

GOD'S LAW, 'GENERAL EQUITY' AND THE WESTMINSTER CONFSSION OF FAITH

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Summary

According to the Westminster Confession of Faith, the only obligation now placed upon the Christian community towards the Old Testament judicial laws is one of 'general equity'. How to interpret these words has often been discussed, mainly because of the very stringent position adopted by the Reconstruction Movement. This article reviews the development of the term 'general equity' in terms of English Law and its subsequent use by theologians. Because of comments by Calvin and others a study is made of the idea in the writings of Aristotle. The practical application of 'general equity' is not without problems, but the conclusion is drawn that it can be implemented in the sense of 'being reasonable'.

1. The Theonomic Debate

Not all are agreed about the continuing importance of God's law in the life of the Christian community. Some understand the Christian as now being 'free from the law', while in the Westminster Confession of Faith Chapter 19 – 'Of the law of God', the abiding obligation of the law is discussed in some detail. It explains that, to Israel, God gave the law moral, ceremonial and judicial. The moral law is binding, the ceremonial law has been fulfilled in Christ and

To them also, as a body politick, he gave sundry judicial laws, which expired together with the state of that people, not obliging any other now, further than the general equity thereof may require.¹

¹ A. A. Hodge, *The Confession of Faith* (London: Banner of Truth Trust, 1958): ch. 19 section 4.

This raises the question, what is actually required by the meaning and use of the term ‘general equity’? It is an important question for all who are interested in the Confession of Faith, but particularly so because of the interpretation being put upon this phrase by the Reconstruction Movement. Holding to a position known as ‘theonomy’, this movement maintains that in order to do justice to the concept of equity, the general principle of the law must remain. In other words it is only the Jewish form that has been replaced but the institution itself, the ‘equity thereof’, is everlastingly binding. The judicial law therefore, when stripped of its peculiarly Jewish appurtenances, is still in force and it is the duty of the magistrate to make sure it is enforced. The special administrations of the judicial laws, which belonged to the Jews in a particular setting and period of cultural development, and therefore one peculiar to that situation, are no longer mandatory. For example, the death penalty must still be applied as part of the equity of the law but the method of stoning is no longer mandatory or even an acceptable mode for capital offences. However, the electric chair is a suitable modern equivalent! Greg Bahnsen, one of the main advocates of theonomy explains that it is not ‘an equity which is found *in* the law, somewhat like a Platonic form of justice that is found diffused throughout the laws... (but) the general equity “*of* the law.”... the general equity as the “marrow”, as it were, of that law, – the inner principle.’²

A second line of argument which is a slightly different approach, but in no way weakens the position, is taken by James Jordan. He makes a case in favour of retaining the actual case laws. It is not that the Mosaic case laws were designed as a civil code for any nation in general but the case laws were explanations of the moral law and thus form a foundation for civil codes. It is only the cultural connotations that are invalid. There is still the obligation to apply these case laws as illustrations cross-culturally to society today.³ Bahnsen also concurs with this idea. For him, equity is only properly fulfilled when it is identical with the case law. Writing about equity in punishment he says:

² ‘An Interview with Greg L. Bahnsen’, *Calvinism Today* 4.1 (P.O. Box 1, Whitby, UK, 1994): 22.

³ Quoted in H. W. House and Thomas Ice, *Dominion Theology: Blessing or Curse?* (Oregon: Multnomah Press, 1988): 98.

The outstanding characteristic of theonomic punishment is the principle of *equity*; no crime receives a penalty which it does not warrant. The punishment for a violation of God's law is always appropriate for the nature of the offence; 'an eye for an eye, and a tooth for a tooth'. Here is the most blessed standard of *social* retribution that man's civilization has ever seen.⁴

Just such a position is succinctly stated by Sinclair B. Ferguson, 'To the theonomist [general equity] means that where the Mosaic judicial law *can* be applied, it *must* be applied just as it was in the Old Testament...The effect is...that *the Mosaic law has actually expired minimally: it remains obligatory and must be applied maximally.*'⁵ If this claim by Theonomists be correct, that the various judicial laws and their associated penalties should continue to be rigorously observed as part of the rubric of general equity and that nothing has essentially changed, then there are obvious implications for both Church and State.

2. Different Categories of Old Testament Law

However, before examining in detail the hermeneutics of 'general equity' I want to explore the broader issue of the threefold division of the Old Testament law into moral, ceremonial and judicial as set out by the Confession of Faith. In general terms these refer to the Ten Commandments; the laws governing the various offerings; and all other laws concerned with social life in Israel, e.g. food, dress, property, sex, crime, etc. At first sight this may appear to be a helpful distinction, as there are obviously different aspects of law in the Old Testament, but it actually raises several important questions:

1. What evidence is there to suggest that the legal framework supports this methodology? Is it not rather artificially imposed?
2. If, however, it can be shown to be the case, can each and every law be placed precisely within its proper category?
3. If it is the case that it can, and I think scholarly research places this in some doubt, what usefulness can the Christian church make of those judicial laws whose only abiding obligation is the 'general equity thereof'? In other words, what is the meaning of 'general equity'? Bearing in mind that when Paul says 'all Scripture...is

⁴ Greg Bahnsen, *Theonomy in Christian Ethics* (New Jersey: Presbyterian and Reformed Publishing Co., 1984): 437.

⁵ Sinclair B. Ferguson, *Theonomy: A Reformed Critique* (Michigan: Zondervan, 1990): 330.

useful for teaching, rebuking, correcting, and training in righteousness' (2 Tim. 3:16) he is referring specifically to the Old Testament, we cannot simply dispense with these many and varied injunctions as belonging to an earlier covenant and therefore of no relevance to the Christian community.

