

# EQUITY AND LAW

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In early law the primary concern is peace and security, and considerations of what is fair and just in each case must yield to the imperative need for social order. Early law consists of rules for exactly defined states of fact. The Laws of Ethelbert, the oldest monument of English law, after fixing an exact money reparation for every detailed injury to life or limb, added "for every nail a shilling". Early law, as Del Vecchio has said, is primarily concerned with fixing into a constant the common characteristics of facts and acts which in reality are widely different<sup>1</sup>. Cases are fitted to the rules by eliminating from consideration factors which introduce variations from the typical situations for which the rules are designed, especially factors which involve moral considerations, which the rules deem irrelevant<sup>2</sup>. As late as the thirteenth century the Siete Partidas provided that "laws should nott be made on matters that seldom occur"<sup>3</sup>. In this stage of the evolution of law the rules, because of their generality, operate at times at the sacrifice of justice in cases which vary from the ordinary situations.

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<sup>1</sup> *The Crisis of the Science of Law*, 8 "Tulane L. Rev.", 321, 324 (1934).

<sup>2</sup> I POUND, *Jurisprudence*, 400 (1959).

<sup>3</sup> *Las Siete Partidas*, Part VII, last law (A.D. 1263, Scott transl. 1931)

Since very early in legal history the impulse toward the humanization of law has been an almost universal phenomenon of man's search for justice. At first, humane advances in the law originate outside the established legal order, and relief from the harsh effects of the rules of law in particular cases comes in the form of royal dispensation<sup>4</sup>. Ultimately, in most legal systems, the precedents of mitigation cast aside their character of equitable relief and become a part of the legal system. There are, however, many systems in which equity and law have for long periods continued to constitute parallel streams in the total jurisprudence. This was true in early Roman law<sup>5</sup>, in canon law up to the fourteenth century<sup>6</sup>, in Frankish law<sup>7</sup> in medieval Spanish law<sup>8</sup>. In France the reception of

<sup>4</sup> Hammurabi described himself as "the shepherd chosen by the gods to care for his people...and... to succor the injured". Cowley 16, an Aramaic papyrus of cir 435 B.C., is a petition to Arschem, the Persian satrap of Egypt, by an aggrieved person who is asking for the intervention of the royal representative in his behalf. The last line reads "Let wrong not be done to me". In the third century A.D., Constantine "very frequently alleviated, by partial acts mercy, the stern temper of his general institutions". 1 GIBBON, *The Decline and Fall of the Roman Empire* (ed. Everyman) 376. As late as the thirteenth century we find Louis IX of France referring to himself as the Fountain of Justice; DUCHÉ, *L'Histoire de France*, 171 (1954).

<sup>5</sup> See LENEL, *Das Edictum Perpetuum* (3rd ed. 1927); PRINGSHEIM, *The Legal Policy and the Reforms of Hadrian*, 24 "Jour. Roman Studies" 141, 143 (1943); JOLOWICZ, *Historical Intro. to the Study of Roman Law*, 83-99 (1939).

<sup>6</sup> Until the beginning of the fourteenth century, canon law was administered at the Episcopal See at Rome in two courts; the Signatura Justitiae and the Signatura Gratiae. Equity was an extraordinary remedy, S.R.R. *Decisiones*, Roma, tome 5, 193; see LEFEBVRE, *Le Rôle de l'équité en droit canonique*, 7 "Ephemerides iuris canonici" 137, 151 (1951). In the fourteenth century a series of Papal decretals transferred the function of relief in cases of extreme hardship, until that time administered in the Signatura Gratiae, into the system of law administered in the Signatura Justitiae, The signaturae of the Roman Curia were not duplicated in the diocesan curiae. See also LEFEBVRE, *Recours à l'office du juge*, "Dictionnaire de droit canonique", fas xxxi, col. 208 (1954).

<sup>7</sup> Toward the end of the eight century there was for a time a separation of Frankish law from Königsrecht, 1 BRUNNER, *Das Deutschen Rechtsgeschichte*, 528 (1892).

