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Charles Lefebvre

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NATURAL EQUITY AND CANONICAL EQUITY

Whoever takes the trouble to read the medieval canonists in their dusty folio volumes or their unedited manuscripts cannot fail to note the frequent allusions either to natural equity or to canonical equity. One may then begin to wonder what connection there is between these two terms. While they are to a certain extent used interchangeably, there is still something to be learned from considering them as referring to distinct if related concepts. A brief study of the role these two concepts have played in the history of canon law may serve to clarify the relation between them and at the same time to bring into relief that "equitableness" which has always been the chief boast of the canonists for their system.¹

After a survey of the theological and juridical milieu in which the notion of equity first gained currency, we will consider the *Decretum* of Gratian and the work of the body of canonists called "decretists" who worked principally in the half century after Gratian and made his compilation the starting point of their studies; next, the work of the later medieval canonists, called "decretalists" — after the *Decretalia* of Gregory IX, which furnished much of their subject matter — or simply "commentators"; and finally, the work of the postmedieval and modern authors. We hope to shed some light on the relation between natural equity and canonical equity, even if we cannot provide a definitive statement of what that relation is.²

I. BACKGROUND

In the domain of equity as in many others the twelfth century canonists — Gratian and the decretists — were influenced by several currents of thought: the canonical tradition, the civil law tradition of the tenth and eleventh centuries, and the Bolognese renaissance. Each of these had its own part to play in the development of the concept of natural equity as well as that of canonical equity. Let us consider them one by one.

*The canonical tradition.*³—The only area in which the canonical collections previous to Gratian's give more than inchoate indications for our purposes is where the collections set out the principles of interpretation. The *aequitas* re-

1. Cf. CHARLES LEFEBVRE, *LES POUVOIRS DU JUGE EN DROIT CANONIQUE* 208 (Paris, 1938).

2. One will find a considerable bibliography on equity in G. KISCH, *ERASMUS UND DIE JURISPRUDENZE SEINER ZEIT* 529 ff. (Basel, 1960). For its role in canon law, see R. Bidagor, *El espíritu del derecho canónico*, 13 *REVISTA ESPAÑOLA DE DERECHO CANÓNICO* 5-30 (1958).

3. This element has been put in the first place because the well-known tendency of Gratian and the first decretists did not dispose them to receive the Roman influence entirely uniformly. Moreover, the tendency which is manifested there is too firmly maintained against the Roman tendency to be neglected. Cf. Charles Lefebvre, "Équité," in 5 *DICIONNAIRE DE DROIT CANONIQUE* col. 394f.; see also L. J. RILEY, *THE HISTORY, NATURE AND USE OF EPIKEIA IN MORAL THEOLOGY* (Washington, 1948).

ferred to in these texts is what the Fathers discerned either in Scripture or in Roman law. It reveals a Christian impress.⁴ We do not know the source of the definition attributed by Hostiensis to St. Cyprian: "Equity is justice tempered by sweet mercy" (*Aequitas est iustitia dulcore misericordiae temperata*),⁵ but it expresses accurately enough the sense in which equity was understood by the writers of this early period.⁶

Even this early, however, Honorius II (1124-1130) is setting up canonical equity (*aequitas canonum*) against the strictness of the laws (*districtio legum*), thus suggesting that the flexibility implied by the term "equity" is to be found within the canonical legislation itself and, at the same time, at least implicitly affirming that the equity of which he speaks is itself a form of law since it is expressed in some way in the canons.⁷

This first appearance of "canonical equity" should not be confused with the related tendency toward benevolence and indulgence found in the same period under the names of *misericordia*, *dispensatio*, and *humanitas*, although these too are logically opposed to *rigor*.⁸ To account for the divergences which cropped up in many canonical texts, Ivo of Chartres (d. 1097)⁹ and Alger of Liège (d. 1131),¹⁰ especially the former, maintained that certain rules reflected a concern for justice, certain others a tempering due to mercy. Later, this distinction was to play an important part, but its relevance to the concept of equity did not at once become apparent.¹¹

The civil law tradition of the 10th and 11th centuries.—The civil law tradition prior to the Bolognese renaissance of the early twelfth century clearly emphasized the notion of equity, although it is not easy to discern just what influences led it to do so.¹² The *Exceptiones legum romanarum* (c. 1100) prefers equity to

4. Cf. E. WOHLHAUPTER, *Aequitas Canonica* 28, n. 1 (Paderborn, 1931).

5. Cf. G. KISCH, *op. cit. supra* note 2, at 44, where a plausible explanation of this attribution is given.

6. See HOSTIENSIS, *SUMMA AUREA*, Book V, *De dispensationibus* n. 1.

7. In opposing the equity of the canons to the rigor of the laws, Honorius II brings out one characteristic of canonical legislation. At this epoch the canons were still typically rules set out by councils.

8. Gratian and the decretists (in particular, Huguccio) did not yet assimilate equity (*aequitas*) and mercy (*misericordia*). See in particular GRATIAN, *DECRETUM* D. 45, and the decretists thereon. Huguccio does note that equity tends toward piety and toward mercy, but one is not yet assimilated to the other, and Huguccio himself assimilates equity to justice.

9. The prologue of the PANORMIA is explicit on this point. Cf. IVO, PANORMIA, 161 PATROLOGIA LATINA col. 48 (henceforth referred to as PL.). See on this point the remarks of MARTIN GRABMAN, 1 DIE GESCHICHTE DER SCHOLASTISCHEN METHODE 242 (Freiburg-im-Brisgau, 1909-11), and also those of J. DE GHELLINCK, LE MOUVEMENT THÉOLOGIQUE DU XII^e SIÈCLE 48ff. (Bruges, 1948).

10. ALGER, *LIBER DE MISERICORDIA ET JUSTITIA*, 180 PL. cols. 857-861.

11. The term "equity" is not used here. It is, moreover, necessary to emphasize that the perspective of these authors — which will also be that of Gratian, of Peter of Blois, and of a good many other canonists — envisions the conciliation of the many rules, so often opposed to each other, presented by the collections of canons. This is a point of view quite different from that of interpretation, although it will evolve into a rule of interpretation.