In reply to the first question, it is often thought that Aquinas was not only the father of this scheme, but has also produced compelling evidence in its favour. For example Deuteronomy 4:13-14, 'Ten words...he wrote in two tablets of stone; and he commanded me at that time that I should teach you the ceremonies and judgements which you shall do'. Or again, Deuteronomy 6:1, 'These are the precepts, and ceremonies, and judgements'. However, it must be pointed out that Aquinas was not the first to suggest the possibility of such a scheme of things but was writing in response to Augustine's bi-partite analysis of Old Testament law. He, along with earlier church Fathers, for example Justin Martyr (ca. 100-165), Origen (ca. 185-254), and the Rabbis commonly referred to the 'heavier' and the 'lighter' parts of the law namely the moral and the ceremonial. To this idea Aquinas added a third category, which obviously set the pattern to be followed later by the Irish Articles of Religion, the Thirty-nine Articles of the Church of England and ultimately the Westminster Confession of Faith. Aquinas states his position as follows:

We must therefore distinguish three kinds of precept in the Old Law; viz., moral precepts, which are dictated by the natural law; ceremonial precepts, which are determinations of the Divine worship; and judicial precepts, which are determinations of the justice to be maintained among men. Wherefore the Apostle (Rom.vii.12) after saying that the law is holy, adds that the commandment is just, and holy, and good: *just*, in respect of the judicial precepts; *holy*, with regard to the ceremonial precepts (since the word sanctus –holy– is applied to that which is consecrated to God); and *good*, i.e. conducive to virtue, as to the moral precepts.⁶

However, not everyone may find this argument from Romans 7:12 convincing, nor concur with the exegesis as a way of substantiating a threefold category of the Old Testament law. But Aquinas having

⁶ T. Aquinas, *Summa Theologica* (Vol. 8; London: R&T Washbourne, Ltd, 1915): 106. For a substantial article on Aquinas and the threefold division of the law see Stephen J. Casselli, 'The Three-fold Division of the Law in the Thought of Aquinas', *WTJ* 61 (1999): 175-207.

given birth to the idea, the Reformers appear to have simply followed his lead without question. It is generally accepted that in his understanding of the law Luther followed the scholastics. While one quotation from Calvin's *Institutes* leaves us in no doubt as to his views:

We must attend to the well known division which distributes the whole law of God, as promulgated by Moses, into the moral, the ceremonial, and the judicial law, and we must attend to each of these parts, in order to understand how far they do, or do not, pertain to us. Meanwhile, let no one be moved by the thought that the judicial and ceremonial laws relate to morals. For the ancients who adopted this division, though they were not unaware that the two latter classes had to do with morals, did not give them the name of moral, because they might be changed and abrogated without affecting morals. They give this name specially to the first class, without which, true holiness of life and an immutable rule of conduct cannot exist.⁷

As far as Calvin was concerned this threefold division was 'well known' and had been adopted by 'the ancients', which has given rise to the view that he is referring to the early Church Fathers rather than the medieval scholastics.⁸

On the other hand, it has to be acknowledged that many contemporary writers are not convinced about this standard threefold classification of the law. For example Christopher Wright⁹ raises the issue of giving to the poor and then poses the question: if this is an abiding moral obligation, why is it not included in the Decalogue? As a result he has produced a quite different framework for understanding Old Testament ethics. His theory is that of 'the ethical triangle' – God, the theological angle; Israel, the social angle; and the land, the economic angle. In dealing with the law and the legal system in particular he establishes four major legal blocks – the Decalogue, the book of the covenant, the levitical collection and finally the deuteronomic col

⁷ J. Calvin, *Institutes of the Christian Religion* (London: James Clark & Co., 1957): 4:20:14.

⁸ Theonomists please note that neither the ceremonial nor the judicial laws should be considered as immutable.

⁹ C. Wright, *Living as the People of God* (Leicester: IVP, 1983): 14; see also *Walking in the Ways of the Lord* (Leicester: Apollos, 1995). See pp. 101-02 for his view on theonomy; *God's People in God's Land* (Carlisle: Paternoster, 1990). Wright's most recent revised and expanded edition is *Old Testament Ethics for the People of God* (Leicester: IVP, 2006).

lection. He further classifies the laws into five different kinds, namely criminal, civil, family, cultic, and charitable.¹⁰

Walter Kaiser¹¹ treats the threefold division of the law with respect, but wants to extend the moral law beyond the Ten Commandments as he detects a breadth of moral principles that inform the whole core and meaning of the Torah. Furthermore, these need not necessarily be restricted to Israel but may be applied to contemporary issues. Norman Geisler¹² simply rejects the threefold division of the Old Testament law by pointing to situations in the New Testament where clearly it is not applied, for example in the cases of adultery and Sabbath observance. Exponents of Dispensationalism¹³ also reject any notion of interpreting the Old Testament in this way as Christians are considered to be no longer under law but under grace.

However, John Goldingay¹⁴ sees a useful place for the Old Testament in Christian ethics as it includes commands, stories, narrative, etc., but he proposes that the application should come by way of ‘middle axioms’ whereby one moves from the specifics of the ancient text to the specifics of the modern context. How to interpret the ancient text in the light of the modern context is surely the difficult issue, but he does warn against not allowing the application/interpretation to become the actual injunction. It is our understanding of the biblical text itself that must remain the sole authority. Wright maintains that if this idea is accepted, then the ‘middle axioms’, or to use his words, the principles or paradigms must be subject to constant revision in the light of the biblical text and therefore our ethics become truly reformed in the sense of being *semper reformanda*.¹⁵

¹⁰ A somewhat similar scheme, favoured by Waldemar Janzen in his *Old Testament Ethics* (Kentucky: Westminster/John Knox Press, 1994) is to focus on various paradigms such as familial, legal, priestly, wisdom, royal and prophetic as a way of extracting ethical principles from the OT narratives.

¹¹ W. Kaiser, *Toward Old Testament Ethics* (Michigan: Zondervan, 1983); *Toward an Old Testament Theology* (Michigan: Zondervan, 1991); *Toward Rediscovering the Old Testament* (Michigan: Zondervan, 1991).

¹² N. Geisler, *Options in Contemporary Christian Ethics* (Michigan: Baker Book House, 1981); *Christian Ethics* (Michigan: Baker Book House, 1989).

¹³ J. N. Darby, and the *Scofield Study Bible*.

¹⁴ J. Goldingay, *Approaches to Old Testament Interpretation* (Leicester: IVP, 1981); *Theological Diversity and the Authority of the Old Testament* (Carlisle: Paternoster, 1995); *Models for Interpretation of Scripture* (Michigan: Eerdmans, 1995).

¹⁵ C. Wright, *Walking in the Ways*: 95.

