

Application of Equity in Contract Law: Comparative Research with Some Countries and Experience for Vietnam

*Stosowanie słuszności (equity) w prawie umów. Badania
prawnoporównawcze i doświadczenia dla Wietnamu*

Abstract

Studies of jurisdictions emphasizing codified law, such as France and Germany, and of those that regard equity as one of the fundamental pillars of the legal system, such as England, indicate that equity plays an essential role in ensuring flexibility within civil law systems, particularly in the law of contracts. These jurisdictions fully recognize the functions of equity, especially its integration with the case law system. Equity in such countries has been “controlled” to a certain extent, thereby preventing misuse or legal uncertainty. In Vietnam, several unresolved issues in contract law could be addressed by the application of equity. This paper preliminarily analyzes such shortcomings and proposes a reasonable application of equity to enhance the Vietnamese legal system.

KEYWORDS: contract law, comparative law, equity.

SŁOWA KLUCZOWE: prawo umów, prawo porównawcze, słuszność (equity).

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I | Overview of Equity in Vietnam Civil Law

In general, the Vietnamese Civil Code bears all the hallmarks of a Civil Law jurisdiction, in which the primacy of written law is highly emphasized. Prior to the 2015 Civil Code, Vietnamese civil law left no room for the application of equity. However, the 2015 Civil Code and the 2015 Civil Procedure Code (CPC) have since recognized the possibility of applying equity as a means to enhance access to justice, thereby empowering the courts to resolve matters not yet provided for by statutory law.

Specifically, in the context of Vietnamese civil law, equity is recognized as a supplementary source of law, applied in accordance with Clause 2, Article 4 of the CPC, which provides that courts must not refuse to settle a case on the grounds of the absence of applicable legal provisions. Within this framework, equity is applicable to all types of legal relationships; however, its application in resolving certain issues of contract law remains limited despite its potential.

Equity appears in positive law with its fundamental functions intact and operates as “an extension of legal norms.” One of the inherent characteristics of codified law is “its inevitable incompleteness”^[1], because “a finite form can only reflect finite content. Thus, written legal instruments contain only a limited number of rules, while the social relationships they aim to regulate are diverse and continuously evolving.”^[2] Therefore, to address the limitations concerning the foreseeability of the law, equity plays a role in promoting justice and preventing the rigid application of legal rules that may otherwise result in unjust outcomes^[3]. Accordingly, the limitations of written law can be categorized into three main aspects: (1) the limitation of foreseeability in practical matters that the law cannot anticipate; (2) the limitation arising from a lack of specificity, whereby the law may contain provisions but remain unclear in application; and (3) the need to prevent the rigid application of legal rules that may lead to unjust outcomes. Therefore, in the study of equity within civil law generally, and contract law in particular, it is evident that all three functions

1 Nguyen Ngoc Kien, Le Nguyen Gia Thien, „Interpretation of Law in Some Countries Following the German-Style Civil Law System in Europe: A View from the Use of Latin Terms” *Journal of Procuratorial Science*, no. 1 (2018): 55–68.

2 Nguyen Ngoc Dien, *Method of Statutory Interpretation* (Hanoi: National Political Publishing House, 2021), 20.

3 Andrew Sucre, *Aristotle's Conception of Equity in Context* (Master's thesis, University of Missouri–St. Louis, 2013). <https://irl.umsl.edu/thesis/201> [accessed: 27.07.2023].

are recognized and safeguarded in the legal systems under examination in this paper, namely those of England, France, and Germany.

Within the scope of research on the role of equity in civil law in general and contract law in particular in England, France, and Germany, it becomes evident that these legal systems consistently allocate a certain degree of “discretionary space” for the application of equitable principles. This allowance contributes to the stability and flexibility of the law, enabling it to address issues that codified provisions of law cannot fully anticipate, especially within the sphere of contractual relations. Contracts, as a diverse and multifaceted category of legal relationships, govern a wide range of matters in daily life. Notably, when contracts are formed on the basis of freedom of contract between the parties, the law cannot foresee all expectations or intentions underlying the agreement. In such circumstances, equity serves as an essential mechanism for remedying unfairness and ensuring justice.

One of the key similarities, and also the rationale for selecting France and Germany for comparison with Vietnam, is that these countries share a common approach to prioritizing the application of codified law while treating equity as a supplementary source of legal interpretation. However, whereas Vietnam permits the application of equity across all legal relationships, France and Germany limit the application of equitable considerations to specific statutory provisions, where judges are expressly authorized to render decisions based on principles of fairness. Additionally, from a comparative law perspective, this paper also includes an examination of equity in English law, with the aim of drawing relevant insights regarding contract interpretation in judicial proceedings. Given that contract law is a broad and complex field, this paper confines its scope to the most prominent and pressing issues within Vietnamese contract law that are pertinent to the application of equity.

In the context where equity is a relatively novel concept, Vietnamese civil law still presents numerous issues requiring further scholarly examination and legal refinement. This paper confines its scope to the domain of contract law, in line with the current legal approach in Vietnam, where equity may be applied across all civil relationships. All of the aforementioned matters are explored through the lens of comparative legal analysis, with the aim of contributing to the improvement of Vietnamese law in areas where existing shortcomings may be addressed through the application of equitable principles.