12. See Charles Lefebvre, *Les tendances chrétiennes dans les législations germaniques postérieures aux invasions*, in MÉLANGES MONIER 280 ff. (Paris, 1959); cf. FR. CALASSO, *MEDIO EVO DEL DIRITTO* 334f. (Milan, 1954). Doubtless Christian influence played a considerable role in this civil law movement, either directly or through the laws it inspired.

strict law.¹³ The *Brachylogus* (c. 1110) is no less definite, for it declares that "Judgment should be given in accordance with the dictates of equity even if they appear to contravene the written law" (*Sin vero equitas juri scripto contrari videtur, secundum ipsam judicandum est*).¹⁴ Fragment V of the *Codex Haenel* is to the same effect, preferring "*equitas non constituta*" to "*jus*" and to "*id quod pro iure habetur*."¹⁵ To the same effect is the *Quaestiones de juris subtilitatibus* in which an *aequitas* distinctly Christian in nature is made to prevail over law.¹⁶ In all these texts, it is important to note, the *aequitas* spoken of is synonymous with justice; it is the supreme law and not the benevolent concession peculiar to certain canonical texts. Nonetheless, one cannot fail to see in these instances of equity at least a tendency toward an indulgence dictated by humanity.

*The Bolognese renaissance.*¹⁷—The great revival of Roman law studies at Bologna in the early twelfth century quickly led the civilians to regard their borrowings from the *Digest* and the *Code* as essential elements of their system. The tenor of these borrowings was somewhat ambiguous. We are able today to distinguish between the classical conception of equity on the one hand and the conception of equity in Justinian's law on the other. But the medieval jurist had not yet arrived at such a distinction; he was led therefore to combine different approaches, all of which seemed to him equally well grounded in the sources.

What classical law emphasizes under the name of equity, as Cicero points out, is that quest for equality "*quae in paribus paria jura desiderat*."¹⁸ Thus, accent is on an element intrinsic to the positive law and imbedded in any system of law, an ideal of justice calling for the uniform treatment of particular cases.

In addition to this first sense of equity, however, we have another one which arises from the praetor's Edict: equity in this sense is an element opposed to the positive law insofar as positive law fails in certain circumstances to incorporate natural justice. The Edict represents an effort to give this equity precedence over the *jus civile* — an equity whose role it is to aid, to supplement, and even to correct the positive law from without.¹⁹

13. See C. G. MOR, *EXCEPTIONES LEGUM ROMANARUM*, 2 SCRITTI GIURIDICI PREIRNERIANI (10 ORBIS ROMANUS) (Milan, 1938).

14. E. BOCKING, *CORPUS LEGUM SIVE BRACHYLOGUS IURIS CIVILIS* (Berlin, 1829).

15. H. FITTING, *JURISTISCHE SCHRIFTEN* 147 (Berlin, 1895).

16. Cf. G. Zanetti, *Carattere canonico dell'aequitas nella letteratura civilistica preirneriana*, 26 RIVISTA DI STORIA DEL DIRITTO ITALIANO 239ff. (1953). The author qualifies this equity as "canonical" in the title of his article. The article itself makes it clear in my opinion that it would be preferable to call it "Christian." See p. 240 of the Zanetti article. Note that the date of the *QUAESTIONES DE JURIS SUBTILITATIBUS* is disputed, and it is placed in the mid-twelfth century by H. KANTOROWICZ, *STUDIES IN THE GLOSSATORS OF THE ROMAN LAW* 189 (1938).

17. A certain systematization which already existed with the Bolognese jurists could not help exercising an influence of the first importance on the canonical conceptions, at least in furnishing them categories.

18. *TOPICA*, 4:23. A little before this he has defined the *jus civile* as "*aequitas constituta iis qui eiusdem civitatis sunt*" (2:9), and this seems to have furnished the first glossators the origin of their distinction between *aequitas constituta* and *aequitas non constituta*.

19. *DIGESTA* 4. Cf. M. VOIGT, *DAS IUS NATURALE AEQUUM ET BONUM UND JUS GENTIUM DER ROMER* (Leipzig 1856-1875) vol. I, pp. 37, 220 ff., 529f.; vol. III, pp. 267, 325f., 357f.,

A third sense of equity, rather similar to that just mentioned, would regard it as a benevolent interpretation of the law, an interpretation by which injustice or excessive rigor is corrected or ameliorated, if not in the formulation of the laws, at least in their application. Here we have Ulpian for our authority: "A judge ought always to have his eye on equity" ("*Aequitatem quoque ante oculos habere debet iudex*").²⁰

Justinian, influenced doubtless by Christianity but also by Hellenism, gives even more scope to equity than did his classical predecessors.²¹ For him, as the *Digest* witnesses, equity is superior to *jus*, and it is toward equity that *jus* should tend. Equity forms the superior ideal of justice, an ideal which transcends the *jus civile* as completely as it does the *jus gentium*. As a consequence, the role of *aequitas* as a concept set over against law — especially against the *jus civile* — has with Justinian a far greater scope than in classical law, since it is rooted in considerations of more transcendent importance. Thenceforth, decisions do not turn primarily on *apices juris* or on *subtilitas* or *jus strictum* or even on *jus civile*, but rather on *bona fides*, on *justitia* (*δικαιοσύνη*), on *jus aequum* or equity: "In all questions let there be observed especially justice and equity rather than strict law" (*Placuit in omnibus rebus praecipuam esse justitiae aequitatisque quam stricti iuris rationem*).²²

The Bolognese authors of the period we are considering drew on these elements without in any way distinguishing the disparate origins we have just noted.²³ Irnerius (insofar as we can judge him from those works which are indisputably his own)²⁴ tends to give precedence to Justinian's concept of equity,²⁵ although he gives place as well to particular determinations drawn from earlier Roman compilations and so based on other conceptions of equity.²⁶

At the time of the composition of the *Decretum*, then, equity is for the glossators the highest end of the law — the end toward which law aspires and before which it bends. This conception had been felt often and variously in the *Digest*. The tenth and eleventh century canonists, on the other hand, show

839f., 1113f. See also F. Pringsheim, *Jus aequum et strictum*, 42 ZEITSCHRIFT DER SAV. — STIFT. F. RECHTSGESCHICHTE 642f. (1921).