Novel as all these developments may be, does replacing one scheme by another make the understanding and usefulness of Old Testament ethics any easier? If there are problems with a simple threefold division of the law, how is one to apply Wright's complex model or Janzen's emphasis on paradigmatic narrative? And at a very practical level it must be remembered that the study of Old Testament ethics is much more than an academic exercise: it is a genuine desire to hear the Word of God addressing important aspects of the Christian life. Furthermore, such attempts to give a better understanding of the relevance of Old Testament ethics face the same challenge as the threefold dimension of the law suggested by the Westminster Divines: how to place each and every law precisely within its proper category. Irrespective of which scheme is used, it is still difficult to know what laws belong exclusively to the old covenant, what laws carry a continuing obligation, and how they may be meaningfully applied today. However, if we take the term 'judicial' laws in the context of the Westminster Confession and accept the fact that there has to be a certain degree of discretion in determining what those laws are, we are then faced with the third question. If such laws are to be interpreted and applied to the Christian community in terms of the 'general equity thereof', what does this mean?

3. General Equity

This concept of 'general equity' as used by the Confession of Faith is with specific reference to the judicial law, which as we have noted, is difficult to define within precise parameters. Nevertheless, if we can establish what is meant by 'general equity' then at least we will know how to apply some parts of the law. And for those who object in principle to the threefold division of the law, here is a concept which could be a useful tool for interpreting the moral teaching of the Old Testament in general and instructive in how to appropriate it to the New Testament Church.

In pursuit of the meaning of the term 'general equity' several questions need to be addressed:

1. What meaning did it have when used in the making of the Westminster Confession of Faith? In other words, in 1643-46 had it certain legal connotations in English law?

2. In the context of theology, did it have a specialist meaning for those engaged in writing the Confession? Is it used in other theological works of that period?
3. As the Reformation began in Europe did the Westminster Divines consult the works of their European counterparts? Were they addressing the same issues about the abiding relevance of OT law?
4. If it is detected in European sources, is it original thought, or merely an adaptation of ideas gleaned from others as part of an intellectual training in law and philosophy? In other words, is the meaning of equity discussed by much earlier scholars?

3.1 Equity in English Law

This will entail a study of the history of the term ‘equity’, as it gradually developed into a well-defined concept in English jurisprudence. It is a technical term and as used in the law today is broadly equivalent to natural justice. Yet because of the very essence of the idea, it is extremely difficult to frame general rules to cover the principles of equity, with the result that many matters of natural justice are left to the promptings of the individual conscience rather than be made matters of legislation. What in fact has taken place is that with the passage of time certain principles have evolved which form an appendage to the general rules of law.¹⁶ When reference is made to that which is ‘equitable’ it is simply taken to mean that which is ‘fair’. A classic eighteenth century quotation is:

Equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is a universal truth...¹⁷

Of particular interest to the present purpose is the fact that around the time when the Confession of Faith was being written the whole idea of equity was only beginning to emerge. Prior to the fifteenth century there was simply a Common law administered by the King’s court. The need for principles of equity had not arisen as there were few statutes in place and little in terms of formulated ‘case law’.¹⁸ However, as the common law developed so too did the custom of referring difficult

¹⁶ P. V. Baker and P. St. J. Langan, *Snell’s Equity*, 29th ed. (London: Sweets & Maxwell, 1990): 5.

¹⁷ Baker and Langan, *Snell’s Equity*: 6.

¹⁸ Baker and Langan, *Snell’s Equity*: 8.

cases to the Chancellor, until eventually there came to be a Court of Chancery.¹⁹

The significant point here is to take note of what motivated these Chancellors in delivering their judgements. As most of them were drawn from the ranks of the clergy and under the influence of the Canon law they were said to exercise their powers on the ground of 'conscience'. Theoretically at least, conscience was considered to be the exercising of universal and natural justice rather than the private opinion of any individual.²⁰

This idea was carried forward into the sixteenth century with the added dictum that 'conscience' became the Conscience of the Queen and the Chancellor was designated the Keeper of the Queen's Conscience.²¹ Admittedly, as matters passed more into the hands of common lawyers they sought to build up a body of precedent. Nevertheless, under Lord Nottingham (1673-82) who was styled 'the Father of Equity', conscience remained a dominant part in decision-making.²² However, the quest for uniformity gradually diluted the application of conscience until the rules of equity became almost as standardised as those of the common law enabling Lord Eldon (1801-27) to write:

The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law...I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.²³

Another great equity judge made similar comments in 1878: 'This court is not, as I have often said, a Court of Conscience, but a Court of Law.'²⁴ The continuing efforts to regulate the rules of equity were also a matter of convenience for the administration which succeeded in

¹⁹ Baker and Langan, *Snell's Equity*: 8. For a detailed account of the development of equity refer to W. S. Holdsworth, *History of English Law* (1903-38) and D. M. Kerly, *History of Equity* (1994); also C. K. Allen, *Law in the Making* (7th ed. 1964): 399-406.

²⁰ However, there seems to have been some unrest about the standards varying with each Chancellor. Refer to F. Pollock, ed., *Table Talk of John Selden* (London: Quaritch, 1927): 43. This situation simply emphasises the point that conscience, like equity, cannot be set in statute.

²¹ Baker and Langan, *Snell's Equity*: 8.

²² Baker and Langan, *Snell's Equity*: 9.

²³ Baker and Langan, *Snell's Equity*: 10.

²⁴ Baker and Langan, *Snell's Equity*: 10.

1875 to amalgamate all the courts into one Supreme Court which was directed to administer both law and equity. The rules of equity remained distinct from those of law but both systems were henceforth to be administered in the same courts.²⁵ The significance of this event, which also removed the threefold division by which equity carried out its work, was to leave the impression of parity in all matters pertaining to the law. As Lord Cairns put it, ‘The court is now not a court of law or a court of equity; it is a court of complete jurisdiction.’²⁶ Such were the discrepancies between the two that several changes had to be made in order to accommodate each other and even then it has been said that ‘the two streams have met and now run in the same channel; but their waters do not mix.’²⁷

Surely it may safely be contended that one of the great fallacies of the theonomic movement is to maintain that our understanding of general equity ought to be confined to this period in its history, when following the Judicature Acts of 1873 and 1875 the courts of law and equity were merged. This is detrimental to a clear understanding of the meaning and use of ‘equity’ during the seventeenth century (when the Confession was being written) and furthermore ignores the modern period that has evidenced a definite swing back to taking account of conscience once again. In a case in 1982 where the detailed rules as previously refined were deemed to be too restrictive, the court returned to ‘the principle of unconscionability’, i.e. the court took into account the conscience of the defendant.²⁸ It may be extremely difficult for the law to state precisely in what circumstances conscience ought to be taken into consideration but the salient point is that the courts still recognise that there are times when the application of strict legal rights would be inequitable, indicating the close association between equity and conscience. As Lord Templeman said in 1986:

Equity is not a computer. Equity operates on conscience but is not influenced by sentimentality.²⁹

In the final analysis, no conclusive definition of ‘equity’ in its technical sense can be given. It has been said to represent ‘a portion of

²⁵ Baker and Langan, *Snell's Equity*: 12.

