Summum ius, summa iniuria

On the ambiguity of law and mercy in ecclesiastical law

Daniel Tibi

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Zusammenfassung: *Eine strikte Rechtsanwendung kann im Einzelfall zu Ungerechtigkeit führen, was im Kirchenrecht zu vermeiden ist, da es auf das Seelenheil der Gläubigen ausgerichtet ist. Das Kirchenrecht kennt das Grundprinzip der aequitas canonica, der kanonischen Billigkeit, die sich charakterisieren lässt als durch Barmherzigkeit abgemildertes striktes Recht. Auf diese Weise sollen Recht und Barmherzigkeit auf angemessene Weise verbunden und reiner Rechtspositivismus einerseits sowie Rechtsunsicherheit und Willkür andererseits vermieden werden. Dazu bedient sich das Kirchenrecht diverser Flexibilitätsinstrumente, die in diesem Beitrag zunächst erläutert werden. Aequitas canonica erschöpft sich aber nicht darin, sondern durchdringt als dynamisches Grundprinzip das kirchliche Recht, was anhand von Beispielen dargelegt wird. Die Ambiguität von Recht und Barmherzigkeit hat im kirchlichen Strafrecht besondere Relevanz, was anschließend thematisiert wird. Am Schluss dieses Beitrags steht die Frage, ob die vorgestellten Wege tatsächlich einen Beitrag zu einer angemessenen Verbindung von Recht und Barmherzigkeit und damit zu einer gerechten Rechtsanwendung leisten können.*

Abstract: *A strict application of the law can lead to the injustice in individual cases, which is to be avoided in canon law, as it is directed to the salvation of souls. Canon law recognizes the basic principle of canonical equity, which can be characterized as strict law tempered by mercy. In this way, law and mercy can be properly combined to avoid mere legal positivism on the one hand and legal uncertainty and arbitrariness on the other. For this purpose, canon law has various instruments of flexibility, which will be explained in this article. Canonical equity is not limited to this, however, but permeates canon law as a dynamic basic principle, which will be illustrated by means of examples. The ambiguity of law and mercy has particular relevance in penal law, which will be subsequently discussed. At the end of this article, the question will be raised whether the ways presented can actually contribute to an appropriate combination of law and mercy and thus to a just application of the law.*

Schlagwörter: Recht, Barmherzigkeit, Gerechtigkeit, *aequitas canonica*, kanonische Billigkeit
Keywords: law, mercy, justice, canonical equity

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Summum ius, summa iniuria - the fullness of law is the fullness of injustice. This is how this Latin principle handed down by Cicero can be translated into German.[1] What is meant is that

[1]See CICERO, De officiis I,33, in: Nickel, Rainer (Editor), Vom pflichtgemäßen Handeln. De officiis, Düsseldorf 2008, S. 32. On the historical background of this principle, which was disseminated by Cicero but not coined by him.

a strict application of the law in individual cases can lead to the greatest injustice. This observation may be shared by pastoral practitioners in particular, who sometimes perceive canon law as an obstacle to their work. Law regulates an abundance of cases in an abstract and generalising manner. The legislator cannot envisage and take into account every possible individual case to which a legal norm applies. There may therefore be individual cases in which a norm should be applied, but its application would lead to obvious injustice.[2] Such a situation must be avoided in ecclesiastical law. The Church has a spiritual goal; it is "as it were the sacrament, that is, the sign and instrument of the most intimate union with God and of the unity of all mankind" (LG 1). All of the Church's actions, including the application of its law, are directed towards this spiritual goal,[3] as Pope Francis emphasised in an address to the participants of the Roman Rota's training course for legal practitioners on 18 February 2023:

> "We are used to thinking of canon law and the mission of proclaiming the Gospel as two separate realities. Instead, it is crucial to discover the link that unites them within the single mission of the Church. Schematically, one could say: neither law without evangelisation, nor evangelisation without law. The core of canon law actually concerns the goods of the community, above all the Word of God and the sacraments. Every person and every community has a right (has a right!) to an encounter with Christ, and all legal norms and acts are aimed at promoting the

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See NÓTÁRI, Tamás, Summum Ius Summa Iniuria. Comments on the Historical Background of a Legal Maxim of Interpretation, in: Acta Juridica Hungarica 45 (2004), S. 301–322, DOI: 10.1556/ajur.45.2004.3-4.5. See also: NELLES, Marcus, Summum ius summa iniuria? Eine kanonistische Untersuchung zum Verhältnis von Einzelfallgerechtigkeit und Rechtssicherheit im Recht der Kirche, St. Ottilien 2004 (= MThSt; III/59).

[2]See THOMAS AQUINAS, Summa theologica, I-II, q. 96, a. 6 co.: "*Contingit autem multoties quod aliquid observari communi saluti est utile ut in pluribus, quod tamen in aliquibus casibus est maxime nocivum. Quia igitur legislator non potest omnes singulares casus intueri, proponit legem secundum ea quae in pluribus accidunt, ferens intentionem suam ad communem utilitatem. Unde si emergat casus in quo observatio talis legis sit damnosa communi saluti, non est observanda*."

[3]The orientation of canon law towards the supernatural goal of the Church was laid down in the third principle for the revision of the CIC: "*Natura sacra et organice exstructa communitatis ecclesialis manifestai indolem Ecclesiae iuridicam omnesque eius institutiones ad promovendam vitam supernaturalem ordinari. Quare iuridica ordinatio Ecclesiae, leges et praecepta, iura et officia quae exinde consequuntur, fini supernaturali congruere debent. Nam ius in mysterio Ecclesiae habet rationem veluti sacramenti seu signi vitae supernaturalis christifidelium, quam signat et promovet. Equidem non omnes normae iuridicae ad finem supernaturalem vel curam pastoralem fovendam directe proferuntur; eidem tamen fini supernaturali hominum obtinendo apte congruere necesse est. Quare, in legibus Codicis Iuris Canonici elucere debet spiritus caritatis, temperantiae, humanitatis ac moderationis, quae, totidem virtutes supernaturales, nostras leges distinguunt a quocumque iure humano seu profano*" (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Principia quae Codicis Iuris Canonici recognitionem dirigant, in: Communicationes 2 [1969], pp. 77-100; here no. 3, p. 79).

