The Concept of Equity in Early-Modern European Legal Scholarship

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This dissertation is submitted for the degree of Doctor of Philosophy

27th April 2018

Thesis abstract

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The Concept of Equity in Early-Modern Legal Scholarship

In modern scholarship, the concept of equity is often assimilated with that of Aristotelian epieikeia, a process which serves to correct rules when, though their wording undoubtedly applies to a case, yet the outcome would be unjust, or the legislator would have never wanted the rule to be applied to such a case. My thesis deals with the early-modern origins of the association of equity and epieikeia in legal scholarship, and of its consequences for the doctrinal development of equity in the sixteenth and seventeenth century.

I begin by showing that medieval legal writings on equity were almost completely unconcerned with epieikeia, and that the latter was only developed by philosophers and theologians. Legists and canonists developed a concept of equity that was unrelated – indeed mostly incompatible – with judicial discretion or the emendation of written rules. Thus, throughout the Middle Ages, there was almost no interaction between the writings of civil and canon lawyers on equity, and those of theologians on epieikeia.

In the second chapter of my thesis, I show that the introduction of epieikeia in legal scholarship was the result of the influence of humanistic philology over the writings of humanist jurists, and argue that it caused the majority of early-modern authors to depart from medieval scholarship on equity, re-modelling instead equity as a doctrine of interpretation of the law beyond its letter in accordance with the intentions of the legislator.

The final part of my thesis argues that the development of equity as epieikeia in legal scholarship broke down the barrier that had hitherto divided theological and legal writings on equity. Indeed, from the late sixteenth century onwards, legal and theological writings on equity were connected to such an extent that many later authors treated these two branches of scholarship as belonging to one, equally authoritative body of learning on the same topic.

Preface

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text

This thesis, including footnotes, does not exceed the permitted length.

Acknowledgments

I have incurred countless debts to individuals and institutions in the course of this thesis. None of the research I have carried out would have been possible without the generous financial support I was lucky to receive from the Arts and Humanities Research Council. Trinity Hall, my college and home for the greater part of this project also bore much of the expenses I incurred for research and training - I cannot thank the College and its Fellows enough for this.

Among the many scholars who have helped me along the way, it is David Ibbetson, my supervisor, to whom I and this research project owe the most. His lucid, sharp, insightful comments were the lens through which I was able to find the shape, direction and purpose of the opaque and amorphous project I had in mind – whether he will want to take any credit in the outcome is another matter! What is certain is that I would not have taken as much pleasure in the journey along this path without finding relief as often in his unfailing wisdom, geniality and wit. I would never have found any path at all in legal history, however, if it hadn't been for the inspiring guidance I received from Ian Williams since my undergraduate years at UCL – for this, and for the advice he has continued to give me through this PhD, I thank him deeply. My advisor for this project John Allison, as well as my examiner for the first year report on my research John Bell both deserve a special mention for reading and commenting helpfully on part of this work. No purpose would be served in producing a full list of the many scholars who have provided helpful advice and comments, or simply valuable words of encouragement at seminars, conferences and congresses where I have presented my work, they all have my warmest thanks.

It has been a great honour to share these past few years with a truly wonderful cohort of fellow research students and legal historians, I have found lasting friends in Andreas Televantos, Astron Douglas, David Foster, Jacob Currie, Jef Thomson, Joanna McCunn, Joe Sampson, and Julia Kelsoe. For his guidance when I took my first steps through the medieval *ius commune* and the generosity with which he shared his superb talent as a Latin scholar to help me through many sources, I should mention and thank Jacob once more.

I can only apologise to my family, and to Giulia in particular, for the countless feverish discussions of *aequitas* and *epieikeia* I have inflicted upon them, there is nothing I can do to deserve all the love and devotion they show me each day. Pascale, my mother, has spent far too many hours proof-reading my footnotes, and I have spent far too little time with her in return.

Clare College

April 2018

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Notes on the text

The Latin is cited as it occurs in the sources referred to, but I have sought to modernise punctuation and spelling where it makes the text easier to read. When translations are provided, they are my own unless otherwise noted.

I adopt square brackets when cross-referring to paragraphs within this thesis. Paragraph 2.2.1 would therefore be referred to as [2.2.1].

Below is a guide to the abbreviations I use to cite Roman law and medieval legal texts:

D.1.1.1:	Digest of Justinian, book 1, title 1, lex 1
C.1.1.1:	Code of Justinian, book 1, title 1, lex 1
I.1.1.1:	Institutes of Justinian, book 1, title 1, lex 1
Nov.:	Novels of Justinian
Dist.1, c.1:	Decretum Gratiani, Distinctio 1, canon 1
C.1, q.1, c.1:	Decretum Gratiani, Causa 1, quaestio 1, canon 1
X.1.1.1:	Liber extra, book 1, title 1, canon 1
VI.1.1.1:	Liber sextus, book 1, title 1, canon 1
Clem.:	Constitutiones Clementis V, book 1, title 1, canon 1
L.F.1.1.1:	Libri Feudorum, book 1, title 1, section 1

Introduction

Equity is a concept of vast scholarly scope – it is one that has been studied across the humanities and in a wide variety of contexts. Most research on the subject has come from philosophical and theological scholarship, where it is often associated with the idea of *epieikeia.* Its development as such from Ancient Greece through the Middle Ages and beyond has been the object of a great number of studies.[1] But though the development of equity as a philosophical and theological concept has relevance for the argument running through this thesis, it is important to narrow the focus of our attention down to the legal concept of equity – that is, the concept of equity as used by lawyers, or, more generally, in writings about law.

That said, the legal concept of equity too is one that has been studied in a bewilderingly wide range of contexts. Equity is a concept of living significance for lawyers. The important place that equity still occupies as a legal branch of law in many common law systems means that much of the available scholarship on equity has come from those jurisdictions,[2] though similar studies from civil law jurisdictions, or indeed within the context of international law are also found.[3] My focus in this thesis is, instead, on the legal historical development of that concept. From its role in biblical, Greek and Roman law all the way through its development in medieval and early modern legal scholarship on both the European Continent and England, the scholarly output has, here too, been plentiful.[4] The purpose of this thesis is specifically to provide an account of the development of equity in the early modern period within what is usually referred to as the *ius commune*, that is, the legal writings of civil and canon lawyers.

Given the breadth of legal historical scholarship on equity, it is useful, before providing a more detailed summary of what the argument is and how it will be approached throughout this work, to spend a moment discussing the choice of topic and the reason for its adoption. This has to do, first, with the fact that there are good reasons to believe that the early modern period, specifically the period from 1508 onwards, was a crucial one for the development of equity in legal scholarship. The second point is that this period, despite its importance has not been to date adequately covered. The third point is that providing an

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[1] See e.g. Karel Kupyers, 'Recht Und Billigkeit Bei Aristoteles', 5 Mnemosyne (1937) 289; Paulus Stoffels, *Billijkheid in Het Oud-Griekse Recht* (1954); Max Hamburger, *Morals and Law: The Growth of Aristotle's Legal Theory* (1951); Francesco D'Agostino, *Epieikeia - Il Tema Dell'Equità Nell'antichità Greca* (1973); Francesco D'Agostino, *La Tradizione Dell'epieikeia Nel Medioevo Latino* (1976); Lawrence Joseph Riley, *The History, Nature and Use of Epikeia in Moral Theology* (1948). Many more sources can be found referred to in the helpful bibliography provided in Guido Kisch, *Erasmus Und Die Jurisprudenz Seiner Zeit* (1960), pp. 529-38.

[2] It is an ongoing debate within these jurisdictions whether any connection can (or indeed should) be found between the role performed by the branch of law referred to as equity and any more general concept of equity, whether as *epieikeia* or in some other sense. See e.g. J McGhee (ed), *Snell's Equity* (2017), 1-002; Eric G Zahnd, 'The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law' (1996) 59 Law & Contemporary Problems 263, 270-5; D. Klimchuk, 'Is the Law of Equity Equitable in Aristotle's Sense?' (2011), unpublished manuscript (2011). For an example in the context of specific rules of equity, see Henry E Smith, 'Equity and Administrative Behaviour' in Peter G Turner (ed), *Equity and Administration* (2016), pp. 335-6.

[3] See e.g. RA Newman, 'Equity in Comparative Law' (1968) 17 The International and Comparative Law Quarterly 807, pp. 830-48; Thomas Franck, 'Equity in International Law' in Nandasiri Jasentuliyana (ed), *Perspectives on international Law* (1995), pp. 23-48.

[4] See e.g. David Daube, 'Summum Ius-Summa Iniuria' in D. Daube (ed), *Studies in Biblical Law* (1947), p. 190. A useful summary of modern scholarship on equity in Roman Law and Medieval legal scholarship is available in Hessel E Yntema, 'Equity in the civil law and the Common Law' 15 The American Journal of Comparative Law 60, pp. 66-73. For the development of the concept of Equity in England see David Ibbetson, 'A House Built on Sand' in E Koops and WJ Zwalve (eds), *Law & Equity* (2014).

account of the early modern development of the concept of equity will not only be of benefit for historians of the *ius commune* but also for historians more broadly encountering equity in different contexts.

Let us consider the first point. It has been known for some years that the early modern period was one during which the concept of equity enjoyed a revival. The renewed interest in the concept of equity was not confined to legal scholarship – and historians have more generally identified it as a feature of Renaissance Humanism.[5] An idea of the many and heterogeneous uses that were made of the concept of equity in early modern times in different contexts can be gathered from Mark Fortier's recent work *The Culture of Equity in Early Modern England*, published in 2005. Though Fortier's study was, as the title suggests, geographically confined to uses of equity by writers in England, it conveys a striking picture of equity as a multi-faceted and contested concept with no stable core, particularly resulting from the many and varied approaches that were taken to it by authors in different contexts, or indeed within the legal context itself.[6] The emergence of a peculiar interest in the concept of equity in early modern European legal scholarship was brought to light most explicitly and fully in Guido Kisch's well-known work, *Erasmus und die Jurisprudenz seiner Zeit*, published in 1960. Kisch's research showed how many among the early generation of so-called 'legal humanists', in particular those who belonged within the intellectual network of Erasmus, were showing an amount of interest in the concept of equity that was unprecedented in legal scholarship.[7] Since Kisch's study, other authors including Vincenzo Piano Mortari, Clausdieter Schott and Jan Schröder have worked on the early modern development of the concept of equity and confirmed that the resurgence of interest in equity identified by Kisch lasted until well into the seventeenth century and even beyond.[8]

The second point is that, despite the importance of the early modern period for the development of equity as a legal doctrine, it is one that has been covered only erratically in available scholarship. Kisch's study, the only monographical work on point, is rather narrow in focus – it identified the circle of scholars among whom ideas of equity as *epieikeia* were initially developed but it did not trace the development of equity as a legal doctrine more broadly, its impact on later civil lawyers and canonists or its relationship with early modern approaches to *epieikeia* within scholastic theology. The other studies available have been much briefer. Vincenzo Piano Mortari, in a short work entitled *Aequitas e Ius Nell' Umanesimo Giuridico Francese*, confined his aim to providing a short review of the thought on *aequitas* of French legal humanists across the sixteenth and early seventeenth century. The passages considered by Piano Mortari are usually rather short, and he made no attempt to engage with equity as a legal doctrine, or to identify its role as those jurists conceived it within the *ius commune* – this study is therefore of little value as a legal historical account of the development of equity in early modern legal scholarship. Two more helpful studies have recently been

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[5] For the debate among philosophers, see François Rigolot, 'Nicomaque et La Règle de Plomb, Fictions Légitimes et Illégitimes de La Justice Montaignienne' (2001) 8 Bulletin de la Société des Amis de Montaigne 87. For its use by Erasmus as a tool for biblical interpretation see Kathy Eden, 'Equity and the Origin of Renaissance Historicism: The Case of Erasmus' (1993) 5 Yale Journal of Law & the Humanities 137.

[6] Mark Fortier, *The Culture of Equity in Early Modern England* (2005).

[7] Kisch, *Erasmus*, passim

[8] Vincenzo Piano Mortari, 'Aequitas E Ius nell'Umanesimo Giuridico Francese' (1997) 9 Atti della Accademia Nazionale dei Lincei 141; Claudieter Schott, 'Aequitas Cerebrina' in Hans Thieme (ed), *Rechtshistorische Studien: Hans Thieme zum 70. Geburtstag* (1977); Jan Schröder, 'Aequitas Und Rechtsquellenlehre in Der Frühen Neuzeit' (1997) 26 Quaderni Fiorentini 265.

produced by Clausdieter Schott and Jan Schröder, both concerned with the concept of equity as developed throughout the sixteenth and seventeenth century among early legal humanists and later civil lawyers, tracing its development into the treatises and commentaries of the *Usus Modernus*. Schröder has argued that in the early modern period equity became associated with unwritten law, and has shown that earlier humanists sometimes described equity itself as a source of unwritten law. Both have shown that this tendency declined and eventually disappeared through the later sixteenth and seventeenth century, as lawyers focussed more and more on the fact that judges should use equity together with written law in order to do justice, referring to the unbridled use of 'unwritten' equity as *aequitas cerebrina*. The latter concept and indeed the consistent resistance of civil and canon lawyers against notions of unwritten equity has instead been the main theme of Schotts's work. Both these studies are helpful in illustrating the potential in carrying out a detailed analysis of the development of the concept of equity in early modern Europe – raising questions such as, what was the role of equity and its relationship with written or unwritten law? What doctrinal function – if any – did it perform? Was there a consensus about the role that equity ought to perform within the legal system and did the changes across the seventeenth century reflect a change in this consensus? Neither work covers the breadth of material necessary, or treats the writings of equity in sufficient detail, to provide an answer to these questions.

The third point is that providing a thorough account of the development of equity in early modern Europe would not only be beneficial to a better historical understanding of the development of the *ius commune*, but also to the study of other subjects where the legal concept of equity plays a central role. A few examples may be provided to give an idea of the extent to which this troublesome gap in legal history has been relevant for historians. One very important field of study where an account of early modern equity in Europe would have a beneficial impact is the legal historical study of the English concept of equity, and it would be of particular aid to those scholars seeking to reconstruct the early modern origin of the association of the concept of *epieikeia* with both statutory interpretation and the Court of Chancery. Recent research by David Ibbetson has shown that English early modern legal scholarship on the concept of equity cannot be understood in isolation from the contemporary development of equity among civil lawyers. Indeed, it seems that accounts of equity produced on the continent played an extremely important role in shaping English theories of equity as they were cited as authoritative sources by many English authors seeking to make sense of equity as a legal concept. A detailed understanding of the doctrinal development of equity in early modern legal scholarship is required in order to assess whether the civil law works cited by English lawyers were interpreted accurately or distorted and whether their juxtaposition as sources was warranted or whether they provided accounts of equity that were entirely inconsistent.[9] Another field of study where a thorough account of the early modern legal concept of equity would be beneficial concerns the development of *epieikeia* as a theological doctrine among theologians. It has been known for some time that the early modern accounts of *epieikeia* by Cajetan, Soto and Suarez laid the foundations for the modern

[9] David Ibbetson, 'A House Built on Sand', pp. 76-7.

theological concept of *epieikeia*.[10] However, and while a number of scholars have already recognised to some extent the contact between early modern scholastics and contemporary legal scholarship on equity, a detailed understanding of the development of equity among lawyers would allow scholars to map to what extent the great focus on law of early modern scholastic theologians affected the way in which they developed Aquinas' ideas about equity.[11] The absence of a study of reference mapping the development of equity in legal scholarship in early modern times is problematic for historians more broadly. Equity is a term often encountered whether in the analysis of legal theory more generally, or specific doctrines. For instance, historians have encountered the early modern concept of equity when dealing with extraordinary jurisdictions. These are not limited to the English courts of equity mentioned above. Charles Donahue's recent work on courts of merchants, and James Shaw's study of the Chancery of Cosimo I de' Medici are but two recent examples of other contexts to which equity is relevant.[12]

Scholars encountering the early modern legal concept of equity have often found it more convenient to refer to the readily available scholarship on the medieval legal concept equity, thus referring to the available research on the works of legists, canonists and theologians on *aequitas* and *epieikeia*. This, however, can only be a helpful approach if one assumes that some kind of continuity existed between the medieval and early modern concept of equity.[13] The difficulty with this view is that, as will be made clear throughout this thesis, the early modern period represented a clean break from the past for the development of equity in legal scholarship, and early modern authors often made it a point of their treatises to depart form the medieval *ius commune* on equity. Other authors have sought to fill the gap by reference to the better-known English concept of equity, but, as mentioned above, the problem becomes one of circularity, as it seems the English concept of equity itself was developed by reference to civilian early modern sources.[14] In short, research providing the missing link between the medieval *ius commune* concept of equity and the modern one would be a very beneficial instalment in European legal history, not only for historians of civil law themselves, but for legal and political historians and indeed for scholars of intellectual history more broadly.

I now turn to my work in this thesis. Its aim is to fill the gap in the literature identified above, providing a detailed account of the development of equity in early modern legal scholarship in the *ius commune*. My research builds on the work of Kisch and later authors to identify what caused the great resurgence of interest in equity in the sixteenth and early seventeenth century and what its significance was for the role (if any) that equity played as a legal doctrine. Before turning to the way in which I have structured

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[10] See Riley, *Epiekeia*, pp. 56-67. Angel Rodriguez Luño, 'La Virtù Dell' Epicheia. Teoria , Storia E Applicazione (I). Dalla Grecia Classica Fino a Suárez' (1997) 6 Acta Philosophica 197.

[11] See Luño Rodriguez, 'La Virtù dell'Epicheia', pp. 23-4: 'Suárez sembra tener presente soprattutto il diritto canonico. [...] c'è da osservare che nel libro VI Suárez si muove in un contesto giuridico, concedendo notevole attenzione alla tradizione canonistica.'

[12] See JE Shaw, 'Writing to the Prince: Supplications, Equity and Absolutism in Sixteenth-Century Tuscany' (2012) 215 Past & Present 51, p. 53, n. 10. Charles Donahue, 'Equity in the Courts of Merchants' (2004) 72 Tijdschrift voor Rechtsgeschiedenis 1.

[13] See e.g. Luño Rodriguez, 'La Virtù dell'Epicheia', n. 5, where all the references provided are to medieval or modern equity. See also Ibbetson, 'A House Built on Sand', p. 57, n. 9.

[14] See e.g. Shaw, 'Writing to the Prince', p. 53, nn. 10, 15. And n. 12 above.

this work, I will outline the main arguments made throughout it. The main point I make, which corroborates the earlier intuition of Kisch, is that the early modern period was a critical moment for the development of the concept of equity, and there are broadly three arguments running through this thesis in support of that fundamental point.

First, and this is the main argument running through the thesis, the early modern period was a time where equity changed its conceptual identity completely in the writings of lawyers, and this was the cause of the sixteenth and seventeenth-century revival of interest in that topic. The reason for that fundamental change was the acceptance by legal scholars of the identity between *aequitas* (or for some, more specifically, *aequum et bonum*) and *epieikeia*. Indeed, while equity and *epieikeia* had been treated as synonyms by philosophers and theologians since the writings of Thomas Aquinas, medieval legists and canonists had not drawn explicit links between equity and *epieikeia*, and certainly not explored the concept of equity by referring to the works of Aristotle or to those of theologians on the point. I make the argument that legal humanists introduced the equivalence of *aequitas* and *epieikeia* in legal scholarship by drawing on fifteenth-century developments in humanistic philology, in particular on the novel translations of Aristotle produced in the Renaissance. Thus, the link to Aristotelian *epieikeia*, perhaps the most distinctive feature of the modern concept of equity, was explicitly accepted and recognised by lawyers only from the sixteenth century onwards.

The second argument running through this work follows from the one above and has to do with the reaction of lawyers to the association of *aequitas* and *epieikeia*. Those early modern lawyers who sought to analyse the concept of *aequitas* in light of the available learning on Aristotelian *epieikeia* were soon to realise that this required a complete re-conceptualisation of the medieval approach to equity and to the way in which it had been used since the early writings on point of the first Glossators and Canonists – this therefore meant (i) that the association of *aequitas* and *epieikeia* afforded many legal writers the opportunity to make a clean break with past *ius commune* scholarship and start their theories of equity anew, and (ii) that equity became a subject of debate among legal writers as they sought to settle a new consistent role for it within the structure of their theories of law. In the thesis, I examine writings of this nature to show that, as to (i) from the second half of the sixteenth-century onwards, most legal writers agreed that the medieval position on equity needed revisiting and, as to (ii) that though equity would never entirely stop being a contested concept, the debate about the nature of equity would eventually converge towards a consensus that its role as *epieikeia* should be that of a doctrine of interpretation of the law beyond the letter.

The third point has to do with the relationship between law and theology. Equity was a concept well known to theologians from the Middle Ages and, as mentioned above, it was developed in that context since the times of Aquinas as a doctrine of emendation of the letter of the law synonymous with Aristotelian *epieikeia*. The concept of *aequitas* of medieval legists and canonists was, instead, not closely related to *epieikeia*, and the theories of theologians did not have a visible effect on the development of *aequitas* among legal writers throughout the medieval period. However, the association of equity and *epieikeia* brought in by humanist jurists broke down the barrier that had separated theology and law in matters of equity. By the

mid-sixteenth century, theological and legal writings on equity as *epieikeia* were influencing one another noticeably, eventually becoming part of a single corpus of writings drawn on indiscriminately on either side. This aspect of my research is in line with a great number of recent studies exploring the interaction of late-scholastic theology and early modern writings by civil and canon lawyers; equity was a subject where the effects of theological writings was particularly long-lasting, and I have traced those effects on the writings of legal writers well into the eighteenth century.

These arguments may be easier to follow with the advantage of a breakdown of the structure of the thesis. The first chapter of the thesis provides an account of the development of the concept of equity as *aequitas* in medieval civil and canon law. It is based mostly on the available scholarship on point, though I also challenge the main arguments that have been made to the effect that the medieval legal concept of equity was in some way based on or related to *epieikeia*, a view which, I argue, is either grounded on a misunderstanding of the concept of *epieikeia* or simply not supported by the available sources. When dealing with the doctrinal development of equity, my focus is mainly on those passages where legists and canonists dealt with *aequitas* at greater length, namely the sources opposing equity and rigour. That said, I also deal briefly with uses of equity in other contexts, namely its use in the context of judgments *ex aequo et bono*, and in relation to interpretation. The main point which will emerge from the first chapter is that *aequitas* was, throughout the medieval period, a term broadly used to signify justice – it was a quality which laws, even written ones, could enjoy, and one which judges should strive to give effect to in their application and interpretation of laws. However, it was not developed as a doctrine related to Aristotelian *epieikeia*, i.e. as one of correction, amendment, or interpretation of the law.

In the second chapter I discuss the introduction of the association of *epieikeia* and *aequitas* in legal scholarship and its effect on the development of the concept of equity among later legal writers. Like Kisch, I have not found any author making the association before Gulielmus Budaeus' *Annotationes in Pandectas* of 1508. In the first part of this chapter, I argue that Budaeus found the connection appealing as a result of developments in humanistic philology, and most probably because of the effect they had on the translations of Aristotle to which he had access. In the second and third part, I deal with the reaction of early legal humanists to the writings of Budaeus, dividing them respectively according to whether they chose to depart from or to stand by the medieval learning on *aequitas* as a result. In the final part of this chapter I show that, by the end of the 1500s, one view among the numerous approaches to equity produced in the course of the century was spreading and enjoying broader acceptance, that is, a theory of equity as a doctrine of interpretation of the law beyond the letter, first introduced by Marius Salamonius in 1525 and developed further by Franciscus Connanus and Franciscus Duarenus towards the mid-sixteenth century - I trace the diffusion of that theory well into the seventeenth century and provide some evidence of its influence in legal writings as late as the eighteenth century.

Having identified the main features of the new, early modern concept of equity as *epieikeia* developed by lawyers, I deal in the third chapter with the contemporary development of equity among theologians. I start by looking at the theological doctrine of *epieikeia* developed by Aquinas and expanded upon by Cajetan

in the 1510s and highlight the main doctrinal differences between that approach and the one that was gaining ground among lawyers shortly after. I then move on to argue that later authors who followed on from Cajetan in developing Aquinas' thoughts on *epieikeia* further, started to engage with the writings of lawyers on the same topic – often simply by adopting their language, but sometimes even substantively departing from Aquinas' views in order to reconcile the theological and legal approaches to *epieikeia*.

The third provides the foundation for the fourth and concluding chapter of this thesis. Having shown that theologians had begun, by the mid-sixteenth century, to treat legal writings on *aequitas* as being part of the same body of learning as the writings of their predecessors on *epieikeia*, this chapter examines the writings on equity of those later sixteenth and early seventeenth century legal writers who sought to find a more precise role for equity as *epieikeia* within the legal system by drawing on the doctrines of theologians on point. The argument here is that the main weakness of the concept of equity as interpretation developed by Salamonius and his followers earlier in the sixteenth century was its great overlap with existing theories of interpretation of the law beyond the letter. Drawing on theological writings on *epieikeia*, where it had a narrower, better defined purpose and scope, allowed the jurists examined in this section to find a more precise role for equity/*epieikeia* as interpretation. These scholars are divided in three main categories. The first category, represented most explicitly in Albertus Bolognetus, drew on theological writings only superficially, choosing instead to deprive equity of any substantive role as a doctrine of interpretation, assimilating it entirely with existing doctrines of *interpretatio restrictiva* and *extensiva*. The second category chose to draw on the theological writings substantively, either identifying interpretations by equity exactly with the scope found for it in the writings of theologians – such was, for instance, the approach of Hugo Grotius – or seeking to fit the theological approach within existing doctrines of interpretation, as a sub-type of *interpretatio restrictiva* – this was the approach of Hugo Donellus. Finally, later theologians, and most importantly Franciscus Suarez sought to bring together the writings of lawyers and those of their predecessors on equity, to distinguish interpretations by equity from other existing kinds of interpretation within the *ius commune*. In conclusion, I assess the impact which these more detailed accounts of equity, with their roots in a blend of theology and *ius commune* scholarship, had on later legal writers on interpretation and equity in the later seventeenth and eighteenth century.

Chapter 1 – Background: *Aequitas* and *epieikeia* in the medieval *ius commune*

My work in the later chapters of this thesis will be focussed on the development of the concept of *aequitas* in the early modern period. However, part of the argument is that the development of the concept of equity between 1508 and ca. 1550 represented a clean break from its previous conceptualisation and from the doctrines that surrounded it. This argument cannot be fully understood without first setting out how the concept of *aequitas* had been developed in medieval legal scholarship by legists and canonists. Fortunately, that aspect of the development of *aequitas* has been the object of a number of studies and is rather well-documented. No comprehensive study of the development of equity in the Middle Ages exists, and I have not undertaken such a study myself. What follows is mostly based on existing accounts of the medieval development of equity, and on my own analysis of the sources cited in those accounts.

Another important aspect of my argument is that, in legal writings from 1508 onwards, the concept of *aequitas* became clearly and unambiguously associated with the Aristotelian concept of *epieikeia*. This section will therefore also include a brief discussion of the development of the concept of *epieikeia* in the Middle Ages and of the arguments that have been made about whether it was seen by medieval legal writers as related to *aequitas*. The development of the concept of *epieikeia* has very deep roots in disparate disciplines, and a comprehensive account of its development will not be sought here. I have limited my study to those sources which have been seen by legal historians as the most likely candidates to have influenced medieval lawyers, in particular I have focussed on its development in medieval scholastic theology.

The essential argument made in this section will be that equity, in the medieval *ius commune*, was developed as a concept synonymous with justice. It was used in this sense in many contexts and for many purposes. It was, for instance, associated with the duty of the judge to act in the pursuit of justice, and in relation to 'courts of equity' in the sense of courts unbound by rules. However, the majority of writings on equity were centred on two sources from Justinian's *Code*, C.3.1.8 and C.1.14.1, both concerned with the prevalence of equity over rigour. As will become clear, the doctrinal development of 'equity' in this context would remain focussed for the entirety of the medieval period around a distinction between 'written' equity (*aequitas scripta*) and 'unwritten' equity (*aequitas non scripta*), using equity as a quality (again, identified with justice) attributable to rules, and which could aid the judge in the selection of the rules appropriate to govern cases before him. Meanwhile, from the mid-thirteenth century onwards, equity began to be associated with *epieikeia* among scholastic theologians from Aquinas onwards. Already in Aquinas, equity as *epieikeia* had acquired a rather distinct doctrinal framework, centred on the avoidance of rules where the application of their letter would violate natural law or the common good. Certain scholars, including Norbert Horn and Pier Giovanni Caron have argued that the link identified by theologians between equity and *epieikeia* influenced the development of *aequitas* among medieval legists and canonists, respectively arguing that this can be seen in the development of equity by Baldus de Ubaldis (d. 1400) and by the canon lawyers as *aequitas canonica*. I engage with these arguments towards the end of the chapter to show that they are not consistent with the available evidence. The most that may be said is perhaps that an implicit influence of *epieikeia* can be identified in some aspects of the medieval use of equity in Baldus and perhaps other isolated sources –

however, the bulk of writings of equity, in particular those that focussed on the opposition of rigour and *aequitas scripta*, was incompatible with *epieikeia* and no explicit reference to a link between the two doctrines can be identified throughout medieval legal writings. This view is consistent with the fact, made clear in later chapters, that it was precisely the association of equity and *epieikeia* that led the majority of early modern legal writers on equity to abandon the medieval approach to it and start anew.

1.1. *Aequitas* in the medieval *ius commune*

1.1.1. The Glossators: *Ius approbatum*, *Aequitas constituta* and *Aequitas rudis*.

A good amount of scholarship has in the past focussed on the concept of *aequitas* as developed by the glossators.[15] In order to understand the meaning which *aequitas* assumed in the debates among the legists of the twelfth and thirteenth century, it is important to understand its relationship with the sources of law. Kantorowicz and Buckland have illuminated this step by pointing to two introductory compilations of glosses by Irnerius (d. c.1125) and Bulgarus (d. c.1165) known as *Materiae* or *Exordia*.[16] It is in Irnerius and Bulgarus' discussion of the subject matter of law that we find an early example of the distinction between *aequitas nondum constituta* or *rudis*[17] and *ius approbatum*.[18] From their discussion of the two, it appears that they understood *aequitas rudis* as the ideal source from which the legislator had to draw in order to enact positive law. *Ius approbatum* or *ipsum ius* is discussed as a concept coming close to what a modern jurist would call positive law, that which is recognized among the available sources of law.[19] This distinction between *aequitas nondum constituta* and *ius approbatum* was followed by contemporary and later glossators.[20]

It can be asserted with confidence that all the early glossators agreed that *ipsum ius* would not always be consistent with the requirements of *aequitas rudis*.[21] The question which most commonly brought *aequitas*

[15] Hermann Kantorowicz and William Warwick Buckland, *Studies in the Glossators of the Roman Law* (1969); Eduard Maurits Meijers, 'Le Conflit Entre L'équité et La Loi Chez Les Premiers Glossateurs' (1941) 17 Tijdschrift voor Rechtsgeschiedenis 117; Marguerite Boulet-Sautel, 'Equité Justice et Droit Chez Les Glossateurs Du XIIe Siècle' (1951) 2 Recueil de Mémoires et Travaux de l'Université de Montpellier 1; Hermann Lange, 'Ius Aequum Und Ius Strictum Bei Den Glossatoren' (1954) 71 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 319; Ennio Cortese, *La Norma Giuridica, Vol. 2* (1964), pp. 331-355.

[16] For the nature of the *Materiae* as legal texts see Kantorowicz and Buckland, *Studies in the Glossators*, pp. 37-41. These sources have been edited in Kantorowicz and Buckland, *ibid*., pp. 283ff.

[17] The name *aequitas rudis* for *aequitas nondum constituta* seems to appear for the first time in the *Summa Trecensis*, before being adopted by all other authors. See Meijers, 'Le Conflit', p. 119.

[18] To avoid confusion, I have not included a further category of law which some glossators called the *voluntates* which meant the 'legal acts of persons, living or dead'. Meijers, 'Le conflit', p. 8. In any case, this third category is not relevant for the *aequitas-rigor* debate that would ensue.

[19] Kantorowicz and Buckland, *Studies in the Glossators*, pp. 45, 48.

[20] See Meijers, 'Le Conflit', p. 9 where he refers to the *Summa Trecensis*, *Exordium* and Rogerius (d. c. 1170), *Exordium Summae Codicis*, both edited in Kantorowicz and Buckland, *Studies in the Glossators*, pp. 234, 282. See also Martinus (d. c. 1166), *Exordium Institutionum* in Giovanni Battista Palmieri, *Bibliotheca Iuridica Medii Aevi, Scripta Anecdota Antiquissimorum Glossatorum, I* (1914); Placentinus, *Exordium Summae Codicis* in Gustav Pescatore, *Beiträge Zur Mittelalterliche Rechtsgeschichte* Vol. *2* (1889), p. 15; Johannes Bassianus (d. 1197), *Materia Codicis*, and the identical *Summae Codicis* of Azo (d. 1220), from MS. Naples Brancacciana IV D. 4 *f.* 26v.

[21] It is true that a handful of sources occasionally use *aequitas constituta* as a synonym of *ipsum ius*, either under the influence of Cicero (*Topica*, 9: 'ius civile est aequitas constituta iis qui eiusdem civitatis sunt ad res suas optinendas') or, in the view of Kantorowicz and Buckland due to a misreading of a difficult passage in Irnerius. On the latter view see Kantorowicz and Buckland, *Studies in the Glossators*, p. 48, 234 but see *contra* Meijers, 'Le conflit', p. 8 arguing that Irnerius himself uses it in this sense. Whatever these early sources meant by *aequitas constituta*, it is clear that they did not consider all positive law to be *ius aequum*, and they engaged unproblematically with the debate about the conflict between *ius aequum* as opposed to *ius strictum*.

to the fore, and that which prompted glossators and later legists to think about the meaning and use of *aequitas*, was – predictably – a question centred on the reconciliation of conflicting Roman law sources. The question was what a jurist or a judge ought to do when *aequitas rudis* conflicted with the written *ius*. Fortunately for the medieval jurists, the question had been addressed in two points of Justinian's *Code*. The bad news, however, was that the two rules provided seemed inconsistent with each other. The *lex Placuit* (C.3.1.8.), prescribed that a judge should always prefer equity to *strictum ius*, while the *lex Inter aequitatem* (C.1.14.1) reserved the power to resolve contradictions between law and equity to the Emperor.[22]

According to a well-known story the glossators were divided into two school, one led by Bulgarus, and the other by Martinus Gosia (d. c. 1166) and on this issue – as on many others – they held different opinions. The opinion of Bulgarus and his students was that the conflict between the two rules could be resolved by appreciating the different sense in which each source used the word *aequitas*. It is important to appreciate fully the meaning of this view, for it is the one that would pose the foundations for the *communis opinio* among legists and canonists on this point for at least three centuries. Their position is representatively stated by Rogerius (d. c. 1170) in his *Enodationes Quaestionum super Codice*.[23] Rogerius argued that the *lex Inter aequitatem* referred to *aequitas* in the sense of *aequitas rudis* (*nondum constituta*, as opposed to *ius scriptum*), he read it to mean that, where a written law – however strict - was applicable to a case, a judge would not be allowed to supplant it with a more equitable one from outside the written sources. On the other hand, the more permissive *lex Placuit*, referred to *aequitas* in the wider sense (*larga significatione*) of *aequitas constituta* (written equity, as opposed to *ius strictum*), i.e. a sense that included the *ius scriptum* introduced in response to equitable needs (*ius scriptum quod equitatis ratione contra rigorem verborum iuris stricti regularisque sit introductum*), thus, where two written sources were applicable to a case, the judge had to prefer the more equitable one.[24] This understanding of the solution effectively deprived *aequitas* of its role as a corrective tool in the hands of the judge, it introduced the idea of *aequitas scripta*,[25] and reduced the tension between *aequitas* and *rigor* to one of priority among competing written sources of law. This view was incorporated in the Accursian gloss and was the starting point for the further theoretical additions of the post-glossators or commentators thereafter.[26] As a testimony to the popularity of this view, by the times of Azo (d. 1230), an interlinear gloss over the *Code* started to circulate which added the word 'scriptae' over the main text of C.3.1.8, eventually

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[22] C.3.1.8: 'Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem.' C.1.14.1: 'Inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere.' Other similarly conflicting sources included the *lex prospexit* D.40.9.12.1: 'quod quidem perquam durum est, sed ita lex scripta est' (see n.553 below), and the *regula iuris* at D.50.17.90: 'in omnibus quidem, maxime tamen in iure, aequitas spectanda est.'

[23] Rogerius' text is edited in Kantorowicz and Buckland, *Studies in the Glossators*, pp. 281-284. See also Rogerius, *Summa*, *Codicis*, 1.1.7, 1.12.7-9, in Palmieri, *Bibliotheca Iuridica*, pp. 10, 14-15, though this text does not deal with the difference between *aequitas rudis* and *consituta*.

[24] Kantorowicz and Buckland, *ibid.*, p. 282.

[25] The expression appears in Azo's gloss to C.3.1.8 at *iusticie*: 'non loquitur de ratione iusticie vel equitatis excogitate sed scripte.' For the role of Azo in helping the hardening of this doctrine see Cortese, *La Norma, Vol. 2*, p. 334, n.73. See also n.27 below. Azo's remarks were then incorporated in the Accursian gloss *ad* 'in omnibus rebus', C.3.1.8, in *Corpus Iuris Civilis* (*CICiv*), Vol. *4* (1560), col. 364.

[26] See Lange, 'Ius aequum', p. 331. Though some of the different positions put forward by the glossators survived among the commentators on which see Cortese, *La Norma, Vol. 2*, pp. 352-3.

finding itself incorporated in the main text of C.3.1.8 in manuscript and printed editions of the *Code* – such editions of the *Code* survived well into the seventeenth century.[27]

Martinus and his followers had a different understanding of the *lex Inter aequitatem*. As expressed in Martinus' own glosses to C.1.14.1,[28] he thought that the latter referred only to interpretations which were both necessary (i.e. binding, such as those of a judge deciding a case) and general (i.e. applicable in all cases, such as that given by a sovereign or by custom).[29] Therefore, insofar as an interpretation is neither necessary nor general (as in the case of a jurist), or where it is necessary but not general (as in the case of a judge),[30] equity (*constituta* or not) should take precedence over the iniquitous written rule.[31] In practice, this meant that Martinus was able to construe a number of actions that were not available by mere reference to the Roman sources.[32] Although in his time Martinus was influential enough to sometimes influence papal decretals and canon law opinions,[33] the prevailing opinion would, as mentioned above, ultimately be that of Bulgarus' school.[34]

There was also, as identified by Meijers and Cortese, a third approach to this issue, which depended on a different understanding *ius scriptum*. A minority of glossators, including Placentinus (d. 1192) and Carolus Siculus (*fl. c.* 1207-1215), argued that the extension of a rule (or, rather, of its *ratio*) by analogy (as the jurists put it, *de similibus ad similia*) to cases that did not fall within its words (e.g. the extension of a rule applicable to *depositum* to a case of *commodatum*) should not be seen as an applications of *ius scriptum* at all. A consequence of this was that, since the *lex Placuit* only referred to the fact that the *ratio aequitatis* should be preferred to the *ratio stricti iuris*, the rule must have referred only to cases where no written law was applicable and one had to proceed by analogy.[35] This means that a rule *de rigore* immediately applicable to a set of facts would not have to give way in favour of an equitable one extended by analogy. This third view was never a

[27] For an example of the interlinear gloss see Azo, *Summa Codicis*, *ad* C.3.1.8 (MS Paris BNF, lat. 4519, *f.* 49r). See for instance the reported text in the very well known edition of the *Corpus Iuris Civilis* by Hugues de la Porte (d. 1572), *CICiv, Vol. 4* (1560), col. 364. See also [2.3.1, 4] below.
[28] Quoted in Meijers, 'Le Conflit', p. 121, referring to Paris BNF, MS Latin, 4523, *f.* 15v.
[29] For the meaning of *interpretatio necessaria* and *generalis* see Cortese, *La Norma Giuridica, Vol. 2*, pp. 364-368, n. 4.
[30] This distinction, while rejected insofar as it permitted the judge to dismiss written laws in favour of unwritten equity, was still being referred to in later times in order to explain why C.1.14.1 could not have been referring to cases of disagreement between *aequitas scripta* and *rigor scriptum*. See Bartolus, *Super... Codicis Cum Additionibus* (1509) *ad* C.1.14.1, *ff.* 31v-32r.
[31] Recent authors have tended to accept the tradition as truthful. See e.g. Kantorowicz and Buckland, *Studies in the Glossators*, pp. 86-88; Meijers, 'Le Conflit', p. 119. However, the traditional view attributing to Martinus the preference for *aequitas rudis* has been disputed. See Cortese, *La Norma, Vol. 2*, p. 321, n. 42. Cortese himself has argued that Martinus, while arguably more liberal in the use of *aequitas* he admitted, still grounded the equitable powers of the judge in written law: '[Martino ammette] il ricorso a un'equità rude intesa non come criterio posto al di fuori dall'ordinamento, ma come una semplice 'equità non scritta' [...] desumibile in via di *extensio ad similia* da una *lex* [*scripta*] equitativa'. See Cortese, *ibid.*, pp. 324-8.
[32] See Charles Lefebvre, *Les Pouvoirs Du Juge En Droit Canonique* (1938), pp. 175-176. See also Meijers, 'Le Conflit', pp. 126-128.
[33] Lefebvre, *Les Pouvoirs,* p. 176. The solutions offered by Martinus were sometimes accepted and reached by the jurists of the rivalling school, but rationalised in terms consistent with adherence to the *aequitas scripta* or with the *ratio* or *mens* of written rules. Meijers, 'Le Conflit' pp. 133-134. Cortese has suggested that this sort of reasoning was that supported by Martinus in the first place. See n. 31 above.
[34] See Eduard Maurits Meijers, 'Sommes, Lectures et Commentaires (1100 À 1250)' (1933) 1 Atti del Congresso internazionale di diritto romano, p. 461. See also Kantorowicz and Buckland, *Studies in the Glossators*, p. 284. In the context of the debate the followers of Bulgarus mocked the use of *aequitas rudis* by referring to it as *bursalis*, or that devised *ex ingenio* or *corde* suo. See [2.5.5] below for references to equity in this sense as *aequitas cerebrina*, a practice that survived into early modern times.
[35] Meijers, 'Le Conflit', p. 125. Cortese, *La Norma, Vol. 2*, p. 352, n. 108. Placentinus, *Summula*, in Pescatore, *Beiträge, Vol. 2*, p. 10. Karolus de Tocco, *ad* C.3.1.8 (Paris BNF, MS Latin, 4546, *f.* 11rb) cited by Meijers, *ibid.*

very popular one, the rapid spread and endurance of the idea that the *lex Placuit* referred to *aequitas scripta* and *rigor scriptum* despite its reference to *ratio* makes this clear. One can also easily infer from the use most legists made of *aequitas* to reconcile conflicting sources that they were happy for equitable rules to be extended analogically *de similibus ad similia* to supplant rules they looked upon as rigorous and immediately applicable to certain facts.[36] Though it was a minority view, it still found some support among a few later commentators.[37]

Having presented the view which was to become the *communis opinio* among the legists, it should be borne in mind that the substantive meaning of what *aequitas* implied, i.e. what it was about, a rule that made it *aequa*, was (and, as shall be shown, was to remain) largely under-theorised. It is clear that *aequitas* represented a quality of certain laws and rules, but it is not clear to which quality it refers. Most times, *aequitas* appears broadly associated with the relaxation of harshness;[38] it was at times associated with flexibility and the avoidance of legal niceties to fit the facts of each case, in this sense exceptions and *bonae fidei iudicia* were seen as equitable in nature;[39] there are also some passages where it is sufficient for a rule to be more recent than another to be called equitable, presumably by virtue of its correction of an earlier rule.[40] When one adds to this that *aequitas* was not always contrasted with *rigor* but also with *bonitas*,[41] and that the meaning of *aequitas* seems to oscillate between absolute and correlative with another rule,[42] it becomes apparent that what the glossators left behind them was not the consistent doctrine it purported to be.

1.1.2. Later developments among legists

We have examined the root of the *communis opinio* and its genesis among the glossators. The later development of medieval scholarship around *aequitas* has not benefited from studies as detailed as those available for the earlier period. In any case, from what can be gathered by the later comments on C.1.14.1 of Bartolus (d. 1357), Bartholomaeus de Saliceto (d. 1411) and Paulus Castrensis (d. 1441), as well as that over C.3.1.8 of Baldus (d. 1400), the understanding of *aequitas* mainly continued to revolve around the previously established dichotomy of *aequitas scripta* and *aequitas non scripta*.[43] Some authors added a further distinction, that of *species* and *genus*. According to the rule that *generi per speciem derogatur*, whether *aequitas scripta* or *rigor scriptum* should apply would also depend on whether they were written *in specie* or *in genere*. Lefebvre traces this distinction back to Dinus Mugellanus (Dino Rossoni, d. c.1300).[44] Thus, if *aequitas* was

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[36] The Accursian gloss is filled with a rather liberal use of this device, on which see Lange, 'Ius Strictum', pp. 334-341.
[37] Notably in Jacobus de Ravanis (Jacques de Révigny, d. 1296), see Cortese, *La Norma, Vol. 2*, p. 352-353, n. 109.
[38] An example of this can be found in the Accursian gloss on the *actio furti* discussed in Lange, 'Ius strictum', p. 341.
[39] See Lange, 'Ius Strictum', pp. 323, 342.
[40] See Cortese, *La Norma, Vol. 2*, p. 340, n. 83.
[41] See the ordinary gloss *ad* 'bonum', C.5.14.8, *CICiv*, *Vol. 1*, col. 874 where *bonitas* and *aequitas* are opposed to one another in a way not dissimilar from the *aequitas-rigor* opposition that has been dealt with.
[42] For instance, in the example provided above of priority in time. This is explored further by Cortese, *La Norma, Vol. 2*, p. 349.
[43] See Bartolus, *Super... Codicis Cum Additionibus* (1509) *ad* C.1.14.1, *ff.* 31v-32r; Bartholomaeus de Saliceto, *Ad I, II, III et IIII Libri Codicis Commentarii* (1560), *ad* C.1.14.1, *ff.* 34v-35v; Paulus Castrensis, *In Primam Codicis partem Commentaria* (1575), *ad* C.1.14.1, *f.* 24v; Baldus, *Lectura Super Codice, Vol. 1* (c. 1490), *ad* C.3.1.8, *ff* 168v-169r.
[44] See Lefebvre, *Les Pouvoirs*, p. 192. The rule that *species derogat generi* goes back to D.50.17.80, but is also found in the added title *de regulis iuris* of the *Liber Sextus* listed as *regula* 34 - it is perhaps no coincidence that Mugellanus was also the compiler of that title. See VI.5, *De Regulis Juris*, 34. See also Dinus Mugellanus, *De Regulis Iuris* (1484), reg. 2, *ff.* 4r-4v and Petrus de

written in *specie* and *rigor* in *genere*, then *aequitas* would prevail, and *vice versa*. What this meant was that rules that specifically pertained to a certain factual situation should be preferred to broad statements of principle. Not all writers made reference to the distinction initially,[45] but it seems to have grown into wider acceptance over time. As mentioned earlier, a thorough examination of the position of later glossators and commentators is not available, but it seems that, apart from certain identifiable dissenting voices,[46] the preferred position was generally that *aequitas* should ultimately prevail if *rigor* and *aequitas* were both written *in specie* (and thus, presumably, also if they were both written generally).[47]

1.1.3. Aequitas in medieval canon law

The term *aequitas canonica* is used in various senses to refer sometimes to the spirit of canon law rules, to the kind of justice that these rules try to achieve, and to a principle of interpretation of those rules in light of its Christian aims.[48] My main concern in this paragraph is to provide a short account of how *aequitas* was discussed in the Middle Ages among canon lawyers and its relationship with the *aequitas* of civil lawyers as opposed to *rigor* or *strictum ius*, explored in the previous paragraph. As we shall see, while the development of *aequitas* had a rather distinctive history among canonists in the earlier period, in later medieval canon law the use of equity mirrored almost exactly that which we have observed among legists in the preceding paragraphs - it referred to written equity in the same sense and articulated the hierarchy against written rigour in the same way.

1.1.3.1. Canonists and *misericordia*

Cortese has in the past argued that 'il confronto tra il pensiero esposto [nella scuola dei Glossatori] e [nella scuola dei Canonisti] si rivela oltremodo incerto, soprattutto per via delle profonde differenze dei rispettivi linguaggi e dei valori disparati attribuiti ai medesimi termini.'[49] These words could not be more appropriate to the study of the early development of equity among canon lawyers, compared with its development among early glossators. The main difficulty when approaching the canonists' sources is the complex interaction between the *aequitas-rigor* opposition as discussed by the legists, and its interaction with the

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Bellapertica (Pierre de Bellperche, d. 1308) *ad* C.1.14.1 (in Cambridge Peterhouse MS. 34, *f.* 87v and Florence BML MS. Plut. 6 Sin. 6, *f.* 43rb). It is later found in Baldus, *Lectura Vol. 1*, *ad* C.3.1.8 (1490), *ff.* 168v-169r as well as among fourteenth-century canonists,

[45] For instance, Bartolus, *ad* C.1.14.1, *ff.* 31v-32r, makes no mention of it.

[46] As mentioned at n.37 above, some of the old disagreements among the glossators lived on, see e.g. Jacobus de Ravanis, *Lectura Super Codice* (1519) at *f.* 127v. Other views were rather disparate, for instance Cinus Pistoiensis (d. 1336) was more restrictive on the one hand, believing that the *rigor scriptum* that was later in time should prevail over a previous *aequitas scripta*, but, in his comment on C.3.1.8 he was also much more liberal, expressing the view that where *rigor scriptus* is expressed in uncertain terms, even *aequitas non scripta* can prevail over it. The diverging views are mentioned, albeit ambiguously, in Petrus De Ancarano (d. 1416), *In Quinque Decretalium Libros Facundissima Commentaria* (1581), *ad* X.1.36.1, n. 5, p. 326. For Cinus' view see Cinus Pistoiensis, *Lectura Super Codice* (1493) *ad* C 1.14.1, *f.* 17r and 3.1.8. *f.* 129r. Cinus' view was shared later on by other authors such as Antonius de Butrio (d. 1408), *Commentaria Super Secunda Parte Primi Decretalium* (1578), *f.* 101v and Alexander Imolanus (Alessandro Tartagni, d. 1477), *In Primam Codicis* (1576) *ad* C.3.1.8, *f.* 60vb. See also Lefebvre, *Les Pouvoirs,* p. 192.

[47] See e.g. Petrus de Bellapertica (d. 1308), *Lectura* (Cambridge, *Peterhouse MS. 34*, *f.* 87v), Bartolus *ad* C.1.14.1, *ff.* 31v-32r; Baldus, *Lectura Vol. 1*, *ad* C.3.1.8, *ff.* 168v-169r.

[48] see e.g. Paolo Grossi, 'Aequitas Canonica' (1998) 27 Quaderni Fiorentini 379.

[49] Cortese, *La Norma, Vol. 2*, p. 335, n. 74.

canonists' Christian tradition of opposition between *misericordia-rigor*.[50] The easiest way to disentangle the canonists' approach to *aequitas* from this difficulty is to spend a few words on the concept of *misericordia*, which the canonists inherited form patristic writings. The first generation of canonists were faced with a large corpus of discordant patristic, pontifical and conciliar texts which they had to harmonise. Among the principles of source-reconciliation that the canonists from Bernoldus Constantientis (Bernold von Konstanz, d. c.1100) to Gratian devised was that of *misericordia*.[51] *Misericordia* was the quality which the canonists opposed to the *rigor* of a number of sources which prescribed more restrictive measures or harsher punishments, either by setting them aside, or by mitigating them in light of more moderate statements in different sources.[52]

Up to the time of Gratian, this tension between *misericordia* and *rigor* did not carry any implications on the theme of *aequitas*, indeed the latter word itself was only seldom referred to, and then only loosely associated with justice, and never in opposition to *rigor* or *strictum ius*.[53] Across the twelfth century, as the importance of the study of Roman law increased, a number of *Summae* show the influence of certain Roman law sources (such as the *Brachylogus*), where *aequitas* is discussed in opposition to the *ius scriptum* - the opposition was rather undertheorised and it is not clear what these *Summae* made of the distinction between *aequitas* and *misericordia*.[54] By the end of the twelfth century, however, the proximity between the school of the glossators and that of the canonists, meant that the latter grew familiar with the tension between *aequitas* and *rigor* as debated by the glossators.[55] Thus, a number of thirteenth-century canonists including Stephanus Tornacensis (d. 1203), Johannes Teutonicus (d. 1245), Bartholomaeus Brixiensis (d. 1258), Bernardus Parmensis (d. 1266) and Guidus de Baysio (d. 1313) started identifying the idea of *misericordia*, closely linked with mitigation and Christian commiseration, with *aequitas*. Tornacensis, a pupil of Bulgarus, is generally regarded as the earliest canonist mainly to have drawn *misericordia* and *aequitas* together.[56] In the prologue to his *Summa in decretum Gratiani*, he addresses, like his predecessors, the issue of reconciling conflicting canonical rules, however, he does so distinguishing between canons given *ex rigore* and those given *ex aequitate*.[57] That the Roman law sources used in similar context by the legists were influential on the

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[50] Some authors, such as Caron, have sought to also identify a third influence on their writing, that of *epieikeia*. This is an inference which can only be made with extreme caution from the sources and is discussed at n.132 below

[51] Aside from Constantiensis, other canonists involved in this were Ivo Carnutensis (Yves of Chartres, d. c.1115), Algerus Magister (Alger of Liège, d c. 1131) and Petrus Abaelardus (Pierre Abélard, d. 1142).

[52] Lefebvre explains this tension as the opposition which survived between the Gregorian sources – strict and authoritarian – and many earlier ones, more flexible and lax. Lefebvre, *Les Pouvoirs*, p. 165.

[53] *Aequitas* appears only four times in the Gratian's *Decretum*. See Peter Landau, '"Aequitas" in the "Corpus Iuris Canonici"' (1994) 20 Syracuse Journal of International Law, p. 98. See also Lefebvre, *Les Pouvoirs,* p. 169 for the limited interest in *aequitas* in this period.

[54] Lefebvre argues that at this stage the equation of the two had not been made. Charles Lefebvre, 'Equité', *Dictionnaire de Droit Canonique* (1935-65)*,* p. 398. See e.g. the *Summa 'Cum in tres partes'* (c. 1170), *f.* 19v: 'Quod si aequitas iuri scripto contraria videatur, secundum eam iudicandum est.' Probably referring to an analogous passage in the *Brachylogus* at 4.17.2, see Eduardus Böcking (ed.), *Corpus Legum sive Brachylogus Iuris Civilis* (1829), p. 156: 'Sin vero aequitas iuri scripto contraria videatur, secundum ipsam iudicandum est'.

[55] See [1.1.1-2] above.

[56] See Landau, 'Aequitas', p. 102.

[57] See Landau, 'Aequitas', p. 99. That Tornacensis was familiar with the use of *aequitas* in the Roman law sources is clear from his letter to Pope Clement III (d. 1191) where he used C.1.14.1 to assert the Pope's sole discretion in reconciling rigorous and equitable canons. See George Conklin, 'Stephen of Tournai and the Development of Aequitas Canonica,' *Proceedings of the Eighth International Congress of Medieval Canon Law* (1988), p. 380, n. 19.

assimilation of *misericordia* and *aequitas* is unambiguous in Teutonicus' gloss on Gratian's *Decretum*. Teutonicus cites the *lex Placuit* (C.3.1.8 which prescribes that *aequitas* should prevail over *rigor*) as authority for the fact that *potius debet iudex sequi misericordiam quam rigore*.[58]

The relationship between equity and *misericordia* was initially not uncontroversial, some authors more straightforwardly identified the function of one with that of the other, for instance, Parmensis said that: 'aequitas rigorem mitigat. Unde aequitas intelligitur iuris relaxatio'.[59] Huguccio (Uguccione da Pisa, d. 1210) on the other hand argued that following *aequitas* meant simply to apply the *ius*.[60] Without exploring the nature of this debate in greater detail, it can be said that around mid-century a *via media* was found by Hostiensis (Enrico da Segusio, d. 1271) who agreed with Huguccio that *aequitas* is *ius*, but also thought that 'rigor non est ius, sed est iuris excessus in austeritate'. Having said this, he defined *aequitas* as *iustitia dulcore misericordiae temperata* and *motus rationabilis regens sententiam et rigorem*.[61] This definition of *aequitas* proved immensely popular among later canonists as well as legists[62] and moral theologians[63] as the general position of canonists about the relationship between *aequitas* and *misericordia*.[64] Its meaning was very broad indeed, it came to stand for the guiding spirit of canon law as a whole, of the legislator seeking to develop the law, and of the jurist and judge in its interpretation.[65]

The interaction between equity and *misericordia* among canon lawyers resulted in a double effect, the first one, which is discussed in the next paragraph, is that *misericordia* lost its role as a principle for the reconciliation of conflicting sources, and the legists' doctrine centred on *aequitas scripta* came to be adopted on this point. The second effect is that later canonists identified the content of *aequitas* with that of *misericordia*. In this sense the *aequitas* of canon lawyers, if indistinguishable from that of legists in terms of its operation as opposed to *rigor*, developed, as far as its content is concerned, a particular link with ideas of moderation or relaxation of the harshness of rules in the name of Christian commiseration which many authors have seen as peculiar to canon law. Perhaps in this sense only (that is, when referring to the qualities related to *misericordia* that canon lawyers associated with equity and which they saw as underlying the system of rules of canon law more generally) one may meaningfully refer to a distinct idea of *aequitas canonica*.[66]

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[58] See the ordinary gloss *ad* 'causae', C. 1 q.7 c.17 in *Corpus Iuris Canonici (CICan), Vol. 2* (1582), col. 802.
[59] Bernardus Parmensis, *ad* 'rigorem', X.5.39.32 in *CICan, Vol. 2*, col. 1903 . Cited in Lefebvre, *Les Pouvoirs*, p. 182. For other uses of *aequitas* as *misericordia* in this period see Lefebvre, *Les Pouvoirs,* pp. 181-183.
[60] Lefebvre, *Les Pouvoirs,* p. 183. Lefebvre argues that Uguccione had *aequitas scripta* in mind when making this point. But it may also be that *aequitas* undertook a more general meaning of law or justice when discussed in opposition to *misericordia*.
[61] See Lefebvre, *Les Pouvoirs*, p. 182. Hostiensis attributes *iustitia dulcore misericordiae temperata* to Cyprian, but the attribution has been doubted, see Amedeo Giannini, 'L'equità' (1931) 105 Archivio Giuridico 205.
[62] See e.g. Baldus at n.97 below, as well as Lucas de Penna (d. 1390), *Commentaria in Tres Libros Codiciis* (1597), *ad* C.12.19.12, n. 31. Lefebvre, *Les Pouvoirs,* p. 191.
[63] See [1.2.1.] below.
[64] See Pier Giovanni Caron, *'Aequitas' Romana, 'Misericordia' Patristica Ed 'Epicheia' Aristotelica Nella Dottrina dell''Aequitas' Canonica* (1971), pp. 91-111.
[65] Landau, 'Aequitas', pp. 101-102.
[66] See [1.1.3.3] below.

1.1.3.2. Canonists and the aequitas *of the legists*

As mentioned above, the assimilation of *aequitas* with *misericordia* caused the better developed principles of the glossators to take over the role that *misericordia* had served for the reconciliation of conflicting sources.

There is strong evidence that, from the mid-thirteenth century onwards, canonists were aware of the debate among the glossators around the discordance between the *lex Placuit* and the *lex Inter aequitatem*, and they did not hesitate to engage with it and offer their views. This should not come as a surprise, by the times of Gratian canonists and legists were drawn closer together and, as Lefebvre puts it, by the fourteenth century, they worked on similar matters, studied the same writings, and were inspired by the same sources.[67]

Canonists were aware of the debate about equity among glossators from the times of Tornacensis, when they started to adopt the language of *aequitas*. We have already mentioned that the opinions of the glossator Martinus Gosia drew support among canon lawyers.[68] Hostiensis already discussed the civilian distinction between *aequitas rudis* and *scriptum ius*, arguing that in certain circumstances (e.g. where what is at stake is the *periculum animarum*), *aequitas rudis* should be allowed to prevail over *scriptum ius*. We have already seen how Tornacensis and Parmensis started to use the language of *aequitas* interchangeably with *misericordia* in opposition to *rigor* in matters of source-reconciliation, and it is also clear that they were familiar with the issues raised by the civilians about the reconciliation of these conflicting Roman law sources.[69] In his gloss to X.1.36.11, Parmensis refers to the tension between the rule that a judge must have 'aequitas prae oculis semper' with the contrary one that 'ius sit praeferendum aequitati' and that equitable interventions are confined to cases where 'ius non invenitur expressum'. He follows the line of the legists by arguing that the two propositions refer to two different kinds of *aequitas*, the former proposition 'poteris intelligere de aequitate scripta, quae debet praeferri rigori iuris', while the latter is true 'de aequitate non scripta, quae tunc solum servanda est cum ius deficit'.[70] The better-theorised doctrine of source-reconciliation of the glossators soon put aside the role of *misericordia*.