20. DIGESTA 13. 4:4:1.

21. It is relatively difficult to distinguish the factors which formed Justinian's approach. Cf. S. Riccobono, *Evoluzione del diritto romano*, 2 MÉLANGES CORNIL 27f.; C. HOHENLOHE, EINFLUSS DES CHRISTENTUMS AUF DAS CORPUS IURIS CIVILIS 122, 126, 130f. (Vienna, 1937).

22. This influence, derived from Christianity and manifest already with Constantine, could only grow in the ages which followed.

23. A sense of history scarcely made an appearance before the humanists; cf. D. MAFFEI, GLI INIZI DELL' "UMANESIMO GIURIDICO," esp. pp. 126 ff. (Milan, 1956).

24. Cf. H. KANTOROWICZ, STUDIES IN THE GLOSSATORS OF THE ROMAN LAW 131-165 (Cambridge, 1938).

25. See A. Rota, *La concezione irneriana dell' aequitas*, 26 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 251-257 (1948).

26. Thus in the gloss on D. 3, where he remarks: "*Bonum et aequum vocat his iustitiam; differt autem aequitas a iustitia: aequitas enim in ipsis rebus percipitur, quae, cum descendit ex voluntate, forma accepta fit iustitia.*" In E. BESTA, 2 L'OPERA D'IRNERIO (Turin, 1896). Calasso seems to draw from this text conclusions which go beyond its meaning (*op. cit. supra* note 12, at 477).

less firmness and consistency in their approach to the notion of equity; to be sure, they too regard it as the ultimate rule of law, but they do not find occasion to appeal to it directly except in extraordinary circumstances.

II. GRATIAN AND THE DECRETISTS

Gratian in certain passages of the *Decretum* has formulated a sense of the term "equity" identical to that found in the sources of Roman law known in his time. At one point, he declares:

When a sentence is passed contrary to the dictates of equity [*quando contra aequitatem sententia fertur*], the case is the same as that of a subject who cannot be compelled to do evil, knowing that obedience is not to be rendered prelates in what is illicit.²⁷

Here he apparently identifies equity with justice. Elsewhere he asserts:

It is in the power . . . of the Holy Roman Church to bestow her privileges on anyone she will, and grant special graces [*specialia beneficia indulgere*] outside the scope of the general laws [*decreta*]. Nevertheless, in doing so, she must always give consideration to the equity of reason [*considerata rationis aequitate*] so that she who is the mother of justice may never be found in conflict with it.²⁸

The opposition set up between "*specialia beneficia indulgere*" and "*considerata rationis aequitate*" proves that, for Gratian as for the glossators, *aequitas* means that equity which constitutes the supreme ideal of justice. In this way Gratian harks back to Justinian's sense of *aequitas*. This, to be sure, is the same sense in which equity is commonly understood by theologians. Peter Lombard, for instance, generally assimilates equity to justice,²⁹ although he admits also an equity which tends to benevolence and mercy.³⁰ But there is also in Gratian an opposition, to which he frequently alludes, between *rigor* and *misericordia*.³¹ This represents a traditional conceptual distinction which is to be of major importance in the development of the idea of equity.³²

In the twelfth century the main lines of the future theory of equity are then drawn. At any rate neither the civilians nor the canonists seem to have disagreed on this: equity is that supreme source of justice and of law which we have

27. Dictum before c. 91, Si quis, C. XI, q. 3. Cf. C. J. Hering, *Die aequitas bei Gratian*, 10 *STUDIA GRATIANA* 97-113 (1957).

28. Dictum, sec. 4 after c. 16, IDEO, C. XXV, q. 1. This expression *rationis aequitas* will be taken up by the decretists, and again by Huguccio, to designate natural equity.

29. Cf. Charles Lefebvre, *La notion d'équité chez Pierre Lombard*, in *MISCELLANEA LOM-BARDIANA* 223ff. (Novara, 1954); see also O. LOTTIN, 3 *PSYCHOLOGIE ET MORALE AUX XII^e ET XIII^e SIÈCLES* 360ff. (Paris, 1956).

30. Cf. Lefebvre, *op. cit. supra* note 29, at 234ff.

31. *DECRETUM*, D. 45: 4f., 8ff., 14, 16.

32. One may remark the reasons for this distinction: the necessity of reconciling canons set out in different senses; see *supra* note 11. This rule of concordance will later become a rule for interpretation. If its meaning is to be understood, its origin should not be forgotten.

seen celebrated in earlier writings.³³ There is no such harmony of opinion as regards the relations between equity and positive law. On this point early tradition was to have great importance for at least one school of civilians, who in their turn came to influence certain of the canonists.³⁴

The Roman texts which give precedence now to the letter of the written law, now to equity, are variously interpreted. According to Bulgarus (fl. 1160), his students Rogerius (c. 1160) and Joannes Bassianus (c. 1180), and after them Azo (c. 1210) and Accursius (d. 1263), only *written* equity is to be given preference in the case of opposition to the letter of a law. On the other hand, Martinus Gosia (fl. 1158), followed by Jacobus (d. 1178), Hugolinus (fl. 1158), and Placentinus (fl. 1175), judges that equity in general should prevail in case of opposition to any kind of written law — is it not the fount and origin of justice (*justitiae fons et origo*)? And Martinus proved his point by referring to "God, who, according to His desire, is called equity, for equity is no other than God."³⁵ This broad notion of equity, however, soon fell victim to the dominant influence of Azo, Accursius, and the *Gloss*.³⁶

Since it was written equity, then, that became the dominant conception, the antithesis noted in the Roman texts between *jus strictum* or *subtilitas* on the one hand, and *aequitas* on the other, became influential in the definition of equity, and ultimately impressed on that definition the idea of a certain tendency opposed to rigor and conducive to leniency and benevolence.

