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EQUITY IN GREEK AND ROMAN LEGAL THEORY

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Equity, as we understand it today, is the application of the intention of a given statute to a case which the statute does not cover. In the common law tradition, it is the special judicial deciding on a claim or right not known to the strict law, yet one which the law ought to recognize and cover. In the words of one commentator: "Equity suggests that the law may not always be perfect, that the enforcement of legal rights and duties may fall short of justice, that there may be conflicts between the demands of conventional or legal justice and natural justice or justice according to conscience or reason."<sup>1</sup>

The term 'equity' has a lengthy heritage. It comes to us in English from the Latin word 'aequitas', which, in turn, stems from the Greek term 'epieikeia'. Although we regularly translate both 'epieikeia' and 'aequitas' with the English term 'equity' we don't often recognize the semantic shifts of these Greek and Latin words. The first mature definition of 'epieikeia' in the works of fourth century B.C. Hellenics Plato and Aristotle differed markedly from the definition of 'aequitas' given by fourth century B.C. Roman jurists. It is a full three centuries later, in the works of Marcus Tullius Cicero, that we see the first evidence of 'aequitas' bearing the Greek connotation of 'epieikeia'. In the writings of the later jurists in the Empire, 'aequitas' bears a Greek connotation, demonstrating a general semantic shift of the Latin term.

## Equity Among the Greeks

In approaching the dialogues of Plato to discern the meaning Plato assigns to the term 'equity' one must first understand the historical and philosophical milieu of fourth century B.C. Athens.

Written laws (nomoi) were at this time commonplace. Draco's crude laws of the 620's had been supplanted by Solon's legislation of 594, which, in turn, had been modified by Cleisthenes in 510. The Persian and Peloponnesian Wars of the fifth century had driven one statesman after another to draft new laws to accommodate the pressing needs of a society at war. Such legislation continued into the turbulent fourth century. The first introduction of these written nomoi to Athenian civil life had met with little opposition. For nomoi -- written or unwritten -- were seen as the promulgation and dispensation of the Olympic god Zeus -- laws which could not be contested or violated.<sup>2</sup> By the sixth century, however, the Milesian philosopher Anaximander had done away with a divine source of law and had introduced the conception of an immanent law (diké) in nature (physis). Diké, said Anaximander, guides the activity of mineral, beast, and man alike. Subsequent philosophers speculated that this immanent cosmic law embodies a law specific for men. This law they called nomos. Nomos propels men to bond socially in the polis. This natural law can be further extended by human promulgation of

nomoi of the polis. Thus both the polis and its inherent nomoi are products of nature (physis).

The rise of the Sophist school in the fifth century, however, provoked a sudden questioning of this traditional supposition of the absolute natural status of the polis and its nomoi.<sup>3</sup> Speculation arose as to whether the nomoi of the polis are indeed natural guidelines for and structures on the activities of men or whether they are merely arbitrary, conventional human enactments elevated to obligatory norms that restrict men from living naturally. Nomos and physis were thereby driven to polar positions. The first Sophist Protagoras sought to reconcile the poles of nomos and physis by positing a lawless physis of savage fighting men who are tamed by the guidelines set by nomoi. The nomoi instill in men the sense of self-restraint necessary for them to co-exist in the polis.<sup>4</sup> Later Sophists merely aggravated the tension of nomos and physis. Thrasymachus, for example, claimed that the nomoi represent "the will of the stronger" individual. By making laws, the strongman arbitrarily decrees what is beneficial for himself to be what is right for his subjects.<sup>5</sup> Conversely, Callicles suggested that nomoi represent the weaker man's attempt to keep in check those who are stronger by nature. Physis dictates that the strong rule and dominate the weak; nomos reverses this. Glaucon and Adeimantus touched upon the root of Callicles and Thrasymachus' arguments by advocating that nomos is but a means to a particular advantage.<sup>6</sup> The important Sophist Hippias set nomos

and physis in sharpest opposition. He viewed nomos as a tyrant over man that forces him to do many things contrary to the inescapable laws of physis.<sup>7</sup> The Sophists' suspicion of the natural authenticity of nomoi invariably led to a skeptical view of the polis as well. Is it according to the dictates of nature that men so congregate in the polis, or has this organization of men arisen merely by convention or for expediency? A plethora of such questions dominated fourth century Athens. Consequently, the Greek mind of the fourth century slowly shifted its allegiance from the polis and its laws to a variety of other political ideals.

