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Legal Sciences in the New Millennium

**Equity – Connotations in the
Current Romanian Legal System**

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Abstract: The underlying principle of the law, and a source of law – equity – has been expressly or explicitly integrated in the judicial development of law, with a view to giving a meaning to the law, for which reason it is aimed at peacefully solving or preventing the social disputes in society. Therefore, equity has a hermeneutic function, strictly for making interpretations when the legislator so allows it, it is intrinsic to the law and contains all phases of good management and enforcement of justice, being a part of all stages of the legal proceedings, from the application initiating proceeding to the actual implementation of the court decision awarded, regardless of the nature or extent of jurisdiction, and of the nature of the litigation referred for judgment. According to the requirements of equity, the judges have special powers for settling specific cases, namely, they may offer resolutions they consider to be fair and conforming to the interests of the parties involved, which is to be grounded on facts, and not on the positive law.

Keywords: equity; positive law; hermeneutic function; social conflicts; society

1. Concept of Equity

One of the most complex principles of law in general, and of civil law in particular – the principle of equity – a moral and legal principle of fundamental importance – finds its application both in the law-making process (Mihai, 1999, p. 96), and in the actual activities of the institutions for the implementation and enforcement of law. An immediate effect of this concept is the concept of justice, defined as the ideal general state of a society, aimed at ensuring that each individual achieves his/her rights and legitimate interests as a way of satisfying the individual good, and embodied in the general, common good of all members of a given society, leading to a balance between honesty and tolerance towards our neighbours, way observing social and legal order rules (Voicu, 2001, p. 236). Therefore, there is an ideal connection between equity and justice (Pitulescu & Abraham, 2000, pp. 116-117), because one is explained by the other, and they are subordinated to a value hierarchy created by the society. At the same time, equity is a principle imposing equal rights and responsibilities for the members of the human community and also of the nations and states, mutual respect, and fair and unbiased resolution of any potential disputes that might arise in the relationships between them. However, the principle of legal equity is not a general abstract principle; legal equity applies only in actual cases and always operates *a posteriori* and under specific circumstances exclusively. (Deleanu, 2008, pp. 187-188)

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In ancient times, equity, which involved developing and enforcing the law, was achieved by conforming to certain principles: living honestly, not harming anybody, giving everybody what they deserve – *honeste vivere, neminem ledere, suum cuique tribuere* – principles expressed by the Roman jurist Ulpian. (Ceterchi & Craiovan, 1998, pp. 30-32)

At the same time, equity and justice are principles inherent to the concept of law, given that the legal rules involve an increasing degree of abstractness, and the legal power is required to be more effective, to resolve increasingly complex cases and even foresee subsequent trends.

The meaning awarded by Cicero (Del Vecchio, 1993, pp. 64-66) for equity continues to be relevant even today; he considered equity to be an equal right for all citizens, and Celsus approximated the meaning of equity to that of law, defining the law as *an art of good and equity* (Popa, 1998, p. 126).

Therefore, equity is a principle of law which gives meaning to the law and allows peaceful resolution or prevention of social conflicts, namely, it is an immaterial, relatively hard to grasp principle that gives substance and consistency to the legal system and converts it into a value separate from its other components. The principle of equity can be considered to be the basis of law ever since the origin of the human society and the concept making possible the organization of society and of social peace (Popa, 2002, p. 116). If equity is considered to be the basis and a ground for law, then it can be said that, on the whole, law is the way to achieve social peace.

Applied in an actual, specific juridical situation with the aim of ensuring a balance between the parties involved because of the conflicting nature of such situation (Deleanu, 2008, p. 184), equity is a fundamental principle of justice, a concept aimed at fairly distributing the goods between persons having decided to cooperate or to be in conflict with each other (Malaurie, 1997, p. 30). The issue of equity may arise when several free and equal persons, therefore, without any authority on one another, decide to engage in a common activity and jointly establish or recognize the rules governing such activity, with a view to determining the appropriate distribution of benefits and resulting obligations. Under these circumstances, an activity can be deemed to be equitable by the parties involved if no one feels that, by taking part in such activity, the concerned person or any other person will obtain an advantage from the other one or he/she will be forced to give in to requirements he/she does not consider to be legitimate. This supposes that each participant has their own notion of what is reasonable for a legitimate requirement to be accepted by other and by themselves. An activity is equitable when it meets the principles the parties involves might offer to one another for mutual acceptance purposes. The parties engaged in an equitable activity may confront each other openly and may assert their own positions if they seem likely to be illegitimate by reference to principles it is reasonable for each of them to accept.