2 | The Concept and Evolution of Equity in Civil Law and Contract Law

2.1. The Concept of Equity

In general, the concept of equity is understood as fairness, impartiality, and equitable treatment[4]. However, when examined through the lens of legal science, it becomes apparent that definitions of equity do not converge on a unified content for specific issues, but rather share certain general features. This divergence arises from the fact that equity is rooted in natural law and is subject to the influence of cultural norms, religious beliefs, social perceptions, and historical contexts. Accordingly, in addition to its ethically objective elements, equity also contains qualitative elements that are shaped by a society's structure and individual viewpoints. From the classical natural law perspective advanced by philosophers such as Plato, Aristotle, and Cicero, equity was regarded as a foundational component of law, derived from natural law and considered its normative basis[5].

2.2. Definition and Characteristics of Equity: A Legal-Historical Perspective

A comparative legal approach reveals that equity has been developed and applied in close connection with the practice of legal science. In ancient Roman law, equity (*aequitas*) appeared in the Corpus Juris Civilis and was described as “the art of law.”[6] The Roman legal conception of equity was transmitted to legal systems such as those of England[7], France, and Germany through com-

4 *Black's Law Dictionary*, ed. Bryan A. Garner, 11th ed. (St. Paul, MN: Thomson Reuters, 2019), 680.

5 Raymond Wacks, *Philosophy of Law: A Very Short Introduction* (Oxford: Oxford University Press, 2006), 4.

6 According to Digest 1.1.1, *bonum et aequum* (Latin) is righteousness, fairness, equality, and justice, these are the core values embedded in the concept of equity. The term appears prominently in the classical definition of law by Celsus: *ius est ars boni et aequi*, commonly translated as “law is the art of what is good and fair”. Read further: Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: American Philosophical Society, 1991), 377.

7 Although the notion of equity was ‘born’ in ancient Rome, it found its most significant development within the Common Law system, which originated in England. Notable ‘products’ of this evolution include Equity Law, the Court of Equity, and the institution of Trusts. See further: Nguyen Ngoc Dien, „The System of Common Law and Equity: Potential Applications for the Use of Equity in Judicial Adjudication in Vietnam” *Journal of Legislative Studies*, no. 1–2 (2023): 473–474.

parative jurisprudence, influencing both adjudication and legislation in these countries[8].

In civil law jurisdictions like France and Germany, equity is treated as part of legal theory and applied in judicial practice. For example, in Germany, the application of equity is heavily shaped by the ideas of Georg Friedrich Puchta (1798–1846), as presented in his *Pandekten* equity is not an obscure, subjective feeling but the rational consideration of the circumstances of a specific case. This understanding requires precise interpretation of the law, forming the basis of the concept of *Einzelfallgerechtigkeit* (justice in individual cases)[9] that characterizes equity in the German legal context.

In Vietnam, the term “lẽ công bằng” (equity) reflects a linguistic particularity, combining “lẽ” (reason, principle) and “công bằng” (fairness). Specifically, “lẽ” refers to what is commonly recognized as reasonable and consistent with moral order[10], while “công bằng” signifies justice, impartiality, and legal fairness[11]. Historically, in the Nguyễn Dynasty’s judicial system, equity was employed in specific cases under the Gia Long Code but remained subordinate to codified provisions. In certain exceptional circumstances, in order to ensure fairness, judicial officials would report a case to the emperor for an *imperial instruction* (*châu phê*) to “decide according to equity.” These decisions, recorded in imperial documents known as “Imperial Records of Nguyen Dynasty” (*Châu bản triều Nguyễn*), held the highest legal authority at the time due to the emperor’s signature and royal seal[12]. Nonetheless, equity in Vietnam has yet to be thoroughly examined or precisely defined in legal scholarship, as it remains a relatively novel principle.

As previously mentioned in the section on definitions, one of the most

8 The level of codification achieved in the Corpus Juris Civilis exerted a profound influence on continental legal systems, notably those of France and Germany. In particular, the Institutiones served as a key doctrinal source for the French Civil Code (Code Civil), while the Digest formed the structural foundation or the very backbone of the German Civil Code (Bürgerliches Gesetzbuch).

9 Renato Beneduzi, *Equity in the Civil Law Tradition* (Cham: Springer Nature, 2021), 141.

10 Institute of Linguistics, *Vietnamese Dictionary* (Hanoi: Social Sciences Publishing House, 1992), 216, 554.

11 *Legal Dictionary* (Ho Chi Minh City: Legal Publishing House, 2006), 108–109.

12 Nguyen Le Thao Ha, „Human Rights and Equity: From Nguyễn Dynasty’s Imperial Archives to International Law”, [in:] *Proceedings of the Scientific Conference on Human Rights in Vietnamese Law*, organized by the University of Finance and Marketing (Hanoi: Finance Publishing House, 2024), 3–12.

notable characteristics of equity that sets it apart from other legal principles is its evolution over time, influenced by prevailing social views. For example, in the law of ancient Mesopotamia the principle of “an eye for an eye, a tooth for a tooth”^[13] was applied only to individuals of equal social status and did not extend to slaves. The influence of natural law on equity in legal systems is further reflected in the classical natural law theory of Thomas Aquinas (1225–1274), who asserted: “An unjust law is not a law at all.”^[14] A key point to note is that the notion of “nature” during this period, which informed the principles of equity and human rights, was often deeply inequitable. For instance, same-sex marriage or homosexuality was considered unnatural^[15]. Thus, what was regarded as good, natural, and equitable in that era would not align with contemporary understandings of fairness and equality.