Into this environment stepped Plato. Almost single-handedly, he sought to stem the tide of the waning ideal of the polis. Appalled by the Athenians' disregard for the condition of the polis, he vigorously confronted them with the anti-Sophist thesis that the polis is indeed a product of physis.<sup>8</sup> The polis, says Plato, is founded on eternal Reason (Nous) and only by following the demands of Nous can any organization of men be worthy of the name 'polis'. Attentiveness to Nous consists in hearkening to the paradigms or ideal forms of justice, bravery, and moderation found in the background world. Nous must always set the bounds and limits to man's bravery and passion and allow for full, proper, and wise expression of these virtues. This spiritual health Plato calls the justice of the soul.<sup>9</sup> It is only when a man attains this justice of the soul that he will know his place in the hierarchy of classes

in the polis and have the capacity to integrate with his fellow man in the same class. A polis with coherent class divisions and with proper expression of the guiding human virtue of each class (be it moderation, bravery, or wisdom) is a just polis and a true embodiment of Nous.<sup>10</sup>

In the Republic, Plato depicts a polis that can attain to rational perfection solely by the guidance of the wise philosopher-king. The wise philosopher, by virtue of the nous in him that participates in the cosmic Nous, is able to apprehend the ideal forms and to lead the polis to attain them. In the later written Politicus (Statesman) and Laws, however, he recognizes that the philosopher-king is an imperfect instrument of the cosmic Nous.<sup>11</sup> Statutes that follow the dictates of Nous are thus necessary guidelines for all men to recognize and follow the rational ideals of justice, bravery, and moderation and for the polis to achieve its highest order and stability. Law, says Plato in the Philebus, is the guideline which is imposed on the indeterminate physis to bring to birth what is stable and good in man and in the polis.<sup>12</sup>

Thus in his post-Republic period,<sup>13</sup> Plato came to recognize two laws: the natural law of Nous and the nomoi that leaders, following their own nous, provide for the polis. Clearly, Nous is the superior and more authoritative law for man. Says Plato: "No law or ordinance has the right to sovereignty over knowledge [of Nous]."<sup>14</sup> Yet, since no man in the polis can fully perceive the true Nous, nomoi, which are the ordinances of Nous, must

perforce be sovereign over men in the polis. For, as Plato goes on, "where the law is overruled or obsolete, I see destruction hanging over the community; where it is sovereign over the authorities, and they its humble servants, I discern the presence of salvation and every blessing heaven sends on a society."<sup>15</sup>

The nomoi of the polis, then, must have in view the complete virtue of the subjects and the maximum order and stability of the polis.<sup>16</sup> Yet the nomoi cannot be expected to guide every man in his every action. Rather, they are structured to direct the normal activities of the average citizen. Lacunae in the nomoi will inevitably appear since they are but simple rules to be applied to a complex, dynamic body of citizens. Plato was well aware of this limitation of nomoi. In his own oft-quoted words: "Law can never issue an injunction binding on all which really embodies what is best for each; it cannot describe with perfect accuracy what is good and right for each member of the community at any one time. The differences of human personality, the variety of men's activities, and the inevitable unsettlement attending all human experience make it impossible for any art whatsoever to issue unqualified rules holding good on all questions at all times... Similarly, we must expect that the legislator who has to give orders to whole communities of human creatures in matters of right and of mutual contractual obligation will never be able in the law he prescribes for the whole group to give every individual his due with absolute accuracy... But we shall find

him making the law for the generality of his subjects under average circumstances."<sup>17</sup> Because of this inevitable general character of any nomoi, Plato introduced epieikeia which one is to use in interpreting the nomoi. The equitable judge of nomos must always assume the natural law of Nous which must be used to amend all nomoi that do not demonstrate true nous.<sup>18</sup>

