

Moral Norms and the Forgotten Virtue of *Epikieia* in the Pastoral Care of the Divorced and Remarried

In my 1981 postdoctoral thesis at the University of Tübingen, I focused on *Epikieia*, an important virtue that for many centuries had often been forgotten. I chose this topic not merely out of historical interest, but because I intuited that it would be useful to shed light on complex moral situations and to help resolve particularly difficult moral cases. The book¹ that ensued is still not available in English translation. However, the recent reprint in the *Osservatore Romano* of Joseph Cardinal Ratzinger's "Introduction" to the 1998 volume *On the Pastoral Care of the Divorced and Remarried*² occasioned the publication of this article in English. In his article, Pope Benedict XVI acknowledges the importance of *epikieia* and *aequitas canonica* in the realm of human and ecclesiastical law, not in divine law. However, he calls for further examination of the virtue since "admittedly, it cannot be excluded that mistakes occur in marriage cases." He notes that "in some parts of the Church, well-functioning marriage tribunals still do not exist. Occasionally, such cases last an excessive amount of time. Once in a while they conclude with questionable decisions. Here it seems that the application of *epikieia* in the internal forum is not automatically excluded from the outset."³

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¹ Günter Virt, *Epikie- verantwortlicher Umgang mit Normen. Eine historisch-systematische Untersuchung zu Aristoteles, Thomas von Aquin und Franz Suarez. Tübinger theologische Studien* Bd. 21 (Mainz: Matthias-Grunewald Verlag, 1983).

² "The Pastoral Approach to Marriage Must Be Founded on Truth," *Osservatore Romano* (Weekly Edition in English), 16 June 2012.

³ Ibid.

The virtue of *epikeia* is relevant for many issues that arise in contemporary society, including pastoral concerns in our parish communities, among which, a particularly difficult one is the pastoral care of the divorced and remarried.

This article will include two parts. First, I will focus on how the understanding of *epikeia* developed historically in order to present its various nuances systematically. I will clarify the different nuances of the understanding of this virtue in three key authors representative of the tradition. Second, I will raise a number of questions for the further examination of the issue of the pastoral care of the divorced and remarried.

An Overview of the History of *Epikēia*

To understand fully the meaning of this often-forgotten but important virtue, it is necessary to follow the historical development of the understanding of *epikeia* through the attempts made, at different points in time, to apply it to concrete situations. As *epikeia* is applied to different ethical questions in changing historical contexts, it receives variously nuanced interpretations. Accordingly, it is important to note how philosophical and theological developments in the understanding of *epikeia* are related to the political circumstances in which it was used. In this regard, my chosen method is both historical and systematic.

It is impossible in a short article such as this to cover the entire history of *epikeia*. Therefore, I suggest that we concentrate on the three authors who have most contributed to its reflection: Aristotle, St Thomas Aquinas and Francisco Suarez.

'*Epikēia*' in Aristotle

Aristotle is the first philosopher to establish ethics as a discipline that can stand on its own and not merely as part of metaphysics, like Plato's closed system of ideas. His three primary works on ethics are the *Eudemic Ethics*, the *Magna Moralia* and the *Nicomachean Ethics*, each offering a slightly different interpretation of *epikeia*. His *Rhetoric* and *Topics* are also infused with ethics.⁴ Aristotle summarises and integrates the Greek philosophers and thinkers before him. He is the first to clarify the concept of *epikeia* that until his time had remained fairly diffuse.

Aristotle starts his ethical reflection with morals as a phenomenon exemplified in the tradition of his society. He speaks about the good praxis of his *polis* Athens. But Aristotle does not stop with morals as experienced. He

⁴ *Virt.*, 74-77.

seeks to understand the underlying reasons and foundations for that which he observes so sharply. In short, he establishes that virtue itself is the driving force for individuals and society to reach the goal of *eudaimonia* (frequently, but not adequately, translated as “happiness”, or in German, as *Glück*).

When Aristotle ponders why people are often not virtuous, he comes to the conclusion that the “movements of the soul” are not in balance. While virtue is always to be found in the mean, it carries the potential to reach the highest nobility of character. So *fortitude*, the central virtue in Aristotle’s tradition, is the middle-point between fear on one side and blind audacity on the other (*NE* III, 9). He uses the same logic for the other important virtues, e.g. *sophrosyne* (sobriety *NE* III, 13), *eleutheriotes* (generosity *NE* IV, 1 ff), *philotimia* (love of honour *NE* IV, 7), and even *dikaiosyne* (justice *NE* V, 1ff). The very use of this logical schema implies that Plato’s idealistic plan of the “spheres of the soul,” from which he deduces the schema of the four cardinal virtues, is not sufficient for a serious consideration of the whole history of moral thought.

Halfway through his *Nicomachean Ethics*, before he proceeds to the dianoetic virtues in *NE* VI, Aristotle concludes his presentation of the ethical virtues, and his argument on the virtue of justice in particular, with a consideration of *epikeia* (in *NE* V, 15; 1137b26). His leading question is: why is it that in certain circumstances, those who follow the law (*nomos*) rigidly (Greek: *akribodikaios*) can be unjust, while those who do not follow the letter of the law, can be just? He answers with the virtue of *epikeia* that in earlier thinkers had taken different meanings:

In Homer, the adjective *epieikes* expresses moral temperance and decency. It is an ideal characteristic of the gods (Zeus, Hera etc.) and of heroes (such as Achilles).