By the times of Iohannes Andreae (d. 1348),the restrictive doctrine of the legists had been fully absorbed by the canonists.[71] Indeed, as mentioned above, the origin of the application of *species derogat generi* to writings on equity was attributed by Lefebvre to Mugellanus's commentary on the *Liber Sextus* and, according to Charles Donahue, it was through the debates of canon lawyers that the popular view that a later rigorous written law could take precedence over an earlier equitable one emerged - the corpus of debates among commentators and canonists was perceived as forming one body of complementary commentary on *aequitas*.[72] From the fourteenth century onwards, discussions of *aequitas* as opposed to *rigor* in canon law commentaries were indistinguishable from those of legists around C.3.1.8 and C.1.14.1. Some scholars have argued that the position changed towards the end of the fifteenth century - in particular, Pier Giovanni Caron has suggested that some later canonists introduced the possibility that *aequitas non scripta*

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[67] Lefebvre, *Les Pouvoirs,* p. 194.
[68] *Ibid.*, p. 176.
[69] See nn.56-6 above.
[70] See Parmensis *ad* 'aequitate', X.1.36.11, *CICan, Vol. 2*, col. 453. See also Lange, 'Ius Aequum', p. 331.
[71] See Iohannes Andreae, *In quinque Decretalium libros Novella Commentaria* (1581), lib. 1, c. 1, n. 9.
[72] See n.44 above and Donahue, 'Courts of Merchants', p. 15.

might prevail over *ius scriptum*. That, according to Caron is the effect of the words of Felinus Sandeus (d. 1503) in his *Commentaria*, where he argues that *licet aequitas non scripta non praeferatur rigori scripto* that may happen in cases where *pro aequitate non scripta concurrat praesumptio*.[73]

Not much research has been carried out on the later developments of the canonists' doctrine surrounding *aequitas scripta* and *non scripta* after the second half of the fifteenth century, but if Sandeus' position signified a change of direction, it was not one accepted by his contemporaries, or indeed by later authors. This can be gathered by looking at the later writings of Decius (Filippo Decio, d. c. 1535). In his comment to *De Regulis Iuris*, the position seems perfectly in line with the orthodox one reached by legists: 'Et quantum ad regulam hic quae dicit, quod aequitas praefertur rigori: primo regula intelligitur quando aequitas sit scripta: secus si scripta non sit: quia tunc rigor scriptus praefertur aequitati non scriptae: ut not. per glo. ubi Bar[tolus] et Salic[etus] per illum text[um] in [C.1.14.1] et idem glo. in [C.3.1.8] ubi Bal[dus] et Sali[cetus] per [*D*., 40, 9, 12, 1] et not. per glo. in [X.1.36.11] ubi Abb[as Panormitanus] et Imo[lanus] post alios. Secundo regula procedit in aequitate scripta in specie. Secus si esset scripta in genere: quia rigor scriptus in specie illi praefertur: ut no[tat] Cyn[us] Bal[dus] Ange[lus] et Sali[cetus] in [C.3.1.8] […] et Abb[as Panormitanus] in [X.1.36.11] ad hoc facit, quia species derogat generi'.[74] This exposition of equity can be found in canon law works well into the early modern period, indeed restated as late as the 1550s in authors such as Petrus Paulus Parisius (d. 1545), Marcus Mantua Bonavitus (d. 1582) and Agostinus Beroius (d. 1554).[75]

1.1.3.3. Aequitas canonica

By the fourteenth century the writings of canon lawyers on equity (usually found around X.1.36.11 and *VI.de.reg.iur.90*) and those of legists around C.3.1.8 and C.1.14.1 were treated as one body of doctrine. However, we mentioned above that there was an aspect of equity that seems to have been peculiar to canon law, and it is often associated with the expression *aequitas canonica*. The idea behind *aequitas canonica* may have derived its originality from the historical links between the concept of *aequitas* and that of *misericordia*.[76] Lefebvre has shown that, by the time of Baldus, *aequitas canonica* was referred to most often as the body of canon law rules in the context of contrasting their peculiar 'equity' with that of the civil law.[77] In this context, the meaning of the expression *aequitas canonica* was perfectly in line with the doctrine of equity as a

[73] See Caron, '*Aequitas' Romana*, p. 102. Caron attributes this to the influence of *epieikeia*, we return to this at n 132 below.
[74] Filippus Decius, *In tit. ff. De Regulis Iuris* (1556), *ad* reg. 90, p. 306.
[75] Petrus Paulus Parisius (d. 1545), *Commentaria Super Capitulo in Presentia Nec Non* (1522) *ad* X.2.19.11, *ff.* 25vb-26ra. Mantua Bonavitus (d. 1582), *Isagogicus Perquam Brevis Modus Ad Tollendos Fere Quoscunque Licet Inexplicabiles Argumentorum Nodos* (1544), pp. 201-205 ; Agostinus Beroius (d.1554), *In Primam Partem Libri Secundi Commentarii* (1578), *ad* X.2.19.11, p. 109. We shall return to this point when discussing the peculiar resistance of canon lawyers to the early modern association of *aequitas* and *epieikeia*. See [2.5.3].
[76] See [1.1.3.1] above.
[77] Lefebvre argues that Baldus was influential in distinguishing *aequitas* in *naturalis*, *civilis*, and *canonica* by reference to the system of rules from which the *aequitas scripta* was being applied. Lefebvre, *Les Pouvoirs,* p. 191.About the meaning of the expression *aequitas canonica*, Lefebvre explains that, for Baldus, 'il s'agit des dispositions canoniques elles-mêmes, de celles qui sont fondées sur les principes du droit canonique.' Baldus may have been influential on the development of notions of aequitas naturalis a nd civilis among early modern authors. See [2.3.4.2] below.

ground for rule-reconciliation centred on *aequitas scripta* explored above.[78] *Aequitas canonica* in the sense of *iustitia dulcore misericordiae temperata*, referred to the particular qualities of the justice that lay at the foundation of canon law – its *aequitas non scripta* – and at the same time to the peculiar qualities of those rules of canon law that counted as *aequitas scripta*. To cite Peter Landau on this point: 'Canon law [...] gave another definition of *aequitas scripta* than the authors of Roman law. The association of aequitas with the special canonical concept of *misericordia* was upheld by the prevailing tradition among the canonists.' [79]

The practical significance of this when it came to determine whether rules of canon law were to be preferred to civil law rules is not straightforward. First of all, it is not clear that medieval commentators always found rules of canon law to be actually imbued with such canonical equity and, when found rigorous, more equitable rules of civil law could prevail over them.[80] Secondly, even when canonists found rules of canon law superior to rules of civil law on account of their canonical equity, this did not automatically mean that they should always be preferred over the civil law, Lefebvre points out that some canonists thought the rigour of the civil law could be discarded only in certain circumstances, e.g. in ecclesiastical matters, and matters concerning the *minorum*.[81]

Pio Fedele has argued that 'l'*aequitas canonica* racchiude in sé un concetto canonistico originale, senza alcun riscontro nel diritto romano o in altro ordinamento giuridico secolare'.[82] Statements such as this can only be accepted if one accepts the narrow view of *aequitas canonica* advocated for here. Equity in canon law did not otherwise empower the judge with greater discretion than its civilian counterpart.

1.1.4. The use of equity in broader context

The discussion above has focussed on uses of equity in the context of its opposition to *rigor*, which – as has been shown – was the main focus of its development through medieval legal scholarship. However, equity in its more general meaning of justice was one of very broad application and was summoned in a number of other contexts. Helmut Coing has suggested that a way to understand the uses of *aequitas* outside of the specific doctrines of rule-discrimination described above, is to regard it as a concept encompassing a set of 'ideas' associated with justice, meekness and flexibility.[83] We shall here focus on two more specific uses of equity within medieval legal scholarship that ought to be acknowledged.

1.1.4.1. Equity as a principle of interpretation

The main argument developed through this doctoral dissertation is that equity – through the influence of legal humanism - would become associated with *epieikeia* in early modern times, and – as a consequence of this – it would be re-shaped from a mere synonym of abstract justice and quality of the law, into a doctrine of interpretation inspired by Aristotle's writings.

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[78] This is explained very clearly in Lefebvre, *Les Pouvoirs*, pp. 186-188.
[79] See Landau, 'Aequitas', pp. 99-103.
[80] See C. Lefebvre, G. Le Bras and J. Rambaud, *L'Âge Classique 1140-1378. Sources et théorie du droit* (1965) (*Histoire du Droit et des Institutions de l'Église en Occident*, ed. G. Le Bras, VII), p. 419.
[81] The meaning of *minorum* is not straightforward. Lefebvre, *Les Pouvoirs*, p. 187, translates this as '[les causes] des pauvres et autres personnes malheureuses'.
[82] Pio Fedele, *Lo spirito del diritto canonico* (1962), p. 245.
[83] Helmut Coing, *Europäisches Privatrecht I* (1985), p. 41.

This is not to say, however, that equity bore no relationship to interpretation in the writings of medieval lawyers. The point is that equity in its broadest sense of justice, meekness, laxity, was seen as the guiding principle of all judicial activity, including – of course – interpretation. We find it often mentioned in this sense. Baldus in particular claimed that equity is the foundation of the interpretation of laws and contracts.[84] An analysis of the role of equity in this sense has been provided by Vincenzo Piano Mortari. Piano Mortari shows that the conception of equity as the foundation of all interpretation lived on in the first treatises on interpretation written across the fifteenth and sixteenth century of Matthaeus Matasellanis (fl. ca. 1410), Bartholomaeus Veronensis (Bartolomeo Cipolla, d. 1475), Lanfrancus de Ariadno (d. 1488), Constantius Rogerius (fl. ca. 1463), Petrus Andreas Gammarus (d. 1528), Stephanus de Phedericis (Stefano Federici, fl. ca. 1496), and Andreas Alciatus, (d. 1550). As late as the times of Gammarus' *de extensionibus*, these authors did not associate equity with *epieikeia* or develop it as a substantive doctrine of interpretation.[85]

Further, there is the occasional use of *aequitas* as a synonym for *causa*, *mens* or *ratio legis*. For instance at C.8.52(53).2, the Accursian gloss explains the meaning of *rationem* as *rationabilem legem vel rationem, i.e. sive mentem sive aequitatem legis scriptae*. Here the phrase *aequitatem legis scriptae*, (the 'equity' of the written law) suggests that the 'equity' or justice underpinning the rule is identified with its scope, the reason why it was enacted (*ratio*) or the purpose it was meant to achieve within the legal system (*mens*).[86]

Finally, the use of equity as justice which came closest to playing an operative role within doctrines of interpretation is found in the context of the doctrines of *interpretatio extensiva* and *restrictiva*. Generally speaking, these doctrines were meant to aid the interpreter in understanding the words of the law, where it was unclear whether the legislator meant them in their usual sense or in some narrower or broader improper sense – treatises on interpretation generally provided a number of arguments, founded on rhetorical and legal authorities, that could be run in order to demonstrate that the legislator meant the law to apply more extensively or restrictively than the plain meaning of the words gives away.[87] Equity, in the sense of justice, is listed by some authors, for instance by Baldus as such an argument. If the plain meaning of the words would lead to an unjust result, this may be a valid argument to show that the legislator meant to use the words in an improper sense, either narrower or broader.[88] That said, in this example as in all others of the use of equity in the medieval *ius commune*, equity is not itself a doctrine of interpretation – it remains a

[84] See Baldus, *Super Codicis Commentaria* (1539), *Vol. 3*, *ad* C.6.55.9 (1539), *ff.* 179v-80r.

[85] Vincenzo Piano Mortari, *Ricerche Sulla Teoria Dell'interpretazione Del Diritto Nel Secolo XVI* (1956), passim.

[86] See the Accursian gloss *ad* 'aut legem', C.8.53[52].2, *CICiv*, col. 1695. For the use of *aequitas* in the sense of *causa*, *ratio* and *mens* see further Cortese, *La Norma, Vol. I*, pp. 268-271, 275-293, where similar examples are provided.

[87] I take this account of *interpretatio extensiva* and *restrictiva* from Stephanus de Phedericis' *De Interpretatione Legum* of 1496. Piano Mortari describes it as the most thorough of the late *ius commune*, see Piano Mortari, *Ricerche*, pp. 12-3. See Stephanus de Phedericis, *Tractatus de Interpretatione Legum* (1577), p. 8, 16ff: 'Aliquando [verba et mens legis] non invicem repugnant, sed se excedunt, quia aut plus vel minus scriptum est quam legislator voluerit. [...] Quo casu si quidem claris argumentis et rationibus comprehendi potest, plus vel minus esse intellectum quam scriptum tunc verba legis amplianda et restringenda sunt quatenus mente conceptum fuit.' This practice continued in early modern times, see Jan Schröder, 'The Concept and Means of Legal Interpretation in the 18th Century', *Interpretation of Law in the Age of the Enlightenment* (2011), pp. 96-8.

[88] Such an argument is not found in the treatises of Rogerius and De Phedericiis, but see e.g. Baldus *Lectura, Vol. 1*, *ad* C.1.14.5, *f.* 60r: 'Regula est quod stamus propriae significationi verborum [...]. Fallit si alia apparet mens legis, quae colligitur ex pluribus. Primo, si sensus proprius continet iniquitatem: et tunc intelligimus secundum improprium'.

synonym of justice, a quality of the outcome which raises a presumption as to the intentions of the legislator.[89] The operative doctrine is the relevant *interpretatio*, whether *restrictiva* or *extensiva*, not equity itself.

1.1.4.2. Proceeding and judging ex aequo et bono

Another, perhaps more important context within which equity can be found is that concerned with so-called proceedings *de aequitate* or *ex aequo et bono*. This was the expression that medieval lawyers adopted to describe proceedings by arbitration, by merchant courts, or other courts, broadly speaking, unbound by (any or some) rules. The number of studies concerned with this aspect of equity is limited – but a short study by Charles Donahue goes in some detail about how medieval lawyers thought about proceedings by equity. Specifically, Donahue points to passages in Bartolus' and Baldus' comments that connect passages in the *Digest* about *apices iuris* (e.g. D.17.1.29.4) with proceedings in courts where judgment is to be rendered *ex aequo et bono* such as the *curia mercatorum*.[90] Bartolus essentially thought that proceedings *ex aequitate* would involve avoiding *apices iuris*, that is, rules *qui veritatem negotii non tangunt,* which Donahue understands to mean 'procedural requirements that did not go to the truth of the matter.' Baldus similarly argued that *in curia mercatorum dicitur quod negocia debent decidi de bona aequitate, omissis solennitatibus iuris*.[91] As explained by Baldus this does not mean that such courts are allowed to disregard civil law rules altogether. Instead, they can avoid the procedural niceties which do not touch directly on the matter at hand. The practical application of these principles is not always straightforward. For instance, Baldus and Bartolus add that an *exceptio nudi pacti* cannot be opposed to another party in a court merchant because in this case *ius commune non intromittit se de detrahendo iurigentium, sed non adiicit et robur*. This seems to suggest that the reason a *pactum nudum* will be upheld by a court proceeding *de aequitate* is that – while such a pact would not be binding at civil law – there is nothing in the *ius commune* specifically meant to take away its binding power under the *ius gentium*. Not all jurists agreed that it was sufficient for a court to be able to proceed *de aequitate* to uphold a naked pact,[92] but Donahue has shown that, following the opinion of those two doctors, arguing that proceedings were 'equitable' (e.g. argued in a court merchant, or before arbitrators) became a viable argument to invalidate an *exceptio nudi pacti* - though how much power such an argument actually had in practice remains unclear.[93] The reasoning in the case seems to imply that a more lenient approach to the introduction of *aequitas non scripta* – even in the form of *ius gentium* - would be permitted, since a normal court would not be able to treat the rules of *ius commune* regarding *nudum pactum* as silent. The use of equity in the context of proceedings *de aequitate* seems consistent with the use of equity discussed above – the general idea being that courts allowed to proceed by equity, i.e. by reference to justice itself, would be bound to a lesser extent by written

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[89] Other examples of uses of equity in a similar way within legal doctrines of interpretation are provided in Piano Mortari, *Ricerche*, pp. 30-1.
[90] See Donahue, 'Courts of Merchants, pp. 6-7.
[91] See Donahue, 'Courts of Merchants', p. 9.
[92] For instance, Donahue cites Ludovicus Romanus (d. 1439) and Decius in favour of the view that only a court allowed to 'decide' (as opposed to proceed) according to equity would have been able to avoid an *exceptio nudi pacti*. This leaves open the question of whether courts able to 'decide' according to equity were, in the view of these authors, bound by any rules at all and in what way. See Donahue, 'Courts of Merchants, p. 27.
[93] Donahue, 'Courts of Merchants', p. 26.

law.[94] The question of equitable courts and of how their powers differed from ordinary courts according to medieval and early modern jurists remains in need of further research, but is not central to the argument in this thesis – as will become clear, the majority of early modern writers associating equity and *epieikeia* saw equity as a doctrine concerning all judges, regardless of the extent to which they were bound by rules of law.

By the times of Baldus, legal writers were increasingly aware of the multi-faceted nature of the concept of *aequitas* and at times attempted to disambiguate between its various meanings. Baldus identifies, referring (in a potentially corrupt passage)[95] to Jacobus de Belviso's (d. 1355) comment to the *Libri Feudorum*, five different meanings for *aequitas*:[96] 'Uno modo prout sumitur contra iniquitatem et dolum: ut [D.9.2.51, D.16.3.31]. Secundo modo dicitur equitas prout distinguit contra rigores et iuris civilis regulas, ut [C.6.2.20, D.45.1.91.3]. Tertio modo dicitur equitas ipsa mens et ratio legis, ut [D.27.1.13.2]. Quarto dicitur equitas ipsum ius et iusticia, ut [D.1.1.1], [X.1.36.11] et ibi Jo[hannes] An[dreae]. Quinto dicitur equitas temperantia sive equalitas, ut [C.6.20.17, C.6.20.19], cum [Nov.18.4pr. i.f.] ibi posita et [C.6.20.20.1], et [C.7.51.6], et dic ut ibi, et dicit Archi[diaconus (i.e. Guidus de Baysio)] quod equitas est dulcior misericordia temperata [sic]'[97] he proceeds then to cite four *Code* passages and a novel. The first distinction is not perfectly clear, and the passages cited in the *Digest* not fully illuminating, but it is likely to refer to the use of *aequitas* in the context of a person's state of mind or moral attitude.[98] More importantly, Baldus was aware of the different juridical meanings that *aequitas* could acquire, and he distinguishes accordingly between *aequitas* as opposed to *rigor*, *aequitas* as *ratio*, and *aequitas* as encompassing all *ius*. His last distinction shows he also had to deal with the increasingly popular canonist definition of *aequitas*.

1.2. *Aequitas* as *epieikeia*

As mentioned above, the concept of *epieikeia* was popularised through Aristotle's *Nichomachean Ethics* and *Rhetoric*. Aristotle developed a narrower idea from a broader one. In a broader sense a man who abides by *epieikeia* (i.e. a man who is *epieikes*) is 'a person who does not insist on their full due; a decent person',[99] the classic example being that of the creditor who allows his debtor some extra time when insisting on his right to immediate payment would cause the other economic hardship. From this, Aristotle derives the narrower legal idea that the law may sometimes need to be adjusted to fit the circumstances of particular cases, because the law can only provide universal statements about a matter (nature) which, being

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[94] The idea does not seem related to *epieikeia* – and it does not seem that it was expected that an arbiter judging a case *de aequitate* would necessarily depart from a rigorous rule, see e.g. Iason de Maino, *Lectura Insignis* (1514), *ad* C.3.1.8, *f.* 116r where he lists among the exceptions to C.3.1.8, alongside cases of written rigour/unwritten equity and equity written in genere/rigour in specie, also cases of *arbitrariis* 'i[n] q[uibus] iudex pot[est] seq[ui] rigore[m] scriptu[m] et non seq[ui] p[ro]ut libet'.
[95] See Donahue, 'Courts of Merchants', pp. 15-16, n. 81.
[96] Baldus, *Lectura ad Libri Feudorum* (1552), *ad* L.F.2.53(54), *f.* 101r. See also Norbert Horn, *Aequitas in Den Lehren Des Baldus* (1968), pp. 11-12, 238. Jacobus de Belviso *Commentarii in Authenticum et Consuetudines feudorum* (1511), *ad* L.F. 2.53(54), *f.* 105r.
[97] The latter appears to be a (confusingly worded) reference to the definition of *aequitas* prevailing among canonists, i.e. that of *iustitia dulcore misericordiae temperata*. See n.61 above.
[98] Although D.16.3.31 is clearly broader.
[99] Aristotle, *The Nichomachean Ethics* (2009), p. 98. See Leslie Brown's note at p. 235.

indefinite, cannot be contained in those statements fully. For Aristotle, when a law fails the purpose envisaged by the legislator because of its application to circumstances unforeseen, the judge has to intervene and set it aside in accordance with what the legislator would have done if he had foreseen the situation. This achieves a 'superior' kind of justice than that achievable by the mere following of the law (which Aristotle sees as a kind of justice in itself, albeit lower). The latter idea is the one which impressed later theologians and early modern lawyers the most; indeed the example used by Aristotle to illustrate the duty of the judge, that of the leaden rule of the artificers of Lesbos (sometimes called the *Regula Lesbia* or Lesbian rule) which can be bent to fit the shape of every stone, just like the judge adapts the law to the facts of each case, was a common theme among medieval and early modern theologians when they referred to *epieikeia*.

Legists and canonists were well acquainted with the works of Aristotle which they are known to have referred to and used to structure their arguments.[100] This has prompted a number of scholars to argue that various aspects of the thought of legists and canonists were influenced by the concept of *epieikeia*.[101] In order to engage with the ways in which medieval lawyers could have grown acquainted with *epieikeia*, a word must be said about the transmission of the works of Aristotle that dealt with it through the Middle Ages. The first source that reported *epieikeia* in its legal sense was a mid-twelfth century fragmentary translation of the *Ethics* now attributed by many scholars to the jurist Burgundio Pisanus (Burgundione da Pisa, d. 1193), but it is not clear how widely it circulated. The rise in popularity of *epieikeia* among philosophers was mainly due to the revision of that translation by Robertus Grosseteste (d. 1253) produced in 1246-1247.[102] Another event which may have increased its popularity was the appearance of the first Latin anonymous translations of Aristotle's *Rhetoric*, both in the mid-thirteenth century, one from Arabic by Hermannus Alemannus (d. 1272) and another one from Greek, probably by Bartholomaeus de Messina (*fl.* 1258-66).[103]

That said, a very important point concerning the potential adoption of *epieikeia* by lawyers is that all the translations referred to above merely transliterated the word *epieikeia* into Latin characters. None identified explicitly a relationship between *epieikeia* and *aequitas*. The first theologian to famously link *epieikeia* with *aequitas* was Thomas Aquinas (d. 1274) in his *Summa IIaIIae*.[104] This means that the medieval tradition of moral theological studies on *epieikeia* as *aequitas* which carried on from the Medieval through the early modern period is the most plausible source for any link to be found in the medieval concept of *aequitas* as developed by medieval legists and canonists and Aristotelian *epieikeia*.

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[100] See e.g. Helmut Coing, 'Zum Einfluß Der Philosophie Des Aristoteles Auf Die Entwicklung Des Römischen Rechts' (1952) 69 Zeitschrift für Rechtsgeschichte, Romanistische Abteilung 25. See also Norbert Horn, "Philosophie in der Jurisprudenz der Kommentatoren: Baldus philosophus" (1967) 1 Ius commune 104.
[101] For instance see Caron, '*Aequitas' Romana* and Horn, *Aequitas in Den Lehren des Baldus*. See also Boulet-Sautel, 'Equité, Justice et Droit', p. 6.
[102] For the circulation of Aristotle's *Nichomachean Ethics* in the medieval period see J. A. Poblete, 'Itinerario de Las Traducciones Latinas de Ethica Nicomachea Durante El Siglo XIII', Anales del Seminario de Historia de Filosofia 31 (2014) 43. For a focus on the development of *epieikeia* see D'Agostino, *La Tradizione Dell'Epieikeia Nel Medioevo Latino*, p. 41.
[103] See B. Schneider, 'Praefatio', *Rhetorica: Aristoteles Translatio Anonyma Sive Vetus et Translatio Guillelmi de Moerbeka*, ed. B. Schneider, Leiden, 1978.
[104] Aquinas, *Summa IIaIIae*, q. 120, art. 1. I refer to the Leonine edition of the *Summa*, see Aquinas, *Summa Theologiae* in *Opera Omnia iussu impensaque Leonis XIII edita* (1888-1906), which is conveniently available online at www.corpusthomisticum.org (last accessed 07-04-2018).

To evaluate the likelihood of such an influence, I will first deal with the medieval development of equity as *epieikeia* by scholastic theologians from Aquinas onwards and then with the potential effect of those writings on the concept of equity found among canonists and legists in the medieval period discussed above. The conclusion will be that, despite some arguments to the contrary, it does not seem that the medieval concept of *aequitas* was influenced by that tradition. Arguments about the influence of theological *epieikeia* over *aequitas* may, at best, be confined to indirect influence over single authors. Towards the end, the argument will be made that the closest medieval legal doctrine got to bringing together equity and *epieikeia* is to be found in the specific approach of certain authors to *interpretatio restrictiva* examined above– and indeed that specific approach to restrictive interpretation would be revived and expanded by early modern authors who sought to reconcile medieval theories of *aequitas* with Aristotelian *epieikeia*.

1.2.1. Epieikeia in Scholastic Moral Theology

That *epieikeia* was an important concept within medieval scholastic moral theology is well known.[105] The aim of this section is to glance over the uninterrupted tradition over *epieikeia* carried through the Middle-Ages.

1.2.1.1. Epieikeia in Aquinas

In the third chapter I return to the theory of equity found in Aquinas in order to assess its revival within the early modern period among late-scholastic theologians. For our present purposes it is sufficient to appreciate what the main features of Aquinas' theory of equity were, so that it can be usefully compared with the approach of lawyers.

As mentioned above, the first work which truly popularised *epieikeia* and which also drew an equivalence between that concept and *aequitas* was Thomas Aquinas' *Summa Theologiae* which started circulating between the mid-thirteenth century and the 1270s. Aquinas dealt in more than one place with the idea that harmful rules can be departed from.[106] One such instance was discussed by Aquinas under *quaestio* 120 of the *Summa IIaIIae*, which discussed *epieikeia*, *quae apud nos* – as Aquinas said – *dicitur aequitas*.[107] Aquinas follows the traditional Aristotelian understanding of *epieikeia* as being required because it is impossible for a good-willing legislator to foresee every case. Some laws that the legislator framed to serve the common good in the most frequent and foreseeable cases will defeat the legislator's intention in single unforeseen cases.

An important point, to which we shall return in the third chapter of this thesis, is that Aquinas in his *quaestio* 120 stressed that *epieikeia* was distinct from interpretation. Interpretation deals with cases where the wording of the law is ambiguous and needs elucidation. *Epieikeia* deals, rather, with cases where the wording is perfectly clear, but it is also perfectly clear that its application would be harmful to the common

[105] See generally, Riley, Epikeia, and D'Agostino, *La Tradizione dell'Epieikeia*.
[106] *IaIIae*, q.96, art. 6.
[107] Riley has argued that Aquinas was aware that *aequitas* had another, more general meaning of justice. See Riley, *Epikeia*, p. 31.

good and to the presumed intention of the legislator to serve it. It is not clear what the exact boundaries of *epieikeia* are for Aquinas. He sometimes says that, in order to be justified, *epieikeia* must be a case of emergency, where the legislator cannot be consulted, but in other passages he seems to deny that, making it instead dependent on the degree of certainty with which one can predict that the law is going to cause injustice.[108] Further, some passages suggest that he wished to confine its use to cases where the application of the law would violate natural law or harm the common good, some others seem to refer merely to the private good of citizens, and, finally others refer to all cases where it can be judged with prudence that the legislator would not have wanted his law applied to a case.[109] These opaque issues are still the object of debate among theologians.[110]

What is certain is that, to be legitimate, equity must not consist in departing from the just or from severity, and it would not pass a judgment upon the law (something forbidden by St Augustine) but merely on the single case.[111]

1.2.1.2. Later medieval scholastic development of epieikeia *in Egidius Romanus and Johannes Gerson*

It was not before the early modern period that Aquinas' ideas on equity would be developed to a great extent, authors in the Middle Ages seem to have either developed *epieikeia* independently from Aquinas or to have re-stated his points without taking them further.[112]

One of the earliest theologians to write about *epieikeia* after Aquinas was Egidius Romanus (d. 1316), and he seems to have also been a rather influential author on this topic.[113] Romanus argued that *epieikeia* is the means by which a judge fulfils the human need to show mercy (*clementia*) and piety (*pietas*). This is quite distinct from the idea of *epieikeia* developed by Aquinas. Guido Kisch has argued that this is due to Romanus's greater focus on Aristotle's *Rhetoric* rather than on the text of the *Nichomachean Ethics* that Aquinas relied upon. The *Rhetoric* stresses the moral character of *epieikeia*. This meant that, rather than focusing on the cases for which *epieikeia* is needed, which the legislator would not have foreseen, Romanus stresses instead the merciful attitude that a judge must show in everyday practice.[114] Kisch also hypothesizes that, given the familiarity of Romanus with Roman and canon law concepts, and following Aquinas' assimilation of *aequitas* and *epieikeia*, this may reflect an attempt by Romanus to bring the concept of *epieikeia* closer to the canon law definition of *aequitas* provided by Hostiensis as *iustitia dulcore misericordiae temperata*.[115]

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[108] I return to these difficulties at [3.2.1-2] below. See Riley, *Epikeia*, pp. 39-42.
[109] Aquinas, *Summa IIaIIae*, q. 60, art. 5 refers to natural law; *Summa IIaIIae*, q. 120, art. 1 refers instead to equality and the common good. For the last of the three see Aquinas, *Senentiae*, 4, dist. 15, q. 3, a. 1, sol. 4, ad 3. I return to this at [3.2.1.] below.
[110] Riley, *ibid..*, pp. 46-51.
[111] Rodriguez Luño, 'La Virtù dell'Epicheia', para. 3. See also Riley, Epikeia 28-32.
[112] *ibid.*, pp. 52-6.
[113] As a note for the English experience of *epieikeia*, it seems that Romanus inspired one of the first utterances of the concept by an English judge. See Fortescue CJ in his treatise *De Natura Legis Naturae*, 1,24 in Lord Clermont (ed.) (1896), pp. 95-6. Egidius Romanus's *De Regimine Principum* was very popular in England, where about sixty manuscripts of his *De Regimine* survive, for more see Charles F Briggs, *Giles of Rome's De Regimine Principum* (1999).
[114] Kisch, *Erasmus*, pp. 414-416.
[115] See n.61 above.

Another medieval theologian writing about equity influentially after Aquinas was Johannes Gerson (d. 1429). Like Romanus, Gerson may have been concerned with linking his ideas about *epieikeia* with the contemporary writings of canon lawyers. Evidence for this may be found in the lectures he delivered as Chancellor of the University of Paris to canon law graduates, where he deplored the fact that *epieikeia* was not a principle generally recognised in their discipline. These lectures have been discussed by Zofia Rueger, who shows that Gerson criticized canon lawyers for treating the written law as the Gospel, and sought to encourage legal reform based on *epieikeia*.[116] Gerson talked about *epieikeia* as an idea overlapping with dispensation, interpretation and good faith, as well as a 'means of harmonizing the rigor of justice and the severity of discipline with the leniency of mercy (*lenitate misericordiae*) and propitious pardon.'[117] Gerson was also aware of orthodox canon law definitions of *aequitas*, and probably sought to reconcile Hostiensis' broad principle of tempering law by mercy with the specific concern of *epieikeia* with special circumstances when he redefined *aequitas* as 'justice which, having considered all particular circumstances, is tempered by mercy' (*iustitia pensatis omnibus circumstantiis particularibus, dulcore misericordiae temperata*).[118] It should be pointed out that Gerson was not entirely consistent in his attempts to reconcile *epieikeia* and *aequitas*. Indeed he argued elsewhere (probably more accurately) that what the scholastic theologians called *epieikeia* was in fact called 'dispensatio' among the canonists.[119]

Be that as it may, the writings of Romanus and Gerson, while very influential, did not raise any issues that moral theologians returned to and, [120] as discussed later on, there is no clear evidence that the attempts by Romanus and Gerson to talk about *aequitas* in terms more familiar to lawyers were successful in persuading canonists and legists to adopt (or indeed to engage significantly with) the moral-theological understanding of *aequitas* as *epieikeia*.[121]

1.2.2. The influence of scholasticism on legists and canonists.

Having looked at the works of Aquinas, Romanus and Gerson, and especially in light of the specific attempts to engage with the equity of canon lawyers by the latter two, one might expect that, from the later thirteenth century onwards, the medieval doctrine of *aequitas* came into contact and was to some extent influenced by theological *epieikeia*.

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[116] Rueger has also rightly noted that, in doing this, Gerson anticipated the *epieikeia*-inspired polemic writings of the first generation of legal humanists addressed to traditional legal learning. See Zofia Rueger, 'Gerson's Concept of Equity and Christopher St. German' (1982) 3 History of Political Thought, pp. 8-10. Whether and how the writings of scholastic theologians such as Gerson influenced these views has not yet been established but Rueger has pointed out that Christian humanists such as Erasmus (d. 1536) 'conceded that Gerson's limitations were those of his times not of his mind'. See Rueger, 'Gerson and St. German', pp. 4-5. See [2.2] below.

[117] See Riley, *Epikeia*, p. 54, citing Johannes Gerson, *De Vita et Aegritudine et Morte Animae Spirituali Lectiones Sex* (1493), lect. 5, *f.* 63v.

[118] For Gerson's definition see Jean Gerson, *Oeuvres, Vol. 9* (1961), pp. 95-96, quoted in Rueger, 'Gerson and St. German', p. 11.

[119] See Jean Gerson, *Concerning Ecclesiastical Power* (1417), edited and translated in Jill Krayer (ed.) *Cambridge Translations of Renaissance Philosophical Texts, Vol. 2* (1997), p. 6. This seems consistent with the (rare) use of *epieikeia* by canonists, see e.g. Johannes Monachus at n. 123 below. See Gerson's *Tractatus de Potestate Ecclesiastica*, in Paris BNF MS. Latin 4359, *ff.* 30r-30v.

[120] Luño, 'La virtù dell'epicheia', 4. For the views of humanist writers see [2.2-4] below.

[121] See [1.2.2] below.

No comprehensive analysis of medieval legal writers referring to *epieikeia* has been undertaken to date, but there is at least one example of a discussion of *epieikeia* in a work of canon law, and that is the commentary to *Rem non novam*, a *decretalis extravagans* of Boniface VIII by Johannes Monachus (d. 1313), which became the ordinary gloss to that passage in the *Extravagantes Communes*. This was a decretal where the Pope held that a papal summons would be valid regardless of whether the defendant had been notified of it. In his gloss, Monachus deals with the question of whether one may proceed against a defendant without a summons, finding that it would be against natural law to permit it.[122] The main point for our purposes was that Monachus discussed the relationship between the Pope and human law. In doing so, he mentioned the power of the Pope to prefer unwritten equity over written law, and his power to dispensate in cases of urgent necessity and obvious benefit to the Church (*propter urgentem necessitatem vel evidentem utilitatem Ecclesiae*), comparing it with Aristotle's discussion of *epieikeia*, which, he argues, falls only within the powers of the Prince.[123] *Epieikeia* in Monachus is not assimilated with *aequitas* – indeed *aequitas* is discussed consistently with its orthodox treatment along the lines of written and unwritten equity. Further, the fact that Monachus confines the exercise of *epieikeia* to the power of the legislator indicates that Monachus saw a narrower scope for it than Aquinas and other theologians. Thus, while Monachus' use of *epieikeia* is evidence of some contact between legal writers and theological writers on *epieikeia*, and while it shows that the former could see the potential of that concept as a justification for legal doctrines, nevertheless it is evidence that it was not assimilated with equity.

Attractive as it is, the argument that the association of equity and *epieikeia* had any influence on the medieval development of *aequitas* among legists and canonist does not seem to be supported by the available evidence. Throughout our earlier discussion of the development of legal sources on equity, we have seen that no reference to *epieikeia* or to the arguments of theologians regarding it can be found up until the early modern period in civil and canon law writings on *aequitas*, and indeed well into that period for the canon lawyers.[124] Further, the idea of *aequitas scripta* – describing equity as a quality of written law, rather than a process of emendation or correction of written law, seems utterly incompatible with the idea of *epieikeia* – indeed this idea would be among the first to be explicitly challenged by early modern lawyers

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[122] For a fuller argument see Kenneth Pennington, *The Prince and the Law 1200-1600* (1993), pp. 160-2.
[123] C. Lefebvre, 'Natural Equity and Canonical Equity,' *Natural Law Forum*, (1963), pp. 132-133. Johannes Monachus *ad* Extrav. Com., 2, 3, 1, *non obstantibus*, in *Corpus Iuris Canonici, vol. 3,* (1582), pp. 226-232: 'Dic quod citatio est de pertinentibus ad iudiciarium ordinem. Iudiciarius autem ordo requirit, ut iudex quilibet ex aliquo iure procedat. Considerandum est primo, qualiter ad ius se habeat iudex, de quo nunc est sermo, videlicet Papa. [...] Circa primum sciendum est, [... quod] est quintuplex ius: scilicet aeternum, divinum, naturale, humanum derivatum a naturali ut conclusio ex principio, et humanum derivatum a naturali ut declaratio cuiusdam communis. [...] Supra nullam dictarum legum, et supra nullum dictorum iurium Papa potest, vel quicumque alter homo: quinto excepto [...] Nullus potest supra ius quod non condidit, sed conditum praesupponit, sed Papa vel purus homo nullum dicoturm iurium condidit [...] igitur supra nullum illorum potest. [...] [S]equitur ergo conclusio: scilicet quod Papa non potest nisi supra [...] ius pure positivum. Et sic patet primum principale. [...] Ad primum arg[umentum] in oppositum dic, quod Papa est supra ius in hoc quod ipse solus potest aequitatem non scriptam ex sui interpretatione praeferre iuri scripto [C.3.1.8 et C.1.14.1] unde ipse potest multa dispensando, quae non potest inferior [...], et si supra ius dispenset, hoc debet esse cum ratio postulat [...] utpote propter urgentem necessitatem vel evidentem utilitatem Ecclesiae [C.1, q. 7, cc. 15-7] non propter bursae repletionem illius cui providit [...] cum ex ipsius aequitate procedit iudicium: alias est dissipatio [...] non dispensatio [...] si aequitas, quae movet ipsum movisset legislatorem, si casus nunc emergens esset sibi expositus, ut habetur [Aristotle, *Ethics*, lib. 5, 10] ubi optime ponitur in fine tractatus virtutum moralium de epykeia, quae praecipue soli principi competit [X.1.7.1].'
[124] See [1.1.3.2.] above.

once the link between *aequitas* and *epieikeia* had been explicitly drawn in later legal sources.[125] The same seems to apply to uses of equity in the context of proceedings *ex aequo et bono*.[126]

That said, two scholars – Norbert Horn and Pier Giovanni Caron - have famously sought to argue in favour of a link between legal *aequitas* and theological *epieikeia*. Horn's arguments to that effect concern specifically uses of *aequitas* to be found in Baldus.[127] Horn argued that *epieikeia*-like reasoning ('Epikiedenken') could be identified in Baldus in relation to (what appear to be) two doctrines that Baldus calls *aequitas specialis* and *rigorosa aequitas*, both of which Horn interprets as doctrines permitting a judge to disobey a statute or a law for a good reason (such as the protection of the public good).[128] The two doctrines are problematic because they are expressed by Baldus in ambiguous terms, and because they are at odds with the orthodox learning about *aequitas scripta*, which Baldus seems to accept without difficulty.[129] Further, even if we accept Horn's argument that those theories meant to solve *epieikeia*-like situations, the lack of both any explicit reference to Aristotle or *epieikeia* and the lack of any reasoning along the lines developed by the moral theologians weakens the argument that Baldus intended to put *epieikeia* specifically into action when introducing these doctrines.[130] Be that as it may, it is not clear how many commentators followed Baldus' development of these two peculiar doctrines, and the aforementioned lack of reference to *epieikeia* by medieval commentators and the strict adherence to the orthodoxy of *aequitas scripta* by other authors (including Baldus himself) throughout the period weighs against taking Horn's argument too far.[131]

Caron, on the other hand, has argued that the development of *epieikeia* by moral theologians indirectly influenced some developments within the doctrine of *aequitas* among canon lawyers. Caron seeks to identify this as an indirect influence on some aspects of the interaction between equity and rigour. For instance, he argues that the gap-filling role that *aequitas non scripta* played in cases where no written source governed a case could be linked to *epieikeia*. Caron argues that the same goes for the definition of canonical equity found in Hostiensis. Finally, he links the influence of *epieikeia* to the relaxation of the doctrine of *aequitas non scripta* in Felinus Sandeus, which we have mentioned above, allowing it to intervene where a presumption occurred against the written law.[132] This does not take the argument very far. Aside from the lack of any explicit reference to *epieikeia* and the incompatibility of that doctrine with the canonists' treatment of *aequitas scripta*, it also does not seem that any of the aspects of the doctrine of *aequitas* linked by Caron to *epieikeia* bear any particular relation to either the doctrine of Aristotle or that of moral theologians: the gap-filling role of *aequitas non scripta* and the statement of Hostiensis do not have much to do with any doctrine of emendation or correction of written law. Regarding the statements of Sandeus on

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[125] See [2.3.] below.
[126] See n.94 above.
[127] Horn, *Aequitas in Den Lehren Des Baldus* (1968).
[128] See Horn, *Aequitas in den Lehren*, pp. 32-52.
[129] Horn, *ibid.*, p. 45. See also n.47 above.
[130] See Guido Kisch, *Claudius Cantiuncula Ein Basler Jurist Und Humanist Des 16. Jahrhunderts* (1970), 96.
[131] It should be noted that Baldus had a peculiar tendency to introduce original nomenclature in his arguments concerned with equity. Aside from the two ideas identified by Horn, one can also find in Baldus' comment to C.6.55.9 references to distinctions between *disposita aequitas*, *disponenda aequitas* , *aequitas motiva*, *aequitas precisa* and *aequitas abusiva*. Baldus, *Super Codicis Commentaria*, *Vol. 3, ad* C.6.55.9, *ff.* 179v-180r.
[132] See n.73 above.

the prevalence of *aequitas non scripta* over *rigor scriptus* in some circumstances, I have shown above that these do not seem to have been taken up by his contemporaries, and Sandeus does not seem to have sought to relate them to the writings of Aristotle or other theologians.[133]

It goes beyond our present purposes to identify the reason for the distinction between equity and *epieikeia* among medieval legal writers. Perhaps the most plausible argument that can be made at this stage is that the development of *aequitas* by legists and canonists, focussed as it was on equity as justice, and as a quality of the law articulated in *aequitas scripta* and *non scripta*, preceded the diffusion of Aristotle's ideas about *epieikeia* around Europe. By the time the latter became accessible, the comments on C.3.1.8, C.1.14.1 and related passages had settled in such a state of orthodoxy that they could not be upset by the newly-found equivalence of equity and *epieikeia* among theologians.[134] Further research on uses of *epieikeia* (or lack thereof) among medieval legal writers might further illuminate this issue. Be that as it may, the tentative argument put forward here seems consistent with the upset of medieval theories of equity brought about with the rise of legal humanism – part of the reason why the early modern writers mentioned in later chapters chose to reconceptualise equity as *epieikeia* was their readiness to dismiss medieval legal orthodoxy. A clean break with the doctrine of *aequitas scripta* was indispensable to any writer wanting to successfully assimilate equity and *epieikeia.*

As a final note, while there is no evidence of equity and *epieikeia* being assimilated in the doctrines of medieval legal writers, we have mentioned earlier a peculiar use of equity within a doctrine that came strikingly close to the *epieikeia* of theologians – that is, the role which equity played within Baldus' exposition of *interpretatio extensiva* and *restrictiva*.[135] In that case, the injustice resulting from the application of the words of the law understood according to their plain meaning, would raise a presumption regarding the intention of the legislator, which could be followed by the interpreter in order to read the words in an 'improper', narrower or broader meaning. Functionally, this is not *epieikeia* in its strictest, theological sense. It involves an interpretation of the words in one sense or another, rather than a case where their meaning is plain and unavoidably leads to injustice.[136] But the kind of interpretation involved where equity is mentioned in this case is very close indeed to the Aristotelian idea of *epieikeia* – there is, if not a correction or emendation, at least an interpretation of written law which departs from the letter (to some extent) in accordance with the intention of the legislator. The author, Baldus, in whose account this use of interpretation is stated very explicitly, did not make the link with Aquinas' or Aristotle's *epieikeia* explicit, indeed no reference to the concept of *epieikeia* is found. However, the connection did not escape those later authors who linked equity and *epieikeia*. As we shall see in the course of the argument in the following chapters, by the later sixteenth

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[133] See nn.73-75 above.

[134] A similar point is made by Lefebvre, Lebras and Rambaud, *L'Âge Classique*, p. 411-412: 'Toutefois, il ne saurait être question pour elle [i.e. l'*epieikeia*] de se substituer à l'équité canonique. La position de celle-ci est bien trop ancrée dans la tradition pour qu'elle [i.e. l'*epieikeia*] y parvienne.'

[135] See n.84 above

[136] See [1.2.1.1] above.

century, some early modern legal writers explicitly associated these aspects of medieval doctrines of interpretation with interventions of *epieikeia*.[137]

[137] The approach of Baldus, for instance, resembles that of Donellus see [4.2.3.3.] below.

Chapter 2 – The introduction and diffusion of *epieikia* in legal scholarship

2.1. Introduction

It has been known for some time, certainly since Guido Kisch's seminal work on early modern humanistic writings on equity, that, if the legists and canonists of the medieval period failed to draw any explicit connection between the concept of *aequitas* and that of Aristotelian *epieikeia*, a very noticeable change occurred in the sixteenth century among early legal humanists, starting with Gulielmus Budaeus' *Annotationes In Pandectas*, first published in 1508.[138] Not many studies are available on the early modern changes brought within legal scholarship by the association of equity and *epieikeia*. One of the few available, that of Jan Schröder in a recent article, argued that one can observe a shift away from the medieval doctrine centred on *aequitas scripta* at an earlier stage, but that such a change was (i) of little significance for the role played by equity and (ii) reversed towards the seventeenth century, when later early modern jurists turned back to *aequitas scripta* as the model on which to centre their analysis of equity.[139] This argument was not based on a detailed analysis of the origin and diffusion of equity as *epieikeia* among humanists, and other early modern legal writer. This chapter will examine the origins of the association of equity and *epieikeia* and its impact among the first generation of lawyers who adopted it, mostly legal writers influenced by humanism. As we shall see, Schröder's arguments are defensible only in the sense that early modern lawyers never adopted a theory of equity which would allow a judge to simply ignore the written law and give force instead to their own views about justice –this aspect of early modern equity had also been the object of research by Clausdieter Schott – however, it is neither correct to say that the role of equity was unaffected by these changes, nor that later early modern lawyers reverted back to a focus on *aequitas scripta*, at least not in the medieval sense that we have analysed so far.[140]

The questions that this chapter seeks to answer are as follows. First, can the legal humanists' change of attitude with regard to *aequitas* be related to any particular influences or causes? Secondly, did this new approach to *aequitas* lead to an identifiable and consistent 'doctrine' of equity as *epieikeia*, or did it simply produce a constellation of irreconcilable arguments? Regarding the first question, it will become apparent from an analysis of the humanists' approach to *epieikeia* that their theories were not – at least at the earliest stage - influenced by the development of *epieikeia* among medieval or contemporary theologians. Rather, I will argue that the reason behind the introduction of *epieikeia* in legal scholarship was the diffusion in early modern times of a new approach to Aristotle within humanistic circles. Indeed, the first writers to associate equity and *epieikeia* seem to have drawn on new, humanistic translations of Aristotle's works into Latin, produced by humanist philologists in the course of the previous century. As we shall see, this led these early

[138] See Kisch, *Erasmus*, pp. 177-226. Gulielmus Budaeus, *Annotationes in Pandectas* (1551). The renewed interest in equity was not limited to lawyers. For the debate among philosophers see François Rigolot, 'Nicomaque et La Règle de Plomb, Fictions Légitimes et Illégitimes de La Justice Montaignienne' (2001) 8 Bulletin de la Société des Amis de Montaigne 87. *Epieikeia* was referred to in many distinct areas, for instance, Bonifacius Amerbach used the notion of Lesbian rule in relation to religious matters, while Erasmus discussed it as a helpful skill for the historian. See respectively Myron P Gilmore, *Humanists and Jurists* (1963), p. 175 and Kathy Eden, 'Equity and the Origin of Renaissance Historicism: The Case for Erasmus' (1993) 5 Yale Journal of Law & the Humanities 137.
[139] Schröder, 'Aequitas Und Rechtsquellenlehre', passim.
[140] See [2.5.5] below.

authors to develop their approach to *epieikeia* independently from medieval sources - comparing the text of Aristotle with references to *aequitas* in both the *Corpus Iuris Civilis* and classical sources. Occasional references to *status* theory in this context suggest that the humanists' interest in rhetoric and dialectic may have also had an impact on their thoughts. The contact between this new approach to equity as *epieikeia* and the theories of theologians and the medieval *ius commune* occurred at a later stage, discussed in the fourth chapter of this thesis.

With regard to the second question, I shall argue that the thought of a significant number of legal humanists evolved towards a consistent doctrine, which departed from the medieval focus on *aequitas scripta* to form a new and original theory of equity as benign interpretation and amendment of the law. I will also look at the various approaches that were taken by those legal humanists who did not conform to that pattern, either developing other, ultimately less successful theories alternative to the medieval orthodoxy, or preferring to adhere more or less closely to the medieval ideas of *aequitas scripta* and *non scripta*.

In the section that follows, I will analyse the introduction of *epieikeia* in legal scholarship by Budaeus and compare it with the philological developments among fifteenth-century translators of Aristotle. After this, I will set out the theory of *epieikeia* produced by authors after Budaeus who departed from the medieval orthodoxy, including those, eventually most successful, who conceptualised equity as a doctrine of interpretation. In the fourth section, I shall set out the thought of those legal humanists who did not reject the medieval orthodoxy and sought instead to either prefer it to or reconcile it with Budaeus' philological points. In the fifth and final section I will look at the impact of the views of the humanists discussed above on later legal writers up until the early seventeenth century, to provide an outline of the spread of those ideas among later civil and canon lawyers.

2.2. The introduction of *epieikeia* in legal scholarship

2.2.1. Gulielmus Budaeus and the introduction of *epieikeia* in legal scholarship

Budaeus' *Annotationes in Pandectas*, published in 1508, is the first legal work to acknowledge the equivalence of *aequitas* with *epieikeia* explicitly. In this work, Budaeus made the argument that 'Aristoteles uno verbo epijces appellat quod nostri aequum et bonum dicunt et interdum aequitatem, ut Aristoteles epijcian.'[141] Budaeus' views on *aequitas* were clearly influenced by those of Aristotle on *epieikeia*, and he argues that 'aequum et bonum ius est, non illud quidem lege comprehensum, id est, legitimum, sed legitimi iuris emendatio.'[142] The amendment is required because 'lex [...] in universum loquitur necessitate coacta, tametsi id recte fieri nequit.'[143]

However, Budaeus does not provide a statement of great substance about the conclusions to be drawn from his views and it is not clear what exactly he thought his argument implied for the development

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[141] See Budaeus, *Annotationes,* pp. 9-10: 'Hac igitur ratione, τὸ ἐπιεικές, ut Aristoteles vocat, id est aequum et bonum, emendatio est iuris scripti. [...] Quod autem epicaizare dicunt, latine dici debet ex aequo et bono statuere, ex bono et aequo arbitrari, censere, aestimare, constituere'.
[142] Budaeus, *ibid.,* p. 10.
[143] Budaeus, *ibid.,* p. 10

of legal doctrine. Budaeus mentioned in passing that he thought Aristoteles' statements about *epieikeia* referred to supreme tribunals, but since Budaeus defines those courts as those *quae praescripto iuris usquequaque non adstricta sunt* – which seems to imply that they would have been allowed to prefer *aequitas non scripta* under the orthodox understanding of C.1.14.1 in any case – it is not clear whether this implied a significant departure from established doctrine. Budaeus does not engage with this at any length.[144] As we have seen above, while the medieval orthodoxy was to consider *aequitas* a quality of law which could find expression in writing, thus distinguishing *aequitas scripta* from *rigor scriptus*, Budaeus implicitly argued that *aequitas* could not find expression in written law, since it consisted in its amendment. Unfortunately, Budaeus does not address head on the inconsistency of that argument with the medieval orthodoxy on equity, nor does he draw any conclusions as to what the duties of the judge, magistrate and legislator should be in light of this. As we shall see, it was only after a few decades that jurists started to develop these aspects of Budaeus' argument and draw clearer conclusion as to what their implementation in legal practice implied.[145]

The only point Budaeus makes which is worthy of note is that, since *aequum et bonum* is a binomial pair synonym of *epieikeia*, then it follows that *aequitas* and *bonitas* are not to be understood as meaning different things. This led Budaeus to conclude that the author of the ordinary gloss, Accursius, was wrong when he distinguished *aequum* from *bonum*.[146] This is relevant in two respects. First of all, while for Accursius and later commentators 'ius est ars boni et aequi' meant that a legal system should balance rules which have *aequitas* with rules which, while rigorous (i.e. lacking *aequitas*) had to be upheld on account of their *bonitas* (something akin to public utility),[147] Budaeus' statement is incompatible with this view and seems to imply that *epieikeia* or *aequitas* alone is the hallmark of a legal system; this would not go unnoticed among later legal humanists.[148] Secondly, this statement is relevant because, as we shall see, it reveals the source for Budaeus' philological remarks; indeed, while the equivalence of *aequitas* and *epieikeia* had been pointed out in the thirteenth century by Aquinas, the translation of *epieikeia* as *aequum et bonum* was a feature of humanistic philological studies.[149]

In fact, Budaeus seems to have been either unaware of or, more probably, unconcerned with the arguments that theologians had made about the role of *aequitas* as *epieikeia*. The conclusions that Budaeus draws with regard to the role of *epieikeia* or *aequum et bonum* and their relationship with the law have little in common with those that were first developed by Aquinas and which - as shown below – had recently been elaborated upon by Cajetan.[150] The scholastic theologians had been rather specific about the role of *epieikeia*, confining it to the function of preventing the law from sinning in its application, and giving considerable

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[144] Budaeus, *ibid.,* p. 11.
[145] See below [2.3].
[146] Budaeus, *Annotationes*, pp. 9-10: 'Accursius hunc locum enarrans [i.e. D.1.1.1] aliud bonum esse censet, aliud aequum, nec satis hoc explicat [see Accursius *ad* 'Bono publico', D.41.3.1]. Nos vero rem animadversione dignam esse iudicantes explicandam latius censuimus. [Budaeus moves on to referring to the legal and non-legal sources using *aequum et bonum* as a binomial pair and, after explaining that the two are the Latin equivalent of *epieikeia* adds that] [m]ale igitur et inscite Accursius aequum et bonum distinxit.'
[147] See n.41 above.
[148] See [2.4.3] below.
[149] [2.2] below.
[150] See [1.1.3] above and [3.2.] below. See also Kisch, *Erasmus*, pp. 177-226.

thought to whether or not the judge should consult with a superior before disapplying a rule of suspect application. None of those considerations can be found in Budaeus' broad approach to *epieikeia*.

Budaeus' analysis is, instead, rather more concerned with making broad polemic points about the (as Budaeus understood it) rigorous and iniquitous approach to law that traditional jurists had developed. For instance, Budaeus refers to a passage in Cicero's *Pro Caecina*, where the latter criticises his opponent's insistence on the strict adherence to the letter of an interdict and adds that these words 'appositissime refelli possunt iurisconsultorum recentiorum cavillamenta, qui huiusmodi verborum aucupiis argumenta validissima elicere se credunt ad nova quaedam iuris dogmata constituenda, quasi unaquaeque syllaba iuris et civilis et pontificii vim suam quandam certamque obtineat.[...] [S]i tam aequi bonique studiosi quam iuris summi fuissent nec magis se iuris quam iustitiae consultos videri et esse exoptassent, immensa illa et numerosa commentariorum iuris volumina haud quaquam reliquissent, materiem et fomitem accendendarum litium, quibus nunc vita passim flagrat incendio quidem vix unquam deflagraturo, quippe causidicorum calumniatorumque commentis quasi facibus in dies invalescentibus iudicumque indulgentia litigiosis non satis infensorum veluti aura quadam aspirante.'[151] Elsewhere, he invites jurists and judges not to give in to *summum ius*, which he takes to be what *rigor iuris* or *strictum ius* was referred as by classical authors.[152] It is unclear whether by *summum ius* Budaeus meant merely legal justice (as Aristotle did) or a perversely literal interpretation of rules. Budaeus generally invites lawyers to be prepared to adopt a looser approach to the rules, having an eye to the justice in each case. This approach to *epieikeia* was clearly much broader than that accepted by scholastic theologians writing on the same theme. Indeed, while Budaeus was extremely influential over later civil lawyers writing about equity, they seem mostly to have referred to Budaeus in order to engage with his rejection of Accursius' distinction between *aequum* and *bonum*, for his statement that *epieikeia* is a synonym for the two words, and to recycle his series of quotations from classical authors on *aequitas* and *summum ius*.

One reason why Budaeus may not have been so interested in the arguments previously made by scholastic theologians and medieval commentators may be that, as mentioned above, his comment on D.1.1.1 was principally meant to correct the understanding of the text of the *Digest* in light of humanistic philological findings. In the next section, I will argue that this approach to the translation of *aequum et bonum* was the product of humanistic philological scholarship of the previous century.

2.2.2. Humanistic Aristotelianism: Leonardus Aretinus and *epieikeia* as *aequum et bonum*

The translation of *epieikeia* as *aequum et bonum* seems to have originated with the controversial Latin edition of Aristotle's *Ethics* by the humanist Leonardus Aretinus (d. 1444). Aretinus' approach was so influential

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[151] Budaeus, *Annotationes*, pp 12-3, where he refers to Cicero, *Pro Caecina*, 84.

[152] Budaeus' use of *summum ius* would also become greatly influential among later writers, and became recognised as a synonym of what medieval authors referred to as *rigor iuris* or *strictum ius*. The use of *summum ius* comes from the aphorism *summum ius summa iniuria*, a citation found in a variety of classical sources including Cicero, *De Officiis*, 1.10.33 and Terence, *Heautontimorumenos*, IV, 5, and popularised by Erasmus (d. 1536) as one of his adages, see Desiderius Erasmus, *Adagiorum Chiliades Tres* (1508), n. 998, *f.* 103v. For more on it see Kisch, *Erasmus*, p. 190.

that, by the end of the fifteenth century, it was common practice in humanist translations of Aristotle's texts to replace the medieval transliteration *epieikeia* with *aequum et bonum*.

The rise of humanism in the late fourteenth century fostered a movement to replace the Latin translations of Greek philosophical works made available throughout the Middle Ages, which, humanists thought, failed to reproduce the agreeable style of the original works. Though humanists are often remembered for their focus on Platonism, they did, at the very least from the point of view of philology, contribute to the study of Aristotle.[153]

Aretinus was an important contributor within this movement, producing a new translation of Aristotle's *Ethics* in the early fifteenth century.[154] In 1420, he published a treatise in defence of it, *De interpretatione recta*. This treatise works as a very helpful description of the aims that Aretinus had in mind as he embarked on this enterprise.[155] The most important of those, for our purposes, was not to leave any Greek words untranslated.[156] Among the many to which he objected, was the transliteration of επιεικεια as *epieikeia*, common to all previous translations of Aristotle. Instead, Aretinus decided to translate all references to *epieikeia* found in Aristotle's fifth book of the *Nichomachean Ethics* as *aequum et bonum*. He defended his choice explaining that "'Epiichia' est iustitiae pars quam nostri iurisconsulti 'ex bono et aequo' appellant. 'Ius scriptum sic habet – inquit iurisconsultus – debet tamen ex bono et aequo sic intelligi, et aliud ex rigore iuris, aliud ex aequitate.' Et alibi inquit: 'ius est ars boni et aequi.' Cur tu ergo mihi 'epiichiam' relinquis in Graeco, verbum mihi ignotum, cum possis dicere 'ex bono et aequo', ut dicunt iurisconsulti nostri? Hoc non est interpretari, sed confundere, nec lucem rebus, sed caliginem adhibere."[157]

Aretinus' translation enjoyed great popularity throughout the fifteenth century.[158] And, though its currency had greatly diminished by the mid-sixteenth century, its translation of *epieikeia* into *aequum et bonum* had a lasting impact. It was followed by Iohannes Argyropoulos (d.1487), who produced probably the most popular early modern translation of the *Ethics* about half a century after Aretinus.[159] The same can be said for the translation of *epieikeia* in other works: when Georgius Trapezuntius (d. 1472) produced a new

[153] For a brief introduction to the transmission of Aristotle in this period, with particular reference to his *Nichomachean Ethics*, see Charles B Schmitt, 'Aristotle's Ethics in the Sixteenth Century: Some Preliminary Considerations' in Walter Rüegg and Dieter Wuttke (eds), *Ethik im Humanismus* (1979).

[154] Leonardus Aretinus, *Aristotelis Stragyritae Ethicorum* in Jacobus Faber Stapulensis, *Decem Librorum Moralium Aristotelis Tres Conversiones* (1535), *f.* 141r-182r.

[155] Leonardus Aretinus, 'De Interpretatione Recta', in Rome, Biblioteca Angelica, MS Manoscritti 141. For a modern edition see Paolo Vitti, *Sulla Perfetta Traduzione - Leonardo Bruni* (2004). Alternatively, for convenience, see the Latin text available online at: https://la.wikisource.org/wiki/De_interpretatione_recta (last access 31/03/2018). On the humanistic approach to translation and Leonardus Aretinus see Paul Botley, *Latin Translation in the Renaissance* (2004). Latin translations of the *Ethics* continued to be an important genre through the sixteenth century, and at least seven other full translations were produced in the course of the sixteenth century. See Schmitt, 'Aristotle's Ethics', pp. 102-3.

[156] Aretinus, 'De Interpretatione Recta', cap. 2: 'Quid de verbis in Graeco relictis dicam, quae tam multa sunt, ut semigraeca quaedam eius interpretatio videatur? Atqui nihil Graece dictum est quod Latine dici non possit! [...] Enim vero, quorum optima habemus vocabula, ea in Graeco relinquere ignorantissimum est.'

[157] Aretinus, 'De Interpretatione Recta', cap. 2.

[158] Schmitt, 'Aristotle's Ethics', pp. 98-9.

[159] See Kisch, *Erasmus*, pp. 475-6. See Johannes Argyropoulos, *Aristotelis Ethicorum Libri Decem* in Stapulensis, *Decem Librorum Moralium Aristotelis Tres Conversiones*.

translation of Aristotle's *Rhetoric* in 1443 he also translated all references to *epieikeia* as *aequum et bonum*,[160] and Georgius Valla (d. 1500) in his translation of the *Magna Moralia* translated *epieikeia* as *aequitas*.[161]

These developments in humanist philology may provide an explanation for the introduction of *epieikeia* in humanist legal writings from the early sixteenth century on. First, by the sixteenth century, the humanist translations of the *Ethics*, *Rhetoric* and *Magna Moralia* were in wide circulation, and these translations were likely to find favour with jurists of a similar inclination. Secondly, it is important to note that Aretinus himself thought that the main justification for adopting such a translation was the use of *aequum et bonum* by jurists, which, whether justified or not, may have made the connection all the more appealing to legal humanists. It may thus come as no surprise that a jurist such as Budaeus, concerned as he was more with philological and linguistic accuracy than legal doctrine in his exposition of the Roman sources, seized the occasion for introducing the popular juxtaposition of *aequum et bonum* to *epieikeia* in his commentary to *Digest* passages referring to those terms.[162]

2.2.3. A new approach to *aequitas*

Reading Budaeus' argument as a mere acknowledgment of a change in philological scholarship may explain why his account of *aequitas* as *epieikeia* bears little resemblance to the ones found in the theological writings that had made a similar link since the thirteenth century.