Plato's most notable provision in asserting epieikeia is that every law code, as well as a number of its individual laws, should be preceded and introduced by preambles. Preambles should capture the general intention of the law(s) and persuade and educate the individual reading the law(s). This proposal was a novel one for its time, and has implicit in it the possibility of distinguishing the intention of the law from its letter.<sup>19</sup>

Aristotle's characteristic acumen and dialectic method gave sharper focus to the Platonic concept of epieikeia. Aristotle defines epieikeia thus: "The nature of the equitable is the correction of law inasmuch as law falls short of what is required by the universal norms in which it is expressed. This deficiency is the reason why all things cannot be regulated by law, so that decrees are required; that which does not admit of definition must be governed by indefinite rules."<sup>20</sup> Thus equity, simply put, is the correction of law in cases in which the law is found deficient because of its generality. The reason for this deficiency, says Aristotle, is that all law is universal, but about some things it is impossible to make a correct universal state-



ment. Yet it is necessary to legislate. Thus one must speak generally.<sup>21</sup> Inevitably, the dynamics of social life will thrust forth cases that are not covered by the law's general statements. In such cases it is necessary to correct the omission and "to say what the legislator would have said and would have put in his particular law if he had known [of such a case]."<sup>22</sup>

As such, law and equity are not entirely different. Equity merely interpolates the law in cases where the law does not directly apply. Equity is the fair or fitting rule which runs beyond or beside the written nomoi.<sup>23</sup> Aristotle offers a penetrating illustration. A law prohibits wounding in general, not wounding a particular sort of person with a particular kind of weapon in a particular way. Thus even a metal ring worn by the striker may bring the blow within the words of a statute punishing wounding caused by the use of a metal instrument. To discriminate in such cases is the appropriate function of equity.<sup>24</sup> Aristotle adds further that actions which should be treated with leniency are cases of equity, and among such actions he includes those that are the consequence of misfortune, error, or human weakness.<sup>25</sup> In such cases, says Aristotle, one should look "not to the action itself, but to the moral purpose; not to the part, but to the whole; not to what the man is now, but to what he has been, always or generally; ...to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the dicast looks only to the law; and the reason why arbitrators were appointed was that

equity might prevail."<sup>26</sup> It was such a pregnant conception of epieikeia that found practical expression in the law codes of virtually every culture that was acquainted with Aristotle's writings.<sup>27</sup>

It is apparent that Aristotle and Plato share a common root understanding of epieikeia. Plato's contribution to the concept of epieikeia is still maintained in the equitable formulations of preambles to statutes during legislation. Aristotle's scientific articulation of epieikeia has done much to allow for equitable decisions in the judicial process.

## Equity in Rome

When used by the fourth century B.C. Roman jurists, the term 'aequitas' encapsulated no such Greek understanding. In fourth century Rome statutory law was but poorly developed. In the century before, the Twelve Tables (451-449 B.C.), a rudimentary law code outlining the rights of the two opposed social classes of Rome -- the patricians and the plebians -- had been decreed. No other law code existed, and the Romans' peculiar adherence to the tradition of their ancestors -- mos maiorum -- provided little incentive to promulgate further laws. Instead, the Twelve Tables were appended by the opinions (responsa) of pontiffs and, after the fourth century, also of jurisconsults on questions concerning the legality or propriety of a given act. The pontiffs and jurisconsults also provided legal formulae to be followed by a given person if he required judicial decisions based on the Twelve Tables. At this early stage of Roman law, 'aequitas' was readily identified with the responsa and formulae of the pontiffs and jurisconsults. By the end of the fourth century, however, it grew apparent that the law of the Twelve Tables, with its appended responsa and formulae, was an insufficient civil law (ius civile) to regulate the growing intricacies of social life. New laws were required. The task of legislation fell to two magistrates called the praetors. The praetors would always legislate in such a way that obsolete formulae and statutes were voided or corrected by more suitable formulae and statutes.