Rooted in natural law, certain issues in society inevitably give rise to divergent opinions – so many men, so many minds. In the legal context, differences in interpretation and reasoning may lead to inconsistent outcomes, sometimes resulting in injustice when similar cases are adjudicated differently. This challenge has been encountered in jurisdictions with experience in applying equity within judicial practice.

For instance, in ancient Rome, *aequitas* as a component of *ius naturale* (natural law) frequently appeared in the decisions of the praetors^[16]. Rather than applying codified law (*ius civile*), praetors relied on *ius gentium*, a body of principles derived from natural law and regarded as equitable in nature, as expressed in the praetorian edicts. This led to judgments that were often discretionary and inconsistent, thereby diminishing the authority of codified statutes in adjudication^[17].

In England, equity evolved through the Court of Chancery, with decisions rendered by the Lord Chancellor^[18]. These decisions, though aimed at fairness,

¹³ Article 196 and Article 200 of the Code of Hammurabi. See further: Percy Handcock, *The Code of Hammurabi* (London: Society for Promoting Christian Knowledge, 1920), 33.

¹⁴ Wacks, *Philosophy of Law*, 4.

¹⁵ Ibidem, 2.

¹⁶ Praetors in the ancient Roman state were magistrates responsible for matters pertaining to the administration of justice.

¹⁷ Charles P. Sherman, *Roman Law in the Modern World* (Boston: The Boston Book Company, 1917), 59.

¹⁸ Wesley N. Hohfeld, „The Relations between Equity and Law” *Michigan Law Review*, no. 8 (1913): 546.

were at times perceived as overly subjective, giving rise to the adage that “equity varies with the length of the Chancellor’s foot.”^[19]

Similarly, in France, *équité* (equity) used to be employed by judges in a manner reminiscent of the Roman praetorial model. However, the arbitrary invocation of *équité* eventually provoked resistance. King Louis XIV famously proclaimed, “God save us from the equity of Parliament,”^[20] which led to the Saint-Germain-en-Laye Ordinance of 1667^[21] prohibiting judges from departing from codified law, even on grounds of equity^[22]. Consequently, equity was cautiously addressed in the Napoleonic Code of 1804^[23], which “explicitly forbade judges from issuing general normative rules.”^[24]

Thus, owing to equity’s mutable character over time and its inherent subjectivity, legal systems in England, France, and Germany have relied on precedent to stabilize the use of equity in judicial reasoning and ensure the consistent delivery of justice.

2.3. The Functions of Equity

In The Nicomachean Ethics, Aristotle offers a classical definition of equity, noting that legal rules, by their very nature as generalizations, may overlook the infinite variability of real-life circumstances^[25]. Accordingly, in certain cases, strict adherence to the letter of the law may result in injustice. Equity, therefore, serves to particularize the abstract and general character of legal norms. The first essential function of equity, then, lies in its capacity to address the specificities of individual cases by ascertaining the objective truth of a legal dispute and rendering a just decision in situations where the law is silent or deficient. Furthermore, the abstract nature of legal provisions permits judicial flexibility in interpretation and application. However, in order to realize such flexibility, legal rules must be tailored through equity to the circumstances of each case, thereby ensuring their practical enforceability. In some instances,

¹⁹ Gary Watt, *Trusts and Equity*, 6th ed. (Oxford: Oxford University Press, 2018), 6.

²⁰ “Que Dieu nous garde de l’équité des parlements”. See further: Beneduzi, *Equity in the Civil Law Tradition*, 141.

²¹ Louis XIV, *Ordonnance de Louis XIV donnée à Saint Germain en Laye au mois d’avril 1667* (Saint-Germain-en-Laye, 1667). https://numelyo.bm-lyon.fr/f_view/BML:BML_ooGOOo100137001101319999/IMG00000012#titre_complet [accessed: 9.05.2023].

²² Article VI, Saint Germain en Laye 1667.

²³ Beneduzi, *Equity in the Civil Law Tradition*, 131.

²⁴ Article 5 of the Napoleonic Code of 1804.

²⁵ Aristotle, *The Nicomachean Ethics*, trans. J. A. K. Thomson (London: Penguin Classics, 1961), 138–141.

statutory law may prove inadequate in delivering justice to the parties involved. Equity, in such cases, acts to correct the shortcomings of the written law, compensating for the law's inherent generality^[26]. This represents the second essential function of equity within the legal domain.

From the foregoing, the nature and functions of equity in law may be distilled into two core purposes: (1) To address individual circumstances in detail and uncover the objective truth of each case, particularly when statutory law is lacking; (2) To correct or supplement written law to a reasonable extent when its generality renders it incomplete or unjust in specific applications.