²⁶ Baker and Langan, *Snell's Equity*: 14.

²⁷ Baker and Langan, *Snell's Equity*: 17.

²⁸ Baker and Langan, *Snell's Equity*: 11.

²⁹ Baker and Langan, *Snell's Equity*: 11.

natural justice which, although of a nature suitable for judicial enforcement, was for historical reasons not enforced by the common law.³⁰ However, as far as the legal profession is concerned, this gives no indication either of the topics on which equity intervened or of the nature of that intervention and a number of case histories can be cited where the rules of equity contradicted the rules of law. In such instances the court ruled that equity should prevail.³¹

If these principles are applied to the use of the term in the Confession of Faith, then the same vagueness arises. As already noted, there is a degree of uncertainty as to what specifically are the judicial laws where equity should be applied. Furthermore, when it is acknowledged that the concept of equity clearly takes predominance over the law, then the whole idea of law enforcement is removed. This is a situation that seriously threatens the theonomic view. The ultimate question for theologians is not how the term 'equity' has evolved to its present connotation or even how it has been understood and applied by the legal system during the last two centuries but against the background of their own day: What did the Westminster Divines understand and intend when they decided to use 'general equity' in the context of the judicial laws? Obviously, in the choice of this technical phrase and in the light of the subsequent discussion as to its meaning and use by experts within the English legal system, the answer is clear and straightforward – the 'conscience' of the individual believer.³²

3.2 Equity in the Context of Theological Engagement³³

Understanding the legal and theological climate surrounding the formation of the Confession of Faith is useful for establishing the meaning and use of 'general equity'. However, other important sources

³⁰ Baker and Langan, *Snell's Equity*: 13.

³¹ Baker and Langan, *Snell's Equity*: 14-16.

³² It is surely significant that the next chapter in the 'Confession' (ch.20) is on Liberty of Conscience and states that 'God alone is lord of the conscience' (20:2).

³³ This is not the occasion to explore the use of the word 'equity' in Scripture. The word occurs ten times in the Authorised Version of the Bible (in Ps., Prov., Eccl., Isa., Mic., and Mal.), where the English word 'equity' translates three different Hebrew roots: *yashar*, to be straight, or even, to make right; *kasher*, to be acceptable, to succeed (as in Eccl. 2: 21); and *nekach*, to be straightforward or upright, or that which makes for concord and harmony (as in Isa. 59: 14 'justice is turned away backward, and righteousness stands afar off; for truth is fallen in the street, and equity cannot enter'). The repeated emphasis in the Bible is that, whatever the detailed meaning of 'equity', it is God who possesses it and upholds it, whereas sinful Israel is said to 'abhor justice and pervert all equity...' (Mic. 3: 9).

for shedding further light on the subject must be the theological thinking and writing that was taking place around that period.

Thomas Boston (1676-1732), a Scottish Presbyterian, wrote a two-volume commentary on the Shorter Catechism. In this, under the heading of sin he heartily acknowledges the tripartite division of the law and refers to the judicial law as consisting ‘of those institutions which God prescribed the Jews for their civil government’³⁴ and further explains:

in other commonwealths the chief magistrates give laws unto the people; in this the laws for their religion and for their civil government were both divine, and both immediately from God. So that the judicial law was given them to be the standing law of their nation...³⁵

Not surprisingly, Boston considers these laws as they ‘concerned the nation of the Jews’ as now abolished except where they are founded upon the law of nature. ‘These are a standing rule of equity and justice.’³⁶ Later, when specifically addressing the matter of the law he states plainly:

The judicial law, which was the civil law of the Jews, given also first by Moses, by which their civil concerns were to be regulated, in respect of which the Jewish government was a Theocracy... Yet does it not bind other nations farther than it is of moral equity, being peculiarly adapted to the circumstances of that nation.³⁷

Thomas Ridgeley (1667-1734) was a minister in London, and professor of theology at Homerton, the oldest independent college in Britain. His commentary on the Larger Catechism, believed to be written for his students, and published in 1731 is a classic. He accepts, in the usual way, that there are three parts to the law. He observes that together with the moral law, ‘there were several forensic or judicial laws given by God for the government of the people of Israel, which more especially respected their civil rights.’³⁸ This law was a gift from God to a very special people when he condescended to be their king.

³⁴ Thomas Boston, *Commentary on the Shorter Catechism* (Vol. 1; Canada: Still Waters Revival Books, 1993): 257.

³⁵ Boston, *Commentary Vol.1*: 257.

³⁶ Boston, *Commentary Vol.1*: 258.

³⁷ Boston, *Commentary Vol. 2*: 60-61.

³⁸ Thomas Ridgeley, *Commentary on the Larger Catechism* (Vol. 2; Canada: Still Waters Revival Books, 1993): 307.

Some of these laws inevitably are founded upon and agreeable to the law of nature and nations. However, he continues:

there were other judicial laws given to Israel, which had a more immediate tendency to promote their civil welfare, as a nation distinguished from all others in the world; which laws expired when their civil polity was extinct.³⁹

A most interesting study is *Truth's Victory over Error* by David Dickson (1589-1662). This is the first published commentary on the Confession of Faith and is the result of Dickson's lectures to his theology students in Edinburgh University during 1650-52. It is presented in the following catechetical style:

Did the Lord by Moses give to the Jews, as a body politic, sundry judicial laws which expired together with their state? Yes. Do they oblige any other now, further than the general equity thereof may require? No... Well then, do some err, though otherwise orthodox, who maintain that the whole judicial law of the Jews is yet alive, and binding all of us, who are Christian Gentiles? Yes...