<sup>8</sup> *Las Siete Partidas* (A.D. 1263), Part III, tit. 4, law 23. A distinction existed in medieval Spanish law between arbitrators of law and amicable compounders, "amigables compondores", who were to decide the controversy in any way they deemed proper.

equity by the Conseil d'Etat is still in a developing stage<sup>9</sup>. In England the legal system split asunder in the mid-fourteenth century, and since that time equity and law in that country have flowed in separate channels<sup>10</sup>. There and in the countries into which the common law has penetrated through conquest or colonization, equitable doctrine is largely confined to actions for specific relief, as distinguished from actions for money damages. The protracted separation of equity from law in the English speaking parts of the world has had the unfortunate consequence of severely limiting the humanizing influence of equity upon law. In Roman law the principles of equity were applied in the courts of the praetor peregrinus for many centuries as a separate system of law and were ultimately incorporated, in the reign of Hadrian, into the main body of the Roman law. In legal systems of the Orient and in Scandinavian, Hungarian and Soviet law the principles of equity passed directly, without any transitional stage of separate administration, into the main body of the law. From the twelfth to the eighteenth centuries most of the nations of continental Europe fell heir to a unitary system of Roman law<sup>11</sup>. In the final stage of the evolution of law, when the reception of the principles of equity into the legal norms has become well advanced, the principles of equity lose their separate identity, and equity and law coalesce. Although the irresistible demand for the humanization of law has led in Anglo-American law to the absorption of considerable equitable doctrine into the main body of the law, the process of absorption is even today far from complete. The difference in the treatment of equity in Anglo-American law and in the civil law is that in Anglo-American law the principles of equity are generally limited to actions in which the available remedy is specific relief, and thus are not applied in all circumstances in which they are relevant; in the civil law the principles of equity are applied wherever they are relevant without regard to the form of the remedy. In the Anglo-American legal system the essential

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<sup>9</sup> See DRAGO, *The General Principles of Law in the Jurisprudence of the French Conseil d'Etat*, 11 "American Univ. L. Rev.", 126, 127 (1962).

<sup>10</sup> I have described this process in NEWMAN, *Equity and Law: A Comparative Study*, c. 2 (1961).

<sup>11</sup> SOHM, *Institutes of Roman Law*, intro. xxii (3rd. ed. 1892); 3 PLANIZ, *Deutsches Privatrecht* 7 (1948); EISENHART, *Grundsätze des deutschen Rechts in Sprüchworten* (1792); KOSCHAKER, *Europa und das römische Recht* (2nd ed. 1958) 45.

problem is to receive the principles of equity as an integral part of law. In unitary legal systems such as the civil law the essential problem is to recognize the precise nature of the principles of equity which have already become an integral part of the legal structure of those systems.

Twenty-three centuries ago Aristotle saw the need of a force to correct the inadequacies of law in particular cases<sup>12</sup>. He called this force *epieikeia*, which to the Greeks of the fourth century meant clemency, and which we translate by the word "equity". Aristotle's view of this corrective force as emanating from a source outside the law was natural in the context of his place and time. His strong sense of justice rebelled against the inflexible rules of law, incapable of adjustment to the ends of justice as demanded by the circumstances of each case. His acceptance of a dichotomy between equity and law was strongly influenced, as was his whole philosophy, by the Greek craving for balance in all things. The distinction between legal rules to be applied without variation, and equitable principles to be flexibly adapted to insure just results in all cases, has continued to present one of the most baffling problems of legal philosophy.

Greek philosophy was unable to solve the problem of altering the law from within. That the separation of equity and law is not, however, inevitable even in the early stages of the evolution of law is demonstrated by the legal system of a neighboring civilization two centuries before the age of Aristotle. The scriptural writings of Israel since the sixth century before the Christian era reveal a philosophy of law in which compassionate justice was an integral part of the divine law, which was later, in the year 444 B. C. in the reign of Nehemiah, to become a part of the secular law. The law of Israel has always recognized that law is composed of both justice and mercy. Isaiah expressed the inseparable relation of equity and law in his statement that when righteousness, "nekoah", cannot enter the market place, justice, "mispat", is turned away<sup>13</sup>.