First, while occasionally referring more generally to *aequitas*, Budaeus explicitly draws a link between *epieikeia* and the binomial pair *aequum et bonum*, mirroring the approach taken by Aretinus and Argyropoulos.[163] As mentioned above, Budaeus took the use of *aequum et bonum* as a pair seriously, and this led him to his principal disagreement with the medieval understanding of D.1.1.1. While Accursius and all medieval jurists after him commenting on passages where these words appeared distinguished *aequum* from *bonum*, Budaeus thought this reflected an important misunderstanding of how these words were used and what they meant. Budaeus relied on a number of references from the *Corpus Iuris Civilis* and from classical sources to show that, among Roman jurists and classical authors, the two words were always used together to signify a single concept, and he identified that concept with *epieikeia*.[164]

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[160] Georgius Trapezuntius, *Aristoteles Rhetoricorum Libri III* (1523), *f.* 117r. Compare with the medieval translations of the rhetoric in *Aristoteles Latinus: Rhetorica*, Vol. *31, 1-2* (1978). For more information on the transmission of the rhetoric see Charles *f.* Briggs, 'Aristotle's Rhetoric in the Later Medieval Universities: A Reassessment' (2007) 25 A Journal of the History of Rhetoric 243.

[161] For Valla see Jacobus Faber Stapulensis, *Decem Librorum Moralium Aristotelis Tres Conversiones* (1535), *f.* 127v. Compare with the medieval translation by Bartholomeus de Messina (d. before 1266) in Rome, Biblioteca Apostolica Vaticana, MS Pal. Lat. 1011, *f.* 142r.

[162] It is perhaps telling that a book edited by Jacobus Faber Stapulensis (d. 1536) which included three translations of the *Ethics* (by Bruni, Argyropoulos, and Grosseteste), as well as Valla's translation of the *Magna Moralia*, dedicated the latter part to Budaeus. See Jacobus Faber Stapulensis, *Decem Librorum Moralium Aristotelis Tres Conversiones* (1535), *f.* 116r (reference to Budaeus). Previous editions of the book, such as the Paris 1505 and 1497 editions also include the dedication to Budaeus, but the pages of the copies I have seen are not numbered.

[163] Budaeus' description of *epieikeia* mirrors closely the wording preferred in Argyropoulos' version: 'Nam aequum et bonum iustum est [...] non autem lege: sed emendatio legitimi iusti.' Budaeus has: '[aequum et bonum] ius est, non illud quidem lege comprehensum, id est, legitimum, sed legitimi iuris emendatio'. See Argyropoulos, *Aristotelis Ethicorum*, *ff.* 57v-58r.

[164] As far as Roman law sources are concerned, Budaeus refers to D.44.7.2.3, D.44.7.34, D.45.1.91.3, D.47.12.10, D.48.19.16.1. The classical sources used to make the same point are Cicero, Columella, Quintilian, Svetonius and Terence. See Budaeus, *Annotationes*, pp. 10-16.

To conclude, Budaeus' lack of concern for the legal and philosophical consequences of his statement probably reflects his greater concern with correcting what he saw as important philological misgivings in the orthodox interpretation of Roman sources. His concern seems rather to show that the uses of *bonum et aequum* in *Digest* sources and classical authors are broadly consistent with Aristotle's statements about *epieikeia*, as had been recognised by translators of the latter since the 1420s. His more general polemic points are typical of some other humanist legal writings, which sought to link the narrow scholastic approach taken by legal scholars to what they saw as the dire conditions of legal scholarship and practice.[165]

Budaeus' work was greatly influential among humanist legal authors in spreading the theoretical and philological points it introduced. Kisch has shown that Udalricus Zasius (Ulrich Zasius, d. 1536), Andreas Alciatus (Andrea Alciati, d. 1550), and Claudius Cantiuncula (Claude Chansonnette, d. 1549) drew on Budaeus' *Annotationes* to identify *aequitas* with *epieikeia*.[166] Piano Mortari has also shown that by the mid-sixteenth century, it was commonplace for French jurists who were close to the movement of legal humanism to similarly assimilate *aequitas* and *epieikeia*.[167] Confirming these findings, we shall see below that the vast majority of civil lawyers more generally, and not only French legal humanists, followed this view throughout the period.[168] Unlike Budaeus, however, some of these later authors were more experienced lawyers, and they were more concerned than he was with the doctrinal consequences of assimilating the received learning on *aequitas* with Aristotelian *epieikeia*.

What should be pointed out at this stage, is that the lack of an in-depth legal or philosophical analysis within Budaeus, as well as the absence of any references to the scholastic analysis of *epieikeia*, apparently left later jurists with a clean slate on which to develop their own thoughts on *epieikeia* and *aequitas*. And indeed, it seems that later legal writers drew on a variety of sources when developing Budaeus' idea as a legal doctrine, including Aristotle, authors from Latin antiquity, the *Corpus Iuris Civilis* itself, and rhetoric theory.

2.3. *Aequitas* in legal humanism I: Challenging the medieval orthodoxy

In this section we shall look at the way in which later legal humanists, who added a concern for legal doctrine to Budaeus' focus on philology, took forward the connection between *aequum et bonum* and *epieikeia*. At this stage, it is useful to provide an outline of the range of ideas that sprung out of early writings which departed from the medieval understanding of equity. There are essentially four authors who wrote about equity

[165] For a work written in a similar vein see e.g. Juan Luis Vives, *Aedes Legum* (1519). On Vives' work see Kisch, *Erasmus*, pp. 69-89.
[166] See Kisch, *Erasmus*, pp. 280-343.
[167] Vincenzo Piano Mortari, 'Aequitas E Ius nell'Umanesimo Giuridico Francese', pp. 141–279 finds references to it in Franciscus Connanus (François Connan, d. 1550) at pp. 176-177, Eguinarius Baro (Eguinaire Baron, d. 1550) at p. 181, Franciscus Duarenus (François le Douaren, d. 1559) at pp. 184-185, Franciscus Balduinus (François Baudouin, d. 1573) at p. 200, Johannes Corasius (Jean Coras, d. 1572) at p. 208, Jean Bodin (d. 1596) at pp. 214-215, and Charondas (Louis Le Caron, d. 1613) at p. 252. See also the reference to *Regula Lesbia* by Pierre Coustau in his *Pegma cum narrationibus philosophicis* (1555) discussed in Valérie Hayaert, *Mens Emblematica,* pp. 245-263.
[168] See [2.3] below.

significantly in the early period from 1525-1545, and we consider them chronologically. The first author we will look at is the most important, that is, Marius Salamonius. Salamonius was the first author to write meaningfully about equity after Budaeus, and he was also the forefather of the most successful doctrinal tradition that the association of equity and *epieikeia* would engender – that is, that which re-conceptualised equity as a doctrine of interpretation of the law in accordance with the intention of the legislator. After Salamonius we consider the writings of Claudius Cantiuncula (Claude Chansonnette, d. 1560), another early author whose original approach to equity/*epieikeia* did not enjoy the same success as Salamonius'. I then consider the theories of Philipp Melanchthon (d. 1560) and Johannes Oldendorpius (d. 1567), their approach can be seen as belonging to a peculiarly Lutheran tradition on equity which, though ultimately not as influential as that of Salamonius's, lived on through the specific medium of legal dictionaries and reference works for several decades.

Having looked at the theories of these early authors, we will then look at the consolidation, from the 1550s onwards, of the view of Salamonius in the hands of later writers – most influentially Franciscus Connanus (d. 1551) and Franciscus Duarenus (d. 1559) – and of its development into a theory of interpretation of the law in accordance with the wishes of the legislator. The main doctrinal features of this new approach to equity and the extent to which they were shared by later writers will be considered in conclusion.

2.3.1. Marius Salamonius and *aequitas* as interpretation

Marius Salamonius (Mario Salamoni degli Alberteschi, d. 1533/4) was a Roman humanist, political theorist and jurist of repute between the late fifteenth and first half of the sixteenth century.[169] With his *Commentarioli*, first published in 1525, he was also the first legal scholar to develop a doctrine of equity drawing from Budaeus' remarks in the *Annotationes*.

Unsurprisingly, Salamonius's considerations over the concept of *aequitas* are found within a commentary on D.1.1.1, at the very beginning of his work, mirroring that found in Budaeus' *Annotationes*, and indeed Salamonius seems to have been heavily influenced by Budaeus' work. Salamonius follows Budaeus in his philological considerations, his argument is therefore focussed on the meaning of 'ars boni et aequi' and he criticises both Accursius and Bartolus for having distinguished *aequum* from *bonum*. He follows Budaeus in treating *aequitas* and *aequum et bonum* interchangeably.[170] Like Budaeus, Salamonius adopts at the outset a rather general polemic tone, arguing that the true qualities of jurists lie in their capacity

[169] For a few details on Salamonius' life see Paolo Carta, 'Salamoni degli Alberteschi, Mario in *Dizionario Biografico dei Giuristi Italiani (XII-XX secolo)* (2013), pp. 1766-7. See also Lucio Biasiori, 'Salamoni degli Alberteschi, Mario', *Dizionario Biografico degli Italiani* (2017), available online at: http://www.treccani.it/enciclopedia/salomoni-degli-alberteschi-mario_(Dizionario-Biografico) (last accessed 31/03/2018); Vittorio Cian, *Un Trattatista Del 'Principe' A Tempo Di N. Machiavelli* (1900).

[170] Salamonius, *Commentarioli in librum I Pandectarum* (1525), p. 7: 'Accursius putat aliud bonum et aliud aequum ius esse, quae Bar[tolus] ansam praebuit multa de, 'Et', coniunctiva dicere. Impertinenter sane et non suo loco labor susceptus, nam hae duae dictiones bonum et aequum unum eundemque significatum habere in omnibus iuris partibus videmus. Sic Aristoteles, sic oratores et scriptores omnes.' See Budaeus at n.141, 163 above for treating *aequum et bonum* as *aequitas*.

to discern justice from injustice rather than to merely know the law.[171] Unlike Budaeus, however, Salamonius goes on to discuss *aequitas* as a legal doctrine.[172] We may summarise the points made by Salamonius under two headings. The first concerns the definition of equity, as we shall see, Salamonius thinks it is a branch of unwritten law. The second concerns how equity should operate, Salamonius distinguishes between its role as an interpretive tool in the hands of judges, and its role as a corrective tool in the hands of the legislator and magistrates with *imperium*.

2.3.1.1. What equity as epieikeia *is*

Referring to Aristotle, Salamonius argues that *aequitas* is one of two kinds of law (*ius*), the other kind being *legitimum ius*, i.e. that which is found in written laws and customs. *Aequitas* is rather law that is not found in writing. As he puts it: 'Iuris vocabulum generale est, cuius species sunt ius legitimum, et id quod bonum et aequum est. Ideo Aristoteles dixit non idem esse simpliciter, nec aliud genere. Quando iuris vocabulum aequitati obiicitur, semper ius legitimum intelligitur id est in tabulis, aut moribus utentium expressum. Aequitatis autem verbo ius non legitimum significatur, et per hoc nullo scripto comprehensum. [...]. Est enim ius latissimum profundissimumque supra captum humanum.'[173]

Salamonius sometimes describes *aequitas* as an unwritten source of law, but it seems that it would be more precise to say that *aequitas* is defined by its interaction with written law, it is perfect reason which 'scripto accedit, interpretando, emendando, molliendo, comprimendo, dilatando, ut rei natura exigit'.[174] It seems that Salamonius sees its operation as limited to exceptional cases, for in most cases the law will straightforwardly apply to a set of facts without causing manifest injustice and the judge should in all those cases merely follow the written law.[175]

This definition of *aequitas* requires Salamonius to deal with the medieval orthodoxy on *aequitas scripta*. Salamonius is rather ambiguous in its treatment. On the one hand he says that 'vereor vera ne non sit illa distinctio de aequitate scripta et non scripta, quia improprium videtur aequitatis scripto contineri, quin in aliam speciem et nomen iuris transeat'.[176] He takes this to be confirmed by D.1.2.2.5, where Pomponius explains that the law that jurists and judges devise from no writing is generally known, as soon as it is laid down, as *ius civile*. Rather, Salamonius sees *aequitas* as linked indissolubly with written law, for one may not exist without the other, indeed 'antequam lex ulla scriberetur, nullum discrimen erat inter ius et aequitatem, et veluti dicimus ante servitutem manumissiones fuisse incognitas, sic ante ius scriptum, ius bonum et aequum incognitum'.[177]

Salamonius does not, however, conclude from this that the distinction between law that is rigorous or equitable is useless. He argues that the reason an equitable law will trump a rigorous one is that two

[171] Solomonius, *ibid.*, p. 5: 'de quibus rebus leges loquuntur non difficile est intelligere, sed iusta facere maius negotium est [...], Quintilianus [ait quod] quae scripta sunt, aut posita in more civitatis, nullam habent difficultatem, cognitionis sunt enim non inventionis. Ars itaque Iureconsulti idest boni et aequi viri in aequitate colenda consistit, quae nullo scripto, sed sola recta ratione continetur, et ingenio sapientis concipitur duce iustitia atque magistra.' *Inventio* is discussed below at [2.3.6].
[172] Salamonius, *ibid.*, pp. 6-13.
[173] Salamonius, *ibid.*, pp. 10-11.
[174] Salamonius, *ibid.*, p. 13.
[175] Salamonius, *ibid.*, p. 14: 'Lex scribitur de iis quae frequenter accidunt. Aequitas exercetur etiam in iis, quae rarius.'
[176] Salamonius, *ibid.*, p. 11.
[177] Salamonius, *ibid.*, p. 11.

contrary laws may not co-exist, and the equitable one is taken to be an amendment of the rigorous.[178] But that does not mean that a law which is equitable is 'written equity', nor does the fact that a law is rigorous or equitable have anything to do with its being written or not, it has rather to do with its interpretation and application to the case at hand.[179] He refers to the legal issues of *scriptum et voluntas* as the kind of legal question where *aequum et bonum* and *strictum ius* will be at odds.[180] So, for Salamonius, any question of *strictum ius* or of *aequum et bonum* is about interpreting a certain writing or saying, and just like interpretation comes from what is not in writing and 'sicut interpretatio extrinsecus ex non scripto venit, sic ius strictum vel aequum dici non potest scriptum'.[181] Salamonius distinguishes instances of *strictum ius* where one defends a narrow reading of the words of the law from those where one seeks to allege that the will of the drafter was that words be interpreted in an absurdly literal way – the distinction is not altogether transparent from Salamonius' text,[182] but he refers to Cicero to define the latter kind of over-subtle interpretation as a trickery (*calumnia*) and the epitome of the maxim *summum ius summa iniuria*.[183]

This last aspect of Salamonius' reasoning is not altogether consistent. If matters of *aequitas* and *strictum ius* depend on the application and interpretation of rules, then it is not clear in what sense equitable rules and rigorous rules may at any time be at odds. In any case, that statement aside, Salamonius' view on the definition of equity seems incompatible with the medieval orthodoxy. If equity is about the interpretation or application of a law to a case, then it is impossible to define a rule as *aequitas scripta* by reference to its content alone. Salamonius is thus the first author to explicitly disown the medieval doctrine of *aequitas scripta* and to attempt a rationalisation of equity as *epieikeia*, i.e. as a doctrine determining how a law is to be interpreted or amended, rather than a mere quality of law, or justice.

2.3.1.2. What equity does: equitable interpretation and emendation

As outlined above, Salamonius regards *aequitas* as having two roles, the interpretation of the law and the amendment of the law; he also distinguishes between a general and particular equity, hinting at the fact that

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[178] Salamonius, *ibid.*, pp. 11-2: 'haud tamen inepte dicimus, haec lex est aequa, illa constitutio est ex bono et aequo, et quotiens duae sunt contrariae leges, scite distinguitur illa ex bono et aequo, haec stricto et duro. Veraque ac notatu digna illa Accursiis sententia, qua protulit eam legem praeferendam quae ex bono et aequo esset. Adiecitque quae aequitate vincit, alteram semper corrigere, quod [Alexander de] Imola monet observandum. Ratio in promptu, ut contrarie pugnantes altera alteram elidere.'

[179] See Salamonius, *ibid.*, p. 12, where he spends some time distinguishing the various manifestations of *strictum ius*, mainly distinguishing between literal interpretations of the law, or pretences of equity to fulfil one's own purposes.

[180] Salamonius, *Commentarioli*, pp. 12-3 : '[Q]uotiens inter sese pugnant scriptum et voluntas, aut scripti tantum, aut voluntatis est quaestio. Alter ex bono et aequo voluntatem defendit, alter verborum aucupio, vel alias callida interpretatione deludit boni et aequi rationem sequendam, et strictum et versutum ius aspernandum.' Salamonius also later discusses in greater detail the various ways in which issues may arise about the text, the will or their conflict.

[181] Salamonius, *ibid.*, p. 13.

[182] He refers, through Cicero, to cases of agreements between parties where one seeks to enforce an absurdly narrow reading of the words – the distinction for Salamonius might lie in the fact that the deceiving party in those cases alleges that it was precisely their intention, as parties to the agreement, that the words be understood in such a narrow way. Thus, the cases don't properly fit the category of cases where one opposes the letter to the intention of the drafter.

[183] Salamonius, *ibid.*, p. 12 : 'Prima stricti species est quae vocabulorum angustiis cohibetur, ad differentiam aequitatis, quae latius patet, et sicut illud strictae, exactaeque interpretationis est, ita hoc latioris benigniorisque est sensus, quod usu tum venit, cum de aliquo scripto interpretando incidunt quaestiones de bono et aequo, stricto et iniquo [...]. Alia stricti species iniqui, cavillatorii, quod summum ius veteres dixere pro suma iniuria summa malitia. Cicero [*De Officiis*, 1.33 :] 'existunt etiam saepe iniuriae calumnia et nimis callida iuris interpretatione ex quo illud, summum ius summa iniuria, factum est iam tritum sermone proverbium.' Haec species est perniciosor suprascripta, quoniam in illa solum scriptum defenditur, in hac quisque voluntatis se iactat assertorem. Alius lata et aperta aequitatis via, alius tortuosa incedit semita, et hypocrita defensione voluntati insidiatur, et quasi praestigiis quibusdam conatur eludere iudicantem, iniquum pro aequo suadendo'.

general equity 'extends most widely' (*latissime patet*) perhaps as an overall guiding principle or source, whereas particular equity is the one which actually governs the single cases of interpretation and amendment.[184] It is worth pointing out at the outset, however, that Salamonius did not see *aequitas* as only applying to the interpretation and amendment of the law, and he made it clear that it applied to any document containing written rules, including wills and contracts.[185]

Interpretation is, for Salamonius, the most frequent application of equity, because all matters that are said or written require interpretation.[186] Salamonius thus has to reconcile his statement with C.1.14.1, which reserves interpretations between law and equity to the Emperor. Salamonius does specify that equitable interpretation is reserved to learned men, however, that clearly extends to the category of judges. Salamonius deals with this issue by arguing that C.1.14.1 only meant to refer to the amendment of the law, rather than its interpretation.[187] For Salamonius, an equitable interpretation (*interpretatio ex aequo et bono*) is achieved 'cum voluntatem potius quae scriptum, cum quod benignius est, sequemur, cum quod omissum est, suppletur, et generaliter quicquid recta dictat ratio, perficitur.'[188] It is not clear whether these are three examples of equitable interpretation, or three sub-species of it. Regarding the case of adding words to a law which have been omitted, Salamonius specifies that one has to imply words which are either obvious or which the legislator would have added if he had been present. He relates all his points about interpretation to a number of passages in the *Digest*.[189] In support of the point that one may only imply words by equitable interpretation that would have been added by the legislator, Salamonius interestingly juxtaposes the Accursian gloss to D.2.14.40.3 and Aristotle's statements about *epieikeia* that a law must be corrected in light of what the legislator would have done if he had been present.[190]

Salamonius' description of equitable interpretation is not very clear. First of all, his selection of passages from the *Corpus Iuris Civilis* does not always match the points he wishes to make. Salamonius argues for instance that D.22.5.13 is an instance of an equitable *interpretatio suppletiva*. The *Digest* passage is about whether it is a bad policy that individuals guilty of calumny should not be barred by statute from providing

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[184] Salomonii, *ibid*., p. 7: 'Aequitas est perfecta ratio quae leges et omne scriptum dictumque interpretatur, emendat [...] quoniam aequitatis duae sunt partes interpretatio et emendatio, est praeterea quaedam generalis aequitas latissime patens, est et alia particularis ab ipsa generali descendens quae cuique negotio applicatur interpretando et emendando. »

[185] Salomonii, *ibid.*, p. 9 (referring to its interpretive role): 'Sola itaque aequitas est, quae scripta, dicta, factaque non solum in legibus, verum etiam testamentis, caeterisque hominum actibus recte interpretando aperit, distinguit, dilatat, cohibet, supplet, praeiudicat'.

[186] Salmonius, *ibid*., pp. 7-8: 'Ab ipsa itaque interpretatione incipiamus quae frequentior est, nullum quippe est dictum neque scriptum quod ut primum in controversiam venit, quin indigeat interpretatione.'

[187] Salamonius, *ibid*., p. 10: '[C.1.14.1] de interpretativa aequitate non loquitur, quia iuris prudentibus et iudicibus id munus creditum fuit.'

[188] Salamoniusus, *ibid*., p. 8.

[189] The first instance of preferring the will of the law to its words, is related to a case of purposive interpretation at D.27.1.13.2; The preference for more benign solutions finds support in D.50.17.56. Finally the latter point about adding words to the law is justified by referring among others to D.23.1.16, in which Ulpian interpreted a law preventing senators from marrying certain individuals as including a ban on betrothal.

[190] Salamonius, *ibid*., p. 8: 'De tertio scilicet quod aequitatis sit interpretatione supplere, quod multifariam potest contingere, interdum suppletur verbum quod ad perfectionem orationis desideratur, et dictum non scriptum. Etiam si non probetur dictum et verisimile sit fuisse dictum [D.35.1.102]. Item quando verisimile est si cogitatum fuisset, aut casus accidisset eo tempore quo scribebatur, dictum fuisset [Accursius *ad* 'exceptionem' D.2.14.40.3, col. 299: 'id esse de iure servandum licet non sit statutum, quod verisimile est statuendum fuisse si hoc quaesitum fuisset, ut [C.3.29.5] [D.29.7.11] [D.30.16.1]'] ubi eleganter Accursius conflando regulam, nota inquit de iure id esse servandum, licet statutum non sit, quod verisimile est, statutum fuisset, si quaesitum fuisset, Aristoteles, emendetur omissum quod et legislator ipse, si adesset, utique faceret.'

evidence in criminal cases, and concludes that the judge's own discretion in giving weight to each piece of evidence in light of the witness' individual qualities remedies that omission. This source's most natural reading has therefore hardly anything to do with statutory interpretation. Further, it is not clear whether preferring the will to the letter, the more benign solution, and implying words that the legislator would have added are all applications of the same principle, whether these aims could ever be at odds with each other, and what a judge should do in such a case.[191]

In any case, as mentioned in the previous chapter, medieval jurists already often referred to equity as the source of interpretation. Salamonius himself includes two references to Baldus saying that no interpretation or extension of legal argument from one case to another can be accepted unless it is founded in equity.[192] In the medieval period such references to *aequitas* were rarely expanded upon, and seem to have generally meant that one should seek to achieve justice when interpreting the law, there was no sense in which equity was perceived as being particularly related, as a doctrine, to the amendment or interpretation of law.[193] Salamonius is thus the first author not only to devise a theory of *aequitas* intrinsically related to interpretation, but also to imply a connection between orthodox statements about interpretation found in the *ius commune* and Aristotle's doctrine of *epieikeia* to devise a doctrine of equitable interpretation.

As mentioned, the second function of *aequitas*, for Salamonius, is the amendment of the law, which may be either aimed at correcting (*correctiva*), or supplementing (*suppletiva*) the law.[194] This kind of amendment is what Salamonius seems to identify most closely with Aristotle's 'emendatio boni et aequi', and the justification for it is provided by juxtaposing Aristotle to a *Digest* source, both to the effect that not all matters may be encompassed by written law.[195] A supplementing amendment seems to be, for Salamonius, one where the legislator enacts a new statute in order to remedy a gap in the law. The examples he has in mind accordingly concern the enactment of new constitutions by the Roman Emperor.[196] The other type of amendment, which he describes as corrective takes place 'cum aliquid legi additur, vel

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[191] At one point Salamonius explains that an equitable interpretation may lead to a harsher application of the law, it is not clear whether this suggests that the will of the law (or legislator) can trump the requirement to prefer a more benign solution, or whether by benign Salamonius merely means more favourable to the public good as the presumed aim of the legislator.

[192] The first is to Baldus, *Super Codice*, *ad* C.6.55.9, *f.* 180r: 'Et nota quod equitas est fundamentum interpretandi leges et pacta [D.17.2.81]'. The second is to Baldus, *Lectura ad Libri Feudorum*, *ad* L.F.2.53(54), *f.* 77ra: 'Item nota quod argumentum a simili desiderat equitatem, quae similes casus iungit unde statuta omnia extensivam interpretationem recipientia debent fundari in equitati'.

[193] See [1.1.4.1] above.

[194] Salamonius cites Cinus Pistoiensis for his definition of *emendatio* as 'changing for the better', see Cinus Pistoiensis, *Lectura Super Codice* (1493), *ad* C.2.1.3, *f.* 32rb: 'emendare est illud, quod est male confectum melius reformare, hoc est defectum in forma supplere.' Salamonius seemingly borrows the distinction between correcting and supplementing from [D.1.1.7.1], which describes the praetorian law as introduced 'adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam'.

[195] Salomonius, *Commentaroli*, p. 9: 'Haec est natura inquit [Aristoteles], boni et aequi emendatio [...] causa autem est quod talia quaedam sunt, ut de ispsi lex ferri non possit, itaque decreto opus est, haec Aristoteles. Iulianus [D.1.3.10] neque leges, neque S[enatus] C[onsulta] ita scribi possunt, ut omnes casus qui quandoque inciderint, comprehendantur, sed sufficit ea quae plerunque accidunt contineri.'

[196] Salomonius, *ibid.*: '[D.1.3.11] et ideo de iis quae primo constituuntur aut interpretatione, aut constitutione optimi Principis esset ius statuendum. Ecce que liquidum est posse suppleri omissa per interpretationem [...] Suppletur etiam constitutione quando casus praeter legis considerationem accidunt [..]. Suppletur itaque aut interpretatione, si mens legislatoris concurrit, aut emendatione, id est constitutione si praeter mentem accidat.' Note, however, that Salamonius specifies that the *Princeps*, must be an *optimus princeps*, because he needs to be furthering the public interest, rather than his own, as he exercises his powers of amendment. *Ibid.*: 'et observa quod [D.1.3.11] ait de optimi principis, et non cuiusque principis constitutione, cuius naturale est ex bono et aequo et non ex suis commodis supplere.'

detrahitur ex bona causa'.[197] Salamonius tells us little more about those, but presumably wishes to distinguish cases where a law is simply added in order to repair a lacuna, and a case where a law has to be modified.

Cases where amendments are required differ from those to which equitable interpretation applies, indeed amendments are only required in cases where justice cannot be achieved by an equitable interpretation of the law.[198] For this reason, equitable amendments fall outside the jurisdiction of judges, and are reserved for the lawgiver, or those officials to whom the latter has delegated his powers. He develops his reasoning as to why this is so from a number of sources. He refers to C.1.14.1, arguing that it refers to matters of amendment, and he adds that by 'nobis solis', the emperor wished to include those to whom he had delegated this task, such as the praetor. It seems that Salamonius also read this as consistent with Aristotle and with Roman sources. He refers to Aristotle's *Politics* where the latter had argued that, in absolute monarchies 'the law allows [magistrates] to introduce for themselves any amendment that experience leads them to think are better than [the law as it stands]'.[199] This, for Salamonius, is consistent with the fact that the corrections by *epieikeia* described by Aristotle are done by decree, and he seems to believe that Paul in the *Digest* refers to a similar allocation of jurisdiction when he says at D.50.17.85.2 that matters of equity delayed by reason of uncertainty are to be settled by decree.[200]

2.3.1.3 Concluding remarks on Salamonius

Salamonius is the earliest author after Budaeus to have engaged with the concept of *aequitas* as *epieikeia*. As we shall see in the following sections his approach to equity would be mostly popularised through the writings of Connanus and Duarenus in the 1550s to become the most influential theory of equity among civil lawyers throughout our period. Salamonius also provides us with a good example of the sources which influenced this novel approach to *aequitas* as *epieikeia*. In various passages both the terminology he adopts and the doctrine he develops seem derived from the juxtaposition of passages from the *Corpus Iuris Civilis, ius commune* doctrine on interpretation, and Aristotle's works.[201] Salamonius does also occasionally refer to language typical of rhetoric manuals, a point to which we shall return, when considering the extent of the influence of legal dialecticians over the early modern development of equity.[202]

That said, between roughly 1529 and 1541, and before the broader spread of Salamonius' approach to equity, there were other authors who – inspired by Budaeus - sought to develop their own original approaches to equity as *epieikeia*. The elements that set these alternative approaches apart from Salamonius'

[197] *Ibid.*
[198] See n.195 above.
[199] The translation is adapted from the Loeb edition of Aristotle's *Politics* (1932), p. 265. The text quoted by Salamonius is from Aristotle, *Politics*, lib. 3, cap. 9, 1287a.
[200] Salamonius, *ibid.*, p. 10. 'quae utraque emendatio suppletiva et correctiva est principis et eorum quibus princeps, vel lex delegavit, de qua [C.1.14.1] 'Inter ius, inquit, et aequitatem nobis solis et licet et oportet inspicere.' 'Nobis solis', intelligo, et quibus nos vel lex delegaverit, ut Romae praetoribus [...] nimirum quod cum Imperio esse debet tam qui corrigit, quod qui leges condit et ideo Aristoteles in iis quae emendatione indigent, decreto opus esse dixit. [D.50.17.85.2] in ambiguis quotiens aequitatem desiderii naturalis ratio, aut dubitatio iuris moretur, iustis decretis res temperanda est, et idcirco Aristoteles [*Politica* lib. 3 c. 9] vult constitui certos magistratus qui emendandis legibus praesint.'
[201] See e.g. nn.190, 200 above.
[202] See n.180 above and [2.3.6] below.

own and with the broader tradition inspired by him is that they (i) did not focus their theories on the interpretation and amendment of legal rules administered by judges and sovereign respectively, and (ii) tended to defend, rather than depart from, the medieval tradition relying on *aequitas scripta*.

2.3.2. Claudius Cantiuncula – Universal and particular equity

Claudius Cantiuncula's peculiar approach to *aequitas* was set out in his *De Officio Iudicis Libri Duo*, completed by 1529, but only published in 1543.[203] In the *De Officio*, Cantiuncula distinguishes two kinds of equity: universal and particular. Universal equity (*universalis aequitas*) seems to be, for Cantiuncula, perfect abstract justice, particular equity (*aequitas particularis*) overlaps instead completely with Aristotle's *epieikeia*, it is an emendation of legal justice (*iustus legitimus*).[204] Cantiuncula does not articulate how each operates in the most straightforward terms. He adopts the terminology of rhetoricians, with particular reference to Cicero and Quintilian, distinguishing *thesis* and *hypothesis*. To draw from Quintilian's examples, one of the tools rhetoricians adopted to make speeches about ethical choices was to distinguish a universal or indeterminate moral statement (*thesis*), such as 'should a man marry?', from one which referred to a practical situation and a particular person (*hypothesis*), such as 'should Cato marry?'. The two would operate in a form asking to a syllogism, where the first statement operated as the major premise which, read with a particular premise, would lead to the second statement – the *hypothesis* – as a conclusion.

Dealing with universal equity, this is how Cantiuncula explains how it relates to written law and the role of the judge: 'potest universalem aequitatem circa thesim infinite versari, at responsa prudentum, principum constitutiones aliasque iuris scripti species theticas quidem quaestiones, sed quadantenus finitas tractare, iudicis autem officium ad quaestionem finitam et hypothesim omnino pertinere, tametsi finitae quaestionis explicationem ex thesis aequitate petere oporteat.'[205] Universal equity concerns abstract statements of justice, indeterminate propositions or, to follow Quintilian's nomenclature, *theses*. The role of the judge is instead to deal with particular cases, he has to formulate *hypotheses*, and do so by reference to the thetical statements of universal equity. Written law is trickier. Cantiuncula seems to argue that it too, like universal equity, is about formulating thetical abstract propositions. However, while universal equity formulates them infinitely (*circa thesim infinite versari*), written law can only do so finitely (*theticas quidem quaestionem, sed quadantenus finitas tractare*), by which Cantiuncula seems to mean that they are not abstract statements that will be right whenever applied to a particular case. This is where particular equity fits in for Cantiuncula, amending written law in cases where it does not apply appropriately to particular cases – he therefore broadly identifies particular equity with Aristotle's *epieikeia*.

Particular equity may intervene in two ways, the first of which is by taking effect in the form of written rules, which Cantiuncula refers to as written equity, *aequitas scripta*. Cantiuncula identifies written equity with 'quicquid prudentum responsis, vel senatusconsultis vel honorario iure vel principum

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[203] Claudius Cantiuncula, *De Officio Iudicis Libri Duo* (1543), pp. 50-67. Guido Kisch also discusses Cantiuncula's theory of equity in Kisch, *Erasmus*, pp. 133-52, 260-303.
[204] See Cantiuncula, *De Officio, Vol. 1*, p. 51, 58-9.
[205] Cantiuncula, *ibid.*, pp. 59-60. For Quintilian's analysis see *The Orator's Education,* 3.5.11. For Cicero's see *De Oratore*, 2.31.134.

constitutionibus continetur.'[206] It is not clear whether he sees these specific sources of law as written equity because of their relationship with other written sources, or whether he believes all written laws to be written equity. At one point he defines written equity as whatever either in the old or the new law has been benignly interpreted, *responsum*, *edictum*, decreed, known or constituted, and also proceeds to justify why he considers each source to qualify as *aequitas scripta*, seemingly by reference to their role as amending or interpreting earlier rules – thus for instance: 'Responsa prudentum aequitatem scriptam appello ob id, quod idipsum, quod ex aequo bono responderunt, scripto comprehensum est. Nimis enim esse ridiculum videretur, legem aequam appellari ex bono et aequo propositam et ibi negare scriptam esse aequitatem. [...] Alia aequitatis scriptae portio est ius honorarium. Nam sicuri ius civile proprie sumprum aequitatem universalem ad id, quod naturae magis congruit, accomodat et responsis suis prudentes aut veteres leges ex regulis eiusdem aequi boni interpretati sunt aut casus ab illis omissos addiderunt, ita et praetorum edicta, iuris civilis et ipsa quoque responsa prudentum propius ad eandem aequitatis amusim reduxerunt, cuius praeter caeteros studiosi videntur extitisse praetores. Idem fundamentum habent senatusconsulta, idem etiam quae postea sequutae sunt constitutiones principum'.'[207] If one understands written equity in this limited sense, a written rule only qualifies as *aequitas scripta* insofar as it is the product of an exercise in *epieikeia* – understood as emendation or interpretation – of a previous rule. Overall, however, it seems that Cantiuncula's statements are not so limited and are in fact meant to encompass the entirety of written law as *aequitas scripta.* First, because in a passage he stresses that '[n]ihil emil [...] iniquius est quam leges, quae per aequum et bonum non spirant ac reguntur'. Secondly, because he stresses that, even though one may identify laws that seem harsh, 'nihil efficit, quo minus isthic sit aequitas scripta. [...] Quamvis enim per legislatores nihil nisi ex bono et aequo constituisse, non possumus tamen ubique divinare, quibus illi rationibus vel temporum vel personarum vel aliarum circunstantiarum adducti fuerint'. In his definition of *aequitas scripta*, Cantiuncula therefore departs completely from the hierarchy of norms medieval writers adopted, including *rigor scriptus* and distinctions of norms *in genere* and *in specie* – he effectively deprives *aequitas scripta* of the substantive role it held among medieval jurists.[208]

Cantiuncula tells us much less about the unwritten side of particular equity. From what can be gathered from his analysis, it seems to correspond to Aristotle's *epieikeia* more closely; it is the device by which the judge interprets, directs or amends the law.[209] Cantiuncula does not say much about the degree of leeway which this should leave to the judge, but, like Salamonius, he explicitly limits the operation of unwritten particular equity to cases where one is acting in accordance with the intention of the law (*mens legis*) because acting against it would amount to correcting the law, which, Cantiuncula thinks is reserved to the Prince, Senate or Praetor.[210] In line with all his contemporaries, Cantiuncula stresses that the judge is

[206] Cantiuncula, *ibid.*, p. 60.
[207] Cantiuncula, *ibid.,* p. 61.
[208] Cantiuncula, *ibid.*, pp. 61, 66.
[209] Cantiuncula, *ibid.,* p. 66.
[210] Cantiuncula, *ibid*: 'Alteram ergo species est aequitatis particularis, non scripta quidem, sed ad iudices et ad respondentes de iure tota pertinens pendensque ex illo iuris altero genere, quod interpretatio dicitur seu, ut Aristoteles ait [*Ethics*, 1137b], legitimi iusti directio vel emendatio. Quicquid enim lege omissum est, hac ratione suppletur (modo non contra legis mentem; id enim esset corrigere legem, quod principi, senatui, ac praetori diximus supra reservatum esse).'

not at liberty to draw on his own sense of justice to provide a remedy. His intervention must be tied to the purpose of the rule in front of him, though it is not clear in Cantiuncula's analysis by what means the judge may gather what the intention of the law is.

Cantiuncula's theory does not acknowledge Salamonius' writings explicitly, and it is not clear whether he expressly intended to engage with it. If read alongside Salamonius' statements, Cantiuncula's view on *aequitas scripta* seems like a counter-argument to Salamonius' rejection of the medieval language on point – as mentioned above, not to describe written rules introduced *ex bono et aequo* as written equity is, for Cantiuncula, 'ridiculous'.[211] Cantiuncula's views on unwritten equity are better aligned with Salamonius' own. The judge should act in accordance with the intention of the law, and in some passages this intervention is described specifically as an interpretation – with the language of emendation and direction referred instead to Aristotle.[212] Where such an intention cannot be gathered the judge will, as we have seen, presume that the legislator had equity as their aim, and give effect to the rule as *aequitas scripta* – a view consistent with Salamonius' reading of C.1.14.1.[213] What Salamonius calls emendations of the law, and which he reserves for the legislator, seem also well aligned with what Cantiuncula describes as corrections.[214]

2.3.3 Lutheran jurists on equity

As mentioned above, another peculiar branch of thought on equity which ought to be mentioned is that which spread among some early Lutheran theologians and jurists. The thoughts of these authors on equity have in the past been discussed by Harold J. Berman and John Witte as part of their broader work on the impact of the protestant reformation on legal thought.[215] Berman and Witte did not have the advantage of a broader view of the development of the concept of equity in early modern times or of the traditional development of equity as a juridical concept in the Middle Ages. It is therefore useful to return to these authors to understand how these theories fit within the broader development of early modern legal scholarship on equity.

The two main authors who adopted this peculiarly Lutheran approach to equity were Philipp Melanchthon (d. 1560) and – developing it in its most complete form - Johannes Oldendorpius (d. 1567). As we shall see, the approaches adopted by these two authors had enough in common to be regarded as a tradition in their own right, and indeed it seems to have influenced some writers linked to Oldendorpius in the later sixteenth century, with the clearest example in Arnold Holsteinus (d. 1599). This take on equity would not, however, overcome that set up by Salamonius in terms of popularity – which would be preferred

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[211] See n. 207 above.
[212] See n.210 above.
[213] See n.208 above.
[214] See n.210 above.
[215] Berman and Witte did so first in an article they co-wrote and then in their respective monographs on the same topic. See John Witte and Harold J Bergman, 'The Transformation of Western Legal Philosophy in Lutheran Germany' (1989) 62 Southern California Law Review 1575; John Witte , *Law and Protestantism* (2002); Harold J Berman, *Law and Revolution II* (2003).

by the majority of later early modern jurists, seemingly irrespective of religious confession, indeed even including Lutheran scholars from the circle of Oldendorpius and Melanchthon themselves.[216]

2.3.3.1. Philipp Melanchthon

Philipp Melanchthon (d. 1560) was a very well known humanist in his time and a central figure of the Lutheran reformation.[217] He dealt with equity in a number of writings, including orations and works on rhetoric. However, the bulk of Melanchthon's writings on equity, and those where he developed at length his idea of equity as *epieikeia* belonged to his commentaries on Aristotle. These works are mainly philosophical in nature, and they do not engage directly with legal scholarship. The references Melanchthon uses in them are mostly confined to theological works and classical texts. The most specific work on equity is found in his philosophical commentaries on Aristotle's *Ethics*. [218]

2.3.3.1.1. Melanchthon's *summum ius*

Melanchthon's thinking on equity fits within a broader early modern movement of influential thinkers linked to humanism, including Erasmus,Juan Luis Vives, as well as Martin Luther himself who – while falling short of developing a philosophical or juridical stance on equity as *epieikeia* -had assimilated the two and contrasted them with the maxim of *summum ius summa iniuria* in a number of their works.[219] More specifically, however, Melanchthon seems to also have been familiar and keen to engage with the approach to equity as *epieikeia* of the contemporary lawyers Budaeus and Salamonius and the more specifically legal meaning of the opposition between strict law and equity. Indeed, having explained that equity and *epieikeia* are synonyms and often opposed to *summum ius*, Melanchthon starts the substantive part of his analysis by explaining that *summum ius* does not necessarily involve a *calumniosa interpretatio* of the law – *summum ius* is merely the law applied in accordance with its letter, without regard for the circumstances of a particular case. Such an application may or may not amount to a *calumniosa interpretatio* depending on the facts.[220]

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[216] See ch. 4 below.. For intance compare the account of the Catholic Cardinal Albertus Bolognetus, *De Lege, Iure et Aequitate Disputationes* (1570), capp. 29-30, 34 with that of Calvinist Hugo Donellus, *Commentariorum de Iure Civili Libri Viginti Octo* (1610), pp. 31-47, with that of Leopoldus Hackelmann (d. 1619), a professor of law in the Lutheran centre of the University of Jena in his *Disputatio Iuris Civilis Prima De Principiis Iuris* (1593), titt. 33-6. On these three authors see respectively Gaspare De Caro, 'Bolognetus, Alberto', *Dizionario Biografico degli Italiani, Vol. 2* (1969) <http://www.treccani.it/enciclopedia/alberto-Bolognetus_(Dizionario-Biografico)/>; L Pfister, 'Hughes Doneau' in Patrick Arabeyre, Jean-Louis Halpérin and Jacques Krynen (eds), *Dictionnaire historique des juristes français XIIe - XXe siècle* (2015) and Carlo Augusto Cannata, 'Systématique et Dogmatique Dans Les *Commentarii Iuris Civilis* de Hugo Donellus' in Bruno Schmidlin and Alfred Dufour (eds), *Jacques Godefroy et l'humanisme juridique à Genève. Actes du colloque Jacques Godefroy, Basel* (1991), pp. 217-30; Albert Teichmann, 'Hackelmann, Leopold' in *Allgemeine Deutsche Biographie,* Vol. *10* (1879), p. 294. For the influence of Oldendorpius on Hackelmann see n. 727 below.

[217] The literature on Melanchthon is vast, for biographical information see Karl Hartfelder, *Philipp Melanchthon Als Praeceptor Germaniae* (1889, repr. 1964); Wilhelm Maurer, *Der Junge Melanchthon Zwischen Humanismus Und Reformation* (1967-69).

[218] Philipp Melanchthon, 'Scripta Philippi Melancthoni Ad Ethicen et Politcen Spectantia', *Corpus Reformatorum, Vol. 16 (CR 16*) (1850). I rely here principally on his *Scripta ad Ethicen*, but many similar arguments are put forward in his *Enarratio Libri Quinti Ethicorum* (1562), pp. 208-24.

[219] See nn.138, 165 above. For Luther's writings on equity see M Arnold, 'La Notion D'epieikeia Chez Martin Luther' (1999) 79 Revue D'Histoire Et de Philosophie Religieuses, pp. 187-208, 315-25. While *epieikeia* was not a central concept for Luther and he never developed a fully thought out approach to it, he did from the late 1510s onwards deal with the concept in a number of texts including commentaries on Scripture, preachings, and table talks.

[220] Melanchthon, *CR 16,* coll. 73-4: 'Summum ius non est calumniosa interpretatio iuris [...]. Est autem summum ius cum leges severe sine mitigatione retinentur, etiamsi qua circumstantia admittit mitigationem, ut si iudex furem adolescentem et lapsum aliquo casu egestasis, sine insigni atrocitate, aut petulantia, afficiat capitali supplicio.' See also Philipp Melanchthon, *Enarratio Libri Quinti Ethicorum* (1562), pp. 210-1: 'Etsi [...] interdum observatio summi iuris est calumniosa, sed tamen in aliis casibus saepe iusta est'.

Salamonius had instead explicitly referred to Cicero's identification of *summum ius* with *calumniosa interpretatio*, and Melanchthon's argument may have been intended as a criticism of that approach.[221] That said, the difference between Melanchthon's approach to *summum ius* and that of Salamonius seems mostly semantic. Salamonius himself included *calumniosa interpretatio* within a broader category of strict law, which encompassed more generally cases of adherence to the words of the law.[222]

2.3.3.1.2. Melanchthon's defence of *aequitas scripta*

Where Melanchthon's approach to equity as *epieikeia* is most strikingly different from that of Salamonius, is in its way of dealing with *aequitas scripta*. Salamonius thought that since both equity and *summum ius* are interpretive approaches to the law, and thus unwritten, the idea of written equity was not straightforwardly defensible.[223] Instead, having identified *summum ius* with laws applied in accordance with their words, Melanchthon explained that, whenever these laws were meant to decide the case before them, they would amount to 'written equity' and call for no further tinkering. In support of this argument he relied on the text of C.3.1.8 as popularised in the medieval tradition, including the word 'scriptae' in the main text[224] – the message in that law was that in cases meant to be governed by a written rule,that which is written is equity, and there is no reason why the judge should refer to anything but the letter of the law in applying it.[225] Under this view, a rule would be *aequitas scripta* depending on how well it happened to suit the case at hand – this approach clearly has little in common with the medieval approach to written equity as opposed to written rigour, which sometimes gave priority to 'rigour' precisely because it suited the facts of a case and was written *in specie*.[226]

However, Melanchthon's approach to written equity was not so straightforward. Recognising, like Salamonius, that the idea of *aequitas scripta* might be only counter-intuitively identified with *epieikeia* (given that Aristotle thought the latter operated precisely to avoid application of the letter of the law), he argued that Aristotle had never specified through what medium *epieikeia* could amend written rules. Thus, a rule would have the quality of being 'equitable' whenever it was itself working as a correction, extension or restriction of another rule.[227] These two explanations of written equity seem to be rather distinct. A rule may very well be enacted to amend another one, and therefore count as written equity under the second test, but not be perfectly suited to the facts of a certain case, and thus fail under the first one, being in need

[221] See nn.152, 183 above.
[222] See n.183 above.
[223] See n.176 above.
[224] See n.27 above.
[225] Melanchthon, *CR 16* col. 79: 'quaestio est, utrum, ubi extat ius scriptum, iudex potius iuxta scriptum, an iuxta aequitatem, hoc est, rationem privatam omisso scripto iure pronuntiare debeat. De hac quaestione sunt prolixae disputationes de rigore, et de aequitate. [...] Regulariter ex scripto iure pronuntiandum est, praesertim in iis casibus, de quibus lex principaliter loquitur. [...] Ergo non licet discedere a scripta lege. [...] Ideo recte inquit textus Codicis [C.3.1.8]: Placuit in omnibus rebus praecipuam esse iustitiae aequitatisquae scriptae quam stricti iuris, rationem. Hic textus vetat as scripto discedi, et monet illud ipsum, quod scriptum est, aequitatem esse.'
[226] See [1.1.2] above.
[227] Melanchthon, *CR 16*, col. 79: 'Aristoteles generaliter aequitatem vocat mitigationem legis, sive scriptam, sive non scriptam. Ut enim nunc plurimae mitigationes extant scriptae in ipsis legum textibus, et in commentariis interpretum: sic Athenis leges mitigabantur, declarabantur, inflectebantur, aut exasperabantur decretis'.

of further (unwritten) equitable emendation. Conversely, a rule may be perfectly suited to the facts of a specific case, but not enacted to alter any existing rule – thus failing the second, but passing the first test for *aequitas scripta*.

That said, Melanchthon was clearly committed to this reading of C.3.1.8 and continued to write orations in defence of *aequitas scripta* even when, through the 1530s, 40s and 50s, Salamonius' argument that equity could not be properly said to be written gained ground among other early modern jurists.[228] As late as 1554, at a time when – as we shall see – the view had gained prominence that the insertion of 'scripta' in C.3.1.8 was a medieval corruption, Melanchthon still held fast to his reading of it despite knowing 'reprehendi a quibusdam, quod hic nominat lex aequitatem scriptam: cum tamen apud Aristotelem *epieikeia* nominetur scripti correctio, omissa inscriptione legis, ut cum iudex mitigat poenam homini modesto, qui non petulantia aut naturae perversitate, sed fame motus, furatus est cibos'.[229]

The main purpose of C.3.1.8's reference to *aequitas scripta* was for Melanchthon to ensure that judges refrain from altering written rules at their whim when they would be clearly suited to be applied to a case. It is therefore probable that the main aspect that would make a rule 'written equity' for Melanchthon was its clear applicability to a certain case, and that his reference mentioned earlier to rules being 'equitable' in the sense of their extension, restriction or interpretation of other rules was merely an attempt to reconcile 'written equity' with Aristotle's understanding of *epieikeia*, without necessarily playing much of a substantial role beyond that.

2.3.3.1.3 Melanchthon's unwritten equity

Aside from the specific role of *aequitas scripta*, Melanchthon generally defined the role of equity, and therefore of unwritten equity, as that of relieving the rigour of strict law when there is some probable reason to do so on account of the particular circumstances of a case.[230] Like Salamonius, Melanchthon thought that (unwritten) equity could be used both by the ruler and by judges - however, his analysis of it was much looser than that found in the account of Salamonius and, from his writings, it is hard to understand exactly when Melanchthon thought that it should apply.

It should be pointed out at the outset that, unlike Salamonius, Melanchthon was unwilling to pin the role of equity to one specific effect on the law. For instance, while Salamonius distinguished the interpretive role of equity in the hands of the judge from its corrective role in the hands of the sovereign, Melanchthon refers to what equity does when applied to the law variously as *dispensatio*, *mitigatio* or *interpretatio*, seemingly interchangeably and regardless of who administers it.[231]

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[228] See e.g. Philipp Melanchthon, *Oratio de Scripto Iure* (1539); Philipp Melanchthon, *Oratio de Lege Placuit* (1554). Other writings to a similar effect can be found in Kisch, *Melanchthons Rechts- und Soziallehre* (1967), pp. 240ff.
[229] Melanchthon, *Oratio de Lege Placuit*, in Kisch, *Melanchthon*, p. 286.
[230] Melanchthon, *CR 21*, col. 1090: '[*Epieikeia*] est virtus leniens severitas stricti iuris propter probabilem rationem'.
[231] Melanchthon, *CR* 16, col. 75-6: 'Ideo dicitur [*epieikeia*] esse legum interpres, et haec mitigatio non caret rationem, sed aliquam superiorem legem sequitur.[...] Semper quaerenda est principalis sententia, de qua lex loquitur, deinde ubi circumstantiae diversae sunt, quaerenda est dispensatio.' Though Melanchthon talks about mitigation, he clearly also has in mind cases where the court would make the law harsher, see *ibid.*, col. 75: 'Cum autem tanta sit varietas casuum et negotiorum, ut non possit de omnibus eodem modo pronuntiari, sed interdum propter circumstantias opus sit, *aut exacerbatione aliqua, aut mitigatione*, diligenter haec doctrina de *epieikeia* consideranda est' (my emphasis).

That said, Melanchthon did see a distinction between the use of *epieikeia* by a judge and by the sovereign. As mentioned above, Melanchthon was quite concerned about judicial freedom to upset legal rules, and a judge would therefore only be able to perform such a *dispensatio*, *mitigatio* or *interpretatio* in cases where the reason calling for it is clear and probable (*perspicua et probabilis ratio*) – whereas all other cases would have to be decided by the Prince, who can make use of equity whenever he sees fit.[232]

Starting with exercises of equity by judges, the main issue is that it is not clear what Melanchthon thought would amount to a clear and probable reason calling for the intervention of *epieikeia*. While for Salamonius these would be cases where one would be able to infer with confidence that the will of the legislator differed from the result that would follow an application of the letter of the law, Melanchthon's approach seems to be much broader and vaguer. He tells us that, generally, these would be cases where the rule before the judge does not principally deal with the case at hand (*in casu de quo non principaliter loquitur*).[233] The stock example provided is that of a law providing for the strangulation of thieves, which meant to deal, however, principally with thieves animated by evil (*atroci consilio*) – a judge should instead make use of equity and apply a softer sentence to one stealing out of hunger.[234] Melanchthon's definition is not much tighter than that, and one can only attempt to infer what kinds of particular circumstances would call for the intervention of equity by looking at the cases he lists as examples. Clearly Melanchthon thought equity should intervene in (i) cases where following the law would violate a higher law, such as natural law - these resemble those that Aquinas and later scholastic theologians had in mind for the intervention of *epieikeia*,[235] and (ii) cases where one seeks to fulfil the purpose for which the law was introduced.[236] However, some cases listed by Melanchthon seem to fit under a much broader and ill-defined category, which can only be described as cases where an application of the law – while seemingly in line with natural law and the purpose of the law - would have seemed harsh because of some other justifying ground. These include the example above excusing a thief stealing out of hunger, or the case of a murder committed in response to a great wrong committed by the deceased.[237] Melanchthon does not make much of an effort to systematise this broad third category, or indeed the former two. It is not clear, for instance, whether they would be ranked in a particular order were they to come into conflict.

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[232] Melanchthon, *CR* 16, col. 81: 'tamen modus est eius rei [i.e. legis mitigatio] ubi est perspicua et probabilis ratio: ideo Imperator in obscuris materiis iusiit legum et aequitatis diiudicationem ad se referri.'
[233] Melanchthon, *CR 16*, col. 74: 'Verum [*epieikeia*] est moderatio legis in aliqua circumstantia, praesertim in casu, de quo non lex principaliter loquitur, ut cum lex iubet strangulari furem, loquitur de eo, cuius aetas est firmior, et quo petulanter furatur.'
[234] Melanchthon, *CR* 16, col. 80: 'Sed incidunt interdum casus, de quibus lex non principaliter loquitur, ac honesta ratio flagitat moderationem, propter aliquam circumstantiam perspicuam. Hic etiamsi deest scripta aequitas, tamen iudex adhibere mitigationem debet, ut lex de fure strangulando loquitur principaliter de eo, qui atroci consilio fecit furtum, non loquitur principaliter de homine modesto, impulso fame ad furandum.'
[235] For instance, Melanchthon gives the example of the deposited sword from Aquinas, as well as a number of examples from Scripture. See Melanchthon, *CR* 16, col. 75. For Aquinas' view see [1.2.1] above and [3.2.1] below.
[236] See e.g. Melanchthon, *CR* 16, col. 75: 'magis cernitur *epieikeia* in casu Machabeorum, qui praeliabantur in sabbato (1 Macc. 2.41). [...] Et Machabei hoc officio servabant finem huius legis. Non enim hoc agebant, ut his exemplis abolerent sabbatum, sed ut ministerium verbi et sabbatum propugnarent et defenderent.'
[237] Melanchthon takes the example of the woman who murdered her husband and son in retaliation for their murder of another son of hers, see Aulus Gellius, *Attic Nights, Vol. II* (1927), 12.7. Melanchthon, *CR* 16, col. 76: 'Apud Gellium [*Attic Nights*, 12.7] Aeropagitae liberant mulierem Smyrneam, quae veneno maritum et eius filium necaverat, qui tamen prius occiderant mulieris filium, natum in priori coniugio [... ita] remittunt poenam propter iustum matris dolorem.'

Melanchthon tells us even less about exercises of equity by the Prince. It seems from the passage referred to above that he thought law-givers would be able to alter legal rules regardless of whether there was a clear and probable reason to do so – which seems to suggest any exercise of power over existing rules may be an exercise of equity. However, it seems Melanchthon's view of this aspect of equity was even broader, and that he did not necessarily regard equity as having to do with the amendment of written rules or with the amendment of anything at all. Some of the cases Melanchthon lists as exercises of equity seem to be mere exercises of discretion by people with authority that achieve justice in particular cases, suggesting that one could exercise equity even when there is no strict law to interpret, moderate or dispense from.[238] Once more, Melanchthon does not distinguish these very clearly, and his reference to examples and authorities from classical texts on this point is so abstract that it is hard to understand whether he had noticed this difficulty at all.

2.3.3.1.4. Melanchthon's original theory of equity

Harold Berman has in the past described Melanchthon's approach to equity as 'address[ing] the problem in the manner of the scholastic jurists.'[239] It is unclear whom Berman had in mind when he referred to 'scholastic jurists', whether the lawyers or the theologians, but neither seems a good fit. Regarding the medieval lawyers, Melanchthon did make reference to the passages in the *Code* that (he believed) referred to *aequitas scripta*, but aside from sharing the references to those passages, his theory had almost nothing in common with that of medieval legists and canonists. Like medieval theologians, Melanchthon assimilated *epieikeia* and equity, and he did occasionally refer to the works of Aquinas,[240] but he does not seem to follow their rather doctrinally specific approach to *epieikeia*. His idea of assimilating equity and *epieikeia* seems rather part of the broader humanist movement to read Aristotle's *epieikeia* as *aequum et bonum* and oppose it to the adage *summum ius summa iniuria*. In fact, Melanchthon's approach to equity seems to be only loosely influenced by other writers, be they scholastic theologians, medieval legists and canonists or early modern humanist jurists. His theory was original, but remained overall doctrinally underdeveloped, perhaps a sign that Melanchthon – unlike Salamonius – did not envisage to be writing specifically for lawyers.

2.3.3.2. Johannes Oldendorpius

Johannes Oldendorpius (d. 1567) was, like Melanchthon, a figure at the centre of the Lutheran reformation. He was also the most prolific writer about equity among Lutheran scholars, and indeed perhaps among sixteenth-century legal writers in general. Oldendorpius' first work dealing with the subject was a short treatise written and published in German[241] entitled *Wat Byllich unn Recht Ys* in 1529, a work that Oldendorpius later reworked and expanded into a Latin edition which represents his most complete

[238] This seems to be the case with Melanchthon's reference to the capital punishment inflicted on the Capuan Senators by Quintus Fulvius Flaccus, which he saw as an exercise of *epieikeia*. This is discussed in Livy, *History of Rome* (1943), 26.14-6. Melanchthon, *CR* 16, col. 74.
[239] Berman, *Law and Revolution II*, p. 91.
[240] See n. 235 above.
[241] The work does include a gloss in Latin providing references (mostly from legal sources, but sometimes from theological or classical sources) for Oldendorpius' statements.

statement on the matter.[242] Oldendorpius dealt with equity also in a number of other works, including his own annotations on D.1.1.1 and his *Actionum Iuris Civilis Loci Communes* of 1539.[243]

2.3.3.2.1. Wat Byllich unn Recht Ys

The reason for dealing with Oldendorpius and Melanchthon together does not simply have to do with their close links and religious affinities, but most importantly with the content of their theories of equity, which shows they belong to a common tradition. However, it is only Oldendorpius' later exposition of equity that became influenced by the thought of Melanchthon quite clearly. It is useful first to deal with Oldendorpius' earliest work on equity, *Wat Byllich unn Recht Ys*. It was published in 1529, like Melanchthon's commentary on equity in Aristotle's *Ethics* – the two must therefore have worked on the topic around the same time. The analysis of equity in this book bears little resemblance to the latter's work, except insofar as it provides an original analysis of equity.

Like the other humanist-inspired legal writers about equity we have examined above, Oldendorpius was convinced by Budaeus' juxtaposition of *epieikeia* and the maxim *summum ius summa iniuria*.[244] However, his analysis of it in 1529 differed from both the account given by Melanchthon around the same time, and from that given by Salamonius in 1525. At a very general level, the account of equity that comes closest to that of Oldendorpius would be that of Aquinas, but any influence would be indirect, as Oldendorpius clearly does not make it a point of his doctrine to align himself with scholastic thought.

First of all, unlike Melanchthon, Oldendorpius was not particularly concerned in this first work on defending *aequitas scripta*. While he discusses it as a potential category of equity, he then goes on to argue that one may not properly be said to write down equity, like Salamonius had.[245] The reason may lie in that he seems to have been relying on (and indeed refers to) an edition of the *Code* which did not feature the interpolation of the word 'scriptae'.[246] Oldendorpius also provides his own explanation for C.1.14.1, i.e. that it was meant to only reserve to the Emperor cases where one sought to provide a permanent interpretation of the law – otherwise, for Oldendorpius, one must always make use of equity.[247]

However, while resembling Salamonius' account in its dismissal of written equity, Oldendorpius did not think that equity had anything in particular to do with the intention of the legislator or the proper understanding of the law. In *Wat Byllich* he describes the proper selection, reading and interpretation of the

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[242] Johannes Oldendorpius, *Wat byllich unn recht ys* (1529), published in modern German (as *Was Billig und Recht ist*) by Erik Wolf, *Quellenbuch Zur Geschichte Der Deutschen Rechtswissenschaft* (1950), pp. 51-68. Johannes Oldendorpius, *De Iure et Aequitate Forensis Disputatio* (1541).
[243] The comment to D.1.1.1 is published in Johannes Oldendorpius, *Opera Omnia* (1559), pp. 5-7, while the *Actionum Iuris Civilis* were re-edited in Johannes Oldendorpius, *Variarum Lectionum*, (1541), p. 125.
[244] Oldendorpius refers in *Byllich unn Recht* to the maxim as 'scharp recht ys scharp unrecht. See Oldendorp, *Byllich unn Recht*, p. 12. The influence of Budaeus is also acknowledged explicitly at pp. 4, 11-2. See also Kisch, *Erasmus*, pp. 235-242. See also n.221 above.
[245] Oldendorpius, *Wat Byllich unn Recht*, p. 16: 'Nyr fallet nun nedder eyne distinctie edder underscheydinges [Accursius et Jason de Mayno *ad* C.3.1.8] so de rechts lerer gemeyntlich yngefört hebben ane grundt als scholde tmyerleye byllicheit syn de eyne beschreuen de ander unverschreuen. Denn ydt ys ytzunder unde och vorhen beweret dat men de byllicheyt nicht fan egentlich ynn schryfft vorfaten als wol ander gesette under berr illinghe der minsche'.
[246] See the gloss *ad* 'Dem' in Oldendorpius, *Byllich unn Recht*, p. 16. See n.27 above.
[247] Oldendorpius, *ibid.*, p. 17. He also invites in his gloss his reader to dismiss the 'diverse rixatorum opiniones de sensu illius legis'

law as a stage earlier to equity.[248] Equity, for Oldendorpius as for Aquinas, has rather to do with whether the law, once applied, is going to be compatible with some forms of higher justice. If the law clashes with these forms of higher justice, then judges ought to give effect to it in a way that satisfies them. Oldendorpius therefore defined equity as a 'judgment of Natural reason, which tempers human law and aligns it to a rightful life' and 'a judgment [that takes place] in the soul or conscience, that provides you with all the defects of the order or action, so that you can verify whether applying it would be contrary to good custom and [leading a] righteous life'. Oldendorpius may have been influenced by Baldus' definition of equity, which he cites as a source for this, Baldus's own definitions of *aequitas specialis* was of an 'applicatio animi seu iudicium in quo circumscripta iuris regula aliquid de mente singulari ex propria ratione statuitur'.[249]

Oldendorpius therefore provides a list of how this form of justice he refers to as equity may be found. He develops some kind of hierarchy, referring to five rules for the recognition of equity. The first consideration should be the law of God, anything that violates it will be inequitable and should be set aside – regardless of whether it is the will of the lawmaker. A striking example of this comes from Oldendorpius' analysis of the law of tithes. It is clearly the will of the popes who passed the written laws relating to tithes that they be paid. However, they are in conflict with God's word, for Christ had banished all business dealing from his temple. With this provocative example, Oldendorpius makes it clear that equity will allow a judge who regards divine law to be in conflict with human law to simply depart from it – no matter how incompatible with its words or the intention of the legislator that reading of the law may be.[250] The second rule Oldendorpius provides is that of fulfilling the common good. The third rule is that one ought to look closely at all the circumstances of person, time and place. The fourth rule is that it is equitable to seek that which benefits one party without doing any harm to the other - Oldendorpius seems to be inspired by Aristotle saying it is equitable not to insist on one's legal right where waiving it would give an advantage to another, and involve no harm for the right-holder. The fifth rule is that, where the solution to a case is clear, the judge should not let himself be persuaded by the crafty use of the letter of the law or other over-subtle arguments put forward by either party.[251]

If the application of a law clashes with equity – in this sense understood as justice – then the judge should not follow it. The main difference between Aquinas' way of dealing with *epieikeia* and Oldendorpius' is that in his 1529 work the latter does not talk about the process of disapplying the law as *epieikeia* – like Aquinas does – but rather talks about equity as the higher standard of justice itself, which if violated then causes the law to be applied differently. The theory is therefore a rather unique blend of the medieval concept of equity as justice and the scholastic *epieikeia* idea that laws should not be applied when violating that higher justice.

