis of the legal instrument of the trust.*

The trust behaves similarly to the process of meaning in the Pragmatist philosophy of Charles Sanders Peirce and is focused on the "outcomes" of actions. That is why the author offers the coinage "value-in-action" as a theoretical explanation of the trust. "Trusting" emerges as a vital component of modern trade which again suggests an ethical orientation of the trust. The author advances speculatively that the ethics of modern capitalism, which is invisible ("reclusive"), surfaces implicitly in the law of equity, whose instrument is the trust.

Key words: *trust, beneficiary, common law, Pragmatism, C S Peirce, anti-formalism, value-in-action, ethics, deconstruction, genealogical method, property rights.*

COMMON LAW AND PRAGMATIST PHILOSOPHY

Commercial Law in legal systems, in both civil law and common law countries, is concerned with the exchange of words and money. A particularity of common law systems is that, like Pragmatist philosophy (Goodman, 1995), they deal with outcomes of ac-

Received September 30, 2013

tions. The kind of (social) value such systems construct could thus be called – to coin a phrase - *value-in-action*. Unlike the legislative matrix of adjudication of civil law jurisdictions, criteria of judgment in the judge-made law of British, American, Canadian and Australian legal systems reflect an action-based structure of value. "Pragmatic" interpretation of actions triggers legal responses. This is both the genius of the common law and a feature of its 'modern' intellectual development.

It is a truism of cultural theory that "modernity", wherever it may be historically situated, is grounded in an economy of exchange of words and money. Both "currencies" — words and money — have no *essential* value. For Foucault, who revolutionised the concept of historical periodisation in the human sciences by insisting on the principle of synchronicity over that of diachrony and causality, modernity emerges at a concrete historical moment between 1775 and 1825 and is most intense between 1785 and 1800. (Foucault, 1975, During, 1992) This coincides with Immanuel Kant's (1724-1804) "transcendental idealism," developed in his *Critique of Reason* (1781), *Critique of Practical Reason* (1788) and *Critique of Judgment* (1790), which is summed up in the following phenomenological axiom: "all our theoretical knowledge is restricted to the systematisation of what are mere spatiotemporal appearances."(Audi, 1999) Consequently, it becomes possible to discuss modernity, in both Foucault's and Kant's sense, through a phenomenology of perception or through the concept of 'the gaze' (Lacan, 1981, Merleau-Ponty, 1968), which constructs meaning out of "what appears" (the phenomenon). Modern knowledge in any sphere of the human sciences, including the legal science, is ultimately a process of interpretation of signs ("spatiotemporal appearances"), which as a process is called "discourse"(the construction of meaning within a context) in poststructural theory of knowledge (Lyotard, 1989).

If we accept this poststructural definition of knowledge, then words and money (signs) acquire value according to their context or situation: the communication situation in which words are exchanged in dialogue to create meanings, and the market situation where goods and services are exchanged to 'create' money. We can thus claim that the notion of value in an economy of exchange is *action-based*. It is similar in its structure to the *structure of thought*, which was defined by C S Peirce, the American Pragmatist philosopher, as an "action" or process, not a state. In the words of the critical theorists,

> "Peirce's conception of thought or practice is that of a process, since meaning 'lies not in what is actually thought, but in what this thought may be connected with in representation by subsequent thoughts' (Peirce, "Some Consequences of Four Incapacities," *Collected Papers*, Volume 5, 173). Thought – or 'truth' – for Peirce is an *outcome* that is always achieved in line with one's purposes. That is, the process of thought, directed through habit, represents a process of sign interpretation that is 'dialogic in form' (Peirce, "Notes on Metaphysics," *Collected Papers*, Volume 6, 233), constituting meaningful practice: 'every thought-sign is translated or interpreted in a subsequent one' (Peirce, "Some Consequences of Four Incapacities," 170)." (Vladiv-Glover and Frederic, 2004)

Such meaningful practice is synonymous with the construction of value which, like thought, *is an action*, not a static formula or taxonomy. Hence our coinage: value-in-action.