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<sup>12</sup> ARISTOTLE, *Laws*, Bk. 10, c. 5: "Equity is the correction of law when the law is defective owing to its universality".

<sup>13</sup> ISAIAH 59.14 is the version in the King James bible. The Soncino edition of the bible is closer to the original Hebrew text; see ISAIAH, *Soncino Books of the Bible*, 290 (1949).

Isaiah thought of equity as an integral component of law, and thus identified law with morality. The difference between the approach of Aristotle and that of Isaiah to the nature of equity is very probably due to the fact that although in both Greece and Israel law and religion were identified with one another<sup>14</sup>, the Greek gods were as immoral as the human beings after whose image they were modeled, whereas throughout the history of Israel, religion has been identified with morality<sup>15</sup>. From the concept of a benevolent God who is concerned with the welfare of His people flowed the concept of the brotherhood of men, created in His image. In the law of Israel the reconciliation between law and equity came about not through the correction of law by an outside force but through the effect of the presence of moral elements within the law itself. The biblical command to do that which is right and good in the sight of the Lord is strikingly similar to the basic concept of Roman law that law is "ars boni et aequi" - the art of equity.

The word "equity", which finds its counterpart in many legal systems, is used in various senses. In both of the two great master systems of the western world, civil law and common law, it is used in the general sense of what is fair and just<sup>17</sup>. In this sense equity is identical with law, since in modern times the goal of all law is to achieve justice. Such a definition is therefore of no significance in legal systems in which the function of equity has changed from mitigation of strict law to the humanization of law by incorporating the principles of equity into the law itself. In Anglo-American law the word "equity" is also used to describe an inner legal system

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<sup>14</sup> This identification of law and religion was common to all ancient societies; see FUSTEL DE COULANGES, *La Cité Antique*, 480 (1870); "Among the Persians and the Hindus, the Jews, the Greeks, the Italians and the Gauls, the law was found in sacred books or in religious tradition". MAINE, *Ancient Law* (ed. 1906) 18; "Views of religion are mixed with views of law". "Priests are often the judges", POST, *Ethnologische Jurisprudenz* II, 511. As late as 1190 A.D. the clergy of Normandy claimed a general jurisdiction over breaches of faith and violations of oaths, FRY, *Specific Performance and Laesio Fidei*, 5 "Law Quarterly Rev." 235, 239 (1889).

<sup>15</sup> *Psalms* 119.64; "The earth, O Lord, is full of thy mercy; teach me thy statutes". *Psalms* 25.10; "All the paths of the Lord are mercy and truth".

<sup>16</sup> *Dig.* 1.1.1, pr. 1.

<sup>17</sup> AUSTIN, *Jurisprudence*, 640 (1879); AMOS, *The Legal Mind*, 40 "Law Quarterly Rev.", 27, 30 (1933).

which applies criteria of justice based on higher moral values than are applied in the greater part of Anglo-American law<sup>18</sup>. It is primarily in cases in which the obligation of one of the litigants is enforceable by the remedies of specific performance or injunction, as distinguished from money damages, that the higher moral values of equity constitute, in Anglo-American law, the basis of judicial decision. The reason for this dual standard of moral values, which strikes so discordantly the ear of the civilian jurist, lies in events of remote English history which led to the separation of English law into two inner systems<sup>19</sup>. These inner systems, equity and common law, were administered for many centuries in separate courts. Even today, when both types of relief are commonly administered in a single court throughout almost all of the English speaking world, deeply entrenched habits of legal thought have built a psychological wall down the middle of what is now a single court<sup>20</sup>, so that the application of the higher standards of values of equity is still confined to a relatively small part of the cases which come before the courts—those cases in which the plaintiff is entitled to specific relief. Although we can no longer, since the law has become humanized, properly speak of strict law in the sense of law devoid of moral content, nevertheless the separation of equity from law in the Anglo-American system bears a close resemblance to Aristotle's conception of equity as the correction of law. The meaning of equity as the correction of law is completely inappropriate in the civil law, in which strict law and equity have coalesced. The meaning of equity as a set of values higher than those which are applied in some areas of law is equally irrelevant in the civil law, where the absorption of equity has incorporated its ethical standards into the legal norms. The question naturally presents itself as to whether, in mature legal systems in which equity has become thoroughly integrated into the body of the law, the need for equity disappears<sup>21</sup>—as the levitical law is replaced, according to Saint Thomas, by a more perfect law when men have acquired a greater capacity for

