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What Light Is Cast by History on the Nature of Equity in Modern Law?*

By RALPH A. NEWMAN**

HOLMES saw law as an eternal procession.¹ History, Cardozo has said, illuminates the present by a study of the past, and so points the way to the future.² I know of no area of law in which these statements are more truly applicable than that part of the law which we call by the name of equity. Equity, which is probably the most important element of law, is without doubt the element which is least understood. This uncertainty as to the nature of equity arises from the fact that it plays a strange role in our jurisprudence; separate from, and yet a part of law; and from the fact that equity is a protagonist in the unending conflict between the goal of certainty, which is so essential to the impartial administration of law, and the goal of ideal justice.

Equity has been dealt with in various ways in different legal systems. In Roman law the principles of equity provided a system of law which was acceptable to inhabitants of different nations because it was based on fundamental impulses of human nature which are common to all peoples. Roman equity, as Ehrlich has put it, "selected those elements which are universally human, and which must exist in every society"³ This body of law, which was called the *ius gentium*, was ad-

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¹ See HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 194-95 (1920). "Our only interest in the past is for the light it throws upon the present." See also HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 225 (1920). "History sets us free and enables us to make up our minds dispassionately whether the survival of what we are enforcing answers any new purpose when it has ceased to answer the old."

² CARDOZO, *The Nature of the Judicial Process*, in SELECTED WRITINGS 128 (1921). The exact statement is as follows: "History, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future. Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow."

³ EHRLICH, *PRINCIPLES OF THE SOCIOLOGY OF LAW* 298 (1962 ed.). The same thought has been expressed by Würzel in *DAS JURISTISCHE DENKEN* § 26 (1904), where he refers to "the concepts, relatively few in number, which embody directly the phenomena of social life as they would appear if there were no laws."

ministered in the court of the praetor peregrinus as a separate legal system. The principles were expanded and developed in the course of experience in their use, exactly as was to occur much later on in England and in the United States; and early in the second century, in the reign of Hadrian, they were incorporated by imperial decree into the *corpus iuris* itself.⁴

Between the twelfth and the eighteenth centuries many countries of Europe fell heir to a system of Roman law in which equity had been completely fused into the main body of the law.⁵ The civil law systems which succeeded to Roman law have dealt with equity by ignoring it as a distinct element of law.⁶ This solution has not been completely successful because there are many areas of civil law in which the principles of equity have become lost and have ceased to perform their function as a creative force which animates the life of the law.⁷

In England, as was the case in early Roman law, equity has been dealt with as a separate system for more than five hundred years. This has been due to a variety of causes. By the end of the thirteenth century the common law had become permeated with dry rot.⁸ Form and tradition, rather than the desire to do justice, controlled. Common law procedure had become a black art, in which the true ends of law had become lost.⁹ Throughout the world, since the dawn of conscience,¹⁰ relief from hardship caused in special cases by the operation of the rules of strict law was granted by the king; we see an early example of this in Solomon's prayer for an understanding heart to judge his people, rather than for knowledge of the law.¹¹ In England such relief

⁴ Shortly before 129 A.D. See LENEL, *DAS EDICTUM PERPETUUM* (3d ed. 1927); Pringsheim, *The Legal Policy and the Reforms of Hadrian*, 24 J. ROMAN STUDIES 141, 143 (1934).

⁵ The *Corpus Iuris* of Justinian did not penetrate into France until the twelfth century, continuing until 1804; see COLIN & CAPITANT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* No. 18 (8th ed. 1935). In Germany the acceptance commenced in the thirteenth century and continued until the eighteenth; see AMOS & WALTON, *INTRODUCTION TO FRENCH LAW* 13 (1936).

⁶ "A civilian cannot understand what American comparatists mean when they say that 'in Anglo-American law Equity has failed to merge into the general body of law, as occurred in all other surviving legal systems.'" Razi, *Reflections on Equity in the Civil Law Systems*, 13 AM. U.L. REV. 24 (1963).