The decretists were not unaffected by this evolution in the thinking of the civilians. In the earliest decretists, what dominates is most probably the tendency favorable to equity and traditional in milieus not yet influenced by Roman law. The *summas*, *Quoniam status* and *Cum in tres partes*, are clear enough in this regard: "A question of law is to be determined by written law, by equity, and by analogy. If equity appears contrary to the written law, judgment is to be given according to equity."³⁷

Stephen of Tournai (c. 1160), the pupil of the civilian Bulgarus, is not, however, of such a mind. He relies on the distinction set up by his master, in which

33. E. M. Meijers, *Le conflit entre l'équité et la loi chez les glossateurs*, 17 TIJDSCHRIFT VOOR RC 117f. (1940); cf. A. Rota, *La concezione irneriana dell'aequitas*, 26 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 24-25 (1948); the interpretation affirmed by CALASSO, *op. cit. supra* note 12, at 474 is to be understood, it seems to me, taking account of the other glosses of Irnerius (cf. LEFEBVRE, *op. cit. supra* note 1, at 172f.).

34. As to the origins of the tendency followed by this school led by Martinus Gosia, see Lefebvre, *loc. cit. supra* note 12, at 280ff. The civilians disputed the place to give equity in interpretation. With the canonists the origin of the conflict between equity and positive law centers in the role to be given in the principles of interpretation to the Roman law, which leaves less to equity than the canonical principles.

35. See H. FITTING, *op. cit. supra* note 15, at 216.

36. For further development, see E. M. Meijers, *op. cit. supra* note 33, at 122; also M. Boulet-Sautel, *Équité, justice et droit chez les glossateurs du XII^e siècle*, in RECUEIL DES MÉMOIRES ET TRAVAUX PUBLIÉS PAR LA SOCIÉTÉ D'HISTOIRE DU DROIT ET DES INSTITUTIONS DES ANCIENS PAYS DE DROIT ÉCRIT, Université de Montpellier 1-2.

37. Bibliothèque nationale [hereafter B.N.] mss. lat., 16538, f. 22 v; WW 16540, f. 19 v. These *summas* probably go back to the years 1160-1171.

equity prevails only when it is written. Nor is it surprising that he goes on also to revive the opposition between "*rigor*" and "*aequitas*."³⁸

Sicard of Cremona (c. 1179) shows evidence of having retained the idea of equity in its general sense. At the same time he notes that a law may be extended to cover a case not strictly within its terms unless it is too rigorous, or unless some reason, or some consideration of time or place, gives ground for equitably restricting it.³⁹

The greatest of the decretists, Huguccio (c. 1187), places clear emphasis on equity's character of indulgence. Doubtless he occasionally assimilates equity to law,⁴⁰ but he insists that natural equity "moves to justice and mercy" (*justitiam et pietatem suadet*).⁴¹ Moreover, though his formation in the Roman law would seem to enroll him in the school of Bulgarus — for whom, as we have seen, only written equity may prevail over written law — Huguccio himself does not hesitate to give a more general precedence to equity. This seems to be the purport of his statement that "Judgment must be given according to law unless something stands in the way,"⁴² a statement made without allusion to the conflict between the followers of Bulgarus and those of Gosia on whether the "something" must be written or not. Elsewhere, he does suggest a certain role for equity as an interpretive principle embodied *within* the law of the Church, making clear that one must always safeguard "*canonica aequitas*."⁴³

In general, then, if the early civilians seem to hesitate in choosing a path to follow, the decretists are at first clearly favorable to the idea of an equity of indulgence to which they assign a pre-eminence over the strict law. But Huguccio, even while he accepts Justinian's definition of equity, is careful to point also the existence of a "*canonica aequitas*," of a legislation, in short, in which equity of a merciful and indulgent stamp has a position of prime importance within the law, rather than above it.

III. THE DECRETALS AND THE DECRETALISTS

In fact, as Huguccio had implied, the papal legislation which was to make up the body of later canon laws had already clearly emphasized that the canons are inspired by natural equity and are in their equitable effects to be contrasted with the rigor of the civil laws.⁴⁴

38. F. V. SCHULTE, *DIE SUMMA DES STEPHANUS TORNACENSIS* 4; 103f. (1891). Simon of Bisignano (c. 1179) adds nothing to the subject. See B.N. mss. lat. 3934, f. 59 s.

39. SICARDUS, *SUMMA*, Vatican [hereafter B.V.] Pal. lat. 653, f. 66 v; f. 78 v; f. 67 r.

40. HUGUCCIO, *SUMMA*, B.V. lat. 2280, ad. dist. 50, c. 25.

41: *Ibid.*, B.N. mss. lat. 3891, f. 214 v.

42. *Id.* at f. 59 v.

43. *Ibid.*, B.V. lat. 2280, f. 9 v; f. 10 r; f. 16 r: Huguccio says that it is necessary not to depart from *canonica aequitas* or *canonica ratio*, using the terms interchangeably. The assimilation of *aequitas* to *ratio* thus remains an essential point, without his putting in doubt that *aequitas* inclines toward piety or mercy. Perhaps one must see in this an effect of the teaching on justice admitted by Peter Lombard, whose definition is taken from St. Augustine (cf. LOTTIN, *op. cit. supra* note 29, at 283ff.): "*Justitia est in subveniendo miseris.*" *Misericordia* is thus to be understood as related to justice.

44. It is, however, necessary to be careful in interpreting the meaning of the term *jus naturale* in this epoch. See, in particular, Sicard of Cremona: "... *Per iniquitatem dictum*

In the early twelfth century, Honorius II, speaking of the requirements in the action initiated by the so-called oath of calumny, had already emphasized that "*aequitas canonum*" is opposed to the "*districtio legum*."⁴⁵ The tradition was followed by Alexander III (1164-1181) in several answers incorporated into the Decretals. The emphasis is on canonical procedure's freedom from rigid technicality.⁴⁶ It is in the same spirit that Innocent III (1198-1216) instituted the broad matrimonial inquest for the discovery of impediments to marriage and liberalized the admission of witnesses in proceedings involving simony. In the latter case, where, as he stresses, civil removal (not criminal punishment) of a simoniac is at issue, witnesses may be heard, though guilty themselves of other crimes: they are admitted "not by rigor of law, but in equitable moderation" (*non secundum rigorem iuris, sed secundum temperantiam aequitatis*).⁴⁷