By what reasons are they confuted? (1) Because the judicial law was delivered by Moses to the Israelites to be observed as a body politic, Exodus 21. (2) Because this law, in many things, which are of particular right, was accommodated to the commonwealth of the Jews, and not to other nations also... (3) Because in other things, which are not of particular right, it is neither from the law of nature, obliging by reason, neither is it pressed upon believers under the gospel to be observed. (4) Because believers are appointed under the gospel to obey the civil laws, and commands of those under whose government they live, providing they be just, and that for conscience sake, Romans 13:1; 1 Peter 2:13-14; Titus 3:1.⁴⁰

The value of this early source lies, not only in the usual statement about the expiry of the judicial law, but in the reference it makes to those who 'err'. Obviously there was an awareness of a group, who like the theonomists now, wish to impose the rigours of the judicial law. Dickson confronts and condemns this as improper, and refuses to allow it to pass as a way of interpreting the Confession of Faith. Note too, his reference to New Testament teaching which places citizens under the laws of the land in which they live, while at the same time preserving their liberty of conscience. A point brought out in the Confession of Faith when it says that the judicial laws were designed specifically for the nation of Israel (a body politick).

³⁹ Ridgeley, *Commentary*: 308.

⁴⁰ D. Dickson, *Truth's Victory Over Error* (Edinburgh: J. Reid, 1684): 198-200.

In more recent times Shaw (1845) and Macpherson (1882) have issued important commentaries on the Confession of Faith. Shaw writes of the judicial law,

[it] respected the Jews in their political capacity, or as a nation, and consisted of those institutions which God prescribed to them for their civil government. This law, as far as the Jewish polity was peculiar, has also been entirely abolished; but as far as it contains any statute founded in the law of nature common to all nations, it is still obligatory.⁴¹

Macpherson writes in similar vein:

Judicial laws or political maxims delivered to the Jews are no longer as such binding. These are in many cases evidently provisional. In Israel's own history they were modified from time to time as circumstances required...It is very evident that the circumstances of modern society demand very different regulations from those which suited national conditions under the Jewish monarchy; and on all hands it is allowed that the increase of enlightenment warrants the application in many directions of a higher standard. Yet whatever principles of eternal justice appeared in those laws are now obligatory, – yet not because found there, but because of their own nature. The adventitious, circumstantial, formal, perishes; the substantial endures.⁴²

He proceeds to illustrate this principle from the laws on marriage and Sabbath observance, where in both cases, the continued obligation does not depend on Jewish law but rather on natural law.⁴³

The unanimous conclusion of so many commentators surely establishes beyond all reasonable doubt the view that adherents to the Confession are no longer under any obligation to obey that part of the Mosaic law commonly called judicial. Particularly, the witness of those who were contemporaries to the Confession of Faith confirm what the Assembly believed and how its members intended their definitions to be interpreted. Legalistic systems such as theonomy, instead of being in the mainstream of the Reformed tradition concerning the use now to be made of the Mosaic law, are in reality out of touch with major theological opinion on the matter.

3.3 Continental Ideas on 'General Equity'

Prior to the making of the Westminster Confession of Faith, the need for some statement of 'Reformed Doctrine' was being considered in

⁴¹ R. Shaw, *An Exposition of the Confession of Faith* (Scotland: Christian Focus Publications, 1980): 197.

⁴² J. Macpherson, *The Confession of Faith* (Edinburgh: T&T Clark, 1882): 118-20.

⁴³ An illustration of how the law may change with changing circumstances is to compare Exod. 21–23 with Deut. 12–26.

Europe. In 1562 the Elector Frederick authorised the formation of the Heidelberg Catechism. Mainly the work of Dr Zacharias Ursinus, he later wrote a commentary upon it in 1591, which has remained an authoritative masterpiece. Of the divine law he considers it ‘as consisting of three parts; the moral, the ceremonial and the judicial’.⁴⁴ He specifies the judicial laws as those:

which had respect to the civil order or government... among the Jewish people... These laws God delivered through Moses for the establishment and preservation of the Jewish commonwealth, binding all the posterity of Abraham, and distinguishing them from the rest of mankind until the coming of the Messiah.⁴⁵

He next devotes an entire section to engage in several arguments relative to the question, ‘To what extent has Christ abrogated the law, and to what extent is it still in force?’ He concludes:

The sum of what we have now said, touching the abrogation of the law is this: That the ceremonial and judicial laws instituted by Moses have been entirely abolished and done away with by the coming of Christ, as far as it relates to obligation and obedience on our part.⁴⁶

It cannot escape our notice that Ursinus thought of the judicial law as being totally abolished after the coming of Messiah, without any need to retain some general principle of equity. This seems strange in contrast to the emphasis on ‘general equity’ in the Westminster Confession of Faith. But what it does show is that the European theologians were more interested in the place of the Old Testament judicial law within the new Christian community.

Some thirty years earlier (1559) John Calvin produced his *Institutes of the Christian Religion* (5th ed.), in which he addresses the subject of the law of God in general and the matter of equity in particular. A remarkable feature in this work is how Calvin sees the idea of ‘equity’ as already inherent within the judicial law even when it was part of the old Jewish system. He writes as follows:

The judicial law, given them as a kind of polity, delivered certain forms of equity and justice, by which they might live together innocently and quietly... so, also, when these judicial arrangements are removed, the duties and precepts of charity can still remain perpetual.⁴⁷

⁴⁴ Z. Ursinus, *Commentary on the Heidelberg Catechism* (New Jersey: Presbyterian and Reformed Publishing Co., 1852): 490.

⁴⁵ Ursinus, *Commentary*: 491.

⁴⁶ Ursinus, *Commentary*: 497.

⁴⁷ Calvin, *Institutes* (London: James Clark & Co., 1957): 4:20:15.

