

## Roman *aequitas* of the Christian Emperor

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[trans. by Meg Leja and Courtney Booker, from Fritz Pringsheim, "Römische *Aequitas* der christlichen Kaiser," in *Acta congressus iuridici internationalis* (Rome, 1935), I:121-52.]

Roman *aequitas* of the Christian emperor—that is, *aequitas* in Roman law from Constantine to Justinian—shall be the topic of this paper. Christian *aequitas* will remain out of the discussion for the moment; a perspective on it will only be ventured here and there.

Constantine ordered: *Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem*. How did he come to confer this position on *aequitas*? What had preceded it, and what was meant here by *aequitas*?

1) *Aequitas* is a term that is difficult to define and scarcely able to be grasped according to its legal character. Since Greek legal philosophy presented this term to the world, it has played a lasting role in the laws of all periods. Two functions of *aequitas* can be distinguished.

At one point, [it had] a more transcendent role: the positive law is considered, assessed, and manipulated from a position outside of the system. Stimuli that are alien to the prevailing law have an effect. This *aequitas* stands between the positive law and another region, conveying stimuli of this region to the existing law. The *aequitas canonica* belongs to the *lex naturalis* and communicates effects from the *lex aeterna* to the *lex humana*. The Roman *aequitas* of the classical period acts as an intermediary between the old *ius civile* and the new, nascent official law, the *ius honorarium*. The principles that gain acceptance with the help of *aequitas* can be new rules of law or new ideas (either ethical, religious, or political) adjacent to the law, ready to permeate the legal realm. In this sense, *aequitas* is the coming law, the moving principle of the history of law<sup>1</sup>—to the extent that it [exists] in the prevailing law in accordance with an awareness of the rules of law. *Aequitas*, equity, has the task of facilitating an even-handed adjudication of particular cases, while complying with the terms of the existing legal order. It arbitrates between the abstract, universal rule and the concrete,

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<sup>1</sup> Binder, *Philosophie des Rechts* (1925) 404.

specific case. To exercise such *aequitas* is the great task of the judge; the law may or may not grant him the mandate for this through special authorization. This *aequitas* is also the key principle for a sound interpretation both of the law and of a legal transaction. The interpretation should be carried out not according to the letter, but according to a properly evolved spirit and reason.

*Aequitas* as nascent law, as a new perspective and standard of critique for the current law, and *aequitas* as a principle of interpretation, as an aid to the enforcement of the true will of the law and the parties: both functions are constants of every order as soon as the law is quite consciously considered. There are, admittedly, the early days of the law, in which this consciousness is still lacking. The early Greek, Germanic, and Roman laws, for example, are not yet prone to such a treatment. They are too concrete, too unsophisticated, too self-contained, too borne along by the will of the people and common judgment for the idea of *aequitas* generally to find space.<sup>2</sup> The notion of a transcendent *aequitas* is not yet conceived in this rather unconscious environment; a gulf between that which exists and that which ought to exist is not felt; one is content with the law that one has. Moreover, a particular mandate to follow the interpretation of *aequitas* in the organs of judicial administration is still unnecessary: either because the harshness of the rule of law is accepted, so that serenity and security do not suffer (one reconciles oneself with not finding the best solution for an individual case), or because the application of law is established so artfully and adroitly that the difference between *ius* and *aequitas* is not perceptible (the law itself, especially its process, is masterful at remaining flexible and adaptive).

As soon as this situation has passed—and this can happen sooner or later depending on the elevation of the spirit regulating the world of law and the power of the unconscious forces—*aequitas* enters into consciousness. The degree and pace of this process of awareness can be very distinct. It is certain that, not long after *aequitas* has begun to operate, its boundaries will become obvious to a healthy populace. Then perils lie in wait in regards to its two functions. Collective [thought] infects each of its functions with the idea that, when one allows it too much leeway, *aequitas* is a loosening element, an element corroding right order.

As we see, according to its essence, *aequitas* is a difficult legal concept to grasp. If we observe it as a principle of critique of the current law, then clarity must prevail, from which perspective and

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<sup>2</sup> Niedermeyer, *Theologische Literaturzeitung* 59 (1943) 358 ff.

with which proper objectives the critique proceeds. Uncertainty with regards to the perspective is dangerous. We observe *aequitas* as a principle of interpretation; in this, weakness threatens to destroy the stable framework of legal order. Through reference to the obscure and convenient *aequitas*, fatigue and frailty simplify the difficult scholarly task of [finding] a solution that complies with the law in each individual case.<sup>3</sup> Latent, enduring forces emerge as contenders for equity. Clarity and precision begin to suffer. The perpetual conflict and counter-play between the two concepts of law and equity (a counter-play that nullifies contradictions in a higher unity) generates an overly positive assessment of the first principle. In both cases, the outcome is a tremor of the nation's faith in its own law and the law's actualization, and uncertainty about the life of the law. Arbitrariness and sentiment, indistinct, veiling forces inimical to the law, are present in the final stages.<sup>4</sup>

All this is avoided if *aequitas* remains faithful to its own law, gradually becoming law itself. Since it is only a particular form of the realization of the law (if not the existing law, then that of the future), situated in the nature of human order, it carries the tendency in itself to establish a new law. *Aequitas* is a dynamic principle, which, after being accepted, rushes into the branch of law. The transcendent *aequitas*, with the help of the law-givers or the judicial administration, gradually merges into the existing law. From an abundance of just individual arbitrations, *aequitas*, acting as a principle of interpretation, tries to establish more general rules, which then customarily become rules of law—rules that betray their point of origin in *aequitas* from time to time. It belongs to the nature of *aequitas* that it is anxious to insert its all too vast expanse into a legal system again and again. This is apparent in civil law as well as in canon law of the present period; it is particularly obvious in English equity,<sup>5</sup> which has become more and more a legal system, and likewise in Roman magisterial law of the classical era.<sup>6</sup> In such a way, law comes into being again out of equity, and this new law, rigid and abstract according to its nature, presently threatens to become inequitable again. Crystallization of

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<sup>3</sup> Hedemann, *Die Flucht i. d. Generalklauseln. Eine Gefahr für Recht und Staat* (1933) 2, 51 f., 66 ff.

<sup>4</sup> Pringsheim, *Ius aequum und ius strictum*, *Sav. Z.* 42 (1921) 668.

<sup>5</sup> Andreas B. Schwarz, *Equity (Die Zivilgesetze der Gegenwart II: England, 1st Part)* 119 f., 146 f., 154 ff.

<sup>6</sup> Arangio-Ruiz, *Istituzioni* (3<sup>rd</sup> ed.) (1934) 3 f.; Chiazzese, *Introduzione* (1931) 119 f.

*aequitas* into law, and the emergence of a new *aequitas*, is the immortal process of thought in the world.

2) Roman law of the early period still does not require *aequitas*. The *interpretatio* of the Twelve Tables helped itself go on along its own route; within those things themselves, the means to develop them further were found. However, later, naïve belief in the traditional and always living law is great enough to maintain unshaken confidence in the proper order. When the praetor begins to enforce new viewpoints in the civil code and beyond, at first he feels completely within the nation's law. His voice is a *viva vox iuris civilis*. In his dark urges, he is constantly aware of the right path. As Greek *epieikeia* (clemency) is brought in through the propagation of Hellenistic culture, as naïve thought becomes scholarly, but at the same time comes into danger of becoming decayed, and as Greek philosophy and rhetoric advance, people initially seize new concepts more intuitively, adopting the values of a foreign intellectual world. *Aequitas* is the vanguard, the forefront of an army first entering into battle; but the old battle formation still remains firm; one uses the new weapon, the ally from a foreign land, only beside other familiar and tested weapons. In the entire classical period, *aequitas* is never placed above law.<sup>7</sup> New legal necessities are satisfied in manifold ways: assimilated complaints (*actiones utiles, actiones ficticiae*), exceptions, refusal of *actio, restitutio in integrum*, interdicts, and praetorian stipulations implement new law. *Aequitas* is thereby sometimes the innovator; however, literature interpreting praetorian edicts does not use the word *aequitas* very often at all.<sup>8</sup> The praetor himself never utters it.<sup>9</sup> When he, wordless, pursues equity step-by-step, he senses it as a new, external force as little as he senses himself as one; he neither subjects himself to *aequitas*, nor does he destroy civil law with its help. He is enforcer and fulfiller of a national consciousness.

Roman lawyers learned the rhetorical technique. However, the points of debate in the market and before the court hardly penetrated the technically fixed, austere governed world of jurisprudence.<sup>10</sup> Reason could hardly win over this world with rhetoric, because in rhetoric opposing

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<sup>7</sup> Pringsheim, *Ius aequum und ius strictum*, Sav. Z. 42 (1921) 644 ff.

<sup>8</sup> Pringsheim, *Aequitas und bona fides* (Conferenze Mil. 1931) 199 f.; 207.

<sup>9</sup> Ibid. 198 and note 1.

<sup>10</sup> Himmelschein, Studien zu den antiken Hermeneutica iuris. *Symb. Frib. in hon. Ottonis Lenel* 1935, 373 ff.

viewpoints were represented with equal vivacity.<sup>11</sup> If the rhetors really leaned more towards *aequitas* and *voluntas* for a while in the competition between *ius* and *aequitas*, it was only because there was more to be gained from it in the rhetorical competition, since a stronger consideration of equity and volition loosened up the purely juridical and thereby created free space for non-juridical, purely rhetorical arguments.

Roman lawyers carried the *ars boni et aequi* inside themselves. They knew and felt what justice was. The word *iustitia* they uttered only when they moved about in the matter of definitions as students of the Greeks.<sup>12</sup> What the Hellenistic philosophers and rhetors loudly propounded as new theory, what Cicero, as tutor of the Roman lawyers, carried over and transformed into a new scholastic system of reflection, was accepted or rejected by expert lawyers, praetors, and judges with instinctive coolness. A rhetoric, which was diverted into the territory of vague and malleable equity by legal policies painstakingly established over the course of the centuries and cautiously (at times, subtly) fashioned, can have been most valuable to the great Roman lawyers as a method of assembling arguments; one could not find healthy nourishment here. They never despised formal training; it belonged to Roman nature to learn from Hellenism what one could appropriate for oneself. This practice, the beginning of which took place in very early times, never ceased.<sup>13</sup>

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<sup>11</sup> Pringsheim, *Conf. Mil.* 196; F. Schulz, *Prinzipien des Röm. Rechts* (1934) 88 note 114; Dulckeit, *Erblasserwille und Erwerbswille bei Antretrung der Erbschaft* (1934) 5 ff.; 76 f.

<sup>12</sup> That will have to be elaborated upon in another place.

<sup>13</sup> Kübler writes in 1931 (*Confer. Milan.* 123): “[trans.] The opinion that only in Byzantine times did the Greek law influence Roman law belongs to the most serious of errors by various researchers of interpolations.” Since I have reason to count myself among these researchers of interpolations, may I note that the accusation does not affect me. I cite only:

1921: *Sav Z.* 42, 644: “[trans.] *Aequitas*; its role admittedly grows in the classical period: however, the Roman lawyers are students of the Greeks, here as everywhere, when philosophy joins in the discussion.” 667: “The lawyers prudently avoid this (certainly influenced by Hellenism) *aequitas*.”