The legal systems in Common Law countries have evolved in concert with this concept of *value-in-action*. UK, Canadian, American and Australian legal systems apply criteria of judgment which reflect this Pragmatist conception of value. The Common Law jurisdiction can thus be said to adhere to a pragmatic (in the sense of Pragmatist philoso-

phy) interpretation of actions whose outcomes trigger legal responses. This is part of the context in which the law of trusts functions.

Concomitant with this pragmatic interpretation of value as outcome, an ethical evaluation of action arose as a philosophical and social correlate of action-based value in the sphere of the law. This ethical dimension of the law is reflected in the law of equity which governs the legal instrument of trusts and the legal fiduciary relation.[1]

The trust is an instrument which is literally based in the concept of trusting someone with something (one's own property interest) or relying on the loyalty of others.

The trust as an instrument comes about as an antidote to the formalistic conceptualisation of the law as a body of rules or statutes imposed on a body of living facts as they arise.

An anti-formalist sentiment in relation to the Law was expressed by the German political economist, Max Weber, who introduced the concept of "the other" as an ethical category which must underpin any legal relationship. Writing between 1910 and 1914, Weber critiqued the emerging formal qualities of modern law but asserted that

> "[T]he system of commodity exchange, in primitive as well as in technically differentiated patterns of trade, is possible only on the basis of far-reaching personal confidence and trust in the loyalty of others. Moreover, as commodity exchange increases in importance, the need in legal practice to guarantee or secure such trustworthy conduct becomes proportionally greater" (Roth and Wittich, 1978).

"Trusting," in Weber's view, had become one of the features of the modern modes of exchange. Consequently, commercial law based in trusting required "ethical rationalisation" through "attitude-evaluation." Categories which express *meanings* and *intention* must regulate the process of exchange. Relevant criteria cannot be reduced to a "mechanical jurisprudence" of rules (Pound, 1908). Meaning and intention are philosophical categories which resonate with European phenomenology, which includes Pragmatism (Peircean semiotics), philosophy of language, and philosophy of perception. In this way, the modern functioning of equity may capture the hermeneutic possibilities of phenomenology – a fact which may have surprised Weber – given the "formalistic" qualities he ascribed to the "Anglo-American common law" (Roth and Wittich, 1978).

HISTORY OF THE TRUST AND ORIGINS OF EQUITY IN ANGLO-AMERICAN LAW

Anglo-American trusts evolved out of the law of equity, which originated in the land law of Britain in medieval or early modern times. Two main purposes were served by the trust.

Trust-like arrangements became common in England from the 11th century onwards. In medieval Britain, it was not uncommon for land-owners to go on "crusades" to the Holy Land. Crusades were armed religious pilgrimages made to Middle Eastern lands of Biblical significance. Crusades took several years and were perilous.

[1] In this paper, I do not discuss the fiduciary relation. That will be the subject of a separate paper to follow as sequel to the present one. JG.

Before leaving Britain, landowners about to go on crusade often sought to arrange their landholdings so as to benefit persons and purposes who would obtain nothing under the legal scheme of property devolution applicable upon their death. Younger sons, widows, charitable and other purposes were provided for by the intending crusader transferring his property to a small body of trusted friends (or "trustees") who would hold the property for the benefit of those whom the crusader intended ("beneficiaries"). These trusts "never failed for want of a trustee". When one trustee died, another was appointed by the trustee body. Another, equally significant advantage of the arrangement was that a major taxing point in medieval society was avoided. Under the arrangement, there was never any succession to property on death. The trust came to be widely used by the property-owning classes (Maitland, 1949).

Enforcement of trustees' duties under the British trust gave rise to a separate legal system when the common law - "the King's courts" - refused to assist what, on one view, was tax evasion and avoidance of obligations. Disappointed beneficiaries applied to the Church in order to enforce the trust accepted by the trustees. The Chancellor, a religious figure, was petitioned to "purge the consciences" of offending trustees in quasi-religious terms and the decisions of Chancellors were formalized in a body of law known as "equity" or "chancery".

