Book Review – Equity: Conscience Goes to Market

Irit Samet

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Clear, general and predictable legal rules are regarded as sacrosanct in systems based on the rule of law.[1] This is because without such well-defined rules, people are unable to arrange their affairs in advance to avoid transgressions. However, tight adherence to clear rules creates an injustice of a different sort. Highly specific regulation is susceptible to exploitation by sophisticated parties.[2] Those intent on evading their moral obligations may hide behind rigid rules.[3] Therefore, the need to do justice in the particular circumstances of a case may require an exception to a strict and general legal rule. Broadly speaking, in the common law world this second concern — 'softening' rigid rules to implement the parties' moral duties — is distinctively tied to the jurisdiction of equity.[4] In *Equity: Conscience Goes to Market*, Irit Samet offers a vigorous and sustained justification for why this distinctiveness of equity should be preserved.

Samet does not purport to develop a unifying theory of all equitable doctrines, but to deflect the argument that equity should be absorbed into the common law.[5] Her major theoretical claim is that equity's moral quality and its lack of strict formalism equips it to achieve a core ideal of justice which the 'bright-line rules'[6] of the common law may not provide. This ideal, which Samet calls 'Accountability Correspondence', demands that legal liability ought be imposed to 'correspond to the pattern of moral duty in the circumstances to which the rules apply'.[7] Put another way, highly abstract and formal rules should not always dominate in a system which is supposed to reflect human values. This, the argument proceeds, is the central reason why equitable doctrines should remain independent from the common law. The easiest example of Accountability Correspondence is proprietary estoppel: where a defendant relies upon a lack of formalities at common law to evade moral responsibility for a plaintiff's detrimental reliance on an oral representation, equity steps in and may enforce the obligation to transfer property nonetheless.[8]

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[1] Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1977) 33–41.
[2] Irit Samet, *Equity: Conscience goes to Market* (Oxford University Press, 2018) 36.
[3] See, eg, the tightly controlled common law doctrines relating to the interpretation of exclusion clauses and remoteness in contractual damages. For a case where moral duty and legal liability were perhaps misaligned due to common law rules, see for example, *Eastwood v Kenyon* (1840) 113 ER 482.
[4] See, eg, Mark Leeming, 'Equity: Ageless in the 'Age of Statutes'' (2015) 9 *Journal of Equity* 108, 124.
[5] Samet (n 2) xv.
[6] Ibid 6.
[7] Ibid 28.
[8] Ibid 32–3.

Samet's central argument is animated by what she views as two criticisms of the dual system of equity and common law. So called 'fusionists' argue that maintaining a dual system is unnecessary because the moral underpinning of a rule applies regardless of its origin in common law or equity.[9] The second strand of criticism directed at equity's independence is a 'scepticism' of the use of conscience-based reasoning on the basis it introduces subjectivity into the law, or conceals judges' policy preferences.[10] Samet contends that each of these critiques are overstated once the notion of conscience is properly conceived.[11] Relying on the work of Kant, she argues for an objective formulation of conscience based on public morality.[12] Further, she argues Accountability Correspondence can only be implemented effectively by 'open-ended'[13] standards rather than granular rules. As a prominent Australian judge said, '[w]ords can often be inadequate to express the subtlety of human relations'.[14] For these reasons, Samet concludes that unifying common law and equity would leave a fundamental ideal of justice unfulfilled.[15]

Equity: Conscience Goes to Market is divided into four substantive chapters. In the first, Samet expounds the book's thesis at an abstract level, including its philosophical justification.[16] The following chapters skilfully extend this theory to three of equity's most well-known doctrines: proprietary estoppel, fiduciary duties and clean hands. This structure enhances the clarity of Samet's argument. Having grasped the contours of her thesis in Chapter 1, the reader is able to follow its application to the doctrines which exemplify it. This persuasive approach leaves an impression of a single and sustained thread of logic.