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> authenticity and fruitfulness of this right, i.e. this encounter. Therefore, the supreme law is the salvation of souls, as stated in the last canon of the Code of Canon Law (cf. c. 1752). Ecclesiastical law is thus closely linked to the life of the Church, since it is a necessary aspect of this life, namely that of justice in the preservation and transmission of the goods of salvation."[4]

The CIC itself refers to this spiritual goal of the law, namely the salvation of souls, when it states that the law is to be applied "always observing canonical equity and keeping in mind the salvation of souls, which in the Church must always be the supreme law" (c. 1752 CIC/1983).[5] Formally, this canon refers to the transfer of pastors, but the prevailing opinion in canon law is that the quoted sentence should be regarded as a general principle, as it forms the concluding words of the CIC.[6] The Church consists of an earthly-temporal and a heavenly-supratemporal dimension, for "the visible assembly and the spiritual community, the earthly Church and the Church endowed with heavenly gifts are not to be considered as two separate entities, but form a single complex reality that grows together from human and divine elements" (LG 8). The norms of ecclesiastical law regulate the earthly-temporal dimension of the Church, but always remain related back to the heavenly-supratemporal dimension. This is also

[4]FRANZISKUS, Discorso ai partecipanti al corso di formazione promosso dal Tribunale della Rota Romana, 18 febbraio 2023. URL: www.vatican.va/content/francesco/it/speeches/2023/february/documents/20230218-operatori-didiritto.html: "*Siamo abituati a pensare che il diritto canonico e la missione di diffondere la Buona Notizia di Cristo siano due realtà separate. It is also crucial to examine the nesso che le unisce all'interno dell'unica missione della Chiesa. We could say schematically: né diritto senza evangelizzazione, né evangelizzazione senza diritto. Infatti, il nucleo del diritto canonico riguarda i beni della comunione, anzitutto la Parola di Dio e i Sacramenti. Every person and every community has the right - has the right - to an encounter with Christ, and all the norms and legal attitudes tend to favour the authenticity and legitimacy of this right, but also this encounter. Perciò la legge suprema è la salvezza delle anime, as affirmed by the last canon of the Codice di Diritto Canonico (cfr. can. 1752). Pertanto il diritto ecclesiale appare intimamente legato alla vita della Chiesa, as un suo aspetto necessario, quello della giustizia nel conservare e trasmettere i beni salvifici*." The German quote is a working translation by the author. Mercy is a fundamental theme of Pope Francis' pontificate. See for further information: BATLOGG, Andreas R., Gerechtigkeit und Barmherzigkeit bei Papst Franziskus, in: Wort und Antwort 65 (2024), pp. 109-115, DOI: 10.14623/wua.2024.3.109-115.

[5]See for further details: Das Heil der Seelen im Codex Iuris Canonici. Ein öffentlich-rechtliches Prinzip der Interpretation und der Rechtsanwendung, in: Archiv für katholisches Kirchenrecht 172 (2003), pp. 84-96; ERDŐ, Péter, Die Funktion der Verweisen auf das Heil der Seelen in den zwei Gesetzbüchern der katholischen Kirche, in: Österreichisches Archiv für Recht und Religion 49 (2002), pp. 279-292; HAHN, Judith, "Salus Animarum Suprema Lex". Does This Principle of Canon Law Relate to the "End of Law'"?, in: Political Theology (03.03.2025), DOI: 10.1080/1462317X.2025.2465934; HERRANZ, Julián, Salus animarum, principio dell'ordinamento canonico, in: Ius Ecclesiae 12 (2000), pp. 291-306.

[6]See LÜDICKE, Klaus, Kommentar zu c. 1752, in: MKCIC. See also THOMAS AQUINAS, Quaestiones quodlibetales, XII, q. 16 a. 2 co: "*Finis autem iuris canonici tendit in quietem Ecclesiae, et salutem animarum*".

reflected in the types of ecclesiastical norms, which can be divided into divine law (*ius divinum*)[7] and *purely* ecclesiastical law (*ius mere ecclesiasticum*). Divine law is rooted in nature or in divine revelation[8] and is always subject to a strict application of the law. Purely ecclesiastical law is law-making by the ecclesiastical legislator. With regard to the principle *summum ius, summa iniuria*, it can be stated for purely ecclesiastical law that the strict application of an ecclesiastical legal norm in individual cases can be contrary to the spiritual goal, the salvation of souls, and in this sense can be unjust. If the Church were to insist on a strict application of the norm in question without taking into account the particular circumstances of the individual case, it would miss its target. This shows the ambiguity of law and mercy in ecclesiastical law, because in such a case, on the one hand, mercy takes precedence over strict application of the law,[9] but on the other hand, the applicable law must not be completely ignored in favour of a misunderstood mercy, which would not only lead to legal uncertainty, but ultimately to arbitrariness. According to St Thomas Aquinas, who refers to St Augustine, mercy is the suffering of another that triggers compassion in our hearts, so that we must help them if we can.[10] In this sense, the particular situation in which the strict application of the law would lead to injustice causes suffering in the person concerned, which must be remedied in an appropriate manner when applying the law, but without causing legal uncertainty or descending into arbitrariness. Canon law recognises the basic principle of *aequitas canonica*, canonical

[7]See for further details: PREE, Helmuth, Ius divinum aus rechtstheoretischer und rechtstheologischer Perspektive, in: Graulich, Markus; Meckel, Thomas; Pulte, Matthias (eds.), Ius canonicum in communione christifidelium. Festschrift zum 65. Geburtstag von Heribert Hallermann, Paderborn 2016 (= KStKR; 23), pp. 479-493.

[8]Here are two examples from the area of marriage law: One example of ius divinum, which is rooted in nature, is monogamy. An example of *ius divinum* rooted in divine revelation is the prohibition of divorce.

[9]See for further details: KASPER, Walter, Gerechtigkeit und Barmherzigkeit. Überlegungen zu einer Applikationstheorie kirchenrechtlicher Normen, in: Puza, Richard (ed.), Iustitia in caritate. Festgabe für Ernst Rössler zum 25 jährigen Dienstjubiläum als Offizial der Diözese Rottenburg-Stuttgart, Frankfurt a. M. 1997 (= AICA; 3), pp. 59-66; MÜLLER, Hubert, Barmherzigkeit in der Rechtsordnung der Kirche?, in: Archiv für katholisches Kirchenrecht 159 (1990), pp. 353-367, DOI: 10.30965/2589045X-15902001; PREE, Helmuth, Kirchenrecht und Barmherzigkeit. Rechtstheologische und rechtstheoretische Aspekte, in: Archiv für katholisches Kirchenrecht 184 (2015), pp. 57-74, DOI: 10.30965/2589045X-18401006; SCHÜLLER, Thomas, Die Barmherzigkeit als Prinzip der Rechtsapplikation in der Kirche im Dienst der *salus animarum*. Ein kanonistischer Beitrag zu Methodenproblemen der Kirchenrechtstheorie, Würzburg 1993 (= FKRW; 14); SCHÜLLER, Thomas, Barmherzigkeit und Gerechtigkeit. Eckpfeiler kirchlicher Rechtskultur im Spannungsfeld von Gesetz und Liebe, in: Communio 46 (2017), pp. 416-424.