Many academic lawyers have doubted whether trusts originated in English law. It has been suggested that the trust originated in Roman-law institutions like *fidei commissum,* which involved a gift of property to a person (usually by will) which imposed on the person to whom the property was given an obligation to transfer that property to an ultimate recipient when that person achieved full age or capacity (Buckland, 1931; Kaser, 1968; Johnstone, 1988).

The German idea of the *Salman* is similar. Under old German law, a Salman was a man whose mission it was to hand over a precious belonging to a third party once a certain event had occurred, often the death of the item's previous possessor (Van Rhee, 2000; Lupoi, 2001; Graziadei, 1993).

Trust-like principles have also been found in the laws of jurisdictions as diverse as Arabian states, laws of the Netherlands/South Africa, the Peoples Republic of China and the Republic of Ghana (Lord Watson, 1892; Ho, 2006; Asante, 1965). The *waqf* in Muslim personal law of property refers to land, buildings and other property, the benefit of which is managed for a philanthropic purpose. Donovan Waters observes that "[T]hough the manager does not have ownership of the *waqf* property, the *waqf* provides for the independent administration of that property" (Glasson and Thomas, 2006).

At the same time, comparative lawyers have long found trusts a difficult subject to study. The idea is functionally protean. Trusts have innumerable uses. This means that the comparativist requirement to "compare function rather than form" can barely be applied to analysis of the trust-concept (Lawson, 1953; Kőtz, 1963). In its Anglo-American form, the trust is now pre-eminently a *commercial* institution which serves business purposes. It is the multiplicity of these purposes which makes it hard to describe and compare with like institutions in different countries.

THE MODERN TRUST

The trust is a legal instrument which is based in an action or actions. Just how complex the model of action that governs or constitutes a trust is can be seen from the following discussion. In each action, the operative question is: what purpose or function is to be served by a certain action? This question of function is the basic question in the structuring of a trust. The trust is thus a structure which has functions. These functions are interpersonal or dialogic: they involve a giver and a receiver. In this sense, the trust is a communicative structure. It has embedded communicative levels just like the structure of discourse. Instead of words, what is 'communicated' is action which translates into value-in-action. Another way of conceptualising value-in-action is as meaning-in-action: the trust constructs actions which are meaningful for someone. Meaning becomes synonymous with obligation or commitment which is enforceable by law. Thus the trust embodies the metaphor "to put your money where your mouth is" and represents the equation of speech and ethics. The trust is the Phenomenologist's ethics incarnate.

A trust arises where a person transfers property to another or others with directions as to how and for whose benefit the property is to be used. Alternatively, a person may assume obligations for the benefit of others regarding the use of his or her own property. In each case, the arrangement is enforced by law. Persons to whom property is transferred, or who assume the obligations of trusteeship are called "trustees". Trustees are required to hold the subject property "on trust" for the benefit of "beneficiaries" - who are able to enforce the arrangement once threshold requirements are met.

Constitution of a trust is an act in law. Trust-creators cease to have any active role after enforceable trusts are brought into being (unless the trust-creator retains a right of revocation or other overriding power in the instrument whereby the trust is created). Beneficiaries are the appropriate persons to require trustees to perform the duties which they have assumed. Trustees are guardians and custodians of property which is not their own. "In equity", in British usage, beneficiaries are entitled to the property held for their benefit by trustees. Beneficiaries who enjoy property rights in the trusted property are the appropriate persons to commence legal actions against defaulting trustees.