In Herodotus, *epikeia* is the opposite of the rigorous defence of one’s right.

In the Sophist Gorgias, *epikeia* is a dynamic element of justice useful to overcome dilemmas. In the process, the human subject creates his own *kairos*. In contrast, for the historiographer Thucydides, *kairos* is supra-individual. He sees history as the combination of destiny and reason, and criticises the Athenians for using *epikeia* in situations of war as a means of power politics.⁵

In Plato, *epieikes* as adjective usually has a positive ring, but *epikeia* as a noun is a dilution of justice. Most commentaries are based on a sentence in Plato’s (possibly posthumous) work *Nomoi* (VI 757d-e), where he criticizes the election for offices for not being based on virtue and talent, but rather, for being simply by lot. Here, the term *epikeia* implies a weakening of justice.

⁵ Ibid., 61-69.

However, simultaneously, Plato strongly supports the content of *epikeia* as respect for the individual human being's complex situation. Plato realises that the law can regulate justice only in a general way. In his first dialogue on the state, *Politeia*, only the wise philosopher-king has full insight and awareness of the idea of the good and just. He needs no law because he knows what is right and just for each situation. In his second dialogue, *Politikos*, Plato is more realistic. The state needs laws, although the law is very general and can never regulate the complexity of life and all concrete situations. In his third dialogue about the state, *Nomoi*, Plato does not aim for the ideal state, but seeks to avoid the worst possible state of *tyrannis*. In this case, only the judge is allowed to fill in the lacunae of the law to serve the intention of the law. In no case is the normal citizen allowed to use *epikeia*.⁶

Within this long and rather confused tradition of *epikeia*, Aristotle narrows down the problem of understanding *epikeia* (in *NE* V, 14) to a sharp 'trilemma': when justice is determined by law, then *epikeia* can only be a dilution (*ellatosis*) of justice; when justice is not sufficiently determined by the law, then the law needs to be improved (*epanorthoma*) by *epikeia*, and *epikeia* becomes the real justice; or justice and *epikeia* are equivalent.

Aristotle solves this trilemma by arguing that there is some truth to all three positions. *Epikēia* is inseparable from justice. But justice is only partly, and not completely, upheld by the law. The difference is not absolute due to the limitations of legal discourse. No law can cover all the conditions for its validity, as life is full of extraordinary circumstances that legislation cannot consider in advance. Thus, Aristotle concludes that *epikēia* is an aspect of justice, yet superior to the letter of the law. *Epikēia* supplements the law in concrete situations that reflect extraordinary circumstances. Therefore *epikēia* is the better form of justice.

But who is entitled to practice *epikēia*? In contrast to his teacher Plato, Aristotle deems that every citizen can practice *epikēia*, because in Athens, the first democracy in the world, every free citizen is a potential legislator.

Why does this virtue belong to all? Aristotle gives his answer in his deliberations about practical reasoning and the dianoetic virtues in *NE* VI. First, he distinguishes between theoretical and practical reasoning. Then, he notes that practical reasoning includes three elements. The first is *phronesis*, the human ability to create norms for moral guidance in the realm of daily choices. Related to *phronesis* is *synesis*, the critical attitude to laws and norms and the ability to judge whether a law is just or unjust. The third element is *gnome*, the ability to understand in which extraordinary circumstances *epikēia* is at stake (*NE* VI, 11).

⁶ Ibid., 69-74.

The criterion for the virtue of *epikēia* is *syngnome*, which is the ability to bring one's *gnome* in relation with another person's *gnome*. So, many times *epikēia* calls for greater duty and commitment from the other person than the letter of the law. Aristotle knows that often the root of injustice is greed and abuse of power; hence the necessity for the consistent application of the law. Consequently, *epikēia* often comes across as leniency or clemency. However, this is not the basis, though it can be understood as the consequence, of a careful consideration of justice in extraordinary circumstances.⁷

In contrast to his teacher Plato, who also respects individual circumstances, Aristotle sees this ability not only in the philosopher-king or in the competence of the lawyer as *epikēia* from above, but as a virtue of every citizen - *epikēia* from below. Contrary to his teacher Plato, Aristotle bases his ethical reasoning not within a system of ideas, which, can lead to a totalitarian state.⁸ Instead, Aristotle establishes what is moral by looking at the most honourable and ethical traditions (*aner spoudaios*, the "noble man"). Thus, Aristotle's reasoning is open to new moral phenomena in the future. Therefore, St Thomas will be able to draw on Aristotle and develop further what Aristotle began.

Indeed, one wonders if some of the tensions and difficulties in our church today could not be related precisely to the different nuances of these two schools of thought: Plato versus Aristotle, which continue playing out through the centuries.

The virtue of *epikēia* played an important role in Greek culture. After the demise of the first democracy, the subsequent monarchic and often despotic political systems restricted *epikēia* to an occasional attitude of leniency on the part of the ruler (cf. "mirror of princes", for example, in the Letter of Aristeas).

'*Epikēia*' in St Thomas Aquinas

It was only in the Middle Ages that *epikēia* was rediscovered by the great theologians St Albert the Great and St Thomas Aquinas.