⁷ Pug Brutau, *Judicial Evolution and Equity*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 82, 84 (1962). Professor Simpson, in "Equity in 1946," 1946 ANN. SURVEY AM. L. 1, says that "to survey equity is to look at the most creative and vital aspect of the judicial process."

⁸ Pound, "Do We Need a Philosophy of Law?," 5 COLUM. L. REV. 639, 650 (1905).

⁹ 9 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 393 (1932).

¹⁰ The expression is taken from BREASTED, *THE DAWN OF CONSCIENCE*.

¹¹ 1 Kings 3:9.

came to be administered by the royal Chancellor, who in the middle of the fourteenth century set up his own court. To avoid conflicts with the established courts, jealous of their jurisdiction and prerogatives,¹² the Chancellor limited his remedies to orders addressed to the litigants commanding their personal action, a form of remedy which the common law courts felt themselves powerless to grant. This form of remedy, and the substantive principles of law which were applied by the Chancellor, were based on doctrines of the canon law, with which the chancellors by reason of their ecclesiastical background were thoroughly familiar.¹³ These doctrines were applied only in the Court of Chancery, since the common law judges were reluctant to accept the humane doctrines which were applied on the other side of Westminster Hall. There is a touch of irony in the practice of Coke, while he was Lord Chancellor, of kneeling, on his way to the woolsack, before his father, who was Chief Judge of the Court of King's Bench, to ask his blessing. "Treason! That's quartering!" said Jerry in Dickens' *Tale of Two Cities*. "It is the law" replied the ancient clerk, turning his surprised spectacles upon him. "It is the law Leave the law to take care of itself." The common law judges walked scrupulously in the ancient ways, and left to the Chancellor the responsibility for the humane administration of law in accordance with elementary principles of justice.

More than a hundred years ago in England, and even earlier in the United States, efforts were begun to humanize the main body of the law by abolishing the separate courts of equity. This procedural solution, as is admitted by Judge Holtzoff¹⁴ and most other authorities on procedure except the late Judge Clark, has failed to bring about a fusion of the the substantive principles of equity with the main body of the law. The principles of equity are still largely confined to cases in which one of the litigants is entitled to specific or "equitable" relief,

¹² See KERLY, HISTORY OF EQUITY ch. 4 (1890).

¹³ "Every Chancellor from 1380 to 1488 was a clerk." Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant*, in SELECT ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY 215 (1907). The Great Seal was held by laymen only for about twelve years during the fourteenth century. Holland, *Some Early Chancellors*, 9 CAMB. L.J. 17, 23 (1945).

¹⁴ BARRON & HOLTZOFF, FEDERAL PRACTICE § 141 (1950). "The change is one of procedure rather than remedy. The substantive distinctions between equitable and legal remedies have not been erased. Only procedural distinctions have been abolished. The substantive principles of equity for balancing rights and obligations are not superseded. The rules have not changed the principles which guide the courts in granting or refusing injunctive relief." Walsh, *Is Equity Decadent?*, in 22 MINN. L. REV. 479, 489 (1938), says that "equitable defenses do not become legal defenses under Code merger."

and most of the cases which come before our courts, those in which the plaintiff is entitled only to damages, are decided without the benefit of the elevated moral principles which constitute the supreme contribution of a long line of distinguished chancellors to a humane administration of justice.

What are these principles? In what respects are they different from the principles which are applied in most legal actions? To answer these questions we must turn back, again, the pages of history, even to those which antedate Roman law. The origin of equity is usually traced back to Aristotle, who defined *epieikeia* as the correction of law when the law is imperfect owing to its universality.¹⁵ Aristotle's definition was perfectly correct in the context of his place and time. Early law was thought of as exactly defined rules for exactly defined facts.¹⁶ Change in the law was difficult, and relief in cases of hardship must come from sources outside the law itself. Aristotle accordingly thought of equity as the correction of the inadequacies of law; but centuries earlier another great thinker who was a prophet, dreaming under the stars in the clear night of the middle east, conceived of a system of law in which justice was identified with charity and brotherhood. In the words of the great unknown Isaiah, when righteousness cannot enter, justice stands afar off.¹⁷ There is a close linguistic relationship between the Hebrew word *nekoah* (righteousness) which is translated in the King James bible as "equity," the Greek word *epieikeia*, which we translate as "equity" but which literally means clemency, the French word *clémence*, and the English word "compassion." In the course of time the doctrines of equity have taken form in Anglo-American jurisprudence in a number of specific principles; but these principles can always be reduced to a common denominator of good faith, of sharing the burdens of misfortune arising out of human relationships, and of deciding controversies not on the basis of general rules for ordinary situations but according to the facts of each case. Celsus defined law as "*ars boni et aequi*,"¹⁸ which Max Radin has beautifully translated as "the art of equity." But the purpose of all law is to do what is fair and just.¹⁹ As Lord Evershed has said,