The reason generally given for the latitude afforded by canon law in such procedural reforms is in its aim to avoid punctiliousness and the multiplication of obsolete formalities which impede the discovery of the truth or the vindication of the rights of the parties. The canon law also developed peculiar institutions such as dispensation, dissimulation, and tolerance, calculated to give the spiritual and individual interests of the faithful the pre-eminence over certain considerations of ecclesiastical organization.⁴⁸ Finally, we have Honorius III's (1216-1227) determination in what became the decretal *Ex parte* that in a case not covered by legislation the dictates of equity are to be followed, taking the path most humane and tending to indulgence.^{48a}

In this emphasis on reducing formality, eliminating administrative obstacles, and inclining toward "indulgence," the canon law made "natural equity" its lodestar. The tie between natural law and canon law is found in this orientation. In a greater degree than other positive law, canon law claims to be founded on natural law, and the latter is the source of *canonica aequitas*. It is this alleged relationship to natural law which is the distant source of the opposition often exhibited by canon law to civil law. In at least one area the canon law consciously contrasted itself with the civil law. It is an area where the danger of sin was in-

est: hoc est meum, illud tuum, ut xii.q.i.c.ii., resp.: ius humanum dicit iniquitatem quia contrarium est naturali equitati secundum quod intelligi potest: Facite vobis amicos de mammona iniquitatis, i. de divitiis que iniquitate iuris humani acquiruntur et acquisite possidentur." (B.V. Pal. lat. 653f, 66v)

45. DECRETALES, CORPUS JURIS CANONICI [hereafter referred to as X] 2:7:2.

46. E.g., X 2:1:6 (Civil action not invalidated by wrong name being affixed to the libel); X 1:20:2 (Discretion delegated to bishop to determine seriousness of physical defect in candidate for ecclesiastical promotion).

47. X 5:3:32. See X 4:1:27 for the matrimonial inquest.

48. Cf. J. BRYs, *DE DISPENSATIONE IN IURE CANONICO* (Bruges, 1925); Charles Lefebvre, "Dissimulation," in 4 *DICT. DE DROIT CAN.* cols. 1296ff. (1949); G. OLIVERO, *DISSIMULATIO O TOLERANTIA NELL' ORDINAMENTO CANONICO* 179ff. (Milan, 1953).

It should be noted, however, that at times there is a greater rigor in the canon law with the claimed intention of avoiding sin. For example, the canon law demands good faith throughout the duration of the period of prescription. Cf. N. Vilain, *Prescription et Bonne Foi du Décret de Gratian à Jean d'André*, 14 *TRADITIO* 179ff. (1958). On the general effect on the canon law of this concern with sin, one should consult the works of P. Fedele. In particular, his *DISCORSO GENERALE SULL'ORDINAMENTO CANONICO* (Padua, 1941) is valuable, despite the reservations which must be made on some of his conclusions, especially on the public character of canon law.

48a. X 1:36:11.

volved, and the canon law attempted to avoid *periculum animae*. Thus, the canon law demanded a higher standard of good faith in prescription; it demanded the restitution of usury; and it upheld agreements made without consideration. There is a second area, where the distinction was not so self-conscious, but there was still antagonism. It was the area of cases where the civil law seemed to prefer institutional necessities to the right of particular persons, while the canon law attempted to assure these rights of persons in a strict fashion.⁴⁹

The decretalists had, then, in the body of legislation that formed their subject matter all the elements they needed for formulating a theory of equity. The elements are, indeed, presented by the commentators without controversy. It was less simple to determine how equity applied in a particular case.

The theory adopted by the canonists included certain civil law elements which canonical tradition had handed down to them. Like Justinian's equity, the equity celebrated in certain canonical texts is the supreme ideal toward which the law, properly subordinated, must tend. It is thus to be contrasted with the positive law, and is marked by special characteristics of humanity, benevolence, and mercy. These are the points we have seen emphasized in the writings of Huguccio. Nonetheless, canonical equity is not to be confused with the "cerebral" equity attributed by the civilians to Martinus Gosia, a type of equity they considered too apt to prefer solutions dictated by the judge's own vague notions of what was equitable to those solutions worked out by the lawgiver in the formulation of his mandates. Canonical doctrine adhered to the principles which carried the day among the civilians and recognized that equity may not be invoked in direct conflict with written law. It is for this reason equity is said to be *informata a jure*, to be based, that is, on principles clearly formulated in legislation.⁵⁰ Obviously the law which is to inform equity in this manner cannot be Roman law, not at least when the rigorous character of Roman law brings it and canon law into conflict.

A difficulty then arises as to what role to assign to Roman law in the interpretation of the canons, or in the solution of cases not provided for in canonical legislation. Some incline to give Roman law a very extensive scope in filling the interstices of the canons, whereas others prefer to rely on general principles emanating from the canon law itself, or on Roman law in a form attenuated and modified by canonical principles. Hostiensis allied himself with the latter approach in his frequent sharp criticisms of Innocent IV for depending too much on Roman law in his interpretations and too little on canonical inspiration or influence.⁵¹ William Durandus (c. 1250), a follower of Hostiensis, took the same position as his master,⁵² and even the great Johannes Andreae (1270-1348) followed suit, at

49. The points on which there is a divergence between canon law and civil law constitute the subject of an entire literature. Cf. J. PORTEMER, *RECHERCHES SUR LES "DIFFERENTIAE IURIS CIVILIS ET CANONICI"* (Paris, 1946).

50. On the legal source of equity, the *Glossa ordinaria* on X 1:36:11 is explicit. Cf. A. REIFFENSTUEL, *IUS CANONICUM UNIVERSUM*, bk. 1, title 2, n. 416 (Paris, 1840), where a résumé of the traditional doctrine may be found.

51. Compare INNOCENT IV, *COMMENTARIA IN QUINQUE DECRETALIU LIBROS*, on X 1:23:7 at the word "*ardua*" with Hostiensis in many passages of his *LECTURA*. See also Charles Lefebvre, "Sinibalde de Fieschi," in 7 *DICTIONNAIRE DE DROIT CANONIQUE* col. 840f.