3 | The Legal Status and Doctrinal Perspectives on Equity in Contract Law in England, France, and Germany

Although the conception and application of equity differ across legal traditions, a commonality among the English, French, and German systems is the recognition of a designated “space” for equity within the framework of positive law. The extent to which this space is defined and operationalized varies according to the legal structure and interpretive approaches of each jurisdiction. Nevertheless, each system acknowledges and upholds the core functions of equity in legal reasoning and adjudication.

3.1. Equity in England: From a Remedy for the Rigidity of Case Law to Equity Law

Equity has been extensively developed in England and evolved into equity law, which operates alongside the common law. Equity is primarily embedded in judicial decisions and forms part of case law. Historically, equity and common law were often seen as conflicting, if not mutually exclusive, sources of law. In situations where the common law was deficient, equitable principles would prevail^[27].

In modern English legal thought, the relationship between equity and statutory law is characterized by mutual influence. Legal scholars such as Gary Watt have emphasized this interdependence, concluding that “common law and equity are mutually dependent aspects of all law.”^[28] He further explains

²⁶ Aristotle, *Nicomachean Ethics*, 141.

²⁷ Hohfeld, „The Relations between Equity and Law”, 540.

²⁸ Watt, *Trusts and Equity*, 13.

that “neither law nor justice today is restrained by its origin, and the fact that both are now administered by a single court inevitably means that each has borrowed from the other to foster the harmonious development of the law as a whole”[29]. Currently, the application of both common law and equity is governed by Sections 49 and 50 of the Senior Courts Act 1981. These provisions affirm that in the event of a conflict between equitable and common law rules, equity shall prevail. In such circumstances, the reasoning of the court will often draw upon case law and established doctrines to ensure a just outcome.

The prioritization of equity is a defining feature of English law, and it helps explain how English courts have remained responsive to the dynamic complexities of modern society. A notable illustration is the landmark case *Uber BV and others v. Aslam and others*, in which the Supreme Court recognized Uber drivers as “workers”[30] within the meaning of labour law. This decision was rendered within the broader context of the gig economy, where companies like Uber, Grab, and others had designated their drivers as “partners,” implying equality between parties. However, the Court’s analysis looked beyond the contractual language and instead examined the substance of the relationship. It held that the actual working conditions and the level of control exerted by the platform indicated a dependent employment relationship rather than a genuine partnership. Equity thus enabled the Court to transcend the formal wording of the contract to identify the true nature of the legal relationship, thereby protecting the rights of the weaker party in an imbalanced contractual setting. Furthermore, the equitable reasoning embedded in the judgment now serves as binding precedent for future analogous cases. It highlights how equity functions not only as a corrective to legal formalism but also as a source of principled, precedent-based adjudication.

3.2. France and the Effort to Integrate *Équité* into Jurisprudence as an Instrument for Refining Codified Law without Undermining Its Flexibility

France represents a prominent example of a Civil Law jurisdiction in which codified statutes are the primary source of law, similar in many respects to the Vietnamese legal system. In the French legal framework, *équité* (equity) is

²⁹ Ibidem, 6.

³⁰ United Kingdom Supreme Court, *Uber BV and Others v. Aslam and Others*, judgment of 19 February 2021, <https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf> [accessed: 2.07.2023].

recognized not as an autonomous source of law but as a legal principle, particularly relevant in addressing the issue of *déni de justice* (denial of justice).

This is codified in Article 4 of the French Civil Code, which provides that a judge who refuses to adjudicate on the grounds of legislative silence, ambiguity, or insufficiency may be held liable for denying justice. However, Article 5 of the same Code imposes a strict limitation: judges are prohibited from making decisions by creating general or normative rules. Furthermore, Article 12 of the French Code of Civil Procedure mandates that judges must resolve disputes in accordance with the applicable legal rules.

As such, equity in the French system is applied within a rigorously constrained framework. It is not to be invoked arbitrarily, but only in strict compliance with existing legal provisions, thereby tempering the discretionary and qualitative nature typically associated with equitable reasoning[31].

French jurisprudence has consistently held that equity is not an independent source of law. Any judgment that relies on equity as a legal basis may be overturned on appeal or cassation. For example, in Cour de cassation, civile, Chambre civile 1, 28 février 2018, 17-11.791, Inédit[32], the Paris Court of Appeal based its ruling on the equitable notion of “reasonable consideration” under Article 700 of the French Code of Civil Procedure[33]. However, this notion of “equity” runs counter to the provision of Article 700 of the French Code of Civil Procedure. Accordingly, the application of equity in this context also contradicts Article 12 of the same Code. Therefore, the Court of Cassation is entitled to adjudicate the appeal on the basis that equity does not constitute a formal source of law under the applicable legal framework.

Nevertheless, equity continues to play a supplementary role within the French contract law system, particularly where specific statutory provisions

31 Equity is not recognized as a formal source of law in France. Legal rules derive from various sources, which are organized in a hierarchical order: the Constitution, international treaties, European Union law, statutes (*lois*), regulations (*règlements*), case law (*jurisprudence*), custom (*coutume*), legal doctrine (*doctrine*), and contracts. See: Vie Publique, *Les sources du droit – Droit et grands enjeux du monde contemporain*. <https://www.vie-publique.fr/dossier/274624-les-sources-du-droit-droit-et-grands-enjeux-du-monde-contemporain> [accessed: 19.02.2025].