<sup>18</sup> 2 KENT, *Commentaries*, 826 (14th ed. 1896).

<sup>19</sup> The reasons for the separation are discussed in NEWMAN, *Equity and Law: A Comparative Study* c. 2 (1961).

<sup>20</sup> POUND, quoted in Cook, 5 *Lectures on Legal Topics* 1923-24 (1928).

<sup>21</sup> "The distinction (between law and equity) has never been known on the Continent or in Latin-America", ARMINJON, VON NOLDE AND WOLFF, *Traité de droit comparatif civil*, 525 (1950).

divine things-or whether equity continues to play, in such systems, a significant role. That equity continues to exist in unitary legal systems is obvious from the references, in many civil codes, to equity as a source of law to fill lacunae in the codes<sup>22</sup>. The existence of equity as a source of law is expressly recognized by the French Conseil d'Etat, which applies the principles of equity even though no authority to do so is to be found in the Civil Code<sup>23</sup>. It not with the problem of whether equity exists that we must concern ourselves, but with the problem of whether it continues to serve a useful purpose. In order to reach a decision on this question, it is clear that we must try to establish a precise meaning for the term "equity".

There is inherent in all law a polarity which stems from the unending conflict between the goals of certainty and ideal justice. The conflict has given rise to an ambivalent attitude of law toward equity, to which law is attracted because of the identity of the goals of law and of equity in the general sense of what is fair and just, but which law rejects because of the clash between the legal goal of certainty and the equitable goal of ideal justice. This ambivalence has led in turn to what might be called a law of equitable fission, which causes the principles of equity, when they are introduced into the relatively unfriendly environment of strict law, to disintegrate leaving in their wake, as a deposit in the legal norms, only a thin residue of equitable doctrine. Since very early times, law has emphasized the importance of certainty; equity, the importance of deciding cases in accordance with humane criteria of right conduct which are derived from the ascertained moral sense of the

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<sup>22</sup> *The Swiss Civil Code*, Art. 4, refers to "equity". The *Egyptian Civil Code*, Art. 4 refers to "equity and justice". The *civil codes of Colombia* (Art. 32), *Equador* (Art. 17, 18) and *Honduras* (Art. 20) refer to "natural equity". The *Chinese Civil Code* (Art. 1), the *Italian Civil Code* (Art. 12), the *Portuguese Civil Code* (Art. 16) and the *Spanish Civil Code* (Art. 6) refer to "the general principles of law". (In the *Italian Civil Code* the reference is to "the general principles of law of the legal system of the State"). The provision in the *Spanish Civil Code* is derived from the *Siete Partidas*. The *Argentine Civil Code* (Art. 16); the *Austrian Civil Code* (Art. 7); the *Avant-Projet for the French Civil Code* (Art. 21), and the *Constituent Assembly Law of Ghana* (Art. 4) refer to "natural law". See also *Montenegro Civil Code*, Art. 3; *Panama Civil Code*, Art. 7; *Proposed General Law Pertaining to the Application of Judicial Norms*, Brasil, Art. 9.