The concept of *equity* (Rawls, 1958, pp. 167-169) becomes fundamental for justice because of the very possibility for several persons, without any authority on one another, to mutually recognize this principle. Only when such recognition is possible may there be true a community of persons as part of their common practices; otherwise, such persons will consider these relationships to be based, to a certain extent, on force.

For an activity to be equitable, it is enough for the participants therein to be knowledgeable and accept the benefits thereof. Implicitly, this obligation may be breached, namely, it may happen that, because of other considerations, the breaching thereof may be justified although other regulations should be observed. However, as a rule, no one may avoid such obligation if he/she asserts an activity is fair only when it is the case for it to be observed. When a person rejects a certain activity, to the extent possible, such person should notify this beforehand and avoid taking part to it or use the benefits

thereof. It can be said that it is a duty for *equitable behaviour*; but it must be accepted that, sometimes, such an approach involves an extension of the concept of equity. In general, acting in an inequitable manner does not involve breaking specific rules – even if illegality is difficult to detect – just enough to take advantage of the lack or ambiguity of certain rules, to capitalise on unexpected or special circumstances rendering their application impossible, to insist on the rules being applied to the benefit of a specific party, when, in fact, they should be suspended or, more generally speaking, action should be taken against the aim of a specific practice. For these reasons, there is the notion of a sense of equitable behaviour: acting equitably involves more than being able to observe rules; it can be said that what is equitable must often be felt or sensed. However, including in the duty for equitable behaviour the obligation to act according to the common practices the participants having knowledgeably accepted the benefits thereof have one to another is not an unnatural extension when it comes to this issue because, as a rule, it is deemed inequitable for someone to accept the benefits of such activities but to refuse to meet the obligations in order to maintain it. As a result, it can be said that tax evasion does not observe the duty of acting in an equitable manner: a person accepts the benefits of a government, but he/she does not want to contribute to the development of the resources thereof.

As a basic moral notion (Popescu, 2000, p. 124), the duty for equitable behaviour ranks with other duties, such as loyalty and gratitude; however, it should not be confused with these. As any other moral duty, the duty for equitable behaviour involves, in certain cases, restrictions to the personal good; sometimes, it imposes a behaviour that a selfish, strictly rational person may not choose.

Some of the forms of behaviour, by which the parties involved in a common activity express gratitude one another, as persons with similar interests and abilities, is the acceptance of such restrictions in specific cases; such acceptance supposes the need for acting in an equitable manner or for a wish to compensate for potential damages when its breach is decided. Just as, in the absence of another explanation, the criterion for recognizing the existence of loss is the assistance provide to the losing party, the duty for equitable behaviour is a necessary part of the criterion for recognizing that the other party has interests and feelings similar to the other one.

But equity is the exclusive task of the legislator as the *holder* of equity, in the sense that they are the ones granting the delegation for equity requesting, and the judge just conform to it, in the absence of appropriate legal rules or when there is ambiguity in the existing ones.

2. A Few Connotations in the New Romanian Legal System

The concept of *equity* has been integrated in the principles for creating, applying and implementing the law, either by way of express provisions contained by the new codes of laws, or implicitly, by the free appraisal possibility granted to the judges by the legislator, which is not prevented by any law to apply the rigors of the law but, on the contrary, some laws even suggest the possibility and the need for the strictness thereof.¹ Therefore, art. 1272 of the New Civil Code (art. 970 former Civil Code) assimilates the meaning of *equity* to that of law, resulting in all agreements signed between civil persons not only binding to what is expressly stipulated therein (“what is expressly provided therein” according to the former Civil Code), but also to the effects of equity over an obligation, according to the nature thereof. Therefore, *equity*, like the other sources of law established between the parties, usages or the law, is a stipulation implicitly transposed into contracts.

¹ See the new Civil Code, Art. 1221, 1222, 1328, 1329 etc.

Equity in terms of business relationships. The new Civil Code has a central role in terms of relationships between¹ professionals, whereby equity and the establishment of the right to a fair trial are deemed to be of crucial importance. In business, equity may be either in the form of the principle of reasonableness in business or in the form of the substance over form principle, and a request for equity may be seen as a return to the old realistic and equitable jurisdiction applied by the justice of the ancient medieval fairs or to the statutory, consular jurisdiction of ancient guilds. The idea of natural law, *of an eternal, unchangeable justice, existing beyond the rule of positive law* (Djuvara, 1999, p. 503) *and which should be enforce in any place and at any time*, is no longer a simple philosophic trend. The nature of the facts – that natural law that appears in itself as an ideal and a judgement determining the rule of law and is above it, transforms the law from an *a priori*, apparently irrational product, into a social product adapted to the ideas of equity and justice, ideas that simply *give meaning to the law*. The democratic and constitutional principles, which are grounded on humanity's aspiration for the good, place above the rule of law a *corpus* of ideas of force that create the law, a common judgment and the last one leading to the development of the rule of law.