[10]THOMAS AQUINAS, Summa theologica, II-II, q. 30, a. 1: "[...] *sicut Augustinus dicit (De civ. Dei, IX,5), misericordia est alienae miseriae in nostro corde compassio, qua utique, si possimus, subvenire compellimur*". See for further details: GERWING, Manfred, "Misericordia" nach Thomas von Aquin. Bemerkungen zum Barmherzigkeitsverständnis, in: Communio 45 (2016), pp. 230-238, DOI: 10.14623/com.2016.3.230-238.

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equity,[11] in order to exercise the necessary and appropriate mercy in the application of the law. In *aequitas canonica*, which can be characterised as strict law tempered by mercy, law and mercy are united in order to enable the just application of the law. One expression of *aequitas canonica* are various instruments of flexibility that enable the application of the law to be adapted to the individual case. They are discussed in the first section of this article. However, *aequitas canonica* is not limited to these flexibility instruments, but represents a dynamic principle of the application of the law to realise justice in individual cases, which is explained in the second section of this article using examples. Criminal law is a special case in which the question of an appropriate combination of justice and mercy arises in a particular way, as both offenders and victims are entitled to a fair application of the law, which is discussed in the third section. At the end of this article, the question arises as to whether the methods presented can actually contribute to a fair application of the law without slipping into legal uncertainty and arbitrariness.

1 Flexibility instruments[12]

Where a strict application of the law in individual cases would lead to injustice, canon law has certain instruments of flexibility for establishing justice in individual cases, which are either standardised in general canon law or have developed in the canonical tradition. This enables the ecclesiastical authority to permanently grant certain favours to persons, things or places (privilege) or to exempt them from an ecclesiastical law in justified individual cases (dispensation). In addition, it can be left to the individual believer to decide in conscience that a law is not binding in a particular individual case (epieikeia). Last but not least, the ecclesiastical authority can decide to leave a violation of the law unpunished (tolerance) or deliberately ignore

[11]See for further details: CARON, Pier Giovanni, Die "aequitas canonica", in: Concilium 13 (1977), pp. 437-442, DOI: 10.58005/conc.v13i8/9.17775; CICOGNANI, Amleto Giovanni, Aequitas Canonica in Salutem Animarum. Canonical Equity and the Salvation of Souls, in: The Jurist 19 (1959), pp. 1-11; HAHN, Judith, Recht, Reform, Reformation. Luthers Billigkeitsverständnis als Impuls für die aktuellen Debatten um Recht und Barmherzigkeit, in: Pulte, Matthias; Rieger, Rafael M. (eds.), Ecclesiae et scientiae fideliter inserviens. Festschrift für Rudolf Henseler CSsR zur Vollendung des 70. Lebensjahres, Würzburg 2019, pp. 141-158 (= MBKR; 7); HERING, Joseph, Die Billigkeit im kanonischen Recht, in: Wolff, Ernst (ed.), Beiträge zur Rechtsforschung, Berlin 1950, pp. 99-113; WOHLHAUPTER, Eugen, Aequitas canonica. Eine Studie aus dem kanonischen Recht, Paderborn 1931 (= VGG.R; 56).

[12]See for further details: PREE, Helmuth, Flexibilisierungsinstrumente im katholischen Kirchenrecht, in: Ancilla Iuris 2019, pp. 86-95, DOI: 10.26031/2019.085; PREE, Helmuth, Le tecniche canoniche di flessibilizzazione del diritto. Possibilità e limiti ecclesiali di impiego, in: Ius Ecclesiae 12 (2000), pp. 375-418.

it (dissimulation). What all flexibility instruments have in common is that they only apply to norms of purely ecclesiastical law, but not to norms that are rooted in divine law.

1.1 Privilege (cc. 76-84 CIC/1983)

A privilege is a favour that is granted to certain physical or juridical persons by rescript (cf. c. 76 § 1 CIC/1983) and creates a special legal status for these persons that either contradicts the general law (*contra legem*) or is outside it (*praeter legem*). The competent legislator and those holders of executive power who have been authorised to do so by the competent legislator are authorised to grant a privilege. A privilege is in principle permanent, unless the contrary is established (cf. c. 78 § 1 CIC/1983). The existence of privileges in ecclesiastical law is not uncontroversial, as such a legal institution could call into question the true equality of all the faithful (cf. c. 208 CIC/1983) and give rise to the idea of a feudal and corrupt ecclesiastical system.[13] However, the possibility of granting privileges to certain persons remains an important instrument for creating individual justice in special circumstances that are not adequately taken into account by general law. For this reason, the Codex Reform Commission decided to include the legal institution of privilege in the revised General Ecclesiastical Code.[14] In practice, privileges should be the exception in order to do justice to a special situation.

1.2 Dispensation (cc. 85-93 CIC/1983)[15]

A dispensation is the exemption from a purely ecclesiastical law in an individual case (cf. c. 85 CIC/1983). In contrast to a privilege, which in principle has a permanent character, a dispensation is limited to a specific individual case. Although it is not mandatory to grant a dispensation in writing, in practice a written dispensation is preferable to an oral dispensation due to the greater legal certainty. A dispensation can be granted within the scope of his or her competence by anyone who has executive authority or to whom this authority has been delegated.

[13]See SOCHA, Huber, Einführung vor c. 76, in: MKCIC, recital 8a.
[14]See Communicationes 19 (1987), p. 29: "*Etiam eo usque ut iuridicum institutum de privilegiis vel inutile, vel noxium evaserit, omnino negandum. Quo plurioribus iisque iustioribus legislator praeditus sit legiferis instrumentis, eo iustiores, quinimmo et efficaciores ipse dare poterit gubernandi normas. Ergo tale iuridico-canonicum institutum etiam sub futuro Codice feliciter retinendum*
[15]See for further details: BAURA, Eduardo, La dispensa canonica dalla legge, Milan 1997.