He states that with all laws there is ‘the enactment of the law, and the equity on which the enactment is founded’.⁴⁸ As equity is natural it cannot be applied in the same way in all constitutions. By way of example, he notes the punishment in God’s law for false witness and then remarks that in other nations it may be infamy, or hanging, or even crucifixion. All nations with one voice declare against crime but the nature of the laws they make to control it need not always be the same. In troubled conditions, particular edicts will be necessary while they can be relaxed in more peaceable times. Having commented on the proper application and usefulness of equity as part of the legal system Calvin continues:

The allegation, that insult is offered to the law of God enacted by Moses, where it is abrogated, and other new laws are preferred to it, is most absurd. Others are not preferred when they are more approved, not absolutely, but from regard to time and place, and the condition of the people, or when those things are abrogated which were never enacted for us. The Lord did not deliver it by the hand of Moses to be promulgated in all countries, and to be everywhere enforced; but having taken the Jewish nation under his special care... he was pleased to be specially its legislator, and as became a wise legislator, he had special regard to it in enacting laws.⁴⁹

In *The Concept of Equity in Calvin’s Ethics*⁵⁰ Guenther Haas begins by summarizing the notion of equity in Greek, Roman and humanist literature, in the belief that Calvin was inevitably under the influence of such thinking. On this basis he identifies two features of the concept of equity that appear in Calvin. First, it acts as a corrective to any general law by applying it to a specific situation and thereby bringing out the original intention of the lawmaker. The second objective is to attain some degree of humanness and fairness in the application of the law.⁵¹ In the course of exploring these suggestions Paul Helm broadly concurs with the findings of Haas. However, Helm then proceeds to

⁴⁸ Calvin, *Institutes*: 4:20:16.

⁴⁹ Calvin, *Institutes*: 4:20:16.

⁵⁰ G. H. Haas, *The Concept of Equity in Calvin’s Ethics* (Carlisle: Paternoster, 1997).

⁵¹ Haas, *Concept of Equity*: 19.

examine Calvin's comments on Mosaic legislation regarding the issues of slavery and poverty.⁵² Calvin's evaluation of the unreasonable harshness of the Mosaic legislation evokes from Helm a very interesting observation.

It seems that Calvin believes that what God could command...is constrained by cultural circumstances. God cannot in all cases command what he would prefer to command. Nevertheless, his command is obligatory, even though 'inequitable'. In other words there are situations in which the social conditions are such that not even the Lord can legislate in accordance with his nature but rather has to go with the grain of institutions such as slavery.⁵³

It is passages such as these that cause Helm to identify a third use of equity in Calvin – 'not only to temper the generality of law, and to criticise positive law as unjust, but even to offer a critique of divinely sanctioned positive law.'⁵⁴

It is surely significant that Calvin and other European theologians should choose this technical term 'equity' when deliberating about the application of certain aspects of God's law. So its later inclusion by the Westminster Divines as a way of interpreting the judicial law makes it abundantly clear that they were not only aware of the concept, but identified with its meaning and applied it in a specific way, as part of their attempt to sustain the 'spirit' of Old Testament law.

3.4 Origins of the Idea of 'Equity' in Aristotle

Calvin shows such an excellent working knowledge of equity in law as to suggest that perhaps he gleaned many of these gems of wisdom from others. Much has been written about his early academic training in law and scholastic philosophy; and as a student of John Major he probably absorbed his moral teaching from Aristotelian ethics.⁵⁵ Since there are several references in the *Institutes* to Aristotle,⁵⁶ it is essential to inquire how Aristotle understood the meaning of equity in law. Perhaps one of Aristotle's best attempts to explain the meaning of

⁵² Exod. 21:1-11.

⁵³ Paul Helm, *John Calvin's Ideas* (Oxford: University Press, 2004): 366.

⁵⁴ Helm, *John Calvin's Ideas*: 366-67.

⁵⁵ A. Ganoczy, *The Young Calvin* (Philadelphia: Westminster Press, 1987): 174. See also J. E. Hare, *God's Call* (Michigan: Eerdmans, 2001); A. N. S. Lane, *John Calvin: Student of the Church Fathers* (Edinburgh: T&T Clark, 1999); and T. F. Torrance, *The Hermeneutics of John Calvin* (Edinburgh: Scottish Academic Press, 1988).

⁵⁶ Calvin, *Institutes*: 1:15:7; 2:2:3; 2:2:23 (2:8:8 note reference to 'Lesbian code').

‘equity’ (ἐπιείκεια) – sometimes rendered as ‘fairness’ or ‘decency’ – is found in the *Nicomachean Ethics*. It is given as an aside to help in the understanding of the deficiencies of legal justice.

We... find that justice and equity are neither absolutely identical nor generically different... it seems odd that what is equitable should be commendable if it does not coincide with what is just; because if it is something different, then either what is just or what is equitable is not good; or alternatively if both are good, they are identical.⁵⁷

This appears to be a coherent argument. However, Aristotle continues:

For equity, though superior to one kind of justice (i.e. legal justice), is still just, it is not superior to justice as being a different genus. Thus justice and equity coincide, and although both are good, equity is superior... it is a rectification of legal justice.⁵⁸

The point being made by Aristotle is that as all law is universal (general in principle), it fails to take account of the special case and therefore can be unjust. It is not the fault of the law or the legislator, but the nature of the problem. So to correct this omission, a ruling is given, as if the legislator was now present, and fully aware of the circumstances. Nevertheless Aristotle is quick to point out that ‘equity, although just, and better than a kind of justice, is not better than absolute justice’⁵⁹

This surely illustrates the wisdom of the Westminster Divines in employing the idea of ‘general equity’. As it is impossible to cover every eventuality in law, here is a principle whereby a biblical law can be applied to a contemporary situation. A good illustration given by Aristotle is that of a lesbian rule used in architecture. This was a piece of soft (non-rigid) lead that could be easily bent to the irregular shape of some particular stone. However, the use of equity can also have an adverse effect – it can mean taking less than your share, not insisting upon your rights, even though you clearly have the weight of the law on your side.

Another reference comes in a passage on the ‘intellectual virtues’ – one of which is ‘judgement’.⁶⁰ The Greek (*gnome*) often carries a prefix resulting in the word (*sungnome*) meaning ‘sympathetic judgement’. The idea of a feeling of sympathy in the exercise of

⁵⁷ Aristotle, *Ethics* (London: Penguin Books, 1976): 198-99 (book 5:10).

⁵⁸ Aristotle, *Ethics*: 199.

⁵⁹ Aristotle, *Ethics*: 200.

⁶⁰ Aristotle, *Ethics*: 219.

judgement is, according to Aristotle, a mark of the equitable man. Here again we see that a good judgement is not one that exercises the letter of the law but one that takes account of the particular circumstances and gives a true and sympathetic assessment of the case. In a similar way one who infringes a biblical commandment should be dealt with in a sympathetic manner.