1921: *Festsehr, Lenel* 246: “[trans.] Under the continually expanding influence of Hellenistic philosophy and with amazing independence, regular jurisprudence emerges here.”

1926: *Sav. Z.* 46, 363: “[trans.] That the Roman code of obligations, which stretches across a vast period, is completely stripped of the influence of Greek legal philosophy is not probable.”

1928: *JW* 49: “[trans.] It remains an urgent task to investigate the influence of these Greek ideas both in the classical as well as the Byzantine Roman law.”

However, even after periods of eager reception, hesitation and resistance are continually palpable in the branch of law when the consideration of the practitioner is alive to the fact that the venture tends too strongly to the side of theory.

So space remains then for *aequitas* of the classical period only in the considerations of the lawmakers and the praetors, the organs of legal direction. Vittorio Scialoja's statement: *aequitas legislatori, ius iudici magis convenit*<sup>14</sup> has been validated through critical study of the classical epoch over recent years. In no Roman formula does the word *aequitas* appear.<sup>15</sup> The Roman judge did not presume to make unrestricted equitable decisions; he was bound by the established formula. The formulas *quidquid ob eam rem dare facere oportet ex fide bona* and *quantum ob eam rem bonum et aequum iudici videbitur* gave the judge a measure of carefully restricted freedom, which every good judge requires. However, neither the *bona fides* in the *intentio* of the *formula in ius concepta* nor the *bonum et aequum iudici videbitur* gave the judge a measure of power to autocratically set his will over that of the law or the men of the court. The conscientiousness, the reliability of the Roman man, was embodied in this *bona fides*, in this *bonum et aequum*; through it, the ancient Roman sense of duty was legally guaranteed.

Under the motto of *bona fides*, the concrete facts of the case can be examined. The defendant has to render only that (but also everything that) which a scrupulous man owes in the specific case. Interests of an incalculable sort were appraised by the *iudex, quantum bonum et aequum videbitur*, in each case. This *aequum*, however, had nothing to do with a malleable equity; it underscored the

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1931: *Confer. Milan*. 193: “[trans.] Even the Greeks, from whom the philosophy of this notion of ἐπιτήχθεια was passed to the Romans.”

1932: *Sav Z.* 52, 94: “[trans.] Then, however, this Roman *bonum et aequum*, whether it was a Greek χαλό υχαζ δίχχιου or replaced it, in any case grew off a Roman floor.”

1933: *Law Quart. Rev.* 46: “Roman rhetoric, under Greek influence, discussed very early the problem of which element, the intention or its expression, deserved pre-eminence.”

If I have not misjudged the early Greek influence all along, I must disagree with the most pronounced part of Kübler's thesis (*Atti del Congresso Internat. di Dir. Rom.* 1934; I, 98) “that the Roman jurisprudence owes its existence to the fertilization produced by Greek philosophy.”

<sup>14</sup> *Del diritto positivo e dell'equità* (Camerino 1880) 16, now *Studi giuridici* (Rome 1932) III, 15.

<sup>15</sup> It is also utterly absent, by the way, in the *Index* to the first part (*Leges*) of the *Fontes iuris Romani* by Gradenwitz.

balance between infringement of the law and amount of the sentence.<sup>16</sup> In the end, *bona fides* ruled only in the territory of the *bonae fidei iudicia*, beside numerous, strict standing procedures. In early times, *bonum et aequum* is confined to a few complaints concerning the *actio iniuriarum*. In both cases is found a certain prudent and limited power of discretion for the judge; in both cases, this power rests in a close investigation into the facts of the case and all its idiosyncrasies.

One recognizes that Roman jurisprudence did not require *aequitas* so very much, but its *one* function (the art of interpretation) was already fulfilled in a number of complaints by ancient Roman terms. The other function (foreign impulses bring into effect the prevailing law) was dispensable, as long as the edict remained alive. With the more severe complaints, however, the Romans did not want to grant *aequitas* too much sway, perhaps because predictability was more important than a just decision. One also sees how little one does justice to the true Roman spirit when, as frequently happens today, *bona fides*, *bonum et aequum*, and *aequitas* are lumped together under a common modern notion of equity. Such a move blocks the sight of a long and tentatively built up Roman praxis with its variation and prudence. Totally hidden, however, is the national Roman essence when one talks about a victory of *aequitas*, considered to be so encompassing and thus un-Roman, over the *ius* in the classical or even republican period.<sup>17</sup>

*Aequitas* provides assistance to the praetor; jurisprudence uses the word without a struggle ever being detected over its abstract clarification. The praetor does not in any way submit completely to *aequitas*, nor does *aequitas* dominate the branch of the law in the classical period. There is no *ius aequum*; *aequitas* stands as a regulating and moulding element in and beside the *ius*.

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<sup>16</sup> Pringsheim, *Bonum et aequum*, *Sav. Z.* 52 (1932) 86, 97.

<sup>17</sup> Thus notably Stroux, *Summum ius summa iniuria* (1926) 40; in agreement is Riccobono, *Ann. Pal.* 12, 639 ff.; *Gnomon* 5, 65 ff. and elsewhere. Or consider the challenge by Levy, *Sav. Z.* 48 (1928) 675; Kunkel, *ibid.* 722; Jolowicz, *Law Quart. Review* 48 (1932) 184 f. 192 n. 3; by Beseler, *Tijdschrift* 10, 190; Albertario, *Studi Bonfante* 1, 641 ff.; Himmelschein, *Symbol. Friburg. in hon. Ott. Lenel* (1935) 391; F. Schulz, *Prinzipien* 89 n. 115; Dulkeit, *Erblasserwille* (1934) 6, 76 f.; Pringsheim, *Sav. Z.* 42 (1921) 643 ff.; *Conferenze Milan.* 192 n. 3, 196 f.; *Sav. Z.* 52 (1932) 113. Without a clear opinion: Rabel, *Sav. Z.* 47 (1927) 485 f.; Wenger, *Arch. F. Pap.* 9 (1930) 300 f.; Kreller, *Juristenrecht* (1932) 8 ff.

3) As the pre-Constantinian constitutions of the *Codex Iustinianus* and the associated sources are examined,<sup>18</sup> the picture changes only so far as the altered and altering process necessitates this. In all essentials, classical *aequitas* remains unadulterated.

*Aequitas* still stands beside the *ius* in a helping position. Marcus Aurelius said in a rescript reported by Marcellus:<sup>19</sup> *ubi aequitas evidens poscit, subveniendum est*. In a rescript that the post-classical *Opiniones Ulpiani* recounts, it is stated: *neque iure neque aequitate tale desiderium admitti*.<sup>20</sup> The *ratio aequitatis*, not yet in use by the classical lawyers,<sup>21</sup> appears in rescripts from the years 212, 225, 257, and 295<sup>22</sup> on an equal footing beside the *ratio iuris*. In 259, *iuris auctoritas et aequitas* supports the petitions (*preces*) of claimants (*adsistit*).<sup>23</sup> This help, sometimes called *auxilium*, is accorded, as in classical law, through the withholding of a lawsuit, through the granting of an *exceptio*, and through *restitutio in integrum*. Despite much interference in later times,<sup>24</sup> this may be asserted. See, for example, the

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<sup>18</sup> The *Indices* are taken as a basis by Mayr, Gradenwitz, Levy, and the V.I.R.

<sup>19</sup> D. 4, 1, 7 pr. (D. 50, 17, 193); without justification, the passage is deemed an interpolation: by Beseler, *Sav. Z.* 45 (1925) 453; I am unable to discover any crucial suspicious fact.

<sup>20</sup> D. 2, 14, 52, 3; doubts about *tale desiderium* in Rotondi, *Seritti* 1, 456 and Albertario, *Alimenti* (PSC 7 (1925) n. 3; interpolated according to Beseler, *Sav. Z.* 45 (1925) 453. For its validity, see Pringsheim, *Sav. Z.* 42 (1921) 644 n. 5 (in agreement with Frese, *Sav. Z.* 43 (1923) 469 n. 2).

<sup>21</sup> *Sav. Z.* 42 (1921) n. 8; the passage claimed there as the sole undisputed one goes back to a rescript D. 36, 1, 56 (Pap. 19 quaest.).

<sup>22</sup> Cod. Just. 2, 1, 4 (Antoninus): *cum neque iuris neque aequitatis ratio permittat* (that one may accept foreign documents); Cod. Just. 2, 1, 8 (Alexander): *cum iuris et aequitatis rationibus congruunt quod ipsa rei aequitas suadet* (not convinced about the validity is Beseler, *Sav. Z.* 47 (1927) 362); C. 3, 29, 3 (Val. et Gall.) (for doubt about the validity, see Pringsheim, SZ 42, 646 n.); Fragm. Vat. 292 (Diocletianus et Max.): *qui eam sententiam promet, quam iuris atque aequitatis ratio dictaverit*; cf. Cod. Just. 4, 37, 3 (Diocletianus et Max.): *Cum in societatis contractibus fides exuberet conveniatque aequitatis rationibus etiam compendia aequaliter inter socios dividi* (doubt in Felgenträger, right of compensation 107 n. 22). For *ratio aequitatis dictat* (not non-classical), see Bonfante, *Storia* 2, 164. That there are interpolated rescripts as well as interpolated *Digest* fragments is self-evident (Pringsheim, *l.c.*).

<sup>23</sup> *Epit. Greg. et Hermog. Visig.* 2, 1 (Valerianus et Gallienus).

<sup>24</sup> For ex., C. 4, 32, 2 (200) (Pringsheim, *Sav. Z.* 42 (1921) 646 n. 8; Siber, *Sav. Z.* 45 (1925) 146 n. 3, 155; by Beseler, *Beitr.* 5, 90;

D. 17, 1, 8, 8 (Ulp. 31 ad. ed.) *Rescriptum divorum fratrum* (by Beseler, *Sav. Z.* 45 (1925) 453; Pringsheim, *Conferenze Milan.* 200 n. 4;

C. 5, 17, 1 (229) (H. Krueger, *Sav. Z.* 19 (1898) 22; Mitteis, RPR 70 n. 27; Bonfante, 1st 183 n. 2; *Corso* 1, 243; Biondi, *Iud. bon. fid.* 201 n. 1; Pringsheim, *Sav. Z.* 42 (1921) 646 n. 8; Levy, *Ebescheidung* 12 n. 5; Segré, *Studi Bonfante* 3, 610 n. 327; by Beseler, *Beitr.* 5, 90.