32 Cour de cassation, 1^{re} chambre civile, judgment of 28 February 2018, no. 17-11.791, Inédit, <https://www.legifrance.gouv.fr/juri/id/JURITEXTTOOOO36697132/> [accessed: 7.09.2026].

33 Article 700 of the French Code of Civil Procedure grants judges the discretion to “reasonably assess” the allocation of legal costs between the parties.

explicitly allow for its consideration. A key example is Article 1231-5 of the French Civil Code, which permits judicial adjustment of contractual penalty clauses. While the parties are free to determine the amount of such penalties, the court may reduce or increase the stipulated amount where it deems the clause to be manifestly excessive or insufficient. This mechanism provides judges with a legal basis to restore contractual balance and ensure fairness, especially in asymmetrical contractual relationships such as consumer contracts or insurance agreements in which one party is structurally disadvantaged.

This approach enables courts to uphold substantive justice while remaining within the boundaries of codified law. An illustrative case is Cour de cassation, civile, Chambre civile 3, 5 septembre 2024, 23-19.492, Inédit^[34], where the court invalidated a contractual penalty clause that had been upheld by the appellate court, citing the lack of consideration for Article 1231-5 and the disproportion between the stipulated penalty and actual damages.

In practice, lower courts in France routinely consult jurisprudence, i.e., higher court decisions as persuasive authority. While equity is not a formal source of law, it operates within the interpretive framework formed by written law, legal doctrine (*doctrine*), and judicial precedents. In this context, *équité* is best understood as a doctrinal tool rather than an autonomous legal foundation, supporting the interpretive coherence and fairness of judicial decisions.

3.3. Einzelfallgerechtigkeit: The Concept Governs the Notion of Billigkeit in German Law

In the German legal system, equity (*Billigkeit*) functions as an integral component in the refinement and supplementation of civil law. The German Civil Code (Bürgerliches Gesetzbuch – BGB) is renowned for its detailed, codified structure and systematic precision in regulating private law relationships. However, even the BGB cannot fully overcome the limitations inherent in the language of written law when faced with complex and evolving social realities. Thus, equity plays a complementary role in filling interpretive gaps and ensuring justice in specific cases. German legal scholarship, shaped by a tradition of meticulous legal reasoning, has developed the concept of *Einzelfallgerechtigkeit*, which means “justice in individual cases,” as a doctrinal expression of equity. This concept reflects the imperative that each legal matter must be adjudicated fairly and

³⁴ Cour de cassation, Chambre civile 3, judgment of 5 September 2024, no. 23-19.492 (Inédit). <https://www.legifrance.gouv.fr/juri/id/JURITEXT000050221502> [accessed: 6.04.2025].

reasonably, with careful attention to its specific factual circumstances[35].

In practice, the BGB incorporates equity in two principal forms: (1) Statutory provisions explicitly referencing *Billigkeit*, which authorize judges to decide based on fairness and reasonableness; and (2) Provisions using the phrase *nach billigem Ermessen* (according to equitable discretion)[36], which grant the court the authority to apply equitable considerations in the exercise of legal discretion.

Regarding the hierarchy of legal sources in Germany, equity embodies a synthesis of statutory law and custom. German law recognizes both written legislation (*Gesetz*) and general customary law (*Gewohnheitsrecht*)[37] as sources of law, with judicial precedent (*Rechtsprechung*) occupying a persuasive, though non-binding, role. Nonetheless, decisions of the Federal Court of Justice (Bundesgerichtshof – BGH) and other higher courts often attain de facto authoritative status, thereby serving as stabilizing references in the application of equity.

When the BGB was first promulgated, certain provisions appeared to confer broad discretionary powers on judges. Over time, however, the German legal system developed methods to transform the qualitative nature of equity into a more objective, structured reasoning process in judicial practice. For instance, Section 138(1) BGB invalidates legal transactions that violate public morality (*gute Sitten*), though it does not expressly mention *Billigkeit*. Nevertheless, German courts have interpreted “immorality” as intrinsically tied to equitable considerations. A landmark case, RG, 11 April 1901 – Rep. VI. 443/00[38], defined immorality as conduct that offends “the sense of justice of all those who think fairly,” thereby infusing the notion with an equity-based standard. Such examples underscore the role of equity in addressing legislative vagueness and supporting principled adjudication through precedents grounded in *Einzelfall-gerechtigkeit*.

Equity in Germany not only serves to remedy statutory deficiencies but also facilitates the interpretation of legal provisions in a just and context-sensitive manner. A notable case is LAG Baden-Württemberg, 15 October 2021 – 9 Sa

35 Beneduzi, *Equity in the Civil Law Tradition*, 141.

36 Ibidem, 142.

37 University of Minnesota Law School, Law Library, *Germany – Brief Research Guide to Key Resources on the Law of Germany*. <https://libguides.law.umn.edu/c.php?g=125785&p=823421> [accessed: 15.10.2024].

38 RG, judgment of 11 April 1901, Rep. VI. 443/00. <https://rgz.staatsbibliothek-berlin.de/judgments/48%2Frgre048029114> [accessed: 15.10.2024].