[248] Oldendorpius, *ibid.*, pp. 46-50.
[249] See Oldendorp, *ibid.*, p. 12: 'Billicheyt ys eyn gerichte der natürlichen vornufft wor dorch wertlich gesette gelyndert und thom ördentlicken leuende gestellet werth. [...] Also geschüth eyn gerichte ynn dynem gemöthe edder conscientien de dy allegebrechte der ordeninge edder hande le so du vorhanden heffst egentlich nawyset esst dar under ytwes den guden seden unde ördentlischen leuende entygen befunden werde.' For Baldus' concept of equity see Baldus *ad* D.1.1.1pr, n.5.
[250] Oldendorpius, *ibid.*, pp. 19-24.
[251] Oldendorpius, *ibid.*, pp. 39-40.

2.3.3.2.2. The influence of Melanchthon on Oldendorpius' theory in the *Disputatio* of 1541

By the 1540s, when Oldendorpius published the *Disputatio*, his most complete statement on equity, he had clearly come under the influence of some of the arguments Melanchthon had made.[252]

There are three noticeable signs of Melanchthon's influence. The first is Oldendorpius' definition of *summum ius*, which, in the manner peculiar to Melanchthon, he sought to distinguish from *calumnia*.[253] Like Melanchthon, Oldendorpius sees the difference between *summum ius* and equity in that the former is the provision of a general rule for a category of cases generally defined,[254] whereas equity, 'cum factum iam evenit, circumspicit quale sit, et confert cum huiusmodi praeceptis legum, ac eligit inter multas bonas leges optimam, hoc est, propositio negocio convenientissimam: reliquas suis relinquens temporibus et factis'.[255]

The second sign of Melanchthon's influence can be identified in Oldendorpius' attempt to reconcile *epieikeia* and *aequitas scripta*, departing from his earlier scepticism about written equity.[256] Indeed, while in his previous work he seemed to rely on a version of the *Code* that did not feature the (interpolated) word 'scriptae', he clearly saw that interpolation as genuine by the times of the *Disputatio*, perhaps – again – influenced by Melanchthon's own defence of it. Thus, in Oldendorpius' own attempt to reconcile C.3.1.8 and C.1.14.1, Oldendorpius refers to references of *aequitas scripta* in the former text.[257] His approach to written equity is, however, not exactly the same as Melanchthon's. While Melanchthon thought written equity would be the quality of whatever rule was perfectly adapted to a case, Oldendorpius sees it as the process of identifying such a rule; this process has much in common with the one he dealt with in his earlier work as the stage preceding that of doing equity, i.e. that of identifying rules applicable to a certain case and interpreting them properly.[258] The link to equity, for Oldendorpius, seems to be that, during such an exercise one seeks to find out what 'equity' moved the lawgiver in writing a certain law. Oldendorpius' example is that of a shoemaker who makes many shoes, and then with equity is able, upon seeing the foot of a purchaser and their status, to choose the size and shape best suited to it.[259] Oldendorpius incorporated in this Melanchthon's language, referring to laws as laid down in writing as *summum ius*, which, if properly selected, may become a certain case's *aequitas scripta*.[260]

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[252] Witte reports that '[i]n 1539, Oldendorpius came into personal contact with Melanchthon.' Witte, *Protetestantism*, p. 156. He also claims that Oldendorpius dedicated the 1541 edition of his *Disputatio* to Melanchthon, but the Cologne 1541 edition is instead dedicated to Thielemannus a Fossa, the notary to the chapter of the Cathedral of Cologne. Melanchthon is, however, mentioned in the epistle alongside Budaeus, Cantiuncula, Zasius and other humanist jurists.

[253] See [2.3.3.1.1] above.

[254] Oldendorpius adopts Melanchthon's distinction between *summum ius* and *calumniosa interpretatio*. Oldendorpius, *Disputatio*, p. 24: 'Improprie autem summum ius appellatur, quod praedura interpretatione trahitur ad species factorum inconvenientes: Vel quod simulatis quibusdam argumentis colligitur sophisticos in fraudem legis [...]. Secundum hanc significationem recte dici potest, SUMMUM IUS, SUMMA INIURIA'.

[255] Oldendorpius, *Disputatio*, p. 19.

[256] Oldendorpius, *ibid.*, pp. 74-5: 'Potest aequitas, tum in scholis, tum in foro duplici modo exerceri. Altero [...] scriptam aequitatem recte dixerimus. Altero modo [...] non scriptam aequitatem vocare possumus'. cf with n.245ff above.

[257] Oldendorpius, *ibid.*, pp. 94-5: 'In summa. [C.3.1.8] loquitur de iudiciis, in quibus exercetur aequitas per leges iam scriptas. [C.1.14.1] tractat potestatem constituendi iuris, quae aequitatem quidem requirit, sed authoritatem praeterea summam: ne inconstantia legum mutandarum conquasset Rempublicam.'

[258] See n.248 above

[259] Oldendorpius, *ibid.*, p. 19: 'Quemadmodum sutor, primum multas sibi comparat et varias formas calceorum. Deinde, cum videt emptorem, inspicit qualitatem pedis, et personae dignitatem: sicque formam eligit aptissimam.

[260] Oldendorpius, *ibid.*, pp. 72-5: '[Aequitas scripta exercetur] ut diligenter consideremus, quo ordine Iureconsulti et Imperatores Romani observarint aequitatem in describendis legibus et praeiudiciis humanorum negociorum [...]. Eam ob

Thirdly, Oldendorpius refined his earlier view of unwritten equity, seemingly aligning it with that of Melanchthon. Melanchthon had suggested that the exercise of unwritten equity was required where a law applied to a case for which it was not specifically designed (*de quo non principaliter loquitur*),[261] similarly Oldendorpius said that exercising unwritten equity is required 'in his facti speciebus, quae nunc eveniunt, nec habent praeiudicium in legibus scriptis ex omni parte respondens: ut nos secundum circumstantias earum applicatis axiomatibus summi iuris, iudicemus, quid diffiniri oporteat.'[262] It is called an exercise in unwritten equity 'non quasi liceat sine scripti iuris observatione illam aestimare, ut supra ostendimus: sed quod aliquanto longius a scriptis thesibus recedit: sicut ius civile a iure naturali distinguitur [D.1.1.6].'[263] This is a significant departure from Oldendorpius' earlier theory, centred rather on checking the compatibility of the law with rules of higher justice, which instead relates the application of equity to the circumstances of particular cases, just as Melanchthon had done. This is clear from the definition of equity that Oldendorpius offered in his *Disputatio*. Equity is a 'iudicium animi, ex vera ratione petitum: de circumstantiis rerum, ad honestatem vitae pertinentium, cum incidunt, recte discernens, quid fieri aut non fieri oporteat'.[264] This definition, with its focus on equity's relationship with the circumstances of each case seems similar to that given by Melanchthon – i.e. a doctrine that allows a judge to depart from a rule when particular circumstances take a case outside its scope. However, Oldendorpius was also concerned to link this focus on the circumstances of each case with his earlier argument that equity had to do with the compatibility of laws with higher principles of justice. In this sense, the circumstances affecting the applicability of the rule must 'pertain to moral character'. Again, like Aquinas, Oldendorpius' focus is on whether the particular circumstances of the case cause the law to do injustice, rather than on whether they comply with the intention of the legislator – though, as mentioned earlier, Oldendorpius invites jurists to assume that legislators are always moved by a certain 'equity' when passing laws.[265] In the *Disputatio* he refers to these principles of justice as *gradi honestatis*, and their resemblance to the principles listed in *Wat Byllick unn Recht Ys* is unmistakable. We find them again listed in the following order: the need to preserve religion,[266] the

rem in explicandis legibus, quae factum diffiniunt, semper rationem dubitandi (sic enim vocant) et decidendi ostendere debemus: nedum ponere simpliciter casum, ut vulgo faciunt. Hoc est, oportet primum regula summi iuris unam aut plures indicare, quarum ductu diversum videretur dicendum. Deinde demonstranda est aequitas ex qualitatibus facti, quae talem diffinitionem postulaverint.'

[261] See nn.249-2 above

[262] Oldendorpius, *ibid.,* p. 75.

[263] Oldendorpius, *ibid.*, pp. 75-6.

[264] Oldendorpius, *ibid.*, p. 13. Berman and Witte report in their 1989 article (and also in their respective monographs) *indicunt* for *incidunt*, and omit *recte discernens* entirely. Oddly, Berman and Witte seem to be aware of the correct reading of this passage, which they report having read in Joseph Story's *Commentaries on Equity Jurisprudence*, but choose to depart from it unexplainedly. That the *incidunt* and *recte discernens* are part of Oldendorpius's citation is made even clearer from the fact that Oldendorpius moves on to provide an explanation for each part of his definition, dividing it in segments which include *incidunt* and *recte discernens*. See Oldendorpius, *Disputatio*, p. 18-20. See Berman and Witte, 'Transformation', p. 1642, n. 196.

[265] See n.259 above.

[266] That is, the avoidance of sin and fulfilment of God's will. Oldendorpius, *ibid.*, p. 79: 'quoties de negocio incidente plures concurrerent sententiae: semper praeferretur illa, quae religioni propius accederet, hoc est, pietati et iuste erga DEUM functioni pro nostro munere.'

public good,[267] equality between private parties,[268] finding a middle-way between two polar opposite solutions,[269] to require parties to do that which profits one without causing any loss to the other, to favour family ties and, rather circularly, to do that which is less iniquitous.[270] As in the previous work, it appears that they are ranked in order of priority.[271] The only one missing seems to be, predictably, that of looking to the circumstances of the case – as it is now, as in the theory of Melanchthon, a broader principle encompassing all applications of equity.

Finally, the last point of contact with Melanchthon's theory is that Oldendorpius, like Melanchthon, is reluctant to pin down the intervention of equity to a specific doctrinal exercise.[272] In fact, Oldendorpius does not even seem to engage, as Melanchthon did, in distinguishing exercises of equity by judges from those by lawgivers. Equity in Oldendorpius is so broadly defined as to encompass any exercise of judicial power aimed at taking the circumstances of a case into account and doing justice – regardless of whether this was achieved by extending or restricting existing laws,[273] departing from laws entirely on account of their clash with one of the *gradi honestatis* described above,[274] or without any interpretive or corrective relation to written law at all. Regarding the latter aspect (perhaps the most surprising), it concerned cases where the written law specifically provides the decision-maker with discretion. No matter that the written law is in need of neither interpretation nor correction in these cases – Oldendorpius seems to regard them as equity simply for the reason that they do justice in light of the circumstances of a particular case. A great proportion of the *Disputatio* is precisely aimed, not at detailing the circumstances warranting interpretations and corrections of rules, but rather at explaining what kinds of rules an equitable legal system would include,[275] arguing they should be few, and leave room for judicial discretion, contrasting this with

[267] Oldendorpius, *ibid.*, p. 78: 'Reipublicae proxima est ratio: ut semper existimemus fore aequius, quod ad publicam utilitatem propius accedit.'

[268] This resolves itself under the principle that 'the same rule which anyone maintains against another is to be applied to him' found at D.2.2.0. Oldendorpius, *ibid.*, p. 82: 'Postremus gradus est rerum privatarum, in quibus semper imitari oportet antesignanum illum aequitatis Praetorem Romanum, longa certe experientia prudentem qui secutus est huius artis absolutissimum compendium istud: Quod quisque iuris in alterum statuit, uti ipse eodem iure utatur'.

[269] Oldendorpius, *ibid.*, p. 84: 'Quoties facti extrema ad regulas iuris collata, non admittunt diffinitionem commodam: quia sensus elicitur nimis durus in utranque partem: toties ex media quadam via oportet aequitatem colligere. [...] Haec enim est aequitas, quae sic vult rem per medium temperari.'

[270] They are discussed at Oldendorpius, *ibid.*, pp. 84-9.

[271] See also Oldendorpius, *ibid.*p. 83: 'Ubi multae iuris rationes ad easdem facti circumstantias concurrunt, et aliquo modo respondere videntur: ibi conferenda est aequitas cum aequitate, ut superior cedat inferiori, secundum gradus supra dictos.'

[272] See n.231 above.

[273] Oldendorpius, *ibid.*, p. 98: 'nihil aliud est aequitas, quam collatio similitudinis et dissimilitudinis, inter casum evenientem, ac praeiudicia legum. Quare Iulianus ibidem [i.e. in D.1.3.12] vocat, Ad similia procedere. Ulpianus appellat, Interpretatione vel iurisdictione supplere [i.e. in D.1.3.13]. Paulus dicit, Producere ad consequentias [i.e. in D.1.3.14]'

[274] This is clear, for instance, in a passage where Oldendorpius deals with the interpretation of the interdict *quod vi aut clam* dealt with under D.43.24. He argues that it is possible to depart form that interdict if it would be against the public interest not to do so or for some other obvious reason (presumably referring to the criteria offered earlier). Oldendorpius, *Disputatio*, pp. 100-1: 'I. Si tali restitutione posset laedi causa Reipublicae. Eam enim praeferri oportet aliis utilitatibus, ut supra probatum est. II. Si ostenderetur statim evidens ratio, quare supersedendum esset nec protinus decernenda restitutio. [...] Et si qua tam evidens sit, ut facile repellat agentem: debere possessorem absolui. [...] [Vide X.2.13.13] ubi Innoncentius Pontifex Romanus ex circumstantiis negat restitutionem petitam. Quoniam (inquit) omne, quod non est ex fide, peccatum est: et quicquid fit contra conscientiam, aedificat ad gehennam: frustra in tali casu adiudicaretur restitutio spoliato: quum contra DEUM non debeat in hoc iudici obedire'.

[275] See Oldendorpius, *ibid.*, pp. 107-51. This discussion includes (at pp. 142-51) Oldendorpius' analysis of the well-known juridical question regarding whether a judge ought to follow rules of evidence or his own conscience in cases where he has been himself a witness of a crime in which he is judge – in which Oldendorpius departs from the general view that he should

the approach of medieval Commentators.[276] The point, for Oldendorpius is that written laws are necessary, but need to be written in moderation (*intra mediocritatem*). Oldendorpius deals, for instance, with the kind of rules one ought to devise to regulate the type of care required of a usufructuary in the management of the subject matter of the usufruct, or to assess the reliability of a witness, arguing that it is useless to try and define these matters through written law, and they should rather be left to the discretion of the judge.[277] Thus, Oldendorpius criticises those commentators who 'ambitione atque stulticia ducti tentarent id, quod natura negat, ut istas species in formulas redigerent: regulis, ampliationibus, limitationibus, aliisquae praestigiis omnem boni et aequi artem obscurarunt.'[278] The definition of unwritten equity is thus even broader than the (already very broad) definition found in Melanchthon. It is thus very loosely identified with the exercise of discretion – interpretive or otherwise – required to achieve justice in a particular case, but Oldendorpius does not distinguish clearly between directions to legislators regarding where a judge should be afforded discretion, and directions to judges regarding when, despite not having been granted discretion, they should nevertheless break free from written rules.

With its contrast between *summum ius* and the circumstances of each case, defence of *aequitas scripta* and broad approach to unwritten equity, Oldendorpius' theory of equity in the *Disputatio* clearly belongs to the same tradition (for want of a better term) as Melanchthon's. It therefore seems that Witte and Berman's statement that Oldendorpius 'took a very different approach [to that of Melanchthon] by insisting that every application of a legal rule required a judge to apply equity' underestimate the similarity between those two theories and – even more – the differences from the three other traditions existing at the time, Salamonius' idea of equity as interpretation, the medieval learning on written and unwritten equity, and Aquinas' theological concept of *epieikeia*.[279] Further, the idea that Melanchthon insisted more than Oldendorpius on the application of written law seems to be based on a misreading of both theories – both authors agreed that equity could be achieved by applying written rules to particular cases, as long as these were meant to deal with the particular circumstances of the case.[280] Both Oldendorpius and Melanchthon defended the importance of *aequitas scripta* against the attack of legal humanists and therefore both emphasised the importance of following or at least using written laws for the proper functioning of a legal system, they would both have agreed that 'the equitable method would [in some cases] yield a strict

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be bound by evidence. The medieval background of this debate is well covered in legal history, see for instance K.W. Nörr, *Zur Stellung des Richters im Gelehrten Prozess der Fruehzeit: Iudex secundum allegata non secundum conscientiam iudicat* (1967).

[276] Oldendorpius, *ibid.*, pp. 19-20. See also, *ibid.*, p. 72: 'Nam aequitas ex scripto iure constat. Siquidem leges propterea sunt literis commendatae, ne quis pro suo arbitratu ab eis discederet. Quamobrem Athenienses, qui certas habebant intra mediocritate descriptas legum formulas, ad quas exigerent aequitatem incidentium negociorum: praeferendi sunt Lacedaemoniis, qui committebant omnia non scriptis moribus, quibus saepenumero gliscentibus, perniciose admodum errabant.'

[277] Oldendorpius refers to many *Digest* passages where matters are left to the discretion of the judge to illustrate this point. Oldendorpius, *ibid.*, pp. 98-9.

[278] Oldendorpius, *ibid.*, p. 97.

[279] Witte, *Protestantism*, p. 165. Berman, *Revolution II*, p. 91.

[280] Oldendorpius does seem to argue that equity is always required in a rather confusing statement, where he explains that whether all equity is unwritten or written is a matter of perspective. Oldendorpius, *ibid.*, p. 76: 'In summa. Si aequitatem consideremus habitu et generaliter: omnis aequitas censebitur scripta, nec distat a iure scripto [...]. Sin autem actu et specialiter perpendamus aequitatem: certe nulla est scripta. Nam de casibus hodie incidentibus, nulla scribi potuit diffinitio specialis ante, quam evenirent.'

application of the rule. In some other cases, it would compel the judge to suspend a legal rule, to interpret it favourably towards one of the parties, to give special solicitude to a civil litigant or criminal defendant who was poor, orphaned, widowed or abused, or to reform and improve the rule and thus create a basis for its future equitable application in a comparable case.'[281]

2.3.3.2.3. Later Jurists inspired by Oldendorpius and Melanchthon

Oldendorpius' writings on equity were among the most popular works on equity of the early modern period, and they are still among the best known and most studied by legal historians.[282] However, as mentioned above, insofar as Melanchthon and Oldendorpius can be seen as writing about equity within roughly the same conceptual framework, their works on equity would not establish a particularly recognisable or durable 'tradition' among later writers, and that seemingly regardless of confession.[283] One cannot therefore attribute to them the creation of a peculiarly Lutheran approach to the concept of equity, nor would their humanistic take on equity prove particularly influential on later humanist-inspired jurists. As we shall see below, a notable exception were legal dictionaries and similar reference works, where the impact of Melanchthon and Oldendorpius would be felt over a very long term.[284] Further, among equity treatise-writers, one can identify at least one exception in a jurist who seems to have studied under, or was otherwise close, to Oldendorpius. That jurist is Arnoldus Holsteinus (fl. ca. 1566), who discussed equity in a treatise of 1566 prefaced by Oldendorpius himself.[285]

The influence of Oldendorpius, in particular of Oldendorpius' *Disputatio* and of Melanchthon, on Holsteinus is not transparent, but the most visible aspect of it is Holsteinus's reliance on *aequitas scripta* to explain the value of basing one's judgment on written laws. These arguments are very close to those of Melanchthon and may have been influenced by those near-contemporary orations that Melanchthon had given in defence of written law,[286] and throughout his treatise Holsteinus displays a concern for protecting the value of written law against the intrusion of untamed equity.[287] For Holsteinus, written equity is that which one extracts from written law, by interpreting its intention.[288] This matches exactly neither Melanchthon's nor Oldendorpius' use of written equity. As mentioned above, the former saw written equity as the quality of laws perfectly suited to the facts of a case, including its circumstances, and Oldendorpius thought that it was the selective process by which one found and interpreted the law applicable to a certain

[281] Witte, *Protestantism*, p. 167.
[282] The modern re-edition of Oldendorpius' *Wat Byllich* by Erik Wolf alongside other milestones of German legal thought is a testimony to this. See n.242 above
[283] See n.216 above.
[284] See [2.5.1.] below.
[285] Arnoldus Holsteinus, *De Aequitate Iuris* (1566), pp. 3-4. Oldendorpius' letter is mostly focussed on praising Holsteinus' account of equity and criticising contemporary commentators for talking about – rather than doing – equity.
[286] See n.228 above.
[287] Holsteinus, *ibid.*, p. 61: 'A scripto iure non erit recedendum propter verborum structuram, quam nulla ratio suadet immutari, ubi vero de aequitate dicitur, est de interna orationis vi, et anima legis, quae ratio dicitur, et verba ad se trahit.[...] Est itaque quam diligentissime servandum, ne a verborum vi temere discedatur, ubi res manifesta est, id enim fieri liceret, iam nihil tam tutum in tota rerum humanarum natura haberemus, quod non sophistarum ac cavillatorum subtilitatibus subiectum esset' See also *ibid.*, p. 63.
[288] Holsteinus, *ibid.*, pp. 104-8.

case. Holsteinus may have been wishing to refer to the latter exercise, but it is interesting to note that the terms used by him to do so – his references to the *mens legis* – seem to be drawing on the language of the increasingly popular theory of Salamonius, which viewed equity essentially as interpretation of the intention of the legislator. Aside from written equity, the only other sign of Holsteinus' reliance on Oldendorpius and Melanchthon is his broad take on equity, which, like Oldendorpius, he seems to believe encompasses exercises of discretion as well as interpretation of rules.[289] The rest of Holsteinus' treatise is rather concerned with drawing examples from the law to show how different rules are created to accommodate the circumstances of different cases.[290] There are not many others substantive points to be found about the use of equity in Holsteinus' treatise, but his writings are the closest I have found to that of Oldendorpius and Melanchthon among later treatise writers on equity. Stylistically, the work seems quite closely linked to Melanchthon's commentaries, in that Holsteinus' is a work of very strong humanist influence, favouring flourishes of learning and references to classical authors rather than to legal doctrine or the *ius commune*.

2.3.4. The consolidation of Salamonius' theory in Connanus and Duarenus

In this last section we deal with the theories of civil law writers who wrote between 1541 and 1550s. What is noticeable in this period is a resurgence of the theories of Salamonius in the writings of Franciscus Connanus and Franciscus Duarenus. These two authors picked up Salamonius' theory of equity as *epieikeia* and took it further, in particular for what concerned its rejection of the medieval orthodoxy and development of equity as a doctrine of interpretation in accordance with the intention of the legislator. Connanus did so in his sole work, the *Commentariorum Iuris Civilis*, written probably around the late 1540s and first published in 1553,[291] Duarenus in both his commentaries on the *Digest* first published in 1542, and in the second volume of his *Disputationes Anniversariae*, also published in 1553.[292] Connanus and Duarenus' adaptation of Salamonius' approach would be followed by the majority of later civil lawyers and form the basis of most later approaches to equity.[293]

2.3.4.1. Aequitas *as interpretation in Connanus and Duarenus*

In their works, Connanus and Duarenus both stressed that *aequitas* had to be classified as a branch of unwritten law, and echoed Budaeus and Salamonius in relating it to *epieikeia* and *aequum et bonum*. They defined it sometimes as an amendment of the law, or a more benign and more humane interpretation of the written law, which is required because of the impossibility for written laws to anticipate all cases.[294]

[289] *Ibid.*, pp. 103-111.
[290] Holsteinus, *ibid.*, pp. 63-103.
[291] Franciscus Connanus, *Commentariorum Iuris Civilis Libri X* (1553). See Laurent Pfilster, 'François Connan', *Dictionnaire historique des juristes français XIIe - XXe siècle* (2007), pp. 199-200. A treatment of Connanus' discussion of equity can also be found in Vittor Ivo Comparato, 'Il Regolo Lesbio Tra Volontà E Ragione: Da Connan a Muratori', *Alessandro Giuliani: L'esperienza giuridica fra logica ed etica* (2012).
[292] These can be found in Franciscus Duarenus, *Opera Omnia* (1558), pp. 19-29, 84-5, (commentary on the *Digest*) 492-3 (*Disputationes Anniversariae Vol. 2*).
[293] See [2.5.1-3] below.
[294] Connanus, *Commentariorum*, *f.* 44r.

Duarenus also followed Salamonius in explaining that that interpretation also applies to wills and contracts.[295]

Connanus was at pains to stress that the existence of civil law was necessary to the existence of *aequitas*, 'nec ulla aequitas est, quae non sit alicuius legis aequitas: et lex nulla quae non alicuius aequitatis, ut sic dicam, lex sit [...]. Sicut autem pater non est, nisi quia filii pater est, et non est filius, nisi quia patris filius, ut unum si tollas, non consistat alterum: item de aequitate et lege dici debet'.[296] He went to great length to further discredit the medieval understanding of *aequitas scripta*, repeating Salamonius' points, and indeed his metaphor of the slave and master, to make the point that, as soon as enshrined into writing, any rule – no matter if derived from an equitable interpretation or amendment of another rule – would cease to be *aequa*.[297] As he puts it, "Quid ergo? Si quod legis aequitas suadet, lege ipsum describatur? Desinet esse aequitas quoad ipsius nominis proprietatem appellationemque res ipsa quamvis eadem maneat. Non minus inquam bonum est et iustum neque vero aliud quam erat antea, sed non est aequum [...] ut Titius qui servum habet Stichum, servi Stichi dominus est, et Stichus Titii domini servus. Sticho mortuo manet Titius, si hominis naturam spectes, idem qui antea: sin ad domini nomen et naturam attendas, qua sola cum servo comparatur, non est idem, imo prorsus esse desiit, quia dominus non est, quanquam homo sit et Titius. [...] ius pretorium quamquam omne ducitur ex equo et bono, tamen adhuc ipsum indiget aequa benignaque, expositione. Adeo nihil tam diserte et aperte scribi potest, ut non sit ab eius verbis plerunque recedendum.' However, Connanus was aware that certain editions of the Justinianic *Code* reported C.3.1.8 as reading 'aequitatisque scriptae'. In one passage he tried to explain away this reference to written equity as one to 'quae scriptis legibus interpretandis consumitur', but soon moved on to suggest that 'qui correctiores sunt codices, non habent, scriptae, verbum. Nam aequitas scripta esse non potest, ut dixi'.[298] It was instead Franciscus Duarenus who gave this reading of C.3.1.8 its *coup de grâce* exposing the addition of the word 'scriptae' as a medieval corruption, which, he argued, had been furtively inserted by medieval jurists incapable of reconciling C.3.1.8 with C.1.14.1. He explained that 'in vetustis codicibus verbum, scriptae, non est, nec dubito quin additum sit ab iis qui vim aequitatis non intelligentes, conciliare illud rescriptum [i.e. C.3.1.8] cum [C.1.14.1] non poterant. Nec vero ignoramus, quae alii non solum Iureconsulti, sed etiam Philosophi ac Theologi comminiscantur, tuendi huius erroris causa. Et extat oratio cuiusdam valde eruditi hominis, de scripto iure, et de dignitate veterum interpretum Iuris, in qua vulgare dictum de scripta aequitate excusat, et interpretatur. Sed quam frustra se torqueant, hinc satis perspicuum est.'[299] It is not unlikely that the reference to the contemporary *oratio* defending *aequitas scripta* was addressed to one of Melanchthon's own orations noted above, a sign that they were growing rather popular and contentious among humanist legal scholars by mid-century.[300]

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[295] Duarenus, *In Primam Partem*, *ad* D.12.3.6 (in *Opera Omnia*, pp. 84-5). In this passage he also explains that it is irrelevant for this purpose whether the action brought under the will or contract is *bonae fidei* or *stricti iuris*.
[296] Connanus, *ibid.ff.* 46r-v.
[297] See Connanus, *ibid.*, *f.* 46v. See n.177 above.
[298] Connanus, *ibid.*, *f.* 47v.
[299] Franciscus Duarenus, *Disputationes Anniversariae II*, cap. 18, in *Opera Omnia* (1558), p. 492. For the introduction of *scripta* in the *Code* see n.27 above. See also Duarenus, *ad* C.3.1.8, in Franciscus Duarenus, *Omnia... Opera* (1592), p. 160.
[300] See n.228 above.

2.3.4.2 Natural equity and civil equity in Connanus and Duarenus

Both Connanus and Duarenus introduce a distinction which does not seem to have been acknowledged by Salamonius, and which would prove quite influential among later authors on equity - that between natural equity and civil equity.[301] They did not explain the distinction in the same terms and Duarenus' approach would ultimately prove the more successful one.

Connanus' use of natural equity and civil equity is not very clear. Perhaps it was meant to match the two ways in which *aequitas* interacts with *ius* in Salamonius. He did not go into much detail regarding what civil equity involved, but discussed it by reference to D.47.4.1, where Ulpian talks about an action introduced in the Praetor's Edict meant to remedy certain instances of fraud by a slave directed to be freed in a will. Ulpian said this action had more natural than civil equity. For Connanus, the reason for this statement is that no interpretation of the civil law as it stood before the introduction of that action would have been able to provide a solution – a new rule entirely had to be devised, drawn from natural equity. Natural equity, unlike civil equity, cannot take effect through the powers of the judge, because that equity does not amend the words of the law but 'earum sententiam et voluntatem, ut quod in iis dees perficiatur, naturalis nominanda est, et nova lege debet constitui'. That amendment of the law is supposed to add what the legislator omitted by their own negligence but, had they been present, it is likely that they would have done the same.[302] The latter remark seems to blur the line between interpretation and amendment for indeed, civil equity, as described by Connanus was, too, supposed to give effect to the intentions of the legislator, but it seems that Connanus saw a difference between guessing what the legislator may have meant by adopting certain words, and going entirely beyond the words to find an intention utterly incompatible with them but which the legislator, or perhaps an ideal legislator, would have had, had he been present. Like Salamonius, Connanus argues that these powers of amendment of the law lie with the legislator, supreme tribunals or other officials appointed for that purpose.[303]

Duarenus talks about the same distinction, but his description of it seems to be made on an entirely different basis, and arguably at odds with his overall theory of *aequitas* as *epieikeia*. In his commentary on the *Digest* title *de pactis*, Duarenus explains that equity 'partim naturalis est, partim civilis'.[304]. His definition of natural equity is 'iudicium quoddam rationis, ac veluti legem de iustis, atque iniustis, a natura omnium hominum mentibus inscriptam, cui sponte sua homines, etiam imperiti, sine ulla probationes, aut doctrina, assentiuntur', that equity does not require knowledge of a special kind to be appreciated, it is the type of

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[301] The closest Salamonius comes to finding this sort of distinction is in his separation of general equity from particular equity, but he sees particular equity as applying to both interpretation and emendation. See [2.3.1.2] above. We have already seen the distinction between natural equity and civil equity mentioned by Baldus n.77 above.

[302] Connanus, *Commentariorum*, *f.* 47v.

[303] See n.194 above. Vittor Ivo Comparato has pointed out that this view is consistent with that of sixteenth century political theorists and their views on the powers of the French sovereign, see Comparato 'Il regolo lesbio', p. 749, where he refers to André Lemaire, *Les Lois Fondamentales de La Monarchie Française D'après Les Théoriciens de L'ancien Régime* (1907). This is unsurprising, as it seems to have been a shared view among jurists since medieval times that the judge could not ignore the meaning of a rule and apply his own views on justice instead. See also [2.5.5] below.

[304] Duarenus, *Partitio et Enarratio Methodica Titulus De Pactis*, in *Opera Omnia* (1598), pp. 42-7, 42. He supports this statement with two passages from the *Digest*, D.47.4.1.1 and D.16.3.31 in which natural equity and civil equity are mentioned.

equity to which the rules not to harm anyone, to give each one their own, to keep one's promises and to love the deserving belong.[305] Civil equity, instead, 'probabilis quaedam ratio est, non omnibus hominibus naturaliter cognita, sed paucis tantum, qui prudentia, usu, doctrina, praediti didicerunt, quae ad societatis humanae conservationem sunt necessaria'.[306] Equity in this context, for Duarenus, seems to be used in the looser sense of natural law, in the case of natural equity, and of the public good in the case of civil law. Thus, he identifies *usucapio* with civil equity, and the rules against enrichment at the expense of another as natural equity – a distinction that resonates with that found by medieval jurists when distinguishing rules *ex aequitate* and *ex rigore* as belonging respectively to *aequitas* and *bonitas*.[307] It is not easy to square this view of natural and civil equity with Duarenus' exposition of equity as *epieikeia* in his other writings, but it may have been inspired by the way in which certain medieval authors, like Baldus, had interpreted the distinction, referring it to the source of the justice inspiring the rules.[308]

2.3.4.3. The application of interpretatio ex aequo et bono *in Connanus and Duarenus*

Regardless of their different approach to civil and natural equity, both authors acknowledged that, in the hands of the judge, *aequitas* functioned as a more humane or benign interpretation of the law. Connanus made it clear that such an interpretation of the law was distinct from *clementia*. *Clementia* is a principle that contrasts *severitatem* and is to be applied by supreme tribunals and legislators only, whenever they see fit. Equity has nothing to do with this, as it is tied to the will of the legislator, however harsh that will may be.[309] It seems clear therefore that the meaning attributed by these authors, and perhaps implied by Salamonius, to *benignitas* and *humanitas* had little to do with avoiding harshness per se. Rather, for Connanus, an equitable interpretation is one that goes beyond the words of the law, in a way that furthers the utility of men.[310]

Connanus and Duarenus made three main points, drawing on Salamonius, which would then form the basis of later theories adopting the approach of equity as interpretation. The first is that equitable interpretations may be applied to all laws. This, Connanus thinks, is warranted by D.1.3.25 which requires that 'measures introduced to favour men's interests should [not] be extended through a sterner mode of interpretation [....] against those very interests',[311] Connanus thinks this passage was meant to refer to the interpretation of all written laws, because they are all introduced to further the advantage of men, and

[305] Duarenus, *ibid.*, p. 42.
[306] Duarenus, *ibid.*.
[307] Duarenus, *ibid.*.: 'Non enim naturali aequitati conveniens est, ut quisquam locupletior fiat cum incommodo alieno. [...] Hanc autem usucapiois aequitatem civilem potius, quam naturalem dicimus, quia licet naturae consentanea sit, tamen dominiorum incertitudinem usucapioe tolli, eamque publicae utilitati adversariam esse, non cuivis mortalium natura insitum est: sed civilibus tantum hominibus, prudentibusque, et eruditis compertum.' See n.41 above.
[308] See n.77 above.
[309] Connanus, *Commentariorum*, *ff.* 49r-v: 'Aequitas est semper legis voluntati coniunctissima, sequiturque eam quocunque tendat, sive ad humanitatem, sive ad acerbitatem. [...] Hac autem legis remissio aut mitigatio [i.e. clementia] longe aliena est ab aequitate, haec enim legem salvam et integram conservat, eam quamvis non ex verbis interpretetur, sed ex sententia'.
[310] Connanus, *Commentariorum*, *f.* 45r. Interestingly, at times Connanus compares following the intention of the law through equitable interpretation to accommodating a rule to the law of nature. This is similar to the approach to *epieikeia* developed by late scholastic theologians from Cajetan onwards, who were increasingly assimilating common good, *mens legislatoris* and natural law. See Connanus, *Commentariorum*, *ff.*46v-47r.
[311] This translation is adapted from the English edition of the *Digest* in *The Digest of Justinian*, A. Watson (ed.) (1985).

indeed no law may be so written as never to require equity to intervene, 'nihil tam enucleate dici potest aut scribi, nihil tam plane et definite, quod non multa aequitate saepe sit aut temperandum, aut supplendum'.[312]

Secondly, they argue that, as long as the intention or meaning of a law is clear, the equitable interpretation required to give it effect can be performed by all judges. In making this point, they, like Salamonius, had to deal with C.1.14.1. Mostly in line with Salamonius, Connanus and Duarenus argued that this referred only to cases where the law had to be amended because it is ambiguous and what it means cannot be understood from the words of the law; in such cases a judge should go to the prince, who shall interpret it and, if necessary, declare a new law out of his own volition.[313] As long as the intention of the law is clear, even judges in the lowest courts should be able to go past the law's words and follow it in unforeseen cases. Indeed, they both went on to argue that to deny a judge the opportunity to interpret the law equitably would be equivalent to allowing him to decide *contra leges* whenever unforeseen cases occur, and referred to many passages in the *Corpus Iuris Civilis* which made it clear that failing to follow the will of the law would not be within the powers of the judge.[314] However, as mentioned above, whenever the meaning itself of the law is ambiguous, which includes a case of a law the usage of which has been confirmed by long custom, but which becomes of ambiguous application faced with an unprecedented set of facts, the judge has no powers to resort to equitable interpretation, and should go back to the legislator.

Finally, they made the point that an equitable interpretation can be used both for the restriction and the extension of laws in accordance with the intention of the legislator.[315] Indeed for Duarenus, '[n]on possumus commodius exemplum requirere de interpretatione huius aequitatis, quam quod vidimus de interpretatione albi corrupti in [D.2.1.7].' The *Digest* passage in question is one where a rule granting an action against anyone who obliterates anything from an official notice is extended to those who do the same to a notice before it has been put up.[316] The issue of whether the role of equity as *epieikeia* should also be that of performing extensive interpretations was contentious among contemporary theologians, to whom we turn in the next chapter, and would become the object of debate among later civil lawyers too over the next few decades.[317]

2.3.5. Concluding remarks – equity as *epieikeia* among early legal humanists

This section has sought to trace the origins of a novel approach to equity that spread among humanist-inspired jurists in the first part of the sixteenth century, which recognised a role for unwritten equity within the legal system, departing from medieval theories of equity focussed on the opposition of written equitable rules and written rigorous ones.

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[312] Connanus, *ibid.*, *ff.* 45r-46r. See n. 295 above for a similar statement by Duarenus.
[313] What matters, for Connanus, is not whether the words themselves are ambiguous, but whether they remove certitude from the intention of the law. Salamonius had not considered such a case, and had merely confined cases of amendment to cases where it was not possible, following the intention of the law, to arrive at a just result. See [2.3.1] above.
[314] Connanus, *ibid.*, *f.* 48r. Duarenus *ad* C.3.1.8 in *Omnia*, p. 160.
[315] See n.312 above.
[316] Duarenus, *ad* C.3.1.8, in *Omnia*, p. 159.
[317] See cap. 3 and [4.2.3-4] below.

A great ferment of ideas seems to have followed the publication of Budaeus' *Annotationes*, with the accounts of Salamonius, Cantiuncula and those of Melanchthon and Oldendorpius being produced in rapid succession, all offering a different approach to how equity and *epieikeia* should be brought together.

The theory that would ultimately be most successful, that of equity as interpretation or *interpretatio ex aequo et bono* seems to have originated with Salamonius. The novel focus of this approach to equity did not lie – as Jan Schröder has argued[318] - in the recognition of *aequitas non scripta* as a source of law. That equity, as justice, could act as a source of law was already well recognised. Glossators and commentators had no difficulties arguing that *aequitas*, even unwritten, ought to have been a source of law in certain cases, for instance, it ought to have been used by a judge to fill the gaps in the law whenever neither *rigor scriptus* nor *aequitas scripta* could cover a case.[319] Rather, it seems that the novelty of the approach that Salamonius and many after him took to *aequitas* lies in the assimilation of *aequitas* as *epieikeia* to a doctrine of interpretation and amendment of the law. Under this view, the role of *epieikeia* was to provide a judge with the means of departing from the words of the law in unforeseen cases to give effect to its intention, and to give legislators the power to amend rules when there was no room for the interpretation of the intention of the law.

It is interesting to note that, while this understanding of *aequitas* as *epieikeia* may at first sight look similar to that developed by moral theologians from the thirteenth century onwards, it differed from it in some important respects. We will return to this point in the next chapter, but the most important features should be briefly mentioned at this stage.[320] First is the assimilation of interpretation and *epieikeia*, which scholastic theologians, especially contemporaries of Salamonius like Cajetan, thought were entirely distinct. Salamonius, Connanus and Duarenus came short of recognising for the judge himself a power to amend the law; all that was permissible was to interpret the law according to the legislator's intention. Secondly, the recognition of a role for *epieikeia* to extend laws, rather than simply restrict them, was explicitly rejected by theologians from Cajetan onwards. Thirdly, the distinctions emphasised by some of these jurists between natural equity and civil equity, or general and particular equity, were unknown to the moral theologians. It is thus very likely that the first generation of legal humanists developed their theory of equity independently from moral theology, and were rather influenced by their reading Aristotle alongside the use of *aequitas* within the *Corpus Iuris Civilis* and compared the uses of *epieikeia* and *aequum et bonum* in those sources with that found in statements from classical authors.

There was one main problem for the view of *epieikeia* as interpretation advocated by Salamonius and his followers. None of them sought to make it clear whether they thought their statements were contributing something substantive to the powers of the judge and lawmaker, or whether they were simply re-stating established doctrine under the banner of *aequitas* and *epieikeia*. Indeed, even though all of the legal writers we have examined were at pains to reject *aequitas scripta* in favour of *epieikeia*, none of the statements that the introduction of *epieikeia* led them to seem to have been inconsistent with the views of medieval

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[318] See [2.5.5] below. See Schröder, 'Aequitas', pp. 267-74.
[319] See [1.1.1-3] above.
[320] See cap. 3 below.

commentators and glossators on legal interpretation. It was rather trite that when interpreting the law a judge had to follow the intention of the legislator and, although it had not been addressed in terms of *epieikeia*, *interpretatio extensiva* and *restrictiva* were extremely well entrenched within the medieval *ius commune* – indeed we have already seen that some accounts of these doctrines came very close to performing the function of *epieikeia*.[321] Furthermore, no medieval jurist would have objected to the idea that a lawmaker had the power to abrogate and correct laws to better achieve justice, indeed, this is exactly the meaning that they attributed to C.1.14.1.[322]

These difficulties led some of the later writers on equity to further refine the approach of Salamonius, Connanus and Duarenus, by breaking the wall which had hitherto divided scholastic theology and legal writings on equity. We deal with these in the fourth chapter of this thesis.

2.3.6. A note on the influence of rhetoric

What the theories explored above have in common is that they all explored the potential for unwritten equity to be identified with *epieikeia*, departing from the medieval orthodoxy resolving interventions of equity as oppositions of equity and rigour. What is striking is that, despite drawing on Aristotle's *epieikeia*, none of these legal writers sought to refer (at least not explicitly) to the learning of theologians on *epieikeia*. It would only be among the later generation of writers on equity that civil and canon lawyers would seek to merge the understanding of equity of the earlier humanist-inspired jurists with that of scholastic theologians.[323] Instead, the only body of learning which all the authors examined so far seem to have drawn on seems to have been that of rhetorical education. In particular, equity is related to the tension between the *sententia* or intention of the law (or legislator) and the words of the law – these issues were known among rhetoricians as *a sententia contra scriptum*. It is therefore worthwhile examining the impact of rhetoric theory and its potential influence on the thought of these early writers about equity. As we shall see, it seems that rhetorical theory provided a useful background of learning for the writings of the authors examined above on equity, but it is not the case that authors in the tradition known as 'legal dialectics' had a particular interest in equity, and the influence was therefore mostly indirect.

With the rise of humanism, studies of rhetoric began to incorporate the accounts of Latin and Greek writers, especially Cicero, Quintilian and Hermogenes, the latter in particular through the works of Trapezuntius (George of Trebizond d. 1473).[324] These works were, broadly speaking, focussed on providing the reader with a specific structure to address, and a number of practical devices to successfully argue, any sort of question. Two important rhetorical devices that rhetoricians used to better grasp and deal with each question were the theory of *status* or 'issue'[325] and that of *topica* or *loci communes* often translated as that of

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[321] See [1.1.4.1]. See also Jan Schröder, 'The Concept and Means of Legal Interpretation', pp. 92-4, 96-9.
[322] See [1.1.1] above.
[323] See cap. 4 below.
[324] See e.g. Trapezuntius, *Rhetoricorum Libri Quinque* (1538).
[325] The translation of *status* as 'issue' in English was first introduced by Thomas Wilson (1524-81) in his very popular *Arte of Rhetorique*, (1553, rep. 1962), 4. See also regarding this translation of the word Malcolm Heath, *Hermogenes* on Issues (1995), p. 2.

'commonplaces'.[326] Both were parts of the branch of rhetoric known as *inventio*, through which the rhetorician identified the kind of speech required and the ways in which to make it persuasive.[327] Theories of issues 'sought to classify the different kinds of dispute with which speakers have to deal, and to develop effective strategies of argument for handling each kind'.[328] Once the issue had been identified, the commonplaces then provided the rhetorician with a set of ready-made points to be made in argument whichever side they stood on.[329]

What legal writers were almost always concerned with were 'legal' issues, i.e. those issues which tried to establish whether a certain event was lawful or not. Though it would be pointless to go in detail about the theory of issues in this section, suffice it to say that issues were generally divided into four main types, proceeding in logical order. First, the issue of conjecture, where the factual occurrence of an event is ascertained. Second, the issue of definition, where an event is attributed to a certain category. Third, the issue of quality, where the event is judged upon in terms of morality or legality. There was sometimes a fourth issue of objection which assessed the procedure by which the preceding arguments were brought. Legal issues, according to Hermogenes and Trapezuntius were a sub-species of the third heading. Roughly following Hermogenes,[330] Trapezuntius explained that legal issues had to arise *ex scripto*, that is, they had to be about a legal written document whether it be a law, contract or will.[331] The number of possible legal issues varied across rhetoricians, but Trapezuntius thought there were four categories.[332] These were the issues of letter and intent (*scriptum et voluntas*), contrary laws (*leges contrariae*), ambiguity (*ambiguum*), and analogy (*ratiocinatio*).

Aequitas, as such does not feature prominently in the works of classical rhetoricians. It appears, however, occasionally within the issue of letter and intent, i.e. the issue where one party seeks to adhere to the letter of the law, and the other seeks to follow its intention or purpose. This issue could be related to two sets of commonplaces, those falling under the title *a scripto*, defending the authority of the letter, and those falling under the title *a sententia contra scriptum*, arguing the opposite point.[333] *Aequitas* or *aequum et bonum* appeared as commonplaces for the latter argument, empowering the will of the law over its letter. However, when the classical authors used *aequitas* in that context, it seems to have had little to do with *epieikeia*. It was generally used to make the point that if there were justice (*aequitas*) in a case requiring a departure from the letter of the law, a judge would have been more inclined to do it.[334]

By the sixteenth century, some legal writers sought to relate rhetoric theory to legal sources in order to empower lawyers either with a method to improve the teaching of law, a clear structure within which to frame legal questions, or a series of commonplaces readily referable to legal sources to improve their

[326] On the latter see Piano Mortari, 'Dialettica e Giurisprudenza', 310-57.
[327] Heath, *Hermogenes.*, pp. 10-11
[328] *Ibid.,* p. 11
[329] Piano Mortari, 'Dialettica e Giurisprudenza', pp. 311-2.
[330] Hermogenes' approach was slightly different, see Heath, *Hermogenes*, p. 34.
[331] Trapezuntius, *Rhetoricorum*, pp. 78, 82.
[332] Ibid.
[333] See for instance Cicero, *De Inventione* (1949), II, pp. 136-40. Anon., *Rhetorica Ad Herennium* (1954), pp. 80-5.
[334] See e.g. Cicero, *Ibid.*

arguments in court. These belong to a genre known as legal dialectics, one in which the authors through 'strong reliance on dialectical models' sought to achieve 'the formal systematization of legal arguments'.[335] While the writings of these legal scholars were not greatly influential in the long run (their works were re-published only in a handful of editions), the importance of rhetoric for the better study of jurisprudence was appreciated across the board by humanist-influenced authors.[336]

It should be pointed out at the outset that, among the works strictly falling under the description of legal dialectics, only one, Claudius Cantiuncula's *Topica Legalia* mentions *aequitas* and, even then, does not relate it to *epieikeia* or discuss it along the lines of interpretation.[337] Nicolaus Everardus (Nicolaas Everaerts, d.1532), one of the main writers in this field, did not engage at all in his *Topica* with the *loci* of *a scripto* and *a sententia contra scriptum*, and, even in those *loci* which do approach issues related to *aequitas*, such as those supporting the preference of a law's *ratio extensiva* over its *stricta ratio*, no mention of *aequitas* or *aequum et bonum* can be found.[338] The same goes for Christophorus Hegendorfius (d. 1540) who, while mentioning the *locus a sententia contra scriptum* in his *Dialecticae legalis libri quinque* did not mention *aequitas* at all;[339] Petrus Gammarus (d.1528) mentioned that interpretations ought to follow the *mens legislatoris* in his *Legalis Dialectica*, but no mention of *aequitas* or *epieikeia* accompanied this consideration.[340] The same goes for the Lutheran Johannes Apelius (d. 1536),[341] as well as Nicolas Vigelius (d. 1600),[342] Johannes Mercer (*fl.* ca. 1592),[343] and Johannes de Reberteria (*fl.* ca. 1580-90)[344]. It is unlikely therefore that, taken as a whole, the movement of legal dialecticians had a particular interest in *aequitas*.

Nevertheless, as we have seen, there are various instances where legal humanists referred to rhetoric theory in their explanation of equitable interpretation, and it is possible to conjecture that some of them assimilated the situations where one would require some form of *aequitas* to intervene either by interpretation or amendment with the various legal issues familiar to rhetoricians. We have seen that Salamonius, for instance, argued that cases which did not require *aequitas* were mere cases of *cognitio*, whereas cases involving interpretation were cases of *inventio*, also explaining that the cases in which equity and rigour would have come into conflict overlapped with the legal issues of *ambiguum* and *scriptum et voluntas*.[345] Similarly, Claudius Cantiuncula in his *De Officio* briefly mentioned at the outset that a judgment *ex aequo et*

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[335] Hanns Hohmann, 'Legal Rhetoric and Dialectic in the Renaissance: Topica Legalia and Status Legales', *Proceedings of the International Society for the Study of Argumentation* (1998).
[336] See Peter Mack, *A History of Renaissance Rhetoric 1380-1620*, p. 281 and generally Vincenzo Piano Mortari, 'Dialettica E Giurisprudenza' (1957) 1 Annali di Storia del Diritto 293.
[337] Claudius Cantiuncula, *Topica Legalia* (1520). Aequitas is mentioned in this work in the context of the commonplaces for *a sententia contra scriptum*, and, despite a brief acknowledgement of Budaeus' *Annotationes*, only reflect the use of it in Cicero.
[338] Nicolaus Everardi, *Topicorum Seu Locorum Legalium Centuria* (1516), pp. 164-74. When *aequitas* happens to be mentioned in this work, the reference seems merely to be either to a quality of the law as fair or just, such as at p. 208 or in opposition to *absurdum*, such as at p. 85 His *Loci Argumentorum Legales* (1581) seem to contain no meaningful mention either.
[339] See Christophorus Hegendorfius, *Dialecticae Legalis Libri Quinque* (1531), pp. 123-4.
[340] Petrus Gamarus, *Legalis Dialectica* (1507), *ff.* 6r-7v.
[341] Johannes Apelius, *Methodica Dialectices Ratio* (1535).
[342] Nicolaus Vigelius, *Dialectices Iuris Civilis Libri III* (1573).
[343] Johannes Mercer, *Opinionum et Observationum* (1575).
[344] Johannes de Reberteria, *Topicon* (1575).
[345] He also seems to have thought that cases of *leges contraries* could be resolved by identifying one law as equitable and another as rigorous. See n.178 above.

bono would have been required in legal issues of letter and intent, ambiguity and analogy.[346] The overlap that these writers saw between legal issues and instances requiring *aequitas* may have played a role in shaping the function they thought the latter should perform, such as departing from the letter of the law to follow the law's intentions (*a sententia contra scriptum*), extending laws to similar cases (*ratiocinatio*) and resolving ambiguities within the words of the law (*ambiguum*). On the other hand, it may well be that these authors merely mentioned legal issues as explanatory examples to clarify the role they had independently devised for *aequitas*. Be that as it may, the references to rhetoric are overall rather in the background of the legal humanists' works on *aequitas*, and any explanation of their interaction remains, for the time being, quite speculative.

2.4. *Aequitas* in legal humanism II: Reconciling *epieikeia* with *aequitas scripta*

2.4.1. The hazards of equity

Within the circle of early legal humanists not all embraced the assimilation of *aequitas* with *epieikeia* and the consequent rejection of *aequitas scripta* with the same enthusiasm as the authors we have considered above. Many jurists seem, on the contrary, to have considered this approach threatening to the integrity of the legal system.[347] This may seem puzzling, given that the doctrines we looked at above did little to explicitly add much to the powers of the judge – but the potential for expansion suggested by Aristotle's doctrine seems to have led some authors to reject it.

Reiterating the concerns that early medieval jurists displayed when they confined the application of C.3.1.8 to 'written' equity, a substantial number of jurists seem to have thought that rejecting *aequitas scripta* in favour of *epieikeia* introduced once more the risk of unbridled judicial discretion. In reply to a letter of Bonifacius Amerbach (d. 1562) exalting the virtue of *epieikeia* as a guiding principle of law as opposed to the countless juridical commentaries,[348] the Dutch jurist Viglius (Wigle Aytta van Zwichem d. 1577) criticised his friend's views on the grounds that *epieikeia* would effectively leave all decisions of law to the good sense of judges, which approach 'would have been tolerable if judges were always, as they ought to be, good men: but how often won't you find that to be the case on account of either favour, ambition or greed?' The law ought, instead for Viglius, to be governed by rules, equity may inspire those rules, but they must be written so as to be certain and predictable.[349] The concerns manifested by Viglius seem to have been at the heart of many legal humanists' reluctance to reject the notion of *aequitas scripta*.

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[346] See Cantiuncula *De Officio*, p. 51.

[347] We have seen similar concerns already in Philipp Melanchthon, which he expressed in his defence of *aequitas scripta* – but without shying away from finding a role for unwritten equity too. See [2.3.3.1.2] above.

[348] Alfred Hartmann, *Die Amerbachkorrespondenz, Vol.* 4 (1953), pp. 120-1.

[349] Hartman, *ibid.*, pp. 143-5: 'Et periculosum est in qualiscunque seu cuiuslibet judicis manu omnia ponere [...]. Tolerabile esset, si iudices semper essent tales, quales esse debent, id est viri boni; sed quotumquemque reperias non expositum vel gratiae vel ambitioni vel avariciae? [...] Affectus itaque judicum necessarium fuit refrenare, ut non ex sua cupiditate sed juris prescriptione sententiam ferant et populus sciat, quid servandum sit, ne semper iudicium accipere cogatur, si in voluntate iudicis stabit aequi et iniqui diffinitio. Curandum tamen, ut, quod legis nomine prescribitur, maxime sit aequum; aequitatem autem ex prudentissimi atque optimi viri iudicio constitui oportere non est dubium.'. Viglius did add, however, that the

It seems that it is possible to divide those jurists in two categories. The former includes those who did not accept, either implicitly or explicitly, Budaeus' philological argument stating the equivalence of *aequum et bonum* with *epieikeia*. The second category was comprised of those authors who, while accepting the theoretical premises of Budaeus' argument, found ways to reconcile it with confining the judge to the use of *aequitas scripta*.

2.4.2. Disregarding or challenging Budaeus

As we have seen above, Budaeus' philological statements were accepted by the overwhelming majority of legal humanists, probably because they reflected the well established practice among humanist philologists at the time to translate *epieikeia* as *aequum et bonum*. However some humanist legal scholars nevertheless preferred either the medieval orthodoxy or a different solution to Budaeus' claims. As we shall see below, Johannes Sichardus, a humanist jurist of repute, made a conscious choice to ignore the points made by Budaeus, basing his work entirely on the medieval orthodoxy of *aequitas*. Andreas Alciatus, instead, chose more boldly to challenge Budaeus' philological statements and introduce his own, ultimately less popular, approach to translating *aequum et bonum* in D.1.1.1.

Johannes Sichardus[350] (d. 1552) in his *Praelectiones*, published around mid-century, comments on C.3.1.8 in entirely orthodox terms, referring to medieval sources from Accursius to Panormitanus to support the understanding of that source in terms of *aequitas scripta*, and warning of the dangers which would ensue if one left a case to the judge's 'own' equity.[351] He makes a number of points which are clearly designed to contribute to the arguments that were being had among medieval legists and canonists, and does not consider *aequitas* as having anything to do with benign interpretation or with judicial correction of the law.[352] Sichardus refers to works which make the identity of *aequitas* and *epieikeia* quite explicit, such as Melanchthon's commentary on Aristotle's *Ethics*, but evidently made a conscious choice not to acknowledge that aspect of those works. . Sichardus does not seem to have expressly wanted to challenge the learning of other humanist jurists, but his writings are evidence that, even among legal scholars with a humanist inclination, by mid-century, the new learning of *epieikeia* had not yet been unanimously accepted.[353]

Andreas Alciatus provides us, albeit only in a short passage of one of his works, with a more explicit rejection of Budaeus' arguments about *aequum et bonum*. In his *Parergon Iuris*, published in 1538, he offered his own philological interpretation of D.1.1.1, quite distinct from that of Budaeus as well as that of humanist

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objective of commentaries would have been the proper interpretation of laws and allowing them to fulfil the intention of the legislator, he did not seem to think, as other jurists in his time did, that this had anything to do with *epieikeia*.

[350] On Sichardus more generally see Hans Erich Feine, 'Johann Sichard. Humanist, Professor Des Roemischen Rechts Und Herzoglicher Rat 1499-1552', *Schwaebische Lebensbilder, V* (1950) and Guido Kisch, *Johannes Sichardus Als Basler Rechtshistoriker* (1952).

[351] Johannes Sichardus, *Praelectiones* (1565), *ad* C.3.1.8, pp. 300-2: This approach is consistent throughout the *Praelectiones*. When commenting on other parts of the *Digest*, Sichardus considers *aequitas* in the context of a law having *aequitas* 'correcting' another law having *rigorem*, see e.g. Sichard, *Praelectiones*, *ad* C.6.29.2.

[352]Sichardus, *ibid*., pp. 301-2.

[353] He also refers to *strictum ius* as *summum ius*, which suggests he must have been familiar with the works of Budaeus, Zasius and many others who all drew the link between *aequitas* and *epieikeia*. See Sichard, *Praelectiones*, p. 300.

translations of Aristotle's *Ethics*.[354] In chapter 30 of this work, he criticised those *literatores* who accused Ulpian of defining *ius* wrongly when he said it was the *ars boni et aequi*.[355] For Alciatus, *aequum et bonum* are separate words, just as Accursius had recognised them to be. Interestingly Alciatus did think that *aequitas* is Latin for *epieikeia*, but he thought *bonum* was a distinct term, Latin for *dikaion*.[356] Alciatus' reasoning is not entirely transparent from this text, but he seems to have concluded that the component of *bonum* within *ius* is that which prevented the abolition of all laws in favour of *epieikeia*. Since *epieikeia* cannot be written down, Alciatus argued,[357] translating *aequum et bonum* at D.1.1.1 as a binomial pair into *epieikeia* would effectively amount to defining *ius* as the art of *epieikeia*, thus implicitly calling for the abolition of all written laws.[358] His point seems to be that *bonitas* is the principle by which *aequitas* is reduced into writing. Alciatus does not go into great detail explaining either the arguments he opposes nor, for that matter, his own. Overall, his analysis resembles that of medieval jurists, who understood *bonitas* as that quality which requires a certain degree of rigour on account of public utility, and it is possible that he sought to give a credible philological foundation to the Accursian approach to *aequum et bonum*.[359] Alciatus seems to have been the only one, however, to develop this understanding of *aequitas* and no other legal humanist seems to have accepted or repeated it. He was also not altogether consistent in his views. In the fifth book of the same *Parergon Iuris*, Alciatus argued, referring to D.45.1.91.3 that the reference to *aequum et bonum* in that passage is to be understood as *epieikeia*.[360] Further, in his comment on C.2.1.4 he states that when the application of a law would be iniquitous 'propter rei qualitatem, vel aliud accidens', one ought to depart from the law and make use instead of *epieikeia*.[361]

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[354] Andreas Alciatus, *Parergon Iuris*, in *Opera Omnia Vol. 2* (1546) coll. 198-200.

[355] Alciatus, *ibid.*, col. 198: 'Inclamant in nos iidem literatores, et ius inepte Ulpianum definisse aiunt, cum dixit esse artem boni et aequi: quem tamen si recte intellexissent, non arbitror tam temere damnassent.' It is unclear whom Alciatus is targeting with this statement. The early modern glossary Du Cange reports the meaning of *literator* as teacher of letters or grammar 'qui Grammaticus Graece dicitur'. Du Cange is easily available online at http://ducange.enc.sorbonne.fr/ (last accessed 04-04-2018). This suggests Alciatus may have meant to refer to those scholars who, like Budaeus, had philology as their focus in their analysis of the *Corpus Iuris Civilis*. However, Budaeus and those who followed him had attacked Accursius' understanding of *bonum et aequum* – they said nothing about Ulpian's definition itself. See [2.2.1, 2.3.1] above.

[356] See Alciatus, *ibid.*, col. 198: 'Igitur sciendum id latine aequum dicit, quod Aristoteles [*to epieikes*] vocat [...] bonum etiam id significet, quod in quacunque civitate utile est, tametsi non semper cum aequitate concordet, videturque Graece [*dikaion*] dictum'.

[357] Alciatus, *ibid.*: '[*epieikeia* est] naturalis quaedam moderatio, quae in pectoribus hominum residet nec satis lege praescribi potest.'