Equity in case of public reward promises. The new Civil Code [art. 1326 (1)] regulates the situation of *unilateral legal deeds subject to communication*, providing for such to conform to this procedure when they “establish, change or cancel a right of the beneficiary and whenever information of the beneficiary is required under the nature of the deed.” In the grounds of these regulation, the institution of the *public reward promise* [art. 1328 (1)] is defined as the unilateral deed under which the party issuing a public reward promise in exchange for a provision has the obligation to make such payment even if the provision was performed without the promise having been acknowledged. In this case, the legal regulations [art. 1329 (3) and (4)] also provide for the possibility to award *equitable compensation* (however, without exceeding the promised reward) to the parties that had incurred expenses related to the provision performance (save for the case when the promissor proves the expected result could not have been achieved) before the cancellation was published, and the right to seek compensation is to lapse within one year of cancellation publication.

Equity in case of damage as a defect in consent. The *defects in consent through damage*, according to art. 1221 of the new Civil Code, exist when one of the parties, upon contract signing, taking advantage of the need, lack of experience or lack of knowledge of the other party, provides for the benefit thereof or for that of another party a provision significantly higher than the amount of their own provision, and the damage is to be sanctioned by the cancellation of the damaging deed and also, by the decrease of the amount of the obligations thereof by the amount of the damages to which they would be entitled. Even when the party chooses to file a proceeding for cancellation, the court will be able to keep the validity of the contract if the other party offers, *in an equitable manner*, a decrease of their own receivable or an increase in their own debt, as appropriate [art. 1222 (3)].

Equity in case of the judicial limitations to the ownership right. The *judicial limits* provided in the new Civil Code (art. 630) are provided for private individuals and relate mainly to neighborhood relationships. In fact, the judicial limitations to the exercising of the private ownership right are established by an *equity law*, which relates applying the equal treatment principle in legal situations. As long as the Civil Code, on the one hand, sanctions the denial of justice (non-resolution of an application referred for judgment because of a lack of legal provisions) and, on the other hand,

¹ *The new Civil Code* defines professionals as all those operating an enterprise, having a scope much broader than that of *seller* provided in the current regulation. Law 71/2011 implementing Law 287/2009 on the Civil Code expressly provides that the notion *professional* shall include the categories: seller, entrepreneur, economic operator, as well as any persons authorised to conduct economic or professional activities. Therefore, the freelancer professions (lawyers, insolvency practitioners, valuers, executors) also shall be covered by the notion *professionals*.

prohibits the judges from giving normative rulings (Art. 3), in these situations, the judge may resolve a case even in the absence of express legal provisions, applying to the analogy of the law and the general principles of law, in this case, the principle of equity. Therefore, when applying this conception, the judge may appraise the inherent limitations to the ownership right, the natural or unnatural character of the neighborhood reports and may establish the judicial limitations to the exercising of the ownership right (Stoica, 2009, pp. 127-129). According to the provisions of art. 630 (1), *equity* is the basis for such interventions from judges.

Equity in the theory of imprevision in contract review. As an exception from the principle of the mandatory character of the contracts (*pacta sunt servanda*), the provisions of art. 1271 of the Civil Code regulate the theory of imprevision, which involves the parties having the possibility to review the initial contractual provisions when the circumstances initially considered change and lead to a contractual imbalance. Hence, a mere change in circumstances, having as a result only a more onerous character of the performance, will not exempt the parties from executing their obligations undertaken [art. 1271 (1)]. When the parties do not reach an agreement for contract renegotiation within a reasonable period of time, the court of law is the one that may order, upon the request thereof, the contract alteration so as to distribute *in an equitable manner*, between the parties, the losses and benefits resulting from a change in the initial circumstances, or *contract termination* under the conditions ordered by it.