Trusts are not just an English-speaking, common law phenomenon. The law of trusts has played a significant part in the recent expansion of European private law. (Graziadei, Mattei and Smith 2005) Several civil law countries, as well as Britain, regularly use trusts in the course of business transactions. At the EU level, trusts are referred to in community regulations and directions: see EC regulation no 44/2001 on the recognition and enforcement of judgements in civil and commercial matters, articles 5(6), 23(5), 60(3); *Webb v Webb* [1994] ECR 1-1717 (ECJ), EC reg No 805/2004 and Council Directive 19 June 1991 at EEC 91/308 (measures to control criminal activities, particularly money-laundering). Uses of trusts as collective investment vehicles has been the subject of specific directives: for example, Council directive EEC 85/611: 91/308 as amended (regulating collective investment in transferable securities). Internationally, the 1985 *Hague Convention on The Law Applicable to Trusts and on their Recognition* has been adopted by over 25 countries (including Switzerland, Britain and Australia). France and the United States have signed but not ratified the Convention. Further adoptions are likely (Harris 2002). Current status of Convention adoptions can be seen at the Hague Conference website:

http://www.hccc.net. (Harris, 2002). Trusts are becoming increasingly well-known in the legal landscapes of non-English speaking countries.

CIVIL LAW AND ITS PARALLELS TO THE TRUST IN EUROPEAN COUNTRIES

Many civil law scholars see the trust as an example of "the separation of assets from the patrimonium of individuals and a devotion of such assets to a certain function, a certain end" (Lepaulle 1928). For instrance, P. Lepaulle's opinion influenced the drafters of the Civil Code of Québec arts 1261-1262 on *la fiduce* (the trust), where the institution is described as "a patrimony by appropriation, autonomous and distinct... made up of property which [the trust-creator] appropriates to a particular purpose" (Lepaulle, 1928; Waters, 1990). "Patrimony" refers to the totality of a person's assets. Whilst everyone has a patrimony in civil law, and nobody has more than one, it is sometimes necessary to suppose a "special patrimony" for the purpose of inheritance and matrimonial regimes in civil law jurisdictions (Grimaldi and Barrière, 1998). Assets of the special patrimony are segregated from the general patrimony and, to an extent, liabilities are segregated as well (Gretton, 2000; Lepaulle, 1964).

In some countries, especially those recently emerged from Communist regimes with command-economies (like Serbia and other EE countries), there is no general category in law equivalent to the trust. But a comparable "special patrimony" may exist where guardians are appointed by the *organ starateljstva* (Serbian term probably based on the German concept of *Vormundschaft*) – the competent administrative body to take care of children without parents, or an adult who does not have full capacity, due to illness, heredity or another cause. Comparable functions are performed by guardians appointed in family law contexts.

Trusts, put simply, confound two organizing principles of Roman private law. There is no parallel in civil law countries. Legal *ownership* of property, which is vested in trustees, is restricted by the ability of beneficiaries to enforce trustees' *obligations* to hold that property for the benefit of others. Property rights, in this way, flow from the ability of beneficiaries to enforce inter-personal obligations. This new species of property is a jurisprudential puzzle – at least in *inter vivos* transactions. For civil lawyers, the idea is not easily accommodated and is still something of a heresy (Kötz, 1999).

USES OF THE TRUST AND EQUITY LAW

"The space" between ownership and obligation made by equitable categories and the availability of proprietary relief may be critical in an economy of exchange (Wright, 2000). Yet the importation of equitable doctrines into commerce was for a long time thought to be undesirable (Hayton, 1999; Mason, 1997; Getzler, 1997).

Through the creation of the trust, equity has conveniently bridged the ownership and obligation divide. Several non-common law jurisdictions supply remedies which parallel trust law in Anglo-American and equivalent jurisdictions (Freeland, 2001; Arai, 1999; Benoit, 1994; Kőtz, 1999; Hayton, 1999). The trust, though, has no true counterpart. Commercial use of the trust has dramatically increased in the last thirty years (Hampton, 1996). It has become the "queen" on the chessboard of financial planning and tax avoid-

ance. Commercial significance of the trust has been acknowledged on a national level by several civil law countries and the device has been widely copied. See, for instance, The Hague Convention of 1 July 1985 on The Law Applicable to Trusts and Their Recognition and the Brussels and Lugarno Conventions on Civil jurisdiction and Enforcement of Judgments applying to EU and European Free Trade Area countries (Hayton, 1999). Tax havens are conduits through which much of the world's liquid capital is now invested (Lessard and Williamson, 1987). 'Sham' trusts, 'grasshopper' trusts, 'black hole' trusts and other means of exploiting the secrecy and non-accountability of the device have been facilitated by the municipal legislation of off-shore centres (Hayton, 1999).