[358] Alciatus, *ibid.*: 'Quod [i.e. the abolition of written laws] [...] etiamnum declamatores aliquos, quibus maxime arrideat ; quorum in iureconsultis (ut apparet) eadem sunt vota, quae libitinariorum in medicis. Sublato enim iure scripto quid aliud supererit, quam ut omnes pro stultitiae suae captu iudicent sententiasque in cuiusque gratiam vel odium arbitratu suo ferant universaque litium trichis involuant?'

[359] See n.41 above.

[360] Andreas Alciatus, *ibid.*, col. 222: "Igitur apparet purgationem morae hac ex aequitate inductam fuisse, et ideo existimarem, etiam Iudaeo concedendum, ut tali beneficio uti possit quia licet cum eis summo iure agendum sit, non tamen ab hac aequitate summovendi sunt, quam *epieikeian* vocant: cum nihil aliud sit ius, quam haec aequitas in artem redacta, ut supra a nobis declaratum est'.

[361] Andreas Alciatus *ad* C.2.1.4 in *Opera Omnia Vol. 3*, (1547), p. 270.

2.4.3. Reconciling *epieikeia* with *aequitas scripta*

As we have said, most legal humanists received favourably Budaeus' analysis of *aequum et bonum* as Latin for *epieikeia*. A great number of them, however, refused to conclude from this that there was no place for the medieval learning on *aequitas scripta* and decided instead to make it fit the philological change.[362]

2.4.3.1. Udalricus Zasius and aequitas scripta *as civil law*

The writings on *aequitas* by Udalricus Zasius exemplify rather well this approach. He seems to have found the arguments taken up by Budaeus linking *aequitas* and *epieikeia* through *aequum et bonum* very persuasive.[363] In his commentary to D.1.1.1, after quoting the arguments made in the gloss about *usucapio* being an institution of *bonitas* as opposed to *aequitas*, Zasius added that, whatever the gloss might say 'tu tene intrepide contrarium. Nam quod Graeci [*epieikes*] dicunt, hoc nos aequum et bonum interpretamur.' Zasius was also entirely persuaded by Budaeus' polemic tirade against the *rigor iuris*, *strictum ius*, or as the humanists now referred to it, *summum ius*; he argued that strict law had no room in a legal system, identifying it with a perverse adherence to words and with wicked over-reliance to the letter of the law. [364]

However, Zasius did not conclude that, in a strictly Aristotelian sense, a judge should be empowered to amend the law in cases where adherence to the letter would cause injustice. In fact, Zasius' position on the powers of a judge faced with written rules is no different than that of medieval commentators, except insofar as it contains no mention of written rigour. A judge would have to adhere to the written rule, and Zasius insists that sources such as C.3.1.8 only meant to refer to *aequitas scripta*. [365] Zasius argued that medieval jurists had wrongly confused two types of equity, natural equity and civil equity. Natural equity for Zasius is founded on natural reason and, unlike *epieikeia*, has nothing to do with the correction of defective rules. And indeed it would be impossible for it to do so, Zasius tells us, for natural equity is rather concerned with making universal statements than with the details of cases.[366] These broad statements, such as to worship God, to love one's parents and country, and not to do wrong to others in order to enrich oneself are principles which inspire all law making, but do not empower a judge to correct the law. For Zasius, all the references to *aequitas* in the edicts of Praetors were to that natural equity, as an inspiring principle of justice.[367] Written rules of law are, however, free to disagree from those broad principles. C.3.1.8, for Zasius, does not refer to natural equity when it says that equity should be preferred.[368] Zasius could thus at the same time reject the role of rigour within the legal system and explain away all rules

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[362] I have not include Cantiuncula, Melanchthon and Oldendorpius among these authors because, despite recognising some validity to *aequitas scripta*, he also found a role for *epieikeia* as a doctrine of interpretation and amendment. See [2.3.2-3] above.
[363] Ulrich Zasius *ad* D.1.1.1, in *Opera Omnia* Vol. *1*, (1590), p. 100. Zasius defined *epieikeia* also as 'temperance'.
[364] *Ibid*, p. 102. See also Zasius *ad* D. 12.6.13.1 in *Omnia Vol. 1*, pp. 438ff where he makes a similar point.
[365] E.g. Zasius, *ad* C.3.1.8 in *Opera Omnia Vol. 4* (1590), pp. 114-5: 'Aequitas quae ad speciem tendit, si est scripta iuri scripto semper praeponderat, et praefertur ut est hic [C.3.1.8]'; 'Si iuris decisio clara sit, et non sit e diverso scripta aequitas, tunc standum est iuri, etiam si durum sit. [D.40.9.12.1], [D.17.1.26.6].' Regarding the latter reference, though the *Digest* itself does not mention *rigor scriptus* it is clear that commentators often associated it to it. See e.g. Bartolus *ad* 'Non omnia' D.17.1.26.6. (1602), *f.* 104v. These points too are resstated in Zasius *ad* D. 12.6.13.1, pp. 438ff.
[366] Zasius *ad* C3.1.8, p. 115.
[367] *Ibid.*
[368] Zasius *ad* D.12.4.3.1.5 in *Omnia Vol. 1*, p. 405. Compare the use of *aequitas naturalis* in Duarenus at [2.3.4.2] above.

which had been identified by medieval jurists as *rigor scriptus* (usually explained as *rigor scriptus in specie*, such as *usucapio* and *prescriptio*) as instances of written 'civil' equity.[369]

This may seem puzzling given that Zasius, as mentioned earlier, identified equity with *epieikeia*. The exercise of following written rules seems to have little to do with *epieikeia*. Zasius' answer is not entirely satisfactory. He answers, on the one hand, by limiting the role of *epieikeia* to a principle of lawmaking, arguing that *epieikeia* is what legislators and jurists use to temper primitive law and adapt it to a greater variety of facts and situations, thus making it equitable. In this context, *aequitas scripta* is such written law that has been formed by the process of *epieikeia*, tempering older rigorous laws to provide justice that is closer to the facts of each case. However, on the other hand, Zasius seems to trivialise this view by arguing that the entirety of Roman law, having been subjected to this process of temperament over a very long period, is equitable to the highest degree.[370] This means, for Zasius, that within the system of Roman law, a judge would be bound by the written rules of the *Corpus Iuris Civilis* as civil equity.

There is a difficult passage in Zasius which seems to recognise a role for unwritten equity. At one point he argues that 'nulla tamen lex est ita rigide scripta, quin iudex ex loco tempore, causis, personis, rebus, quantitate, contractu, et caeteris id genus circunstantiis temperare possit aequitate quadam rigorem iuris: quae aequitas eo casu inter easdem personas etiam si scripta non sit, iuri praefertur', but he adds immediately after that 'nottissimum est iudicem posse procedere de similib[us] ad similia', which, if it was meant to be a qualification of the previous statement, suggests that the judge will in any case be confined to referring to orthodox rules of interpretation in order to temper the rigor of those cases. In some passages Zasius expresses the point more broadly, saying that 'lex quae careret aequitate, et quae non haberet unde excusaretur, ista est fugienda, quam olim veteres nominabant summum ius, nos vero strictum dicimus ius.'[371] The latter statement is not qualified in any way, and it remains unclear how free, in Zasius' view, a judge should be to determine whether the application of a rule in a certain case is unjust.

Regardless of whether the remarks adduced in conclusion were meant to depart in any way from *ius commune* orthodoxy, it seems that Zasius' attempt to reconcile *epieikeia* with the *ius commune* makes him one of the first authors to see equity both (i) as Aristotle's *epieikeia*, the power given to judge or lawmaker to interpret, amend and direct rules, and (ii) in its medieval sense of a quality that rules may enjoy as *aequitas scripta* or lack as *summum ius*. The two are linked in that it is precisely the lack of 'equity' (as a quality) in a rule that triggers the power of a judge to do 'equity' (in the sense of *epieikeia*). This rather confusing approach – which stems from the incompatibility of *epieikeia* with the medieval concept of equity as justice – is also found in later authors seeking to square the role of equity as *epieikeia* with the orthodox understanding.[372]

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[369] Zasius, *ad* C.3.1.8 in *Omnia Vol. 4*, p. 115,: 'Licet ergo lex scripta aliqando deroget naturali aequitati in unum finem, nihilominus aequitatem habet alio fine'.

[370] In doing so, he agrees with Budaeus and disagrees with medieval doctrine that *aequum* and *bonum* are different things. He thinks that they cannot be distinguished and that the virtues that make laws *bonae* in the medieval doctrine must necessarily make them *aequae*. For instance, the reason usucapio is *bonum* is that it makes property more certain, that quality of making property more certain is, however, for Zasius, precisely what makes *usucapio* also the *ratio aequitatis* which justifies the law's *aequitas*. Zasius *ad* D.1.1.1 in *Omnia Vol. 1*, p. 100.

[371] Zasius *ad* C.3.1.8 in *Omnia Vol. 4*, p. 115.

[372] See for instance equity used in a similar way in Donellus at [4.2.3.3] below.

All in all, Zasius' theory of equity may have caused more problems than it solved, but some aspects of his views are found in other authors. Aspects of his explanation for *aequitas scripta* are in Oldendorpius, Melanchthon, and Cantiuncula, and his definition of natural and civil equity is similar to that of Duarenus, which, proved itself influential among later authors.[373]

2.4.3.2. Conrad Lagus – aequitas scripta *as a formal cause of law*

Some other humanist-inspired jurists were content with a less elaborate effort to reconcile *aequitas scripta* with *epieikeia*, simply reading *epieikeia* as a synonym of *aequitas scripta* and *rigor scriptus* as a synonym of *summum ius*, ignoring Budaeus' criticisms of the latter. A clear statement of this view appears in Conrad Lagus' *Iuris utriusque traditio methodica*, published in 1543, a work meant to provide an accessible structure of Roman law as a teaching tool.[374]

A useful representation of Lagus' thought on point can be found in the simplified re-edition of the *Tratidio Methodica* in Ramist style by Thomas Freigius. From Freigius' work we get a very clear graphical representation of Lagus' classification of laws. Laws (*iura*) may be distinguished in various categories, which categories are structured around the four Aristotelian causes. From the point of view of their formal cause, laws fall under the category of either (i) *rigidum*, *strictum*, *akribodikaion*, or (ii) *bonum et aequum*, *epieikeia*. Freigius goes on to explain that this distinction only applies to *rigore scripto* and *aequitate scripta*, 'nam aequitas non scripta, dicitur a I[ure]C[onsulti] naturalis aequitas'.[375] For Lagus, this difference, i.e. whether a law belongs to the category of equitable or rigorous, is relevant to the issue of when a law, though valid, should be binding. In the course of explaining how natural (i.e. unwritten) equity may moderate civil law, he explains that, while it would be desirable in principle for this to happen, and while a *dispensatio* by a superior may achieve that effect, 'non satis tutum est, propter iudicum imperitiam et humanarum etiam mentium caliginem, in quam facile propter affectuum impetum deducuntur, [...] ut quoties ipsis videatur leges aequitate naturali moderentur'.[376] This is the reason why the moderation of law is subject to rules establishing the priority of written *aequitas* and *rigor*,[377] the only case in which it is possible for the office of the judge to appeal directly to natural equity will be, for Lagus, a case where neither *rigor* nor *aequitas* is found in writing and it is not possible to extend the *ratio legis* of another rule to cover the case at hand, then 'nobile iudicis officium imploratur tanquam subsidiarium et extraordinarium iudicis auxilium, quo petentibus aequitas ministratur'.[378] Lagus seems to identify in his work at least one specific role for *epieikeia* as understood by Aristotle, when he explains that it provides the justification for legal fictions – in saying

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[373] See [2.3.2, 2.3.3.1.2, 2.3.3.2.2, 2.3.4.2]. The fact that all these works were written around the same time makes it difficult to tell who was the main influence within this group of humanist jurists. Cantiuncula, Melanchthon and Oldendorpius were all writing about equity since the second half of the 1520s, Zasius published his commentaries around the 1530s and Duarenus' works on point were published through the 1540s.

[374] Conradus Lagus, *Methodica Iuris Utriusque Traditio* (1543). Thomasius Freigius, *Partitiones Iuris Utriusque* (1571).

[375] See e.g. Freigius, *Partitiones*, *f.* 3r. Lagus is less explicit but treats *naturalis aequitas* as a synonym of justice and natural law throughout his treatise.

[376] Lagus, *Traditio*, p. 9. Freigius, *Partitiones*, *f.* 3v.

[377] *Ibid.*

[378] Lagus, *ibid.*, pp. 9-10.

this he drew on medieval statements that fictions are grounded upon equity, but this does not seem to have had any substantive effect on his analysis of fictions.[379]

A number of other works seem to have taken an approach similar to Lagus. For instance, Sebastianus Derrerus[380] (Sebastian Derrer d. 1541) in his *Jurisprudentiae liber primus* published in 1540 made it clear that he was aware that *aequum et bonum* was a synonym for *epieikeia*,[381] and added that 'de Legibus, dum constituuntur iudicari ac consultari posse, nemo dubitat. Sed postquam constitutae, promulgatae, et moribus utentium comprobatae sunt, secundum illas erit iudicandum [D.1.3.2] [C.1.14.3] [D.4 c.3] [...]. Adeo, ut nullus inferior a Principe Magistratus, propter aequitatem non scriptam, possit a scripto iure discedere: etiam si rigorem continet."[382] Derrer then carries on by stating the familiar hierarchy between *rigor scriptus* and *aequitas scripta*.[383] This approach is also that found in Andreas Tiraquellus' (d. 1558) *Retrait lignager*, where he discusses the meaning of that custom being of 'strict law' (*d'estroicz droit*).[384]

2.5. The diffusion of equity as *epieikeia* in later legal scholarship

In the paragraphs above, the early development of equity by early humanist jurists in the first half of the sixteenth century was laid down. In this earlier period views covered a broad spectrum, they ranged from those emphasising the role of unwritten equity as *epieikeia* to justify the interpretation of legal rules *ex aequo et bono*, to those where the association of equity and *epieikeia* was rejected altogether.

In this section, I will give a brief outline of the spread of the ideas explored above among later authors. As we shall see, two main authors seem to have had the greatest impact over later writers. Johannes Oldendorpius had a very noticeable impact over reference works, such as legal dictionaries. On the other hand, the view of equity as *interpretatio ex aequo et bono* of Salamonius, Connanus and Duarenus, would have a greater, more general impact on civil law writers generally writing about equity. That is not to say that reference to these works was exclusive, in fact, most works strived to rely on the broadest range of sources possible, often selecting passages in a way to avoid obvious inconsistencies – though not always successfully. That said, my focus is here more on the main arguments made about the nature of equity in the works cited, rather than on the range of sources used – my objective is to provide an outline of the diffusion of the ideas about equity explored above, rather than accounting for the spread of specific works on equity among civil lawyers.

In the last section we will look at the peculiar development, up until the early seventeenth century, of canon law. We have seen in the previous section that canon lawyers adopted, over the course of the Middle Ages, an approach to equity that was rather similar to that of civil lawyers, focussed as it was on written and unwritten equity and ranking sources against each other on the basis of their qualities as

[379] Lagus, *ibid.*, pp. 38-9.
[380] Derrerus was a friend of Erasmus and Ulrich Zasius, he succeeded to Zasius to his chair of law in 1535. See the entry for 'Sebastian DERRER', in P Bietenholz and T Deutscher (eds), *Contemporaries of Erasmus* (2003).
[381] Sebastianus Derrerus, *Jurisprudentiae Liber Primus* (1540), p. 10.
[382] Derrerus, *Jurisprudentiae*, pp. 46-7.
[383] *Ibid.*,: 'Ubi tamen utrunque, et rigor et aequitas scripta inveniuntur, regulariter aequitas rigori praeferenda est. [C.3.1.8]'
[384] Andreas Tiraquellus, *De Utroque Retractu Municipali et Conventionali* (1618), pp. 497-504.

equitable or rigorous.[385] The main point made below is that canon lawyers were extremely conservative when it came to engaging with the views of humanist or humanist-inspired jurists. Their views, as we shall see, remained anchored to the traditional distinction of written and unwritten equity until well into the seventeenth century.

2.5.1. Legal Dictionaries

Discussing the diffusion of the concept of equity as *epieikeia* among legal writers in our period, it is useful to begin with works that would have been the most immediate medium for its popularisation – reference works and legal dictionaries. One of the earliest reference works referring to equity in this sense seems to have been the *Lexicon Iuris Civilis* of Jakobus de Speculis (d. 1547), first published in 1538, and referring to equity by reference to Budaeus and Salamonius. This work preceded the publication of Oldendorpius' *Disputatio* and indeed of his own *Lexicon Iuris* in 1548, where he restated the views expressed in the *Disputatio* under the entry for 'aequitas'.[386] It is interesting to note that from the publication of Oldendorpius's *Lexicon Iuris* onwards, Oldendorpius became one of the most popular sources among legal dictionaries for entries on equity. Already in later, posthumous editions of de Speculis' *Lexicon*, starting from 1549, we find the writings of Oldendorpius on the topic incorporated alongside the other sources.[387] Another important source referring to Oldendorpius' entries in the *Lexicon* was the *Lexicon Iuris* of Simon Schardius (d. 1573) published in 1582,[388] which became itself a popular reference for later legal dictionaries, for instance Johannes Calvinus' (Johann Kahl, d. 1614) *Lexicon juridicum*, first published in 1600.[389]

That said, one may also find, even following the publication of Oldendorpius' *Lexicon*, some legal reference works being instead exclusively influenced by the views of Salamonius, Connanus and Duarenus - for example Barnabas Brissonius' (d. 1591) *De Verborum Significatione* published in 1559, an extremely popular legal glossary, the entry for which at *aequum et bonum* draws on the theory of Duarenus and Connanus to describe equity as a benign interpretation which is called *epieikeia* in Greek, associated with D.1.1.1, and D.50.17.90, also distinguishing between 'natural' and 'civil' equity as Duarenus did.[390] Finally, some other works of this sort made use of material from both traditions indiscriminately, such as

[385] See [1.1.3] above
[386] See Johannes Oldendorpius, *Lexicon Iuris* (1548), pp. 27-30. For Oldendorpius' approach see [2.3.3.2] above.
[387] Jacobus de Speculis, *Lexicon Iuris Civilis* (1538), p. 12. Compare with the same author's *Lexicon Iuris Civilis* (1549), p. 32. It is perhaps not a coincidence that later editions of de Speculis' *Lexicon* from the 1549 edition onwards include Oldendorpius' *In Verba Legum XII Tabularum Scholia* as an appendix. The 1549 edition, but not later ones, also included a number of other works in appendix – among these was also Melanchthon's *Oratio de Scripto Iure* where he outlined some of his arguments about equity. See n.229 above. De Speculis was a student of Zasius, see Steven Rowan, *Ulrich Zasius. A Jurist of the German Renaissance, 1461-1535* (1987), pp. 222-3.
[388] See Simon Schardius, *Lexicon Iuris* (1600), p. 59.
[389] Johannes Calvinus, *Lexicon Juridicum Juris Caesarei Simul, et Canonici: Feudalis Item, Civilis, Criminalis, Theoretici, Ac Practici.* (1622), coll. 147-8.
[390] Barnabas Brissonius, *De Verborum Quae Ad Ius Civile Pertinent Significatione. Libri XIX* (1559), col. 24-5: "Aequum et Bonum coniungi solent [D.1.1.1, D.1.1.10, D.2.11.2.8, D.12.1.32] et alias fere semper. Significatur autem his verbis humanior et benignior iuris interpretatio, quae grecae [*epieikeia*] dicitur. [...] Est autem duplex aequitas, naturalis et civilis. Naturalis ex naturali ratione hominum mentibus insita. Civilis vero ex civilibus praeceptis aestimanda est [D.2.14.1pr].' For more on Brissonius' life and work see Eva Jakab, 'Brissonius in Context: De Formulis et Solennibus Populi Romani Verbis' in Paul J du Plessis and John W Cairns (eds), *Reassessing Legal Humanism and its Claims* (2016), *passim*.

Pardulphus Prateius' (d. 1570) *Lexicon Iuris Civilis et Canonici* first published in 1567.[391] Prateius' work featured a lengthy entry on *aequitas* explaining that '[a]equitas variis in iure modis significatur. Adpellatur enim saepissime aequum et bonum [...]. Unde a Salo[monio *ad* D.1.1.1pr] recte definita est', moving on to describe it echoing Salamonius and Duarenus as *humanior et benignior iuris interpretatio* as well as 'perfecta ratio, quae leges et omne scriptum, dictumque interpretatur, et emendat'. Interestingly Prateius echoed Duarenus' point that the word 'scriptae' is absent from the old manuscripts of Justinian's *Code* at C.3.1.8, while at the same time referring to Oldendorpius' analysis of *aequitas scripta* and *non scripta* as having to do with the proper application of written law and departure from it respectively.[392] He also refers to Schardius' entry to provide the four causes of equity: 'Aequitatis causa efficiens est Deus, qui naturam humani generis sic condidit, ut omnia quidem de futuris negotiis certo praescribere non posset ullo modo [...]. Aequitatis causa materialis est ius naturae, Ius Civile, boni mores. Nam ex his sit pulchra quaedam ac Reipublicae salutaris mixtura, per iudicium animi incorruptum. [...] Aequitatis causa formalis est, ut conferantur diligenter facta iam incidentia cum circumstantiis suis (pertinentibus inquam) ad formulas iuris. [...] Aequitatis causa finalis, seu effectus est, us serveretur aequalitas humanarum rerum, quae maxime inter se sunt dissimiles'.[393]

While entries in legal dictionaries did not elaborate in any detail on the role of equity within the legal system, and indeed referred to inconsistent approaches to that concept unpoblematically, their approach shows that the medieval doctrine of equity had almost[394] entirely lost its influence by the mid-sixteenth century among legal scholars, and that – whether by reference to Oldendorpius, to Budaeus or to Salamonius – the overwhelming majority of reference works would have led their reader towards *epieikeia* and the interpretation or amendment of legal rules as the basis for any understanding of the nature of equity.

2.5.2. Civil law

I turn now to writings by civil lawyers more generally. From the 1550s onwards, a great number of works emerged which adopted the basic points made by Salamonius, Duarenus and Connanus. These works cited the approach of equity as interpretation unproblematically, without seeking to resolve the problems surrounding the specific role – if any – to be played by a doctrine of equitable interpretation or correction of the law within the legal system. The works I refer to here therefore show the long-lasting impact that the general approach to equity as interpretation introduced by Salamonius had in the long term. In the fourth chapter of this thesis I shall instead deal with those works that sought to bring together the approach of

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[391] Pardulphus Prateius, *Lexicon Iuris Civilis et Canonici* (1567), *ff.* 11rb-vb.

[392] Prateius, *Lexicon*, *f.* 11rb-va: 'Dicitur et humanior, et benignior iuris interpretatio. [...] Aequitas duplex est, scripta et non scripta. Potest enim aequitas, tum in scholis, tum in foro duplici modo exerceri. Altero, ut diligenter consideremus, quo ordine Iurisconsulti et Imperatores Romani observarint aequitatem in describendis, ponendisque legibus et praeiudiciis humanorum negotiorum. [...] Quamobrem merito non scriptam aequitatem vocare possumus, non quasi liceat sine scripti iuris observatione illam aestimare: Sed quod aliquanto longius a scriptis thesibus recedit.' Compare with n.263 above

[393] Prateius, *Lexicon*, *f.* 11va.

[394] Cf e.g. Augustinus Barbosa (d. 1649), *Thesaurum Locorum Communum Iurisprudentiae: Ex Axiomatibus* (1652), pp. 86-7, which reports equity purely by reference to the medieval understanding of written and unwritten equity.

Salamonius and scholastic theology in order to define equity more precisely, and will discuss the long-term impact which those more detailed approaches to equity had.[395]

The examples of civil law works following the approach of equity as interpretation are plentiful. They are found among legal writers across Europe spanning the entirety of our period. First of all, we find the idea of equity as interpretation repeated, predictably, among legal writers producing works of a recognisably humanistic nature such as Ludovicus Russardus (d. 1567), who produced a glossed and updated edition of the *Code*, and the systematiser Johannes Corasius (d. 1572).[396] Secondly and most importantly, we find this view expressed almost ubiquitously when it comes to sixteenth and early seventeenth-century commentaries on civil law. An important example is found in the *Corpus Iuris Civilis* of Dionysus Gothofredus (d. 1622), first published in 1583. In his comment to C.3.1.8, Gothofredus makes it clear that he did not regard it as a source concerned in any way with written equity or rigour, or indeed as a source concerned with the reconciliation of conflicting laws. He instead explained it entirely as one having to do with interpretation. As he puts it: 'Aequitas [...] iuris scripti duritiem et asperitatem, habita ratione circumstantiarum mitigat. Qua via? Veluti si depraehendens neque plus aut minus in facto esse quam in lege scripta, dicas scriptam legem facto controverso proprie convenire: si tamen legislatoris mentem attentius consideres et ipsam facti controversiam non convenit. Hucque spectat ars boni et aequi [D.1.1.1pr].'[397] At C.1.14.1 Gothofredus also follows the Salamonius line of interpretation of that law as concerned with how clearly a certain case is defined by a written rule of law, also hinting at the fact that the nature of a certain rule, for instance, whether a Roman law rule is of ancient origin or an imperial constitution, can inform the interpreter about how harshly the legislator would have wished that we interpret it.[398] Gothofredus is one of few authors maintaining his discussion of equity centred around C.3.1.8 and C.1.14.1 – most other early modern commentaries on civil law hold their main discussion of equity around chapters concerned with either the interpretation of the law, or the first principles of law, or around the 90th *regula* in D.50.17, which says that equity should be favoured in all matters, and especially so in law. Discussions of equity in this sense are found, for instance, in the comments on the *Institutes of Justinian* of Franciscus Balduinus (d. 1573) and Hermannus Vultejus (d. 1634), in the commentaries on the *Digest* of Petrus Faber (Pierre du Faur de Saint Jory, d. 1600), Hubertus Giphanius (d. 1604), Petrus Gudelinus (d. 1619) and Reinhardus Bachovius ab Echt (Reiner Bachoff von Echt, d. 1640), as well as in the *Paratitla* of Matthaeus Wesenbecius (d. 1586), the *Pandectes* of Charondas (Louis Le Caron, d. 1613), the *Disputationes* of Georgius Obrechtus (d. 1612), the *Exercitationes* of Dominicus Arumaeus (d. 1637), and the *Jurisprudentia*

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[395] See ch. 4 below.

[396] See Ludovicus Russardus, *Ius Civile* (1561), *ad* 'scriptae' in C.3.1.8, p. 63. Russardus adds a gloss to C.3.1.8 repeating Duarenus' definition of equity. Johannes Corasius, *De Iuris Arte Libellus* (1560), pp. 50-1: '[*Bonum et aequum* g]raeci uno verbo dicunt [*epieikeia*], id est convenientiam et aequalitatem [...]. p. 251.

[397] Dionysus Gothofredus, *ad* 'aequitatisque', C.3.1.8 (1583), col. 192. See also Gothodredus *ad* 'stricti', C.3.1.8, col. 192.

[398] Dionysus Gothofredus, *ad* 'solis' C.1.14.1 (1583), col. 88: 'Sensus est, ubi lex negotium quaesitum palam definiit, iudex eam sequi debet, quantumvis dura sit: solius principis est eam mitigare [...]. Ubi vero lex scripta palam negotium non definit, iudex potest ex duarum vel diversarum legum sententia, et collectione, una scilicet stricti iuris, altera aequitatis plena argumentum ad facti controversi decisionem ducere, et hanc illi praeferre. Huc etiam refer, quod de iuris et constitutionum differentia utiliter scripsit Cuiacius [*Observationum*, lib. 7, cap. 19]'. See also Gothofredus *ad* D.50.17.90 (1583), col. 1770.

Romano-Canonica of Henningus Rennemannus (d. 1646).[399] Similar views on equity are also found expressed in treatises written on more general themes of civil law where equity is encountered such as the *De Iurisdictione et Imperio* by Antonius de Quintanadueña (d. 1628) and – predictably – treatises written specifically to treat the theme of equity, such as Andreas Ludovicus Schopperus' (d. 1643) *Dissertationem Inauguralem de Aequitate* of 1621.[400] While I have in this study focussed only on works published through the sixteenth and early seventeenth century, the concept of equity as interpretation clearly had an impact well into the eighteenth century. One can find the views of Salamonius and his followers still cited without much in the way of change in civil law treatises concerning equity and interpretation such as Andreas Weiss' (d. 1792) *De Usu Aequitatis in Interpretatione Legum* published in 1737.[401]

2.5.3. Canon Law

Early modern writings on equity within canon law, by which I mean within commentaries on the *Corpus Iuris Canonici* or treatises dealing specifically with canon law doctrine, deserves a separate discussion entirely. The main reason for this is that canon law seems to have been much more resistant to change in its treatment of equity than civil law. We have mentioned in the first chapter that, in the period going up to 1550 canon law commentaries continued to feature the traditional exposition of *aequitas* centred on the concept of *aequitas scripta*.[402] And that, even among authors who were themselves otherwise influenced by legal humanism.[403]

The first authors to write works of canon law which adopted the concept of equity as interpretation that was spreading around Europe belonged to the circle of early modern scholastic theology. In particular we owe the earliest examples to Martin de Azpilcueta (d. 1586) and his pupil Didacus Covarrubias (d. 1577). We do not have very much from Covarrubias. His comments on equity feature in a commentary on a *Regula* of the added title *De Regulis Iuris* of the *Liber Sextus* published in 1558. However, Martin de Azpilcueta's (d. 1586) commentary on X.1.2., includes a rather detailed analysis of equity, and one perfectly consistent with those of Salamonius and his followers.[404] These works are of a rather exceptional nature: both authors being scholastic theologians would have been aware of the revival of *epieikeia* that occurred among early modern

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[399] Franciscus Balduinus, *Commentarii In Institutionum* (1556), pp. 23-5. For Vultejus see Hermannus Vulteius, *Institutiones Iuris Civilis a Iustiniano Compositas Commentarius* (1598), pp. 8-9, he also mentions it briefly in his *Jurisprudentiae Romanae a Iustiniano Compositae Libri II* (1590). Petrus Faber, *Ad Titulum De Diversis Regulis Iuris Antiqui* (1590), pp. 233-8. Hubertus Giphanius, *Commentarii in Titulum Digestorum de Diversis Regulis Iuris* (1606), p. 409. Petrus Gudelinus, *Commentariorum de Jure Novissimo Libri Sex* (1620), p. 225. Reinhardus Bachovius ab Echt, *Commentarii in Primam Partem Pandectarum* (1630), pp. 69ff. Matthaeus Wesenbeck, *In Pandectas Iuris Civilis [...] Paratitla* (1629), p. 24. Louis Charondas, *Pandectes Ou Digestes Du Droit François* (1597), p. 45. Georgius Obrechtus, *Disputationes Ex Variis Iuris Civilis* (1603), pp. 5-6. Dominicus Arumaeus, *Exercitationes Iustinianeae* (1604), pp. 4-5. I discuss Rennemannus below in the context of later authors, which Schröder has argued departed from this view, see [2.5.5] below.

[400] Quintanadueña should not be confused with another Antonio de Quintanadueñas (d. 1651), a contemporary theologian and canonist. See Nicolás Antonio, *Bibliotheca hispana nova* (1783), p. 156. Antonius de Quintanadueña, *De Iurisdictione et Imperio* (1598), pp. 238-44. Andreas Ludovicus Schopperus, *Disputatio inauguralis de aequitate* (1621), paras 68-70, 98-108.

[401] Andreas Weiss, *De Usu Aequitatis in Interpretatione Legum* (1737), pp. 10-2.

[402] See n.75 above.

[403] Bonavitus, for instance, (cited at n.75 above) was such an author, and though he displayed an awareness of the concept of *benigna interpretatio* developed by humanists, did not associate it with *aequitas*, which he discusses along the orthodox lines of *scripta* and *non scripta*.

[404] See [3.3.2.2] below.

Thomists more generally from the 1510s onwards. Azpilcueta in particular engaged in his texts with the writings of theologians and sought to reconcile the learning of civil lawyers on equity with the writings of Aquinas, Cajetan and Domingo de Soto. My concern in this section is to trace the spread of equity in works of canon law of a more orthodox nature, and I therefore return to Azpilcueta and Covarrubias in the next chapter, dedicated to the theological concept of equity.

Aside from writings by theologians, the earliest canon lawyer to deal with equity as *epieikeia* seems to have been Hyppolytus Bonacossa (d. 1591) in his *De Aequitate Canonica*, published in the 1570s.[405] Bonacossa does not spend much time discussing the point, but does mention Budaeus and Salamonius' writings on equity and makes it clear that he is aware of a connection between equity and *epieikeia*.[406] However, and despite mentioning humanist sources, Bonacossa's text soon reverts to discussing *aequitas* at length in the orthodox terms of *aequitas scripta* and *non scripta*. In fact, Bonacossa's text moves on to deal with *aequitas canonica* precisely in the way medieval authors intended. His treatise shifts from dealing with the nature of equity itself, into listing rules of canon law, seemingly on account of the 'equity' which distinguishes them from the civil law, and would warrant their being favoured as *aequitas scripta*.[407] That said, though Bonacossa's treatise lacks any precise analytical direction in its exposition of *aequitas*, and while it does little more than provide a list of definitions of equity as found in various sources available at his time, it clearly shows that - by the end of the sixteenth century - canon lawyers were growing increasingly aware of the literature on equity as *epieikeia* as developed by contemporary humanists and theologians. Thus, as late as the 1570s, and aside from the existence of canon law works by scholastic theologians, there is little evidence that canon lawyers adopted the early modern concept of equity in their commentaries on the *Corpus Iuris Canonici*.

There were not a great number of canon law treatises that dealt with equity in the period from the 1570s to about the mid-seventeenth century. Evidence that canon lawyers were influenced, around this period, by the theory of equity as interpretation is therefore sparse. Some evidence can be found in more general legal treatises written by canon lawyers. I have mentioned above briefly the treatise *De Iurisdictione et Imperio* published in 1598 by Antonio de Quintanadueñas, which did deal with equity in terms perfectly consistent with Salamonius and his followers.[408] That Quintanadueñas was also a canon lawyer seems evidenced by the fact he was also the author of a treatise on ecclesiastical benefices published in the 1590s.[409] But I have not found throughout this period any commentaries on canon law beside the two works by scholastic theologians identified above dealing with equity.

Examples of canon law commentaries dealing with equity can be found almost a century after Bonacossa, in the mid-seventeenth century. Emanuel Gonzalez Tellez's (d. 1649) commentary to the

[405] Ippolito Bonacossa, *De Aequitate Canonica Tractatus*, (1575).
[406] Bonacossa, *Aequitate Canonica*, p. 6.
[407] For the medieval understanding of *aequitas canonica* see [1.1.3] above.
[408] See n.400 above.
[409] Antonius de Quintanduenas, *Ecclesiasticon Libri IV* (1592).

decretals, written not long before his death in 1649 and published posthumously is a striking example.[410] In it, Tellez comments specifically on the passage in the *Liber Extra* where the ordinary gloss and many canon lawyers thereafter had articulated their theory of *aequitas scripta* – X.1.36.11.[411] Tellez, however, completely eliminates from his commentary any reference to *aequitas scripta*, focussing instead entirely on the meaning of equity as a doctrine of interpretation, and making specific reference to the works of civil lawyers listed above. After this time, many examples can be found of canon lawyers discussing equity in terms of interpretation. Some are, like those of Tellez, adopting the approach of Salamonius to interpretation, such as the commentaries on the decretals of Ludwig Engel (d. 1694), where at X, 1, 2 he assimilates interpreting laws by a *benigna interpretatione* which is *iuxta verisimilem mentem legislatoris* with equity,[412] and we can find works published well into the 18th century, for instance in Placidus Böcken's (d. 1752) *Commentarius in Ius Canonicum Universum* where equity is discussed under X.1.2 and is used as a synonym of *epieikeia* and *benigna interpretatio*.[413] The majority of canon lawyers after the 1650s continued to adopt the theory of Salamonius and his followers as the basis of their approach to equity, though – as we shall see in the fourth chapter of this thesis – some, mostly under the influence of Franciscus Suarez (d. 1617) – also incorporated the approach of early modern scholastic theologians.[414]

2.5.4. Surviving plurality of views

While the discussion above is meant to provide a broad-brush picture of the diffusion of ideas of equity as *epieikeia* among early modern legal writers, it should not be taken to mean either that all authors after the writings of Connanus and Duarenus accepted Salamonius' points about equity as interpretation, nor that the authors that did accept it all discussed equity in precisely the same terms.

Regarding the second point, while authors that followed Salamonius did share the common denominator of regarding equity as a doctrine of interpretation entrusted with all judges, some individual authors could contribute minor variations when it came to working out the detail. For instance, Wesembecius restated the idea of equity as an instrument of interpretation in terms perfectly consistent with those of Salamonius and Connanus, recognising its role for interpreting rules extensively and restrictively. However, he also added that equity could perform an additional role, 'ut in his quae nec de sententia legis, nec ratiocinationis argumento definiri possunt, pro regula iudicii atque iuris valeat.'[415] This

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[410] Emanuel González Tellez (d. 1649), *Commentaria Perpetua in... Decretalium* (1673), *ad* X.1.36.11, p. 680: 'Ubi enim ius apertum est, et verborum legis, vel sententiae nulla pugna est, etiamsi quod statutum est, perdurum sit, observandum est, et tantum Princeps potest aequitatem interpretari, [D.26.7.24.1]. […] Quod si aliud verba legis significant, aliud ex mente, et sententia eius deducatur, tunc iudex neglecto summo iure aequitatem servare debet [C.3.1.8] […]. Cum enim innumera sint negotia, nec omnia quotidie emergentia legibus comprehendi possint [D.1.3.10] [D.1.3.12] tunc iudex supplere debet partem aequitatis, ubi legislator deficit.'

[411] See n.70 above and the references in Decius at n.74 above.

[412] Ludwig Engel, *Collegium Universi Juris Canonici*, (1700), pp. 44-5: 'Juxta verosimilem mentem legislatoris leges universales, vel admodum rigorosae nonnunquam benignam aliquam interpretatione secundum bonum et aequum explicandae sunt [...] que ista interpretatio secundum bonum et aequum, Epickia, aut praesumpta mens Legislatoris vocatur. Huc etiam pertinet textus in [C.3.1.8]'.

[413] See Placidus Böcken, *Commentarius in Ius Canonicum Universum* (1735), pp. 127-8.

[414] See [4.2.4.1] below.

[415] See Wesembeck, *Paratitla*, coll. 23-4.

broad statement could be read as providing more room for judicial discretion, but the sources provided to support it – D.39.3.2.5 and the sixth and Panormitanus's comment to X.1.36.11, n. 7 – can be construed as referring only to cases where no rule of law at all is applicable, limiting this third function of equity to a gap-filling role, one in line with the role of unwritten equity as recognised by medieval legal writers. More authors applying minor variations on the main points put forward by Salamonius and his followers could be listed by treating them individually, but such a study is beyond the purpose of this chapter.

Regarding the first point, there are also a number of examples that show that Salamonius' theory never enjoyed universal acceptance. To make this point we may turn to Joachim Hopperus' (d. 1576) *De Iuris Arte Libellus*, published in 1553. Hopperus was clearly influenced by humanist writers on equity, and in the section of his work dealing with different kinds of laws, he explicitly sought to deal with the difference between *aequum et bonum* and *summum ius*.[416] However, the distinction found by Hopperus between *aequum et bonum* and *summum ius* has little in common with that we have analysed so far. The main point is that Hopperus does not identify *aequum et bonum* with *epieikeia* in the sense of interpretation of the words of the law in accordance with the intention of the legislator. Instead, he seems to understand *aequum et bonum* in a way which is more similar to Melanchthon's and Oldendorpius' approach, as the justice which takes into account the circumstances of a particular case. It seems clear Hopperus does not mean this to work as an interpretive approach to the law of general application, and he confined cases in which *strictum ius* and *bonum et aequum* will be in conflict to two categories.[417] The first such case 'est cum res subiecta tam obscuros et difficiles habet explicatus, ut secundum communes iuris regulas nihil possit constitui, quod non falsum confestim reperiatur [D.35.2.88pr] tunc enim ad exitum inveniendum necessarium est, ut aequi et boni ratio ineatur: quemadmodum usu venit in iis, quae insolubilia, in se redeuntia praepostera, asystata, intricata vulgo dicuntur.'[418] The example Hopperus offers of such a situation is D.35.2.88pr, that is a case where a man possessed of 400 gold coins made legacies for three quarters and left the remaining quarter to his heir provided that the *lex Falcidia* applies to his will. Since the *lex Falcidia* only applies to a will where less than a quarter is left for the testator's heir, this case poses the kind of logical problem medieval philosophers called *insolubilia*, akin to that posed by the liar's paradox, where whatever solution is adopted will lead to a contradiction.[419] Hopperus therefore thinks interventions of equity will be required where the legal system could simply offer no solution, and a judge would have had to step outside of rules of law to provide a new solution. The second situation is 'cum negotium Iure quidem consistit, et definiri potest: sed ob causam aliquam id sit ponderosius quod aequum bonum est, quam quod iustum, veluti in Publiciana [I.4.6.4],

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[416] Joachim Hopperus, *De Iuris Arte* (1555), p.17: 'Et ultima in hoc ordine descriptio est, ut aliud strictum ius dicatur, aliud bonum et aequum.'

[417] Hopperus, *ibid.*, p. 17: 'Nam regulariter certe tanta tenentur inter sese coniuncitione, ut alterum ab altero ne nomine quidem seiungatur, et omne quod iustum est, idem quoque simul aequum et e contrario quod aequum idem quoque iustum dicatur. Sed existunt nonnunquam causae quae faciunt ut aliud in iure esse videatur, aliud in benignitate: quae quidem in universum sunt duae.'

[418] Hopperus, *ibid.*, pp. 17-8.

[419] An authoritative and accessible description of these problems can be found in Paul Vincent Spade and Stephen Read, 'Insolubles', *The Stanford Encyclopedia of Philosophy (Fall 2017 Edition),* Edward N. Zalta (ed.) available at https://plato.stanford.edu/archives/fall2017/entries/insolubles (last accessed 09-04-2018). For a modern example of such a problem in a legal context see *Nurdin & Peacock v DB Ramsden & Co* [1999] 1 WLR 1249, 1273-4.

Serviana [I.4.6.7], et aliis eiusdem exempli.'.[420] Here, Hopperus gives us the example of the *actio Publiciana* and of the *actio Serviana* in Roman law. What these actions have in common is that they stemmed from the Praetor's jurisdiction, an official who – for a certain period in Roman times - had the power to introduce new remedies in the Roman legal system when he deemed existing ones inadequate. Again, the examples provided by Hopperus are not of interpretation beyond the letter of the law, but rather of providing a solution to a legal problem by drawing on justice, setting aside existing rules or simply introducing a new one. It may be that Hopperus was influenced by the meaning with judging *ex aequo et bono* had acquired in the medieval period.[421] Examples of original statements of equity, departing from the view of equity as interpretation can also be found as late as the end of the seventeenth century. A good example is Jean Domat (d. 1696). In his *Les Lois Civiles dans Leur Ordre Naturel*, published in 1689, while seeing equity as related to interpretation, Domat did not think it was related to interpreting the will of the legislator – indeed he discusses interpretations of the legislator's will separately, and described equitable interpretation in a very general sense as interpretation of a rule by reference to 'l'équité naturelle, qui étant l'esprit universel de la justice, fait toutes les règles, et donne à chacune son usage propre'. Equity features neither as *epieikeia* nor as *interpretatio extensiva*, *restrictiva* or otherwise.[422]

Hopperus and Domat are useful examples of how, following the second half of the sixteenth century, at a time when civil law views of equity were coalescing towards the idea of equity as interpretation, original views on the point were still on offer. There is also evidence, however, that some authors continued to use, often alongside the concept of equity as interpretation, the medieval references to written and unwritten equity. An example of this is found in Forcatulus' (Etienne Forcadel, d. 1573) commentary on the title *De Iustitia et Iure* of the *Digest*.[423]

2.5.5. Aequitas cerebrina – decline of equity in later sources?

One last point should be addressed. Jan Schröder, drawing also on research by Clausdieter Schott, has in the past put forward the argument that equity as a doctrine finding a role for unwritten equity lost most of its appeal from the mid-seventeenth century onwards. The idea behind the argument is, broadly stated, that in the early stages of its development, the association of *aequitas* with *epieikeia*, led sixteenth-century jurists to re-conceptualise it as an unwritten source of law.[424] However – the argument goes – by the mid-seventeenth century, the view was increasingly gaining ground that equity could not be separated form written sources, Schröder describes this as a return to *aequitas scripta* in later writers such as Henning

[420] Hopperus, *ibid.*, p. 18.

[421] Hopperus hints at a number of circumstances where he thinks it would be appropriate to depart from law in favour of *aequum et bonum*, but it is not clear whether he believes this should be a prerogative of princes or a power extended to judges and, if the latter, he does not explain how this would interact with existing rules of *ius commune* limiting judicial discretion. See Hopperus, *ibid.*, p. 18. For judging *ex aequo et bono* see [1.1.4.2] above.

[422] Jean Domat, *Les Lois Civiles Dans Leur Ordre Naturel* (1689), pp. 14-6. It should be noted, however, that Domat does mention the example used by Aquinas of a madman depositing a sword. See n.235 above.

[423] Forcatulus, *Commentarius in Titulum Digestorum de Iustitia et Iure* in *Opera* (1595), p. 5.

[424] Schröder, 'Aequitas', pp. 270-3.

Rennemannus (d. 1646) who – for Schröder – 'will die Aequitas als geschriebenes Recht einordnen'.[425] He seems to derive this view from the argument in Rennemannus, put forward in his *Jurisprudentia Romano-Germanica* of 1651, that equity 'ut ex iure scribto prodit, tanquam effectum ex causa sua, ita etiam scribti iuris qualitatem tenet, et cum eo, ex quo depromitur, ius scriptum est et manet'.[426] However, to argue that this statement represented anything like a departure from the doctrine of equity as interpretation does not seem to be supported in any way by the substance and function of equity as put forward by Rennemannus in the same work.[427]

Rennemannus' substantial explanation of how equity operates seems entirely consistent with those of Salamonius and his followers – he discusses equity in his chapter on interpretation, specifically dealing with the features of *interpretatio aequa*, equating it with *epieikeia*, and describing it as one that 'ex ratione iuris, in dubio, sententiam rigori iuris benigniorem et humaniorem ita obponit: ut illa quandoque plus vel minus vel aliud quam nudo verborum cortice continetur, expromat'.[428] Indeed, Rennemannus moves on to explain exactly what he thinks the connection between equity and writing is in a note on the following *Disputatio* – he explains that '[e]st [textus] in [D.35.1.16] in quo interpretationis species proponit Caiius duas, unam cuius usus esse debeat in dubitationibus ex ipso testamento ortis: alteram in his, si quae extra testamentum incurrant. Illas esse secundum scribti iuris rationes expediendas, has vero ex aequo et bono interpretationem capturas. Quo in textu, cum non obponatur ius scribtum iuri non-scribto: sed illi quod ex aequo et bono interpretamur: hinc manifestum est, aequitati obponi interpretationem strictam: cuius usus sit in verbis testamenti explicandis: Ut statuamus in casu dubio, secundum id, quod scribtum est verbis expressis, voluntatem Testatoris regulariter definiendam. Extra vero Testamenti verba si casus incurrat dubius: illum ex aequo et bono, quod scribti iuris evidens Ratio subpeditabit, esse interpretandum. [...] Ergo si ius scribtum est id, quod verbis iuris scribti continetur: etiam hoc ius scribtum erit: quod ex sententia eiusdem iuris profluit.'[429] This statement, though identifying interpretations *ex aequo et bono* with those *ex sententia iuris* rather than from the intention of the legislator, is broadly in line with the understanding of *interpretatio ex aequo et bono* espoused continuously by the majority of writers from the 1550s onwards.

The real concern for Rennemannus seems to be that equity should not be disjointed from written law, that is, it should be based on an interpretation of the intention of the law, rather than entrusted entirely to the discretion of the judge.[430] In many treatises, the latter idea is referred to disparagingly as *aequitas cerebrina*, the equity, that is, springing out of the mind of an individual, rather than based on an interpretation of the law.[431]

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[425] Schröder, 'Aequitas', p. 273.
[426] Henning Rennemannus, *Jurisprudentia Romano-Germanica* (1651), p. 170: 'Quae in iure Romano Benignitas et Humanitas: [...] Aequum et bonum [...] vocari solet: Graecis [*epieikeia*].'
[427] Schröder, 'Aequitas', p. 273.
[428] Rennemannus, *ibid.*, p. 164.
[429] Rennemannus, *ibid.*, p. 170-1. Rennemannus makes similar points with the legislator and the law as the subject, rather than the testator, within the same passage.
[430] See Rennemannus, *ibid.*, pp. 171-2.
[431] See Schott, 'Aequitas Cerebrina', passim.

What we find taking a closer look at Rennemannus seems to be true also of the other authors that Schröder cites in support of his argument for a seventeenth-century change of tide. He refers to Arnold Vinnius (d. 1657), Amadeus Eckolt (d. 1623), Nicolaus Christoph Lyncker (d. 1635), Johannes Strauch (d. 1679), and Georg Adam Struve (d. 1692). I will refer briefly to these authors to make it unambiguous that their statements are consistent with the analysis above.

Vinnius tells us about equity that 'In specie autem, et proprie accepta aequitas iuri opponitur, non scripto, ut male nonnulli, sed stricto. Haec Graecis [*epieikeia*] dicitur, nostris etiam aequum et bonum, humanitas, benignitas [...]. Cuius usus elucet, cum in verbis legis ex sententia extendendis, et ad casus similes producendis, ubi lex minus scripsit, plus voluit; tum in verbis restringendis, ubi ex sententia constat, plus scripsisse legislatorem, minus voluisse: maxime vero in benigna interpretatione, earumque ad singulas facti species accomodationes; tali tamen, quae ab expressa et manifesta legislatoris voluntate non recedeat. [...] Atque hinc etiam peti potest conciliatio [C.3.1.8] cum [C.1.14.1] et [D40.9.12.1].[432] This paragraph of Vinnius is the source for the passage in Eckolt cited by Schröder.[433] Similarly, we find Lyncker's commentaries dealing with equity in the passage cited by Schröder in the paragraph entitled *De recta, Leges etiam interpretandi ratione* – where Lyncker says that '[u]bique pro scopo interpres aequitatem habere debet. Accipitur vero aequitas aut (1) late: pro eo quod iustum, seu aequum et bonum est, et hac ratione aequitas etiam scripta datur. (2) stricte prout versatur circa rationem iuris [...] Graecis [*epieikeia*][...] iterumque scripta est: saltim virtualiter, seu implicite. Hanc tum suppletoriam esse dicunt: quam respicit Interpretatio extensiva; tum correctoriam: quam restrictiva'.[434] Strauch may tell us that '[c]um ergo ius non scriptum hic intelligatur, quod ab initio suo non est habile per scripturam publicari, constat ejus speciem neque esse aequitatem', but he does not hesitate to add that 'aequitas in actu signato omnino scribi nescit. Est emin [...] temperatio et mitigatio iuris positivi, seu legitimi.'[435] Struve is even more explicit about the role of equity in interpretation – which Schröder himself acknowledged in note. Struve discusses equity in a paragraph entirely dedicated to interpretation and, like Lyncker, he specifies that '[s]umitur autem aequitas vel absolute, et est idem quod justitia, et aequum est quod in genere iustum. Vel relate, ut notat legis ad certum et specialem casum aequam accommodationem: Qua duplici observata acceptione vulgata bene dici potest quaestio: *an detur aequitas scripta secundum legibus sancita?* Priori namque sensu omnis lex bona est aequa, et ita datur aequitas scripta. Posteriori sensu nulla aequitas est scripta [...]. Est vero posterior significatio huius loci, in qua ab Aristotele [*Ethics*, lib. 5, cap. 10] his describitur verbis: [epieikeia...] *est correctio iuris legitimi, ea parte, qua deficit ob universale non secundum legem*.'[436]

Schröder refers in support of his argument to Schott's research on the use by early modern lawyers of the concept of *aequitas cerebrina*. Schott made the argument that, throughout the early modern period,

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[432] Arnoldus Vinnius, *In Quatuor Libros Institutionum* (1665), p. 20.
[433] Schröder refers to Amadeus Eckolt, *Compendiaria Pandectarum Tractatio* (1680), p. 20. The passage referred to seems to be an annotation by Bartholomaeus Leonhard Svevendoerffer on Eckolt's text.
[434] (Nicolaus Christoph Lyncker), *Commentaria Lynckeriana in Jus Civile Universum* (1698), pp. 69-70.
[435] Johannes Strauch, *Dissertationes ad Iustinianeum* (1718), p. 12.
[436] Goerg Adam Struve, *Syntagma juris civilis* (1672), p. 69. The latter part of the definition resonates strongly with that adopted by late scholastic theologians, see chapter 3 below.

legal writers rejected the idea that a judge may be able to draw on unwritten equity. However, and without the need to go through the sources in detail, it is clear that the authors referred to by Schott dealt with equity in a way entirely consistent with what we have observed above. An illustrative example found in Schott of an early modern author referring to that concept is that of Juan Garcia de Saavedra's (fl. ca. 1599) *De Expensis et Meliorationibus*, published in 1599. The passage seized upon is rather colourful. Saavedra tells us that 'non [...] subvertendas esse leges [...] sub specie aequitatis; nam quae aequitas sine jure, sine lege, quae scripta non est, sed capitose arrepta, pestilentissimum virus est.'[437] Saavedra's statements have much in common with those of Rennemannus and he too emphasises the role of 'written natural equity'. Having said that, just like Rennemannus, Saavedra has no problem directing the reader – for a better view of how equity works – to Franciscus Connanus' writings on point. It emerges clearly from the text that, just like Rennemannus, Saavedra conceptualises written equity as the interpretation of civil law.[438]

The idea that the association of equity and *epieikeia* should entitle any judge to ignore the law was, as we have seen, a concern for many even among the humanist jurists in the earlier sixteenth century, but it never seems to have been very popular among legal writers – in particular because it seems to bear no relation to Aristotelian *epieikeia*. This explains why Schröder, while finding some sixteenth-century lawyers classifying equity as an unwritten source of law, does not find any statements to the effect that the judge can in some cases rule unbound by rules, and finds all roles of correction of the law confined – consistently with Salamonius' approach – to interventions by the legislator.[439] The rejection of *aequitas cerebrina*, i.e. of the judge unbound by rules, in the later seventeenth century seems however to have been interpreted by Schröder as a reaction to the writings of earlier humanists because the latter classified equity as a branch of unwritten law. As we have seen, and regardless of taxonomy, those earlier authors did not only share, but indeed were the first to establish, the idea that equity as *epieikeia* was intrinsically linked to written law, as its interpretation *ex aequo et bono*.[440]

2.5.6. Conclusion

From the analysis above, it seems clear that the identification of equity as *epieikeia* saw a speedy spread among legal writers across the sixteenth and seventeenth century around Europe. Except for the peculiar effect noted of Oldendorpius and Melanchthon's theories over reference works, civil and canon law commentaries and treatises seem to have overwhelmingly preferred the view, first introduced by Salamonius, of equity as a doctrine of interpretation. The general features of that theory, which formed the common denominator for the overwhelming majority of writers dealing with equity, were: (i) a rejection of the medieval understanding of equity centred on 'written' and 'unwritten' equity, (ii) a reconceptualisation

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[437] Joannes Garcia de Saavedra, *De Expensis et Meliorationibus* (1599), pp. 19-21.
[438] Saavedra, *De Expensis*, p. 20: 'Refert Franciscus Connanus [*Commentarius Iuris Civilis, lib.* 1, cap. 11, n. 7] ubi latissime et elegantissime de aequitate et quatenus sit accipienda. [...] Vigeat ergo ius, abeat aequitas non scripta, naturalis autem aequitas scripta. Omnia moderetur instituta civitatis. Omnes temperet ex iure scripto leges.'
[439] The most that he finds is a statement among some that the judge may do so in cases not governed by any rule. A role for *aequitas non scripta* that medieval lawyers had long acknowledged. See Schröder, 'Aequitas', p. 275.
[440] See Schröder, 'Aequitas', pp. 278-82.

of equity/*epieikeia* as a theory of interpretation of the law in accordance with the intention of the legislator, which power they thought should be entrusted to all judges, (iii) a restriction of the scope of this doctrine to cases where the intention of the legislator is clear – leaving cases of uncertainty or of legal correction and emendation to the legislator alone.

As mentioned above, I have not here set out to deal in detail with minor variations in each author's approach to equity as interpretation – though there were a number.[441] My focus in the following chapter will, instead, be on those legal authors that set out to develop extensively the doctrine of equity as interpretation, to identify its precise role alongside other kinds of interpretation. Indeed, the overwhelming majority of authors referring to equity as interpretation in this period did not engage at all with what, if anything, *interpretatio ex aequo et bono* was meant to add to the theories of interpretation of the law in accordance with the intention for the legislator that had been known since the Middle Ages. In other words, they failed to explicitly engage with the question of how equitable interpretation related to interpretation in general, and in particular with *interpretatio restrictiva* and *extensiva*. All of them left it unclear whether equity was going to be a broader category encompassing and justifying all interpretations of laws beyond their words, or whether it was going to be a narrower, more specific type of interpretation of this sort.

Those authors who did seek to identify more clearly the role of equity in interpretation found a valuable source in the writings of early modern scholastic theologians on equity. Theological writings on *epieikeia* had long been kept separate from the approach of lawyers to equity.[442] With the diffusion of Budaeus' assimilation of equity and *epieikeia*, we instead find that these two branches of scholarship came into contact with one another. In the following chapter, I argue that, from the 1550s onwards, the influence of legal writings assimilating equity and interpretation was being felt in contemporary theological writings on *epieikeia*, as writers like Domingo de Soto adopted the language of *interpretatio ex aequo et bono* to describe the role performed by Aquinas' *epieikeia*, and other writers such as Martin de Azpilcueta abandoned Aquinas' theory wholesale in favour of the legal approach to equity. Having appreciated the differences between the theological and legal concepts of equity, it will then be possible, in the fourth chapter, to deal meaningfully with those writers who sought to find a more precise role for the doctrine of equitable interpretation among other doctrines of interpretation by seeking a middle ground between the theological and legal branch of writings on equity as *epieikeia*.

[441] See [2.5.4] above.
[442] See [1.2.] above.

Chapter 3 – *Aequitas* and *Epieikeia* among early modern scholastic writers.

3.1. Introduction

In the previous chapter we have seen that early modern humanist jurists, influenced by humanistic philology, developed a novel approach to the legal concept of *aequitas*, moving away from the medieval theory of equity developed by canonists and legists and re-conceptualising it as an aspect of interpretation and emendation of the law closely related to Aristotelian *epieikeia*.[443] We have also seen that the first generation of humanist writers from Budaeus to Connanus do not seem to have been influenced by the medieval approaches of scholastic theologians to *epieikeia*, and insofar as later approaches to equity in civil and canon law followed the earlier humanists, they were equally independent from the writings of theologians.[444] Interestingly, however, while interest in *epieikeia* remained rather scant among theologians following the writings of Aquinas,[445] writings on *epieikeia* saw a resurgence in the early modern period among that generation of sixteenth and seventeenth-century Thomists who are known to have been particularly interested in juridical concepts.[446]

The concept of *epieikeia* as first articulated by Aquinas and later developed by Cajetan had little in common with that developed by Salamonius and his followers in the first half of the sixteenth century. As we shall see, it was neither assimilated to interpretation, nor focussed on giving effect to the intention of the legislator. This chapter therefore deals, first, with exposing in more detail what equity as *epieikeia* meant for Aquinas and Cajetan, and how it differed from the equity of civil lawyers, and secondly on the extent to which later theologians from the 1550s onwards were themselves influenced by the concept of equity as interpretation that was gaining ground among lawyers. Within that last point, we shall see, first, that the majority of theologians, starting from Dominicus de Soto (d. 1560), were only influenced by the equity of civil lawyers as a matter of form – describing equity as an aspect of legal interpretation and drawing on the medieval *ius commune* on interpretation to provide examples of its operation, without changing its role as a doctrine of correction substantively. Secondly, we will look at those theologians who were more directly engaged with writing works of a more recognisably legal sort, and (perhaps consequently) felt the influence of the equity of civil lawyers much more strongly - challenging (sometimes explicitly, sometimes implicitly)

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443 See [2.2] above.
444 See [2.3] above.
445 See [1.2.1.2]. Riley only identifies Henry of Hesse (d. 1397), Gerson and Antoninus Florentinus (d. 1459) as writers on the topic. We have also dealt with Egidius Romanus above. None of these authors followed Aquinas very closely in their accounts of *epieikeia* and none seem to have developed it substantially. See Riley, Epikeia, pp. 52-6.
446 This movement is often collectively identified with the name of 'School of Salamanca', 'second scholasticism' or 'late scholasticism'. For the School in general see, among many others, Miguel Anxo Pena González, *La Escuela de Salamanca. De La Monarquía Hispánica Al Orbe Católico* (2009). The literature on the contributions of the School of Salamanca to juridical thought is extremely vast, a general treatment of the subject can be found in Jan Schröder, *Recht Als Wissenschaft. Geschichte Der Juristischen Methode Vom Humanismus Bis Zur Historischen Schule (1500-1850)*, p. 201 or, in English, in James Gordley, *The Jurists: A Critical History*, 2013, pp. 82-110. For an extensive bibliography on this subject, a useful and easily accessible resource is the working paper by Thomas Duve and others, *The School of Salamanca: A Digital Collection of Sources and a Dictionary of Its Juridical-Political Language: The Basic Objectives and Structure of a Research Project*, 2014. Also conveniently available at http://publikationen.ub.uni-frankfurt.de/opus4/frontdoor/deliver/index/docId/32402/file/SvSal_WP_2014-01.pdf (accessed on 04/04/2018).

the approach to equity of Soto in order to fully adopt the idea of equity/*epieikeia* as an interpretation of the law in light of the intentions of the legislator.