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In principle, the diocesan bishop (cf. c. 87 § 1 CIC/1983)[16] or a person delegated by him for this purpose (e.g. vicar general or episcopal vicar) is competent to grant a dispensation from general or particular laws issued by the supreme ecclesiastical authority, as well as the local ordinary (cf. c. 88 CIC/1983) for a dispensation from particular law (diocesan law, laws of a plenary or provincial council or laws of the bishops' conference). Excluded from the diocesan bishop's power of dispensation are norms of procedural or criminal law as well as dispensations reserved to the Apostolic See or another authority (e.g. higher superior of a religious institute). Dispensations reserved to the Apostolic See are those concerning the celibacy obligation of clerics (cf. c. 291 CIC/1983), the vows of members of religious institutes on transfer to a secular institute or a Society of Apostolic Life (cf. c. 684 § 5 CIC/1983) or on resignation from an institute of pontifical right (cf. c. 691 § 2 CIC/1983), the involvement of fewer than two bishops as co-consecrators at an episcopal ordination (cf. c. 1014 CIC/1983), falling below the minimum age for ordination as a priest or deacon by more than one year (c. 1031 § 4 CIC/1983), the irregularities and impediments to receiving ordination mentioned in c. 1047 CIC/1983 as well as certain impediments to marriage (cf. c. 1078 §§ 2-3 CIC/1983).[17] As a matter of principle, they cannot be dispensed, at most by the Pope personally,[18] are laws that determine the essential elements of legal institutions or legal acts (cf. c. 86 CIC/1983), i.e. "laws that standardise what is indispensable for the identity of an institution or act, not only

[16]C. 87 § 1 CIC/1983 limits the diocesan bishop's power of dispensation to disciplinary laws (*leges disciplinares*), a term which, apart from this passage, only appears in c. 6 § 1 no. 4 CIC/1983. This term can be understood as all laws relating to ecclesiastical discipline (legal order), and thus as all laws of purely ecclesiastical law. However, since norms of procedural or criminal law are explicitly excluded and dispensations exempt the faithful from an obligation in a specific individual case, "disciplinary laws will have to be regarded as those which require the faithful to do or refrain from doing a certain thing. This excludes all those legal provisions that only indirectly affect the faithful" (Aymans-Mörsdorf, KanR I, p. 277).

[17]Authentic interpretations have also clarified that a diocesan bishop has no dispensing authority with regard to the canonical formal obligation for the marriage of two Catholics (cf. Acta Apostolicae Sedis 77 [1985], p. 771) and with regard to the reservation of the homily for priests and deacons (cf. Acta Apostolicae Sedis 79 [1987], p. 1249). The reservation of the Apostolic See regarding the reduction of Mass obligations (cf. c. 1308 § 1 CIC/1983) ceased to apply when the legal amendments by the Apostolic Letter *Competentias quasdam* of 11 February 2022 came into force.

[18]An example of this: Celibacy is an essential part of the consecrated life. Therefore, according to c. 643 § 1 no. 2 CIC/1983, a married person cannot be validly admitted to the novitiate. This becomes a problem when state divorcees request admission to the novitiate who are considered married by the Church. In this case, a dispensation can only be requested via the Apostolic See and granted by the Pope. See for further details: KAINER, Yasmin; TIBI, Daniel, Die Aufnahme Geschiedener in das Noviziat. Kirchenrechtliche Grenzen und Möglichkeiten, in: Erbe und Auftrag 100 (2024), pp. 311-321.

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by purely ecclesiastical decree, but also by its very nature".[19] Since dispensations aim to establish justice in individual cases and are orientated towards the salvation of souls, they serve the spiritual good of the faithful (cf. cc. 87 § 1; 88 CIC/1983). What is required is a just and reasonable cause, taking into account the circumstances of the case and the meaning of the law (cf. c. 90 § 1 CIC/1983). The aim is to find a fair balance that appropriately combines justice (importance of the law) and mercy (consideration of the circumstances of the case). If there is no just and reasonable cause, a dispensation is unauthorised and invalid unless it was granted by the legislator himself. Dispensations should be the exception to the fair application of the law in individual cases. If dispensations from a norm are regularly granted in practice, this may be an indication that an amendment to this norm is necessary in order to adapt it to changing circumstances.

1.3 Equity (Epieikeia)[20]

The principle of equity (epieikeia) is handed down in Aristotle's *Nicomachean Ethics*,[21] which states that law does not always mean justice and therefore explores the question of whether unlawful behaviour can be just. A law regulates a large number of cases in an abstract manner. In specific individual cases, the strict application of a law can lead to injustice. Equity is a correction of the law in cases in which the law would cause injustice in individual cases due to its general-abstract formulation and is therefore imperfect. Unlike privilege and dispensation, which are granted by ecclesiastical authority, equity gives the individual believer the freedom to make a conscientious decision that a law is not binding in a particular individual case. There

[19]SOCHA, Huber Kommentar zu c. 86, in: MKCIC, recital 6d.

[20]See for further details: LEISCHING, Peter, Epieikeia. Kanonistische Erwägungen über einen zentralen Begriff, in: Kaluza, Hans Walther (ed.), Pax et iustitia. Festschrift für Alfred Kostelecky zum 70. Geburtstag, Berlin 1990, pp. 207-216; SCHLÖGL-FLIERL, Kerstin, Epikie. Ein Movens für die Moraltheologie, in: Studia moralia 55 (2017), pp. 65-97; SCHLÖGL-FLIERL, Kerstin, Die Tugend der Epikie im Spannungsfeld von Recht und Ethik, in: Chittilappilly, Paul Chummar (eds.), Horizonte gegenwärtiger Ethik. Festschrift für Josef Schuster SJ, Freiburg i. Br.; Basel; Vienna 2016, pp. 29-39; VIRT, Günter, Epikie - verantwortlicher Umgang mit Normen. Eine historisch-systematische Untersuchung zu Aristoteles, Thomas Aquinas und Francis Suarez, Mainz 1983 (= TTS 21).