Trusts have great elasticity and, as a legal institution, are comparable to contracts in the generality of their application (Maitland, 1949).

Equity's collection of doctrines and 'remedy triggers' are now primarily used in the commercial law (Mason, 1994). Markets for capital and legal services, like concepts in Wittgenstein's philosophy of language, have few borders. Legal systems actively compete with each other for work. Most large conflicts between governments and suppliers of capital, between corporations and their stakeholders, and between global banks and the victims of fraud are mobile - or rhizomatic (Deleuze and Guattari, 1993) – in structure: they spread along a surface like a follicle or weed. Equity is the resource of the Anglo-Australian legal systems when there arises a contested *locus of value* – like an account containing misappropriated funds, or an heirloom.

Modes of exchange within and between the world's developed economies have changed in the past two decades. Electronic communication and computer technology is supplanting documentary titles, invoices and paper-based records - particularly in international transactions (Murray, Chorvat and O'Connor, 2002; Ballego, 1991). The value of services, in mature economies, has become more significant than the production of goods as the twentieth century unfolded (Shelp, 1981). Such changes affect the nature of commercial interaction and wrongs.

Law, particularly the commercial law, has adjusted itself to change throughout the twentieth century. Private law in common law countries developed *formally,* to reflect the new fluidity in commercial exchange and levels of reciprocity and trust. Standards and principles, not rules are now widely used to express private law norms. Judicial justifications are increasingly consequentialist – meaning they are based on function and outcome of actions (hence its resemblance to the axioms of Pragmatist philosophy). Purposive considerations are dominant – whether legal reasoning is in the form of 'top-down' or 'bottom-up' variety (Posner, 1992). The familiar process of drawing factual analogies and inferences from doctrine may be in decline (Attiyah, 1980).

Commentators have observed that a corresponding ethical attitude accompanies these changes (Kennedy, 1976). Sharp distinction between one's own interest and that of others is no longer drawn. Robust individualism is dying. A 'right to be selfish' no longer legitimates action and people are enjoined, instead, to make sacrifices and to share. Ethical consideration of the 'other' and a new altruism are becoming the private law's dominant ideology. Norms are given a good-neighbourly aspect. The once widely-held belief in the neutrality of rule systems has been discredited. Justice is thought to inhere in outcomes reached. 'Anti-formalist' is a term used to describe this new orientation.

Anti-formalism has different vehicles in different countries. In Australia, case-law and equity are still the spearhead of the movement. In the United States, anti-formalism has

been predominantly code-driven. The distinction between law and equity in America may still be enshrined in remedies textbooks, but, for most other purposes, it is said to be 'long forgotten' (Dobbs, 1993; Thomas, 2003). Aspects of the private law have been continuously restated for the past ninety years under the auspices of the American Law Institute. The *Uniform Commercial Code* became law in 51 jurisdictions between 1953 and 1966 (Twining, 1973). Anti-formalistically (and equitably), the Code states that any 'unconscionable' contract or clause is unenforceable insofar as it produces an 'unconscionable result' (US *Uniform Commercial Code*, § 2-302) (Barnes, 1990). Commercial courts are thus 'chartered' to find and eradicate aspects of transactions which they find unethical.