<sup>23</sup> See DRAGO, op. cit. n. 9, supra.

community. Objectivity in the judicial process is best attained through norms in which the opportunity for the exercise of judicial discretion is reduced to a minimum<sup>24</sup>. The application of norms based on moral criteria requires close attention to circumstances which vary considerably from one case to another; for this reason the latitude for judicial discretion must be wide<sup>25</sup>. When the law faces the task of constructing norms for the adjustment of conflicting human interests, it must recognize not only the obligations of the individual to other individuals and to the society as a whole, but also the obligations of society to the individual. Social interests emphasize certainty; individual interests, justice. Social and individual interests often coincide; although the social interest is primarily concerned with stability of rights and institutions, there is also a strong social interest in the individual life<sup>26</sup>. André Gide has expressed this interest in his statement that "each is more precious than all"<sup>27</sup>. Conversely, the individual is concerned not only with his own fulfillment but also with the objective of certainty, so essential to an impartial administration of justice<sup>28</sup>. Often, however, social and individual interests conflict. The resolution of the conflict can never be in a state of perfect equilibrium; the point of balance will shift with changing views of the proper role of the State in the eco-

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<sup>24</sup> SAINT THOMAS ACQUINAS, *Summa Theologica*, 1a 2ae, Q. 25, art. 1 and 2; "In so far as it is possible, all things that must be judged should be determined by law; the fewest things possible should be left to the decision of men". CLARK, *The Limits of Judicial Objectivity*, 12 "American Univ. Law Rev.", 1 (1963); POUND, *Law and Morals* (2nd ed. 1924) 56-57.

<sup>25</sup> CLARK, *The Limits of Judicial Objectivity*, 12 "American Univ. Law Rev.", 1 (1963); "Adjudication...always and primarily concerns and affects specific persons actually before the court; only in a subordinate and secondary way does it deal with or proclaim abstract principles". ISAACS, *The Limits of Judicial Discretion*, 32 "Yale Law Jour.", 339 (1923); "There are many situations where judicial action is left wholly to the judge's individual sense of right and wrong".

<sup>26</sup> STAMMLER, *Lehre von den rechtigen Rechts*, 208-211 (1919).

<sup>27</sup> 4 "Journals of Andre Gide", 1939-49, p. 19 (1951).

<sup>28</sup> MINGHETTI, *I partiti politici e la ingerenza loro nella giustizia e nell'amministrazione* (2nd ed. 1881), quoted in DEL VECCHIO, *Justice* (1940; Edinburgh ed. 1952) 173, n. 13; "The worst misfortune of a civilized people is doubt about the impartiality of justice". CARDOZO, *The Nature of the Judicial Process*, 112 (1921); "There is no more fundamental social interest than that law should be uniform and impartial".



conomic and social life of the individual<sup>29</sup>. The capital problem of the science of law today is how to find, as Pound has said, "the right place for discretion, dispensation and mitigation in a system of administration of justice in the unified world of tomorrow"<sup>30</sup>.

If moral standards which are appropriate to law were identical with the standards of ethics and morals, we might well conclude that equity has fulfilled its function when it has become completely integrated into the legal norms. Equity and morals, although springing from a common source, the altruistic elements of human nature, are not, however, identical, because of their different objectives. This is what Del Vecchio means by his magnificent phrase that law is the social profile of ethics<sup>31</sup>. It is equity which sketches the profile. Ethics and morals attach primary importance to individual obligation and fulfillment; the law, since it must police society, emphasizes social order. The objectives of law require norms which do not in every case accord with the norms of ethics and morals, because the moral criteria which are appropriate in even a humanized system of law are not precisely the same as those which are to be found in systems of ethics and morals, in which the objective of certainty is less resistant to the requirements of good faith and compassion. The continuing need for equity rests on the difference between the moral criteria which are appropriate in law the moral criteria which are applicable to virtuous conduct the enforcement of which does not

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<sup>29</sup> Since the last years of the nineteenth century a tendency has been discernible to cast responsibility for many of the risks of economic and social life upon the part of the community which is closely connected with the activity out of which the injury occurred. The effect of this view of social responsibility for the individual is to shift the point of balance in favor of norms which emphasize the interests of the individual; see PATTERSON, *The Apportionment of Business Risks Through Legal Devices*, 24 "Columbia Law Rev.", 335, 358 (1924); PROSSER, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 "Yale Law Jour.", 1099, 1120 (1960).