Aristotle writes in the same vein in the *Magna Moralia*. The context is a discussion on 'wisdom'. In acting wisely one cannot ignore the importance of equity. For example, it is not natural to take less than what is absolutely just, but where the law has failed to determine the details then it is wise to act in a considerate manner.

Now considerateness is not found apart from equity. To the considerate man it belongs to judge, and to the equitable man to act in accordance with the judgement.⁶¹

Turning now to an essay entitled *Virtues and Vices*, which is generally included in the works of Aristotle, but to quote Jonathan Barnes, 'its spuriousness has never been seriously contested.'⁶² This is especially interesting in that here we may have the thoughts of someone else who also shares the views of Aristotle. The essay is not so much concerned with explaining the meaning of the term, but refers to equity as a mark of great excellence and as an associated quality of the virtues:

It belongs also to excellence to do good to the worthy, to love the good...Its accompaniments are worth, equity, indulgence, good hope...love of strangers, love of men, love of the noble; all these qualities are among the laudable.⁶³

Finally, there are three references to equity in the *Rhetoric*. In Book 1:12 Aristotle considers the states of men's minds that encourages them to do wrong. One such state is that they may feel they can appeal to chance, or necessity, or natural causes, or habit:

to put it generally, as if you had made a mistake rather than actually done wrong. You may be able to trust other people to judge you equitably.⁶⁴

⁶¹ J. Barnes, *The Complete Works of Aristotle* (New Jersey: Princeton University Press, 1984): 1897 (2:2).

⁶² Barnes, *The Complete Works of Aristotle: Notes to the Reader*.

⁶³ Barnes, *The Complete Works of Aristotle*: 1985 (1251b1: 30).

⁶⁴ Barnes, *The Complete Works of Aristotle*: 2185 (1372b1: 17).

This means that to expect to be treated equitably is to be considered as a special case, and to be given a sympathetic hearing rather than a rigorous application of the law.

Book 1:13 has to do with two kinds of law: particular law and universal law. Universal law is the law of nature. Particular law is that accepted by a community and applied to its own members: it is partly written and partly unwritten. Equity is then discussed as a kind of right that

makes up for the defects of a community's written code of law. For equity is regarded as just; it is, in fact, the sort of justice which goes beyond the written law.⁶⁵

Equity is not necessary when the legislators are unaware of any defect in the law, but when it becomes difficult to define an offence because of the endless (unwritten) motives or circumstances involved then the rule of equity comes into play. This is very similar to ideas expressed in the *Ethics*, but here Aristotle introduces the suggestion that equity must be applied to forgivable actions, furthermore, it must distinguish between what was a deliberate action and what was a mistake or a misfortune. Mistakes and misfortunes are not actions of wickedness with anticipated results. Therefore only the use of equity is an appropriate judgement in such situations.

Some guidelines are now provided for the administration of equity, including an account of its numerous benefits.

Equity bids us be merciful to the weakness of human nature; to think less about the laws than about the man who framed them, and less about what he said than about what he meant; not to consider the actions of the accused so much as his choice, nor this or that detail so much as the whole story; to ask not what a man is now but what he has always or for the most part been.

It bids us to remember benefits rather than injuries, and benefits received rather than benefits conferred; to be patient when we are wronged; to settle a dispute by negotiation and not by force; to prefer arbitration to litigation – for an arbitrator goes by the equity of a case, a judge by the law, and arbitration was invented with the express purpose of securing full power for equity.

The above may be taken as a sufficient account of the nature of equity.⁶⁶

⁶⁵ Barnes, *The Complete Works of Aristotle*: 2188 (1374a1: 26).

⁶⁶ Barnes, *The Complete Works of Aristotle*: 2189 (1374b1: 9).

The third reference in Book 1:15 is associated with the use of persuasion. If by an application of the written law our case is found against, we should appeal on the grounds of equity because equity like the universal law of nature is a more just process of law. Moreover, we are in the position to persuade the jurors that the principles of the universal law and equity in particular, are permanent and changeless, whereas the written laws are subject to change and often do.⁶⁷

The benefit of Aristotle's study on 'equity' is that it helps to illuminate similar biblical ideas. For example, while acknowledging the rigid definitions of the Decalogue Jesus goes on to explain in Matthew 5:17-48 that the Mosaic Law is good but how I interpret it for my disciples is better. And again, the Apostle Paul in emphasizing an important principle of the new covenant reminded the Corinthians that concerning the law, 'the letter kills, but the Spirit gives life' (2 Cor. 3:6). With these thoughts in mind combined with the influence of Aristotelian⁶⁸ ethics we should be left in no doubt as to the intended interpretation of 'general equity' when used by the Westminster Divines in reference to the Old Testament judicial laws.

4. Administrative Problems with Equity

However, with all its appeal as a perfect means of justice, the actual administration of equity raises its own problems. Some have attempted to establish certain rules of equity or a set of principles to govern its application. For example:

Whatever I judge reasonable or unreasonable that another should do for me: that by the same judgment I declare reasonable or unreasonable that I should in the like case do for him.⁶⁹

⁶⁷ Barnes, *The Complete Works of Aristotle*: 2190 (1375a1: 25).

⁶⁸ In this attempt to understand the meaning of equity in law the main focus has been on Calvin and Aristotle but this is by no means the full story. Aquinas discusses the issue in two places with much the same conclusions as Aristotle. See Paul Helm, *John Calvin's Ideas* (Oxford: University Press, 2004): 362-63 for details. In the first place he notes the generality of all laws and the need for equity to interpret justice in difficult cases. It is justice in a fuller sense, a kind of higher rule for human action. (*Summa Theologica*, 2a, 2ae, 120). In the second place he deals specifically with written law and makes the same point as Aristotle, that 'judgment should be delivered, not according to the letter of the law, but by recourse to equity, this being the intention of the lawgiver' (*Summa Theologica*, 2a, 2ae, 60.5).

⁶⁹ M. Ginsberg, *On Justice in Society* (England: Penguin Books, 1965): 41-42.