*Opiniones Ulpiani: vindicatio ex aequitate inbibetur;*<sup>25</sup> according to Papinian: *qui aequitate defensionis infringere actionem potest, doli exceptione tutus est;*<sup>26</sup> thus says Gordian<sup>27</sup> to the believer: *debitorem contra iuris rationem convenies, cum eum aequitas auxilio exceptionis munit;* and Diocletian<sup>28</sup> speaks of the *restitutionis auxilium* and of the *divisio*, which *ad aequitatis temperamentum reformari potest*, as well as of the fact that<sup>29</sup> *exceptionis proficit aequitas. Aequitas* still serves as the analogous practice in serious cases: Papinian says of one of Marcus Aurelius' decisions: *quod mihi videtur non tantum aequitatis ratione, verum exempto quoque motus fecisse.*<sup>30</sup> Alexander Severus commands that the *Praeses ad exemplum interdictorum, quae in albo proposita habet rem ad suam aequitatem rediget.*<sup>31</sup> Valerian and Gallienus proclaim that *is, qui provinciarum regit, ad similitudinem inofficiosae querellae auxilium, tibi aequitatis impertiet.*<sup>32</sup> Instead of the *aequitas* of the praetor, there now appears the *aequitas* of the *ius reddens*,<sup>33</sup>

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C. 3, 32, 8 (246) (Pringsheim, *Kauf*; against that, Riccobono, *Dal. dir. rom.* 237; against him, Rabel, *Studi Bonfante* 4, 300 n. 65);

C. 3, 42, 7, (286) (doubtful; interpolated according to Biondi, *Iud. bon. fid.* 53 n. under f., referencing D. 10, 4, 3, 14 (interpolated according to Beseler, *Beitr.* 34; De Francisci, *Synallagma* 2, 138); but Diocletian could certainly have followed Julian, since he also especially liked to cite the edict);

C. 8, 15, 5 (286) (Schulz, *Festg. Zitelmann* (1923) 124; Beseler, *Sav. Z.* 45 (1925) 455; Silv. Romano, *Pegno dei frutti* (Ann. Camer. 1931) 97);

C. 2, 4, 14 (290) (doubtful; Felgenträger, *Lösungsrecht* 32 n. 19);

C. 3, 42, 8, 1 (293) (Eisele, *Beitr.* 80; Pacchioni, *Contr. a favore di terzi* 37; Bonfante, *r<sup>st</sup>* 398; Pringsheim, *Sav. Z.* 42 (1921) 656; Riccobono, *Sav. Z.* 43 (1922) 360; Frese, *Sav. Z.* 43 (1922) 488 n. 1; 473; Bonfante, *I contratti a favore di terzi, Per il XIV Cent. delle Pandette* (Pavia, 1933) 239 f.; Vazny, *BIDR* 40 (1932) 83 ff.);

C. 5, 14, 7 (294) (Pringsheim, *Sav. Z.* 42 (1921) 646 n. 8, 665 n. 1; Albertario, *Studi Bonfante* 4, 644, 669).

<sup>25</sup> D. 27, 9, 10 (cf. Kuebler, *Sav. Z.* 31 (1910) 191; Peters, *Sav. Z.* 32 (1911) 212 n. 4; Levy, *Sav. Z.* 42 (1921) 512 n. 1 and, in opposition, 2, 1, 191 n. 5

<sup>26</sup> D. 44, 4, 12 (Pap. 3 quaest.) (interpolated according to Beseler, *Sav. Z.* 45 (1925) 454; genuine according to Mitteis, *Sav. Z.* 33 (1912) 194; Riccobono, *Sav. Z.* 43 (1922) 285; I am convinced that Papinian particularly loved *aequitas*).

<sup>27</sup> C. 7, 72, 3.

<sup>28</sup> Consult. 2, 7 (286).

<sup>29</sup> C. 2, 4, 36 (294); see H. Krueger, *Sav. Z.* 36 (1925) 92 f.

<sup>30</sup> D. 36, 1, 56 (cf. note 21).

<sup>31</sup> C. 8, 1, 1 (224).

<sup>32</sup> C. 3, 29, 2 (256) (on this matter, cf. Siber, *RPR* 381 and Pringsheim, C. 3, 29, 3 [n. 21 above]; for interpolation of a here unimportant, antecedent piece: Stoll, *Sav. Z.* 44 [1924] 67 n. 1).

the *praeses*,<sup>34</sup> the *corrector*,<sup>35</sup> and those *qui provinciam regit*.<sup>36</sup> There also appears one time *aequitas petitionis* (which can be recommended to the *iudex*<sup>37</sup>), but *aequitas iudicis* never appears, nor *aequitas legis*, nor *aequitas naturalis*;<sup>38</sup> only twice and not beyond suspicion, *aequitas iuris*<sup>39</sup> appears, and never, finally, is there juxtaposition of *iustitia* and *aequitas*.

It seems that, as the meaning and frequency of *aequitas* gradually increased in the rescripts concerning jurisprudence, it is also conspicuous that in sixty-three fragments from the post-classical collection of the *Opiniones Ulpiani*, arguably dated around the year 300, *aequitas* appears nine times.

However, this *aequitas* is still a concrete consideration, gathered from the facts, not a universal concern for equity or clemency, as in later periods. The terms *aequitas rei*, *ipsius rei aequitas*, and *ipsa rei aequitas* are characteristic of it. Everywhere, it depends on the particulars of the case.<sup>40</sup> In the *Digests*, Ulpian states: *et rei aequitas et causa edicti efficit*.<sup>41</sup> Celsus speaks of the fact that *occurrit*

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<sup>33</sup> C. 2, 1, 3 (Severus et Antoninus, 202: *prout edicti perpetui monet auctoritas vel ius reddentis decernit aequitas* (cf. Pringsheim, *Symbol. Friburg. in hon. Ott. Lenel* 34; Fliniaux, *Rev. Hist. Dr.* 1923, 102 n. 1).

<sup>34</sup> C. 8, 1, 1 (224): *praeses rem ad suam aequitatem redigat*; C. 7, 71, 3 (259): *implorare aequitatem praesidis debes*; C. 10, 68, 1 (Alexander): *praesidis aequitas faciet*; Ulpiani Opiniones D. 4, 2, 23, 1 and 2: *res suae aequitati per praesidem provinciae restituitur* (for these passages, which are used here around 300, cf. Gradenwitz, *Sav. Z.* 7 [1886] 64; Albertario, *Filangieri* 1912, 520; Biondi, *Act. arbitr.* 50, 74); Ulpiani Opiniones D. 50, 13, 2: *ut is (praeses provinciae) secundum rei aequitatem et iurisdictionis ordinem convenientem formam rei det* (cf. by Beseler, *Beitr.* 2, 24; Biondi, *Iud. bon. fid.* 54 n.; idem, *Studi Bonfante* 4, 63 n. 133); cf. also Aurelianus (271) *Fragm. Vat.* 30: *pro sua aequitate*.

<sup>35</sup> Diocletian et Max. (295) *Fragm. Vat.* 292: *adi correctorem qui eam sententiam promet, quam iuris atque aequitatis ratio dictaverit*.

<sup>36</sup> C. 3, 29, 2 (256).

<sup>37</sup> C. 6, 6, 4, 1 (224): *aequitatem petitionis tuae commendare iudici potuisti*.

<sup>38</sup> Pringsheim, *Sav. Z.* 42 (1921) 667 n. 5; *Sav. Z.* 52 (1932) 141 n. 4; *Law Quarterly Review* 1933, 50 n. 10, 59.

<sup>39</sup> C. 2, 3, 12 (230): *Pacta novissima servari oportere tam iuris quam ipsius rei aequitas postulat*; the introduction is excessively common for this time; perhaps it was added at the break in the constitution from C. 3, 42, 4. C. 9, 35, 6 (290): *Cum nec patronos iniuriam facere libertis iuris aequitas permittat, proponasque*; here also the introduction is too commonly kept; moreover, it is imbued by the Christian spirit of changing patronage into a relationship of duty, while classical law generally does not recognize any *iniuria* of the *patronus* against the *libertus*, but instead only intervenes when there is an *atrox iniuria* (Bonfante, *Corso* 1, 175 n. 5).

<sup>40</sup> Biondi, *Iud. bon. fid.* 53 n. i. commonly and unjustly suspects the terms *aequitas rei*, which I would rather keep as an indication of authenticity.

<sup>41</sup> D. 38, 6, 6 (Ulp. 39 ed.); on this matter, cf. Bergmann, *Adoptionsrecht* 62, Niedermeyer, *Sav. Z.* 50 (1930) 95 n. 4; Beseler, *Sav. Z.* 45 (1925) 454 wants to discard *et rei et aequitas*, but this is scarcely justifiable (cf. also Biondi, *l. c.*).

*aequitas rei, ut...*; <sup>42</sup> Paulus renders an argument before Septimus Severus and concludes: *imperator autem noster motus et aequitate rei et verbis testamenti*; <sup>43</sup> Alexander Severus <sup>44</sup> says the defendant who wants to set against the plaintiff an *exceptio doli* should justifiably demand from the plaintiff a brief presentation of the account books: *quod utique ipsa rei aequitas suadet*. The same emperor demands from the *praeses* that, when the growing roots of a tree cause danger to the foundations of a neighbouring house, he *rem ad suam aequitatem rediget* according to the example of two interdicts. <sup>45</sup> It is presumably Caracalla who orders in three cases, according to the *Epitome Ulpiani*, that the ‘res’ ‘*ad suam aequitatem*’ (*suae aequitati*) be restored through *restitutio in integrum*, <sup>46</sup> and that, in a different case, <sup>47</sup> the provincial *praeses secundum rei aequitatem convenientem formam rei det*.

*Aequitas rei* should not in any way be suspected universal; rather, it indicates that it depends on the particular facts of the case. <sup>48</sup>

Just as little does *aequitas compensationis* belong to the post-classical period. One may imagine the development of compensation as usual; <sup>49</sup> it is certain that the praetor played a crucial role in this, be it through the arrangement of formulas or through the withholding of *actio*. It is not forbidden to speak of an *aequitas compensationis*, <sup>50</sup> especially since, without doubt, compensation frequently answered the demands of equity. One already grows frustrated with the credibility of the claim that *aequitas compensationis* is interpolated everywhere, <sup>51</sup> when one sees that this phrase never

<sup>42</sup> D. 37, 6, 6 (Cels. 10 dig.); Beseler, *Beitr.* 3, 30 leaves the passage disputed; in *Beitr.* 4, 218 it is stricken out (agreeing previously, Pringsheim, *Sav. Z.* 42 [1921] 454).

<sup>43</sup> D. 36, 1, 76, 1 (Paul. 2<sup>nd</sup> decr.); valid according to Biondi, *l. c.*; interpolated according to Beseler, *Sav. Z.* 45 (1925) 454 *et aequitate rei et*; on this matter, see Brassloff, *Sav. Z.* 22 (1901) 179 ff., from whose remarks comes the idea that *aequitas* cannot be lacking here.

<sup>44</sup> C. 2, 1, 8 (225); according to Beseler, *Sav. Z.* 47 (1927) 362 almost the entire constitution must be struck.

<sup>45</sup> C. 8, 1, 1 (224).