Equity in victim compensation by a perpetrator void of reason Starting from the principle of equity, an equity that is attached to court decisions and also, to a range of propositions of the doctrine, the new Code enshrines the subsidiary obligation to pay damages to the victim whenever the perpetrator is void of reason, and the person who has the obligation, under the law, to supervise the former, cannot become liable. In such a case, the perpetrator is not to be exempt from paying damages to the victim; the amount of the damages is to be determined in an *equitable manner*, with due regard to the patrimonial condition of the parties. It seems obvious that, as part of the legislative enshrinement of this disposal, it is no longer about the actual civil liability, which is also proved by the law not mentioning anymore the perpetrator's obligation to compensate the victim, but to pay damages which, most often, are to be in an amount below the prejudice actually incurred; however, in our view, undoubtedly the amount of the damages cannot exceed the amount of the damage incurred by the victim.

Equity in case of compensation for self-defense excess. *Self-defense* (art. 1360) does not exclude, when the perpetrator's misdemeanor involves exceeding self-defense limits, the obligation to pay to the aggressor appropriate *equitable* damages; please note that, in this case also, the law does not mention compensation, so it is not about curing the prejudice; certainly, the appropriate *equitable* character of the damages is to be determined by the court of law.

Equity in terms of judge's role in truth determination. The new Civil Procedure Code, art. 22 covers the judge's role in truth determination by enshrining the principle of equity in par. 7, providing that "Whenever the law reserves to the judge the power of appraisal or requests to him/her to take account of all circumstances of the case, the judge shall take account, among other things, of the general principles of law, the requirements for equity and good faith."

This paragraph transposes the regulation in art. 5 (3) which, in terms of court of law competence, binds the judge, on the grounds of their role in the civil trial: "When a case cannot be resolved on the grounds of the law or of the usages and, in the absence of the latter, nor on the grounds of legal

provisions governing similar situations, it shall be judged on the grounds of the general principle¹ of law, with due regard to the circumstances thereof and taking account of the requirements for equity". (Popa, 1998, p. 91)

As a result, a correct application of the civil procedure rules in time and space or by reference to the beneficiaries of the rules is a pre-set objective of significant importance in order to guarantee a civil trial conforming to all current objectives imposed by the principle of the right of defense, the *Audi alteram partem* rule, the principles of directness, lawfulness, equity and equal trial.

Equity in the enforcement procedure. The principle of equity in the enforcement procedure implies the rule that all bodies and State authorities involved in this stage of the civil trial act in an equitable manner with the parties, so that any of them be prejudiced or damaged in relation to the other (Stoica, 2008, pp. 55-58). Therefore, since the creditor is the one that is entitled to start the enforcement procedure, at the same time, it has the obligation to act in compliance with specific terms, specifically for the enforcement not to be biasedly appraised by it. At the same time, by way of the procedural instrument of the challenge on enforcement, the parties considering that their rights have been prejudiced have the possibility to challenge before a court of law any potential irregularities during the enforcement stage.

Equity in the institution of the preliminary chamber². By the institution of the preliminary chamber, the draft new Criminal Procedure Code aims at meeting the requirements for lawfulness, celerity and equity in the criminal trial. The aim of the institution of the preliminary chamber is to resolve matters pertaining to the lawfulness of the summons and of evidence taking, providing the prerequisites for the expedite resolution on the substance of the case.

In conclusion, in the absence of a rule of law, the court can ground their decision on equity principles and, this way, the equity rules become rules of law themselves; as a result, equity does not become a source of law, but only a ground for court decisions in the absence of a rule of law and merely a reference in the judicial proceeding that is specific to actual legal situations, with the ultimate goal of reasoning a disposal that is in line with the need for the specific case. However, it may have a certain role in order to avoid formally applying principles or rules of law that would lead to results contrary to justice. For this reason, equity can be seen if not as a source of law, at least as an important part of the process for the development and enforcement of the rules of law, which must always be based on the principles of equity. Hence equity, as a general moral value, is enshrined by the legislator specifically for being applied, which is the judge's responsibility.

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¹ The general principles of law classified as: principle ensuring the legal functioning grounds for the State; the principle of freedom and equality; principle of responsibility and principle of equity and justice.

² In accordance with the provisions of art. 3 (1) (c) and (6) of the new Criminal Code, as corroborated with art. 54 of the new Criminal Procedure Code, the judge in the *preliminary chamber* is the judge who, subject to his/her court of law and competence, verifies the lawfulness of the summons referred by the prosecutor, verifies the lawfulness of evidence taking, of deeds from the criminal prosecution bodies and resolves the complaints against disposals for non-prosecution or non-referral for judgment.

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*** Law 71/2011 of implementing Law 287/2009 on the Civil Code.