3.2. The theological concept of *epieikeia*

3.2.1. *Epieikeia* in Aquinas

Aquinas' account of *epieikeia* was mentioned in the first chapter of this study when we compared it to the use that medieval lawyers made of *aequitas* in the same period.[447] We will now look at the thought of Aquinas in greater detail and consider its impact on early modern theologians. The main source for the later writings of theologians was Aquinas' *Summa*, rather than his commentaries on Aristotle's *Ethics*, and I will therefore not discuss the latter in this section.[448]

For Aquinas, as for early modern jurists, the central issue equity was meant to determine concerned whether and when subjects of the law, including judges, should be allowed to depart from the words of the law. One important aspect of Aquinas' discussion, however, and one at the centre of a great divide between the humanist and theological concept of equity, is that, for Aquinas, *epieikeia* may only intervene to prevent human law from applying in cases where such an application would exceed the power of human law and, therefore, that of the legislator. Generally, Aquinas identifies these cases either as those where human law contradicts higher law, such as natural law, or with those where human law does not fulfil its end of benefitting the common good.[449] The intentions of the legislator, central to the thought of the jurists from the previous chapter we identified, are only important for Aquinas insofar as the legislator can be presumed not to intend to violate natural law or on the basis that the legislator would be better placed to assess what would accord with the public good.[450]

In order to better appreciate the thought of Aquinas on equity it will be best to deal with the two *quaestiones* where he expresses his thoughts on the issue of whether and when a subject should be able to depart from the words of the law. Aquinas does so both in *quaestio* 96 of the *IaIIae* and *quaestio* 120 of the *IIaIIae* (from now on, I shall simply refer to those as *quaestio* 96 and *quaestio* 120). It is not clear that Aquinas meant, in both of those, to talk about equity, and only one of the two contains any reference to equity, but

[447] [1.2.1.1] above.
[448] Aquinas' commentaries on Aristotle's *Ethics* can be conveniently found on www.corpusthomisticum.com (last accessed 04-04-2018). While they do not seem to have wandered far from Aristotle's text, the commentaries went through their own interesting developments in the early modern period, as they were either added to, or modified in light of, Aretinus' translation of the *Ethics*. As I have found no evidence that the commentaries themselves were relied upon by either Humanist jurists or early modern scholastic theologians, I will not examine them in this chapter. For a general discussion of the transmission of Aquinas in the early modern period and its interaction with the Aretinus translation of Aristotle see F Edward Cranz, 'The Publishing History of the Aristotle Commentaries of Thomas Aquinas' (1978) 34 Traditio 157.
[449] See Aquinas, *IIaIIae*, q. 60, art. 1: 'si Scriptura legis contineat aliquid contra ius naturale, iniusta est, nec habet vim obligandi [...]. Et ideo nec tales Scripturae leges dicuntur, sed potius legis corruptiones, ut supra dictum est. Et ideo secundum eas non est iudicandum. [...] [I]ta etiam leges quae sunt recte positae in aliquibus casibus deficiunt, in quibus si servarentur, esset contra ius naturale. Et ideo in talibus non est secundum litteram legis iudicandum, sed recurrendum ad aequitatem, quam intendit legislator.' As well as Aquinas, *IIaIIae*, q. 120, art. 1: 'in aliquibus casibus [legem] servare est contra aequalitatem iustitiae, et contra bonum commune, quod lex intendit [...]. Et ad hoc ordinatur epieikeia, quae apud nos dicitur aequitas.'
[450] See n. 453 below.

as both would become key sources for the early modern theological doctrine of equity, it is important to look at them in some detail.

3.2.1.1. Quaestio *96*

Quaestio 96 is generally concerned with the power of human law. In article 6, Aquinas addresses the question of whether a subject should in certain circumstances be allowed to disregard the letter of the law and instead interpret the intention of the legislator. He contrasts the opinions of Hilarius (Hilary of Poitier, d. c. 367) and Augustine on the point, the former arguing in favour of such an interpretation, whereas the latter authority voiced the objection that only the legislator should be allowed to interpret his own laws. Aquinas resolved this question as follows: since the end of human law is to promote the public good, a law that harms the public good should not be followed.[451] On the other hand, the person best qualified to judge whether a law is going to be harmful to the public good is the legislator, he should therefore be consulted whenever possible so that he may provide a dispensation.[452] If it is clear that applying the law would harm the public good, and there is no time to consult the legislator, then the necessity to protect the public good will provide a dispensation itself, and a subject should not follow the law.[453]

Within this *quaestio*, Aquinas unhelpfully alternates references to the common good with references to the will of the legislator as the central consideration when acting against the words of the law.[454] It seems clear, however, that the legislator's intention is only relevant insofar as one presumes the legislator would intend his law to further the common good, so that the legislator's will never exceeds his power. If we assume that Aquinas saw public good and (at least the presumed) will of the legislator as always coinciding, the reasoning in *quaestio* 96 can be summed up as follows: in a case where the words of the law lead to a result which seems to be in conflict with the public good, the starting point is that one should consult the legislator. If there is no time to consult the legislator, one should apply the words of the law, unless it be so plain that the application of the law would violate the public good, that the necessity of avoiding harm itself provides a dispensation from the law.

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[451] See Aquinas, *IaIIae*, q. 96, art. 6: 'Respondeo dicendum quod, sicut supra dictum est, omnis lex ordinatur ad communem hominum salutem, et intantum obtinet vim et rationem legis; secundum vero quod ab hoc deficit, virtutem obligandi non habet. Unde iurisperitus dicit quod nulla iuris ratio aut aequitatis benignitas patitur ut quae salubriter pro utilitate hominum introducuntur, saluti, non est observanda.'

[452] Aquinas, *Summa IaIIae*, q. 96, art. 6: 'ed tamen hoc est considerandum, quod si observatio legis secundum verba non habeat subitum periculum, cui oportet statim occurri, non pertinet ad quemlibet ut interpretetur quid sit utile civitati et quid inutile, sed hoc solum pertinet ad principes, qui propter huiusmodi casus habent auctoritatem in legibus dispensandi.'

[453] Aquinas, *Summa IaIIae*, q.96, art. 6: 'Si vero sit subitum periculum, non patiens tantam moram ut ad superiorem recurri possit, ipsa necessitas dispensationem habet annexam, quia necessitas non subditur legi […], ille qui sequitur intentionem legislatoris, non interpretatur legem simpliciter, sed in casu in qui manifestum est per evidentiam documenti legislatorem aliud intendisse. Si enim dubium sit, debet, vel secundum verba legis agere, vel superiorem consulere'

[454] Confront the reference to *commune salute* at n.451 above and *quid sit utile civitati* in n.452 above with the reference to *intentionem legislatoris* at n.453 above.

3.2.1.2. Quaestio *120*

Aquinas made no mention of *epieikeia* or *aequitas* in his *quaestio* 96.[455] *Epieikeia* is instead explicitly addressed briefly in *quaestio* 60 of the *IIaIIae* and at length in *quaestio* 120. In *quaestio* 60, the discussion features under article 5, which states that equity applies whenever the application of human law in certain cases would be contrary to natural law.[456] The discussion in *quaestio* 120 is much lengthier and has a lot in common with the one under *quaestio* 96. Here too Aquinas asks whether a subject should in certain cases be allowed to interpret the intentions of the legislator rather than the words of the law, and once more opposes to it the objection, this time supported by C.1.14.1, that only the legislator should be able to interpret between equity and law.[457]

That said, the reasoning in *quaestio* 120 is slightly different from the one above: the focus shifts to equity rather than dispensation. Aquinas argues this time that *epieikeia* will be sufficient to entitle a subject not to follow the law in such a case because, while interpretation should indeed be the sovereign's prerogative only, *epieikeia* requires no interpretation of the law at all and would not be captured by the objection in C.1.14.1.[458] The reason Aquinas gave for this is that *epieikeia* does not involve the resolution of any ambiguity about the meaning of the law. It applies to cases where the meaning of the law is plain and it is plain that following the law would be unjust (e.g. upsetting the public good or natural law), simply recognising that the rule has lost its binding power.[459] Aquinas did not make any mention of the requirement to consult a superior in this *quaestio*, which may be related to the fact that *epieikeia*, rather than a dispensation, is here summoned to resolve the issue.

3.2.1.3. Ambiguities in Aquinas' theory of equity

Having looked at these passages, two issues are left unresolved. The most important issue is the relationship between *quaestio* 96 and *quaestio* 120: while both seem to answer the same question, the reasoning and answer seem to be different in each and – most importantly – only one of them seems to be focussed on *epieikeia*. This first point will – as we shall see – be addressed by Cajetan. The second issue left unresolved is what role the intentions of the legislator are playing within Aquinas' theory. In both *quaestiones* Aquinas sees the right to disobey the words of the law as permissible only when the law would harm the public good or violate natural or divine law. Aquinas also mentions, however, that one would also in those cases be giving effect to the intentions of the legislator. It is therefore unclear whether the focus of Aquinas is on the will or the power of the legislator. On the one hand, a legislator passing a law with the intent of upsetting the

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[455] The only reference to *aequitas* occurs in the context of quoting D.1.3.25, where equity is the principle opposed to the common good, and thus to be rejected. See Aquinas *IaIIae*, q. 96, art. 6.

[456] See n.449 above.

[457] Once more, and like in *quaestio* 96, he placed this objection alongside the authority of Augustine.

[458] Aquinas, *Summa IIaIIae*, q. 120, art. 1: 'Praetera ad epieikeiam videtur pertinere ut attendat ad intentionem legislatoris, ut philosophus dicit [i.e. Aristotle, *Ethics*, lib. 5, cap. 10]. Sed interpretari intentionem legislatoris ad solum principem pertinet, unde imperator dicit [C.1.14.1] inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere. Ergo actus epieikeiae est illicitus. […]Ad tertium [i.e the preceding statement] dicendum quod interpretatio locum habet in dubiis, in quibus non licet absque determinatione principis a verbis legis recedere, sed in manifestis non est opus interpretatione sed executione'

[459] See nn.449, 458 above

public good or natural law would, in Aquinas' view, be passing no law at all – no need for *epieikeia* to resolve such a case.[460] But what of a case where one has hard evidence that the legislator did not wish the rule to apply to a certain case, and yet following the words of the law would not upset either the public good or laws of a higher order? This ambiguous use of language, assimilating will and power of the legislator (perhaps encouraged by Aristotle's discussion of *epieikeia*, where the intention of the legislator is key) would characterise theological writings on equity up until the time of Franciscus Suarez.[461]

3.2.2. Cajetan's commentary

As mentioned in the first chapter, Aquinas' theory was not substantively developed in the course of the Middle Ages.[462] However, greater interest in Aquinas' writings on equity emerged in the course of the sixteenth century, starting with the commentary of Cajetan (Tommaso de Vio, d.1534) and then throughout the next two centuries in the writings of early modern Thomists. Cajetan began to work on his comment to the *Summa* in the early 1500s, completing his comment on the *Primam Partem* by 1507, and those on the *IaIIae* and *IIaIIae* by 1511 and 1517 respectively.[463] Unsurprisingly, most of his discussion on *epieikeia* centres on Aquinas' *quaestio* 96, article 6, in the *IaIIae*, and on Aquinas' *quaestio* 120 in the *IIaIIae*.[464]

In many respects, Cajetan follows Aquinas closely, in particular in referring interchangeably to the will of the legislator and the common good as the triggers for *epieikeia*. As will appear below, however, Cajetan made it much clearer that *epieikeia* was a doctrine concerned with the limits of human law, rather than with interpreting the intentions of the legislator and, working from this premise, derived the key principles of the theological concept of equity. These principles are relevant for our purposes insofar as they highlight the great difference between this approach to equity, which would be the starting point for almost all early modern theologians, and the one that would be developed shortly thereafter by humanist jurists such as Salamonius.[465] The main aspects of Cajetan's theory of equity, and the ones that clash most obviously with its humanist counterpart may be narrowed down to three.

The first elaboration on Aquinas that Cajetan introduced related *epieikeia* much more clearly to the limits on the power of the legislator. Aquinas had mentioned that, for equity to intervene, the law ought either to violate natural law or the public good – Cajetan stated the rule more broadly, saying that *epieikeia* should apply whenever following the words of the law would cause one to do wrong (to act *inique*). Cajetan specifies, in this context, that the mere fact that the reason why a law was passed (*ratio*) does not apply to a certain case is not enough to justify the intervention of *epieikeia* as long as following the words does not

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[460] See n. 449 above.
[461] See [4.2.4] below.
[462] See n. 445 and [1.2.1.2] above.
[463] Eckehart Stöve, 'De Vio, Tommaso', *Treccani - Dizionario Biografico Degli Italiani* (1991).
[464] I refer throughout to Thomas Aquinas and Thomas De Vio, *Divi Thomae Aquinatis... Primam Secundae et Secundam Secundae Summae Theologiae. Cum Commentariis... Thomae de Vio* (1593).
[465] There is no evidence that Cajetan was aware of developments among humanists, or that he was familiar with the take on *epieikeia* developed in Budaeus' *Annotationes in Pandectas*, the only Humanist work dealing with *aequitas* before the publication of Cajetan's comment on the *IaIIae* and *IIaIIae*.

cause any injustice.[466] Cajetan labels cases which cause injustice as cases where the reason of the law (*ratio legis*) fails obliquely (*defectu obliquitatis*).[467] Clearly therefore, for Cajetan, the avoidance of injustice, rather than giving effect to the *ratio legis* or intentions of the legislator is the core function of *epieikeia.*

From this narrower focus followed another principle of *epieikeia*, only implicit in Aquinas' analysis. If the role of *epieikeia* is simply to allow subjects not to follow the law where it has no power to bind, rather than give effect to the intentions of the legislator or *ratio legis*, then, for Cajetan, it can only serve to disapply broadly framed rules in certain particular cases where they happen to do injustice, rather than to extend the application of rules from one case to another. Cajetan supported this view by reading Aquinas' *quaestio* 120 in conjunction with Aristotle's own discussion of *epieikeia* in the *Ethics*, where the latter described *epieikeia* as a correction or direction of the law where it is defective on account of its universality.[468]

The final point made by Cajetan concerned how certain one should be of the injustice that would follow applying the words of the law and whether and when one should consult a superior before resorting to *epieikeia*. In order to answer this question, Cajetan had to resolve the ambiguous relationship between *quaestio* 96 and *quaestio* 120 mentioned above.[469] The problem, for Cajetan, was that the two rules seemed inconsistent with each other. In q*uaestio* 96, Aquinas seemed to require both certitude that injustice or harm would follow (*evidentiam nocumenti*) and an imminent danger (*subitum periculum*), only in the presence of both requirements would a dispensation from following the law arise, one should consult a legislator or follow the words of the law in all other cases. Instead, in *quaestio* 120, Aquinas seemed simply to require certainty that injustice or harm would follow (*locum habet in manifestis*), without any reference to imminent danger or consulting a superior. If both passages referred to *epieikeia*, they would be incompatible. Cajetan, however, avoided this difficulty by divorcing more clearly equity from interpretation. The point in both questions was that subjects are not allowed to interpret the law. However, Aquinas explained that *epieikeia* properly understood did not involve any exercise of interpretation at all.[470] For Cajetan, this meant that *quaestio* 120 was the only one of the two that concerned *epieikeia*, since it required such a degree of certainty that injustice

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[466] De Vio, *Thomae Aquinatis*, *ad IiaIIae*, art. 1, *f.* 284r: 'Dupliciter namque contingit deficere legem propter universale. Sive negative vel contrarie. Deficit siquidem lex propter universale negative tantum quando accidit casus, in quo cessat ratio legis, ac propter hoc videtur, quod lex in illo casu non obliget. Si tamen servetur lex, nihil mali, nihil inordinati committitur.'

[467] De Vio, *ibid.*, *f.* 284r: 'Diligentissime quoque notandum est quod non de quocunque defectu legis, propter universale, est sermo in hac distinctione Aristotelis, sed de defectu obliquitatis. […] Contrarie autem deficit lex propter universale, quando evenit casus, in quo non solum cessat ratio legis, sed inique ageretur, servando legem'. Cajetan justifies this by referring, among others, to Scripture, to the definition of equity as a part of justice, as well as to a *reductio ad absurdum* by pointing to the various objectionable acts which *epieikeia* would render permissible if its application were broader. See De Vio, *Thomae Aquinatis*, *f.* 284r.

[468] De Vio, *ibid.*: 'In quaestio 120 nota primo quod quid est epiiciae, seu aequitatis, ut Latine loquamur in lingua Latina. Ut enim ex [Aristotelis, *Ethicorum*, lib. 5] patet, aequitas est directio legis ubi deficit propter universale […] Dicitur propter universale, quia causa defectus eius ad hoc, ut aequitas habeat locum, non est quaecumque, sed sola ista, scilicet si propter universale deficit, hoc est, si ideo deficit, quia quod universaliter statutum esse in hoc particulari casu deficit. […] Nam si deficeret lex in casu aliquo propter privilegium aliter praecipiens, quam lex communis, non spectat directio actuum privilegii ad aequitatem: quam non deficit tunc lex propterea quia erat universalis, sed quia legislator derogavit legi quo ad hos privilegiatos: et simile est si ex quacumque alia causa lex deficiat. Nunquam enim spectat directio ad aequitatem nisi deficiat propter universale.'

[469] See [3.2.1.3] above.

[470] See Aquinas, *IIaIIae*, q. 120, art. 1: 'ad epieikeiam videtur pertinere ut attendat ad intentionem legislatoris […] sed interpretari intentionem legislatoris ad solum principem pertinet […] sed in manifestis non est opus interpretatione, sed executione.'

would follow as to avoid any need to interpret the law.[471] What about *quaestio* 96? For Cajetan, *quaestio* 96 concerned cases where the degree of certitude was not such as would obviate the need for interpretation (and thus trigger *epieikeia*), but where it was reasonably foreseeable (*rationabile*) that harm would ensue; in these cases interpretation would still be required, and a superior should be consulted whenever possible, but a *subitum periculum* may provide a dispensation from the rule despite the need for interpretation.[472]

To conclude, in Cajetan's analysis, *epieikeia* properly understood applies in cases where one is confronted with a generally framed rule, and it is so certain that applying the words of this general rule to a particular case would result in injustice that no interpretation is required to know it has no binding power.[473]

Cajetan's approach provides an interesting starting point for early modern theologians precisely because it is so different from the theory of equity that would soon be developed by early modern humanist jurists. The latter saw equity as (i) a doctrine of interpretation that (ii) gave effect to the intentions of the legislator and (iii) would serve both to narrow general rules and to broaden narrow ones.[474] Cajetan instead settled the theologians' theory of equity by (i) distinguishing it from interpretation, (ii) centering it on the recognition of the legislator's inability, rather than unwillingness, to bind in a certain case and (iii) confining its scope to the restriction of broadly framed rules. The effect of the emerging humanistic approach on the accounts of equity of early modern theologians will be the focus of the following section.

3.3. The approach of sixteenth-century Thomist theologians and jurists

Cajetan's theory of equity was produced at a time when the concept of *epieikeia* had not yet been incorporated in the accounts of *aequitas* by legal writers in either civil or canon law. As was considered in the previous chapter, the only legal writer who, by 1517 (the date of completion of Cajetan's commentary), had discussed in print the concept of *epieikeia* assimilating it to *aequitas* was Gulielmus Budaeus in his *Annotationes in Pandectas*, but the latter's account was rather vague and bore little relation to the writings of legists and canonists on *aequitas*.[475] In contrast, this section will deal with those early modern theologians

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[471] See De Vio, *Thomae Aquinatis*, *ad IaIIae*, q. 96, art. 6, *f.* 209v: '[Occurrere potest casus in quo] manifestus [sit quod observatio legis secundum verba sit damnosa communi saluti] sed sustinens moram [i.e. where there is no *subitum periculum*], et tunc duce gnome et epieichia sine superioris consultatione praetermittuntur verba legis, et servatur intentio eius: quia in manifestis non est opus interpretatione, quae spectat ad superiorem, sed executionem, ut in [*IIaIIae*, q. 120] author dicit. [...] Quod ergo in litera [i.e. *IaIIae*, q. 96, art. 6] dicitur, quod extra subitum periculum, non pertinet ad quemlibet interpretari, in casu dubio est sermo. [...] Si [namque] de manifestis [est sermo] contradicit dictis ex [*IIaIIae*, q. 120] quod in manifestis extra casum necessitatis, non est opus interpretatione, sed virtus epieicheia sufficit. [...] Et quod mens authoris sit ista, patet ex hoc, quod dicit, scilicet, quod necessitas habet dispensationem annexam. Constat enim, quod dispensatio ex interpretatione legis procedit. Interpretatio autem locum non habet in manifestis. De ambiguis igitur [...] intendit.'

[472] De Vio, *ibid.*, *f.* 209v: '[I]n ambiguis datur latitudo. Nam quaedam sic occurrunt ambigua, ut in sua ambiguitate remaneant. Quaedam vero sic sunt ambigua, ut rationabile sit, quod si legislator adesset, hanc proculdubio partem determinaret nunc, hic servandam. Sermo ergo literae [i.e. *IaIIae*, q. 96, art. 6] de ambiguis et de eis universaliter docet, quod interpretatio spectat ad superiores, quando potest ad eos recurri: quando vero non potest recurri, si sunt ambigua secundo modo [i.e. ut rationabile sit etc.], necessitas habet dispensationem annexam. Si vero sunt ambigua primo modo, tunc secundum verba legis agendum est.'

[473] De Vio, *Thomae Aquinatis*, *ad IIaIIae*, q. 120, art. 1, *f.* 284r: 'Non nam aequitatis est interpretari, an in hoc casu servanda sit lex, sed ubi manifeste lex deficit propter universale, dirigere.'

[474] See [2.3.1], [2.3.4] and [2.5] above.

[475] See [2.2.1] above.

who had developed Cajetan's and Aquinas' theory of *epieikeia* at a time where, under the influence of humanist jurists such as Salamonius, Duarenus and Connanus, the concepts of *epieikeia* and *aequitas* were being drawn together by legal writers and associated with a doctrine of legal interpretation focussed on the intentions of the legislator. The works examined in this section will be divided into two categories, because they interacted with the humanist concept of equity very differently. The first category consists of works of a straightforwardly theological nature, the main example of which is Soto's *De Iustitia et Iure*, providing the main source for theologians up until the times of Franciscus Suarez. In works of this nature, the impact of the civil law concept of equity as interpretation was negligible in terms of substance, but seemingly influenced the way in which certain concepts were expressed, most obviously in the way *epieikeia* and interpretation were brought together. The second category are works of a more legal nature, such as commentaries on the *Liber Extra*, or discussions of legal points within theological works. Here, the impact of the humanist concept of equity is unmistakable as the authors of these works draw mainly from legal or humanist sources in the course of their discussion, either ignoring or departing from the position of Cajetan and Soto. The latter works are consistent with the argument of the second chapter – as the views of Salamonius, Connanus and Duarenus on equity spread among later civil lawyers, those theologians who drew on civil law writings to inform their ideas about equity inevitably came into contact with them.

3.3.1. Development of the early modern theological concept of equity: Dominicus de Soto

3.3.1.1. Soto's concept of equity

Soto dealt with equity mainly in the first book of his *De Iustitia et Iure*, written around 1553-4,[476] and specifically under the eighth article of the sixth *quaestio*. The title of the article is 'whether subjects are entitled to act beyond the words of the law', the same as that of Aquinas' *quaestio* 96, article 6 in the *IaIIae*, and Soto's discussion is essentially a commentary on it.

Soto's approach to *epieikeia* remains, like that of Cajetan and Aquinas, focussed on the theological question of the binding power of human law. Soto refers to Aquinas' position about the availability of *epieikeia* on the basis that a law which is harmful to the public good ought not to be followed and extends the meaning of public good to cases where applying the words of the law would result in the death of an individual.[477] Thus, for Soto as for Cajetan, *epieikeia* allows one to depart from the law in cases where the law simply loses its power to bind on account of the harm that its application would cause. This is all the more clear from the distinction that Soto sees between the legal maxim *cessante ratione legis cessat lex* and the role of *epieikeia*. Soto follows Cajetan in specifying that *epieikeia* only has a role where the application of the law results in such harm as to overstep the boundaries of human law. Simply finding that the *ratio* of the law did not contemplate the case at hand will not be enough for a subject to make use of *epieikeia* – though

[476] For a brief history of the genre see Wim Decock, *Theologians and Contract Law* (2013), pp. 65-8.
[477] Dominicus de Soto, *De Iustitia et Iure* Vol. *1* (1556), q. 6, art. 8: 'Videtur enim sactus Thomas nimium illam stringere, dum ait illo praeciso casu quo legis observatio in exitium vergeret communis salutis, non esse servandam, cum tamen neque in privatam interniciem sit servanda. Etenim ille cui palam esset, osbservationem legis esse sibi lethalem, constaretque, ex natura legis non esse eius mentem in tantum periculum adigere subditos, neutiquam tenetur legem custodire.'

it may very well provide a sound ground for a superior to grant a dispensation. This is explained in a passage where Soto says that *epieikeia* explains why a subject in a certain case is not bound by the law, whereas a dispensation is instead a declaration that the *ratio* of a law does not apply to a certain case, and the latter is only the prerogative of a superior. As Soto puts it, for the law to lose its binding power it is necessary that its application contravene reason, which is not the same as saying that the reason of the law would be missing for that particular person or case.[478] The examples Soto gives of the application of a law violating reason clearly match the instances described above of a law resulting in either harm to the public good or in the risk of death for an individual, and have nothing to do with the *ratio legis*: if a rule commanding one to abstain from eating meat will cause one to die, *epieikeia* is available to avoid the application of the rule; however, the mere fact that one does not need the mortification of the flesh on account of which fasting is required is not enough to invoke *epieikeia* to avoid it.[479] Similarly, if a law forbids low-borns and disgraced individuals (*ignobiles homines et infames*) from getting on horses, *epieikeia* will only allow them to do so in order to escape from the enemy (and presumably save their lives), but not simply because it would be useful to them in battle.[480]

Another set of cases that would have been obviously falling within the scope of *epieikeia* if its purpose had been to give effect to the intentions of the legislator would be those where a subject of the law is endeavouring to adhere to the written words of a rule while clearly intending to subvert its aim. Soto does recognise that this attitude to the law 'iniquitas est, epieikeiae e regione adversa',[481] but does not explicitly recognise that these are cases which *epieikeia* is meant to remedy by allowing for a different interpretation of the rule in question. Soto's example is of a situation where a law prohibits that one institute as heir a child born out of wedlock (*adulter filium spurium*), and a subject nominates as heir another individual on the understanding that he is to then pass the inherited property onto the bastard son. Soto merely makes the point that this approach to the law would amount to a *prevaricatio legis* and refers to D.1.3.29 to make the point that it would be prohibited.[482]

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[478] Soto, *ibid.*: 'Patet ergo discrimen quid epieikeia non est subditum per licentiam eximere casu quo teneretur, sed explicare quod in illo casu non tenebatur: dispensatio autem est licentiam concedere. [...] Sed arguis contra: si Praelatus non potest sine causa dispensare, sit ut dispensatio nihil aliud sit quam declaratio causae ob quam ratio legis in tali casu deficit. [...] Nam etsi ratio legis in hac persona deficiat, non ideo protinus a vinculo legis enodatur. Aliud enim est quod observatio humanae legis rationi sit contraria, ubi epieikeia locum habet: aliud vero quod ratio legis in hac persona deficiat, ubi nihilominus necessaria est dispensatio'.

[479] Soto, *ibid.*: 'Exempla sunto. Si carnes dievetita non comedere caussa mihi esset ut fame perirem, possum epieikeia usus comedere. Tamen licet ego castigatione carnis non indigerem, ob quam ieiunium indictum est, imo abstinentia et inedia aliquod mihi esset impedimentum studii, non ideo liber a lege fio, sed est causa ut mecum Praelatus dispenset.'

[480] Soto, *ibid.*: 'Item dum vetaret lex ignobiles homines et infames equos ascendere, si occurreret eorum cuipiam casus, ut nisi se equo eriperet, in manus hostium incideret, tunc epieikeia eum docet lege se illo casu non obligari At vero etsi contingeret quempiam illius classis hominem utilem esse bello, non subinde equo liceret uti, sed tamen ratio dispensationis emergeret.'

[481] But this acknowledgment itself may be the product of humanistic influence. See n. 487 below.

[482] Soto, *ibid.*: 'Prohibet lex ne adulter filium spurium haeredem instituat: concedere ergo alteri haereditatem qui det filio, est verba legis, non autem mentem servare. Prohibet et altera lex ne sacerdos sacerdotium in favorem filii renuntiet: alter autem confert alterius filio, ut ille suo vices rependat.'

3.3.1.2. Equity and interpretation in Soto

However, in certain respects it may be possible to see the influence of the humanist concept of equity on Soto's analysis. One way in which this influence seems to have manifested itself is in allowing Soto to assimilate *epieikeia* and interpretation, broadening the scope of equity beyond Cajetan's narrow view.

Throughout his exposition of the theory, Soto unproblematically describes the process of invoking *epieikeia* as one of interpretation, using expressions such as *epieikeia interpretari*, and *interpretatio per epieikeiam*. Both expressions are adopted in the course of distinguishing *epieikeia* from dispensation, when Soto also describes the former as involving an 'interpretatio ex aequo et bono',[483] adopting the language that was growing more common among humanist-influenced jurists.[484] This passage suggests that in his treatment of *epieikeia*, Soto was at least superficially familiar with the way in which equity was discussed by Salamonius, Connanus and Duarenus around the same time.

Soto does not articulate this explicitly, but one aspect in which assimilating *epieikeia* and interpretation may have influenced his thought was to cause him to depart from Cajetan's reconciliation of Aquinas' *quaestio* 96 with *quaestio* 120 mentioned above. As mentioned earlier, Cajetan thought that only *quaestio* 120 applied to *epieikeia* proper, and that therefore there was only room for *epieikeia* in cases that were so certain as to require no interpretation.[485] While Soto did recognise the inconsistency between *quaestio* 96 and *quaestio* 120, he simply extended his doctrine of *epieikeia* to encompass Cajetan's explanation of *quaestio* 96, i.e. that where it is reasonably foreseeable (*rationabile*) that the application of the words of the law will result in an evil, the law can be avoided. Cajetan thought the latter a form of dispensation on account of necessity rather than *epieikeia*, precisely because it involved some degree of interpretation. Soto instead had no problem regarding *quaestio* 96 as covering an aspect of *epieikeia* itself, notwithstanding the fact that Aquinas described it as an instance of interpretation. Thus, for Soto, there are two situations where a subject may have recourse to *epieikeia*, (i) those cases where it is certain that an evil would follow the application of the law, and in those cases one may depart from the law even if there is time to have recourse to a superior, and (ii) those cases where it is only probable that injustice (i.e. a breach of higher law, or public good, or private death) will follow, and in those cases one may only have recourse to *epieikeia* where a superior cannot be consulted on account of a *subitum periculum*.[486] As we shall see, Soto's extension of equity to cover cases of probability as falling within the scope of *epieikeia* would be followed by all later writers.

Finally, another consequence of the greater assimilation of *epieikeia* and interpretation seems to be the acknowledgment that the strict adherence to the words of a rule disregarding its purpose – a case, as

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[483] Soto, *Iustitia et Iure, Vol. 1,* q. 7, art. 3: 'Quo haec autem lucidiora fiant, nonnulla hic sunt consideranda. Insinuat se enim hic primum omnium fallacia quae nonnullos devincit. Nempe idem esse dispensationem, quod est epieikeia: eo qua dispensator nihil eis aliud videtur efficere, quam legem in tali casu ex aequo et bono interpretari. At vero secus res habet. Differunt enim significato [...] epieikeia interpretari et dispensare. [...] Interpretari autem per epieikeiam est ipsam declarare, in tali casu locum non habere. At vero dispensare est quempiam subditorum a lege excipere: concessa illi licentia et facultate, sine qua legi esset obnoxius.'

[484] See [2.5.2] above.

[485] See n.471 above.

[486] Soto, *De Iustitia et Iure Vol. 1,* q. 6, art. 8: 'Si [...] medio modo se habeat, ita ut neque certus omnino sit, neque prorsus ambiguus, sed in illam partem propendeat, quod potest facere contra legem. Itaque illius partis opinionem habet cum formidine alterius: tunc si mora datur qua possit magistratum consulere, id facere tenetur: sin vero per subitaneum periculum id non licet:tuto facere potest contra legem. Atque hic est casus tertiae conclusionis'.

we said, often mentioned by humanist jurists as paradigmatic of *epieikeia*, would for Soto, if not fall within the scope of *epieikeia* itself, certainly be an interpretive attitude the polar opposite to interpretation by equity.[487]

3.3.1.3. Soto and the sixteenth-century theological concept of equity

All in all, Soto's discussion of *epieikeia* remained faithful to that of Cajetan in substance. The intention of the legislator or the *ratio legis* have little to do with the reason for the intervention of *epieikeia*, which remained inextricably linked to the power of human law. As Soto puts it, *epieikeia* merely serves as an explanation of why a law has no power to bind in a certain set of circumstances.[488] Soto's doctrine did not engage substantively with either the doctrine of equity of medieval legists and canonists or that which was emerging among humanist jurists. Nevertheless, as we have seen, the influence of the latter may have been responsible for the assimilation of *epieikeia* and interpretation in his analysis – thus broadening the scope of *epieikeia* - as well as the identification of the polar opposite of *epieikeia* with fastidious adherence to the words of the law at the expense of its intention.

Soto's approach soon became popular among early modern theologians engaged in commentaries over Aquinas' work. Juan De Salas (d. 1612), writing in the 1580s, provided an account very close to that of Soto,[489] even repeating word for word the latter's comments about the opposition between *epieikeia* and fraudulent adherence to the words of the law.[490] Bartholomaeus de Medina (d. 1580) in his *Expositio* on IaIIae q. 96 art. 6 of 1580 and Gabriel Vasquez (d. 1604) writing a commentary on the same work a decade later both followed Soto in substance as well as in his association of *epieikeia* with the language of interpretation.[491] A similar approach can be seen in Petrus de Aragon (d. c. 1592),[492] who followed Soto's and Cajetan's doctrine without any reference to its medieval or early modern legal concept.[493]

Soto's writings on equity clearly had a very profound impact on theologians and remained the most authoritative work on the point until the publication of Franciscus Suarez's own analysis in *De Legibus*. However, not all early modern theologians followed Soto's approach in this period. As we shall see in the next section, especially among jurist-theologians writing works of a more clearly legal nature, the approach

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[487] See above n. 481. Cf with the attidue of humanist jurists with particular reference to *calumniosa interpertatio* at nn. 151, 183 and 220.

[488] See n.483 above.

[489] Juan De Salas, *Tractatus De Legibus* (1611), p. 269.

[490] Like Soto, Salas refrained from finding a specific role for *epieikeia* in remedying those cases, simply referring to this as a *prevaricatio legis*. De Salas, *ibid.*, p. 270: '[An violet legem qui servando verba eius in cortice, contra eius mentem et intentionem facit]. Respondeo talem esse legis prevaricatorem. [...] et haec iniquitas est opposita epieikeiae, nam epieikeia servata mente legis contra eius verba, seu corticem tantum facit : et qui sic operatur, non peccat'. Compare with Soto n.481 above.

[491] Bartolomé de Medina, *Expositio in Primam Secundae Angelici Doctoris D. Thomae Aquinatis* (1580), pp. 533-4: 'Dicit lex quod depositum reddatur: exposcit quis depositum ad destruendam rempublicam; *ex aequi et iusti interpretatione* non teneor reddere.' (my emphasis). See also Gabriel Vázquez, *Commentariorum Ac Disputationum in Primam Secundae S. Thomae Tomus Secundus* (1605), disp. 176, art. 2, p. 296: 'si alicui immineret periculum hostium, si domum exiret ad audiendam missam diebus sestis, non deberet exire, sed legem posset *ex aequitate interpretari'* (my emphasis). There are some minor differences from Soto's account in Vasquez, on which see Riley, *Epikeia*, p. 65, but the main features, including that a simple failure of the *ratio legis* will not suffice to justify *epieikeia*, are all present.

[492] Theodore Tack, *Pedro de Aragón. His Life, Works and Doctrine on Restitution* (1957).

[493] See Pedro de Aragón, *In Secundam Secundae* (1597), p. 18.

of contemporary jurists was much more influential and accounts of equity differed greatly from those examined above.

3.3.2. The impact of the legal concept of equity on theologians writing legal works

As we have seen, there were important differences between the theological approach to *epieikeia* led by Soto and Cajetan and that of humanist jurists explored in the previous chapter. However, in striking contrast to this, the legal writers we shall examine below – Azpilcueta, Covarrubias, Molina and Salon – either ignored or openly challenged the theological orthodoxy on equity when writing works of a legal nature, adopting instead the humanist approach to *epieikeia* as *aequum et bonum*.

3.3.2.1. Martin de Azpilcueta (d. 1586)

Martin de Azpilcueta was the first of the early modern Thomists to clearly attempt to bring in line the theological learning on *aequitas* as *epieikeia* with the humanist concept of equity. His most thorough discussion of *epieikeia* is found in his commentary on the decretals at X.2.1.[494] There, Azpilcueta engages with equity in the course of a discussion of how judgments may be distinguished from one another.[495] One distinction, is that between a judgment which is just (*iustum*) and one which is unjust (*iniustum*), according to whether it is given pursuant to a just law or an unjust law.[496] In this context, Azpilcueta explains that one does not give an unjust judgment simply when one does not follow the words of the law, as long as one judges according to the *mens legislatoris*. Immediately after making this point, Azpilcueta brings together passages from Aquinas' *Summa*, passages in the Accursian gloss about interpretation, sources of Roman law, and Budaeus' own theory of equity to substantiate his point.[497] Azpilcueta seems to have been aware that identifying *epieikeia* with an interpretation according to the *mens legislatoris* was at odds with the narrower theories of theologians such as Soto and Cajetan. As a result, he needed to address the points in the theories of these other authors that most obviously clashed with the humanist approach to *epieikeia*.

The first point, as mentioned earlier, was that an interpretation of the law according to the *mens legislatoris* would not seem to be confined to cases of restrictive interpretation in the way that a theory of equity focussed on the power of human law would be. Azpilcueta therefore objected to the view, shared by Cajetan, Soto and their followers, that *epieikeia* should only be used to restrict the application of broadly framed rules. In order to make the argument that it should not be so confined, he read Aquinas' and

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[494] Martin de Azpilcueta, *Commentarius Utilis in Rubricam de Iudiciis* (1585), pp. 48-54.
[495] See Azpilcueta, *ibid.*, p. 45.
[496] Azpilcueta, *ibid.*, p. 48: 'Decimoctavum principale, quod iudicium, prout sumitur pro actu iudicandi, tertio dividitur in iudicium iustum et iniustum. Iustum est quod secundum leges iustas fertur, iniustum autem, quod non secundum leges iustas fertur, intelligendo per leges tam humanas, et consuetudines praescriptas, quam divinas et naturales iuxta [X.1.4.11] et [C.8.52.3.].'
[497] *Ibid.:* 'Advertendum tamen, quod qui iudicat secundum mentem legislatoris, et ut ille iudicaret, si ab eo quaesitum fuisset, aliter quam verba legis sonant, non iudicat iniuste, nec peccat, ut egregie ait [Aquinas, IIaIIae, *quaestio* 60, art. 5] glossa recepta et reputata in [D.2.14.40.3 *ad* 'per exceptionem'] in haec verba: 'id est de iure servandum, licet non sit statutum, quod verisimile est statutum fuisse, si hoc quaesitum fuisset', ut [C.3.29.5, D.45.1.138.1?] haec illa quod ipsum docet [Aquinas, *IIaIIae*, *quaestio* 120, art. 1] dicens, id fieri per aequipeiam [sic], vel rectius epiiciam, que latinis est aequitas, ut probat [C.1.14.1] et [C.3.1.8] et appellatur etiam bonum et aequum in [D.1.1.1pr] imo bonum aequum, et aequum bonum ut late docet Budaeus ibi post [Aristotle, *Ethics*, lib. 5]'.

Cajetan's theological arguments about *epieikeia* alongside the writings of medieval canonists and legists on issues of interpretation. He puts it so clearly it is helpful to quote the passage in full: 'An autem aequitas sive bonum et aequum duplex sit: altera limitans, qua excluduntur casus inclusi: altera extendens, qua includuntur casus non inclusi, quaestio pulchra est: cuius partem affirmantem quidam recentiores haud vulgari eruditione […]. Contra quae tamen facit quod [Aristotle, *Ethics*, lib. 5, cap. 10], solum ponit epiiciam ad dirigendam legem deficientem propter universale, et nil meminit de deficiente propter particulare: nec [Aquinas, *Summa IIaIIae*, q. 120] nec alibi id videtur meminisse, quem tamen cum primis fuisse Aristotelis studiosum nemo ignorat. Caietanus item vir maxime Aristotelicus definiens aequitatem ait, quod est directio legis, ubi deficit propter universale'.

Azpilcueta did note that none of the medieval discussions of cases of extensive interpretation in the medieval sources mentioned equity or *epieikeia* as part of their reasoning, justifying the cases instead as extensions of the same *ratio* from one case to another: '[n]ec obstat quod leges et Doctores multi frequentissime exendunt legem particularem de uno casu ad alium similem, iuxta [D.1.3.12] quia nulla est lex quae dicat illam extensionem fieri ex aequitate, sive epiicia, sed ex rationis identitate. Non obstat etiam dicta lex [D.2.1.7.2] quia dici potest quod illa suppletio non fit per epiiciam, sive aequitatem, sed ex rationis identitate, iuxta [Dominicus de Sancto Geminiano (d. 1424), *ad* 'italiae' in VI.9.1.]'[498] Despite that, Azpilcueta put forward a number of arguments to defend the view that *epieikeia* also covers extensive emendations of the law.[499] His main focus was on D.2.1.7.2, a rule stating that whoever should damage the Praetor's Edict will suffer a punishment. This passage was often used as an example of *interpretatio extensiva* by *ius commune* writers as the Roman jurist Pomponius extended the rule in question to cover cases where one damaged the Edict before it was exposed, despite the fact that that case would not fall within the words of the rule.[500]

First, Azpilcueta argued that the medieval sources supported his analysis. Despite the fact that medieval jurists justified extensions of the law as cases of *eadem ratio*, some were better explained as interventions of equity, that is, as he understood it, as interpretations of the *mens legislatoris*. Referring back to D.2.1.7.2, Azpilcueta made the point that that was a case better explained by looking to the intentions of the Praetor rather than the *ratio* of the rule.[501] Later, he also identified a specific passage in the *Liber Extra* where – albeit on a strained reading of the passage - an extension of a rule was justified on account of *eiusdem aequitas*.[502]

Secondly, he addressed the confinement by Cajetan and Aquinas of equity to an emendation on account of universality. Even if one were to agree with Aquinas and Cajetan that *epieikeia* only effects a *directio* or *emendatio propter universale*, this does not necessarily confine the doctrine to restrictive emendations

[498] Azpilcueta, *Commentarius*, p. 50.
[499] See n.503 below
[500] See e.g. n.559, 602 below.
[501] Azpilcueta, *ibid*.: 'dici potest quod illa suppletio [i.e. *ad* D.2.1.7.2.] non fit per epiiciam, sive aequitatem, sed ex rationis identitate, iuxta [Dominicus de Sancto Geminiano, *ad* 'italiae', VI.9.1.] [...] [sed] responderi potest ad [D.2.1.7.2] quod rationem de rumpente edictum iam fixum ad rumpentem illud, cum figitur, non esse quod eadem ratio militat in utroque casu; sed quod verisimiliter creditur mentem Praetoris illud figere iubentis fuisse, ut in utroque casu esset locus edicto.'
[502] See below at n.506.

of the law, Azpilcueta puts forward the *novissima* view that both can be seen as correcting rules *propter universale*, 'altera quidem quae excludit inclusum in sensu directo verborum; altera vero, quae includit exclusa in sensu contrario verborum.'[503] Coming again to D.2.1.7.2. Azpilcueta makes the point that this passage can be interpreted as a correction of the law because of a defect of universality, even though it is an extensive interpretation of it, because 'Praetor ponens certam poenam corrumpenti edictum in albo propositum, videtur a contrario sensu statuisse, ne illa imponatur aliis, et ita emendatio illa per extensionem, quod imponatur corrumpenti, cum proponeretur, vel antequam proponatur, potest dici emendatio legis peccantis per universale'.[504]

Thirdly, Azpilcueta argued that in any case, the medieval sources from legists and canonists made it clear that a defect of universality is not the only type of defect remediable by equity. Once more he turned to medieval statements about interpretation. Shortly put, his argument is that there are passages throughout civil and canon law sources saying that not only rules, but also exceptions to rules, can be extended to similar cases where the legislator so intended.[505] In these cases the defect in the exception to the rule that the extension is remedying is due to the exception's particularity, not to its universality.[506] Crucially, Azpilcueta noted that the main source for this type of extension in the *Liber Extra*, X.2.30.4, describes it as an extension by similitude of equity (*aequitatis similitudine*);[507] this led him to make the point that references to *aequitas* in this passage were to be understood as references to *epieikeia*, and that the extension was being justified by the Aristotelian doctrine.[508]

The other aspect of *epieikeia* that Azpilcueta had to address was that which confined its application to cases where the law would fail 'obliquely' if it were applied.[509] This second limitation, while perfectly sensible if the scope of *epieikeia* is limited to cases where an application of the law would fall outside the legislator's power, fits oddly within a theory centred on giving effect to the legislator's will. Once more, Azpilcueta saw *epieikeia* as closely linked to doctrines of legal interpretation, and drew from civil law and canon law medieval sources in order to make the point that *epieikeia* should not be confined in this way.

[503] Azipilcueta, *ibid*.: Sed ultra ea urget primo, quod subtiliter et novissime dici possit, quod utraque emendatio fiat propter universale'.
[504] Azpilcueta, *ibid*, p. 51.
[505] Azpilcueta, *ibid*.. Azpilceuta refers to Panormitanus *ad* X.2.30.4 (1547), *f.* 178rb and Decius *ad* X.2.19.6 (1551), *f.* 214ra.
[506] Azpilcueta, *ibid*.: '[Decius *ad* X.2.19.6] et alia citata ibi per Decium probant casum exceptum a regula extendi ad alium similem per aequitatem, sive epiiciam: et palam est, per illam extensionem non emendari legem deficientem per universale, sed deficientem per particulare.'
[507] Specifically, X.2.30.4 is a source where the Pope extends a civil law rule (about the fact that witnesses may exceptionally be allowed to provide evidence before *litis contestatio* on account of old age) to a case where an ecclesiastical privilege written on papyrus had to be confirmed ahead of proceedings contesting its validity: 'Nos igitur attendentes, quod iure sit civili statutum, ut quando periculum testium formidatur, ne veritas occultetur, et probandi copia fortuitis casibus subtrahatur, etiam lite non contestata testes valetudinarii et alii de quibus ex aliqua rationabili causa timetur, ad testimonium admittantur*: eiusdem aequitatis similitudine provocati*, praedicta, praedicta privilegia quasi iam nimia vetustate consumpta cum fuerint non in pergameno, sed in papyro conscripta, duximus innovanda.' (my emphasis). This use of *aequitas* is typical of the medieval occurences of the concept, where equity is a quality of a rule rather than a process of interpretation, though Azpilcueta chooses to adopt a strained reading of this passage to make his point.
[508] Azpilcueta, *Commentarius*, p. 51.: '[regula] qua statuitur quod testes de quorum morte timetur, possint accipi lite non contestata […] relatum in [X.2.19.6] extendi [per X.2.30.4] ad renovationem privilegiorum nimia vetustate consumptorum, idque fieri iusdem aequitatis similitudine, et ita per epiiciam, cum epiicia et aequitas sint idem, ut praefatum est. […] ergo epiicia, sive aequitas invenitur in emendatio legis deficientis per particulare, sicut in emendatio legis deficientis per universale.'
[509] See n.467 above

The main point Azpilcueta made was that a number of medieval sources made it clear that in cases where the *ratio* of the law is missing, then a law should no longer apply,[510] and he found that many of these cases involved no cases of 'oblique' failure of the law at all. He points, for instance, to D.37.14.6.2, where the rule preventing a patron from forcing a freedman to swear not to have children does not apply if the slave being manumitted has been castrated. Azpilcueta argues that in this case the absence of the *ratio* (encouraging the conception of children) is enough for the jurists to disapply the rule, even though it would be perfectly possible to enforce it without causing any injustice or sin.

That these are cases of interpretation by *epieikeia* is clear to Azpilcueta because, in his view, 'ratio legis videtur causa finalis, cur eam facit legislator. Ergo intentio eius non est comprehendere casum, in quo illa cessat; etiamsi absque peccato in eo servari possit'.[511] With these points in mind, Azpilcueta concludes that, whenever the entirety of the reason why the legislator has passed a law is missing in a single case, then the law should no longer apply, because the legislator could not have intended it to apply to such a case.[512]

Azpilcueta's discussion is an interesting example of the impact that the humanist development of *epieikeia* along the lines of interpretation could have on the development of that doctrine. Azpilcueta thoroughly treats equity as going hand in hand with doctrines of interpretation and is quick to assimilate instances both of extensions of the *ratio legis* from one case to another and cases where the *ratio* is missing, to instances of *epieikeia* on account of the fact that the true matter at stake is the *mens legislatoris*. Passages from medieval authors where equity is never mentioned are unproblematically treated by Azpilcueta as relevant to it, an indication of the great impact that the humanistic transformation of that concept had had by the second half of the sixteenth century. *Epieikeia* in Azpilcueta had little to do with the avoidance of sin or the limits of human law and to be entirely centered on the intentions of the legislator and the purposive interpretation of the law.

Azpilcueta was not always entirely consistent with the statements above, especially in works of a different nature. In his *Enchiridion*, a manual for confessors (and thus of a straightforwardly theological nature), Azpilcueta also briefly addressed the issue of whether a law would cease to be binding when its *ratio* failed. There, Azpilcueta's answer was less straightforward and he made a distinction between a law that is passed to address a number of evils, which would cease to be binding when the evils are no longer a threat, and a law that was passed to pursue a good, which would not cease to be binding simply because the good can be achieved in another way.[513] Later authors read this statement as consistent with the view

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[510] Azpilcueta, *Commentarius*, pp. 51-2.: 'insignis et utilis quaestio est, an aequitas, sive bonum [sic] excludat a lege generaliter statuente omnes casus, in quibus deficit ratio legis? Ad quam respondet Caiet[anus *ad Summa IIaIIae*, q. 120] quod non, quem sequitur Sotus [...] nisi quando non potest servari illa absque alio peccato. […] Contra quos tamen facit, quod ratio legis est anima legis secundum [Dinus Mugellanus *ad* VI. 5. De *Regulis Iuris*, *regula* 88] cui tribuunt hoc [Baldus *ad* C.6.2.20], quos refert et sequitur [Sandeus *ad* X.2.24.11] […]. At anima animalis deficiente, deficit animal. Ergo ratione legis deficiente, deficit lex.'
[511] Azpilcueta, *Commentarius*, p. 52.
[512] Azpilcueta, *Commentarius*, p. 53.
[513] See Martin de Azpilcueta, *Enchiridion* (1579), lib. 1, cap. 16, n. 36, p. 271: 'aliud esse dicere, quod lex praecipiens aliquid ob aliqua inconvenientia, illis cessantibus, non obligat [...] et aliud dicere id, quod in aliquem bonum finem praecipitur, cessare, si finis ille alia via habeatur, quod [Cajetan *ad IIaIIae q. 120* and *q. 186, art. 3*] et nos etiam [*consilium super* X.3.5.13?] tradidimus.' He claimed to have backed this view in another of his legal works, a commentary on X.3.5.13, but I have not

of Soto and Cajetan that a simple failure of the *ratio legis* would not be enough for *epieikeia* to step in,[514] and indeed it seems to be inconsistent with the one expressed by Azpilcueta in his commentary on the *Decretals*. It is possible that Azpilcueta was, in this context, drawing on different sources because of the different nature of his work. However, it is also possible that he saw the two statements as compatible. One has to remember that the focus of the humanist concept of equity Azpilcueta implemented in his commentary was not on the *ratio legis*, but rather on the *mens legislatoris*, and it may have been implicit that the failure of one would not always imply a failure of the other. Azpilcueta did specify in his commentary that the entirety of the *ratio legis* should cease before *epieikeia* could intervene,[515] and perhaps the *Enchiridion* could simply be read as a development of this statement, saying that the entirety of the *ratio* would only fail in cases where a law had been introduced to respond to an evil, and that in other circumstances one would not be entitled to infer that the legislator no longer wished the law to apply. Though it is not clear how this reading could be reconciled with Azpilcueta's application of *epieikeia* to the case of the manumitted castrated slave, where the rule seems to have been introduced to further a good, rather than the avoidance of any particular evil.[516] Azpilcueta does not provide us with sufficient analysis to speculate further than that.

Another inconsistency can be found in one of his *Consilia*, where the concept, when mentioned simply adopts the medieval distinction of written and unwritten equity.[517] The case was about whether the *Camera Apostholica* or the successor of a bishop *morientem extra suas ecclesias* should inherit the deceased's property in circumstances where the bishop left without a licence to do so, but where he had a good reason for not obtaining such a licence. While a specific rule held that a bishop dying in these circumstances should pass his property to the *Camera Apostholica*, it was argued, *inter alia*, that there is a rule of written equity, namely *regula* 88 in the added title *de regulis iuris* of the *Liber Sextus*, to the effect that the justice of a case should not depend on writing, but on the reason why some act is done.[518] Azpilcueta's dismissal of the applicability of the latter rule as an *aequitas scripta in genere* is a textbook example of application of the medieval approach to equity, plainly inconsistent with a view of *aequitas* as *epieikeia*, whether theological or humanistic.

3.3.2.2. Didacus de Covarrubias (d. 1577)

Didacus de Covarrubias, Azpilcueta's pupil, does not provide us with a detailed discussion of *epieikeia* in his writings and, unlike Azpilcueta, does not seem to acknowledge any discrepancy between the humanist and

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been able to find it. Arguably, Azpilcueta's view in the *Enchiridion* does not lend any clear support the more blunt statements in Soto and Cajetan about 'negative' failures of the *ratio*, but later authors seemed to think the two reconcilable.

[514] Most of the later authors listed at [3.3.1.3] above cited Azpilcueta's *Enchiridion* alongside Soto and Cajetan. See also n.667 below.

[515] See n.512 above.

[516] See n.510 above.

[517] Martin de Azpilcueta, *Consiliorum sive Responsionorum, Vol. 1* (1602), cons. 22 at pp. 447-450: 'Sexto non obstat etiam quartum; quia quando aequitas non est scripta et rigor sic, ille est praeferendus [D.40.9.12.1]. Quando item aequitas est scripta in genere, rigor autem in specie, rigor praefertur aequitati, secundum resolutionem communem [C.3.1.8] [...] et in nostro casu rigor est scriptus in specie, et aequitas nullatenus, vel in genere tantum.'

[518] The link between the said *regula*, which is merely a restatement of C.1.14.5, and the point in the case about obtaining a written licence, seems rather tenuous.

theological concepts of equity. The only discussion of equity to be found throughout his works is in his commentary on a *regula* from the title *de regulis iuris*[519] of the *Liber Sextus* – a work, therefore, of a distinctly legal focus. In the course of an exposition on the concept of *bona fides*, Covarrubias moves into a description of *epieikeia* that is perfectly aligned with that of humanist jurists, drawing from Budaeus, Oldendorpus and other humanist jurists as well as sources from Roman law and rhetoric.[520] He explains that, sometimes *bona fides* in legal sources is used not to refer to the honest mental state of an individual, but rather to equity and justice opposed to rigour. *Epieikeia* or *aequum et bonum* is a benign and humane interpretation of the law, one that departs from the surface of the words on account of the circumstances of a particular case. Covarrubias does not go into much greater detail about the nature of *epieikeia*, but both the substance of his argument and the sources he refers to make it clear he does not have in mind the narrower theological theory of equity examined above – indeed, Covarrubias does not make a single reference to other early modern theologians in the course of his discussion of equity.[521]

It is not altogether surprising that Azpilcueta and Covarrubias favoured the humanist approach to equity. As well as a theologian, Azpilcueta had read law in Toulouse from 1516, where he came into contact with legal humanism, and later taught canon law in Salamanca and Coimbra – he would have been particularly interested in the humanistic concept of equity and the diffusion it was enjoying among civil lawyers. Covarrubias, who studied under Azpilcueta at Salamanca, was also a well known jurist and equally hard to place; to cite Wim Decock, Covarrubias 'quoted as easily from the classical authors, the theologians, and the humanists, as he did from the civilians'.[522] The approach of Azpilcueta and Covarrubias therefore may only reflect their peculiarly legal and humanistic background, as much as the nature of the works in which they were engaged. They were not, however, isolated examples and other scholastic theologians writing before Suarez can be found similarly disregarding the theological concept of equity in favour of the juridical-humanistic one and not necessarily within works of a particularly legal nature.

[519] That is VI. *de reg. iur.*, *reg.* 2: 'possessor malae fidei ullo tempore non praescribit'.
[520] Didacus de Covarrubias, *Relectio Regulae, Possessor Malae Fidei. De Regulis Iuris, Liber Sextus* (1558) in Didacus de Covarrubias y Leyva, *Opera Omnia* (1627), p. 425: 'strictum ius esse, quod stricte et proprie ad corticem literae absque ulla benignitate et humanitate est intelligendum atque interpretandum, et ideo opponitur aequitati, ac bono et aequo, a quo benigna et humana deducitur interpretatio [D.29.2.86pr; D.28.2.13; D.38.17.1.6; D.40.5.41.10; D.46.1.51.1] omnium latissime [Andreas Tiraquellus, *Utroque Retractu* (1618), pp. 497-504]. [...] Hinc [...] ab Aristotele deducitur [*Ethics*, lib. 5, cap. 10] ex nostris praeter alios id anotarunt [Budaeus *ad* D.1.1.1pr] [...]. Sic et Quintilianus [*Institutes*, 7.7.] [...]. Sic constat aequitatem esse admirabile quoddam temperamentem [sic], quod ex perfecta ratione omnia operatur [D.4.1.7; D.28.5.85(84)] explicat et [Ioannes Corasius, *Miscellanea Iuris Civilis* (1598, pp. 135-139), lib. 2, cap. 18].'
[521] While later authors such as Suárez occasionally use Covarrubias as a source in support of their understanding of equity, the passages they quote are from sections of Covarrubias' *Epitome in quartum decretalium* where he does not discuss *epieikeia*, but rather dispensation. I have found no discussion of equity anywhere else in that work. See n.668 below.
[522] Decock classifies the approach of Azpilcueta and Covarrubias as 'humanist scholastic canon law'. See Decock, *Theologians and Contract Law*, [2.1.3.].

3.3.2.3. Later examples – Luis de Molina (d. 1600) and Miguel Bartolomé Salon (d. 1621)

Luis de Molina was a Spanish Jesuit well known for his writings in political theory, theology and philosophy.[523] As a part of his *De Iustitia et Iure* written in the 1590s, Molina included a discussion of contracts (*de contractibus*), and in there he briefly mentioned *epieikeia*.

Molina's treatment of *epieikeia* is very brief, but provides a hint that his views on equity were inspired by the writings of contemporary jurists rather than theologians. Molina, like Covarrubias, discusses *epieikeia* in the context of distinguishing it from the meaning of equity used in the context of *bona fides* – this time, in the context of *bonae fidei* contracts. Molina talks about *bona fides* as the *aequitas arbitrio iudicis* which takes place in contracts *bonae fidei*. Equity in the latter meaning, for Molina, had nothing to do with *epieikeia* and merely refers to the discretion of the judge to rule according to what is equitable. Instead, according to Molina*, epieikeia* refers to that aspect of equity where we are concerned with interpreting laws according to what the legislator would have said if he had foreseen their application to the present case. Interestingly, he says that the application to contracts would work in a slightly different way than its application to law. Where a contract is involved, the exercise of *epieikeia* involves interpreting it as it ought to have been worded if neither party had fraud and dishonesty (*fraus et dolus*) in mind when entering into it. Molina explained this process of interpretation by reference to the maxim *summum ius summa iniuria*, commonly referred to by humanist jurists when developing their theories of equity.[524] Molina seems, at least when describing the role of equity in interpreting legal rules, to have in mind the equity of humanists; the description of its application to contracts seems also to be derived from those principles, and certainly would not make much sense within the theological or medieval concept of equity. If this is right, a theologian like Molina, engaging, like Soto, on a commentary *De Iustitia et Iure*, originally centred on Aquinas' *Summa*, could by the end of the sixteenth century, in the course of a rather technical discussion of civil law (in this case concerned with the distinction of *bonae fidei* contracts and *stricti iuris* ones) think about equity drawing entirely from the legal-humanistic tradition, rather than referring to its theological sources.

An even later example of the adoption of *epieikeia* in its humanistic sense by a theologian is found in Miguel Bartolomé Salon, a Valencian theologian.[525] In his *Commentariorum in disputationem de iustitia*, published in the 1590s, Salon mentions *aequum et bonum* in the course of an explanation of the meaning of *ius* referring to D.1.1.1pr, where the latter is described as *ars boni et aequi*, and straightforwardly adopts the humanistic account of *aequum et bonum* as a synonym of *epieikeia* as an interpretation of the law in accordance

[523] Alexander Aichele and Mathias Kaufmann, 'Introduction' in Alexander Aichele and Mathias Kaufmann (eds), *A Companion to Luis de Molina* (2013).
[524] Luis de Molina, *Disputationes de Contractibus* (1607), p. 15: 'Bonam fidem, seu aequitatem arbitrio iudicis, quod locum habet in bonae fidei contractibus, non item in contractibus stricti iuris, non idem esse quod Epicheiam, qua, sicut in legibus iudicamus, quod eventus non censeantur eis comprehensi, eo quod, si de illis in particulari interrogaretur legislator quando legem condebat, respondisset suam mentem non esse, ut compraehenderentur, ita in contractibus iudicemus neutrius contrahentium mentem fuisse, ut censerentur comprehensi, nisi in eorum altero fuisset fraus, et dolus, quod ei non debent patrocinari. [...] Atque de eius modi iudicio intelligitur tritum illud sermone proverbium: *Summum ius, summa iniuria*.' For *summum ius summa iniuria* see n.152 above.
[525] Gonzalo Díaz Díaz, 'Salon, Miguel Bartolomé', *Hombres y documentos de la filosofía española, Volume 7* (2003).

with the wishes of the legislator. The references to humanists are rather clear in Salon, and his discussion even includes Budaeus' criticism of the Accursian gloss at D.1.1.1pr[526]

3.3.2.4. Salamonius' equity and theologians

As we have seen, certain theologians, perhaps on account of their peculiar background and training, as may be the case with Azpilcueta and Covarrubias, or on account of the subject matter of their discussion, such as the definition of *bonae fidei* contracts and *ius* in Molina and Salon respectively, adopted the concept of equity that was growing in popularity among humanist-influenced jurists. This is consistent with the argument made earlier, which showed that Salamonius' idea of *epieikeia* as an interpretation of the law in accordance with the intention of the legislator was, from the 1550s onwards, the most successful among the theories devised by legal humanists following the introduction of *epieikeia* in legal scholarship by Budaeus.

Returning to the theological concept of equity, there are two important points to be made. The first point is that, with the spread of *epieikeia* in legal scholarship, the theory of equity of theologians and that of those lawyers were much closer – so close, in fact, that the description of equity as an exercise in *interpretatio ex aequo et bono* travelled across from the writings of lawyers to those of theologians. So close, too, as to encourage writers like Azpilcueta to deal with the two branches – the theological and the legal – as though they were dealing with the same issues.

The second point to be made follows from the first one. Though they were brought closer together, the theological and the legal concept of equity were not obviously compatible. Azpilcueta is a good example of a jurist/theologian being influenced by the approach to equity of civil lawyers, but he seems to have simply favoured the latter approach over the theologian's equity. He did not make any particular effort to find a way of reconciling the two. If one were to attempt a reconciliation, it would be important to explain how interpreting the intention of the legislator related to (i) remedying a defect of universality – and not one of particularity – and (ii) depriving the law of binding power in cases of injustice.