Australia and Canada remain more case-law oriented. Retreat from formal rules in those countries has proceeded through the development of equitable doctrines (Klinck, 2001; Sneddon, 1992). Partly, this is in codified form. Equity is prominent in Australia for an historical reason. Procedurally, equity and the common law remained separate in New South Wales until 1970. A lot of twentieth-century equity appeals from New South Wales were made to the High Court. Other Australian jurisdictions were 'fertilized' in this way (Heydon, 2002).

EQUITY AS "SUPPLEMENT" AND CORRECTIVE TO COMMON LAW

The ultimate function of equity is as "supplement" to Common Law. Equity as a "corrective" of the law is an ancient idea. One finds it, for example, in Chapter Five of Aristotle's *Nichomachean Ethics*. Aristotle there discusses the difference between what is equitable and what is just and whether either one or both can be "good." He comes to the conclusion that while both are "good" (ethical), "the equitable" is superior, on the following grounds. "What creates the problem", according to Aristotle,

> "is that the equitable is just but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. (...) Hence the equitable is just, and better than one kind of justice – not better than absolute justice, but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality" (Aristotle, 1998).

Thus the Aristotelian concept of what is ethical in the law (equitable being the superior "good" to what is just) shares the situation-based ground which ethics has in modern Pragmatism. Equity is also a *supplement* – in the poststructuralist sense – to judge-made law (Browne, 1933; Symons, 1941). "[A]t every point," equity presupposes the existence of the common law (Maitland, 1949). The common law is the pre-text while equity is the text or supplement.

Echoing Aristotle, we can assert that law has a problem by reason of its general application. Particular persons and circumstances are inevitably treated unfairly on occasion.

Results intended by a rule's authors are frustrated by the facts of some cases. Exceptions or particulars must be accommodated, if the reverse of what rules intend is not to be achieved. This is the consequence of the 'inevitable grossness' of rules (Sherwin, 2001; Regan, 1989; Raz, 1986).

The concept of the "supplement" captures the theoretical essence of the relationship of equity to common law in poststructuralist terms. In his theory of textuality, Jacques Derrida posits that every text must have a supplement. By supplement is meant interpretation of or the creation of meaning in a text. Texts do not have essential meaning which is som'ewhere hidden, only to be 'revealed'. Texts constitute meaning in the act of their reception by an active reader or interlocutor. (Derrida, 1976). Seen through Derrida's (and poststructuralism's in general) model of discourse, the "supplementarity" of equity in relation to the common law would mark equity as the ideal interpretation of Common Law doctrine in the context of a certain given action which is being evaluated in equitable – or ethical – terms.

Equity thus becomes a body of 'doctrines' which help to overcome the static and formlistic nature of the law. This is also captured in Aristotle's formula of equity as more "good" than the "law" which is also "good" (Aristotle, 1998). Generalised discretion must otherwise be given to judges, empowering them not to apply the law in cases where they see fit. In such instances, judges would become our rulers. Equity's genius is to systematise a discretionary power and make it subject to the rule of law. The process functions predictably and according to precedent. To a degree, equity is the simulacrum of the common law corrected (Newman, 1973). Equity enters a 'purposive overdrive' in the performance of its function.

EQUITY AS AN "INNER MORALITY" OF CAPITALISM

The ethics which underlies equitable intervention is different from the moral basis of the common law. Universal good is not equity's concern. Equity's corrective norms are individuated and focus on how a person, positioned in a certain way, *should act*. Once again, equity's structure shows a profound correspondence with the structure of meaning: meaning is, according to Wittgenstein, correlative or relational. The interpersonal 'value' this articulates is inherent in the social order.