[21]ARISTOTLE, Nicomachean Ethics, in: Frede, Dorothea (ed.), Aristotle. Werke in deutscher Übersetzung, vol. 6/1, Berlin 2020, pp. 3-198, here no. 1137b, p. 98: "Now if the law is written in general terms, but in this particular case there is something that contradicts the general, then it is right, where the legislator has left a gap and has not covered this case with his simple formulation, to make up for what is missing, just as the legislator himself would have done if he had been present and had drafted the law in knowledge of this case".

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is a danger that "equity becomes a vice that mocks the law"[22] and that the application of existing law is left to the arbitrary decision of the individual, which would ultimately lead not to justice but to injustice and thus completely distort the meaning of equity. In order for equity not to slide into arbitrariness, the decision of the individual believer against the binding force of a law must be objectively comprehensible in the individual case, therefore "his behaviour, which outwardly represents a violation of the law, is subject to legal judgement by the competent authority, which can approve or nevertheless condemn the action of the person concerned on the basis of its own considerations of fairness"[23] . The question of whether the legislator would have authorised an exception if it had been aware of the special circumstances of the specific individual case can be used as an objective criterion. Equity therefore means "a responsible handling of one's own freedom, which must not lead to arbitrariness and deliberate circumvention of the law, but must be measured by the postulate of justice".[24] It is disputed whether equity is also applicable in the case of irritating or inhabilitating laws, i.e. norms whose non-compliance results in the invalidity of a legal act or the legal incapacity of a person.[25] The fact that non-compliance renders an act legally invalid or a person legally incapable is intended to create legal certainty, which argues against the applicability of equity in the case of such laws. In favour of the applicability of equity in the case of such laws,[26] is that it is a matter of conscience, which, however, must have very serious reasons in the case of irritating or inhabilitating laws. In addition, the aim should be to make the law valid for the external sphere.

A distinction must be made between legal doubt and the impossibility of fulfilling the law. A legal doubt exists if it is doubtful whether a law is binding or whether a certain fact is covered by the law. The doubt must be objectively comprehensible and cannot be resolved using canonical methods. If there is a legal doubt, a law is not binding in accordance with the legal principle *lex dubia non obligat* (see c. 14 CIC/1983). Furthermore, a law does not impose an obligation in the event of physical or moral impossibility to fulfil the law in accordance with

[22]AYMANS-MÖRSDORF, KanR I, p. 176.
[23]NELLES, Summum ius summa iniuria? (see note 1), p. 311.
[24]SCHÜLLER, Thomas, s. v.: Epikie, in: Lexikon für Kirchen- und Religionsrecht, vol. 1, pp. 850-851, here p. 851.
[25]See for further details: HERING, Billigkeit (see note 11), p. 111.
[26]See AYMANS-MÖRSDORF, KanR I, p. 176.

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the legal principle *ultra posse nemo obligatur*.[27] Physical impossibility exists if the fulfilment of the law is actually impossible. Moral impossibility exists "if the observance of a law happens to be associated with a particular difficulty, the overcoming of which would require such an effort that it cannot reasonably be expected of the individual"[28] or if the fulfilment of the law would cause great harm.

1.4 Tolerance and dissimulation[29]

If the competent ecclesiastical authority becomes aware of a violation of the law and it is not possible or appropriate to grant a dispensation in the matter, it may decide to accept a violation of the law without legitimising it. Such an approach may be appropriate if intervention is not possible or not opportune, for example because a penalty could not be enforced or would not be proportionate or because intervention would lead to greater injustice than accepting the infringement. A violation of the law can either be deliberately left unpunished (tolerance) or deliberately ignored (dissimulation). Tolerance is characterised by the fact that "it contains both a negative evaluation of the tolerated behaviour and a positive decision: It allows this behaviour to be accepted as a given".[30] In the case of tolerance, it is known to the outside world that the ecclesiastical authority is aware of unlawful behaviour. The ecclesiastical authority classifies this behaviour as a violation of the law, but does not take action against it, but rather tolerates it. Similar to tolerance is dissimulation, which can be characterised as "deliberately ignoring violations of the law for particular reasons, namely to prevent greater evil".[31] The main difference to tolerance is that in dissimulation it is not known to the outside world that the ecclesiastical authority is aware of the violation of the law. Whereas in the case

[27]See for further details: MONTINI, G. Paolo, Impossibilium nulla obligatio. L'impossibile non obbliga, in: Quaderni di diritto ecclesiale 10 (1997), pp. 456-477.
[28]AYMANS-MÖRSDORF, KanR I, pp. 177-178.
[29]See for further details: BIER, Georg, issimulieren? Notizen zu einem Prinzip der Rechtsanwendung, in: Althaus, Rüdiger; Hahn, Judith; Pulte, Matthias (eds.), Im Dienste der Gerechtigkeit und Einheit. Festschrift für Heinrich J. F. Reinhardt zur Vollendung seines 75. Lebensjahres, Essen 2017 (= BzMK; 75), pp. 179-196; PRZYTULSKI, Mateusz, Dissimulation or Negligence. On the Failure of the Ecclesiastical Authority to React to Law Violations, in: Biuletyn Stowarzyszenia Kanonistów Polskich 33 (2023), pp. 197-214, DOI: 10.32077/bskp.7954; ROCA FERNÁNDEZ, María José: Der Toleranzbegriff im kanonischen Recht, in: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Canon Law Section 90 (2004), pp. 548-561.
[30]ROCA FERNÁNDEZ, Toleranzbegriff (see note 29), p. 561.
[31]HEIMERL, Hans; PREE, Helmuth, Kirchenrecht. Allgemeine Normen und Eherecht, Vienna; New York 1983, p. 13.

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of tolerance, the ecclesiastical authority actively refrains from intervening against the violation of the law, in the case of dissimulation it behaves passively. Dissimulation can therefore be described as the "principle of non-application of the law", because those who "dissimulate do not apply the law, even though they are obliged to do so and have no other choice by law".[32] In practice, dissimulation is only opportune if it is limited to individual cases and the ignorance of the ecclesiastical authority is credible to the outside world.