These two points apply most conspicuously to the authors treated in the next chapter. The three central figures are Albertus Bolognetus, Hugo Donellus and Franciscus Suarez. All three sought to draw from both the legal and theological to further refine their approach to equity and find a more specific space for a doctrine of equity within the legal system. Not all appreciated fully (or at least explicitly) the tension between the theological and legal concept of equity. The most explicit recognition and resolution of the tension between the two is found in the approach to equity of Franciscus Suarez, himself a theologian, who would himself remain the most important source for the theological concept of equity from the seventeenth century onwards.

[526]Miguel Bartolomé Salon, *Commentariorum in Disputationem de Iustitia, Vol. 1* (1591), coll. 5-6: 'In hoc sensu vocatur ius, id est iurisprudentia a Celso in [D.1.1.1pr] ars boni et aequi. Ex quo licet inferre primo non esse idem legem, et artem boni et aequi, ut iudicavit Accursius.'

Chapter 4 – The place of equity within doctrines of interpretation

4.1. Introduction

We have dealt in the two previous chapters with two revivals of equity as *epieikeia* in the early modern period, one among lawyers, sparked by the writings of legal humanists, the other among early modern Thomists, starting with Cajetan's comment on Aquinas. This chapter's main focus – which brings this thesis to a close – is on the efforts by later civil lawyers to find a specific place for equitable interpretation alongside other exercises in interpretation, including *interpretatio restrictiva* and *extensiva*. An important argument that runs through this chapter is that the writings of theologians were valuable sources for later writers in order to identify the place of equitable interpretation. Indeed, the barrier that had kept separated theological and legal writings on equity up until early modern times, had – following these two revivals – been broken down. In articulating their theories, the authors examined in this chapters sought to rely on both traditions, theological and legal, to refine their understanding of the role of equity.

A point should be made clear. A number of authors among the sixteenth and seventeenth-century civil lawyers and canon lawyers mentioned in the second chapter had already started to rely on theological sources from the later sixteenth century onwards. It is, however, hard to tell for the majority of them whether and how theological sources influenced their approach to equity. The reason for this is that most authors mentioning equity only dealt with it in extremely general terms, and did little more than echo the theory of equity/*epieikeia* as interpretation as put forward by Salamonius.[527] As already mentioned, in authors that so relied on the writings of earlier humanist jurists, the idea of equity as interpretation remained generally underdeveloped; they shared the view that equity in the hands of judges would only allow for the interpretation of the law in line with the intention of the legislator,[528] but what that interpretation would entail and how it would differ from other kinds of interpretation known since the Middle Ages was expressed only in rather vague terms. What is perhaps even more striking is that this rather great problem went for the most part unacknowledged. Questions that remained unanswered were therefore, what does it mean to interpret the intention of the legislator by equity? How does that differ from interpreting a rule restrictively or extensively as medieval lawyers would have done? What kind of evidence should one be allowed to adduce when labouring to show that the intention of the legislator, or of the law, is such as to allow a judge to depart from its words? As we saw, these was also true of the approaches to equity found in the later seventeenth and eighteenth century.[529]

Some of these questions were, as we saw in the previous chapter, answered by scholastic theologians.[530] The authors I examine in this section are, instead, among the few that dealt with equity in enough detail to give us an idea of what purpose theological sources served when cited alongside the civil law orthodoxy on equity, and of how they influenced the way in which these authors conceptualised the

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[527] See [2.3.5], [2.5.2] above.
[528] We saw some, including Connanus, refer to this idea as 'civil' equity, but the way in which this concept was developed was not consistent, see e.g. in Duarenus. See [2.3.4.2].
[529] See [2.5.5] above
[530] See [3.2.1], [3.3.1] above.

role of equitable interpretation within the legal system. The scope of equity in theologians from Cajetan onwards was narrower, confined to cases where the words of the law suffered from a defect of generality. That defect was also narrowly defined, the rule would have to do wrong, sin, or otherwise exceed the power of human law. They considered the probability that such a sin or injustice would take place, and this would inform the subject or judge on whether it was safe to use *epieikeia* or whether they ought to refer the matter to a superior. These questions, and the arguments put forward to answer them had little in common with those brought up in matters of interpretation within legal doctrine, in medieval or in early modern times. At the same time, however, the influence of the legal concept of equity on writers from Soto onwards brought the language used by theologians when dealing with these problems closer to that of lawyers. They began discussing *epieikeia* as a process of restrictive interpretation of the law that would allow one to avoid the application of a rule where it would cause injustice. That process of equitable interpretation would have been recognisable to lawyers as fitting their own description of the concept of equity, but also have been easily distinguishable from other processes of interpretation in that it performed an entirely different function. The theological sources would therefore from that time onwards have the potential to attract legal writers seeking to carve a more specific role for equity within the legal system – distinct from existing doctrines of interpretation.

In this chapter we therefore focus on the authors who took the opportunity to do precisely that: bring together the works of theologians and civil lawyers on equity in order to develop substantively the doctrine of equity as interpretation.

4.2. The development of the concept of equity in later civil law

4.2.1. Bringing together medieval interpretation, humanist equity, and late-scholastic theology.

As mentioned above, we will in this chapter deal with these writers who drew on theological and legal accounts of equity as *epieikeia* as belonging to the same branch of scholarship, in order to better define the role of equity within the legal system. What they had in common, and what distinguishes them from the writers merely drawing on the theory of equity of Salamonius and his followers, is that they explicitly juxtaposed *interpretatio ex aequo et bono* – as filtered through legal and theological writings – and other exercises in interpretation, including *interpretatio restrictiva* and *extensiva*, trying to find a way to either assimilate them with equitable interpretation or distinguish it from them.

These exercises gave, through the sixteenth and early seventeenth century, rise to broadly three approaches, and for each of these I have identified an author exposing it most explicitly and extensively. The three central figures discussed in this chapter are therefore Albertus Bolognetus, Hugo Donellus and, the author functioning as a convenient end-point for our study, Franciscus Suarez, who wrote perhaps one of the best known and most celebrated accounts of equity as *epieikeia* available. It is useful to briefly describe each approach in turn.

Albertus Bolognetus was the author who took the broadest approach to equity, and was also perhaps the one departing the least from the more general accounts of equity relying on earlier humanists. Indeed, Bolognetus made explicit what was in all probability implicit in the theories of Salamonius and his followers – he explicitly assimilated entirely *interpretatio ex aequo et bono* with all other types of interpretation, and did so relying on both scholastic and legal sources. Bolognetus' is thus perhaps the most unsatisfactory approach to equitable interpretation in terms of identifying its substantive content. In Bolognetus, equity is not so much a doctrine as a justification for existing doctrines of interpretation.

The second approach to equity seems to have originated around the 1570s with writers like Ferdinandus a Mendoza. These authors borrowed heavily from the writings of scholastic theologians to narrow down the scope of equitable interpretation, distinguishing it from other types of interpretation. The specific role of equity in these writers was that of restricting general rules (it was thus an aspect of *interpretatio restrictiva*) in cases where the injustice which their application would cause allows the judge to presume that the legislator would not have wanted them to apply. The most complete and influential restatement of these theories would be found in the writings of Donellus – who sought to reconcile this product of legal humanism and scholastic theology with tradition, assimilating it with some of the approaches to *interpretatio restrictiva* we have observed in the first chapter.

The third approach, and probably the most complex one, was that of Franciscus Suarez. Suarez was a theologian and therefore engaged to a greater extent with the approach to equity of his predecessors, like Soto and Cajetan. He acknowledged the contribution of the legal concept of equity by dividing equity in two functions – one concerned, in traditional theological fashion, with taking a rule outside the power of the legislator, the other – in line with the legal learning – with taking it out of the will of the legislator. Further, like Donellus, Suarez saw equity as only applicable to a restrictive interpretation of the law and he also sought to distinguish it from other exercises in interpretation. However, and rather unlike Donellus, he did not assimilate *epieikeia* with *interpretatio restrictiva*, seeing the two as entirely separate exercises. Suarez's view is therefore slightly more complex. It is not altogether clear from his account how interpreting a rule to take it out of the will of the legislator in cases where the words are of broader application than the legislator intended them to be is going to differ from the more traditional doctrine of *interpretatio restrictiva*. I put forward the view that Suarez meant equitable interpretation to cover a range of cases where the words of the law would not be able to bear any possible restrictive meaning that would avoid the application of the law, so that equity has to intervene to deprive it of its power. In this sense, Suarez more satisfactorily distinguished the more traditional doctrines of *interpretatio* as concerned with working out the meaning of the words of the law, from equitable interpretation, which was – in his view – concerned with whether the law would in a case be able to bind.

To conclude, I consider briefly the impact of these theories on later writers. As mentioned earlier, it is beyond the scope of this thesis to provide a full account of the development of equity beyond the early seventeenth century, but it seems that the broader approach of Bolognetus and the more restrictive reading of equity provided by Donellus influenced different clusters of scholars, and that Suarez had an impact at

least as far as concerns the doctrine of equity developed by theologians in the later seventeenth and early eighteenth century.

4.2.2. Linking equity and interpretation I: Albertus Bolognetus – *interpretatio ex aequo et bono* as a general category of interpretation beyond the letter

Let us first examine the approaches to equity that sought to explicitly construe it as a broad doctrine of interpretation of the law beyond the letter, acting as an explanation for and within which to fit existing medieval doctrines of interpretation of law. These doctrines were at odds with the doctrine of equity put forward by scholastic theologians, but we shall see these theologians referred to by authors adopting them to substantiate their points – a testament to their influence and popularity among legal writers engaging with equity in this period.

The most complete and explicit statement of a doctrine of equity in this sense is that produced by Albertus Bolognetus (d. 1585) in his *De Lege, Iure et Aequitate* published in 1570.[531] Bolognetus was a professor of civil law in Bologna from 1565 until 1574 when he abandoned his legal career to start working as protonotary apostolic for his distant relative Pope Gregory XIII (d. 1585).[532] Like most writers on equity in this period, Bolognetus took the theories of Salamonius and his followers as his starting point to define equity: he cites Budaeus for his understanding of *aequum et bonum*, refers to the intervention of equity as concerned with aligning the law with the intention of the legislator, specifies its aim is not necessarily to make the law meeker, and adopts the distinction of civil and natural equity that was current among those writer, drawing from Duarenus – we return to that latter aspect below, as Bolognetus dealt with it in greater detail.[533] He occasionally also refers to some of the points from legal dialectics that can be found among earlier humanist jurists, discussing the role of equity in terms of legal issues (*constitutio legitima*) and as a type of argument 'ex scripto et sententia'.[534]

4.2.2.1. Equitable intervention in Bolognetus

We now turn to how Bolognetus exposes his theory of equity after these more general statements. Unlike the civil law writers we have previously encountered, Bolognetus made an effort to deal more specifically with the role of equity and relate it to other exercises of interpretation departing from the words in favour of the intention of the legislator.

Bolognetus starts by explaining that there are two roles that equity is meant to perform through emendation or direction. In doing this, he sticks quite closely to the text of Aristotle and argues that laws can suffer from two types of defect, one is produced by the legislator knowingly, the other unknowingly.

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[531] Bolognetus, *De Lege, Iure et Aequitate Disputationes* (1570).
[532] For more on the life of Bolognetus see Gaspare De Caro, 'Bolognetus, Alberto', *Dizionario Biografico degli Italiani, Vol. 2* (1969): conveniently available at http://www.treccani.it/enciclopedia/alberto-Bolognetus_(Dizionario-Biografico) (last accessed on 19-07-2017).
[533] Bolognetus, *De Lege*, cap. 28, para. 10-1 (natural and civil equity), 12-14 (interpretation not making the law meeker); cap. 29, para. 1-2 (Budaeus and *aequum et bonum*).
[534] Bolognetus, *ibid.*, cap. 29, para. 17. Citing *ad Herennium* 1.19. For the role of rhetoric see [2.3.6] above.

The former happens when the legislator defines a law generally, having regard to what happens most frequently, knowing that he cannot provide for all particular circumstances. This is the defect, for Bolognetus, that D.1.3.4 and D.1.3.5 refer to, acknowledging that the legislator will be perfectly aware his laws are only suited for the majority of cases.[535] The second defect, however, 'non volentibus, sed invitis legumlatoribus contingit' on account of some oversight, '[q]uare sicut primum illud legis p eccatum positum est in eo, quod plura, quam oporteat legis scriptura fuerint comprehensa, ita hoc secundum in eo consistit, quod fuerit aliquid praetermissum. Ac sicut ibi verba legis coangustanda sunt, ita hic suppleri, ac dilatari debent' - that, for Bolognetus, is what D.1.3.12 refers to.[536] Both can be remedied by the intervention of equity. While all interpretation of the law is aimed at identifying the intentions of the legislator, equitable emendation is that which is aimed at resolving these defects in particular.

The second point Bolognetus makes is that interventions of equity are distinct from those which explain the meaning of the words of the law, or those by which we decide which law or custom is supposed to govern a case. Insofar as a law or custom governs a case specifically, equity plays no role in the process which leads to the selection of that law or custom.[537] An interpretation is only properly equitable if it seeks to apply a rule to a case, in circumstances where the letter of the rule is not suited to resolve the case, and one must rely on the intention of the legislator to go beyond the letter. When faced with this problem, there are two ways to find the intention of the legislator. One way is to draw on other, existing civil law, and that is the first kind of equitable interpretation identified by Bolognetus. As he puts it 'si non illud idem reperiertur esse decisum, recte posset aequitatis nomen usurpari: quamvis vel in supplendis iis, quae lege praetermissa essent, vel iis coangustandis, quae nimis generatim fuissent tradita, alis aliquas potius civiles leges, quam naturalia praecepta prae oculis haberemus. [...] Hoc vero cum facimus [...] tunc vere dicuntur uti aequitate, et ex aequo bonoque interpretari'.'[538] However, we are not told by Bolognetus how these laws are meant to be used in order to arrive at the intention of the legislator. The second kind of *interpretatio ex aequo et bono* for Bolognetus is that through which a defect of generality or particularity in the law is resolved by reference to natural precepts. Bolognetus explains the role of natural law in interpreting civil law on the basis of the strong links between the two - 'potissimum de causa conditae fuerunt leges civiles, ut iuri naturali praesidio essent', Bolognetus says, '[q]uapropter cum leges civiles a iusto naturali quasi vitam et spiritum assumant, contraque et iam totis viribus in naturae conservationem inclinent, nihil tam rationi consentaneum est, quam ut quoties illae aliqua in re peccant, a iusto naturali emendentur'.[539] In this latter case, the intention of the legislator is assumed to coincide with natural law, but, as we shall see below, clear

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[535] Bolognetus, *ibid.*, cap. 29, paras. 9-12.
[536] Bolognetus, *ibid*, cap. 29, paras. 13-4.
[537] Bolognetus, *ibid.*, cap. 30, para. 1: 'Possumus generatim hic concludere, hanc suppletionem et restrictionem ex ipsius legislatoris mente desumi, ut saepe inculcat Arist[oteles] [...]. Sed quia haec mens varie coniici potest, ut magis distincte loquamur, dicamus tria esse, ex quibus sumi potest recta legis expositio [...] sive suppletione, sive restrictione lex indigeat. Primo sumi potest ex iis, quae in eadem lege vel praecedunt, vel sequuntur [D.30.50.3]. Et tunc crediderim non recte aequitatis nomen usurpari posse. Nam aequitas praeter legem scriptam est, ut recte docet Arist[oteles]. At quod ex iis, quae eadem in lege scripta sunt, saltem per interpretationem desumitur, non potest videri praeter legem esse, imo recte legitimum appellatur, perinde ac si expressim lege illa cautum esset'.
[538] Bolognetus, *ibid.*, cap. 30, para. 4.
[539] Bolognetus, *ibid.*, cap. 30, para. 8.

evidence from other sources that the legislator's intention are to depart from natural law, will be conclusive.[540] The former, Bolognetus calls, an interpretation by civil equity, and the latter an interpretation by natural equity – following loosely Duarenus' definition of it.[541]

4.2.2.2 The scope of equity - C.3.1.8 and C.1.14.1

Broadly put, therefore, Bolognetus' equity is a doctrine not dissimilar from that of other humanists before him. One which extends or restricts written rules where their letter is at odds with the intention of the legislator, which intention is gathered by inference from other available (but inapplicable) rules of civil law, written and unwritten, or by – necessarily unwritten – principles of natural law. The only difference seems to be that, unlike Connanus and Salamonius, Bolognetus does not see equity as encompassing also corrections of the law by the legislator. The legislator may, of course, interpret himself the law *ex bono et aequo*, but the focus of Bolognetus' discussion is the use of equity by judges and subjects of the law.[542]

Insofar as equity is a doctrine concerned with the intentions of the legislator, Bolognetus makes clear that it will have no application where such intentions are wholly unclear. This was already argued by Bolognetus' predecessors, and, like them, Bolognetus uses this distinction to explain the tension between C.3.1.8 and C.1.14.1.[543] Thus, in a case where a rule is so unclear that no evidence at all can be gathered of the intention of the legislator, there will not be any room for equity. Bolognetus refers to his predecessors from Salamonius onwards in holding that C.1.14.1 is aimed at preventing the application of equity in cases of this kind, i.e. where both letter and intention of the law cannot be discerned.[544] Interestingly, Bolognetus relates this statement also to theological writings and believes it supported by Aquinas' own use of C.1.14.1 in the *Summa*.[545]

On the other hand, there are cases where the letter of the law is altogether unclear, but the intention is certain from other sources. These cases are unproblematic, and one must follow the intention of the legislator.[546] Insofar as these are cases where one follows the intention of the law, interpertations of this kind are referred to by Bolognetus as cases of *interpretatio ex aequo et bono*.

Finally, there are cases where the letter leaves room for no ambiguity as to its meaning, but is in conflict with the intention of the legislator. Bolognetus links these cases to rhetorical legal issues *ex scripto*

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[540] See n.551 below.

[541] Bolognetus, *ibid.*, cap. 31, para. 10: 'Distinctionem ergo illam, cuius supra meminimus, naturalis et civilis aequitatis, ex iusto quod emendatur desumere non poterimus, cum illud semper vel legitimum sit, vel ut legitimum consideretur. Recte autem illam desumemus ex eo iusto quod ad alterum emendandum adhibetur. Id enim si civile est, civilem, si naturale, naturalem aequitatem constitutit'.

[542] Bolognetus, *ibid.*, cap. 33, para. 6.

[543] Bolognetus, *ibid.*, cap. 33. See e.g. n.195, 313 above.

[544] Bolognetus, *ibid.*, cap. 33, para. 2. Similar considerations are repeated in Bolognetus, *De Lege*, cap. 35, though Bolognetus concludes that this explanation of C.1.14.1, while sound, is not historically accurate. He argues instead that Constantine meant originally to refer to interpretations of the law which are of general application.

[545] Bolognetus, *ibid.*, cap. 33, para. 2: 'Quod attinet ad primum, cum scilicet verba ita dubia sunt, ut dubiam quoque, ac plane incertam sententiam reddant, constanter hic puto posse nos affirmare, interpretationi ex aequo et bono locum non esse. Ac nobiscum hac in re sentit Divus Thomas in [*IaIIae*, q. 96, art. 6, *IIaIIae*, q. 120, art. 1]. Quibus in locis ita interpretatur verba Constantini in [C.1.14.1]'. For Aquinas see [3.2.1] above, note that Aquinas' reference to ambiguity does not straightforwardly refer to legislative intention.

[546] Bolognetus, *ibid.*, cap. 34, paras. 4-7.

et sententia.[547] They are the ones that are most problematic, because they require the interpreter in some way to read a provision in a way that departs from the sense that is conveyed from the plain reading of its words.

Both the second and third category of cases suppose that one is able to identify the intention of the legislator independently from the letter of the law. Bolognetus does not provide us with much information regarding what evidence the interpreter may use to do that. Furthermore, his focus is only on how to deal with cases of the third kind, which he finds more problematic precisely because in these cases the applicability of the intention of the legislator, however gathered, depends whether the direction found in the letter of the law is specific to the case at hand or not. We move on to the solutions of those conflicts in the next pargraph – but returning to the issue of where the intentions of the legislator might be gathered, it is clear from Bolognetus' later arguments that the intention of the legislator will be presumed to be aligned with justice and right reason.[548] Reading this alongside Bolognetus' earlier argument that an *interpretatio ex aequo et bono* may refer to both natural and civil law, one can presume that the identification of injustice or irrationality could be arrived at by reference not only to natural law, but also to the other rules within the legal system, but Bolognetus does not say much else about the process of gathering the intentions of the legislator.

4.2.2.3. Ius commune rules of interpretation as *interpretatio ex aequo et bono*

As mentioned above, Bolognetus is mostly concerned with resolving cases of the third kind – those where the intention of the legislator is at odds with a clearly expressed rule of law. To resolve these cases, he mostly relies on *ius commune* sources dealing with the doctrines of *interpretatio restrictiva* and *extensiva*. However, these doctrines were not governed by a unified theory in medieval and early modern works of interpretation, but rather articulated around a series of particular rules centred on specific Roman law sources. This means that Bolognetus' arguments, rather than identifying general principles, restate the medieval particular rules and, which rules can vary considerably depending on whether he is restating doctrines pertaining to the extensive or restrictive interpretation of the law.

Bolognetus distinguishes three distinct types of cases where letter of the law and intention of the legislator are at odds – the case in which the letter deals expressly with the case at hand, that in which the letter says nothing, and, finally, that in which the case is treated by the letter only generally. 'Primo enim aperta sunt verba, cum illud ipsum de quo agitur, expressim determinant, ac decidunt. Secundo cum prorsus illud omittunt. Tertio et ultimo cum neque prorsus omittunt, neque etiam speciatim decidunt, sed generalibus id tantum verbis complectuntur.'[549] Throughout his discussion in this section, Bolognetus

[547] Bolognetus, *ibid.*, cap. 34, para. 1: 'denique verba nulla ex parte dubia sunt, sed undequaque apertissima, ita ut quod in ea lege ambiguitatis inest, id non ex verbis oriatur, sed ex eo tantum, quia aperta legis scriptura a verisimili legislatoris mente videatur abhorrere. Unde ea inducitur causae constitutio, quam Rhetores legitimam appellant ex scripto et sententia.' See n. 548 below.
[548] See n. 547 above and in particular Bolognetus, *ibid.*, cap. 34, para. 8: 'Tertium et ultimum erat caput nostre distinctionis, cum verba plane aperta sunt, ac per se nihil obscuritatis habet, quamvis eo modo, quo sonant, non prorsus rationi et iustitiae congruere videantur.'
[549] Bolognetus, *ibid.*, cap. 34, para. 9.

juxtaposes passages relevant to *interpretatio restrictiva* and *extensiva* from medieval commentators to statements of late scholastic theologians.

Let us first deal with his arguments relating to the first and third cases. Both involved a legal rule broadly framed, covering a particular case where the application of the rule would appear to fall outside the intention of the legislator.[550] In the first case, that of a law dealing openly with a case, the rule for Bolognetus is that one cannot interpret a law *ex aequo et bono* if that would lead to a defective reading of its words (*sine vitio scripturae inflecti non possint*).[551] For Bolognetus, such an interpretation of the law would not be an exercise in *interpretatio ex aequo et bono* but rather in *clementia*, which is the prerogative of the Prince. It is not clear what Bolognetus exactly means by *vitio* here, and he makes no effort to relate this to the medieval doctrines of proper and improper meaning of the words of the law.[552] This he relates to D.40.9.12.1 or the *lex Prospexit* – often referred to in medieval and early modern writings on interpretation as determining the outer boundaries of *interpretatio restrictiva*, since it involved a case where the Roman jurists refused to narrow the general scope of the words of a rule despite the harshness which would follow from following them.[553] The *lex Prospexit* had been, since the Middle Ages, explained in a number of ways by commentators and legal writers in the course of their analysis of *interpretatio restrictiva* – which approaches Bolognetus dismisses as incorrect. His justification for the result in the *lex prospexit* is different from that of medieval commentaries, but he engages with those writings and clearly sees this exercise in equitable interpretation as simply coinciding with the application of *interpretatio restrictiva*. [554]

The situation is different where, as in the third category of cases, the words of the law capture the particular case clearly, but not explicitly, so that it merely falls within a broader category of cases governed by it. This is a case where *interpretatio ex aequo et bono* may sometime play a role, so that one may moderate or narrow down the general statement of the letter. In this case, to identify exactly the cases where a restrictive interpretation may take place, Bolognetus seems to be aware of the great resemblance between those cases and those discussed by late-scholastic theologians in writings on *epieikeia*, and he therefore proceeds to weave together the thoughts of theologians, in particular those of Soto, on *epieikeia* and legal writings on *interpretatio restrictiva*. He borrows Soto's example of a law forbidding a man to bear arms at night so as to avoid violence, asking whether it would apply to one who is too frail to inflict damage on anyone. Bolognetus aligns Soto's argument with those made in medieval legal writings on *interpretatio restrictiva*, which said that the failure of a minor *ratio* would not be enough to allow the judge to presume the legislator would

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[550] See n.538 above.
[551] Bolognetus, *ibid.*, cap. 34, para. 9: 'Primo casu, cum verba legis illud ipsum tam aperte decidunt, de quo disceptatio est, ut sine vitio scripturae inflecti non possint, tunc nulla interpretatione, nullaque aequitate evitari poterunt, aud ad eum sensum contorqueri, qui prorsus a verbis alienus sit, nam cum ad legis sententiam interpretatio omnis, quae sit ex aequo et bono, referenda sit, non poterit videri ea fuisse legislatoris sententia quae verbis perspicuis adversatur [D.33.10.7.2]'.
[552] These are discussed at [1.1.4.1] above, and [4.2.4.1.4] below.
[553] D.40.9.12pr: 'Prospexit legis lator, ne mancipia per manumissionem quaestioni subducantur, idcircoque prohibuit ea manumitti certumque diem praestituit, intra quem manumittere non liceat. [D.40.9.12.1] Ipsa igitur quae divertit omnes omnimodo servos suos manumittere vel alienare prohibetur, quia ita verba faciunt, ut ne eum quidem servum, qui extra ministerium eius mulieris fuit vel in agro vel in provincia, possit manumittere vel alienare: quod quidem perquam durum est, sed ita lex scripta est.'
[554] Bolognetus, *ibid.*, cap. 34 para. 9-16. Confront Bolognetus' approach with that of Andreas Tiraquellus, *Tractatus Cessante Causa Cessat Effectus* (1552), pp. 91-2, as well as those of various other jurists referred to at [1.1.4.1].

not have wanted it to apply.[555] In general, Bolognetus seems to treat late scholastic arguments about *epieikeia* as dealing with the same issues that were dealt with by medieval jurists on *interpretatio restrictiva*. Within a few paragraphs, he juxtaposes the arguments of medieval legists and canonists about the fact that the legislator is presumed not to intend outcomes that are absurd or incompatible with a *ratio* he has expressly stated,[556] with Soto's argument that a law does not bind where its application would cause one to incur the risk of death, reading those statements as part of one corpus of writings on *interpretatio restrictiva* and therefore on *interpretatio ex aequo et bono*.[557]

The final category to be dealt with is one easily identifiable with *interpretatio extensiva*. That is, one where the words of the law clearly omit the case at hand, but it is presumed from the irrationality or injustice that would follow that the legislator intended that rule to apply. In such a case an *interpretatio ex aequo et bono* can intervene to extend the rule to cases the letter does not include. Bolognetus draws on a number of *Digest* passages to make the point,[558] but, most importantly, borrows the rules from medieval approaches to *interpretatio extensiva* to better define the limits of such extensions.[559] For instance, extensions will not be available where the rule in question was introduced to bestow a privilege on a group or if it contains a matter of strict law (*stricti iuris materiam contineret*).[560] The discussion also includes other technical rules of extensive interpretation, such as that a law that is corrective (*lex correctoria*) will need to have the *ratio legis* expressly stated by the legislator in order to be extended.[561] It is clear that Bolognetus sees interpretations by equity to overlap with *interpretatio extensiva*, but he does not enter into a detailed analysis of all the rules, explaining that '[v]erum non id nobis hoc tempore propositum est, ut casus omnes enumeraremus, in

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[555] Bolognetus, *ibid.*, cap. 34, para. 22-25: 'non semper cum legis ratio cessare videtur, temere a legis praecepto recedere possumus; ut si, gratia exempli, lex municipalis puniat eum, qui noctu arma tulerit, non debemus illico senem liberare [...]. Et ita recte concludit [Soto, *Iustitia et Iure*, q. 6, art. 8]. [...] Quod vero aliquo casu minor subsit ratio, non sati causae est, ut propterea a generali legis regula recedere debeamus, ut docet Socin[us *ad.* D.45.1.2.2.] Alciat[us, *De Verborum Significatione*, Vol. I], late Doct[ores] ferme omnes in [C.2.1.1].' Technically, the argument from Bartholomaeus Socinus (d. 1507) – 'non sit extensio de casu ad casum in quo videbatur minor ratio decisionis' - is an argument relating to *interpretatio extensiva*, but Bolognetus evidently thinks it applicable to restrictive interpretations. It is also unclear what *doctores* Bolognetus has in mind commenting on C.2.1.1.

[556] Bolognetus, *ibid.*, cap. 34, para. 26, 30: 'Sed tamen duo mihi praecipua videntur esse, ex quibus legis restrictio recte desumatur. Primum est, cum videmus non posse legem generatim accipi, quin absurdum aliquod sequatur: tunc enim eius vitandi gratia legis dispositio coarctari omnino debet, ut recte tradit Rainer[ius (Raniero da Perugia? d. c. 1245) [*ad* D.1.1.9] cui hac in re consentit Bart[olus *ad* D.39.4.15]. Qua de re minime mihi dubitandum videtur, cum nihil sit quod nobis iurisconsulti crebrius inculcent, quam verba ita esse accipienda, ne absurdum ex iis aliquod oriatur. [...] 'Alterum est, cum perspicuum est legislatorem spectasse rationem aliquam quam constet non vigere in ea facti specie, quam volumus a generali legis regula eximere, sed recte utrunque ex his constare, vel planum fieri necesse est, ut hoc nomine restrictio fieri possit.'

[557] Bolognetus, *ibid.*, cap. 34, para. 29: 'Exemplum etiam illud hanc rem maxime apertam facit, quod affert Doming[us] Sotus [*De Iustitia et iure*, lib. 1, quaest. 7, art. 3.] Lex est, quae infames, vel obscuris parentibus ortos prohibet equos conscendere. Latrones in eum locum impetum faciunt, in quo eiusmodi homines multi degunt; isti cum videant se non alia ratione latronum manus effugere posse, vitae suae praesidium quaerentes equos ascendunt, ac citatis cursibus sese illis subducunt. Dubium non est, quin a poena legis immunes esse debeant.' For Soto see n.480 above.

[558] Bolognetus, *ibid.*, cap. 34, para. 16: 'Secundus casus erat ille, cum id de quo disceptatio est, in lege prorsus omissum fuit. Et tunc clarum est aequitati locum esse posse, cum videamus saepe iurisconsultos, supplere ea, quae legibus fuerant praetermissa ut [D.38.17.2.5, D.2.1.7pr-2, D.14.6.14].'

[559] Bolognetus, *ibid.*, cap. 34, paras. 16-7.

[560] Bolognetus, *ibid.*, cap. 34, para. 18: 'Tunc enim ad casum omissum lex non [...] extenderetur, si forte lex illa de cuius interpretatione agitur, privilegium aliquod induceret, iuxta [D.29.1.21] aut alio quocunque modo stricti iuris materiam contineret.' The same points are made by Bartolus, *ad* D.1.1.9, n. 60.

[561] See Bolognetus, *ibid.*, cap. 34, para. 20: 'Idque posse fieri etiam in correctoriis frequentius admittunt nostri interpretes, dummodo ratio sit expressa, ex qua extensionem sumere volumus. Ita concludit glo[ssa *ad* 'eligatur', Clem.1.3.1] quam caeteri passim sequuntur'. He goes on to cite Baldus, Butrius, Decius, and Socinus.

quibus vel possent, vel non possent leges extendi; tantum enim quaerimus in praesentia, an aequitati locus tunc esse possit, cum casus de quo agitur a legislatore plane omissus est'.[562] Thus, the fact that doctrines of *interpretatio extensiva* permit the extension of rules in these cases is a sign for Bolognetus that equitable interpretation has a place. Again, the overlap between the two is unambiguous. Bolognetus does not make any particular effort in criticising or adapting medieval rules of *interpretatio extensiva* – it seems he sees these cases as one aspect of *interpretatio ex aequo et bono*, but the latter seems to perform nothing but a different justification for the old rules.

4.2.2.4. The influence of epieikeia *theory in Bolognetus*

What appears clearly from Bolognetus' analysis of *interpretatio ex aequo et bono* above is that, for Bolognetus, it is a *genus* of interpretation to which other, more specific types of interpretation belong – specifically *interpretatio extensiva* and *restrictiva*. However, equity seems to play no significant operative or substantial function in determining how the rules and principles of the doctrines of interpretation it contains are to be articulated. Bolognetus does not seek to change much in the medieval rules by reference to *epieikeia* or equity, and seems simply to use the latter to provide a conceptual basis for their existence

This is most clear when one assesses the impact of scholastic theology on his treatise. Throughout his work, Bolognetus refers several times to the writings of theologians, with particular reference to Aquinas, Cajetan and Soto. Their arguments are adopted, for instance, in the passages where Bolognetus discusses whether natural law can be amended by equity,[563] or where he discusses the difference between equity and dispensation.[564] However, Bolognetus seems only to refer to those authors in order to ground the medieval learning on interpretation in further authority, rather than to affect its development. This is most clear from Bolognetus' unproblematic extension of the role of equity to *interpretatio extensiva* and to his argument that, even if the letter of the law causes plain injustice, specific words of the legislator applicable to a particular case will have to be followed. Both of these cases are unambiguously rejected in the doctrine of theologians, but Bolognetus fails to address the problem entirely – his focus is instead on laying down and giving effect to the medieval doctrines of interpretation. Take for example Bolognetus' reference to Soto's distinction between interpretation by equity and dispensation. Bolognetus cites Soto's example of a rule forbidding a man to bear arms at night.[565] If it is plain that the law was introduced to avoid violence, may one who is not in a position to inflict violence avoid the rule? For Soto, the answer is clear, *epieikeia* only avoids the application of rules when they would violate natural law or put one at the risk of death or otherwise cause injustice – the fact that the *ratio* of the law does not apply to the case is irrelevant. Bolognetus adopts that example, but to make a different point – a *ratio cessans* will be enough to avoid the

[562] Bolognetus, cap. 34, para. 19.
[563] See Bolognetus, *ibid.*, cap. 31, para. 5.
[564] See n.554 above.
[565] See n.555 above. Bolognetus, *ibid.*, cap. 31, para. 24: 'At si forte eveniret, ut tu non posses a carnibus abstinere, quin fame perires, licite illis absque ulla dispensatione uti posses [...]. Neque enim exceptio illa praeter verisimilem Pontificum mentem esse iudicari debet. Verum ut tibi facere id liceret, causa illa non satis esset, quod carnis forsan coercione non indigeres, ob tantum dispnsensationi locus esset, ut recte ex Divi Thomae, aliorumque sententia concludit Domin[icus] Sotus [*De Iustitia et Iure*, q. 7, art. 3].'

application of a rule and, for Bolognetus, Soto is merely showing an example where the *ratio* is missing only in part. Bolognetus does this throughout his treatise, reworking the texts of the scholastic theologians to explain medieval doctrines of interpretation.

4.2.3. Linking equity and interpretation II: the influence of scholastic theology - *interpretatio ex aequo et bono* as a correction or interpretation of the law to avoid injustice

4.2.3.1. Introduction

The second way of linking equity and interpretation that emerged from the later sixteenth century onwards was one that owed much more to the theological writings of Cajetan and Soto on *epieikeia*. Doctrines of this kind, far from assimilating interventions of equity with all kinds of interpretations of the law 'beyond the letter', sought to find a narrow scope for equity, consistent with that found for it in theological writings. Not all the authors we shall examine in this section did this in the same way, and not all of them acknowledged the scholastic roots of their theories with the same enthusiasm, but they broadly had in common two elements. First, they limited interventions of equity to cases where broad rules had to be restricted, and thus denied that equity had any role to play in the extension of rules. Secondly, they centred interventions of equity on the avoidance of injustice – which means they distinguished equitable interpretations from mere applications of the *ratio legis* or of other indicators of legislative intention. The third element that these doctrines seem to have had in common, and in which they were distinct from those of theologians, is that, on closer analysis, they do not seem to have developed equity as a standalone doctrine, disapplying rules irrespective of the intentions of the legislator in all cases of injustice. On the contrary, they inscribed *interpretatio ex aequo et bono* within a broader doctrine of interpretation seeking to interpret the intentions of the legislator, and saw its application as providing a presumption of legislative intention. All the scholars discussed in this section, with perhaps the only exception of Hugo Grotius, seem to have agreed that it was not the business of the judge to use equitable interpretion to avoid a rule it if it was clear that the legislator meant to apply it to a certain case, regardless of any injustice that might follow. Theologians would instead have viewed such a case as central to the intervention of *epieikeia*, insofar as it would take the law outside of the legislator's power.

The authors developing theories of equity of this kind are the civil lawyer and canonist Ferdinandus a Mendoza (fl. ca. 1586), perhaps the earliest author to publish a treatise developing equity in this sense, followed by the civil lawyers Alexander Turaminus (d. 1605), Hugo Donellus (d. 1591) and Hugo Grotius (d. 1645).

4.2.3.2. Mendoza and Turaminus – Equity as a restrictive correction of the law

We shall here first approach the two earlier authors developing equity as a restriction of the law. The reason they should be considered together, however, is not simply chronological. They also shared the important theoretical foundation of not considering equity as a doctrine of interpretation – but rather as one of emendation of the law. As we have seen in the preceding sections, this was not a common approach to equity – even theologians, whose starting point from Aquinas and Cajetan had been that equity and

interpretation had nothing in common, had begun by the 1550s to refer to equitable interventions as *interpretatio ex aequo et bono*.[566]

Ferdinandus a Mendoza and Alexander Turaminus were among the earliest authors, together with Bolognetus, to notice parallels between the theory of equity put forward by earlier legal humanists like Salamonius and that of contemporary scholastic theologians. However, unlike Bolognetus, they saw much greater substantive potential in the concept of *epieikeia* as developed by theologians to generate a doctrine of equitable intervention distinct from other doctrines of interpretation and did not hesitate to draw on those theories to inform their own views.

4.2.3.2.1. Ferdinandus a Mendoza– the need for a *formalis et vera ratio aequitatis*

Only very little is known about Ferdinandus a Mendoza, but he seems to have been a canonist, and operated in the second half of the sixteenth century – he produced a comment on the Synod of Elvira published in 1594.[567] However, his concept of equity as articulated in his commentary on the *Digest* title *De Pactis* (D.2.14), seemingly first published in 1586, was the earliest work seriously attempting to align doctrines of interpretation from the medieval *ius commune* with both humanistic and theological learning on *epieikeia*. Mendoza took as his starting point the rather general points made by earlier humanists, and then used the doctrine of theologians to fill the gaps. Mendoza's discussion of equity is focussed, as the title suggests, on the title *De Pactis* of Justinian's *Digest*. Like other authors before him commenting on the same passage,[568] Mendoza's discussion of equity is prompted by the introductory passage where Ulpian states that the Praetor's *Edict* on pacts 'has natural equity, for what is more consonant with human faith than to require men to abide by what they have agreed with one another?'[569] Mendoza thus proceeds to explain what is meant by equity here and what the role of equity is in civil law.

After adopting the views of Budaeus and Salamonius which associated equity with *aequum et bonum* and *epieikeia*,[570] and rejecting the medieval approach to *aequitas scripta*,[571] Mendoza went on to explain that, in his view, an intervention of equity would require a clear and certain (unwritten) equity on one side (*aequitas certa et clara*) and the rigour of the law on the other, or, as he calls it in a different passage, a 'formalis et vera ratio clarae aequitatis'.[572] By this, he did not merely mean a clear intention of the legislator, but drawing on the writings of Cajetan, Soto and other contemporary theologians, he meant a case where the law would suffer from (i) a defect of generality where (ii) an application of the words of the law would cause the *ratio*

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[566] See [3.3.1.2] above.

[567] Mendoza is referred to as a 'celebrated canonist', and his treatise is also referred to in Alexander Croke, *A Report of the Case of Horner aginst Liddiard* (1800), p. 112-3, n. 2.

[568] See e.g. Duarenus at [2.3.4.2] above.

[569] D.2.14.1pr: 'Huius edicti aequitas naturalis est. Quid enim tam congruum fidei humanae, quam ea quae inter eos placuerunt servare?' My translation is taken from Watson's edition of the *Digest of Justinian* (1985).

[570] Ferdinandus a Mendoza, *Liber Primus Disputationum Iuris Civilis in Difficiliores Leges ff. de Pactis* (1586), cap. 3, para. 2.

[571] See above, cap. 2.

[572] Mendoza, *ibid.*, cap. 3, para. 9: 'in omnibus vetustis codicibus [...] verbum id (scriptae) abesse testatur [...] Franciscus Duarenus.' See n. 573 below for *formalis et vera ratio clarae aequitatis*.

legis to fail contrarily.[573] He discusses the requirement of a defect of universality throughout in terms similar to those used by Cajetan.[574] Mendoza's statements about the fact that a mere negative failure of the *ratio legis* will be sufficient is also consistent with the views of theologians,[575] and his discussion of a contrary failure of the *ratio legis* bears great resemblance to that of Soto, even when it comes to the examples adopted to make his points.[576] An example Mendoza gives is that of a law which says that the children of prostitutes are to be excluded from holding public office purporting to include the case of a child born at a time when the mother was not a prostitute, though she later became one. For Mendoza there is nothing equity can do to avoid the application of the rule to such a child, because applying the words does not result in a contrary failure of the law.[577] Mendoza also mentions that a law asking the city walls to remain shut in all circumstances may be disapplied in a case where it would upset the public good,[578] and a variation on Soto's example of a law forbidding a citizen from ascending a horse, which can be disapplied if that would be necessary to save the individual's life.[579]

His only open disagreement with the statements of theologians concerns cases of probability – as we saw in the previous chapter, theologians from Soto onwards accepted that *epieikeia* could intervene also in cases where, though it was not certain that following the words of the law would result in a contrary failure of the law, it was nevertheless probable and there was no time to consult a superior.[580] Mendoza objects to this view, arguing that such a distinction is not supported by the civil law.[581] He points to Modestinus at D.49.16.3.15-16, where it is said that one who disobeys an order in times of war should be beaten with rods or transferred *in deteriorem militiam* whatever his motivations for so acting, and regardless therefore of whether he thought it probable that the commander would have given a different order in the circumstances. The example is not the most satisfactory,[582] but leads Mendoza to provide a further, more

[573] Mendoza, *De Pactis* cap. 3, paras. 15-6 'Quod modo nobis reliquum est [...] explicare in quo consistat formalis et vera ratio clarae aequitatis, quam diximus inferiores iudices spreto verborum legis rigore sequi posse [...] quod ad constituendam formalem rationem aequitatis [...] duo copullative requiruntur, quorum si aliquod desit, aequitas vera non erit, primum est ut lex quae deficit, deficiat claro propter universalitatem seu generalitatem [...]. Secundum autem est quod ratio legis deficiat non pure negative, sed contrarie.'
[574] Mendoza, *ibid.*, cap. 3, para. 15.
[575] He discusses the *lex Prospexit* (see n.553 above) as a case where the *ratio legis* is simply failing negatively, which is not enough to depart from the rule. See Mendoza, *Pactis*, cap. 3, paras. 16-7. On the *lex Prospexit* see n.553 above.
[576] Mendoza, *ibid.*, cap. 3, para. 16: 'Secundum autem est, quod ratio legis, deficiat non pure negative, sed contrarie.' See also Mendoza, *ibid.*, cap. 3, para. 15: '[puta legem] quod equites non vehantur mulabus [...]. Ponas equitem circundatum peditis hostibus, aliter periculum mortis, vel servitutis, vel aliud quodcumque grave, evitare non posse, si mulam non ascendat [...], certe in his casibus lex propter universale claro deficit, et sic servanda non erit in casu occurrenti.' Compare with Soto, *Iustitia et Iure Vol. 1,* q. 6, art. 8.
[577] Mendoza seems, like some other of his contemporaries, to have sought to link issues of equity to rhetorical issues arising *ex scripto et sententia*. The example of the prostitute appears as one such example in Quintilian, *The Orator's Education* (2002), 7.6.3-4: "Ex meretrice natus ne contenetur: quae filium habebat prostare coepit: prohibetur adulescens contione.' Nam de eius filio quae ante partum meretrix fuit certum est: an eadem huius causa dubium est, quamquam ex hac natus est, et haec metretrix est.' This example can also be found in other Greek authors on rhetoric, including Hermogenes, see Quintilian, *The Orator's Education, Vol. 3: Books 6-8* (2014), p. 267, n. 2.
[578] See Mendoza, *ibid.*, cap. 3, para. 24.
[579] See above n. 576.
[580] Cajetan agrees with this view too, but it was not – in my view – part of his doctrine of *epieikeia*. See [3.2.1.] above.
[581] Mendoza, *ibid.*, cap. 3, para. 24: 'Quare non possum non improbare Caietani ac Soti opinionem [...] existimantium cuilibet privato fore licitum agere contra legem, etiam si certus non sit de voluntate legislatoris'.
[582] Modestinus' statement seems to prove too much. The soldier would be punished regardless of his motivations, which must mean that even if he was certain, as required by Mendoza's *epieikeia*, that the superior would have acted in a certain way that would not have been enough to discharge him of liability under the rule.

pertinent example – what of a case where there is a rule that says the doors of the city are not to be opened if the enemy is advancing towards the city and the situation is such that the enemy is approaching the city in pursuit of a number of good citizens, familiar to the Prince himself, who are good and useful members of the community. Should the doors be opened? This is a question where it is in doubt whether the public good will be furthered best by keeping the enemies out while sacrificing the citizens, or by attempting to rescue the pursued and opening the doors to the enemy. In such a case, it makes no difference whether the inferior judge or private citizen thinks it more probable that the public good will be furthered by disobeying the law. Insofar as it is not certain, and there is no time to ask the Prince for his opinion, the words of the law should be attended.[583]

Thus, for Mendoza, a judge can only make use of equity to depart from the words of the law where (a) the rule suffers from a defect of universality, and (b) it is certain that following the words would cause the *ratio legis* to fail contrarily. On the surface this statement is quite nicely aligned with the theological tradition and finds a self-standing and clear role for equity within the legal system. Looking at the doctrine in greater detail, however, reveals the uneasiness Mendoza found in sticking consistently with the statements of theologians and separating his doctrine from the medieval doctrines of interpretation. We return to this in the final section.

4.2.3.2.2. Alexander Turaminus – equity as a correction of the law *propter defectu ob universale*

Alexander Turaminus was a jurist from Siena who sat as an auditor on the Rota Fiorentina, a relatively new institution established as the highest court in the Florentine republic in the early sixteenth century, and which survived into the Duchy of Florence and then in the Grand Duchy of Tuscany.[584] He published a comment to D.1.3 in 1590.[585] It is in the third chapter of his commentary that Turaminus argues that no laws can be written so perfectly as not to need any emendation, and it is in this context that he discusses *aequitas* and its relation to *epieikeia*. Turaminus' views about equity are closely in line with those of Mendoza,

[583] Mendoza, *ibid.*, cap. 3, para. 24-5, 28: 'Ponas legem, quae praecipit portas civitatis obsidione ab hostibus imminenti, nulli aperiendas, et casum, quo hostes insequantur egressos a liquos cives reipublicae utilissimos et Principi amicos et familiares: dubitatur tamen, an qui eos persequuntur, ingressi civitatem, damnum aequale, vel aliquantulum minus inferant, quam proficiferetur ex absentia vel morte civium, certe quicquid ipsi dicam, mihi videtur nullo pacto posse, civitatis custodes, portas aperire, et si periculum eorum civium moram non patiatur, quia melius et praestantius erit, illos cives mori, observata lege et remoto periculo, etsi minori, quod ex insequentibus timebatur, quam eosdem conservando, sine Principis interpretatione agere contra legem scriptam, et periculo alterius incommodi se exponeere. [...] Nec obstat si dicas [...] voluntatem etiam esse verosimilem legislatoris, ut aperrirentur portae civitatis civibus sibi amicis, et reipublicae utilibus, nam respondeo eam non adeo esse certam et claram, sicut hanc, sed imo cum periculum aequale vel parum minus esset suspectum, dubia erat et ambigua, et dato quod legislator, certo voluisset portas aperiri, non tamen voluit aperiri simpliciter, et sine eius licentia, sed eo iubente, nec in dubio cum non adest expressa Imperatoris declaratio praesumi debet contrarium'. The argument is not the easiest to follow, as Mendoza later seems to blend the two questions of whether – in principle – probability of harm should allow judges to depart from the words of the law with whether it is in fact more probable that harm would follow. Another question would be whether only certitude of greater harm will provide the certitude of the legislator's intention or whether some other device can provide such certitude, the mention that the legislator can indicate otherwise seems to suggest some kinds of evidence of legislative intent will allow such a conclusion and it also seems that in these cases this would be enough to depart from the words of the law, which seems inconsistent with Mendoza's earlier statement that a mere negative failure of the ratio legis will not do.

[584] Lauro Martines, *Lawyers and Statecraft in Renaissance Florence* (1968), p. 126. See also 'Turamini, Alessandro' , *Treccani - Enciclopedie On Line* available on http://www.treccani.it/enciclopedia/alessandro-turamini (last accessed 09-04-2018).

[585] Alessandro Turaminus, *Ad Rubricam Pandectarum de Legibus Libri Tres* (1590).

but he develops them with greater analytical care and detail. It is not clear that Mendoza had a direct influence on Turaminus and no explicit reference to Mendoza can be found – however, their approaches have sufficient elements in common to look at them side by side.

Like Mendoza, Turaminus began by dealing with the usual theoretical section assimilating equity and *epieikeia*,[586] and then moved on to explain that equity could only operate to restrict rules framed too generally. He did not explain this by reference to the need for a 'clear equity' however, as Mendoza had, but simply by reference to the approach of Aristotle. The argument is that equity is meant to correct the words of the law. In cases of extension, when the letter of the law is not broad enough to include a case which the legislator meant to cover, the words themselves are doing nothing wrong, there is no defect to correct, the defect lies in the legislator's omission. He targets Bolognetus explicitly, saying this is an error 'in quem visus est incidere eruditissimus Albertus Bolognetus [*de lege, iure et aequitate disputatione*, cap. 29, n. 11, cap. 30] per totum, ut existimaverit aequitatem non tantum legem emendare diminuendo, et moderando, sed etiam addendo et supplendo.'[587]

Further, for Turaminus as for Mendoza the words of the law would only be defective in a particular case if they resulted in injustice. However, he develops this idea specifying that he does not, like other humanist jurists before him, view equity as being capable of both making laws more lenient or harsher depending on the intention of the legislator. Turaminus comes to this conclusion by reading Aristotle's *Rhetoric*,[588] where Aristotle, taking a broader view of equity, also described its role as pardoning human weaknesses (*rebus humanis ad ignoscendum commoveri*). This, for Turaminus, was the aspect of equity which medieval canon lawyers had in mind when they described equity as 'iustitia dulcore misericordiae temperata',[589] though he disagreed with the views of those that thought equity and *misericordia* (which he saw as a synonym of *clementia*) were the same thing.[590] He therefore explicitly rejects the arguments of Bolognetus and others that equity could be used to cause a law to apply more harshly than its words would have it, even if it were shown to be the intention of the legislator that it be so applied.[591]

The examples that Turaminus provides to illustrate interventions of equity are drawn from problems falling squarely within what medieval legists and canonists called *interpretatio restrictiva*. For instance, with Bartolus' comments about the application of the Bolognese statute forbidding that blood be shed in the royal palace to a barber spilling blood while working in the castle. The issue, a thorny one for Bartolus and other commentators, would not have caused much controversy if they had understood *aequum*

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[586] Turaminus, *ibid.*, p. 147. It is also interesting to note that, as late as 1590, Turaminus' treatise still contains a fully argued dismissal of the medieval distinction between written and unwritten equity, Turaminus, *ibid.*, p. 157.

[587] Turaminus, *ibid.*, pp. 149-50. It should be mentioned that Turaminus' language later in the passage is reminiscent of that of theologians, as he uses the terminology *defectus ob universale*.

[588] Turaminus clearly relies on Trapezuntius' translation as his source. Georgius Trapezuntius, *Aristoteles Rhetoricorum Libri III* (1523), *f* 117r-v.

[589] See [1.1.3.1] above. As we have seen, that definition owed nothing to Aristotle's writings. Turaminus, *ibid.,* p. 159.

[590] Turaminus, *ibid.,*, p. 159: '[After citing the relevant passage from Aristotle's *Rhetoric*] Quibusdam vero persuasum est huius loci authoritate posse defendi nostrorum opinionem maxime Saly[cetus *ad* C.3.1.8] et Ias[on de Maino, *ad* C.3.1.8] quod aequitas in quadam clementia ac benignitate posita foret tanquam iuris rigori, ac severitati opponeretur. Sed quod inquit Arist[oteles] 'aequum esse ad ignoscendum commoveri' non ad hanc clementiam referendum est.'

[591] Turaminus, *ibid.,*, p. 162: 'De aequitate igitur diffinita minus recte Albertum pronunciasse existimo quod in supergressione, ac severitate consistere possit.'

et bonum, Turaminus tells us.[592] Unlike Mendoza, however, Turaminus engaged directly with the literature on equity which was incompatible with his claims, with most of his arguments – as we saw above - specifically aimed at Bolognetus' *De Lege Iure et Aequitate*.[593]

4.2.3.2.3. Natural and Civil Equity in Turaminus

A final note should be made of Turaminus' distinction between civil and natural equity, not found in Mendoza. The distinction is developed by Turaminus instrumentally to explain away all the *Digest* passages in which equity is discussed in the context of making rules harsher – passages such as D.2.10.1pr. Turaminus' argument is that his explanation of equity as *epieikeia*, as amending written law restrictively, only covers that facet of equity known as civil equity. Instead, all passages such as D.2.10.1pr are concerned with the broader notion of natural equity. We have already seen that this distinction posed a challenge for a number of jurists before Turaminus, and the view he takes of the distinction does not fall far from the one that had been adopted by Connanus in his works. Natural equity, for Turaminus, bears no relation to what the judge must do when amending laws, or to what Aristotle discusses in both *Ethic* and *Rhetoric*. Instead, it relates to the powers to make new rules for the parties, unbound by existing law written or unwritten – powers such as that of the Emperor or the arbiter. In passages where Roman jurists linked equity with making rules harsher, they were referring, in Turaminus' view, to the Praetor's power to simply produce new rules – in the exercise of this power the latter could, of course, choose to produce a rule as harsh as he liked.[594]

Defining natural equity as the exercise of judicial (or indeed legislative) power unbound by rules, Turaminus makes room within his theory for all the medieval references to judging by equity or *ex aequo et bono* – which would have fitted *epieikeia* only awkwardly.[595] One who has the power to act by natural equity is not confined in any way to following either the words or indeed the *sententia* of the law, but can rather draw whatever solution seems fair. This Turaminus identifies with the power by which the Praetor introduced all his actions within Roman law.[596] In more abstract terms, Turaminus sees natural equity as perfect justice, natural law from which all law ought to be derived, and civil equity as one aspect of it which

[592] Turaminus, *ibid.,*, p. 148: 'Simile exemplum est quod tradit Bartolus [*ad* D.1.1.9, q. 6, n. 55]. Statutum Bononiae capite punit, qui fecerit sanguinem in palatio. Barbitonsor aegro e vena medici praescripto sanguinem misit. Scribit Bartolus post magnam contentionem fuisse absolutum, ne verba legis captarentur [...]. Neque profecto diu contendendum fuerat inter eos, qui se boni et aequi magistros profiterentur.'

[593] See n. 587 and [4.2.2] above.

[594] Turaminus, *ibid.,*, p. 162: 'Sed hic locus [i.e. D.2.10.1pr] quod et alii admonuerunt, distinguit inter naturalem et civilem aequitatem. [...] [A]t quod aequitas sit emendatio legitimi iuris, naturali aequitati convenire non potest, tum quia naturalis aequitas et ius naturale idem sunt [D.1.1.11]. [...] Aristotelem de sola civili aequitate, quae iuris civilis emendatio est loquutum esse non est ambigendum. [...] Ex iis intelligi poterit cur praetor ad naturalem, non ad civilem se referat aequitatem, ut in [D.2.14.1pr].'

[595] Turaminus, *ibid.,*, p. 163: 'Tum statuta quae disponunt procedi ex bono et aequo ad naturalem aequitatem referenda sunt [...]. Amplius ex predictis illa nostrorum assortio rectissime iustificatur quod coram mercatore, vel arbitro, el quocunque iudice apud quem bonum aequum praevaleat, ille reiicietur, qui allegabit ex pacto non dari actionem, quemadmodum [Bartolus *ad* D.17.1.48; Baldus *ad* C.4.35.10, n. 14; Salycetus *ad* C.3.1.8; Iason de Maino *ad* D.2.14.7.4] scribunt. [...] Nam ad aequitatem naturalem boni et aequi mentio referenda est; quod respectu civilis aequitatis superflua illa adiectio foret, neque hunc effectum operaretur.'

[596] Turaminus, *ibid.,*, pp. 163-4.

judges have to exercise in order to moderate the words of written law when they depart from the intention of the legislator.

In short, Turaminus is another author finding a way of distinguishing equity from interpretation as a standalone doctrine. He clearly drew on humanist jurists a distinction between a civil equity addressed to judges and a more general natural equity identified with justice and natural law. He also most probably (though perhaps not directly) drew from theologians to further confine equity to the restrictive emendation of statutes.

4.2.3.2.4. Equity and interpretation in Mendoza and Turaminus

The argument that equity could only operate to restrict rules suffering from a defect of universality seems to have led Mendoza and Turaminus to another conclusion, namely, that equitable interventions should not be seen as involving a process of interpretation at all. Mendoza did not address this issue head on – though he consistently referred to the process of doing equity as one of amendment or tempering, without ever mentioning interpretation.[597] In Turaminus we find instead a more detailed explanation behind this choice, though a rather peculiar one. Turaminus argued that only exercises in extending rules could properly be regarded as exercises in interpretation, as their work is to add to the rule. Instead, the point of equity was, as explained in the previous section, that of restricting rules, i.e. amending them or correcting them when their words caused them to be defective in particular cases. In doing so, Turaminus takes exception to the approach of Bolognetus explicitly, referring to his views and criticising them directly.[598] His argument is that equity performs the role not of interpreting or understanding the *sententia* legis, but of correcting a law where the use of written words made it defective.[599]

The approach of Mendoza did not distinguish as neatly exercises of correction from those of interpretation of the law. And there are passages in Mendoza which seem to emphasise the role of equity in explaining what the words of the law should be taken to mean. In an example that Mendoza borrows from Cicero, he refers to a law that states 'should a prostitute wear a crown, let [it/she] be made public property' (*publica esto*). Mendoza uses *epieikeia* here to determine whether the crown or the prostitute should be made public property. As one of the two interpretations would lead to sin, *epieikeia* allows us to prefer the interpretation that applies the law to the crown. This is plainly a case where the meaning of words is being interpreted, rather than one dealing with unambiguous words to be disapplied.[600] There is the

[597] There do not seem to be references to *interpretatio aequitatis*, *per epieikeiam* or *ex aequo et bono* throughout the text – equitable interventions are instead described as processes of correction, amendment or tempering.

[598] Turaminus, *ibid.*,, pp. 151-2: 'Alber[tus Bolognetus, *de lege, iure et aequitate*, cap. 30, para. 2] dum ait, quod 'per interpretationem desumitur non potest videri praeter legem esse, imo recte legitimum appellatur etc.', et paullo supra fatetur non recte aequitatis nomen usurpari. Verum non de omni interpretatione tunc loquutus est, sed de ea, quae sumitur ex praecedentibus, vel sequentibus argumentis. [...] Ego vero absolute pronuncio emendationem ab interpretatione distare, ac ideo interpretationi nullo casu nomen aequitatis convenire'.

[599] Turaminus, *ibid.*,, p. 151: 'Hoc autem interest inter [aequitatem] et [interpretationem], quod interpretatio vim legis aperit, et ex lege est, et secundum legem [D.1.3.17], [I.1.17], [D.50.16.6.1] ibi: 'verbum ex legibus sic accipiendum est, tam ex legum sententia, quam ex verbis', et ideo quantum interpretatio distat ab emendatione, tantum distat ab aequitate, quae emendatio est, sive correctio.'

[600] See also Mendoza, *De Pactis, cap.* 3, para. 19 where he cites D.1.3.19, which is a passage clearly concerned with the interpretation of the words of the law.

possibility that Mendoza referred to those examples not as examples of *epieikeia* but of more general principles of interpretation that he saw as consonant with *epieikeia*, however, no such explicit distinction is drawn in his text.[601]

The approach of Turaminus is much more consistent with the principle he stated. Turaminus explicitly links his view of equity as not involving any interpretation with the view – which he shared with theologians as well as Mendoza – that equity could not apply to cases of *interpretatio extensiva*. For Turaminus the latter would not be an exercise in amendment of the words, but in their interpretation. From this it followed that *Digest* passages such as D.2.1.7 had nothing to do with equity because they did not involve an emendation (*emendatio*, *correctio*) of the words, but their extension (*extensio*, *porrectio*).[602] Perhaps the most unusual distinction found by Turaminus between the extension and restriction of the words of the law is that he sees the exercise of interpreting (i.e. of interpreting extensively) as 'good, but not equitable' – a distinction harking back to the medieval line drawn between *rigor* and *aequitas* as the two facets of *bonitas* (what is necessary to preserve the public good, though perhaps harsh in the circumstances) and *aequitas* (justice in the circumstances), and which had been rejected among humanist jurists from Budaeus onwards.[603] Turaminus does not develop this distinction much beyond this, and it is unclear whether he thought it performed any particular substantive role.

4.2.3.2.5. The influence of scholastic theology and the role of the intentions of the legislator

If on the surface Mendoza's and Turaminus' theories seem quite well aligned with those of early modern Thomists, a closer look at their doctrines shows that, both – and in similar respects – held views that were incompatible with those of late-scholastic writers. As we shall see, this was probably caused by the increasing association of the role of equitable intervention with giving effect to the intentions of the legislator among civil and canon lawyers around this time. As we saw in the third chapter, the focus of scholastic theologians until the mid-sixteenth century was on the power of the legislator or of human law itself. The point was, essentially, that in cases where following the words of the law would cause injustice, it would be beyond the power of the legislator or of human law to bind the subject. That would, in turn, be the reason why a subject is entitled to disobey the words of the law by virtue of *epieikeia*. What we can gather from the writings of theologians is that an application of the words of the law would not be causing

[601] There is no direct reference in the passage about the prostitute and crown to the fact that equity is required for such an interpretation to take place, but it is contrasted with other cases where one cannot be certain enough of the intention of the legislator for equity to intervene. Mendoza, *ibid.,*, cap. 3, paras. 9-10.