The reclusive – unconscious – "inner morality" of capitalism may thus come to expression. "Examination of the activities of fiduciaries," in the words of Ernest Weinrib, "involves, above all, an inquiry into the propriety of profit-making" (Weinrib, 1975; Brock, 2000). Fiduciary litigation involves the determination of whether or not to "sanction or stigmatise a particular act performed by a businessman in a commercial context." This is the "moral terrain" of breach of faith, fairness and good faith, where actors are acknowledged to be unequal and people regularly pledge themselves to act and do business in the interests of others (Finn, 1994). Equitable obligations, it is said, have trust and not self-interest at their core (McLachlin, 1991). Wealth maximisation criteria are, to a degree, ambivalent in their outcomes. "Adam Smith's invisible hand," on one view, may provide more optimal social outcomes than the interference of courts and legal doctrines (Malloy, 1994). There is also this perspective: more and better quality goods and services are produced by more efficient markets (Prince, 1998; Duggan, 1997; Posner, 1994). Eq-

uitable intervention in commerce may enhance the infrastructure through welfare of producers, consumers and society by creating a better business environment (Johnson, 1996; Cooter and Freedman, 1991).

CORRECTIVE AND DISTRIBUTIVE JUSTICE

Equity, like language, has a relational structure and is a differential system which comes to expression in its corrective and distributive restitutionary mechanisms. Synchronicity prevails in the structure of equitable remedies over that of diachrony and causality.

Measures of both corrective and distributive justice are used in the 'structures of justification' which lead to the award of equitable remedies. Correctively, equity reverses gains and makes good losses - by "taking away the defendant's excess and making good the plaintiff's deficiency." (Weinrib, 2002). The logic of this is correlative or differential: it is grounded in what Derrida and postsructuralism call radical (fundamental, ontological) 'difference'. Corrective claims have a plaintiff and a defendant with opposing interests or interests grounded in radical mutual difference. Loss to one is a gain to the other. All common law and many equitable remedies take this form. Restitution is a differential paradigm, in which one thing is defined by difference to another: '[N]ecessarily bi-polar' relationships exist between the parties to restitutionary claims (Weinrib, 2000; Rotherham, 1998; Gordley, 2000).

Equity also acts distributively when it shares benefits and burdens. This logic is then comparative. Comparisons require a comparator. *Fault* is the criterion used by equity. Resolution of rival property claims according to whether the parties have knowledge or notice of each other's claims implies fault or sharp (unlawful) practice on one side. The common law has no such competence. Distributive justice is used in aid of corrective relief. Restitutionary claims may require distributive remedies. Three-party and multi-party facts are common (Mautner, 1991). Disinclined as many jurists are to admit the fact, redistribution inevitably accompanies the award of remedial property rights (Rotherham, 2002).

THE METHOD OF EQUITY

Equity has its own way of resolving commercial disputes. A 'space of justice' may exist between the rule-oriented, non-consequentialist formalism of traditional law and the anti-formalism of modern equity (Chesterman, 1997). Factual analogies and resemblances play a large part in equitable method. Analogical arguments have a moral significance in addition to the legal outcomes suggested. Analogies are used to establish 'harmony' between 'proposed and established' norms. Rules chosen for the resolution of conflict are analogically 'assigned the weight which it is morally right to give them' (Raz, 1979). Categories such as 'fiduciary', 'unconscionable' and 'confidential' have a character different to common law categories expressed through qualifiers such as 'impermissibly', 'dishonest' and 'deceit'. Equity's ideas are not imposed on the facts as external evaluative and prescriptive criteria of judgement. They are interpretive, hermeneutic and based on a personalised - and hence ethical - point of view which inheres in equity's function. This is not to be confused with a normative morality: moral culpability, for example, need not be

proven as the 'cause' of equitable fraud. Causality does not come into the picture. The function of equity is to have a positive equitable ("good") outcome. This puts equity's structure and process into the philosophical domain of Pragmatism which grounds modern hermeneutic practices.