2 *Aequitas canonica* as a basic principle of ecclesiastical application of law

In its historical development, *aequitas canonica* brings together three strands of tradition: the Greek concept of *epieikeia*, the Roman concept of *aequitas* and the Christian concepts of *misericordia* and *caritas*. The Greek principle of epieikeia from Aristotelian ethics, which found its way into the Christian tradition via Thomas Aquinas, has already been explained above. Its central content is the idea of "a correction of positive law in cases in which it could not be applied without its application leading to injustice".[33] In Roman jurisprudence, *aequitas* was understood as the antithesis of *ius strictum* in order to be able to realise the ideal of perfect justice in individual cases. The Christian tradition added the principles of mercy and charity, which mitigate strict law when its application would lead to obvious injustice. These traditional strands are united in the definition of *aequitas* in the *Summa Aurea* of Henry of Susa: "*Aequitas est iustitia dulcore misericordiae temperata*".[34] *Aequitas* acts as a mediator between strict law and mercy in order to enable justice. As *aequitas* arises from a natural sense of justice, it is regarded as an institution of natural law. If human law is unable to create justice in individual cases due to its imperfection, natural law steps in in the form of *aequitas*. As a principle of natural law, *aequitas* is not limited to cases in which the law explicitly prescribes *a* procedure with *aequitas* (*aequitas legalis* or *aequitas scripta*), but is a universally valid basic principle of the application of law (*aequitas naturalis* or *aequitas non scripta*). In the current general canon law, eleven canons of the CIC/1983 explicitly prescribe *a* procedure with *aequitas* (*aequitas scripta*). However, *aequitas* also permeates ecclesiastical law as a fundamental principle

[32]BEER, Dissimulieren? (see note 29), p. 184.
[33]CARON, Die "aequitas canonica" (see note 11), p. 437.
[34]HOSTIENSIS, Summa aurea, Lib. V.: De dispensationibus, Lyon 1537 (reprint: Aalen 1962), p. 289.

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(*aequitas non scripta*) in order to be able to take the circumstances of an individual case into account appropriately through a dynamic application of the law.

2.1 *Aequitas scripta* in current canon law

A procedure with *aequitas* is explicitly prescribed in the following places in the CIC/1983:

- Filling legal gaps (c. 19 CIC/1983)
- Division of common property in the event of the division of an entity with public legal personality (c. 122 CIC/1983)
- Right to a judgement according to law and equity when believers are brought before the court by the competent authority (c. 221 § 2 CIC/1983)
- Recall of a cleric who has been assigned to another particular church for a certain period of time (c. 271 § 3 CIC/1983)
- Imposition of exclaustration (c. 686 § 3 CIC/1983)
- Provision for retired members of the Institute (c. 702 § 2 CIC/1983)
- Provision for the dissolution of non-Christian plural marriages (c. 1148 § 3 CIC/1983)
- Right to impose penalties in accordance with the law and with due regard for canonical equity (c. 1311 § 2 CIC/1983)
- Preference for an equitable settlement of a dispute over a judicial settlement (c. 1446 § 2 CIC/1983)
- Determination of the reimbursement of expenses for experts (c. 1580 CIC/1983)
- Transfer of pastors (c. 1752 CIC)

As an example, the procedure prescribed in c. 702 § 2 CIC/1983 for the care of retired members of a religious institute is explained in more detail below.

The vow of poverty in a religious institute means financial dependence on the institute as well as restrictions on the use and disposal of assets (cf. c. 600 CIC/1983). The scope of the vow of

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poverty is to be defined in the individual institute's own law. It ranges from the renunciation of the administration of one's own property (cf. c. 668 §§ 1-2 CIC/1983) to the complete renunciation of one's own property (cf. c. 668 §§ 4-5 CIC/1983). What a religious acquires through his work, he acquires for the institute (cf. c. 668 § 3 CIC/1983). Conversely, a religious institute has an obligation to provide for its members (cf. c. 670 CIC/1983). This obligation exists for the duration of membership of the institute. Anyone who has left a religious institute, whether by resignation (voluntary departure from the institute) or by dismissal (imposed separation from the institute),[35] is no longer entitled to a pension from the institute and cannot claim anything for work performed (cf. c. 702 § 1 CIC/1983).[36] The only exceptions are claims that exist under state law. In German-speaking countries, these are in particular the subsequent insurance in the statutory pension insurance scheme in Germany (§ 8 para. 2 no. 3 SGB VI) or the transfer amount to be paid to the pension insurance institution in Austria (§ 314 para. 1 ASVG).[37] This general regulation cannot adequately do justice to the various possible situations in which a retired member of a religious institute may find themselves. Various factors play a role here, such as age, family situation, length of affiliation to the institute, health, education, work carried out in the institute and circumstances of separation from the institute. One former religious is still young, can stay with his parents for a transitional period and has a good chance of finding a job soon. The other was already working as a university professor, teacher or nurse during his time at the institute and can continue to do this work after leaving. Yet another has spent decades in a contemplative monastery, has not practised his profession during this time and has little chance of finding a job on the labour market. For yet another, the physical or mental state of health makes it virtually impossible to pursue gainful employment. Even if, as c. 702 § 1 CIC/1983 stipulates, there is no legal entitlement to

[35]See further on the various forms of separation from the institute: TIBI, Daniel, Die Trennung der Religiosen vom Institut. Ein kanonistischer Überblick unter besonderer Berücksichtigung der Leitlinien "Il dono della fedeltà" und der jüngsten Änderungen des Kirchenrechts, in: Zeitschrift für Kanonisches Recht 1 (2022), DOI: 10.17879/zkr-2022-4619.

[36]See TIBI, Daniel, Ordensrecht. Einführung in Rechtslage und Rechtsfragen, St. Ottilien 2023, 228 f..

[37]See further on the legal situation in Germany: LAUER, Gisela, Ansprüche ehemaliger Ordensangehöriger nach ihrem Austritt aus der Ordensgemeinschaft, in: Ordenskorrespondenz 41 (2000), pp. 33-42, and on the legal situation in Austria: KALB, Herbert, Das Verhältnis zwischen Kirche und Staat im Bereich des österreichischen Sozialversicherungsrechts. Reflections on the transfer amount for Catholic priests and religious, in: Paarhammer, Hans; Rinnerthaler, Alfred (eds.), Scientia canonum. Festgabe für Franz Pototschnig zum 65. Geburtstag, Munich 1991, pp. 471-488.