52. DURANDUS, *SPECULUM IURIS* bk. 1, pt. 1, *de dispensatione* (Venice, 1598).

least in certain cases.⁵³ The later leading canonist Panormitanus (d. 1445) was also among those who followed this line of thinking.⁵⁴

To be sure, the reality of this divergence has been challenged.⁵⁵ It would, perhaps, not be accurate to see at work here two schools opposed to one another as the followers of Bulgarus were opposed to those of Gosia. Nevertheless, it seems clear that there were two countervailing tendencies. Innocent IV himself gives evidence of such a division when he speaks of the tendency of certain canonists to turn unnecessarily to Roman law in cases where the principles of the canon law would have furnished appropriate solutions.⁵⁶

These old distinctions are also pursued by later commentators. Thus Dinus Mugellanus (fl. 1300), the glossator if not the author of the rules of the Sext, points out that where a general rule of *aequitas scripta* and a particular rule or *rigor scriptus* apply in terms to the same case, familiar principles require that the latter prevail.⁵⁷ In contrast, John of Lignano (d. 1383) supposes a case which is not directly covered by any rule, but presents persuasive analogies with one case covered by *aequitas scripta* and with another case covered by *rigor scriptus*. He gives the preference to the equitable analogue.⁵⁸

It is in those cases that may be dealt with along equitable lines that equity is most often done. To be sure, it is only in the *Conclusiones Novae* (1376-1446) and in the work of Gilles Bellemère (d. 1407) that decisions specifically appealing to equity are to be found.⁵⁹ But equity is by no means absent from other decisions. Moreover, the majority of the cases presented in the papal curia hardly allowed for the intervention of equity; most of them concerned either benefices or rescripts — administrative matters to be dealt with along lines clearly laid down, and allowing no place for unforeseen situations.

In the course of time — especially from the end of the thirteenth century on — the theory of *ratio legis* encroaches more and more on the domain of equity. That is to say, an increasing reliance on the intent of the legislator makes it appear unnecessary to resort to a higher source of law.⁶⁰ We must admit a certain convenience in such a substitution. The higher source of law as contrasted with the

53. Especially *Commentarium* on X 1:35:1.

54. *Commentarium* on X 2:1:14 n. 32, where he takes a very clear position on the subject of the place of equity in judgments.

55. Stephan Kuttner, *Methodological Problems concerning the History of Canon Law*, 30 *SPECULUM* 542 (1955).

56. On X 1:23:7, criticizing the use made by certain canonists of the Roman concept *defensor civitatis*.

57. *COMMENTARIUM IN REGULAS IURIS PONTIFICII*, on reg. 2, *Possessor*, n. 23; on reg. *Aequitas*, n. 8 (Lyons, 1563). JOHN GAUFREDI, *COLLECTORIUM* (on 1:36:2) attributes to Dinus a position which makes equity prevail, and yet Dinus says expressly: "*praefertur rigor, quia in iure generi per speciem derogatur.*"

58. B. V. CHIS. E VIII 241, f. 90 v: ". . . licet haec aequitas non scripta, tamen similis aequitas est scripta . . . in simili casu novo tunc bene praefertur simile aequitatis simili rigoris."

59. P. REBUFF, *DECISIONES ROTAE NOVAE* (Lyons, 1555), f. 108, c. 2, dec. I. *De rerum per mutatione*, the chapter of the Clementines where equity intervenes, and G. BELLEMÈRE, *DECISIONES CANONICAE* (Venice, 1613) dd. 52 f., reporting fourteenth century decisions on the same chapter of Clementines.

60. Cf. CHARLES LEFEBVRE, *op. cit. supra* note 1, at 101ff., where the development of the theory of the *ratio legis* is traced together with the consequences which flow from it in the interpretation of the canonical rules.

sources of written legislation speaks all too often with so uncertain a voice as to leave the way open to arbitrary decisions.

The Roman conception of *aequitas* was not the only version of equity to gain currency during the Middle Ages. In the middle of the thirteenth century the influence of Aristotle is felt. Aristotle saw in *ἐπιεικεία* (which was translated as *aequitas*) two points to emphasize:

1) Law must include an element that does not conform to written legal rules, but rather serves to correct them. Law must give effect to a governing principle whereby a general rule of positive law may be amended in its application, since it applies in terms to situations the legislator cannot have meant it to cover unless he meant to be unjust.

2) The equitable man, *ἐπιεικέυης*, is characterized by humanity and indulgence, of which his actions give evidence.⁶¹

The second of these points raises no difficulties. The first point, however, presents some ambiguity. The Roman law had dealt with the same problem by appealing not to a superior principle of justice but simply to the intention of the legislator, who cannot be supposed to have wished the law to be observed in extreme cases. Thus the celebrated law *Non dubium* had made clear that "There is no doubt that one violates the law when he adheres to its literal language contrary to its intention" [*Non dubium est in legem committere eum qui verba legis amplexus contra legis nititur voluntatem*].⁶² The classic example of such a case supposes a law which orders that the gates of a city be barred at the approach of an enemy and asks, Are the guards to follow this law even if it means excluding a number of citizens who have not had time to take refuge in the city?⁶³

In exactly the same spirit, the *Glossa ordinaria* of Johannes Teutonicus (c. 1215) speaks of not departing from the letter of the law "unless the letter gives rise to a distorted understanding."⁶⁴ In another place it declares, "It is enough that one comply with the intention [*mentem*] of a rescript, even if he acts contrary to the letter."⁶⁵ The *Gloss* also says more broadly: "General terms do not extend to cases that have not been spoken of or thought of."⁶⁶

Conceptions of this kind, as they are recognized both in the Roman law and in the canon law, differ considerably from the approach of Aristotle and of St. Thomas to the same subject.⁶⁷ For these thinkers, *epikeia*, or equity, derives its authority not from a supposed intention of the legislator, but from an inherent limitation of positive law: positive law has no binding force in a case where its application would be contrary to the common good or to the natural law. Positive

61. See G. KISCH, *op. cit. supra* note 2, at 18ff.

62. CODEX JUSTINIANI 1:14:5. The canonists comment on this at c. *Intelligentia*, X 5:40:6.

63. See also THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, 96:6. Baldus gives another example of the same kind. Cf. Charles Lefebvre, "Epikie," in 5 *DICTIONNAIRE DE DROIT CANONIQUE* col. 368.