The result of this reasoning is a novel contribution to the theoretical literature. While the moral underpinnings of equity are often taken as its defining feature,[17] few have given conscience such a thorough interrogation. Other authors have offered purely historical accounts of how the use of 'conscience' has developed in English law.[18] However, it is a concept prone to being used by courts without rigorous consideration of its

[9] Ibid 3–9.
[10] Ibid 14.
[11] Ibid 56.
[12] Ibid 58.
[13] Ibid 35.
[14] Chief Justice James Allsop, 'The Rule of Law is not a Law of Rules' (Annual Quayside Oration, Perth, 1 November 2018) 3 <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20181101-2>.
[15] Samet (n 2) 194.
[16] Ibid 28–37.
[17] GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 7th ed, 2018) 6.
[18] Dennis R Klinck, *Conscience, Equity, and the Court of Chancery in Early Modern England* (Ashgate, 2010).

precise content.[19] The analysis, in Chapter 1, of what judges are referring to when they invoke 'unconscionability'[20] – which Samet contends is an objective standard – is thus helpful. Further, Samet does well to make a concerted effort to present counter arguments, such as that of Burrows,[21] in their most compelling form. Her replies to these counterpoints demonstrate that the book builds on the existing literature.

One noticeable omission from the book is an analysis of the law of trusts, equity's iconic jurisdiction. Its absence is confronted in the introduction where Samet explains her intention was to focus on those doctrines argued to be ripe for fusion.[22] While it is acknowledged that the book does not claim to advance a universal theory of equity,[23] at points its tenor does seem to imply the theory is intended to apply to all equitable doctrines.[24] In the law of trusts, particularly as it operates in commerce, the features which Samet holds as distinctively equitable have been weakened. One only has to look at the prevalence of unit trust structures to see how equity has indeed 'gone to market'. Samet may have engaged with current thorny areas of trust law, such as the 'contractualisation'[25] of trusts when they are used as vehicles for holding funds, viz. the importation of traditionally common law concepts such as compensatory loss when monies are paid out in breach of trust. Such a discussion could have only improved the book's currency.

A second criticism may be directed at the substance of the Samet's central claim. A key plank of Samet's argument is that, unlike the common law, equity operates mostly by guiding principles and standards rather than prescriptive rules.[26] For Samet, this distinctive approach is a key reason that a dual system of common law and equity should be preserved.[27] However, just how unique this feature of equitable doctrines is may be questioned. For example, in the common law doctrine of negligence, the duty of care is expressed as a *standard* rather than a rigid rule. The duty of care has notoriously evaded easy prescription precisely because its purpose is to align moral duty with legal liability in a limitless range of factual scenarios where a defendant has caused a plaintiff loss by his or her fault.[28]

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[19] See, eg, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. The Court variously invokes the concepts of 'good conscience' and 'unconscionability' without providing a standard by which this is to be judged.
[20] Samet (n 2) 48.
[21] Andrew Burrows, 'We Do This at Common Law but That in Equity' (2002) 22(1) *Oxford Journal of Legal Studies* 1.
[22] Samet (n 2) xvii.
[23] Ibid xv.
[24] See, eg, ibid 28, 74.
[25] See Paul S Davies, 'Remedies for Breach of Trust' (2015) 78(4) *Modern Law Review* 681, 693. See also *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 500 and *AIB Group (UK) Plc v Mark Redler & Co* [2014] 3 WLR 1367.
[26] Samet (n 2) 35.
[27] Ibid 40.
[28] See, eg, James Plunkett, *The Duty of Care in Negligence* (Hart Publishing, 2018) 35–78.

Hence the common law already has some standards-based analytical tools which are used to implement Accountability Correspondence. Though Samet does allude to this point,[29] it does suggest that the distinctiveness which she claims for equity may, in some respects, be overstated.

Samet's central thesis stands despite these criticisms. In summary, *Equity: Conscience Goes to Market* is a thought-provoking work of private law theory. Samet's limpid prose makes the book accessible, which is impressive given its theoretical depth. For these reasons, it is hoped that *Equity: Conscience Goes to Market* will be widely read by practitioners, students, the academy and the judiciary to enrich our understanding of how and why equity works the way it does.

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[29] Samet (n 2) 65.

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