<sup>46</sup> D. 4, 2, 23, 1 and 2; D. 4, 4, 40, 1; on these passages, cf. Pringsheim, *Sav. Z.* 52 (1932) 136 f.; Felgenträger, *Lösungsrecht* 104 f.; I suspect that the revisions were carried out around the year 300.

<sup>47</sup> D. 50, 13, 2 (cf. n. 34 above).

<sup>48</sup> Nevertheless, *aequitas rei* may be interpolated at times; D. 49, 1, 28, 2 (not 7) is not in order: Biondi, *l. c.*

<sup>49</sup> Pringsheim, *Atti del Congr. internat. di Dir. Rom.* (1934), 1, 472 f.

<sup>50</sup> Joers, *RPR* 137 f.; Kreller, *Sav. Z.* 49 (1929) 508.

<sup>51</sup> Biondi, *Iud. bon. fid.* 52 n. 1, a; *Compensazione* 197 ff.

occurs in our sources in post-classical times. One stumbles still more when one observes that it appears in two constitutions of Alexander Severus, both of which are from the same year (229),<sup>52</sup> and in one of which it states uncontested:<sup>53</sup> *non enim prius exsolvi quod debere te constiterit aequum est, quam petitioni mutae responsum fuerit*. One discerns, however, that Papinian is a special admirer of *aequitas* in general.<sup>54</sup> Indeed, the only two uncontested *Digest* fragments with *aequitas compensationis* belong to Papinian;<sup>55</sup> Papinian composed the two sole passages that speak of *ius compensationis*;<sup>56</sup> and, finally, according to Justinian's account,<sup>57</sup> Papinian played a crucial role in the development of compensation. Thus, the truth is evident: *aequitas compensationis* originates with Papinian; the *praefectus praetorio* imprinted his linguistic usage on the imperial chancellery, which incorporated it again under Alexander Severus.<sup>58</sup>

One moves forward into the time of Diocletian—a period that once again strongly followed the classical pathway. *Aequitas* of the rescripts and *aequitas* of jurisprudence have essentially the same scope and the same content.

4) With Constantine, however, a new epoch begins. Despite numerous individual studies, the complete works of the emperors are still not delineated. So even today we cannot pursue the question of how Hellenistic and Christian thought, influences from the eastern provinces and

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<sup>52</sup> C. 4, 31, 5: *aequitas compensationis usurarum excludit computationem*. C. 4, 31, 6: *compensationis aequitatem iure postulas*. Alexander's particular interest in compensation is demonstrated by the fact that, in the title C. 4, 31, five constitutions (3–7) that arise from compensation are devoted to it.

<sup>53</sup> Biondi, *Compens.* 123, 144.

<sup>54</sup> D. 6, 1, 48 (2 respectively) (interpolated ?); D. 17, 2, 81 (9 quaest.) (modified); D. 21, 2, 66, 1 (28 quaest.); D. 27, 3, 20 pr. (2 respectively) (modified); D. 27, 7, 7 (3 respectively) (certainly interpolated); 31, 70, 1 (20 quaest.) (doubtful); D. 31, 77, 29 (8 respectively) (but probably interpolated; cf. Pringsheim, *Gött. G. A.* 1933, 193 n. 2); D. 36, 1, 56 (19 quaest.); D. 44, 4, 12, (3 quaest.) (cf. Mitteis, *Sav. Z.* 33 [1912] 194; Riccobono, *Sav. Z.* 43 [1922] 285); D. 46, 3, 95, 4 (28 quaest.); D. 46, 6, 12 (12 quaest.) (modified). Beseler, *Sav. Z.* 45 (1925) 453 ff. declares that all these fragments are interpolated.

<sup>55</sup> D. 16, 2, 18 pr. (3 respectively) (Biondi, *Compens.* 144, 198); D. 34, 9, 15 (6 respectively) (Biondi, *Compens.* 198, 288).

<sup>56</sup> D. 16, 2, 20 (13 respectively): *iure compensationis retinere* (Biondi, *l. c.* 206); D. 26, 7, 36 (3 quaest.): *aequitas quae merum ius compensationis inducit* (Biondi, *l. c.* 199). In Gaius (D. 13, 6, 18, 4 [4 ed. prov.]), one finds *iure compensationis* (Biondi, *l. c.* 200).

<sup>57</sup> C. 7, 35, 14 (529?).

<sup>58</sup> It is also this chancellery that mentions *ratio compensationis* (C. 4, 31, 7).

Greek and Roman rhetoric and philosophy, economic considerations, and practical education in the Roman imperial law were united. That a new world began, though, the expert immediately recognizes in the new language.<sup>59</sup> A reader of Constantine's constitutions, accustomed to the mundane, sparse, technical diction of the classical period and age of Diocletian, instantly has the impression of no longer standing within the law. The sentences solemnly strut in pompous ostentation: rich in imagery and lacking in technical vocabulary, artful and majestic. And the content, as in the case of the form, proves to be immediately non-Roman in an old national Roman sense, as the late Emilio Albertario has demonstrated so splendidly. Diocletian's grand attempt to relentlessly defend the true Roman against each incursion of common, provincial opinion has once again been abandoned. One empire, one law, one belief—these now become one Christian empire with a law that, abandoning all the old national idiosyncrasies, opens wide the gate to an influx of Hellenistic, imperial Roman, and Christian thought. These had long coveted admission. But the structure, slowly constructed by dogged deduction, had lasted up until then; extensions and side wings had been added, many a thing had been developed and arranged differently. In the end, only a strong judicial power could oversee and govern the whole system. For an astoundingly long time, Rome held firm to that which was created in such a conservative tradition. Foreign legal material was kept away or integrated only after vigorous revision. The law stood like a lonely rock from ancient times protruding in the middle of a cavernous world. Diocletian's constitutions adhered rigidly to the old, while all around the basis of Roman culture had begun to topple. Constantine opened himself to a newly emergent world, gave space to the spiritual, and let the inner make its way outward. What occurred was a fusion of all the realms carefully segregated until then, a loosening of judicial austerity, and an overwhelming of the law with ideas from other empires. A new structure seems to emerge, constructed from above and outside.

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<sup>59</sup> Seeck, *Sav. Z.* 10 (1889) 203. When Vernay, *Etudes Girard* 2 (1913) 363 ff. makes reference to the fact that a change in the nature of the office is responsible for the transformation, he consequently does not deny that, despite some forerunners, only in Constantine's time does rhetoric intrude in matters of justice; indeed, it is characteristic of the spirit of the new time that the constitutions now seem to be authored no longer by lawyers but instead by literati.

Already in the year 314, the emperor proclaimed:<sup>60</sup> *Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem*. The new descended with a vast reach. After a long struggle, the victory of *aequitas* was, for the first time, heralded over the *ius*;<sup>61</sup> because *in omnibus rebus aequitas* should rule absolutely and universally. The *ius*, on the other hand, obtained for the first time in the history of Roman law<sup>62</sup> the pejorative label *ius strictum*; the old, strict, frozen, and overly exact law has to yield to the new *aequitas*—new<sup>63</sup> because it stands now in a bond with *iustitia*, a bond that since then has remained indissoluble. We saw how the classical lawyers had been reticent toward this *iustitia*.<sup>64</sup> It had never before been paired with *aequitas*; now *iustitiae aequitatisque ratio* reigns. A quick look at the Latin Church Fathers is sufficient to show clearly that this phrase no longer involves a Roman safeguard for the existing social order, but instead a *iustitia* that is certainly from a transcendent place. I cite here only from Tertullian:<sup>65</sup> “*Legis iniustae honor nullus est;*”<sup>66</sup> “*sic et iustitia (nam idem deus iustitiae et creaturae per evangelium efferbuit in iuventutem;*”<sup>67</sup> from Cyprian:<sup>68</sup> “*Pigamus hanc domum pigmentis innocentiae, luminemus luce iustitiae;*” and from Lactantius:<sup>69</sup> “*altera est iustitiae pars aequitas; aequitatem dico se cum ceteris coaequandi, quam Cicero aequabilitatem vocat.*” Thus, the direct reason for Constantine’s law of *favor libertatis* is derived from Christianity.<sup>70</sup> In the following year, Constantine spoke of the *prisca legum aequitas* and of the *praefectus urbi, qui petitioni secundum iuris*

<sup>60</sup> C. 3, 1, 8 (cf. *Sav. Z.* 42 [1921] 657 n. 6 and Riccobono, *Mél. Cornil* 2 [1926] 285 as well as *Conferenze Milan.* 192 n. 3).

<sup>61</sup> *Sav. Z.* 42 (1921) 644 f.

<sup>62</sup> *Sav. Z.* 42 (1921) 648 f.; 653 ff.

<sup>63</sup> About Byzantine *aequitas*, cf. from now on Albertario, *Studi Bonfante* 1, 641 ff.; *Etica e diritto nel mondo classico latino* (Riv. int. di Filosofia del Dir. 12 [1932] 19 n. 1).

<sup>64</sup> Page 10 above.

<sup>65</sup> *Nat.* I, 6 (B. 8, 24).

<sup>66</sup> *Virg. vel.* I (O. I. 884).

<sup>67</sup> On “römische iustitia bei Tertullian,” cf. Beck, *Röm. Recht bei Tertullian u. Cyprian* (Schrift d. Königsberger Gel. Ges. [Geist. Kl.] 7 J., H. 2 (1930) 47.

<sup>68</sup> *Donat.* 15 (15, 25); cf. Beck, *l. c.* 136.

<sup>69</sup> *Div. Inst.* 5, 14.

<sup>70</sup> As is revealed from the corresponding constitution C. 7, 22, 3: *liberatis iura minime mutilare oportere congruit aequitati.*

*providebit iustitiam*.<sup>71</sup> The first instances of *aequitas legum* and *iustitia iuris* appear here. One remembers that *iustitiae aequitatisque ratio* is supposed to have been preferred to *ratio stricti iuris* since 314; as an impact of this directive, we will see that the *leges* are no longer placed under *aequitas*, and the *ius* is now placed under the new *iustitia*.

One year later (316), the emperor ordered: *Inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere*.<sup>72</sup> For a moment, one is startled. Clearly, what had once been the great task of jurisprudence, the emperor now solemnly ascribes to himself.<sup>73</sup> Yet one continues to wonder why any interpretation between *ius* and *aequitas* is necessary, if *aequitas in omnibus rebus* prevails over *ius strictum*. Justinian ripped the constitution from its context. In the *Codex Theodosianus*,<sup>74</sup> Constantine's sentence stands at the end of a decree, the beginning of which reads: *Ubi rigorem iuris placere aut lenire specialiter exoramur*. It remains, therefore, the task of imperial interpretation to subdue and mitigate the severity of the *ius*, the *ius strictum*; thus, *aequitas* continues to precede *ius*.