Outdated statutes were never discarded; they were only appended and emended by the new laws of the praetors. These new laws were called the iura praetorium (iura honorarium); the new formulae were termed actiones and exceptiones. Now, the third century Roman praetors readily identified aequitas as the iura praetorium, actiones, and exceptiones. Aequitas, then, by the third century, came to cover both the responsa and formulae of the jurists as well as the iura, actiones and exceptiones of the praetors. This view of aequitas is substantially different from the Greek understanding of epieikeia. Fritz Schulz, the eminent Oxford scholar of Roman law, depicts this contrast well: "The Roman [jurists] rendered epieikeia by aequitas... But to the lawyers this distinction was useless. Of course the problem raised by Aristotle had long been familiar to them... But the problem raised for them as practising lawyers was always simply this: is it possible to meet the case given either by the interpretation of the given statutes or by [the praetors'] propounding an actio or exceptio... In their search for its solution Aristotle's appeal to the hypothetical intention of the legislator could only be misleading. It would seem to them farcical to rack their brains as to what the authors of the Twelve Tables would have laid down had they been called to advise on the case in hand."<sup>28</sup>

It would seem probable that the Roman jurists' and praetors' monistic view of law prevented them from seeing precisely what Plato and Aristotle meant when they spoke of a

law running antecedent to the law of the state, and thus from understanding their rendering of epiekeia. For, under the influence of the dualistic Stoic natural law theory, 'aequitas' evolved a Greek meaning. In the writings of Marcus Tullius Cicero one encounters a mature natural law theory. Adapting the teachings of Panaetius, Posidonius, and other middle Stoics, Cicero asserted that God is the perfect embodiment of reason, and thus nature, which is ruled by God, is ultimately ruled by a natural law of reason emanating from this God.<sup>29</sup> This true law (the vera lex), which impinges itself upon all men, expresses the purpose and authority of God. Any human cultural activity, if it is to have truth or validity at all, must conform to reason, the vera lex.<sup>30</sup> Says Cicero in summation of his view: "There is in fact a true law; right reason in accordance with nature; it applies to all men and is eternal. It summons men to the performance of their duties: it restrains them from doing wrong...to invalidate this law...is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible."<sup>31</sup> Every state constitution must thus be an encapsulation of the vera lex in order to deserve the title 'constitution'.

Although Cicero himself did not use this dualism of natural law and state law to assert, as did Plato and Aristotle, that the eternal divine law of reason may be used in judicial interpretation to correct statutory law, the jurists of the Roman Empire clearly did. The Codex Theodo-

sianus of Theodosius II (438) implicates equitable judicial decisions a number of times. One example will suffice:

When we are persuaded by treaty to temper or to mitigate the rigor of the law in a special case, the following regulation should be observed...<sup>32</sup>

In the Justinian Digest (533), we find more pointed examples of equity:

To do what the law prohibits violates the law and anyone who evades the meaning of the law, without disobeying<sup>33</sup> its words, is guilty of fraud against it.

There is no doubt that he violates the law who, while obeying its letter, attempts to destroy its spirit, for he will not escape the legal penalties prescribed, if, contrary to the intention of the law, he frequently<sup>34</sup> and fraudulently takes advantage of its words.

When His Imperial Majesty examines a case for the purpose of deciding it, and renders an opinion in the presence of the parties in interest, let all the judges in Our Empire know that this law will apply, not only to the case with reference to which it was promulgated, but also to all that are similar.<sup>35</sup>

This is not to say, however, that the jurists of the Roman Empire use 'aequitas' exclusively with this understanding in mind. More often than not, it is readily equated with justice and used simultaneously with the latter term, with no difference of meaning intended. Yet, among the more theoretically aware jurists, 'aequitas' often bears a Greek connotation.

Through the Corpus Iuris Civilis and the original Platonic and Aristotelian texts the Greek concept of equity found entrance into medieval jurisprudence. There the glos-

sators and post-glossators of Roman Law, and the decretists and decretalists of canon law cast the concept in a firm theoretical and practical form. Thereafter, it has remained an integral part of jurisprudence and has done much to shape the judicial and legislative organs of modern civilization.