St Thomas' most mature and comprehensive work, the *Summa Theologiae*, is the starting point to our understanding of his teaching on *epikēia*. We get a first glimpse of the significance for Thomas of *epikēia* in those passages where he reflects specifically on the virtue. *Quaestio* 120 of the *Secunda Secundae* offers the essence or skeleton of his teaching on *epikēia*, but the flesh can be gleaned

⁷ Ibid., 77-83.

⁸ For example, Plato's account of the invasion of Sicily, where the attempt to establish a totalitarian state model went horribly wrong, or by inflicting capital punishment on people not attending religious service.

through many other *quaestiones* in the *Summa* where he deals with the problem without using the word *epikeia*, as well as in his many biblical commentaries and other works, where he associates *epikeia* with *aequitas* to give it a richer meaning.

St Thomas' thinking process moves from the general to the particular "concrete" reality. *Quaestio* 120 of the *Secunda Secundae* concludes his exposition on the virtue of justice by discussing *epikeia* in two articles. From this movement we can conclude that for St Thomas *epikeia* is the most concrete form of justice.

St Thomas presents an ethics of virtue. So the first article of *Quaestio* 120 of the *Secunda Secundae* is on whether *epikeia* is, in fact, a virtue. After three objections he states that *epikeia* is a virtue, because it is the attitude related to the moral action, which is always consistent with a single and contingent object (S.Th.II-II 120.1, ad 3: "*actus humani, de quibus leges dantur, in singularibus contingentibus consistunt, quae infinitis modis variari possunt, non fuit possibile, aliquam regulam legis institui, quae in nullo casu deficeret*"). Circumstances vary infinitely, but laws are made for moral actions that happen under normal circumstances (ibid.: "*sed legislatores attendunt ad id, quod in pluribus accidit, secundum hoc leges ferentes; quam tamen in aliquibus casibus servare est contra aequalitatem iustitiae et contra bonum commune, quod lex intendit*"). It is thus not possible to formulate a law that is right in every case (ibid.: "*non fuit possibile aliquam regulam legis institui, quae in nullo casu deficeret*"). Only tautologically or negatively formulated norms (and even then, mostly implicitly tautologically) have no exceptions one could think of. Sometimes to follow the letter of the law goes against the sense of justice and the common good which the law implies (ibid.: "*quam tamen in aliquibus casibus servare est contra aequalitatem iustitiae et contra bonum commune quod lex intendit*"). In other cases, following the law could even be evil.

St Thomas refers to an old example: the law says that a deposited object must be returned when the owner asks for it. But if the owner of a weapon is in a rage when he asks for it back, and there is a serious danger that he could harm someone, it is not right to follow the norm. In this case it is good to neglect the law and to follow, what is called, the "sense of justice" (ibid.: "*Sicut lex instituit, quod deposita reddantur quia hoc ut in pluribus iustum est; contigit tamen aliquando esse nocivum, puta si furiosus deposuit gladium et eum reposcat dum est in furia...bonum autem est praetermissis verbis sequi id quod poscit iustitiae ratio et communis utilitas. Et ad hoc ordinatur epieikeia, quae apud nos dicitur aequitas. Unde patet, quod epieikeia est virtus*").

In the second article of *Quaestio* 120, Thomas asks whether *epikeia* is part of justice, and if so, in which way? He answers that *epikeia* is the *pars subiectiva*, which means, that it is the essential part (S.Th.II-II 120.2, ad 3: "*unde patet quod epieikeia est pars subiectiva iustitiae. Et de ea iustitia per prius dicitur quam de*

legali: nam legalis iustitia dirigitur secundum epieikeiam. Unde epieikeia est quasi superior regula humanorum actuum). *Epikēia* is the higher rule for human actions.

To fully understand this extraordinary claim it is necessary to reflect on how Thomas conceives the process of lawmaking in several steps:

At the basis of normative reasoning is the highest ethical principle “to do the good and avoid evil.” As the first step along the path to make this formal principle concrete, Thomas refers to the so-called *inclinationes naturales* – the essential purposes of life: self preservation, preservation of the species, cognition and community. The next step in this open field of ethical reasoning is to determine, or conclude, which of the different possibilities should be chosen on the basis of such criteria as empirical facts. Based on this reflection one formulates the law. Thus, the product of this process of reasoning is the human concrete law.

There are two meanings of “natural law”. First, St Thomas calls “natural law” the process of this norm-giving reasoning. Second, only the highest principles in this process are immutable, and thus, “natural law” in the strict sense. Other norms are called “secondary natural law” because concrete human nature is always changeable (S.Th. II-II 57. 2: “*natura autem hominis mutabilis est. et ideo id quod naturale est homini potest aliquando deficere*”).

Now we can understand what Thomas means when he says, that *epikēia* is a higher rule of justice than the law. The law is the product of a process of ethical and juridical reasoning. In extraordinary circumstances the letter of the law is not valid, because it violates the higher principles. In such cases, it becomes necessary to follow the higher principles, e.g. the common good, over and above the law (“*praeter legem*”) through arriving at a better conclusion or determination. So it is not the intention of the legislator that is crucial, but the person’s own practical reasoning and insight. Nevertheless, at times St Thomas adds the side argument that in certain cases the legislator would have decided in the same way if he were present and, indeed, when possible, he should be asked.