I mention only briefly that other constitutions by Constantine and his immediate successors speak of the *aequitas* that *ad publica trahat obsequia*,<sup>75</sup> of that which *aequitas* advises,<sup>76</sup> and of the contempt for *aequitas* held by the defendant.<sup>77</sup> It is more important that, from now on, in stark contrast to classical law,<sup>78</sup> the discourse concerns *aequitas iudicantis*,<sup>79</sup> which is named together with its *innocentia*<sup>80</sup> or stands in contrast to *utilitas litigantis*.<sup>81</sup> Based on the judgment of the first instance, it is stated: *si ex evidenti claruerit sententiam a iure iustitiaque discedere, ea penitus explosa controversia de*

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<sup>71</sup> Fragm. Vat. 273 (315).

<sup>72</sup> C. 1, 14, 1.

<sup>73</sup> De Visscher, *Conferenze Milan*. 69.

<sup>74</sup> C. Theod. 1, 2, 3.

<sup>75</sup> C. Theod. 16, 2, 6 (326).

<sup>76</sup> C. Theod. 12, 5, 1 (*Nam aequitatis ratio persuadet*) (326).

<sup>77</sup> C. Theod. 11, 36, 7 (Constantius et Constans: 344).

<sup>78</sup> Page 6 above.

<sup>79</sup> C. Theod. 9, 1, 6 (388; 362/3).

<sup>80</sup> *Ut de innocentia iudicantis atque aequitate consistat*.

<sup>81</sup> C. Theod. 11, 30 (321): *non aequitas iudicantis, sed litigantis debeat considerari utilitas* (C. 7, 62, 16 omitted by Justinian).

*aequitate, terminum capiat*.<sup>82</sup> Here the equality of *ius*, *iustitia*, and *aequitas* is revealed, and, at the same time, the absolute rule of *aequitas* is demonstrated once more. In another edict,<sup>83</sup> in objection to the *veteris iuris definitio* and to the *rescripta retro principum*, the emperor declares: *tamen nos aequitate et iustitia moti iubemus*. Finally, imperial benevolence and clemency resound in the words:<sup>84</sup> *praesertim cum ad iuris etiam praesentis et veteris aequitatem illud quoque indulgendum esse ducamus*; and in Constantine's form of self-address:<sup>85</sup> *lenitas nostra*. Constantius sets into motion *leges*, which are now placed beneath *aequitas*, itself also under the new track, when he says:<sup>86</sup> *aequitatis ratio corrigi persuasit – simili iustitiae moderamine*. In opposition to *asperitas* and *iuris severitas*, *humanitas* emerges as the legal motif with Constantine and Constantius.<sup>87</sup>

Christian justice (*iustitia*), moderation and innocence (*moderamen* and *innocentia*), alleviation and mitigation of harshness (*rigorem iuris placare et lenire*), indulgence, and *humanitas*—these are the features of the new *aequitas*, which Constantine made ruler over all the law.

It is no wonder that in the *Opiniones Ulpiani*<sup>88</sup> and the *Sententiae Pauli*,<sup>89</sup> collected around the same time, *aequitas* does not allow (*non patitur*): that the son's inheritance be charged for what the father sent to him for studies;<sup>90</sup> that *omnis excusatio sua aequitate nititur*;<sup>91</sup> that an *actio – ex aequitate*

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<sup>82</sup> C. Theod. 1, 5, 3 (331).

<sup>83</sup> C. Theod. 11, 39, 1 (325).

<sup>84</sup> C. Theod. 11, 9, 2 (337) (omitted by Justinian, C. 4, 46, 3).

<sup>85</sup> C. 3, 14, 1, pr. (334): *lenitatis nostrae iudicium* (cf. Constantius et Constans C. Theod. 15, 1, 5 [338]: *lenitudo nostra*).

<sup>86</sup> C. Theod. 8, 18, 4 (339); cf. Constantinus C. Theod. 12, 5, 1 (above n. 76).

<sup>87</sup> *Humanitas* under Constantine: C. Theod. 9, 37, 1 (319); C. Just. 3, 19, 2, 1 (331); Fragm. Vat. 248 (*humanitatis ratio*); C. Theod. 3, 5, 3 (*ne inhumanum aliquid statuatur*). *Humanitas* under Constantius: C. Theod. 9, 1, 6 (340); C. Theod. 7, 9, 1 (340); C. Theod. 6, 29, 5 (359). *Asperitas* under Constantine: C. Just. 8, 34, 3 (326). *Iuris severitas* under Constantius: C. Just. 3, 26, 8 (358). *Humanior via legum severitas* under Constantius: C. Theod. 12, 1, 23 (338).

<sup>88</sup> Felgenträger, *Symbol. Friburg. in hon. Ott. Lenel* 371.

<sup>89</sup> Felgenträger, *l. c.* 368 f.

<sup>90</sup> D. 10, 2, 50 (Ulp. 6 op.); cf. D. 48, 17, 1 pr. (Marc. 2 publ.): *neque enim aequitatis ratio patitur* (interpolated: Niedermeyer, *Antike Protok.-Lit.* 78; Koschaker, *Sav. Z.* 40 (1919) 368 n. 1; Pringsheim, *Sav. Z.* 42 (1921) 646 n.; Beseler, *Sav. Z.* 45 [1925] 453).

<sup>91</sup> D. 50, 5, 1 pr. (Ulp. 2 op.).

*competit*;<sup>92</sup> or that *ratio aequitatis*, together with the *compendium litis*, make provision for the fact,<sup>93</sup> or show (*ostendit*), that a slave can be questioned about his own actions.<sup>94</sup>

The picture would be incomplete, if there were not a word on episcopal jurisdiction, the civil *episcopalis audientia*.<sup>95</sup> Ushered in by Constantine in the year 318, and endorsed by the first Sirmondian constitution in the year 333, it stands under the rule of the *Lex Christiana*. Therefore, this administration of justice, which particularly attracted those from the lower classes, deployed religious law: a sign indicating with what might the church promptly elevated itself over worldly law. However, when the bishop's court began attracting all litigation, *quae vel praetorio iure civili tractantur*,<sup>96</sup> primarily for that reason it was decreed that the dangerous germs of litigation should be smothered (*malitiosa litium semina comprimentes*), so that the unfortunate were delivered from the continuous snares of *actiones* in which they had become entangled (*ut miseri homines longis ac paene perpetuis actionum laqueis implicate ab improbis petitionibus maturo fine discedant*). This is stated in one of the constitutions directed to the praetorian prefect, a constitution in which this man is called *gravitas tua, quae plena iustitiae ac probae religionis est*. When the discourse here is not expressly about *aequitas*, both the *iustitia et religio* of the prefect and exemption from the *improbae petitiones* point clearly toward the process having been a summary and peaceful one (whichever substantive law may have been used), in which the harsh rules of Roman law withdrew (and other sources corroborate this).<sup>97</sup> There also occurs here a loosening, an interspersion with Christian thoughts of equity.

Under Constantine, the high point has already been reached. With one stroke, the new has prevailed in the branch of the law. The proceeding periods do not have very much to contribute. Indeed, when Justinian later gathered together the immense material of classical jurisprudence in his

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<sup>92</sup> D. 50, 8, 2, 9 (Ulp. 3 op.).

<sup>93</sup> Paul. Sent. 2, 1, 1: *hoc enim et compendio litium et aequitatis ratione provisum est* (Demelius, *Schiedseid* 127 ff.; Seckel-Kuebler *a. b. l.*; Beseler, *Sav. Z.* 45 [1925] 453).

<sup>94</sup> Paul. Sent. 5, 16, 1 (Beseler, *l. c.*).

<sup>95</sup> For *episcopalis audientia*, cf. Beck, *Röm. R. bei Tert.* 133, De Francisci, *Annali Perugia* 30 (1915–18) 45 ff., and especially Steinwenter, *Byzantin. Zeitschr.* 30 (1930) 660 ff.; *Sav. Z.* (Canon. Abt.) 54 (1934) 7 ff.

<sup>96</sup> C. Sirm. 1 (l. 16).

<sup>97</sup> P. Lips. 43 (4th century): the procedure is by arbitration (l. 3). P. Oxy. 903 (4<sup>th</sup> century); several bishops.

work on the law, he took a step backwards behind Constantine in the matter of *aequitas*; here, too, he acted as mediator between the new and that old material which he had accepted again.

5) From the time of Julian to Justinian, we pick out only extremely typical and discrete uses of *aequitas*. *Ratio aequitatis*,<sup>98</sup> the *legum*<sup>99</sup> or *iuris aequitas*,<sup>100</sup> *aequitas nostrae legis*,<sup>101</sup> *aequitas et ius*,<sup>102</sup> and *ratio et aequitas*<sup>103</sup> all play a further role. *Iustissimus aequitatis cursus* is new,<sup>104</sup> as is *aequitatis honestatisque ratio*.<sup>105</sup> In three cases, as a justification for a law, that law is said to be *plenum aequitate et iustitia*;<sup>106</sup> in two cases, the *regula iuris* is placed beside *aequitas*;<sup>107</sup> in three interpretations of the *Lex Romana Visigot.*, texts in which the word *aequitas* does not appear, it is used by the interpreters.<sup>108</sup> The concept of *aequitas naturalis* emerges for the first time under Gratian, Valentinian, and Theodosius in

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<sup>98</sup> C. Theod. 13, 3, 4 (362); *r. ae. exposcit*; C. Theod. 8, 15, 3 (364): *r. ae. exposcit*; C. Theod. 11, 31, 5, 10 (373): *ae. r. et iuris praescripta dictaverint*; C. Just. 11, 58, 7, 2 (417): *ae. ratione suadente*; Nov. Leo et Anthem. 3 pr. (468): *Itaque nos...et iuris regulam et ae. rationem volumus custodiri...prudenti et cauta, qua pollet, aequitate* (cf. Nov. Majorani 7, 11 [458]: *cum...hoc et aequitas suadet et regula iuris antiqui*).

<sup>99</sup> C. Theod. 9, 40, 5 (364).

<sup>100</sup> C. Theod. 2, 1, 5 (365): *iudex eam sententiam decernat, quam iuris ae. postulaverit*; C. Theod. 9, 40, 17 (399); Nov. Val. 25 (447).

<sup>101</sup> Nov. Val. 25 (447): *iuris aequitas...aequitatem nostrae legis*.

<sup>102</sup> C. Theod. 14, 4, 5 (389): *plenum aequitatis et iuris est*.

<sup>103</sup> Nov. Valent. 11, (443): *plenum rationis et aequitatis putavimus*.

<sup>104</sup> C. Theod. 15, 3, 2 (363).

<sup>105</sup> C. Just. 10, 5, 2 (451): *ae. hon. r. non patitur*.

<sup>106</sup> C. Just. 12, 40, 2 pr. (398) (=C. Theod. 7, 8, 5). C. Theod. 14, 4, 5 (389): *et ae. et iuris*. Nov. Valent. 11 (443): *rationis et ae.*

<sup>107</sup> Cf. note 98 at the end.