¹⁵ ARISTOTLE, *NICHOMACHEAN ETHICS* Bk. 5, ch. 10.

¹⁶ Pound, *Introduction to NEWMAN, EQUITY AND LAW. A COMPARATIVE STUDY* 10 (1962).

¹⁷ *Isaiah* 59:14.

¹⁸ CELSUS, *DIGEST* I.1.1.

¹⁹ See RIPERT, *LA RÉGLE MORALE DANS LES OBLIGATIONS CIVILES* No. 32 (4th ed. 1949). "Le droit n'est que l'analyse de ce qui est équitable et bon" (The law is only the analysis of that which is equitable and good). *Contra*, FRIEDMANN, *LEGAL THEORY* 344 (4th ed. 1960). equity "means nothing else but the application of considerations of fairness and justice against the letter of the law."

the principles of equity "illustrate, nay illuminate, but never precisely define, the concept which lies behind, understood but unexpressed."²⁰ If I may be permitted to suggest a definition of what might be called pure equity as distinguished from equity in the general sense of what is fair and just, equity may be described as a force which gives shape to the ideal of decent and honorable conduct in the relations of man with man.

But what is the role of equity, now that law has become humanized, in modern times? Does equity disappear, as seems to have been the case in civil law, or does it continue to perform a useful function? The continuing need for equity in all legal systems arises out of the lag between law and morals, due to the unending conflict between the objectives of certainty and ideal justice. For most of legal history law has been satisfied with what Jellinek has called a minimum ethic.²¹ A Persian king said that the Greek market was a place where men might cheat one another under oath. In all social disciplines except the law—ethics, morals, government and religion—the requirements of complete honesty, of sharing the burdens of misfortune, and of adjusting conflicting interests according to the facts of each case, are accepted as axiomatic. Only in our inner common law system are such requirements of human decency disregarded. Selling a termite-ridden house without disclosing the facts²² is cheating in all social disciplines except the law. Insistence on the strict terms of a contract which will ruin one of the parties and his family²³ is condemned in all systems of social

²⁰ Lecture at the Faculty of Law of The Hebrew University of Jerusalem, p. 17 (1954).

²¹ DIE SOZIALETHISCHE BEDEUTUNG VON RECHT, UNRECHT UND STRAFE 45 (1908 ed.).

²² *Hendrick v. Lynn*, 144 A.2d 147, 150 (Del. ch. 1958); *Fegeas v. Sherrill*, 218 Md. 472, 147 A.2d 223 (1958); *Swinton v. Whitinsville Savings Bank*, 311 Mass. 677, 42 N.E.2d 808 (1942).

²³ *Siegelman v. Cunard White Star S.S. Co.*, 221 F.2d 189 (2d Cir. 1955) (contract of carriage provided that suits must be brought within one year, and that English law governed the contract; carrier advised passenger that there would be no need to bring action within the one-year period, then argued successfully that under English law the time limitation had not thereby been waived); *Stenmeyer v. Schroepfel*, 226 Ill. 9, 80 N.E. 564 (1907) (mistake in addition by seller; relief denied, because seller was said to have been negligent); *Streich v. General Motors Corp.*, 5 Ill. App. 2d 485, 126 N.E.2d 389 (1955) (long contract in fine print contained provision nullifying any obligation on the part of the corporation; mistake in construing contract held no basis for relief).