Who has the competence for this practical reasoning? How does St Thomas frame this practical reasoning? When St Thomas talks about prudence, he has every human being in mind. He follows Aristotle when he explicates further that *gnome* is an important part (“*pars potentialis*”) of prudence with the specific ability to discern which cases are not to follow the common law (S.Th.II-II 48.1: “*gnome, quae est circa iudicium eorum in quibus oportet quandoque a communi lege recedere*”).

In *Quaestio* 120 of the *Secunda Secundae* St Thomas lays down the skeleton (basics) of his concept of *epikēia* and follows Aristotle in noting that *epikēia* is justice in particular cases. But he goes beyond Aristotle when we take into

account that St Thomas integrates *aequitas* in this concept of *epikeia* (“*epieikeia, quae apud nos dicitur aequitas*”). He does not integrate aspects of Roman Law directly in the Greek concept of *epikeia*, but through the *Corpus Iuris Civilis* of Justinian. More importantly, Thomas’ understanding of *aequitas* is the same that emerges in many passages of his biblical commentaries. *Aequitas* appears not as a principle, but as a method of balancing.

Aequitas-epikeia respects objective extraordinary circumstances as well as the inner condition of the person. This is evident in Thomas’ interpretation of the Psalms for instance, where he says that *aequitas* is a judgement not only about the extraordinary objective circumstances, but also about the personal inner condition. (In Ps 42:1, “*.. est duplex iudicium: scilicet severitatis, et misericordiae seu aequitatis. Primum est, quando attenditur solum res et non conditio; et hoc est timendum...secundum est, quando consideratur non solum natura rei, sed conditio personae*”). Only God is able to fully grasp *aequitas-epikeia*, but the human person created in God’s image (“*imago Dei*”) has the ability to partake of this double cognition and recognition of extraordinary outer and inner circumstances (“*conditio personae*”).⁹

We can see that St Thomas goes beyond Aristotle by including from his theological background the inner condition of the person (*Personengerechtigkeit*). St Thomas’ perspective is grounded most decisively in the doctrine of the human person as created in the image of God. *Epikieia-aequitas* is for St Thomas the highest realisation of justice.

In St Thomas we find the most distinguished and clear concept of *epikeia*. Only St Albert the Great went slightly beyond St Thomas in his examples for *epikeia*, as found in his commentaries on the *Sentences* of Peter Lombard, Aristotle’s *Nicomachean Ethics* and the Bible. One of these examples, found in his commentary on Aristotle (*Super Ethica V*) shows this quite clearly. Law forbids adultery. But if committing adultery with the wife of a tyrant is the only possibility to find out about the domestic habits of the tyrant-husband whom one seeks to assassinate, then this could be seen as an expression of the virtue of *epikeia* from a civil aspect. (*Super Ethica V: ... “lex praecipit non adulterandum, sed epieikes committit adulterium cum uxore tyranni, ut contrahat familiaritatem et possit tyrannum interficere*”). In a number of his biblical commentaries, St Albert describes Jesus Christ as a model of *epikeia* (“*Christus exemplum*”). This is especially evident in Jesus’ conflict with the Pharisees which Albertus Magnus interprets as an attitude of *epikeia* (*Evangelium Joannis* cap V, 16). Jesus is the model of *epikeia* par excellence.¹⁰

⁹ Ibid., 124-141; 158-168.

¹⁰ Ibid., 154-158.

From St Thomas to Francisco Suarez

There is good reason why I have chosen Francisco Suarez (1548-1617) as the next paradigmatic thinker on *epikēia*. He lived in the beginning of the Modern Age and was very influential in the shaping of Canon Law and moral theology. With Suarez we can observe how the ethical and theological questions changed. For St Thomas and the High Scholastic theologians, the leading question was of how God created the world and how the human being can return back to God from whom he originated (*exitus-reditus*) through the way opened up by Christ's work of redemption. The answer was given in an ethics of virtue (*ultimum potentiae* was an expression of virtue in St Thomas).

Francisco Suarez, one of the most prolific thinkers of the Spanish late Scholastic period, worked in the central administration of the empire "in which the sun did not set." He was the counsellor of King Philip II, who appointed Suarez as professor at the University of Coimbra for political reasons.

Francisco Suarez' main work is titled *Tractatus de legibus ac Deo legislatore*. Even from the title we can see that for Suarez, God as Supreme Lawmaker becomes central and thus, the image of God as legislator becomes dominant. The problems of the time were no longer answered by an ethics of virtue, but by an ethics of laws. Canon Law, civil law and ethics become blurred.

Before we focus on Suarez' teaching on *epikēia*, we have to take into consideration how *epikēia* was applied in politics. This historical consideration is important to understand Suarez' notion and application of *epikēia*. While nothing new happened in the theological reflection on *epikēia*, in the 14th and 15th centuries, the virtue was applied in the crisis of the Western Schism of the two Popes. The schism of two Popes divided not only governments, but even religious orders, chapters and families; in other words, the whole Church. The *Via Concilii* was proposed to overcome the Schism. But a Council could be legitimate only when convened by a Pope. What could be done when neither Pope was willing to do this? The concept of *epikēia* was introduced by various important theologians, like Konrad von Gelnhausen (*Epistula concordiae*, 1380), Heinrich von Langenstein, and Johannes Gerson who interpreted *epikēia* as a "biological function" in the body of Christ and as a gift of the Holy Spirit. In the Council of Basel, Nicolaus Cusanus (1401-1464) became the intellectual leader of the conciliarists. Later, he changed his mind and held that *epikēia* is reserved only for the Pope. It is possible that this led to anxiety about recommending the use of *epikēia*.¹¹ This historical note is important to understand Suarez' context,

¹¹ Ibid., 176-179.

which was dominated by an anxiety and fear that the application of *epikeia* could undermine authority.