CONCLUSION

The method of equity is hermeneutical, which implies a method of interpretation according to the facts and their pragmatic outcomes. "[I]nterpretation is always open-ended . . . no interpretation is ever final" (Gadamer, 1986; Hoy, 1978). Jacques Derrida claimed that deconstruction of the law as a construct to get to the principles of its structure (which is the true meaning of the term "deconstruction") was desirable (Derrida, 1992). There are two ways in which the law may be deconstructed, that is, reduced to its basic structures or the principles by which it functions. This, incidentally, implies that poststructuralism is no more and no less than a "super" Structuralism (Harland, 1987). The first is the unravelling of "logico-formal paradoxes'" – by which Derrida referred to the linguistic analysis of legal texts. The other was the close "reading of texts, meticulous interpretations and genealogies." By 'genealogy' Derrida, like Foucault, understood a complex relationship of history, knowledge and power, which emphasises the relations of things as well as the relational nature of thought and language (Foucault, 1972; Apperley, 1997). Contemporary uses of words, for example, may be at some variance with earlier historical or accepted (received) meanings. Legal texts have multiple historical and social 'contexts' and must be interpreted in the appropriate one. Equity's "categories of meaning and intention" are amenable to both approaches which coalesce in the so-called method of close-reading-of-texts. The "network of concepts," or discourses, which mediates law and commercial interaction must be understood subtly. Layers of meaning imparted at different legal and historical levels must be addressed, pursuant to a 'genealogical' analysis in the already defined sense. Sources of law, including case law authorities, statutory instruments and social interaction, must be viewed as bodies of linguistic signs according to the genealogical method. Each source is to be interpreted in a mutual relation with the interpreter and the legal subject. This intersubjective method is the way to the construction of a totality called 'meaning'. This construction is only possible as action, as process. Hence the close-reading of the law produces acts of reading which become legal actions. In equity, these acts of reading are underwritten by a 'particular' – historical - point of view which interprets in contexts. The particular, historical, interpretive perspective is the ultimate ethical guarantee of equity law. Construction of meaning moves from the interpreter to the text and its context and back to the interpreter and his context. This is the so-called 'hermeneutic circle' of Gadamer. Legal texts, in the end, have as many contexts as they have interpreters (Gadamer, 1986; Hoy, 1978). Law is or should be authoritative – but in its Pragmatist modern aspect it cannot be absolute.

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FUNKCIJA TRUSTA U SISTEMIMA CIVILNOG PRAVA U FILOZOFSKOM KONTEKSTU

Prateći razvoj trusta od antičke misli o pravičnosti (kod Aristotela), kroz njegovo rasprostranjenje od 17. veka na ovamo, u zemljama sa anglosaksonskim civilnim pravom, autor daje savremeni poststrukturalistički kontekst primeni pravnog instrumenta trusta, čiji se ekvivalent ne nalazi ni u jednom drugom zakonskom sistemu. Vec je Aristotel priznao potencijal zakona o pravičnosti da deluje kao korektiv opšteg zakona. Trust je primenjena forma pravičnosti u anglosaksonskim sistemima civilnog prava. Kao doktrina, trust eliminiše razliku koju civilno pravo vidi između imovinskog prava i obligacije i time se trust premešta u domen etike. Funkcionalno, trust služi raznovrsnim svrhama, koje

se protežu od brige oko neosposobljenih lica, finansiranja korporacija, poklanjanja novca i imovine u dobrovoljne svrhe i izbegavanja poreze.

Anti-formalizam i pragmatizam uramljuju u ovom članku teoretsku osnovu pravnog instrumenta trusta. Trust se ponaša analogno procesu značenja u filozofiji pragmatiste Sanders-Pirsa (Charles Sanders Peirce) i usmeren je na "rezultate" akcije. Zato se u članku predlaže termin "value-in-action" (vrednost kao akcija) kao teoretsko objašnjenje trusta. "Poverenje" se pritom ispoljava kao bitna komponenta moderne trgovine što opet upućuje na etičku orijentaciju trusta. Autor predlaže spekulativno da se etika modernog kapitalizam, koja je nevidljiva, implicitno pomalja kroz zakon pravosuđa, čiji je instrumenat trust.

Ključne reči: *Trust, beneficiar, civilno pravo, Pragmatizam, C. S. Peirce, anti-formalizam, vrednost-kao-akcija, etika, dekonstrukcija, genealogija, imovinsko pravo.*