Footnotes - 'Equity'

- 1 M.R. Konvitz, "Equity in Law and Ethics," Dictionary of the History of Ideas, Vol. II, p. 148.
- 2 W.K.C. Guthrie, The Sophists (Cambridge: Cambridge University Press, 1971), p. 55.
- 3 J. VanDerVyver, "The Concept, Origin, and General Characteristics of the Idea of Natural Law," (Lectures at the University of Potchefstroom, 1980), Lecture 1, p. 3.
- 4 Plato, Protagoras 326. cf. Guthrie, op. cit., p. 68 ff.
- 5 Plato, Republic I, 336b ff. cf. Guthrie op. cit., p. 88 ff.
- 6 Plato, Republic, II, 357a ff.
- 7 Plato, Protagoras 323c 337d cf. J.W. Jones, Law and Legal Theory of the Greeks (Oxford: The Clarendon Press, 1956), p. 37.
- 8 Ernst Barker, Greek Political Theory (London: Methuen and Co. Ltd., 1918), pp. 145-147.
- 9 Werner Jaeger, Paideia, Trans. G. Highet (New York: Oxford University Press, 1943), Vol. II, p. 241.
- 10 M.B. Foster, Masters of Political Thought (Cambridge: The Riverside Press, 1941), Vol. I, pp. 32-33.
- 11 Plato, Statesman 293c-298; Laws, IX, 875.
- 12 G.R. Morrow, Plato's Cretan City (Princeton, N.J.: Princeton University Press, 1960), p. 556 ff.



- 13 G.C. Field, The Philosophy of Plato (Oxford: Oxford University Press, 1949), p. 209. A.E. Taylor, Plato, The Man and His Work, 6th ed. (New York: 1952), pp. 18-19.
- 14 Plato, Laws 875d.
- 15 Ibid., 715d.
- 16 Ibid., 875. cf. Barker, op. cit., p. 296 ff.
- 17 Plato, Statesman 294a-295a.
- 18 Konvitz, op. cit., p. 149. Plato, Laws 793.
- 19 Huntington Cairns, Legal Philosophy From Plato to Hegel (Baltimore: Johns Hopkins University Press, 1949), pp. 154-156; J.W. Jones, op. cit., p. 15; Morrow, op. cit., p. 556.
- 20 Aristotle, Nicomachean Ethics, V, 10.
- 21 Konvitz, op. cit., p. 149. Aristotle, Rhetoric, I. 13. 13.
- 22 Aristotle, Nicomachean Ethics, V, 10.
- 23 Aristotle, Rhetoric, I, 13. 13.
- 24 Jones, op. cit., p. 65.
- 25 Konvitz, op. cit., p. 150.
- 26 Aristotle, Rhetoric, I, 12. 13-19.
- 27 Paul Vinogradoff, Outlines of Historical Jurisprudence (London: Oxford University Press, 1922), Vol. II, p. 69.
- 28 Fritz Schulz, History of Roman Legal Science (Oxford: Oxford University Press, 1946), pp. 74-5.
- 29 M.T. Cicero, De Legibus, Trans. C.W. Keyes (Cambridge: Loeb Classical Library, 1959), I. 7. 20 ff.

- 30 A.J. Carlyle and R.W. Carlyle, A History of Medieval Political Theory in the West (New York: Barnes and Noble, Inc., 1903), Vol. I, pp. 320-21.
- 31 M.T. Cicero, De Republica, Trans. C.W. Keyes (Cambridge: Loeb Classical Library, 1959), III, 22. 33.
- 32 Theodosian Code, Trans. C. Pharr (Princeton: Princeton University Press, 1959), I, 2. 3.
- 33 "The Digesta or Pandects," The Civil Law. ed. S.P. Scott (Cincinnati, OH: The Central Trust Co., 1932), Vol. 2, p. 225. Digest I, 3. 2, 9.
- 34 "The Justinian Code," Ibid., Vol. 12, p. 87. The Justinian Code, I, 14. 5.
- 35 The Justinian Code I, 14. 11.