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a benefit from the Institute,[38] it would lead to injustice in individual cases if all retired members were to remain indiscriminately without support from the Institute, even if they were dependent on it. Therefore, according to c. 702 § 2 CIC/1983, an institute should "exercise equity and evangelical charity towards the departed member". To leave a departed religious without help from the institute without considering the circumstances of the individual case would be contrary to the natural sense of justice. The procedure prescribed by c. 702 § 2 CIC/1983 with *aequitas* mitigates the strict regulation in § 1 through mercy and Christian charity. In this way, a just solution is to be found for each individual case. It is in keeping with the nature of justice in individual cases that there can be no general rules, but that the individual case must be taken into account. Whether and in what form an institution supports a departed religious person beyond the entitlements existing under state law is a matter for agreement according to the circumstances of the individual case. For example, a one-off bridging allowance can be paid depending on the possibilities of the institute and the needs of the member who has left. Subsequent insurance in the statutory pension insurance scheme in Germany only provides a retired religious member with a small pension, which is why an institute may decide to transfer a life insurance policy that it has taken out for the religious member to the latter. Since in Germany and Austria retired religious who are not in work and are not supported by their parents are generally entitled to state social benefits, at least the basic needs of a retired member should be covered. If not, the institute may decide to pay a monthly benefit for a limited period of time until the departed religious can support themselves, whereby help from an institute is always limited in time and never has the character of a lifelong pension.[39] Separation from the institute is not always by mutual agreement, but can give rise to disputes, especially if a religious has been dismissed for an offence. However, even in this case, the institute should proceed with *aequitas* and endeavour to find a fair solution.

[38]See APOSTOLIC SIGNATURE, Decree of the *Congress* of 6 July 1971, Prot. no. 209/70 CA, in: Commentarium pro religiosis et missionariis 53 (1972), pp. 181-183: "*In primis, certum omnino est quod, in casu, Religio nulla adstringitur obligatione ex iustitia*" (ibid. p. 182).

[39]"*Excluditur ergo quod Religio, et si tantummodo ex caritate, obligatione adstringatur curandi ut religiosa dimissa vel commode vivere queat, vel toto vitae suae tempore - aut ad tempus longum seu indefinitum - necessaria habeat ad honeste vivendum. Nec aliud censendum est etsi agatur de religiosa dimissa quae iam senuerit et viribus sit destituta ac inhabilis ad laborandum*" (ibid.).

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2.2 *Aequitas non scripta* in current canon law

In ecclesiastical law, an *aequitas* approach is not limited to those cases in which it is explicitly prescribed. Rather, *aequitas* is a basic principle of the entire application of church law for the realisation of justice in individual cases. This *aequitas non scripta* is explained below using the example of the admission of remarried divorcees to receive communion.

The question of the admission of remarried divorcees to receive communion is the subject of controversial debate.[40] The principle is that any baptised person who is not legally prevented from doing so can and must be admitted to receive communion (cf. c. 912 CIC/1983). Those who persistently remains in public grave sin may not be admitted to receive communion (c. 915 CIC/1983). The central question of whether remarried divorcees persistently remains in public grave sin is answered differently by different authors.[41] In a statement by the Pontifical Council for Legislative Texts of 24 June 2000[42], the answer is in the affirmative. In his Apostolic Exhortation *Amoris laetitia* of 19 March 2016[43], Pope Francis addresses the question of the admission of remarried divorcees to receive communion, but does not wish to issue "a new general legal regulation of a canonical nature to be applied to all cases"[44], as remarried divorcees "can find themselves in very different situations that must not be catalogued or locked into overly rigid statements"[45]. Pope Francis emphasises the importance of generally valid legal norms, "but in their formulations they cannot possibly encompass all special situations"[46].

[40]See for further details: HAHN, Judith, Zur Bedeutung von Amoris laetitia für das Verständnis des c. 915 CIC/1983, in: Neumann, Thomas; Platen, Peter; Schüller, Thomas (eds.), Nulla est caritas sine iustitia. Festschrift für für Klaus Lüdicke zum 80. Geburtstag, Essen 2023 (= BzMK 82), pp. 93-105; TRAVERS, Patrick J., Amoris Laetitia and Canon 915: A Merciful Return to the Letter of the Law, in: Periodica de re canonica 107 (2018), pp. 297-326, DOI: 10.32060/periodica.2.2018.297-326 (Part 1) and 107 (2018), pp. 367-418 DOI: 10.32060/periodica.3.2018.367-418 (Part 2).

[41]The question is answered in the affirmative, for example, by: BURKE, Raymond L., Canon 915: The Discipline Regarding the Denial of Holy Communion to those Obstinately Persevering in Manifest Grave Sin, in: Periodica de re canonica 96 (2007), pp. 3-58. The question is answered in the negative, for example, by: LÜDICKE, Klaus, Warum eigentlich Barmherzigkeit? Die wiederverheirateten Geschiedenen und der Sakramentenempfang,in: Herder-Korrespondenz 66 (2012), pp. 335-340.

[42]German translation in: Archiv für katholisches Kirchenrecht 169 (2000), pp. 135-135, DOI: 10.30965/2589045X-16901011. This declaration is not an authentic interpretation, and without papal approval it has no legal force.

[43]German edition: FRANZISKUS, Nachsynodales Apostolisches Schreiben *Amoris laetitia* über die Liebe in der Familie (19.03.2016), Bonn 2016 (= VApSt; 204).

[44]Ibid, no. 300 (p. 213).

[45]Ibid, no. 298 (p. 210).

[46]Ibid. No. 304 (p. 218).

In order to reach a just decision in individual cases, mitigating conditions and circumstances should be taken into account - in accordance with the basic principle of *aequitas canonica*. On the one hand, "there must never be the idea that one intends to diminish the demands of the Gospel"[47], which is why Pope Francis has not provided for the general admission of remarried divorcees to receive communion. On the other hand, "it is no longer possible to maintain that all those who live in any so-called 'irregular' situation are in a state of mortal sin and have lost sanctifying grace. [...] Because of the conditionalities or mitigating factors, it is possible that one can live in the grace of God in the midst of an objective situation of sin - which is not subjectively culpable, or at least not totally so"[48]. A "path of accompaniment and discernment"[49] by a priest should therefore lead to a just decision in the sense of the fundamental principle of *aequitas canonica*, taking into account the applicable law and the circumstances of the individual case.