<sup>108</sup> One time it states (Int. to C. Theod. 1, 29, 7 [392]: *Defensores...curiam vel plebem...cum omni iustitia et aequitate defendant*; another time it states (Int. to C. Theod. 1, 16, 9 [364]: *Iudex hanc sibi praecipuam curam impendendam esse cognoscat, ut litigantium causas iugiter adhibita aequitate discutiat* (similarly Valentinian and Valens C. Theod. 2, 1, 5 [note 100 above] and Valentinian, Valens, and Gratian C. Theod. 11, 31, 5 [373]: *sententia proferatur ea, quam aequitatis ratio et iuris praescripta dictaverint*); the third interpretation is written in Paul. Visig. 1, 18: *habita aequitate distribuat (quae sunt communia)*. These, together, are the only interpretations that contain the word *aequitas*; that the interpretations do not originate from the Visigoths, but rather from the western Roman Theodosian commentaries, has been proven by Wieacker, *Symbol. Friburg. in hon. Ott. Lenel* 259 ff.

the year 380<sup>109</sup>—a concept that then occupies a large amount of space in interpolations of the classical sources.<sup>110</sup>

The interaction between the law of nature, which stands over the law, and *aequitas*, a tangible consequence ever since Greek philosophy,<sup>111</sup> cannot be considered here.

The key role belonging to *aequitas* in this period is finally documented in several imperial pronouncements. In 339, Valentinian says in one of his amendments:<sup>112</sup> *cum nos tam salubris aequitatis auctores aetas et praesens et futura declaret*; in 450, Theodosius and Valentinian remark:<sup>113</sup> *quoniam conditores legum aequitatis convenit esse fautores*. The emperors want to stand as creators and continuators of *aequitas* in their own world as well as posterity. That *aequitas* and *iustitia* are a primary source of imperial majesty is expressed in two amendments of the period with the words: *imperatoriae maiestati, cui semper debet aequitas inhaerere et vigere iustitia*;<sup>114</sup> *in omnibus rebus...iustitiam conservari oportet, ...quoniam utili aequitate succurrunt*.<sup>115</sup> The capacity of *aequitas* becomes clear through the combination of related terms: *In hac tamen naturali aequitate animadvertimus quoddam temperamentum adhibendum*;<sup>116</sup> *quia consequens est, ambiguas atque legum diversis interpretationibus titubantes causas benigne atque naturalis iuris moderamine temperare, non piget nos in praesenti quoque negotio...aequitati convenientem...opinionem sequi*.<sup>117</sup>

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<sup>109</sup> C. Theod. 10, 18, 2 (380); later under Zeno C. Just. 11, 57, 1: *Grave est et non solum legibus, verum etiam aequitati naturali contrarium pro alienis debitis alios molestari, idcirco huiusmodi iniquitatem*.

<sup>110</sup> Pringsheim, *Sav. Z.* 42 (1921) 667 n. 5; *Sav. Z.* 52 (1932) 141 n. 4 (for D. 49, 15, 19 pr., cf. from now on Beseler, *Sav. Z.* 45 [1925] 445; for Just. Inst. 3, 19, cf. Gai Inst. 3, 25). It is strange that the phrase not only is absent in Gaius and in the sources included in Levy's appended index, but also is rare in the codices and not encountered at all under Justinian. It may involve textual alterations of the *Digest* fragments from before Justinian. *Civilis aequitas* is also post-classical, and is composed concurrently and used in opposition; it is encountered only once (VIR 1, 749) in D. 47, 4, 1 (Ulp.-Labeo) and is there interpolated: Pringsheim, *Sav. Z.* 42 (1921) 667 n. 5; *Festschr. Lenel* 268; Beseler, *Sav. Z.* 45 (1925) 455; Albertario, *St. Bonfante* I, 644 n. 129.

<sup>111</sup> Cf. provisionally *Sav. Z.* 42 (1921) 667.

<sup>112</sup> Nov. Val. 27.

<sup>113</sup> C. Just. 5, 14, 8.

<sup>114</sup> Nov. Anthem. 2, 3. (478).

<sup>115</sup> Nov. Val. 10 pr. (441).

<sup>116</sup> C. Theod. 10, 18, 2 (380).

<sup>117</sup> C. Just. 6, 61, 5 (473).

*Aequitas* softens, moderates, and placates: *temperamentum*, *benignitas*, and *moderamen* are the guiding stars of this Byzantine equity.<sup>118</sup>

The *humanitas* advanced since Constantine rises up alongside these guiding stars<sup>119</sup> (C. Theod. 10, 10, 23 = C. Theod. 9, 42, 17: *ut nobis ingenitum est, duriores causas et tristio rem fortunam imperatoria humanitate molliamus*) as the antithesis of *duritia*,<sup>120</sup> *asperitas*,<sup>121</sup> *scrupulositas*,<sup>122</sup> and *severitas*.<sup>123</sup>

One sees<sup>124</sup> how *humanitas* is set over *iustitia* in the Christian approach of Honorius and Theodosius (C. Sirm. 13 (419): *convenit nostris praescita temporibus ut iustitiam inflectat humanitas*); with Theodosius and Valentinian, however, *religio* is situated above *humanitas* (C. Just. 1, 12, 3, 2 = C. Theod. 9, 45, 4, 2: *praeferenda humanitati religio est*). Thus, a sequence of steps clearly emerges: *aequitas*, *iustitia*, *humanitas*, *religio*.

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<sup>118</sup> Still to be named are: the arbitrary (*arbitra*, *arbitraria*, *arbitri*) *aequitas* (C. Theod. 7, 8, 5);

that *aequitas* which is hardly more than a euphemism for the law, 10, 10, 10 (365); C. Theod. 14, 13, 1, (370); C. Just. 12, 40, 2, 2, (398) = is the proper one. C. Just. 11, 59, 7, 2 (386) *pro modo et aequitate* (should the single *ager desertus* apply)—C. Just. 10, 22, 1, 1 (410) *quo et descriptionis aequitas illustretur* = C. Theod. 12, 1, 173; C. Just. 12, 35, 18, 7 (492) *si quis vero ad huiusmodi audacissimum tamque aequitati contrarium communem prosiluerit*; Nov. Valent. 28 (449) *haec pro sua aequitate servari*;

the path of *aequitas* (*trames aequitatis*) (C. Just. 1, 12, 6, 5 [466]; Nov. Valent. 12 [443];

*aequalis aequitas* (Nov. Marcian. 5 pr. [455]; *aequalis enim in utroque aequitas est*;

*aequitas fori* (C. Sirm. 15, 6 [412]: *Quae fori aequitas, responsis veterum et legum nostrarum aeternitate solidata*;

*ipsa aequitas* beside *iuris ratio* (C. Just. 4, 4, 1 [422] = C. Theod. 2, 28, 1;

*aequitas petitionis* (C. Theod. 10, 10, 31 [422], *aequitatis studium* (C. Just. 6, 20, 17 [472], *aequitatis examinatio* (Nov. Valent. 8, 2, [441], *aequitatis consideratio* (Nov. Valent. 22 [446], *iustitia et aequitas* (C. Theod. 9, 1, 15 [385], without *aequ.* C. Just. 9, 12, 4); C. Just. 12, 40, 2, pr. (398); Nov. Anthem. 2 (468);

*similis aequitas* (C. Theod. 5, 1, 4 [389].

<sup>119</sup> Page 16 above; H. Krüger, *Sav. Z.* 19 (1898) 9 ff.

<sup>120</sup> C. Just. 10, 35, 2, 2 (443): *quid enim tam durum tamque inhumanum est*; C. Just. 9, 7, 1 pr. (393) *neque durum quid neque asperum sustinere*.

<sup>121</sup> C. Just. 9, 7, 1 (393).

<sup>122</sup> C. Just. 7, 71, 6 (386).

<sup>123</sup> C. Just. 3, 26, 8 (358); C. Theod. 9, 1, 12 (374): C. 9, 4, 4 (371): *severitas legis*.

<sup>124</sup> Cf. H. Krüger, *Sav. Z.* 19 (1898) 19.

6) Justinian, who conducts the various streams of classical and post-classical law into the one large river of his work of law, faces the task of bringing the often divergent components of his collection into a single system by means of linking common ideas. It is not always successful, and a good deal of effort from the following centuries must be applied to fulfilling what Justinian had not finished. How far Justinian succeeded in the union of *ius civile* and *ius honorarium*, in the consolidation of a previously two-part process, in the amalgamation of Roman and Hellenistic thought, and in the interpenetration of classical and post-classical law with Christian ideas, we are more eagerly intent on determining today than ever before.

*Aequitas* played a unique role in this process. On the one hand, it was superseded as justification for the advancement of the praetor ever since there ceased to be a practical distinction between *ius civile* and *ius honorarium*. It also no longer had a place as a principle of interpretation by sound jurisprudence in a legislation that explicitly (if also futilely) gave very little room to jurisprudence, and bound the judge to the imperial interpretation.

However, as a corrective principle, as mediator between the various layers of the law, which could now be unified, and, above all, as a policy ruling over the law in an already utterly Christian empire, it found a further field of activity. Indeed, the very uncertainty of its capacity, its lapse into other just-as-poorly-defined notions lying at the heart of imperial majesty, and its intrusion into all earlier sealed precincts placed it at the centre of Justinian law.

Since there was no longer a praetor and an edict, *aequitas* infiltrated the office of the judge; in numerous interpolations to the *Digests*,<sup>125</sup> there appears *aequitas in iudicio*, *aequitas iudicis: in summa aequitatem...ante oculos habere debet iudex;*<sup>126</sup> *poteris...aequitate iudicis tueri te;*<sup>127</sup> *cum ex aequitate haec res descendat caritateque sanguinis, singulorum desideria perpendere iudicem oportet.*<sup>128</sup>

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<sup>125</sup> To chronologically classify the interpolations to the *Digests* is not a task that can be carried out here; however, the development of *aequitas*, as we have attempted to show here primarily in the constitutions, provides a means to accomplish that task. It is certain that the interpolations of *aequitas* belong to a section already significant in the pre-Justinianic period.

<sup>126</sup> D. 13, 4, 4, 1 interpolated (Ind. interpolation); Pringsheim, *Confer. Milan.* 200 n. 3.

<sup>127</sup> D. 17, 1, 8, 8 interpolated (Ind. interpolation); *Confer. Milan.* 200 n. 4.