59/20[39], decided by the regional labour court of Baden-Württemberg. In this decision, the judge evaluated the proportionality of a contractual penalty by considering its punitive nature and its deterrent effect against future breaches. The evaluation was based on the severity, scope, and potential harm of the violation. Through a rigorous interpretation of statutory language and the application of equitable reasoning, the court achieved a fair and legally sound outcome.

Accordingly, German law does not regard equity as a vehicle for arbitrary decision-making, but rather as *billiges Ermessen* – a principled exercise of equitable discretion – to realize justice in concrete cases, consistent with the ideal of *Einzelfallgerechtigkeit*.

4 | The Regulation of Equity in Vietnamese Civil Law and the Need for its Application in Contract Law

4.1. Legal Provisions on Equity in Vietnamese Law

Equity was first officially acknowledged in Vietnamese law under the 2015 Civil Code (Bộ luật Dân sự) and the 2015 Civil Procedure Code (Bộ luật Tố tụng Dân sự), where it was introduced as an independent method of legal reasoning. Although Vietnamese law does not provide a formal definition of equity, it offers a descriptive framework under Clause 3, Article 45 of the 2015 Civil Procedure Code, which states: “equity shall be determined based on principles generally accepted by the society, conforming to humanitarian values, impartiality, and the equal rights and obligations of the parties involved in the civil matter.”

Under this framework, equity is deemed an available legal basis for resolving civil disputes that fall under Clause 2, Article 4 of the Civil Procedure Code, which prohibits courts from refusing to adjudicate on the ground that there is no applicable legal provision. In such instances, courts are authorized to resort to fundamental principles of civil law, precedent, and equity[40]. These references are supported by Article 3 and Clause 1 of Article 5 of the 2015 Civil

³⁹ LAG Baden-Württemberg, judgment of 15 October 2021, 9 Sa 59/20, Landesrecht BW. <https://www.landesrecht-bw.de/bsbw/document/NJRE001495630> [accessed: 15.10.2024].

⁴⁰ Clause 2, Article 6 of the 2015 Civil Code and Clause 3, Article 45 of the 2015 Code of Civil Procedure.

Code, which address analogous application and the use of equity.

From these provisions, several key features of equity in the Vietnamese legal system emerge: (1) equity may be applied to all civil legal relationships; (2) equity serves a limited function in resolving cases where the law is silent (*non liquet*), as stipulated under Clause 2, Article 4 of the Civil Procedure Code; (3) equity is ranked as a last-resort source of law. Consequently, equity may not be used concurrently with other legal sources when resolving legal issues.

4.2. Existing Issues Regarding Equity in Vietnam and Comparative Lessons from England, France, and Germany

From the current legal framework, it is evident that the hierarchical limitation on the application of equity poses a significant obstacle to the full realization of its inherent and necessary functions. In the author's view, this limitation originates from the absence of a formal definition of equity in Vietnamese law, which has led to confusion about its legal nature and function. The following points highlight some of the key inadequacies in how equity is currently recognized in Vietnamese civil law in general, and its implications for contract law in particular:

First, a precise definition of equity is essential for standardizing its application and facilitating its invocation during adjudication.

At present, very few judgments explicitly invoke equity as a legal source in accordance with Clause 3, Article 45 of the 2015 Civil Procedure Code. However, instances of misapplication have occurred due to conceptual confusion, leading to the reversal or annulment of decisions. A case in point is Decision no. 03/2022/KDTM-GĐT dated 22 March 2022, issued by the Supreme People's Court of Vietnam concerning a construction contract dispute⁴¹. The trial court improperly applied equity to an issue that had already been contractually agreed upon by the parties, thereby violating Clause 3, Article 45. As a result, the judgment was annulled.

Similarly, in Decision no. 02/2021/DS-ST dated 14 April 2021, issued by the

⁴¹ Decision no. 03/2022/KDTM-GĐT dated 22 March 2022 of the Supreme People's Court. <https://anle.toaan.gov.vn/webcenter/portal/anle/chitietnguonanle?dDocName=TAND284154> [accessed: 2.12.2025].

Gia Lai Provincial People's Court^[42], the court determined a 30% contribution rate based on equity, without providing a clear rationale for such a quantification. The prosecutorial opinion also relied on equity but failed to substantiate the basis for the 25–30% figure cited. These examples reveal that, in the absence of a clear definition, the application of equity remains highly subjective and lacks coherent reasoning.

Second, there is a need to recognize equity as a “fundamental legal principle” that can serve to protect weaker parties in contractual relations.

As currently framed in the 2015 Civil Code and Civil Procedure Code, equity is primarily treated as a supplementary source of reference. However, in practice, it should also function as a fundamental legal principle – such as those enumerated in Article 3 of the 2015 Civil Code. In the context of contract law, these fundamental principles emphasize respect for party autonomy and the preservation of contractual obligations. Nonetheless, in certain contracts – particularly insurance, labor, and consumer contracts – imbalance and unfair terms may still arise despite statutory safeguards.

For example, Clause 3, Article 418 of the 2015 Civil Code allows parties to freely negotiate both penalties and compensation for contractual breaches. Compensation is not automatically granted to the aggrieved party. This provision may be exploited in contracts of adhesion or those involving structurally disadvantaged parties. In such cases, courts should be empowered to adjust the penalty amount to prevent injustice^[43].