64. Gloss at the word "*sententias*," D. 38:12. He says, "*nisi ex verbis praevis generatur intellectus.*"

65. Gloss at the words "*Sed spiritualiter*," D. 2:3:104.

66. Gloss at the words "*Is autem*," D. 22:2:4.

67. ARISTOTLE, *NICHOMACHEAN ETHICS*, bk. V, ch. 10, 1137b.

law by its very nature can have no real existence if it is unjust. The canon law, in certain texts, adopts this position.⁶⁸

Yet this position does not seem to be a popular one among the medieval canonists.⁶⁹ Even when we come to the works of Guido de Baysio (c. 1300) or the *Collectarium* — works unquestionably influenced by St. Thomas — we find no evidence of epikeia, at least in the Aristotelian sense.⁷⁰ Both authorities content themselves with restating the traditional conception of equity, and using it to elucidate the law *Non dubium*. When the Aristotelian notion of epikeia is taken up again it is in the fourteenth century theological treatises called the *summae confessorum*, especially the *Summa astesana* (1317) and those that follow it.⁷¹ These works tend to be outside the purview of the canonists, who continue to confine themselves to interpretations of the law *Non dubium*.

This restraint on the part of the canonists is understandable enough. There is after all no need to have recourse to a supervening principle of justice except where the rules of the positive law cannot be brought by ordinary processes of interpretation to yield just results. Within the framework of the medieval canon law, the development of *ratio legis* as a principle of interpretation apparently provided a satisfactory way of solving such problems as arose without resort to any supervening principle.

IV. POST-MEDIEVAL DEVELOPMENT

1. *The Influence of Suarez.* — It is under the influence of sixteenth century moral theologians that the conception of equity is further developed. As we have seen, it had been understood by the majority of authorities that only written equity could prevail over the positive law. The supervening principle of justice had been further limited by the development of *ratio legis*. But now the more rigorous study of sources characteristic of the new school of civilians indicated that the old distinction between *aequitas* — whether written or unwritten — and *rigor* rested on an inaccurate reading of the texts.⁷² These distinctions, therefore, were promptly dropped from the vocabulary of the civilians with the expectation that the canonists would shortly follow suit. Civilians thereafter kept strictly to the two doctrines of *ratio legis* and epikeia. The correction of an unjust law required by epikeia was conceived of as doing no more than allowing for the moderation or amendment of a law under certain circumstances to conform to the intention of the legislator, who is deemed to be inspired by that equity, benevolence, or indulgence so often recommended by the written law.⁷³

68. DECRETUM, D. 8:2 and the preceding dictum. An application is found in INNOCENT IV, *op. cit. supra* note 51, with a good many precisions, on X 3:49:8. The later commentators on this chapter take up the doctrine of Innocent.

69. The term "epikeia" is first not found at all in this sense. The later case of the law *Non dubium* does not correspond exactly to the conception of Aristotle.

70. See both Guido's *Rosarium Decreti*, and his famous Commentary on the Sext, and note the *Collectarium* on X 1:36:2 where normally an allusion ought to have been made.

71. ASTESANUS, *SUMMA ASTESANA* (Lyons, 1586) at the word "epikeia"; the *Summae confessorum* sometimes treats this case under the word "lex."

72. LEFEBVRE, *op. cit. supra* note 1, at 196ff.

73. See H. DONEAU, *COMMENTARIUM IN IUS CIVILE*, bk. I, c. 13, nn. 6, 11ff. (Florence, 1847).

The canonists, however, took a more complex approach to the subject in order to incorporate the new doctrinal formulations introduced by Suarez. The problem to which Suarez had addressed himself was whether epikeia is to be regarded as one of those principles of natural law which prevail over inconsistent provisions of positive law — and, therefore, as distinct from any principle of restrictive interpretation by which the application of a provision of positive law is intrinsically limited. Suarez, in answering this question affirmatively, developed a precise theory of epikeia, and one so different from the understanding of equity which had by then prevailed among the canonists that the upshot is the development of a rather sharp distinction between epikeia and equity despite the similarities exhibited by the two concepts.

Suarez's position enlarged the scope of epikeia as conceived by Aristotle and St. Thomas. He began by setting up summarily the distinction between epikeia and interpretation; interpretation aims only at showing what cases are clearly within the ambit of a given law, whereas epikeia serves to exclude from that ambit certain types of cases otherwise within it. Suarez detailed the cases so excluded under three heads:

- 1) Cases to which the legislator had not power to extend the law in question, as to do so would be unjust. This is the situation Aristotle and St. Thomas had in mind, and that envisaged by one of the traditional versions of equity.
- 2) Cases to which we assume that the legislator did not *intend* the law in question to apply, as its application would work too great a hardship.
- 3) Cases in which, given the circumstances surrounding the enactment of the law in question, it is reasonable to suppose that the legislator would have been willing as a matter of benevolence to make an exception to the law.⁷⁴

Epikeia as thus understood covers not only the extraordinary cases envisaged by the law *Non dubium* or by the traditional theory of equity, but also certain cases previously dealt with under some of the broader conceptions of equity or under the doctrine of excusing causes.

How was this new doctrine received among the canonists? Obviously, it had much to recommend it — its clarity, its logical force, its benevolent inspiration. It quickly assumed a prominent place among the recognized principles of interpretation, and soon became itself the object of a process of interpretation.

Some commentators refused to distinguish Suarez's version of epikeia from the principle of restrictive interpretation.⁷⁵ Similarly, other commentators insisted that it was neither a dispensation nor a license, but a benevolent interpretation of the intention of the legislator. Yet Suarez's version is not an interpretation in the strict sense of the word. Although it purports to say what the

74. DE LEGIBUS, bk. 6, c. 6, a. See my article on "Epikeia," *op. cit. supra* note 63, at col. 369.

75. F. SCHMALZGRUEBER, *JUS ECCLESIASTICUM UNIVERSUM*, bk. 1, title 2, n. 49 (Dillingen, 1717); G. PICHLER, *SUMMA IURISPRUDENTIAE*, bk. 1, title 2, n. 76; F. SCHMIER, *IURISPRUDENTIA CANONICO-CIVILIS* 28, n. 86 (Salzburg, 1761), without speaking of the decisions of the Rota. (RECENTIORES, XI, d. 357.)

legislator intended, it makes its determination on the basis of considerations extrinsic to his intention as objectively manifested.⁷⁶