Suarez' own teaching on *epikeia* was very broad and sophisticated. Already in his lectures in Rome, Suarez showed interest in *epikeia* and criticised St Thomas, because in his mind, the latter did not distinguish between the act and object of *epikeia*. In his critique of St Thomas, Suarez differs on some points, but also does not quote St Thomas precisely. This is more than a terminological difference. Suarez' mode of thinking is deductive from the *dominium altum* of the state over the property and life of subordinate persons. Suarez comes to the conclusion that *epikeia* is not a virtue in itself. His understanding of *epikeia* is influenced more by Plato than Aristotle and St Thomas. This preference was to influence the course of history, since *epikeia* was no longer esteemed as a virtue, nor was it understood as the competence of every person.

Suarez' late ten-volume work *De legibus ac Deo legislatore* (*About the Laws and God as Legislator*) belongs more to law than to ethics, although no clear distinction is made. He deals with *epikeia* mostly as an act "*contra verba legis*", and not as a virtue that under certain conditions dares to act "*praeter verba legis*", as St Thomas had said. Suarez emphasises legal certainty more than justice, and the legislator's will more than reason. Put simply, Suarez shifts *epikeia* from a virtue, to a sophisticated interpretation of the law in extraordinary circumstances when the law is too generic. Unlike Aristotle and Aquinas, who understood *epikeia* as belonging to every rational human being, Suarez maintained that only legal experts are entitled to act in the sense of *epikeia*.

Epikēia is obligatory when obedience to the law is immoral. *Epikēia* is possible when obedience to the law is not reasonable (e.g. the burden is too heavy), or whenever the legislator intends the law not to bind in specific circumstances (*Leg VI, 7: ... "ita tres modi vel rationes utendi epieikeia distingui possunt, ut unus sit propter cavendum aliquid iniquum, alius propter vitandam acerbam et injustam obligationem, tertius propter conjectatam legislatoris voluntatem, non obstante potestate"*). After his many distinctions, Suarez presents the interesting conclusion: it is by all means necessary to observe every single aspect, so that a prudent judgement can be made (*Leg VI, 7,14: ... "et in univsum loquendo omnia sunt consideranda ut prudens iudicium in contingenti casu feratur"*).

So *epikeia* still has some relation to virtue, but is no longer a virtue in itself. Now, *epikeia* belongs partly to justice, partly to prudence and partly to temperance. In relation to St Thomas, Suarez narrows down the content of *epikeia* in two ways. The realm of *epikeia* is not the whole area of law, but only the laws of the state. For St Thomas *epikeia* was the virtue that enabled everybody to act "*praeter legem*" in extraordinary circumstances through recourse to higher principles.

When Suarez quotes St Thomas, he uses “*contra legem*” in the sense of acting against the law of the state. For Suarez it is impossible to act independently of the legislator, because the binding power of law comes from the will and intention of the legislator. Everyday life became regulated by laws overall.

It is interesting to note that in the 18th century the patron saint of moral theologians, St Alphonsus Maria de Liguori, mainly follows Suarez in his *Theologia Moralis* (the first of seventy editions published in 1748). There is one exception, however, when in *Theologia Moralis* lib. 1, tractatus 2, caput 4, nr 201 he states: “*Epikēia est exceptio casus ob circumstantias, ex quibus certo vel saltem probabiliter judicatur, legislatorem noluisse illum casum sub legi comprehendere... haec epikēia non solum habet locum in legibus humanis, sed etiam in naturalibus, ubi actio possit ex circumstantiis a malitia denudari.*” *Epikēia* is an exceptional case in particular circumstances, only when there is a certainty or a probability that the legislator did not include this case in the law ... but *epikēia* not only takes place in human law, but also in natural law, when a person’s acting is not wrong in itself.¹²

For a correct understanding of *epikēia* in the realm of natural law one has to take into account the ambiguity of *lex naturalis* as *recta ratio* or as concrete formulation of derived natural law in the sense of St Thomas. Natural law understood as *recta ratio* has no exceptions; every exception would mean that not *recta ratio* is *recta ratio* - a contradiction in terms. But, as the examples show, natural law understood as derived from principles (secondary natural law) can fail in extraordinary situations. It is also necessary to explain what is *intrinsece malum* vis-à-vis the seven different meanings of *intrinsece malum* in our tradition.¹³

As an example, of the relevance of *epikēia* on the political level at that time, I would like to refer to an interesting regulation in my country, Austria, installed under the Empress Maria Theresia (empress from 1740-1780). Whoever dared to neglect the order of a superior or the law (e.g. in military context) and was successful in his action was honoured with the highest merit. This is a clear instance when *epikēia* was applied in politics. This highest national award (*Maria-Theresien-Orden*) was given 1,243 times until the end of the Austrian-Hungarian Empire in 1918.¹⁴

¹² Ibid., 233f.

¹³ Werner Wolbert, *Gewissen und Verantwortung* (Fribourg: Herder, 2009), 234 distinguishes among seven different meanings of *intrinsece malum*.