In this regard, France offers a useful legislative model. As discussed earlier, Article 1231-5 of the French Civil Code authorizes judges to intervene and adjust disproportionate penalty clauses to restore balance. Similarly, Vietnamese judges should be empowered through the application of equity to override party autonomy where it leads to significant contractual imbalance or inequal-

⁴² The parties agreed for one party to hold title on their behalf, with a written commitment; however, one party refused to return the property. As a result, the court took into account the contribution of the party holding the title and ruled that the property be returned to its rightful owner, the true owner of the disputed real estate – Decision no. 02/2021/DS-ST dated 14 April 2021 of the Gia Lai Provincial People's Court, https://congbobanan.toaan.gov.vn/5ta701326t1cvn/BA_Ha_Hung_2021.pdf [accessed: 2.12.2025].

⁴³ Du Ngoc Bich, „Comments on the Contract Penalty Clause and Its Relationship with Damages in the Draft Revised Civil Code” *Journal of Democracy and Law* (2015), <https://tedcpl.moj.gov.vn/qt/tintuc/Pages/xay-dung-phap-luat.aspx?ItemID=186> [accessed: 16.06.2025].

ity.

Third, there is a growing necessity to apply equity in cases where the law contains provisions that are vague or insufficiently detailed.

The current hierarchy of legal sources does not permit equity to be applied in cases where a legal provision exists, even if it lacks clarity. Under Clause 3, Article 45 of the Civil Procedure Code, equity is to be applied only when there is no applicable law. Yet there are circumstances, especially in contractual interpretation, when statutory language is imprecise and the parties' agreement lacks clarity. These situations could be effectively resolved by recourse to equitable reasoning.

A relevant example is the aforementioned Uber case in the United Kingdom. Despite the contractual designation of Uber drivers as "partners", the court relied on equitable principles to analyze the substantive reality of the employment relationship, thereby protecting the weaker party.

In the Vietnamese context, Clause 1, Article 2 of the 2019 Labour Code defines "persons working without an employment relationship" as those not hired under a formal labour contract. Thus, technology-based drivers (e.g., Uber, Grab) are often considered partners rather than employees. Even if the employment reality suggests otherwise, the mere existence of a statutory provision, however vague, combined with the parties' agreement prevents the court from applying equity. This restrictive interpretation of Clause 3, Article 45 significantly limits the remedial potential of equity.

Germany offers a contrasting approach. In BGH Decision X ZR 93/15 dated 31 January 2017, the Federal Court of Justice employed judicial discretion to interpret vague statutory provisions in light of equity. Moreover, the earlier RG precedent of 1901 (Rep. VI. 443/00) exemplifies the use of equity as a flexible principle grounded in judicial practice.

5 | Suggestions and Conclusion

One of the most significant similarities between Vietnam and the legal systems examined in this study lies in the shared orientation towards building a rule-of-law state. In Vietnam, the establishment of a socialist rule-of-law state is a long-term objective, necessitating the feasibility and stability of the legal

system^[44]. It can be said that, in order for the law to possess the necessary stability amid the unpredictable transformations of social reality – particularly in the field of contract law, which serves as the “cornerstone” of most civil relations – equity is an essential tool that enables the law to adapt to and meet the demands of contemporary development. From this line of reasoning, several recommendations for Vietnam, derived through the lens of comparative legal scholarship, are proposed as follows:

a) Promote Research to Define the Concept of Equity

In practical application, the absence of a clear and express definition of equity has caused difficulties in both interpretation and application. Therefore, one of the initial and essential steps towards improving the legal institution of equity is to promote research aimed at defining this referential legal source. According to Professor Dr. Nguyen Ngoc Dien, “once equity is deemed a normative standard external to codified law yet is shaped through codified law, it risks being confined by that very codification.”^[45] Accordingly, “Written law should merely formally acknowledge the application of equity as a supplementary normative standard; the formulation and refinement of the concept of equity, as seen in England and many other countries, is the task of legal scholars and practitioners.”

As evidenced in Germany, the historical case RG, 11.04.1901 – Rep. VI. 443/00, which was analyzed earlier in this article, plays a paradigmatic role in interpreting and defining equity and remains a citation-worthy precedent to this day. Based on this foundation, the author proceeds to the second recommendation.

b) Establish Legal Conditions to Increase the Availability of High-Quality Case Law Reflecting Equity

A comparative study of the practical application of equity shows that legal systems such as those of England, France, and Germany highly value the use of judicial precedents as a means of ensuring legal certainty in adjudication, particularly concerning qualitative legal principles such as equity. In these systems, case law originates from decisions of higher courts, which fosters a tradition of citation by lower courts. Hence, the number of decisions from higher courts corresponds to the volume of applicable precedents.

⁴⁴ Resolution no. 27-NQ/TW, dated 9 November 2022, of the 6th Plenary Session of the Central Committee of the 13th Party Congress on “Continuing to Build and Perfect the Socialist Rule of Law State of Vietnam in the New Era”.

⁴⁵ Nguyen Ngoc Dien, „The System of Common Law and Equity”, 475.