<sup>30</sup> POUND, *preface to NEWMAN, Equity and Law: A Comparative Study* (1961).

<sup>31</sup> DEL VECCHIO, *On the Conditions of a True Peace*, in "Humanity and Unity of Law, Essays in Legal Philosophy", 262 (1963).

fall within the province of law<sup>32</sup>. It is in the broad intermediate area between strict law and ideal morality that the principles of equity serve to narrow the gap between law and morals by incorporating into the law standards of essential morality.

There are jurists who have despaired of arriving at a definition of equity<sup>33</sup>, and there are others who are of the opinion that it better to leave equity undefined<sup>34</sup>. It is fair to say that there are many civil law jurists who feel that the law of any legal system will be in a better ethical posture if equity is completely disregarded as a separate component. On the other hand, it is the view of many jurists that equity is necessary in order to transform what without it would be a sterile system of law into a system of compassionate justice<sup>35</sup>. One of the world's greatest legal philosophers who is also one of its leading comparatists, Jose Puig Brutau, has said recently that equity is "one of the names under which is concealed the creative force which animates the life of the law"<sup>36</sup>. In this diversity of approach to the nature and function of equity, the experience of Anglo-American equity may be helpful in providing a more precise meaning of equity. In the Anglo-American legal system, in the course of half a millenium of administration of equity in a separate court, equity has been enabled to preserve its separate identity and its basic concepts have become clearly revealed. The principles which originated in classic antiquity and beyond have been tested by experience in their use, and the results of such experience have in turn been further developed by reason. The principles which have emer-

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<sup>32</sup> There are many moral principles which are "not general abstract concepts of natural equity but concrete principles of jurisprudence", ALLEN, *Law in the Making* 382 (6th ed. 1958). FRÉJAVILLE, *Cours de droit civil* 4 (1954), defines law as "l'adaptation humaine de la justice"; i.e., justice to the extent to which it can be realized within the limits of human capabilities. FELIX S. COHEN, in 41 "Yale Law Jour.", 201, 202 (1931) says that there are certain "ethically justiciable facts" which the law can effect.

<sup>33</sup> DE PAGE, *A propos du Gouvernement des Juges. L'Équité en Face du Droit*, 161-64 (1931), quoted in RAZI, *Reflections on Equity in the Civil Law Systems*, 13 "American Univ. Law Rev.", 24, 26 (1963); "Unless one lures himself with the mirages of metaphysics, equity escapes any logical definition".

<sup>34</sup> 2 LORD BRYCE, *Studies in History and Jurisprudence*, 181.

<sup>35</sup> According to CAPITANT, "Révue Trimestrielle", 371 (1928), "equity has remained one of the most radiant formulas of justice by which, since Greece and Rome, the hope of human societies has been illuminated".

<sup>36</sup> In *Juridical Evolution and Equity*, in "Essays in Jurisprudence in Honor of Roscoe Pound", 82, 84 (1962).

ged from this process constitute a catalyst for determining the nature of equity in the civil law, in which the complete integration of those principles into the norms of law has tended to obscure their identity. The influence of equity in the civil law is also obscured by the prominence of the codes, the provisions of which hide the principles which underlie the statute and the judicial decisions<sup>37</sup>. By comparing the principles of equity as they have been revealed in Anglo-American law with the results which have been reached in the jurisprudence of civil law systems, the extent of the penetration of equitable doctrine into the code provisions and into the judicial decisions can be observed, and areas of imperfect reception or application detected. There is reason to believe, as Piero Calamandrei has observed, that there are "open windows of the Palace of Reason, through which, despite the best laid plans, the wind of irrationality blows"<sup>38</sup>. Underlying, like a strong undercurrent, the eddying tides of a multitude of rules of application of the principles of equity, are three fundamental concepts which might be described, to borrow one of Del Vecchio's most magnificent phrases, as "the eternal postulates of reason"<sup>39</sup>. The fundamental concepts of equity are (1) the duty to act with scrupulous good faith in transactions with other members of the social community; (2) the duty to share the burdens of misfortune which arise out of human relationships and transactions, for example by relinquishing the chance of prospective profit when, because of unknown or normally unforeseeable circumstances, things go wrong and vital presuppositions fail; and (3) the principle that controversies should be decided on the basis of the facts of each case<sup>40</sup>. No doubt other concepts will emerge in the course of time;