¹⁴ “Militär-Maria-Theresien-Orden,” *Wikipedia*, accessed 20 August 2012, <http://de.wikipedia.org/wiki/Militär-Maria-Theresien-Orden>.

From the mid-19th century to the Second Vatican Council, the manuals of Neo-Scholasticism dominated the teaching of moral theology. These manuals favoured (or even pushed forward) a school of thought different from the High Scholasticism of St Thomas.

In these manuals, which focused on obedience to authorities and the law, *epikeia* played a marginal role.¹⁵ When *epikeia* is mentioned at all, it is in the context of Church Law, such as regulation for fasting in lent, or in the liturgy. I give you an example and an anecdote.

As an application of *epikeia*, J. Mayrhofer's *Theologiae moralis christiano-catholicae principia*¹⁶ gives the example of an old and frail woman being exempted from the obligation to attend mass on Sunday if the road is too dirty or if she has no suitable clothes.

During an oral examination at the Gregorian University in Rome the well-known Jesuit Prof. Franz Hürth asked a student from the United States what is *epikeia*. As usual he adjusted his watch to grant the student exactly fifteen minutes to answer the question. No answer was given, but after fourteen minutes of silence the student began to smile and said: *epikeia* is some kind of biretta (*epikeia est aliqua species biretti*). A little surprised, Prof. Hürth asked why, and the student replied that he had read in a liturgical book: when no biretta is available *epikeia* should be applied (*si non adest birettum, adhibeatur epikeia*).

From cases like these, we can see that *epikeia* was applied only to trivial or even absurd cases. The authentic understanding of the virtue of *epikeia* as established by St Thomas was forgotten in Neo-Thomism. The legalistic approach of Neo-Scholastic moral theology was to overshadow the genuine ethical dimension of *epikeia*.

In the horrible times of German National Socialism, Rudolf Egenter, Professor of Moral Theology in Munich, dared to revive the concept of *epikeia* in the rich sense of St Thomas in an article published in 1940.¹⁷ This position was dangerous since R. Egenter explained that *epikeia* is not the recourse to the intention of the legislator. The legislator in power at that time was Adolf Hitler. Like Egenter, other mostly German theologians (J. Fuchs, J. Giers, W. Schöllgen, B. Häring, F. Dingjahn, and E. Hamel) deplored the fact that *epikeia*

¹⁵ *Virt.*, 234-244.

¹⁶ Josef Mayrhofer, *Theologia moralis christiano-catholicae principia, e probatissimis auctoribus in usum et subsidium cleri dioecetani Jaurinensis collecta et curae pastoralis regulis adaucta: De actibus humanis, de lege et conscientia, de peccato et censura*, vol. 1 (Jaurini: Sauerwein, 1863), 243.

¹⁷ Richard Egenter, "Über die Bedeutung der Epikie im sittlichen Leben," *Philosophisches Jahrbuch* 53 (1940): 115-127.

was a forgotten or marginalised concept, but they did not find enough resonance in the public arena of Church and society.¹⁸

In the same context, Karl Hörmann, Professor of Moral Theology and chairperson of the Theological Committee of the Austrian Bishops' Conference, published the deliberations of this committee in the book, *Kirche und zweite Ehe (Church and Second Marriage)*.¹⁹ In this book, Hörmann launched *epikēia* as a project that needs to be studied further for the pastoral application of the divorced and remarried. This position was strongly contested by Canon Law experts, who interpreted *epikēia* only as linked to the intention of the legislator.²⁰ Karl Hörmann responded that this position of Canon Law is only one of many interpretations of this concept and called for a systematic study of the history and concept of *epikēia*. I took up the challenge from my predecessor and embarked on my postdoctoral thesis in Tübingen, published in my book *Epikēia: Responsible Use of Norms*.

The Quest for Pastoral Solutions that are Ethically and Theologically Founded: Applying *Epikēia*

As good pastors we seek pastoral solutions to the very complex situations of divorced and remarried Catholics. Josef Ratzinger suggests that *epikēia* is a sound extra-juridical and theological tool for pastoral solutions.²¹

Which of the Different Philosophical and Theological Models Discussed in the Article can be Helpful?

Is Plato's model helpful, when only the Philosopher-King or, in his later works, the Judge, is entitled to consider extraordinary life circumstances?

Can the model of Aristotle be useful, with his rich concept of *epikēia*, that is not a norm opposed to the law, but an improvement to the law in extraordinary circumstances?

Is everybody entitled to the virtue of *epikēia* using his/her practical reasoning, namely *sophrosyne*, *synesis* and *gnome*? Does this differentiation of practical reasoning assist our reflection?

¹⁸ *Virt.*, 249-255.

¹⁹ Karl Hörmann, *Kirche und zweite Ehe - Um die Zulassung wiederverheirateter Geschiedener zu den Sakramenten* (Innsbruck: Tyrolia Verlag, 1973).

²⁰ Karl Theodor Geringer, "Review of K. Hörmann," *Österreichisches Archiv für Kirchenrecht* 25 (1974): 296.

²¹ Josef Ratzinger, "Zur Frage nach der Unauflöslichkeit der Ehe," in *Ehe und Ehescheidung. Diskussion unter Christen*, eds. Franz Henrich and Volker Eid (München: Kösel Verlag, 1972), 54.

Can the tradition of the Orthodox Church of application of the law in a soft way through the principle of *oikonomia* suggest possible solutions? The Orthodox tradition follows the Platonic insight of considering extraordinary cases only through the exercise of authority and is understood as clemency.