Moreover, cited precedents often contain well-reasoned interpretations of legally binding decisions. As mentioned in the first recommendation, the legal framework should empower judges to perform interpretative functions in law, thereby advancing the “definition” of equity in specific cases. Thus, it is essential to establish a legal framework outlining the specific conditions under which equity may be applied in the domain of contract law, thereby guiding judges in their deliberations and facilitating the development of equity-based case law.

c) Develop “Equity Precedents” that Meet the Requirement of Explicitness

With respect to current regulations on the selection and publication of precedents in Vietnam, Resolution no. 04/2019/NQ-HĐTP has opened a promising pathway for the development of equity-based case law. However, this direction has yet to be fully implemented or effectively operationalized. In practice, the number of precedents remains limited and does not adequately cover various legal relationships and issues, particularly in the field of contracts.

In terms of equity-related precedents, Clause 1, Article 2 of Resolution no. 04/2019/NQ-HĐTP^[46] stipulates that selected precedents must reflect equitable considerations in cases not yet governed by law. Accordingly, to constitute a precedent based on equity, the case must meet this requirement, fall under the situations described in Clause 2, Article 4 of the 2015 Civil Procedure Code (CPC), and comply with the legal application rules set forth in Clause 3, Article 45 of the CPC. Unlike the jurisdictions examined, Vietnamese case law is not “full precedent,” i.e., the entire judgment is not treated as binding precedent; only the specific legal solution within the judgment is considered precedent.

Therefore, the application of equity-based precedents necessitates the presence of explicit keywords indicating equitable elements, in accordance with Point (đ), Clause 2, Article 7 of Resolution no. 04/2019/NQ-HĐTP, which requires published precedents to include “keywords reflecting the legal situation and legal solution in the precedent”^[47].

Currently, equity-related published precedents often lack clearly stated keywords, contrary to the provisions of the aforementioned Resolution. Identifying equity in such cases typically relies on scholarly papers analyzing case law

⁴⁶ Resolution no. 04/2019/NQ-HĐTP, dated 18 June 2019, of the Council of Judges of the Supreme People’s Court on the Process of Selecting, Announcing, and Applying Precedents.

⁴⁷ Nguyen Thi Minh Hue, „Application of Equity in Precedent no. 04/2016/AL and Precedent no. 07/2016/AL” *Journal on Legal Professions*, no. 8 (2020): 57.

or on interpretative reasoning embedded within judicial arguments, without any overt indicators such as keywords or statutory references.

In particular, given the increasing integration of information technology and artificial intelligence into judicial activities, especially the development of AI-powered tools such as Virtual Assistants for Judges – accuracy in keyword usage becomes imperative. These technologies require precise search parameters, making keywords the “key” to the effective and accurate application of equity in line with current regulations on precedent selection and publication.

Additionally, given the inherently qualitative nature of equity, its application requires sound legal reasoning and interpretative elaboration, which should be tailored to the facts of each case. Under the principle that “similar legal situations must be resolved similarly,”^[48] the use of equity serves to concretize legal standards, thereby enhancing the predictability and referential value of judicial decisions in comparable cases. This approach has long been practiced in the adjudication traditions of France and Germany and has contributed to the development of a stable judicial culture. Furthermore, the role of case law in shaping and developing equity in Germany between 1800 and 1945^[49] demonstrates the scholarly and legislative value that detailed and specific case law can provide. From this comparative perspective, equity-based precedents must be robustly developed in Vietnam.

d) Recognize Equity as a Fundamental Legal Principle of Civil Law

In addition to its role as a “source of law,” it is evident that statutory provisions and existing legal principles are constructed on a foundation of equity. Therefore, recognizing equity as a fundamental principle of civil law would support judicial reasoning, promote consistency in legal interpretation, prevent misinterpretation of statutory provisions, and ensure both legal coherence and substantive justice. However, this recognition must be based on a thorough understanding of the definition, nature, and scope of equity.

e) Fully Acknowledge and Implement the Functional Role of Equity

Given the practical needs and current legal context in Vietnam, the full recognition and implementation of the functional role of equity would address inherent limitations of codified law as identified in the first section. Specific benefits include:

- Enabling the application of equity through mechanisms tailored to specific

⁴⁸ Clause 2, Article 8, Resolution no. 04/2019/NQ-HĐTP.

⁴⁹ John P. Dawson, *The Oracles of the Law* (Ann Arbor: University of Michigan Law School, 1968), 432–433.

legal relationships, particularly in the realm of contract law. For instance, in cases involving the interplay between compensation and contractual penalties, equity may prevent the mechanical application of contract terms where injustice is evident. Judges can invoke equity to avert unjust outcomes and uphold justice.

- Addressing situations where statutory provisions exist but remain ambiguous, leading to legal dilemmas in which the law is insufficient, precedent is lacking, and the conditions for invoking equity under “unregulated by law” are unmet.

In conclusion, based on a comparative legal study of the presence and application of equity across legal systems in both the Common Law and Civil Law traditions, the five recommendations outlined above represent urgent and essential steps toward the improvement of Vietnam’s civil law system – especially in the domain of contracts, which serve as the foundational framework for most civil relations and a vital instrument for national economic stability and international integration.

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