<sup>128</sup> D. 25, 3, 5, 2 interpolated (Ind. interpolation); *Confer. Milan.* 200 n. 5. Cf. also D. 6, 1, 48 interpolated (*per officium iudicis aequitatis ratione*; Ind. interpolation), D. 10, 3, 14, 1 interpolated (*aequitate ipsius iudicii*; Ind. interpolation: Riccobono, *Dal. dir. class.* 170 wishes to read *aequitatis ratione exceptione doli opposita*), D. 11, 1, 21

In this way, *aequitas* was able to form a close bond with *bona fides*, which now imbued all *iudicia*, even though serious complaints were being made against *bonae fidei iudicia* to date, and even though each *actio* was commonly conceived through the opposition of *exceptio* or *replicatio doli bonae fidei*.<sup>129</sup> The complaint originates (*descendit*) from *bona fides*;<sup>130</sup> all other actions belong to *ius strictum*, a newly minted expression.<sup>131</sup> *Ius aequum* and *ius strictum* are pitted against one another; however, *ius strictum* is an antiquated law, which ought to be opposed and which is generally considered only negatively. The careful preservation of serious complaints in classical law gives way to worship of *aequitas*, which breaks up all actions. *Bonae fidei iudicium* is now *iudicium aequitatis: bona fides aequitatem summam desiderat*;<sup>132</sup> *in omnibus quidem, maxime tamen in iure aequitas spectanda est*.<sup>133</sup> This *aequitas* can thus be considered outside the branch of the law. One of Justinian's constitutions similarly demonstrates this (in Latin translation): *Prosecuti undique aequitatem et iustitiam, quam in omni re, et praecipue in legibus ferendis veremur*.<sup>134</sup> Constantine had likewise already spoken of the *iustitiae aequitatisque ratio*, which should be *in omnibus rebus praecipua*.<sup>135</sup> The Byzantine *aequitas* is no longer the classical form of equity, but instead a new equity, penetrating the law from without.

Thus, *bona fides* has also stepped out of the classical framework.<sup>136</sup> It is related to *fides humana*,<sup>137</sup> the Christian dictates of faith; this *fides humana* requires that contracts are kept<sup>138</sup> and that

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interpolated (*Ubi cumque iudicem aequitas moverit*; Ind. interpolation), D. 11, 7, 14, 13, interpolated (*et generaliter puto iudicem iustum...solutius aequitatem sequi*; Ind. interpolation and *Sav. Z.* 52 [1932] 108 n. 4).

<sup>129</sup> Confer. *Milan.* 208; for example, *actio de dote* and *hereditatis petitio*. Haymann, *Sav. Z.* 38 (1917) 219 ff.

<sup>130</sup> C. 5, 13, 1, 2 (Just.) and, regarding that, Gradenwitz, *Interpol.* 108 ff.; Pringsheim, *Conf. Mil.* 210.

<sup>131</sup> *Sav. Z.* 42 (1921) 463 ff; against that, Riccobono, *Mél. Cornil* (1926) 2, 295 and idem, *Conf. Mil.* 190.

<sup>132</sup> D. 16, 3, 31 interpolated (Ind. interpolation).

<sup>133</sup> D. 50, 17, 90 (Pringsheim, *Sav. Z.* 42 [1921] 644 n. 4: probably classical component parts; Riccobono, *Sav. Z.* 43 [1922] 300, 303; interpolated; Beseler, *Sav. Z.* 45 [1925] 455: interpolated); = *Sav. Z.* for the amalgamation of *aequitas* and *bona fides*, cf. *Confer. Milan.* 209 ff.

<sup>134</sup> C. 1, 4, 34, 18 (534); cf. Nov. Val. 10 pr. (n. 115 above).

<sup>135</sup> Page 14 above.

<sup>136</sup> Confer. *Milan.* 201 ff.

<sup>137</sup> D. 2, 14, 1 pr. interpolated: Ind. interpolation and Stoll, *Sav. Z.* 47 (1927) 538.

C. 2, 4, 20 (Diocl. 293) ip.: Pringsheim, *Sav. Z.* 42 (1921) 651 ff.; *Law Quart. Rev.* 1933, 50 n. 10.

<sup>138</sup> D. 2, 14, 1 pr.: *Huius edicti aequitas naturalis est. quid enim tam congruum fidei humanae, quam ea quae inter eos placuerunt, servari?*

the will of the party (the *animus*<sup>139</sup>) attract attention in every case. A new consensus, the conformity of *animi*, fulfills the *bonae fidei iudicia: Nihil consensui tum contrarium est, qui (stricti iuris) ac bonae fidei iudicia sustinet, quam vis atque metus*.<sup>140</sup> *Fides humana* is a hyponym of *humanitas*, which Justinian idiosyncratically ascribes to God himself for the first time (*divina humanitas*<sup>141</sup> and *dei humanitas*<sup>142</sup>) and thereby proves to be an eminent Christian virtue. This *humanitas*, however, also pertains to the emperor, who emulates God with it: *nihil tam peculiare est imperiali maiestati quam humanitas per quam solam dei servatur imitatio*;<sup>143</sup> *duritiāque legum nostrae humanitati incongruam emendari*.<sup>144</sup>

*Bonum et aequum*<sup>145</sup> has also lost its carefully bordered precinct.<sup>146</sup> It intrudes in the aediles' edict: *ne id quod adfirmavit venditor amare ab eo exigitur, sed cum quodam temperamento...sed haec omnia ex bono et aequo modice desiderantur*.<sup>147</sup> In the *interpretatio testamenti: possunt res ex bono aequo interpretationem capere*;<sup>148</sup> and *ibidem: licet subtilitas iuris refragari videtur, attamen voluntas testatoris ex bono et aequo tuebitur*.<sup>149</sup> In the *iudicium mandati: totum hoc ex aequo et bono iudex arbitrabitur*.<sup>150</sup> Many years ago, the

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C. 2, 4, 20: *Non minorem auctoritatem transactionum quam rerum iudicatorum esse recta ratione placuit, si quidem nihil ita fidei congruit humanae, quam ea quae placuerunt custodiri*.

Cf. also D. 19, 1, 11, 1 interpolated (Ind. interpolation and *Law Quart. Rev.* 1933, 30 n. 10): *cum enim sit bonae fidei iudicium, nihil magis bonae fidei congruit quam id praestari, quod inter contrabentes actum est. quod si nihil convenit, tunc ea praestabuntur, quae naturaliter insunt huius iudicii potestate*; here the identity of *bona fides* and *humana fides* is revealed.

<sup>139</sup> SZ 42 (1921) 652, 274; *Law Quart. Rev.* 1933, 47 f., 379 ff.; Wieacker, *Studien zur Societas* (1935).

<sup>140</sup> D. 50, 17, 116 pr. interpolated: Partsch-Pringsheim, *Sav. Z.* 42 (1921) 652 n. 4; Riccobono, *Sav. Z.* 43 (1922) 300, 302; F. Schulz, *Sav. Z.* 43 (1922) 209 ff., Von Lübtow, *Quod metus causa* (1932) 76 ff.; Sanfilippo, *Il Metus* (1934) (147 ff.; 185 f.). Cf. D. 2, 1, 15: *quid tam contrarium consensui est quam error?* interpolated (Ind. interpolation and F. Schulz l. c. 210; Von Lübtow l. c. 78 f.).

<sup>141</sup> C. *Tanta* pr.: *Tanta circa nos divinae humanitatis est providentia*.

<sup>142</sup> C. 6, 23, 31 pr. (534) *ideo ad dei humanitatem respicientes necessarium duximus*.

<sup>143</sup> C. 5, 16, 27, 1 (530).

<sup>144</sup> One of Valentinian and Marcian's constitutions (Nov. Marc. 4 pr.) added by Justinian (C. 1, 14, 9).

<sup>145</sup> Page 6 f. above; *Sav. Z.* 52 (1932) 78 ff.

<sup>146</sup> L. C. 97 ff.

<sup>147</sup> D. 21, 1, 18 pr. interpolated (l. c. 127).

<sup>148</sup> D. 35, 1, 161 p. (l. c. 128).

<sup>149</sup> D. 28, 3, 17 interpolated (l. c. 129).

<sup>150</sup> D. 17, 1, 12, 9 (l. c. 133).

principle was already observed as Christian by Salvatore Riccobono:<sup>151</sup> *quia bono et aequo non conveniat aut lucrari aliquem cum damno alterius aut damnum sentire per alterius lucrum*. In multiple forms, this sentence pervades Byzantine law.<sup>152</sup> It is based on *bonum et aequum* as well as on *aequitas*,<sup>153</sup> the *melius* or *benignius*,<sup>154</sup> *bona fides*,<sup>155</sup> and the praetorian intervention.<sup>156</sup> No one should get rich at the expense of strangers: *nemo ex aliena iactura locupletari debet*. As all powers that are directed toward assuagement and compromise align themselves here indiscriminately, *condictio* is brought together with *bona fides*,<sup>157</sup> *bonum et aequum*,<sup>158</sup> *ius gentium*,<sup>159</sup> *natura*,<sup>160</sup> and *naturalis aequitas*.<sup>161</sup>

*Natura* and *naturalis aequitas* establish a new perspective; they are, for Justinian, likewise a lever, in order to unhinge the *ius civile*, which, rather than being for all peoples and all times, is only nationally valid, and thus changes: *Sed naturalia iura..., quae apud omnes gentes peraeque servantur, divina quadam providentia constituta semper firma atque immutabilia permanent*.<sup>162</sup>

Beside this continue the lines that Constantine first drafted. In the *Codex Justinianus*, his two guiding principles concerning the *iustitiae aequitatisque ratio*<sup>163</sup> and the *interpretatio* between *ius* and

<sup>151</sup> D. 23, 3, 6, 2; Riccobono, *Christianesimo*, Riv. Dir. Civ. 3 (1911) 55 f.; *Dal. dir. class.* 576 ff.; Pringsheim, *Sav. Z.* 52 (1932) III.

<sup>152</sup> Pringsheim, *Sav. Z.* 52 (1932) 145 ff.

<sup>153</sup> *aequum*: D. 2, 10, 3, 1; D. 3, 5, 44, 2; D. 10, 2, 49; *iniquum*: D. 42, 8, 10, 24; *aequius*: D. 20, 5, 12, 1; *aequissimum*: D. 2, 15, 8, 222; D. 14, 4, 5, 16; *aequitas*: D. 23, 3, 16; *natura (iure naturae) aequum*: D. 16, 14 and D. 50, 17, 206. For all these and the following passages, cf. *Sav. Z.* 52 (1932) 145 ff.

<sup>154</sup> *melius*: D. 11, 7, 14, 1. *benignius*: D. 5, 3, 38.

<sup>155</sup> *quia bonae fidei hoc congruit, ne de alieno lucrum sentiat*: D. 17, 1, 10, 3.

<sup>156</sup> D. 39, 2, 18, 15 i. f.; D. 42, 8, 10, 24.

<sup>157</sup> D. 23, 3, 50 (*Sav. Z.* 52 [1932] 138 f.).

<sup>158</sup> D. 12, 1, 32; D. 12, 6, 65, 4; D. 12, 6, 66 (*Sav. Z.* 52 [1932] 151 ff.).

<sup>159</sup> D. 12, 6, 47 (l. c. 141).

<sup>160</sup> D. 12, 6, 15 pr.; D. 12, 6, 64; D. 12, 6, 14 and D. 50, 17, 206 (l. c. 139 f.).

<sup>161</sup> D. 12, 4, 3, 7 (l. c. 141 f.).

<sup>162</sup> Inst. 1, 2, 11 and the *Studi Bonfante* I, 584 ff. cite passages: see Pernice, *Sav. Z.* 22 (1901) 73 n. 3 under reference to Diochrys. and Aristoteles.

<sup>163</sup> C. 3, 1, 8; page 14 above.