Can St Thomas help us with his concept of *epikeia* as taking recourse to the higher ethical principles of practical reasoning (“*superior regula humanorum actuum*”)?

Can St Thomas help us with his expanded concept of *epikeia-aequitas* as explained in his biblical commentaries, where he pleads for consideration of all extraordinary external and internal circumstances of the person (“*conditio personae*”)?

Can St Albert the Great help us with his insight that Jesus Christ is the model of *epikeia*? Is it helpful to ask how Jesus Christ would decide in a particular situation?

Can Francisco Suarez help us with his criteria for *epikeia*, especially in the extraordinary situations when the burden of law is unreasonable, or the intent of the legislator is not to bind?

As St Thomas believed, could *epikeia* become a dynamic principle of justice when extraordinary single cases become more frequent - a possible indicator that life patterns are changing (STh I-II 97)?

Essential ethics, derived from the essence of human nature is only one part of ethics and must be complemented by existential ethics, e.g. in the tradition of the *Exercitia spiritualia* of St Ignatius. Keeping in mind that *epikeia* generally demands that one takes seriously into account all inner and external circumstances in order to do justice to another person, *epikeia* demands more than the fulfilment of the letter of the law. This approach seems analogous to the “*magis*” of the Spiritual Exercises of St Ignatius of Loyola. Accordingly, one must raise the question: Is *epikeia* the bridge between essential ethics and existential ethics?²²

Against this Rich Historical Background, the Following Points also Need to be Considered

Jesus’ teaching on marital faithfulness and the indissolubility of marriage as reported in the New Testament in five slightly different passages (Mk 10:11; Mt 5:32; Mt 19:9; Lk 16:18 and 1 Cor 7:15), with some exceptions, reflects the

²² Karl Rahner, “Über die Frage einer formalen Existentialethik,” in *Schriften zur Theologie* 2 (Zürich: Benziger, 1962), 227-246; Bernhard, Fraling, “Existentialethik-spirituelle Mitte der Moralthologie,” *Geist und Leben* 70 (1997): 12-28.

special application of the word of Jesus Christ in the different local churches. 1 Cor 7:12-15 is a clear example of the application of *epikēia* in the Scriptures.

It took the Church more than 1,000 years to realise and articulate fully that marriage is a sacrament.

The axiom that *gratia supponit naturam* holds even for sacramental law and the *ius divinum* is made concrete as it is embedded in historical circumstances.

The requirement of canonical form (*Tametsi*) was established at the Council of Trent.

An important evolution in the teaching about marriage culminated in the Second Vatican Council with the Pastoral Constitution *Gaudium et Spes*, 47-51. Most importantly, in *Gaudium et Spes* 48, the traditional term “marital contract” was changed to “marital covenant”. Marriage as a whole with all its consequences is considered a sacrament, and not only the juridical contract sanctioned during the church wedding ceremony.

The praxis of the Rota Romana has changed e.g. with regards to the psychological impediments considered for marriage annulment.

The tension between the two main schools of Bologna (contract theory, *contractus facit nuptias*) and Paris (consummation theory, *consummatio facit nuptias*) continues to play a background role today. How problematic is the equation between contract and sacrament?²³

Different dioceses seem to apply different regulations for pastoral praxis.

The Code of Canon Law (1983) assumes the logic of *epikēia* not only in the very last canon 1752, where *aequitas canonica* refers to the highest principle of the “salvation of souls” (*salus animarum*).

During the 1980 Synod of Bishops in Rome²⁴ a number of bishops exhorted the Church to find a pastoral solution for the increasing number of divorced and remarried Catholics and to distinguish carefully among the different situations (proposition 14, 1-6).

Christians from the Orthodox churches can receive Holy Communion in the Catholic Church under certain circumstances.²⁵ This seems also valid in those

²³ Eberhard Schockenhoff, *Chancen zur Versöhnung? Die Kirche und die wiederverheirateten Geschiedenen* (Freiburg: Verlag Herder, 2011), 145.

²⁴ The Fifth Ordinary General Assembly of the Synod of Bishops met in Rome to discuss the Christian family from September 26 to October 25, 1980. The Propositions that ensued were not officially published.

²⁵ Pontifical Council for Promoting Christian Unity, *Directory for the Application of Principles and Norms on Ecumenism*, 25 March, 1993, accessed January 2013, http://www.vatican.va/roman_curia/pontifical_councils/chrstuni/general-docs/rc_pc_chrstuni_doc_19930325_directory_en.html, 125.

cases which, through the *oikonomia* principle, were reconciled in their church and received a second marriage.

Only after a lot of pastoral experience through *epikeia praeter legem* did Pope Paul VI modify the rules for mixed marriages in the 1970 Apostolic Letter *Matrimonia Mixta* (e.g. the formulation for the obligation of Catholic education of children in mixed marriages).

After the publication of the Encyclical *Humanae Vitae*, thirty-eight episcopal conferences tried to show in their pastoral letters, how in extraordinary circumstances where the faithful cannot follow the norm, they can follow their conscience - as long as they are ready to form their conscience.

The societal circumstances of marriage have changed, are changing and will continue to change.