There is no warranty of the condition of the premises in sales of real property 4 WILLISTON, CONTRACTS § 926 (rev. ed. 1936). See also *Tetenman v. Epstein*, 66 Cal. App. 745 (1924), wherein a suit was instituted to rescind a deed given to the holder of a mortgage in payment of the debt. The deed was given in ignorance of the existence of oil which had been discovered in the vicinity of the property, making the

control except the law. Application of rules of conduct designed for ordinary situations is not required when different circumstances are present, except in law; for example, where a contract has been made by mistake,²⁴ or where the basic purpose of one of the parties has been thwarted by unexpected future events.²⁵ It is ludicrous to think that cases should be decided according to different moral standards depending on whether the plaintiff seeks specific performance or an injunction, or only damages; yet the force of custom, "light as air, yet strong as links of iron," still imposes a double moral standard in our courts of law.²⁶

Plato tells of a conversation between Socrates and Glaucon concerning the nature of justice. "The time has arrived, Glaucon," Socrates says, "when like huntsmen, we should surround the cover and look sharp that justice does not slip away, and pass out of sight, and get lost; for there can be no doubt that we are in the right direction. Only try to get a sight of her, and if you come within view first, let me know."²⁷ Equity, like justice, is one of the ghosts of the law, elusive to the grasp. The recognition of our common humanity is the greatest

property worth five times as much as before. The deed was upheld, since the mistake was only as to the value of the property.

²⁴ *Hubbert v. Fagan*, 99 Ark. 480, 138 S.W. 1001 (1911); *Mansell v. Lord Lumber & Fuel Co.*, 348 Ill. 140, 180 N.E. 774 (1932); *Stemmeyer v. Schroepel*, *supra* note 23; *Olsen v. Shepard*, 165 Minn. 433, 206 N.W. 711 (1926) (mistake in boundaries; relief denied to mistaken party); *Kennedy v. Mail Co.*, L.R. 2 Q.B. 580 (1871) (shares issued to enable the defendant corporation to perform a contract for mail service with the government of New Zealand; the purported contract was invalid, and this reduced the value of the shares; relief was denied to the shareholder).

²⁵ *Albert D. Gaon & Co. v. Société Interprofessionnelle des Oléagineux Fluides Alimentaires*, 3 Weekly L.R. 622 (1959) (closing of the Suez Canal in 1956-57, although increasing the cost of freightage between The Sudan and Nice nearly five times, held not to justify rescission of a contract for ocean shipment). *Hawke's Bay Electric Power Board v. Thomas Borthwick and Sons, Ltd.*, [1933] N.Z.L.R. 873 (premises damaged by earthquake while a five-year lease still had more than two years to run, and the damage necessitated ten months of expensive repairs; contract held not discharged).

²⁶ The double moral standard is endorsed in *RESTATEMENT, CONTRACTS* § 367 (1932), which provides as follows:

"Specific performance of a contract may be refused, if

- (a) the consideration for it is grossly inadequate or its terms are otherwise unfair, or
- (b) its enforcement will cause unreasonable or disproportionate hardship or loss to the defendant or to third persons, or
- (c) it was induced by some sharp practice, misrepresentation or mistake."

Comment *a* states that "even though the plaintiff's conduct has not been such as to cause a court to refuse him a judgment for damages or even such as to entitle him to any affirmative remedy against him, it may be such as to disentitle him to the remedy of specific performance."

²⁷ *PLATO, REPUBLIC*, Bk. IV. 431.

social revolution of our time. If the equity of all human laws is to be related to the common principle of human brotherhood, we must recognize that law no longer requires correction from without, but that equity is an integral part of justice. Only then can the law fulfill its function, in Lord Radcliffe's words, of nourishing and enriching the growth of the human spirit.²⁸ The age of the prophets has gone, and "other souls sweep shadow-like around";²⁹ but there are still the stars under which to dream.

²⁸ RADCLIFFE, *THE LAW AND ITS COMPASS* 65 (1960).

²⁹ HOMER, *ODYSSEY*, Bk. x, at 122 (Butcher & Lang transl. 1924).