A rather clumsy effort, when compared to the simplicity of Jesus' 'golden rule', 'do unto others as you would that they should do unto you' (Luke 6:31). If, however, as would seem to be the case, equity cannot be precisely defined then, justice has lost one of its most valuable attributes, namely uniformity. T. Marshall, obviously alluding to Aristotle's lesbian rule, concludes that it is a 'leaden rule ... so soft that it can hardly be used'.⁷⁰

On the other hand, if a set of rules could be drawn up for executing the law of equity, there is the danger that these principles would be incorporated into the legal process in such a manner that they in fact become the law and are applied accordingly. To do so would create a situation that Marshall describes as a leaden rule 'so rigid that you might as well have taken the iron one to begin with'.⁷¹ If this were allowed to become the practice, a position which Roscoe Pound once described as the 'decadence of equity'⁷² then obviously equity has failed to move the judgement forward. The important issues in a given case have become stagnant, and the relationship between justice, law and equity convoluted. This is not unlike the teaching of the Pharisees, where their prescriptive rules and hence their practices are given the same authority as the law of God – a position condemned by Jesus Christ and one still to be guarded against today.

A further problem connected with the execution of equity is simply a human one, but nevertheless very real. It involves the use of discretionary powers. If the decision of a judge is different to the written law, the offended party may interpret it as unjust. So the difficulties of injustice associated with the inflexibility of the written law, are merely mirrored in the injustice due to the element of flexibility in the exercising of equitable law. Even the most ardent believer in the impartiality of a judicial system in either church or state cannot rule out the possibility of the misuse of discretionary power that could result in an inequitable verdict. The famous Egyptian speech of the Pharaoh at the installation of the Vizier was to 'regard him you know as him you know not'⁷³ and Moses declared to Israel 'do not show partiality in judging; hear both small and great alike.' (Deut. 1:17).

⁷⁰ T. Marshall, *Aristotle's Theory of Conduct* (London: T. F. Unwin, 1906): 317.

⁷¹ Marshall, *Aristotle's Theory of Conduct*: 317.

⁷² Roscoe Pound, 'The Decadence of Equity', *Columbia Law Review* 5.1 (1905): 20-35.

⁷³ From the Tomb of Rekhmira, Vizier of Tuthmosis III (www.touregypt.net): line 44.

5. Conclusion

In the course of this paper several suggestions have emerged in an attempt to explain the meaning of ‘general equity’. From the Hebrew we get the ideas ‘to be straight’ or ‘even’; ‘to make right’; ‘to be acceptable’; ‘to be straightforward or upright’; ‘that which makes for concord and harmony’. In English law that which is equitable is that which is in accordance with natural justice, and when it is difficult to establish what is ‘fair’ it defers to a matter of conscience. Equity acts as a moderator by reforming the rigour and rough edges of the law.

Aristotle points to the usual positive values of fairness and decency; introduces the illustration of the lesbian rule, but also draws attention to an adverse influence as when one may accept less than his share. Equity is showing sympathy, consideration, when some act is a mistake or a misfortune. In this way equity is a corrective to the defects in the written code. Kant states it succinctly, ‘The strictest right is the greatest wrong’⁷⁴ As the rectification of legal justice, equity is a superior and more excellent way than the exercise of the letter of the law and it is the mark of the virtuous man. It can be a very persuasive tool should one wish to appeal against the handing down of the severity of the law.⁷⁵

Equity is an abiding principle. The various theologians describe it as ‘a principle of eternal justice’. Like natural law it is of enduring substance. Calvin considers equity as belonging to the precepts of love, which are perpetual. It functions as a benign interpreter of the law,

⁷⁴ I. Kant, *The Science of Right* (1790; tr. W. Hastie; philosophy.eserver.org).

⁷⁵ Alasdair MacIntyre’s extensive study of Aristotle helps confirm much of the foregoing research, as the following quotation explains: ‘And a judge will from time to time be confronted with cases about which the existing laws yield no clear answer or perhaps no answer at all. In those situations the judge too lacks rules and must exercise *phronesis*, just as the legislator had originally done. The area into which the judge moves in so acting is that of what Aristotle calls *epieikeia*, that of reasonable, although not rule-governed, judgment. In the specifically legal context of Aristotle’s discussion in which “*epieikeia*” is related to “*dikaosune*” – Aristotle says that *epieikeia* is not the same as justice, but it is not generically different either (NE 1137a 33-34) – “*epieikeia*” is usually translated by “equity” (see also Topics VI, 1141a16, for the same type of use of “*epieikeia*”). And since “equity” is used in English law to name something very like that type of exercise of legal judgment to which Aristotle is referring, it is understandable that English scholars should have so translated it. Nonetheless, that “*epieikeia*” does not mean “equity” is quite clear not only from its range of uses by other authors but also by Aristotle’s use of it and its cognates in other contexts (e.g., *Politics* 1308b27 and 1452b34 or *Nicomachean Ethics* 1107b11), where the most generally apt translation is “reasonable”. See MacIntyre, *Whose Justice? Which Rationality?* (Indiana: University of Notre Dame Press, 1988):119-20.

tempering its rigours with mercy and clemency. Its strictest meaning according to MacIntyre is that of being 'reasonable'.

Having weighed these various views, perhaps the way to understand 'general equity' in the context of the Westminster Confession of Faith is to ask, what is the *intention* behind this specific law? Does it have some enduring substance that could possibly render it 'universalisable' (to borrow from Kant). There must be numerous examples, but take the injunction of Deuteronomy 22:8 'When you build a new house make a parapet around your roof'. Why, one may ask? The *intention* is obviously to ensure that no one falls off. Here is a basic principle governing the safety and health of every person in and around your property. Moreover, it can be applied at all times and in every place. So when a contractor has a statutory obligation to take every 'reasonable' precaution, at all times, to ensure the safety and health of his employees, such a law of equity has a greater expectation of justice than someone being given the impossible task of drawing up written legislation to cover every eventuality that may occur on a building site.

This simple example surely demonstrates the essential nature of the concept of 'equity' and its important value in the exercising of justice. In the same way other Old Testament laws can be made meaningful today, they have a 'general equity' thereof, and when taken in conjunction with the New Testament 'golden rule' we are some way towards appreciating the continuing moral value of the Old Testament.⁷⁶

⁷⁶ A shorter version of this paper was first given as the Tyndale Lecture in Philosophy of Religion (2002). Since then members of the PR Study Group have made various comments and suggestions which have helped clarify several issues. To them I wish to express my sincere thanks.