The Magisterium may not have spoken the last word on the situation of the divorced and remarried and their admission to the sacraments. *Familiaris Consortio* 84 stresses that pastors “are obliged to exercise careful discernment of situations” and hence to distinguish among different cases of divorce and remarriage. John Paul II emphasised that this is a question of truth. What conclusions can be drawn?

The Magisterium never spoke about an obligation to mistrust the serious and proven judgement of conscience (*Gaudium et Spes*, 16 and *Veritatis Splendor* 59).

Towards a Solution for Accumulated Thorny Issues

It is within the nature of problems, that sometimes there are no clear-cut solutions, especially for all diverse situations.

First and foremost, we have to observe the clear intention of our Lord Jesus Christ about faithfulness in marriage and consequently, about the indissolubility of marriage. But even in the biblical tradition, and in particular in St Paul’s First Letter to the Corinthians 7, we see how *epikeia* was applied to this clear intention. Moreover, the tradition of the Church developed not only the so-called *Privilegium Paulinum*, but also the *Privilegium Petrinum*.

We also observe the evolution of the praxis of marriage tribunals that are taking more into consideration extraordinary psychological situations etc.

Familiaris Consortio 84 calls for evaluating and respecting different situations as a question of truth. What consequences can be drawn from this message in the future?

The main argument of *Familiaris Consortio* 84 for not admitting divorced and remarried Catholics to the sacraments is that the state of the divorced and remarried objectively contradicts the covenant of love between Christ and the Church symbolised and realised in the Eucharist. Nobody can deny, that there

is a contradiction. However, there are other contradictions, which are not mentioned in FC 84. For instance, there is also an objective contradiction, that while in the Gospels Jesus is depicted as openly sharing meals with public sinners, divorced and remarried Catholics are excluded from the Eucharistic meal. The Eucharist is the source and the summit of the whole of the Christian life (*Lumen Gentium*, 11) from which the Church lives and grows (*Lumen Gentium*, 26). Hence, it is also a contradiction, when in some parts of the Church at least half of the members are indistinctly excluded from the sacraments. What does this mean, not only for the persons concerned, but also for the growth of the Church? Is there a discontinuity between Jesus' dining with the public sinners in the Gospels and the exclusion from the sacrament of the Eucharist of the divorced and remarried?

The important argument for the absolute and indistinct exclusion of divorced and remarried Catholics from the Eucharist comes from sacramental theology. Following St Thomas, "*sacramentum est in genere signi.*" So, reasoning about sacraments is also reasoning about symbols. Symbols are "forms" (*Gestalten*) in a deep and rich sense that carry many levels of meaning each connected and referring to the others.²⁶ Symbolic reasoning is never-ending and the symbolic sense of the Eucharist is too rich to be extinguished.

It is within the logic of symbols that consequences for our life must be drawn in an analogical rather than univocal way. Laws must always be formulated in a univocal way. But the jump from analogical to univocal reasoning is a *metabasis eis allo genos*, a crossing over from one order of logic to another.

In sacramental theology we often speak of divine law (*ius divinum*). But the relation between divine law and human law (and even ecclesiastical law) is rather complex. Divine law is always embedded in human law formulations.²⁷ *Ius divinum* does not fall from the sky, like the Islamic understanding of the Koran as being dictated directly from Allah. Instead, divine law is always the word of God uttered in the words of humans (cf. 1 Tess 2:13). In our Christian understanding of revelation, the Divine appears not beside human situations, but within the human condition.

Complex situations and problems call for differentiated solutions. *Epikēia*

²⁶ Günter Virt, "Sittliches Handeln als Symbolgeschehen," *Theologische Quartalschrift* 163 (1983): 123-131; and Paul Ricoeur, *Freud and Philosophy: An Essay on Interpretation*, trans. Denis Savage (New Haven: Yale University Press, 1977).

²⁷ K. W. Merks, "Göttliches Recht, menschliches Recht, Menschenrechte. Die Menschlichkeit des *ius divinum*," *Bijdragen* 65 (2004): 257-283; Avery Robert Dulles, "*Ius Divinum* as an Ecumenical Problem," in *A Church to Believe in: Discipleship and the Dynamics of Freedom* (New York: Crossroad, 1982), 80-102.

should be considered as helpful for such complex and often extraordinary situations. *Epikēia* is not a norm that goes against norms (many are anxious that *epikēia* is a contra-norm). But *epikēia* is the old and proven virtue to dare to act *praeter legem* in extraordinary situations. The justification for this is in St Thomas, who calls for reverting to the higher principle in extraordinary situations. The last canon in the Code of Canon Law specifically mentions *salus animarum* as the higher principle (1752).

When we consider all this and more, can *epikēia*, this oldest and often forgotten virtue, serve as a theological basis for pastoral solutions in particular cases - at least for the time being?

Epikēia is not the solution for all cases and it is not a contra-norm against the norm, but it could be suitable to evaluate particular extraordinary cases in an extra-judicial way.

Theological arguments for changing marriage law are also being put forward.²⁸ Even if some day in the future, church law on the divorced and remarried were to change, *epikēia* would continue to be useful, because no law can include all the circumstances under which it is valid. Life is always richer than any law or regulation that can be formulated, and our God is a God of life.

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²⁸ Theodor Schneider, ed., *Geschieden, Wiederverheiratet, Abgewiesen? Antworten der Theologie*, Quaestiones Disputatae, vol. 157 (Freiburg: Herder, 1995); Schockenhoff, *Chancen zur Versöhnung?*