

# Challenging the Assumption of Asset-Security Privileges: Some Thoughts?

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# Reasons to Like Security

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Greater Protection

Priority (including Legal over Equitable)

Carving Out (separate secured and general pools)

Over-Securing

In Rem Right (access to object or equivalent)

Tracing into 3P Hands

# Reasons not to Like Security

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Costs (Imputed to Debtor)

Loss of Priority (Equitable (Moveable) Charges

Subordinated): *Re Spectrum Plus*; (Statute): s176A IA 1986

Negative Pledge Clauses Ineffective

De Jure Merger of Pools (IPs/Courts retaining collateral)

De Facto Merger of Pools (*Quistclose*)

Tracing Difficult

Breach of *Pari Passu*

# Path Dependency?

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Security is Ancient/Good/Effective

The View of the International Institutions:

- Access to Finance Enabled

- Registration Systems instituted

- Collateralisation of Assets promoted

Reforms to Asset-Security Frameworks Prevalent

Competition between Civil/CL/US Methodologies

# “Alternative” Strategies/Adjustments

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Write-Offs/Tax Breaks

Higher Interest/Punitive Conditions

Personal Guarantees

Mostly, in addition to conventional in rem security

Only adjustments:    restrictions on types of collateral  
                              delays to enforcement/recovery  
                              subordination

# Real “Alternatives”

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Reconceptualising Ownership: no more *meum et tuum*

Islamic Finance Model:

shared investment/risk: *musharakah* (joint investment); *murabaha* (agreement as to cost and markup: i.e. shared profits from increase in values), but *riba'* (no excessive interest)

influenced trusts law; “clogs and fetters”; equity of redemption etc.

# The Way Forward

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Is conventional security here to stay?

No harmonised treatment of security or priorities (creates comparative advantages and “forum-shopping”; also ties security types/availability to sources of credit, hence preference for US/CL)

But: new assets, new models?

Subjection of crypto-assets to property/security rules problematic

