

EQUITY AND THE LAW

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Summary

This article describes the roles of “equity” in a legal system. Since the earliest national systems of law, and throughout the modern world, legal systems have incorporated certain mechanisms for resolving disputes not according to specific rules for the conduct of citizens but according to general principles of right. These principles of right, once applied to a new situation, may in turn give rise to new rules reflecting the earlier application of the principle. Further, the law sometimes commits decisions related to these principles to a specific court in which the principles will be applied, although the principles have recurrently been exported to other arenas of the courts. The Roman law and later civilian systems recognized the need to determine some disputes not only according to rules but also conforming to principles of fairness and right that would moderate an unfair result required by rules, and this recognition gave rise both to judicial institutions and to new rules in the civil codes. Likewise, the common-law systems of England, the United States, and the Anglophone nations generally have developed both particular fields of the substantive law that represent rules derived from such principles and general mechanisms for the use of such principles in situations that would otherwise require the law to tolerate injustice. Similar developments occurred in such seemingly different systems as the Islamic *shari’ah* and the law of socialist states. The fundamental institutional reasons for principled responses to the failings of rules have been recognized at least since the time of Aristotle; human conduct is too varied and unpredictable to allow the perfection of a fair system of legal rules. Taking as an example the forms of principle that evolved within

common-law equity, certain concerns have recurrently arisen that illustrate principled responses to this imperfection. These common-law illustrations are themselves principles that resonate with the principles of other systems: Equity must assure that those who are harmed can find relief, that the relief will only be granted for reasons that are themselves fair, that the form of the relief granted is fair to all concerned, and that equity is not used for unfair purposes.

1. Introduction

“Equity” has many related but distinct meanings. Broadly, equity is the treatment of others with justice and fairness. In Anglo-American legal systems, it refers, first, to a specific set of rules governing a limited set of remedies and causes of action and, second, to a principled approach to resolving legal disputes in order to avoid unjust results as a matter of law. Sir Henry Maine described this idea of equity in his classic work, *Ancient Law*, as “a set of legal principles, entitled by their intrinsic superiority to supersede the older law.”

Although not every legal system employs the term “equity,” practically every mature legal system has methods of resolving disputes through resort to principles as opposed to rules, and many have comparable sets of remedies and causes of action. In particular, civil-law systems incorporate similar doctrines, in which certain legal decisions must be made not according to narrow rules but according to what is just and good, and all decisions accord with the universal principles of fairness.

Legal systems that apply the rule of law require that rules be created in advance of their application to a given situation or conflict. [*See Rule of Law.*] But the human affairs that must be governed by rules are so complicated and unpredictable that no set of rules can be adequate in both specificity and comprehensiveness. Inevitably, officials of the legal system will be required to act in situations in which there is no adequate rule, and so they must then resort to more general principles, which both describe the conduct of the citizen that must be judged and guide the bases of the judge’s reaching a judgment. In doing so, the continuing need to maintain the legal system as a system of rules will often result in new bodies of rules based on historical resolutions of questions in which there was no adequate rule. In this manner, specific bodies of “equitable doctrine” emerge, with limits of jurisdiction, or procedure, or remedy that reflect their histories.

These bodies of equitable doctrine are then both artifacts of and testaments to a broader operation of equity in resolving disputes when the rules of law are inadequate to govern a particular situation. In this sense, equity provides rules for officials to apply when the ordinary rules break down.

Because of its nature as a power inherent in the court, there has almost always been the potential for controversy over the authority of judges to give orders to a citizen, or to refuse to do so, according to equity. In its purest form, when acting from equity alone, the judge bases a decision solely on the authority of the court, rather than on authority delegated from a legislature, king, or president. The court is acting with its greatest degree of discretion. At such times, the court is both exercising great power and risking great criticism, particularly from those who believe that legitimate sources of law must ultimately be derived from a popular source, or at least a source that is subordinate to popular will. The

exercise of such discretionary authority depends for its success on the institutional political power of the court among other arms of the government, as well as the general esteem and authority of the court in society. Both of these sources of authority in turn depend on how officials and citizens perceive the fairness of the result and the rationale of the court's decisions over time and in especially famous cases. An inherent function of equity is to ensure that the rules of law are applied according to broad standards of what is just, right, and good, and these standards are both limits on the rules of the law and limits on actions of the officials. Thus, equity provides authority for a judge to refuse to enforce an unjust, evil, or wrong decision or rule. Further, by application of such standards, judges may act in the absence of pre-existing rules in their powers of equity, but they are still not acting with unfettered discretion: the principles of justice, right, and good limit their discretion.

2. Equity in Specific Systems of Law

Perhaps there has never been a system of law that survived long without equity in its broadest sense, as a claim that the nature of law demands the just application of laws, and that this justice apply with fairness toward all. Certainly, there are numerous examples in antiquity. The 3,000 year-old Sumerian laws depicted Hammurabi as propounding laws for divine favor: "When Marduk sent me to rule over men, to give the protection of right to the land, I did right and righteousness . . . , and brought about the well-being of the oppressed." The idea that law must be limited by the right, even for a tyrant, was a central idea to Aristotelean ethics and to Greek thought in general. Sophocles' *Antigone* depicted Creon, the all-powerful tyrant of Thebes, as lawfully ordering that Polyneices be denied a burial, but in so doing acting beyond the right. Similarly, Jewish histories required even an avenging God to offer mercy to spare first the family of Noah and then the family of Lot, rather than let them blamelessly perish in his rightful punishments. Man was assigned a more constant obligation than that of God, and in the book of Deuteronomy, Moses was advised not merely to follow the law but to do "right and good in the sight of the Lord." From such a base came Mosaic obligations not to use the law to one's advantage but to return lost goods to owners, and not to oppress the poor with sureties for loans, as well as the divine edicts against iniquitous laws, such as that raised by Isaiah.

Obligations to act according to the right, and to be judged according to whether one has acted according to the right as opposed to the law, occur in many legal systems that are strongly informed by religious or moral texts. For example, the *Koran* recites divine commands that man be ruled by Equity, and according to tradition, not only does Allah act with *adalat*, a form of equity in acting as Lawgiver of Islam, but also man must act with right and goodness toward all others. Thus the *shari'ah* of Islam requires equity to be enforced between the parties to a dispute and in the application of the law to any given case.

Each of these ancient examples is as much the stuff of national myths as of a legal system. Even so, as discussed in section three of this article, it is quite impossible for a system of laws to be both sufficiently comprehensive and universal and sufficiently fair and just without some mechanisms of official decision according to equity. So it is that most nation-states have incorporated equity as a requirement for a just and comprehensive legal system. The two most significant Western legal systems, common law and civil law, have roughly similar histories in the announcement of decisions of equity to ameliorate the

injustice of law, the crystallization of equitable decisions into rules, and the rise and fall of independent institutions for the announcement of new decisions and application of old rules. Further, the principles and institutions of international law, while not developing a specific institution dedicated to the development of decisions of equity, have evolved certain rules that reflect past equitable decisions and dedicated forms of question to be resolved through equity.

2.1 Equity in Civilian Legal Systems

The idea of equity is most usually associated with the common-law systems, which employed courts of equity specifically for that function. The civil systems, however, present two critical examples of the role of equity in the law. In the ancient example of Roman law, equity is present as both means and ends, in which the legal system evolved principled means of moderating the demands of law, in order to ensure that the law reached fair and right ends in given cases. The emphasis of the civil law tends not so much toward means as toward ends, and for matters that are prone to injustice, the code enshrines obligations on the judge to act with equity to ensure a just application of law.

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Biographical Sketch

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