<sup>37</sup> RAZI, *op. cit.* n. 33, *supra*, at pp. 32-33; "During the 19th century la loi, the statute, meant the law, all the law. Under such a conception, the judge was supposed to mechanically state and apply the rule of law as given by the statutes and by the codes".

<sup>38</sup> *Procedure and Democracy*, 21 (Adams transl. 1956).

<sup>39</sup> *La Parole de Pie XII et les Juristes*, in "Humanity and Unity of Law", 133 (1963).

<sup>40</sup> "All legal experience shows that the power of adjusting the operation of legal precepts to the exigencies of special circumstances is unavoidable if there is to be a complete system of justice under law", POUND, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 "N. Y. Univ. Law Rev.", 925, 936 (1960). Equity is "la giustizia del caso singolo" (the justice of the single case), 1 DUSI, *Instituzioni di Diritto Civile*, 49 (2nd ed. 1930). See also DESSENS, *Essai sur la notion d'équité*, 5-6 (1934)

but over the life of the law from remote antiquity to modern times, these concepts comprise the essence of equity.

The foregoing concepts do not, of course exhaust the entire ethical content of law. The task of reducing the structure of law to fundamental concepts is one which has challenged jurists from the time of Moses<sup>41</sup>. In the various formulations of basic postulates we can discern two levels of ethical doctrine. At one level lie certain standards of duty which are so basic that without them life in organized society would hardly be possible. Examples of such fundamental standards of duty are the duty to refrain from intentional aggression upon the person or property of another; the duty to act with due care so as not to injure others, and the duty to control one's property so that it will not cause harm. In these legal norms the equitable concepts of good faith has in most cases only minimal importance, and the urgent social need for universal application on equitable grounds. The objectives of these fundamental norms are identical with the objectives of equity in the general sense of what is fair and just.

There is a second level of standards of duty which are ethical in their nature and which, to distinguish them from standards of equity in the general sense of what is fair and just, might be termed standards of pure equity. The norms in which this level of duty is defined apply to somewhat higher ethical standards of conduct, more exigent upon men's consciences, than are the standards of duty which lie at the first level. In the norms lying at the second level the humane elements in them are not overcome by social need for certainty. The ethical standards at this second level are those which have been shown by experience to be of such a nature as to be enforceable by law. An example is the duty to perform promises in the absence of circumstances which would excuse performance on equitable grounds. Beyond this second level of standards of pure equity are ethical standards which must be left for enforcement to religion or public opinion, or the individual conscience. It is at the intermediate level that law, through equity, "provides ethics with explicitly expressed content as formulated by the people themselves of a given culture"<sup>42</sup>.

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<sup>41</sup> *Deut.* 5.7-21.

<sup>42</sup> NORTHROP, *The Complexities of Legal and Ethical Experience*, 183 (1959).

It has been said that "every system of jurisprudence needs... a constant preoccupation with the task of relating its rules and principles to the fundamental moral assumptions of the society to which it belongs"<sup>43</sup>. Equity may be defined as a force which gives shape to the ideal of decent and honorable conduct in the relations of man with man. If men were angels, then morals and ethics would provide practicable guides to justice. Since men are less than angels, the concepts of pure equity provide an effective method of measuring the degree of the humanity of laws<sup>44</sup>. May we not describe equity as the helmsman of law?

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<sup>43</sup> LORD RADCLIFFE, *The Law and Its Compass*, 63-64 (1960).

<sup>44</sup> "The expression is taken from DEL VECCHIO, *Les Bases du Droit Comparé et les Principes Généraux du Droit*, "Revue internationale de droit comparé", 1960, N.º 3, p. 1.