3 Mercy in criminal law[50]

If *aequitas canonica* is a fundamental principle of all legal action of the Church, it must also be applied in criminal law. C. 1311 § 2 stipulates that "penalties must be imposed and determined in accordance with the law and always with due regard for canonical equity". But how can *aequitas canonica*, understood as strict law tempered by mercy, be appropriately implemented in criminal law? Formally, laws that impose a penalty are subject to strict interpretation (cf. c. 18 CIC/1983), which leaves little room for the application of canonical equity. Furthermore, the past has shown that the non-application of ecclesiastical criminal law out of a misunderstanding of mercy has caused a great deal of damage, as both offenders and victims are entitled to a just application of the law in criminal law. Mercy in criminal law can therefore mean neither a complete renunciation of punishment, which would mean injustice towards

[47]Ibid. No. 301 (p. 214 f.).
[48]Ibid. No. 301 (p. 215) and No. 305 (p. 219).
[49]Ibid. No. 300 (p. 213).
[50]See for further details: CRABBE, Brecht, In Search of a Theology of Canonical Penal Law. An Interpretation of Canon 1311 § 2 Through Pope Francis's Writings on Mercy and Justice, in: The Jurist 80 (2024), pp. 197-226, DOI: 10.1353/jur.2024.a929956; RENKEN, John A., Penal Law. A Realisation of the Misericordiae Vultus Ecclesiae, in: Studia canonica 50 (2016), pp. 95-143, DOI: 10.2143/stc.50.1.3136940.

the victims, nor rigid punishment aimed at retribution, which would mean injustice towards the offenders.

Criminal law has a pastoral character in the church:[51]

> "Observing and respecting the Church's penal discipline [...] is a task that is inextricably linked to the *munus pastorale* [...]. It should be exercised as a concrete and indispensable requirement of charity towards the Church, the Christian community and any victims, but also towards the person who has committed an offence and who, together with mercy, also needs correction from the Church."[52]

C. 1311 § 2 CIC/1983 lists the purposes of punishment as the restoration of justice, the correction of the offender and the elimination of the offence. The first purpose of punishment (only mentioned in second place in c. 1341 CIC/1983 old version) is the restoration of justice, which primarily focuses on the victims and is intended to create justice for them. However, restoring justice must not degenerate into revenge, because "revenge never really solves the victims' misery. There are crimes that are so horrific and cruel that making the perpetrator suffer does nothing to make them feel that the damage has been repaired [...]. Revenge is not a solution".[53] In addition to the necessary punishment of the offender, ecclesiastical criminal law also has the offender's correction in mind as a second purpose of punishment. In this way, without diminishing justice towards the victims, mercy should also be shown to the offenders:

> "Mercy is therefore not in opposition to justice. Rather, it expresses God's attitude towards the sinner, to whom He offers a further opportunity for repentance, conversion and faith [...]. This in no way means undervaluing justice or making it superfluous. On the contrary. Anyone who makes a mistake must serve the sentence. But this is not the end point, but the beginning of conversion".[54]

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[51]See also: KIMES, John Paul, Reclaiming Pastoral. Pascite Gregem Dei and Its Vision of Penal Law, in: The Jurist 77 (2021), pp. 269-289.

[52]FRANZISKUS, Apostolic Constitution *Pascite gregem Dei* (23 May 2021), in: Archiv für katholisches Kirchenrecht 189 (2022), pp. 172-176, here p. 175.

[53]FRANZISKUS, Encyclical *Fratelli tutti* on fraternity and social friendship (3 October 2020), Bonn 2020 (= VApSt; 227), No. 251 (p. 157).

[54]FRANZISKUS, *Misericordiae vultus*. Bull of Annunciation for the Extraordinary Jubilee of Mercy (11 April 2015), Bonn 2015 (= VApSt; 200), no. 21 (p. 29 f.).

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Mercy in ecclesiastical criminal law therefore does not mean that an offender is not punished at all, but that a punishment serves both to restore justice and to bring about the repentance and correction of the offender, which ultimately serves to eliminate the offence, the third purpose of punishment.

4 *Aequitas canonica* as an appropriate combination of justice and mercy

Canon law is orientated towards the salvation of souls. Laws are formulated in a general and abstract manner and cannot take into account every possible individual case. Where the strict application of an ecclesiastical law in an individual case would run counter to the salvation of souls, injustice would result, and mercy takes precedence over the strict application of the law. In order to appropriately combine justice and mercy in the application of the law and to avoid pure legal positivism on the one hand and legal uncertainty and arbitrariness on the other, canon law recognises the basic principle of *aequitas canonica*, canonical equity, which can be characterised as strict law tempered by mercy and which is intended to contribute to justice in individual cases. As a dynamic principle of the application of law, *aequitas canonica* permeates the whole of canon law. Certain instruments of flexibility, whether standardised in the CIC or taken from the canonical legal tradition, enable the ecclesiastical authority to create special regulations in justified cases (privilege) or to exempt from a purely ecclesiastical law (dispensation) or to deliberately leave a violation of the law unpunished (tolerance and dissimulation). The individual believer can also come to a justified and objectively comprehensible decision of conscience that a law does not bind him in a certain exceptional situation (epieikeia). Flexibility instruments are expressions of *aequitas canonica*, but it is not limited to them. In certain situations, the CIC prescribes a decision that takes account of canonical equity. Furthermore, it permeates all canon law as a general basic principle of the application of law. The principle of *aequitas canonica* was explained using the practical examples of the care of religious who have left the institute and the admission of remarried divorcees to receive communion. Criminal law is a special case in which misunderstood mercy can cause great harm. However, *aequitas canonica* is also applied in criminal law, as ecclesiastical criminal law has a pastoral character. A punishment serves both to restore justice on the part of the victim and to bring about the repentance and correction of the offender.

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True justice in the Church's application of the law requires an appropriate combination of justice and mercy. Law without mercy would slide into pure legal positivism and canon law would no longer serve the salvation of souls. Mercy without law would not only create legal uncertainty, but ultimately cause arbitrariness. A church without law would not be a church of mercy, but a church of arbitrariness, because the opposite of law is not mercy, but arbitrariness. *The aequitas canonica*, or canonical equity, seeks to combine justice and mercy in an appropriate manner in order to create justice in individual cases, even in life situations that the legislator cannot take into account in general, abstract norms. It is the nature of justice in individual cases that it cannot be standardised in a universally valid way, as it is precisely the individual case that must be taken into account. However, it must not slip into legal uncertainty and arbitrariness. It is therefore crucial that individual believers as well as church decision-makers form their conscience on the basis of the Christian faith in order to reach a just decision in individual cases. In addition, decisions made with *aequitas canonica* must always remain objectively comprehensible so that all those affected can understand why a decision was made. In this way, legal uncertainty and the impression of arbitrariness are avoided.

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