On the other hand, an increasing number of commentators were impressed with the exceptional character of *epikeia*, and sought to find in it an element whereby it might be distinguished from cases excusing observance of the law.⁷⁷ In this way, they left it an extremely restricted field of operation — so restricted, in fact, that it seemed to lose all relevance in the external forum.⁷⁸

Equity in some sense continued to be involved in decisions of canon law. A number of rules, continued in force from an earlier period, made express provision for the intervention of equity whenever the occasion demanded. An example is furnished by the commissions whereby causes are committed to tribunals with the term "*arbitrio*" (i.e., with decision committed to the judge's discretion);⁷⁹ others are to be found in the decisions of the Congregation of the Council.⁸⁰

Furthermore, there are a number of matters in which equity was habitually taken into consideration — interpretation of statutes, rescripts, and exceptions; cases of inheritances and contracts requiring good faith; dowries; cases pending before commercial courts; cases in which neighbors or relatives intervened; arbitration cases; and summary processes.⁸¹ In addition, equity played a large role in other cases when there was a doubtful interpretation to be made, when the judge intervened *ex officio* or his authority was invoked, or when the bad faith of a party was in issue.⁸² In all these cases, it was equity "informed by law" — *informata a jure* — that was involved.⁸³

In short, despite the reaction to Suarez's doctrine of equity, which ultimately served to limit its application to exceptional cases, equity continued to play an important role. Canonical equity remained a significant characteristic of the system of canon law.

2. *The New Code.* — In this area, as in many others, the Code of Canon Law issued in 1918 did no more than assemble and elucidate the principles supported by the strongest elements in the existing tradition. Equity, as distinguished from *epikeia*, made a number of scattered appearances in the Code. At the same time, it now received little or no attention from contemporary moral theologians, who came to regard it as a concept pertaining exclusively to the canon law.⁸⁴

76. Cf. BENEDICT XIV, *DE SYNODO DIOCESANA*, bk. 12, c. 8.

77. P. LAYMAN, *THEOLOGIA MORALIS*, bk. 1, tract 4, c. 19, n. 1 (Munich, 1625); A. REIFFENSTUEL, *op. cit. supra* note 50, at n. 378; L. FERRARIS, *PROMPTA BIBLIOTHECA*, at Lex 5, n. 42 (Paris, 1833); I. D'ANNIBALE, 1 *SUMMULA THEOLOGIAE MORALIS*, I (Rome, 1883), no. 187, note 49; H. FEYER, *DE LEGIBUS* 183, n. 192 (Louvain, 1887).

78. F. X. WERNZ, *JUS DECRETALIU*, n. 117, n. 136 (Prati, 1899); A. VERMEERSCH, *QUAESTIONES DE IUSTITIA* 400f.; B. OJETTI, *SYNOPSIS* at *Epikeia* (Rome, 1912).

79. E. WOHLHAUPTER, *op. cit. supra* note 4, at 129-137; cf. MARCHESANI *DE COMMISSIONIBUS* (Rome, 1615).

80. The collection, *THESAURUS RESOLUTIONUM S. CONG. CONCILII* (Rome, 1718-1907), furnishes many examples.

81. Cf. H. BONAGOSSA, *TRACTATUS DE AEQUITATE CANONICA* (Venice, 1575); J. CALVINUS, *DE AEQUITATE LIBRI III* (Milan, 1676).

82. I. D'ANNIBALE, *op. cit. supra* note 77, at c., n. 187.

83. A. REIFFENSTUEL, *op. cit. supra* note 50, at n. 416.

84. E.g., L. FANFANI, *THEOLOGIA MORALIS* (Rome, 1949), where no mention is made of *aequitas* as corresponding to *epikeia*.

Equity, as the modern canonists conceive of it, is simply the equivalent of justice itself insofar as justice relates to a particular case. Equity means also that equality or universality of application which is an essential of justice. An essential of the ideal of natural justice, equity may also emanate from a positive human law, either civil or canonical. There is, then, both a natural equity, coinciding with what is naturally just, and a civil or canonical equity based on civil or canon law. The essential role of equity thus understood is the mitigation of a rule of positive law which proves too rigorous in its application to a given case. Is it not then the incarnation of a human longing for more justice?⁸⁵

Whether the word "equity" is used alone⁸⁶ or in conjunction with "natural"⁸⁷ or "canonical,"⁸⁸ it must be read always as implying an effort to insure a correspondence between natural and legal justice. As in ancient law, this equity is "informed by law" (*a jure informata*); it does not emerge from the blind aspirations of the faithful, but is based on an outlook informed by the sum total of canonically formulated principles. It is in this sense that equity is properly called "canonical."

The Code begins by recalling the whole body of rules which, though not set forth expressly in the new canons, are still valid; among these are to be found the principles of natural justice, natural law, or natural equity. (Canon 6:6) From this reference we may conclude that the prime norm of canonical equity is precisely its conformity with natural equity.

Canonical equity, however, differs from natural equity in that it develops the various tendencies of which natural equity is the source. Thus, while natural equity is universal and unchanging, canonical equity furnishes the guiding principles for the different configurations in which canon law conforms to different times and places. There cannot be a total assimilation of canonical equity to natural equity.

Equity *simpliciter*, the term used with no qualifying adjective, is used among the canonists to designate canonical equity. As we have already seen, such equity is not allowed to intervene unless it is "informed by law" (*informata a jure*).

These two notions of canonical equity and natural equity are not opposed, as at first glance they might seem to be; they are complementary. Canonical equity is believed by canonists to develop more surely than any other type of legislation the principles of natural equity and their application. And what would canonical equity be without natural equity? Is not the latter the source and foundation of all canonical legislation? While natural equity and canonical equity cannot be identified, they are yet almost indissolubly bound together.

CHARLES LEFEBVRE

(Translated by JEANNE RODES)

85. See U. STUTS, *DER GEIST DES CORPUS IURIS CANONICI* (Stuttgart, 1918); A. HAGEN, *PRINZIPIEN DES KATHOLISCHEN KIRCHENRECHTS* (Würzburg, 1949).

86. *CODEX JURIS CANONICI*, Canons 1455:2, 1833:2.

87. *Id.* at Canons 144; 192:3; 643:2.

88. *Id.* at Canon 20.