*aequitas*<sup>164</sup> are detached from their original context and moved to particularly important places in order to emphasize them still more.<sup>165</sup>

The second sentence also appears in other settings: *tam conditor quam interpret legum solus imperator iuste existimabitur*;<sup>166</sup> *leges interpretari solum dignum imperio esse oportet*;<sup>167</sup> *imperiale culmen cui soli concessum est leges et condere et interpretari*.<sup>168</sup>

That, in the *interpretatio* corresponding to C. 3, 1, 8, *aequitas* and *iustitia* are equated is all the more important because *iustitia* occupies an eminent position in Justinian's work of law.<sup>169</sup>

*Iustitia* is no longer the justice of classical times taken from Greek philosophy<sup>170</sup>—an *iustitia* that realistically accommodates the varieties of beings in the world, the idiosyncrasies of the various classes, and individual people. Now all people are the same before God, and all are subjects before the emperor. This Byzantine *iustitia* is thus translated not only as δικαιοσύνη but also as ισότης; yet, the same word also serves as a translation for *aequitas*. One gathers from this that δικαιοσύνη indicates not only *iustitia* but also *aequitas*.<sup>171</sup> It is clear how close *aequitas* and *iustitia* have moved to one another. The Justinianic judge's oath reads: *χχζ πάσαν ζσότητα φυλάξω χχτά τδ φαινόμενόν μοι δίχαιον χαζ πάσαν δικαιοσύνην αύτοτς διατηρήσω*;<sup>172</sup> and in an interpolated sentence of the *Digests*<sup>173</sup> we see: *et generaliter puto iudicem iustum solutius aequitatem sequi*.

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<sup>164</sup> C. Theod. 1, 14, 1; page 15 above.

<sup>165</sup> C. 3, 1, 8 originally belonged together with C. 7, 22, 3 and was first placed in the title *de iudiciis* by Justinian; perhaps a modification was carried out there (*quam stricti iuris?*: Pringsheim, SZ 42 [1921] 657 n. 6; *Conf. Milan*. 192 n. 3).

C. 1, 14, 1 (= C. Theod. 2, 3) is shortened by Justinian to create a narrower meaning and placed at the beginning of the important title *De legibus et constitutionibus principum et edictis* (C. Theod. 1, 2: *De diversis rescriptis*).

<sup>166</sup> C. 1, 14, 12, 5 (529).

<sup>167</sup> C. 1, 14, 12, 3 (529).

<sup>168</sup> C. *Tanta* § 21 i. f.; cf. also Nov. 143 praef.; Nov. 150 praef.

<sup>169</sup> "Justitia in den römischen Rechtsquellen" should be spoken about in a different paper; here I will only briefly mention the relationship of *iustitia* to *aequitas*.

<sup>170</sup> Page 5 above.

<sup>171</sup> *Sav. Z.* 42 (1921) 647 n. 8 and 8.

<sup>172</sup> Nov. 8.

Beside *iustitia*, *veritas* steps up as companion to *aequitas*: *sed omnes iudices nostros veritatem et legum et iustitiae sequi vestigia sancimus*;<sup>174</sup> in another place:<sup>175</sup> *Ergo iubemus iustitiam atque veritatem circa omnes nostros tributarios reservari; sic enim et deus placatur*. Here it is also evident how reference to the veneration of God<sup>176</sup> appears alongside *humanitas*.<sup>177</sup>

*Veritas, iustitia, aequitas*: in this triumvirate *aequitas* ultimately appears most often. *Illud aequitatis vovere rationibus bene nobis apparuit*:<sup>178</sup> so reads a statement of law. *Ut aequitatis ratio communiter in omnes procedat* it says in one constitution.<sup>179</sup> With similar solemnity, inequity is opposed. In the C. *Imperatoriam*, the emperor says (pr): *Princeps Romanus victor existat per legitimos tramites*<sup>180</sup> *iniquitates expellens, et fiat iuris religiosissimus triumphator*. In the C. *Deo auctore* (§ 1): *legum auctoritas, quae et divinas et humanas res bene disposuit et omnem iniquitatem expellit*.<sup>181</sup>

We come to the end. It has been established through recent research that an array of terms are associated with Byzantine *aequitas*, and, opposing those terms, are an array of hostile ones:<sup>182</sup> *benignitas* and *acerbitas*; *caritas* and *asperitas*; *clementia* and *austeritas*; *humanitas* and *duritia*; *medietas*, *moderatio*, and *immoderatio*; *innocentia* and *severitas*; *lenitas* and *atrocitas*; *pietas* and *impius*; *temperamentum* and *rigor*; *simplicitas* and *subtilitas*, *scrupolositas*, *malignitas*.

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<sup>173</sup> D. 11, 7, 14, 13 (Ind. interpolation).

<sup>174</sup> C. 7, 45, 13 (529).

<sup>175</sup> C. 1, 27, 1, 16 (534).

<sup>176</sup> For *aequitas* under Justinian, cf.: C. *Tanta* 2, 10 i. f.: *quidquid legum veritati decorum et necessarium fuerat, hoc nostris emendationibus servavimus* (since *veritas* is also the principle determining choice); C. 2, 55, 4, 1 (529) *iuramentum* of the *arbiter*: *super lite cum omni veritate dirimenda*; C. 3, 14 pr. (530) old judge's oath: *omnimodo sese cum veritate et legum observatione iudicium disposituros*.

<sup>177</sup> Page 23 above.

<sup>178</sup> C. 3, 38, 12 pr. (530).

<sup>179</sup> C. 6, 42, 32 pr. (531). Cf. also: *minime rationi convenit aequitatis* (C. 4, 21, 19, 1 [539]); *ad aequitatis rationem omnia corrigitibus* (C. 3, 1, 13, 7 [530]; C. 4, 18 3 [531]; C. 6, 50, 9 [532]; C. 5, 17, 11, 10 [533]).

<sup>180</sup> n. 118 above.

<sup>181</sup> Elsewhere, the talk is of a *resicare* (C. 10, 35, 3 pr.), *tollere* (C. 3, 28, 33, 1), *nullo modo audire* (C. 4, 1, 11 pr.), *non ferre* (C. 5, 27, 10 pr.), *corrigenere* (C. 7, 54, 3, 1), *inhibere* (C. 8, 10, 14, 2), *amputare* (C. 7, 63, 5, 4) of *iniquitas*, whereas *iniquitas* in the earlier law collection in C. 5, 9, 10; C. 6, 23, 28, 6; C. 6, 28, 4, 3 is contested with other words.

<sup>182</sup> With respect to the evidence not covered in this essay, the evidence in the *Indice* by Guarneri Citati (most recently, *Supplemento, Studi Riccobono* 1, 699 ff.) can be located easily.

Whoever is familiar with the Church Fathers will recognize the words that are voiced here. However, that person will, at the same time, sense how far off lies the goal of our study from its beginning; it is a rather long path from the classical to the Justinianic *aequitas*. Instead of an abstract concept sometimes, but certainly not always, influencing the law and facilitating progress—a concept that is used mostly unconsciously and stands beside the tidy and clear Roman elements of *bona fides* and *bonum et aequum* established in the legal order—we now have an *aequitas* that governs the entire law, the collection of laws, and the judge. It is intermingled with *ius naturale* as *naturalis aequitas*; it is unified with *iustitia* and *veritas*; and, in its retinue, an entire array of religious and ethical attributes find their way in the law. The ideal—the removal of all barriers between law, morality, and religion—has theoretically been achieved. Yet, perils arise for the secular law, which in those days, as always, aimed at a practical, social arrangement. The equilibrium between severity and accommodation, between *ius* and *aequitas*, and between law and equity is shattered. The triumph of *aequitas* has seemingly ended the interplay between two similarly valuable ideas that exist in necessary and healthy conflict. The new equity of the Byzantines (for whom the emperor is the only exegete and lord) makes way for capriciousness as well as justice. For the world, which incorporated and continues to incorporate Justinian's law—because ideas do not die, and fighting against them still leads to learning about them—the victory of *aequitas* is apparently permanently sealed. However, just as often, I have demonstrated here that, in Justinian's work, although the new is seemingly so forcefully confirmed, it stands beside the old, which does not lose its formidable power even during the imperial revision. The ambivalence of his law is precisely what made it so beneficial for all the following centuries, since only a single multifaceted entity, in that it carries the entire world within itself, can thus conquer the entire world. The classical *aequitas* that we attempted to describe at the beginning we have gleaned no less from Justinian's work as from the Byzantines'. This classical *aequitas*, lurking under the cover of the *Corpus iuris*, has finally been revived. The old Roman structure was far too enclosed for the theories of the Christian emperors to have been able to shatter it completely. When Justinian decided to create the *Digests*,<sup>183</sup> he essentially capitulated before the strong spirit of the classical law. He felt himself to be the consummator of the great

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<sup>183</sup> Pringsheim, *Die Entstehungszeit des Digestenplanes und die Rechtsschulen*, Atti del Congresso Internat. di. Dir. Rom. 1934; I. 449 ff., especially 466.

Roman jurisprudence; in fact, he proved that to be more correct than even he himself suspected. Thus, it was not really his *aequitas*, but that of the classical authors, that survived. The *aequitas* of the Christian emperors had fulfilled the perpetual task of relaxing severity, maintaining the adaptability of the law, promoting progress, and keeping discussion concerning justice flowing.<sup>184</sup> Under the impetuous onrush of new ideas, it had actually gone a bit too far in those tasks; all too freely was *aequitas* allowed to prevail in this epoch; all too greatly was the culture and serenity of the classical times abandoned. Nothing seemed more important than to let flow into the law whatever had attained dominance among the new ideas circulated since Constantine. The danger—that, as a result, the legal order began to totter gravely—and the concern—that the handling of *aequitas* by the emperors would lead to capriciousness—seemed to be avoided through the conviction that this new *aequitas* was a Christian one, that its might was a Christian might. The scientific order of the law and the dependability of its practice may suffer, but, despite everything, the new spirit must make the attempt to pervade the mundane world. Yet, while *aequitas* was already prevailing, its borders were becoming visible; no authority of an absolute monarch could perpetuate this victory. After the task had been fulfilled, *aequitas* stepped back into its rather modest position again. Nevertheless, during those times in which an immense quest for something new dominated, it was ever ready for a repeated attempt. However, the role that the classical authors allocated to it remained the healthier one and more in keeping with its character. Neither in canon law nor in the law of the German Middle Ages, neither in the Bologna school of law nor in the English law, did *aequitas* make itself the complete mistress over the *ius*. Every law as abstract rule wants to substantiate itself fairly in each case. And every form of equity, when it is continually applied, transforms into abstract law. The self-realization of justice<sup>185</sup> can only proceed in this unending contest.

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<sup>184</sup> *Confer. Milan.* 231.

<sup>185</sup> R. Kroner, *Die Selbstverwirklichung des Geistes* (1928) 108 ff.; 218 ff.; R. Kroner, *Kulturphilosophische Grundlegung der Politik* (1931) 35 ff.