[602] Turaminus, *ibid.,*, pp. 150-1: 'Neque contrarium recte probari contendit [D.2.1.7] [...] Nulla enim verborum emendatio est, sed extensio eorumdem ex sententia legis; quod si non corriguntur verba, sed porriguntur, aequitas correctio est, non porrectio, vel productio verborum.'

[603] Turaminus, *ibid.,*, p. 151: 'interpretatione supplere [...] autem bonum est, non tamen aequum [D.1.3.13]' By saying this Turamini seems to mean that the circumstances justifying interpretation would be different from the circumstances justifying a correction of the law by equity. Turaminus, *ibid.,*, p. 152: 'Tum vero quocunque te vertas interpretatio secundum hanc, vel illam legem est; et aequum et bonum, ut Arist[oteles] inquit non secundum legem est, sed legitimi iuris correctio; et ideo in [D.1.3.13], suppletio fit eiusdem utilitatis caussa, quoniam eadem utilitas sit in uno, et altero casu emendatio aequitatis officio sit damni potius, aut iniusti cuiusdam evitandi gratia.'

injustice or sinning unless (a) it violated natural law, (b) it went against the public good or (c) it endangered the life of a private individual.[604]

Both the idea that equity focusses on the amendment of the law on account of a defect of universality (a phrase adopted by Mendoza and Turaminus themselves), and that it only operates to restrict the law in cases of injustice (or of 'contrary failure'), were consistent with the way theologians were adapting equity as *epieikeia* in their writings. However, it seems that, ultimately, the view of Mendoza and Turaminus put much more emphasis on the intention of the legislator than the theories of theologians would have permitted.

First of all, and despite the two limitations mentioned above, both authors ultimately viewed the role of equity as that of aligning the words of the law with the intention of the legislator. This is most clear in Turaminus.[605] The account in Mendoza is less easy to determine, but one can find many references suggesting that clear evidence of the intention of the legislator will be conclusive regarding the solution to which an application of *epieikeia* should lead. Indeed in some passages it looks like, for Mendoza, sin, private harm, and upsetting the public good, are simply indicators of legislative intent, rather than themselves the trigger for *epieikeia*.[606] In the example cited above, where Mendoza discusses a case where a subject of the law cannot determine whether following the words of the law would harm the public good, he seems to hint again at the possibility that if there is clear evidence that the legislator would have preferred the rule not to be followed in the case at hand, that should be enough for *epieikeia* to intervene.[607] It is possible that in this last passage Mendoza meant nothing more than that the legislator is to be regarded as the best person to assess the public good, and that therefore indications of his will are to be taken as the best evidence of what will further the public good,[608] but they can also be read together to say that the intentions of the legislator are the trigger for *epieikeia* and the other requirements merely evidence to establish it. Conversely, in yet another passage, Mendoza seems to suggest that a contrary failure of the law will include a case where the application of the words of the law results in a set of affairs that is contrary to that which the legislator intended when passing the rule. Again, such a case would not necessarily be one where applying the words would cause injustice, sin or death, and once more it seems that Mendoza is more concerned with linking equity with the intentions of the legislator rather than his power.[609] Finally, Mendoza often mentions that

[604] See [3.3.1] above.
[605] Turaminus, *ibid.,*, p. 156: 'quoniam scripturae peccatum emendatur constat errorem in verbis esse non in sententia legis quatenus ea non ex verbis sed ex ratione ac mente legislatoris colligitur quod perspicuae probat Arist[oteles, *Ethics*, lib. 5, cap. 10] ibi absoluteque ac simpliciter loquendo peccavit et paullo post id quod legislator ipse si adesset dixisset et si servisset ita praescribentem legem statuisset. [...] [E]t hoc videtur esse officium aequitatis, ut verba legis minuendo maxime legislatoris mentem observet.'
[606] Though this is inconsistent with Mendoza's own statements about the reason why a mere negative failure of the *ratio legis* will not be enough See n.573 above. For an example where Mendoza suggests the intentions of the legislator can be sufficient for *epieikeia* to intervene see n. 601 above, and n.577 above where he contrasts the example of the children of a prostitute born before prostitution with the case of prostitute and crown on the basis that in the former case the absence of sin or turpitude was not enough to conclusively identify legislative intent.
[607] Mendoza, *ibid.,*, cap. 3, para. 29. See n. 583 above.
[608] Mendoza repeatedly makes the point that in all cases where one doubts what the public good requires, it shall be for the superior to determine. Mendoza, *ibid.,*, cap. 3, para. 25: 'Teneas ergo memoria distinctionem nostram, de certitudine et ambiguitate, ut in primo casu liceat agere contra verba, in secundo autem non sic, alioquin tolles perfectam pollitticae gubernationis rationem, dispositionem et ordinem intervertendo operationes et officia superiorum, cum inferioribus.'
[609] Mendoza, *ibid.,*, cap. 3, para. 18. He interprets this as the meaning of the *lex non dubium* at D.1.3.14-15.

an example of contrary failure of the *ratio legis* would also include an application of the law resulting in absurdity - *epieikeia* would therefore have a role in avoiding the application of the words of the law in these cases too.[610] However, this is not necessarily true in the doctrine of early modern Thomists.[611] Absurdity may provide a hint that the legislative intention was not that the law should bind, and was indeed used within medieval doctrines of interpretation to establish such an intention, as we saw earlier, for instance, in Bolognetus.[612] However, just like a negative failure of the *ratio legis*, it does not necessarily mean that following the law will lead to injustice in the narrow sense identified by theologians.

4.2.3.3. Hugo Donellus – equity's place in the structure of interpretation

Donellus was a pupil of Duarenus and was one of the most influential legal humanists of early modern times. Donellus discussed equity in his *Commentarii de iure civili*, a work he started around 1565, and which sought to systematise the *Corpus Iuris Civilis* under an institutional framework, but which Donellus never completed or published in its entirety.[613] Like the other authors examined in this chapter, Donellus draws on sources from scholastic theology, the medieval learning on interpretation, and the recent opinions of legal humanists, to fit the concept of equity as *epieikeia* within the broader medieval learning on interpretation. Donellus seems to have been much less concerned with the formal acknowledgment of theological sources than with their substantive meaning for the development of a specific doctrine of *interpretatio ex aequo et bono*, distinct from other kinds of interpretation. What this means is that, on the one hand, Donellus is rather reluctant to explicitly refer to and acknowledge the sources from scholastic theology that were influencing his thought. On the other hand, even unacknowledged, these sources influenced Donellus' understanding of equity as *epieikeia* and of its doctrinal place in substance, defining the way in which it ought to operate.

Donellus shared the humanist background analysis of the central sources relating to equity with the other authors examined – he rejected the opposition between C.3.1.8 and C.1.14.1 based on *aequitas scripta*, reading C.1.14.1 as applying where the sententia is unclear or the law is *tota iniqua*.[614] His account differs from that of Turaminus and Mendoza - Donellus was interested in identifying equity with a doctrine of interpretation, and therefore discussed it alongside other theories of interpretation. Unlike, Bolognetus, however, Donellus did not merely use the concept of *epieikeia* as a broad and inoperative justification for the operation of doctrines of interpretation 'beyond the letter' generally. In Donellus, the theories of equity of theologians play a substantive role in finding a place for equity among theories of interpretation – a place, that is, specific enough to be distinguished from other doctrines of interpretation.

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[610] Mendoza, *ibid.,* cap. 3, para. 23.
[611] Though we do find it mentioned in Soto, see n.474 above.
[612] See n.557 above.
[613] L Pfister, 'Hughes Doneau' in Patrick Arabeyre, Jean-Louis Halpérin and Jacques Krynen (eds), *Dictionnaire historique des juristes français XIIe - XXe siècle* (2015).
[614] Hugo Donellus*, Commentariorum de Iure Civili Libri Viginti Octo, Vol. 1*, (1610), p. 34.

4.2.3.3.1. Equity's place among theories of interpretation

Donellus confronts the problem directly, and the structure he adopts is very clear. In the part of his work dedicated to interpretation, he dedicates a chapter to the broader category of interpretations of the law that depart from its words in order to apply its spirit, meaning or intention (*sententia*).[615] Echoing Bolognetus, and clearly influenced by medieval doctrines of interpretation, Donellus explains that there are two ways in which the meaning of the law may differ from the content of its words - it may either be broader, or narrower. When the meaning is narrower, one will require an *interpretatio restrictiva*. If broader, an *interpretatio extensiva*. For Donellus, however, *interpretatio ex aequo et bono* does not correspond to all such exercises of *a sententia contra scriptum* – it instead merely relates to a specific category of interpretation of this kind. More specifically, Donellus fits equitable interpretation within this structure as one of the ways of performing an *interpretatio restrictiva*.

Donellus' structure goes like this - since an *interpretatio restrictiva* is a kind of interpretation that looks at the narrower intention of the law, one will need a series of rules to guide the legislator in finding such a narrower intention, so as to depart from the words. There are, for Donellus, four ways of establishing the intention of the law, namely (i) looking to other parts of the law which are meant to narrow it down, (ii) to the *ratio legis*, (iii) to equity and (iv) to other laws suggesting the present rule should be of narrower application.[616] Equity is therefore but one way of achieving an *interpretatio restrictiva* in the sense that it can lead the judge to find that the intention of the law is narrower than its words.[617] This approach, of listing 'equity' as one of the ways of interpreting a law restrictively, is one we have encountered before in the context of Medieval doctrines of interpretation.[618] This is probably no coincidence – Donellus may have been aware of the strong parallel between the use of equity within that context and *epieikeia* and sought to relate it to the theories of equity of civil lawyers and theologians.

Donellus seems to intend the various approaches to *interpretatio restrictiva* to be adopted in logical order. First one will seek to understand the *sententia* of the law by reference to words in other sections of the law, operating on its meaning, and, if the words do not help, one would then look at the *ratio legis*. Donellus does not refer to the medieval doctrines of interpretation in detail in this section, for instance, there is no discussion of the rules relating to when a *ratio legis* will permit an *interpretatio restrictiva* in various kinds of rules - Donellus simply provides examples from various parts of the *Corpus Iuris Civilis* to make the point that, when the *ratio legis* can be found, one ought to presume it is the legislator's intention not to apply the rule in cases where it fails. Nor is there any discussion of whether, upon finding a discrepant intention of the law, one may simply do away with the words of the law, or keep within their possible constructions (albeit improper). Those were important matters for the medieval doctrine of *interpretatio restrictiva*, but

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[615] This choice of wording may have been inspired by the rhetorical legal issue *a sententia contra scriptum*. See [2.3.6] above.

[616] Vol. 1, *Commentariorum Vol. 1*, p. 31, n. 51: 'Deprehenditur sententia angustior seu lex plus scripsisse, minus sensisse quatuor ex rebus [...]: ex aliis partibus eiusdem legis; ex ratione legis; ex aequitate: ex aliis legibus. Quae omnia cum ad sententiam et vim legis cognoscendam pertineant, diligenter in omnibus legibus quaerenda et spectanda sunt.

[617] Schröder has noted, however, that in some passages Donellus suggests an equivalence of the *ratio legis*, with the *mens legislatoris*, which would make his approach confusing. See Schröder, 'The Concept and Means of Legal Interpretation in the 18th Century', p. 97.

[618] Schröder, 'The Concept and Means of Legal Interpretation', pp. 92-4, 96-9. See also [1.1.4.1] above.

Donellus does not aim to provide a detailed restatement of the rules.[619] Equitable interpretation will instead intervene when the words of the law are unhelpful in identifying the *sententia*, and the *ratio legis* is uncertain.

4.2.3.3.2. Interpreting by equity in Donellus

The way in which equitable interpretation allows one to arrive at the *sententia* of the law and to depart from its words is, for Donellus, through the presumption that it is not the legislator's intention to reach a harsh or unjust result (*iniquitas*).[620] He sees this kind of interpretation as analogous to that which occurs when we prefer the *ratio legis* to the words of the law, for there too the words are being departed from, rather than construed (as in the case where one looks for words elsewhere in the law).[621] Donellus relies on a number of citations from the *Corpus Iuris Civilis* to make the point that, where the *ratio* cannot be found, the legislator's intention can be presumed to be that of avoiding injustice. Aside from the usual references to D.50.17.90, D.1.3.18, C.6.61.5pr, C.3.1.8,[622] and D.1.1.1,[623] he also refers to a number of more substantive passages, for instance D.5.3.40, where Roman jurists appear to depart form the words of the law simply on account of the fact that the outcome would be unjust, without reference to the *ratio legis*.[624]

Donellus' approach to the role of equity therefore draws on the medieval tradition of regarding equity as *aequitas*, itself as a synonym of justice – in this sense, this is an interpretation 'by equity' because one looks at the equity or justice of the result, rather than to the words of the law or the *ratio legis*, we have already observed earlier that in certain medieval accounts of interpretation the judge would be allowed to depart from the proper words of the law in cases where the proper sense would result in injustice.[625] Donellus therefore adopts the medieval understanding of equity as justice in order to provide the content of what an equitable interpretation will refer to when assessing the intentions of the legislator and be distinguished from other kinds of interpretation.

Some aspects of Donellus' approach may be reminiscent of that of theologians, especially insofar as it limits its operation to the restriction of general rules and to cases where the application of the law would be unjust, and I return to this in the next section. One should bear in mind, however, that unlike theologians, Donellus does not deal with equity in isolation – it will not be able, on its own, to determine whether a rule should or not apply to a case. This is because Donellus inscribes equitable interpretation within a broader approach to finding the law's *sententia*. The point for Donellus is not, as it was for

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[619] Donellus, *Commentariorum,Vol. 1*, p. 52.
[620] Donellus, *ibid.,*, p. 53: 'Deprehenditur et ex aequitate sententia legis angustior, seu minus voluisse lex, plus scripsisse, cum quod generaliter et indistincte scriptum est, quibusdam in caussis eiusdem generis iniquum videtur.'
[621] Donellus, *ibid.,*, p. 53: 'quoties id contingit, eadem hic interpretationis regula recepta est, quod in ratione legis, ut lex in iis casibus, in quibus iniqua videatur, aequitatis regula temperetur, id est, in iis verba sint, at lex cesset propter sententiam, et quod idem est, excipiantur hi casus ex lege repugnantibus quidem verbis: at maxime suffragante, et ita postulante sententia ac voluntate legis.'
[622] Donellus, *ibid.,*, pp. 53-4.
[623] Donellus, *ibid.,*, p. 34: 'Voluntas haec ex fine iuris colligitur. Ius est ars aequi et boni, est ars ad iustitiam ferens, [D.1.1.1pr]. Hinc intelligimus omnem legislatorem aut hoc ipsum aequum et iustum sibi propositum habere, aut si de rebus utilibus constituendis agitur, tamen hactenus ius constitutum probare, ne contra aequum et bonum in quibusdam caussis recipiatur.' Here clearly *aequum et bonum*, like equity, is not taken in the sense of *epieikeia*, but in the sense of justice.
[624] Donellus, *ibid.,*, p. 33-4.
[625] See [1.1.4.1] above.

theologians, that the law would lose its binding power if it led to injustice, but that injustice, in the absence of all other elements, may be a safe guide to the intention of the legislator. First of all, if one arrives at the *sententia* legis from either the prior step of referring to other written parts of the law, or by following the *ratio legis*, whether the rule does injustice will not even come into consideration. But Donellus goes even further, making it clear that even in a case where the *ratio* is unavailable, if it does appear for any reason that the legislator intended the rule to apply harshly or unjustly to a certain case, this would be sufficient to rebut the presumption that a more just or benign solution would reflect the *sententia legis*. This, for Donellus is the effect of the *lex prospexit* at D.40.9.12.1, which he refers to in a sense similar to that used by Bolognetus.[626] Donellus argues that the reason the Roman jurist would not depart from the law despite its obvious harsh application in the case at hand is that the legislator had made it clear that his law would apply to all slaves, wheresoever they might be found. The addition of words to the effect that the rule is to apply in all cases encompassed by it will rebut any presumption that the unjust result was not intended by the legislator.[627] This is true regardless of whether one can gather the law's *ratio* - Donellus draws on D.1.3.20 to argue that where a law is clearly intended by the legislator to apply to a case, and the *ratio legis* is not apparent, one should always presume that it nevertheless exists and is justified, and that the judge or subject is simply unable at present to grasp it. [628] In these cases, only the legislator has the power to amend the rule, as it would require abrogating it altogether. This is the meaning that Donellus attributes to C.1.14.1, if there is no room to find an equitable application of the law in the case at hand, C.1.14.1 reserves the power of removing the law altogether to the legislator.[629] This approach is consistent with the overall aim of *interpretatio restrictiva* to find the law's *sententia*.

To summarise, equitable interpretation is a way in which a judge may construe restrictively the *sententia* of a rule by reference to the injustice that would ensue if the rule were applied. In order to achieve such a restrictive interpretation one should, beside looking for evidence of legislative intent in other written sources such as parts of the law or other laws, (i) look for the *ratio legis* and restrict the law in accordance with it if it can be gathered, if not (ii) check whether the law explicitly encompasses the case within its words, if so, presume that the legislator meant it to apply, and that the *ratio* is ultimately justified, but if the rule does not cover the particular case explicitly with its wording (iii) presume that the legislator meant to achieve justice, and restrict the rule by *interpretatio ex aequo et bono* if it would lead to an unjust result.

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[626] See n.553 above.
[627] Thus, Donellus justifies the result at D.40.9.12.1 by reference to the words of the law. Donellus, *ibid.,*, p. 35: 'legem Ulpianus aliter accipere non potuit, quia quomodo aperte scripta est [...] ut declarat [...] his verbis: Ipsa igitur, quae divertit, omnes omnimodo servos suos manumittere prohibetur.'
[628] Donnellus, *ibid.,*, p. 35: 'non semper eam rationem, quam movit legislatorem, nobis esse cognitam. Qua ex re fiat, ut quamvis optima fuerit, tamen a nobis reddi non possit. Itaque in proposito exemplo [legem] prospexit dicemus, etsi nobis durum et iniquum videtur, quod in ea specie constitutum est, tamen nec durum nec iniquum esse. Lex enim suam rationem habuit, neque eo minus habuit, quia ratio nobis ignota est.'
[629] Donellus, *ibid.,*, p. 34: 'At ubi totum ius iniquum dicimus, idque agitur, ut totum tollatur; hoc vero modo interpretari, atque hoc facere privato cuiquam non licet, sed soli principi, optima ratione? Sic. Enim ius vetus interpretando sit, ut et prius id mutemus et simul constituamus novum, quod soli principi facere concessum est, [C.1.14.12.1]. Hanc sententiam esse [C.1.14.1] verba declarabunt.'.

4.2.3.3.3. The influence of early modern scholasticism

Donellus does not acknowledge any scholastic authors in his text explicitly, but there is evidence that he was influenced by their writings. At a general level, the influence of theologians may be seen in that, throughout his account of equity, Donellus thinks of it as applying to cases where an application of the law would be unjust. He does align himself with previous authors on interpretation from the *ius commune* or early modern writers on equity by seeing the ultimate purpose of interpretation as that of finding out the intention of the legislator, but he only ever defines an interpretation as properly equitable if the evidence on which it bases its presumption that the case falls outside the intention of the legislator is the unjust result to which it would lead. The same argument had been made by theologians, who thought that the role of equity, properly understood, was that of limiting the power of the law in cases of injustice – this was inconsistent with Donellus' ultimate focus on legislative intention, but may nevertheless explain Donellus' choice in grounding the defining characteristic of equitable interpretation in avoiding injustice. This argument is far from conclusive, however, for it should be pointed out that the approach of seeing an interpretation 'by equity' in cases where the unjust outcome provides evidence of the intention of the legislator can also be found in certain medieval accounts, and Donellus could plausibly have been drawing from those instead. However, there are two reasons to argue that the more specific influence of theological writings, or at least of the writings of other civil lawyers influenced by theologians was present.

The first and most important one is that Donellus confines the role of equity to interpreting laws restrictively. In the section of his treatise dealing with *interpretatio extensiva*, Donellus does not mention equity as a doctrine of interpretation.[630] The argument that *epieikeia* should only have the power to restrict rules had been made only by theologians from Cajetan onwards before, and was applied in this sense by Mendoza and Turaminus. Secondly, while medieval theories of interpretation were focussed on the sense to be attributed to words – so that cases of injustice could lead the judge to read the words improperly - Donellus did not refer to equity when, later in his treatise, he dealt with cases of ambiguous words. When confronted with uncertain words or syntactical constructions, Donellus does argue that one ought to resort to the interpretation of those words which is less harsh or which leads to justice in the case at hand. However, he does not say that in such cases the law is being interpreted according to equity – he rather talks of *benigna interpretatio*. This may be due to the fact that, as theologians had explained, equity is not concerned with cases where the words or their syntactical construction are ambiguous, it is not – in other words - concerned with cases where the letter of the law is uncertain, but rather with cases where the letter is certain, but the outcome is certainly unjust.[631]

4.2.3.4. Hugo Grotius' de Aequitate, Indulgentia et Facilitate – *an entirely theological account of equity*

Donellus' argument that the role of equity should be subsumed within the traditional doctrine of *interpretatio restrictiva* provided an easy way to reconcile theological and legal writings on equity. However, the tradition

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[630] Donellus, *ibid.,,* pp. 37-42: 'Colligitur sententia latior, seu lex amplius velle, et sentire, quam scriptum est, ex his quatuor: ex aliis partibus rursum legis; ex contrariis; ex consequentibus; ex ratione latiore legis.'
[631] See Donellus, *ibid.,,* pp. 43-7.

started by Turaminus and Mendoza of drawing unequivocally and substantively on theological writings to found the legal doctrine of equity had not run its course. This is easily illustrated by turning to Hugo Grotius' (d. 1645) approach to equity. Grotius discussed his concept of equity in a short treatise called *de Aequitate, Indulgentia et Facilitate*, first published posthumously in 1656. This work has been the object of studies in the past, but it is worth returning to it in some as it provides a useful example of the continuing relevance of theological sources on *epieikeia* for civil law writings on equity.[632]

In his treatise, Grotius sought to explain how one ought to distinguish three concepts usually opposed to law - that is, equity, indulgence (*indulgentia*) and facility (*facilitas*).[633] Grotius aligns himself with the scholarship of his time, associating *aequitas* and *epieikeia*. The treatise makes it clear that Grotius was influenced by the late scholastic theologians in his thinking about equity. This is unsurprising, and it has been long recognised that Grotius was heavily influenced by early modern scholastic thought in the development of his doctrine.[634] In his manuscript Grotius expressly acknowledges as sources Aristotle, Quintilian, the *Corpus Iuris Civilis*, Franciscus Connanus, Petrus Faber, Thomas Aquinas, Domingo de Soto, and Vasquez.[635]

Grotius defines equity, drawing on the language of theologians: 'aequitas est virtus voluntatis, correctrix ejus in quo lex propter universalitatem deficit [...]. Aequum autem est id ipsum, quo lex corrigitur'.[636] Like scholastic theologians, Grotius also juxtaposes references to the intention of the legislator with references to natural law, blurring the line between the two.[637]

For Grotius, equity is the virtue that allows one to disapply a legal obligation, whether arising from a statute, contract, or will, or other source of rules, whenever it arises from words that are universally framed and fail in a particular case.[638] There are passages where Grotius seems to display some awareness of the distinction between excluding a case from the will of the legislator and from his power: in a passage he points out that equity can intervene either by giving force to the presumed intention of the legislator (or other rule-giver), or, when these intentions are expressed (and, presumably, expressly inequitable), by giving effect to a superior rule, drawn from higher law.[639] This would be an important step towards explicitly

[632] Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres... Cum Annotatis Auctoris, Ejusdemque Dissertatione de Mari Libero, Ac Libello Singulari de Aequitate, Indulgentia et Facilitate* (1735), pp. 37-43 (the pagination starts over in the third part of this work dedicated to the *Libello Singulari de Aequitate, Indulgentia et Facilitate*). For a discussion of its production and transmission see JE Scholtens and R Feenstra, 'Hugo de Groot's De Aequitate - Tekstuitgave En Tekstgeschiedenis Met Bijdragen over Nicolaas Blanckaert En over de Vorrede Tot de Inleidinge' (1974) 42 Tijdschrift voor Rechtsgeschiedenis, pp. 201-42.
[633] Grotius, *de Aequitate*, p. 37
[634] The scholarship on this point is vast. But see most recently Joe Sampson, *The Historical Foundations of Grotius' Analysis of Delict* (2017).
[635] See Feenstra, 'Hugo de Groot', p. 228.
[636] Grotius, *ibid*., p. 37. He also draws on the theologians' stock example of the deposited knife to be returned to a madman. See *ibid*., p. 38 and n.235 above.
[637] Grotius, *ibid.,* p. 38: 'multa saepe occurrere, quibus illae regulae non satis congruerent. In quibus oportuit non regulam, sed eius qui regulam dedisset mentem aeque propositum sequi, id quod erat omnia dirigere ex principiis naturae; unde ad ipsa naturae principia recurrendum fuit, ut ita ex infinito suppleretur, quod finito deerat'.
[638] Grotius, *ibid.,* p. 38: 'prima natura principia et quae leges virtutem ponunt, nihil nisi vitium tollunt, aequitatem non recipiunt [...]. Caeterum et ad leges inferiorum potestatum, et ad patrum, maritorum, dominorum imperia, ad vota etiam, pacta, et testamenta aequitas pertinet.'
[639] Grotius, *ibid.,* p. 38: 'aequitas pertinet [...] dupliciter, aut enim verba atque conceptus jubentium, voventium, paciscentium, testantium, corrigit, prout casus ex ipsorum praesumta mente poscit: aut etiam cum mens expressa est, legem ipsam, qua iussa, vota pacta, testamenta servari jubentur, restringit ex superioribus.'

distinguishing the juridical from the theological role of equity – and one that, by the time Grotius was writing, had been taken by Suarez -[640] but, on closer inspection, it seems clear that Grotius did not draw the distinction consistently or clearly. Indeed, we find Grotius elsewhere referring to the intervention of equity as limited to cases where there is a 'contrary' failure of the law. He follows the arguments of Soto and Vasquez to the effect that, in cases where the intention of the legislator fails, but no injustice is caused, *epieikeia* may not intervene. The focus is therefore not on interpreting the law in accordance with the *mens legislatoris* - only the law-giver will be able to intervene in the latter case, through a *dispensatio*.[641] Grotius also re-iterates Soto's points about the degree of certitude necessary to employ *epieikeia*. He argues that in cases where it is clear that injustice would follow, then equity can be used by anyone, including a subject or a judge. If, however, it is doubtful whether an exception is appropriate, 'quia ambiguum est, utrum aequius utrumve publico utilius sit, legis verba sequi, aut non sequi' one must distinguish 'aut enim res moram patitur aut non: si non patitur moram, faciet privatus id, quod in re dubia recte ratiocinando aequius et melius inveniet: ita tamen, ut si dubius maneat, nec se recte explicare possit, legis verba sequatur.'[642]

There are, however, some indications that the intention of the legislator played a greater role in Grotius' theory of equity than it did in theological accounts of it – perhaps on account of the influence of contemporary civil law theories. The first sign is that, when theologians from Cajetan to Soto wrote about a contrary failure of the law, they generally referred to the *ratio legis* failing contrarily, something they identified with the law violating natural law or threatening human lives. Grotius' focus is instead slightly different. He refers to a contrary failure, not of the *ratio legis* , but of the *mens legislatoris*. The argument cannot be taken much further - the example Grotius provides of a law failing contrarily is the rather unhelpful one of a law governing the punishment for homicide, which demands that one be struck with a blade. For Grotius, equity would prevent the application of such a rule to a person who acted in self-defence because the killer is innocent, and 'innocentem autem puniri pugnat cum iustitia et cum mente legislatoris'.[643] No conclusive role of the intention of the legislator can be derived from this statement.

Another clue in this sense may, however, be derived from a difficult passage in Grotius, where he talks about what would occur in a case where a law is simply intended by the legislator to be at odds with natural law. In that example he explains that it would not be the job of equity to deal with it, because there would not be a defect of universality in a particular case, but rather the law as a whole would be defective. He then moves on to refer to the *lex Prospexit* to explain that one would in these cases have to follow the law anyway.[644] His explanation for that rule is that in matters of doubt (*in dubio*), the authority of the law prevails. The problem with this analysis is that the starting point for Grotius' discussion was that the

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[640] See [4.2.4.1.1] below.
[641] Grotius, *ibid.,* p. 41.
[642] Grotius, *ibid.,* p. 40. It seems here that Grotius is unaware of, or does not wish to follow, Suarez's distinction between taking a case out of the power of the legislator, in which case the availability of a superior to decide the issue would be irrelevant, and cases falling outside the intention of the legislator, where the matter would ultimately be resolved by referring the matter to the legislator. See n.676 below.
[643] Grotius, *ibid.,* p. 41: 'sciendum est mentem legislatoris dupliciter posse cessare in casu speciali cadente sub verba legis: aut enim cessat ita ut simul pugnet cum casu, aut sine pugna cessat; subtiliter loquentes illud vocant cessare contrarie, hoc negative. [...] In priore locum habet aequitas, in posteriore dispensatio'
[644] On the *lex Prospexit* see n.553 above.

intention of the law would unambiguously be to violate natural law, in which case it is not clear what doubt Grotius is postulating. Even more confusingly, Grotius moves on to say that '[c]ontra has enim, cum vim obligandi non habeant, aequitatis remedio opus non est', suggesting that the laws would not have to be followed. He concludes this difficult paragraph by explaining that 'ostendimus praeterea eorum, quae in lege obscure dicta sunt, interpretationem aut productionem legis ad casus similes'.[645] There are no other passages in this text which clarify Grotius' position.

That said, and despite writing a treatise dedicated (at least in part) to the topic, the interest of Grotius in equity was limited, and he clearly did not think it had great explanatory power to be related back to doctrines of civil law. Grotius did not discuss equity in his other writings, even when dealing with matters of interpretation. In his *Introduction to Dutch Jurisprudence* (*Inleidinge tot de Hollandsche Rechts-Geleerdheid*) first published in 1631 but written in 1620,[646] Grotius dealt with the question of whether laws might not bind on account of particular circumstances.[647] However, he explained the disapplication of legal rules purely by reference to the maxim *cessante ratione legis cessat lex ipsa*. What is most surprising, however, is that, while not mentioning *epieikeia* at all in that passage, Grotius adapted the doctrine of *cessante ratione* to his approach to equity, finding that only cases of 'contrary failure', as opposed to 'negative failure' of the *ratio legis* would allow a rule to be disapplied.[648] He also relied on examples from Soto and Aquinas' comments on equity to illustrate this point,[649] but, even in that context, made no mention of *epieikeia*.[650] Similarly, in his *De Jure Belli ac Pacis*, Grotius does not mention equity at al in his chapter on the interpretation of the law, despite referring to principles recognisably borrowed from the treatment of equity by scholastic theologians.[651]

Grotius' reluctance to mention equity in writings other than those dedicated to that topic, even as it exercised an influence on his way of thinking about the law, may be a sign that the concept had not quite found an uncontroversial place within civil law works – a point to which we return below.[652] That was despite the fact that it was almost universally recognised, by the early seventeenth century, that equity's role, if any, would have to be one related to the interpretation or amendment of the law.

[645] Grotius, *ibid.,* p. 39.
[646] Hugo Grotius, *Introduction to Dutch Jurisprudence* (AFS Maasdorp ed, 1903), p. ix.
[647] Hugo Grotius, *Inleiding Tot de Hollandsche Rechts-Geleertheid* (1631), *f.* 3.
[648] The marginal lemma to this paragraph reads in Latin *cessatio per contrarietatem*, as opposed to *cessatio negativa*, which introduces the next paragraph, and which does not suffice to disapply a rule. See Grotius, *Inleiding*, *f.* 3.
[649] Specifically, to Aquinas' example about climbing the city walls and Soto's example of a law forbidding citizens to bear arms at night. See [3.2.1] above.
[650] Grotius, *Inleiding*, *f.* 3: 'Maer indien de wet niet in 't algemeen op en houd, zo moet gelet werden of de oeffening vande wet in de voorgevallen gelegentheid opentlick soude strijden met de wille des wet-gevers, in welcken ghevalle de wet noch uiterlick noch innerlick en verbind: als by voor-beeld: de wet verbied alle burghers by nacht op de wal te komen: een borgher woonende by de wal hoort by nacht dat den viand de wal beklimt: Indien hy alsdan t'huis bleeff ende niet sijn best en deede om den viand af te keeren, hy soude wel doen nae de woorden van de wet, maer niet nae de zin van den wetgever die voor al betracht moet werden. Maer indien de oeffening sodanigen opentlicken strijd met wet-gevers meeninge niet meede en brengt, zo moet noch ghezien zijn, of de wet nae't recht-snoer des voorzichtigheids ziet op een alghemeen ghevaer, of dat de wet iet houd als zeeckerlick gedaen 't welck niet en is gedaen. [...] Over-sulcks de wet verbiedende dat iemand die de wacht niet en heeft by nacht sal gaen langers straet met wapenen, verbind oock de gheschickte luiden, die niet quaeds in de zin en hebben om dat het gevaer daer de wet op ziet plaets heeft of kan hebben.'
[651] Grotius, *De Jure Belli Ac Pacis Libri Tres*, lib. 2, cap. 16, in particular compare para. 27 with Suarez at n.663 below.
[652] See [4.3.1.1] below.

4.2.4. Linking equity and interpretation III: Suarez and the seventeenth-century development of theological *epieikeia* as interpretation

4.2.4.1. Franciscus Suarez (d. 1617)

Suarez is often acknowledged as the writer who contributed the most to the theological development of *epieikeia*.[653] He did so in his *Tractatus de legibus ac deo legislatore*, published in 1612.[654] As we shall see, we owe to Suarez the most sophisticated attempt by a theologian to bring together the two approaches to equity by the authors who had preceded him, namely, on the one hand, that of Soto, Medina, Vasquez and the like, who followed Cajetan and Aquinas' line very closely, and of those of civil lawyers, also adopted by fellow-theologians such as Azpilcueta and Molina. His greater attention devoted to the doctrine of equity among lawyers allowed him to distinguish the function of limiting the power of human law from that of identifying the wishes of the legislator, a line that had been blurred in previous accounts of the theological concept of equity.[655]

In his attempt to bring together the two approaches to equity, Suarez did not engage explicitly with the writings of humanist-jurists on *aequum et bonum*, but he did pay a great deal of attention to the medieval sources from legists and canonists on equity and interpretation. Suarez's account was the most elaborate attempt to bring in line the legal and theological approach to equity even considering civil law writings more generally, and had a lasting impact on determining both the theological and juridical view on the place of *epieikeia* within legal doctrine as a theory of restrictive interpretation of the law.[656]

4.2.4.1.1. Two aspects of epieikeia

In *De Legibus* Suarez engages at the outset with the question that his predecessors failed to address. What exactly is the relationship between the limits of human law and the intention or presumed intention of the legislator? While the approach of civil lawyers was entirely focussed on the latter, Soto and his followers blended the two as though they answered the same question.

By the times of Suarez, the connection between interpretation and equity that had been finding its way in theological writings since the time of Soto was entirely uncontroversial.[657] In the sixth chapter of the second book of *De Legibus*, while dealing with the issue of whether natural law could be subjected to *epieikeia*, Suarez explained that *epieikeia* is a species of legal interpretation or, as he puts it, ': omnis enim epiikia est legis interpretatio; non vero e converso omnis interpretatio legis est epiikia'.[658] In telling us what kind of interpretation *epieikeia* involves, Suarez followed Cajetan's explanation: it is the kind of legal interpretation that finds a law to be deficient on account of a defect of universality.[659] However, unlike any author before him, Suarez spelled out clearly that that interpretation may take place in two entirely different cases. One

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[653] See e.g. Riley, *Epikeia*, p. 67: 'No theologian treats so comprehensively the concept of *epikeia* as does Suárez.'
[654] Franciscus Suárez, *Tractatus De Legibus Ac Deo Legislatore* (1613).
[655] See [3.2-3] above.
[656] See [4.3.2] below.
[657] See [3.3.1.2] above.
[658] Suárez, *De Legibus*, lib. 2, cap. 16, p. 118.
[659] Suárez, *ibid.,* lib. 2, cap. 16, p. 118: 'non tamen omnem huiusmodi interpretationem esse epiikiam, sed illam solum, per quam interpretamur, legem deficere in aliquo modo particulari propter universalem, id est, quia lex universaliter lata est, et in aliquot particulari ita deficit, ut iuste in illo servari non possit.'

case was traditionally Thomist, that is, where it would exceed the legislator's power to bind. Suarez thought this would occur in two sub-sets of circumstances: where the law – if applied - would sin, and where it would bind too harshly. However, *epieikeia* would also take place in a second case, one where, even though the legislator would have the power to bind the subject, it is clear that he had no intention to do so.[660]

4.2.4.1.2. The first limb: Epieikeia and the power of the legislator

Suarez's explanation of the first limb of *epieikeia* bears the hallmarks of its development by Cajetan and Soto, but Suarez was able to develop the doctrine with greater consistency, having separated it from the intentions of the legislator. Suarez recognised two separate instances where the legislator would be unable to bind a subject.

The first should by now sound rather familiar. It concerned cases where the application of the law would violate divine or natural law or otherwise result in injustice.[661] However, Suarez found that confining cases where the law loses its binding power to situations where it would positively lead to sin or commit an injustice would be too narrow. Building on Soto,[662] Suarez extended the scope of *epieikeia* beyond these cases, to those where it would prove very onerous for the subjects to follow the words of the law, i.e. where the law would cause a subject to suffer some unjust loss.[663] In seeking to determine what kind of prospective harm might justify a subject in not following the law Suarez looked to civil law sources on interpretation, and specifically to Bartolus and Tiraquellus. He cites passages by the two where they discuss the applicability of the maxim *cessante ratione legis cessat lex ipsa*.[664] While they had argued that only an ensuing *damnum emergens* (a direct loss as opposed to a loss of future opportunity to make a gain, or *lucrum cessans*) could justify a

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[660] Suárez, *ibid.,* lib. 6, cap. 7, p. 439: 'Et ita tres modi, vel rationes utendi epiikia distingui possunt, ut unus sit propter cavendum aliquid iniquum, alius propter vitandam acerbam et iniustam obligationem, tertius propter coniectatam legislatoris voluntatem, non obstante potestate.'

[661] *Ibid.*,: 'in primo modo praecipue considerandum [est], an in eo casu occurrat aliud praeceptum, praesertim iuris divini et naturalis, cui repugnet executio legis humanae secundum verba eius, et consequenter, an actus tunc habeat iniustitiam, vel malitiam inseparabilem, vel saltem contra praeceptum gravius et magis obligans, et iuxta haec principia debet fieri iudicium. […]. [In secundo modo iudicandum est] de modo obligandis legis humanae, et uxta illa iudicandum erit an hoc factum particulare cum his circunstantiis excedat potestatem legis humanae.'

[662] See Soto's extension of *epieikeia* to cases of private death at [3.3.1.1] above.

[663] Suarez, *ibid.,* pp. 437-40: 'Caiet[anus dixit] epiikiam esse directionem legis, *qui peccat propter universale*, solum autem peccare posset, si obligaret ad actum iniquum […]. Videtur tamen haec sententia nimis rigida et limitata, quia saepe potest homo excusari ab observantia legis generaliter loquentis, etiamsi posset licite actum per illam praeceptum facere [...] nec refragatur Divus Thomas, nam licet in dicto [*IaIIae* q. 96, art. 6] loquatur de detrimento communis boni, sub illo comprehendit detrimentum particularium civium.'

[664] Neither Tiraquellus nor Bartolus mention *epieikeia* in this context, these are rather commentaries ancillary to the discussion of the *cessante ratione* maxim and the various ways of applying this rule of interpretation. See Bartolus *ad* C.1.14.5, *ff* 32v-33v and Andreas Tiraquellus, *Tractatus Cessante Causa Cessat Effectus* (1552), pp. 91-2. Stated simply, the question was whether, once it is established that the *ratio legis* in a certain case is missing, this automatically means that the law will not apply. Certain commentators saw the *lex prospexit* (D.40.9.12.1) as contradicting this, because it was a case where the *ratio* of the law was missing, but the law applied nonetheless. Bartolus argued that the theory behind this was that in a case like the *lex prospexit*, although the *ratio* of the law was missing, all that would ensue was a *lucrum cessans*, in that case, the law could be applied despite the missing *ratio*. On the other hand, if the application of the law had involved a *damnum emergens*, it should not have been applied if the reason went missing. In his own writings on interpretation (which he distinguished from equity, see [4.2.4.1.4] below), Suárez adopted a different solution.

subject in not following a rule, Suarez thought the better view to be that any ensuing loss, as long as it was substantial, could form the basis of an interpretation by *epieikeia*.[665]

The difficulty here in Suarez's discussion lies in identifying exactly in what circumstances the loss that the application of a rule will cause to one party will be such as to cause the rule to bind too harshly. It is beyond doubt that perfectly just rules may require abiding parties to suffer a loss, even a substantial loss. This is not addressed by Suarez straightforwardly. The medieval sources on which Suarez relies, all seemed to assume that the loss would have had to be of a kind that did not fall within the rule's *ratio*.[666] However, at the outset of his discussion, Suarez drew on the authority of Cajetan, Soto, Covarrubias, Ledesma, Medina and Azpilcueta's *Enchiridion*, to make it clear that a negative failure of the *ratio* would not have anything to do with the intervention of *epieikeia*.[667] The reason why the law in these cases is unable to bind, is the same as in the cases of sin – it is beyond the legislator's power to do so.[668] Therefore, even if the legislator had devised a rule with the precise *ratio* of binding in such a harsh way, *epieikeia* would still allow a subject to avoid applying that rule, because the legislator would have exceeded his power. The *ratio* is thus neither here nor there.[669] The point is instead that a law or legislator may not inflict on a certain individual some grave harm when 'nulla alia ratio communi boni obliget ad illud inferendum'.[670] Unfortunately, we are not told much more by Suarez about this aspect of the doctrine, and it must remain unclear exactly how one should determine whether a loss inflicted by a rule is justifiable or not. It is rather curious that, in his analysis of the type of triggering loss examined above, Suarez felt free to relocate the writings of medieval legists and canonists on issues of interpretation of the law according to its *ratio*[671] within a doctrine that bore seemingly no relation to it. As with previous writers, this may be due to the growing influence of those approaches to *epieikeia* among jurists that saw it closely related to those kinds of doctrines of interpretation.

Having identified the two cases above, namely those of sin and of harshness, it is important to emphasise once more that Suarez was very clear in stating that in these circumstance the applicability of *epieikeia* bore no relation to the intentions of the legislator. The point is rather that, in these circumstances, the legislator would not be able to bind the subject even if he wanted to. This led Suarez to depart from Cajetan and Soto in one significant respect. The latter two thought that, in a case where a subject's judgment about the detrimental effect of following the law were only probable, it would be better to refer to a superior

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[665] Suárez, *ibid.,* p. 440: 'Aliter limitant Iuristae dictam assertionem ut procedat, quando detrimentum vel proximi est in bonis acquisitis, non vero in acquirendis, nam ex hoc sumi non ptest sufficiens excusatio, quia illud non est verum detrimentum, seu damnum emergens, sed tantum lucrum cessans. […] Ita fere Bart[olus *ad* C.1.14.5], quos late refert Tiraqu[ellus, *Tractatus Cessante Causa*, n. 151]. Statim vero [Tiraquellus, *Tractatus Cessante Causa*, n. 152] refert Salicetus contradicentem et plura contra illam distinctionem congerit Felinus [Sandeus *ad* X.1.3.5]. Nobis ergo non servit distinctio, nam si damnum sit leve, licet sit in bonis acquisitis, potest non sufficere ad excusandum ad obligatione legis, si vero lucrum cessans sit iustum, et grave, saepe aequiparatur damno, moraliter loquendo, ut constat ex [C.7.47.1.2].

[666] See n.664 above.

[667] Suárez, *ibid.,*, lib. 6, cap. 7, p. 437.

[668] See e.g. Suárez, *ibid.*, p. 439: 'non solum esse alienum a prudenti legislatore iniqua praecipere, sed etiam inhumana, et gravior quam humana conditio patiatur, vel quam ratio communis boni postulet.'

[669] That is, despite the fact that Suárez follows Cajetan's confusing language in calling cases exceeding the power of human law as cases where the *ratio legis* fails obliquely.

[670] Suárez, *ibid.,* p. 439.

[671] See n.664 above.

if time allowed one to do so.[672] Suarez saw in this a clear inconsistency – in cases where it is not within the power of the superior or legislator to bind the subject, what benefit could one possibly derive from asking his opinion Suarez says that in this matters one has to distinguish 'duos modos epiikiae supra tactos, scilicet, vel excipiendo casum a potestate legislatoris, vel a sola voluntates. Et in priori […] posse subditum ex probabili iudicio, quod talis casus non comprehendatur sub potestate legis, excusari a legis observatione; nulla expectata interpretatione superioris, non solum in casu subito et urgente, sed etiam in quolibet alio. Probatur quiatunc non agitur de interpretanda superioris voluntate, sed de potestate quam non tenemur interpretari ex iudicio ipsius Principis quando ipse illam non declaravit, sed ex principiis Theologiae aut iuris.'[673] For Suarez, the recourse to a superior was clearly important in cases of the second type to which *epieikeia* applied, those where the will of the legislator was in issue, but it seemed to be of no help where it was his power, rather than his will, that was in doubt.

4.2.4.1.3. The second limb: Epieikeia and the intentions of the legislator

As we have seen, Suarez was more precise in his analysis of the first limb of *epieikeia*, connecting it more clearly with the power – as opposed to the will – of the legislator. This left Suarez to discuss the precise relation between the intentions of the legislator and *epieikeia*, which was central to the understanding of equity spreading among jurists by the end of the sixteenth century, but seemed entirely redundant in the accounts of *epieikeia* of Cajetan and Soto.

Suarez explained that a general law may apply to a case where the legislator, while perfectly able to bind a subject because following the law would not cause any injustice, would not have intended the law to apply. In these circumstances, a subject would be entitled to rely on *epieikeia* not to follow the law if it is clear that it was not the intention of the legislator to bind – Suarez founded this aspect of *epieikeia* on Aristotle, without referring to any of the humanistic or legal literature on point.[674] Suarez did not engage at any length with how this aspect of *epieikeia* would operate, and said little except that the kind of evidence one may make use of in determining the intention of the legislator would be conjectures derived from the circumstances of the case, the customs and ways of the ruler and of the manner of interpreting similar laws.[675]

That said, Suarez saw a clear substantive distinction between this aspect of *epieikeia*, founded on the legislator's will, and the previous one, based on its power, examined above. The most important difference was that, as mentioned above, while in cases involving the power of the legislator, recourse to a

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[672] See [3.2.1], [3.3] above.

[673] See Suárez, *De Legibus*, lib. 6, cap. 8, p. 441. Suarez did not refer to the opinion of Aquinas that a superior may be better placed to judge, See n.452 above.

[674] Suárez, *De Legibus*, lib., cap. 7, p. 439: 'ulterius habere locum epiiciam in casu, in quo non deesset potestas in legislatore ad obligandum, sed ex circunstantiis iudicatur, non fuisse hanc mentem eius. […] Et hunc certe modum videtur significasse Asristoteles cum dixit, epiikiam emendare legem, quod et ipse legislator, si adesset, hoc modo dixisset, id est, ita esset moderaturus, et interpretaturus legem suam.'

[675] Suárez, *De Legibus*, lib. 6, cap. 7, p. 439 'Quia non semper Praelatus vult obligare cum toto rigore, et in omni eventu, in quo posset obligare. Ut verbi gratia [...] propter minorem debilitatem, qua non obstante potuisset Ecclesia obligare, sed nihilominus creditur ex benignitate noluisse, quae intentio legislatoris colligi potest ex aliis circunstantiis temporis, loci, et personarum, et ex ordinario modo praecipiendi cum illa moderatione subintellecta, licet non exprimatur. [… Et in hoc casu] magis est utendum coniecturis, ex circunstantiis desumptis, et praesertim ex usu, et modo regiminis, et ex more interpretandi similes leges.'

superior could be of no assistance, in cases where the will of the legislator was in issue, an opportunity to consult the legislator would have to be taken whenever his will was not certain.[676] However, if recourse to a legislator could not be had, Suarez thought that a probable judgment that the legislator would not have wished it to be followed would justify the intervention of *epieikeia*, and that even though following the law would cause no sin or unjust harm.[677] He justified this on the basis that it would be a very great limitation on *epieikeia* if it could only be used in cases where the interpretation of the will of the legislator were certain, for most human judgments are probable in nature.[678] He also referred to the practice in matters of interpretation in the Church itself and by jurists, which he saw as being in line with his view.[679] In cases where the intention of the legislator is wholly in doubt, Suarez finds, predictably, that one ought to simply follow what the words prescribe, and referred to a number of juristic sources to support that view.[680] Interestingly, perhaps in an attempt to deal with the medieval sources referring to equity, Suarez also added at the very end of his analysis that, in cases where equity cannot be followed without consulting the legislator on account of the uncertainty of his will, one may nevertheless follow a written equity – it is unclear how Suarez squared this with his own theory, or what he thought a written equity to be.[681]

4.2.4.1.4. Epieikeia and interpretation in Suarez

As we have seen, Suarez brought *epieikeia* more closely in line with that of contemporary jurists. Most importantly because he thought *epieikeia* had a role in situations where, though the legislator had the power to bind, it was at least probable that this would violate his intention. This led him to define very clearly *epieikeia* as a species of interpretation. However, one important respect in which Suarez's doctrine of equity differed from that of jurists was that it more precisely distinguished equitable interpretation from the doctrines of restrictive and extensive interpretation,[682] seeking to carve a special role for the first alongside the latter two.

A few words need to be spent on Suarez's approach to interpretation. Suarez derives most of his statements about interpretation from medieval legists and canonists, as well as their interpretation in early modern civil law works.[683] For Suarez, interpretation is about giving effect to the *mens legislatoris*, for it is the

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[676] Suárez, *De Legibus* lib. 6, cap. 8, p. 441: 'At vero in altero modo epiikiae, in quo casus excipitur a sola voluntate, et non a potestate legislatoris, ait haec opinio [i.e. that the superior has to be consulted], [...] esse recurrendum ad superiorem, quando fieri potest in casu probabili.'

[677] Suárez, *De Legibus*, lib. 6, cap. 8, p. 441: 'Nihilominus sententiam Caietani, et Soti censeo esse practice certam quoad hanc partem, ut quando non potest conveniri superior, liceat ex probabili sententia, aut iudicio epiikia uti, sive casus excipi iudicetur a potestate legislatoris, sive a sola voluntate.'

[678] Suárez, *ibid.*: 'imponeretur gravissimum onus hominibus, si nunquam liceret eis uti epiikia ex iudicio probabili, quando non patet aditus ad superiorem [...] cum nemo sit tam certus de sufficientia causae, quin dubitet, vel formidet.'

[679] Suárez, *ibid.*: 'Constat autem contrarium esse in usu totius Ecclesiae, et approbari ab omnibus Doctoribus.'

[680] See Suárez, *ibid*, pp. 442-3

[681] Suárez, *ibid*, p. 443.: 'in casu dubio […] non licet aequitatem sequi contra ius scriptum inconsulto Principe, nisi ipsamet aequitas scripta sit, ut dicitur in [C.3.1.8] iuxta vulgatam lectionem'. In this passage he cites the opinions of Bartolus, Baldus, Panormitanus and Cinus Pistoiensis.

[682] Suárez discusses those in chapters 1 to 5. See Suárez, *De Legibus*, lib. 6, cap. 2-5, pp. 421-435.

[683] Among the early modern works that seem to have influenced Suárez's views on point are Constantius Rogerius, *Tracatus de Iuris Interpretatione* (1463); Andreas Tiraquellus, *Commentarii in Lege Si Unquam Codice de Revocandis Donationibus* (1581) and the latter's *Tractatus Cessante Causa*, see nn.664-665 above.

latter that gives any law its binding power.[684] To put it simply, Suarez goes through a number of ways – which seem to proceed in logical succession – in which one may seek to divine the intentions of the legislator. First, since the words of the law are the only way for the legislator to express his intention, one must presume that they are an accurate reflection of it. One will therefore start from taking the words in their proper meaning. The proper meaning of the word can either mean their natural meaning, as used in everyday language, or their 'civil' meaning.[685] The foremost evidence to divine the *mens legislatoris* are therefore, quite sensibly, the words that he chose.[686] There may be cases, however, where the latter do not reflect the intention of the legislator. But what evidence may one resort to in order to determine the latter?[687] Suarez's answer is that one may refer to, (i) the subject matter of the law (*materia legis*), (ii) the injustice or absurdity which following the words would lead to, (iii) other laws and their incompatibility with the meaning of the words in the rule in question, and finally (iv) the *ratio legis* – though Suarez is rather sceptical about the latter, and warns interpreters not to equate it to the *mens legislatoris*, even when the legislator himself has expressed it in writing.[688] In cases where any of these elements militate against a reading of the words of the law in their proper sense, one should stretch the meaning of the words to any improper sense which they may hold in order to satisfy the intention of the legislator.

The exercise of interpreting words beyond their proper natural meaning, for Suarez, can be of two kinds – either extensive, if the words are given a meaning that is broader than their natural one, or restrictive

[684] Suárez, *De Legibus*, lib. 6 , cap. 1, p. 418: 'mens legislatoris est anima legis, unde sicut in vivente substantia, et operatio vitae ab anima maxime pendet, ita in lege a mente legislatoris. Illa est ergo vera interpretatio legis, per quam mentem, et voluntatem legislatoris assequimur, et ideo quacumque ratione de mente legislatoris constare possit, secundum illam maxime erit lex interpretanda.'

[685] Suárez, *ibid.*, pp. 418-21: 'Circa verba dicendum est, in omni lege humana primum omnium expectandam esse verborum proprietatem, id est, propriam significationem, nam ex illa maxime sumenda est vera interpretatio legis, semperque est praeferenda nisi aliquid obstet. [...] Observandum est autem in hoc puncto in verbis iuris, seu legum, duplicem proprietatem solere distingui, unam naturalem vocant, aliam civilem. Prior non sic appellatur, quia significatio aliqua verborum legis sit a natura [...] sed quia quaedam significatio est ex simplici et primaeva verborum impositione, et in ea solent significari res prout vere, ac naturaliter sunt, sicut dictio mors significat nauturalem mortem. Significatio autem civilis dicitur, quae est per extensionem, parificationem, vel fictionem iuris, ut dictio *Mors* significare solet civilem, quasi sit per religiosam professionem et filius adoptatus dicitur filius et sic de aliis. [...] Item quia verba sunt, quae ex intentione legislatoris potissimum assumuntur ad declarandam voluntatem suam; ergo illa etiam primo, ac principaliter consuli debent ad eamdem voluntatem cognoscendam.'

[686] Suárez, *ibid.,* p. 419: 'Priori ergo modo dicendum videtur, verba per se loquendo esse potissimum signum voluntatis legislatoris, et illo maxime utendum esse ad mentem legis perspiciendam'.

[687] Suárez, *ibid.,* p. 418: 'Quaeret vero aliquis qui possit fieri, ut mens praeter verba aliquid conferat ad legem interpretandam. Quia homines non possunt mentem alterius hominis percipere, nisi ex verbis eius.'

[688] Suárez, *ibid.*, p. 419: 'Tandem vero interrogari potest, quibus modis, vel coniecturis utendum sit ad mentem legislatoris indagandam praeter nudam vim verborum. [...] Primo materia legis, [... s]ic etiam in [D.19.2.15.4], verbun *Donationis* per verbum transactionis exponitur, *materia exigente.* Secundo quoties verborum proprietas induceret iniustitiam, vel similem absurditatem circa mentem legislatoris, trahenda sunt verba ad sensum etiam improprium, in quo lex sit iusta et rationabilis, quia haec paresumitur esse mens legislatoris, ut multis iuribus declaratum est in tit. De Legibus [D.1.1] [...]. Tertio ex comparatione ad alia iura potest indagari mens legislatoris in aliqua lege [...]. Primo ex repugnantia, et contrarietate aliarum legum [...]. [Secundo] per concordiam circumstantiis [nam si interpretatio] consentanea sit aliis iuribus, in quibus similia verba in illo sensu accipiuntur, vel aequiparantur, tunc enim valde probabilis sit talis interpretatio ex mente legislatoris, quia secundum ius loqui praesumitur. [...] Ultimo circa rationem legis [...]. Oportet tamen circa illam advertere, duplicem esse posse rationem legis, unam in lege non expressam, sed ab interpretibus excogitatam. Aliam in lege ipsa explicatam. Prior ergo ratio licet aliquid conferat ad assequendam legislatoris mentem, non est tamen certum indicium, sed probabilis tantum coniectura, tum quia saepe ratio non est certa [...]. At vero quando ratio legis in ipsa lege continetur, magnum indicium esse potest mentis legislatoris [...] non tamen ita infallibile, quin aliae etiam circunstantiae ponderandae sint, quia etiam ipsius rationis sensus potest esse ambiguus, et ex aliis circunstantiis certior redditur [...] et ideo ad plene cognoscendam legislatoris voluntatem, quae est propria mens eius, non sufficit sola ratio, etiam in lege expressa, sed omnia expendenda sunt, et attente consideranda.'

if it is narrower.[689] The two are dealt with in a way that is consistent with the more general analysis above, adding more detail to the circumstances in which elements (i)-(iv) may be relied upon to infer the *mens legislatoris*.[690] They are also clearly both distinguished from other interpretations, such as *epieikeia*, which are aimed at carving exceptions into rules, not at construing their meaning extensively or restrictively and no reference to equity or *epieikeia* is found in Suarez's analysis of either.[691]

When it comes to distinguishing the scope of *epieikeia* from interpretation, Suarez's analysis is not always clear. There is no problem at all with the difference between construing the proper natural meaning of the words of the law, an exercise involving neither extension nor restriction, and the application of *epieikeia*. There seems also to be no problem distinguishing the extensive interpretation of the law from the application of *epieikeia* – Suarez is clear throughout his analysis, following Cajetan and Soto, that *epieikeia* will only serve to remedy defects of universality and, in any case, is a doctrine concerned with the cessation of the law's binding power, which could hardly result in the extension of a rule. This leaves us with the distinction between *epieikeia* and *interpretatio restrictiva*.

The two seem to have quite a lot in common, especially since Suarez extended *epieikeia* to cover cases where the legislator would not have wished a general rule to apply. They will both result in preventing a general rule from applying to a particular case where that would result in injustice,[692] but, most importantly, they will also do that where there is other evidence that the *mens legislatoris* is that the rule should not apply. However, the directions the two doctrines give about the kind of evidence which may be relied upon to make a probable judgment of the intention of the legislator do not match perfectly. The rules of *interpretatio restrictiva* are quite detailed, referring to all the rules of interpretation mentioned in the more general discussion, as well as going into greater detail regarding how the *ratio legis* may, in certain circumstances, work as evidence of the *mens legislatoris*. The rules of *epieikeia* are much briefer, simply making vague reference to the circumstances of the case, the ways of the ruler and the way in which similar laws would be applied. It is not clear whether Suarez implied that one should seek guidance from rules of *interpretatio restrictiva* when seeking to discover the *mens legislatoris* for the purpose of *epieikeia*. It is also not clear whether the rules expressed in *epieikeia* about the need to consult a superior when the legislator's intention is in doubt would also apply to cases of *interpretatio restrictiva*. Finally, it is not easy to demarcate exactly what cases would fall within the domain of *interpretatio restrictiva* and what in *epieikeia*. It seems, reading

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[689] Suárez, *ibid*., p. 421: 'Legis interpretatio, si praecise, ac secundum vocis rigorem sumatur solum consistit in declaratione et intelligentia proprii, et (ut sic dicam) immediati sensus ipsius legis, sistendo tantum in usitata et propria significatione verborum, et in sensu legis ex illis sic intellectis resultante [...] nobis vero nihil de illa dicendum superest. [...] Alio ergo modo sumitur interpretatio prout aliquid specialiter operatur circa legem. Quae multiplex est secundum varios effectus, unus est correctio vel abrogatio legis [...] quia specialiter sit, per unal legem circa alias, vel per posteriores circa praecedentes; alii vero sunt, qui in unaquaque lege secundum se spectari possunt, ut sunt extentio, restrictio, exceptio [i.e. *epieikeia* (see n. 684 below)] vel excusatio [i.e. dispensatio], seu cessatio obligationis legis'.

[690] See Suárez, *ibid*., pp. 421-35.

[691] Suárez later makes it clear that his reference to *exceptio* is a reference to *epieikeia*. Suárez, *De Legibus*, p. 435: 'in particulari eventu propter circunstantias occurentes cesset obligatio legis circa talem actum [...] et haec exceptio est emendatio legis, quae per epiikiam fieri dicitur'.

[692] In his discussion of *interpretatio restrictiva*, Suárez extends his understanding of injustice to harm to private individual, as he did in *epieikeia*, though without going in as much detail regarding *lucrum cessans* and *damnum emergens*. See Suárez, *De Legibus*, p. 433: 'dispositionem legis indistincte loquentis, ita esse restringendam, ut non cedat in praeiudicium innocentis, nam inferre innocenti nocumentum, alienum esse praesumitur ab intentione legislatoris, quia iniustitiam involvit.'

Suarez's general comments about interpretation and his discussion of *interpretatio restrictiva*, that an exercise of interpretation would be confined to interpreting the words of the law, and thus that it should always find some sense, if improper, that the words could plausibly assume.[693] Under this view, *epieikeia* would be confined to a scenario where the words of the law may in no sense, proper or improper, be construed in accordance with the intention of the legislator, or in a way that will avoid injustice. The only difficulty with this argument seems to be Suarez's view that, certainly in cases of *interpretatio extensiva*, it may be possible to move beyond any meaning that the words could acquire, and disregard them altogether in favour of the *mens legislatoris*.[694] Curiously, Suarez seems to think that one will only be able to do this by reference to the *ratio legis*, rather than the other evidence listed earlier which may allow one to guess the intention of the legislator,[695] and he seems to imply at the outset of his discussion of *interpretatio restrictiva*, that the same should be possible there.[696] Suarez does not return to this point, and gives no example of a restriction beyond any reading of the words. However, if he did envisage *interpretatio restrictiva* to also cover those types of cases, then a distinction from *epieikeia* would probably be impossible to draw. This would be particularly problematic in light of the lack of clarity in Suarez as to how the various rules governing the evidence of *mens legislatoris* and recourse to a superior in *epieikeia* and *interpretatio restrictiva* should interact. It is perhaps this ambiguity that would lead some later authors relying on Suarez, such as Paul Laymann, to merge *interpretatio restrictiva* and *epieikeia* entirely.[697]

In conclusion, Suarez's account of equity provides a detailed and serious attempt to meaningfully engage with the relationship between *epieikeia* and interpretation, though it does not resolve the distinction between the two entirely unproblematically. In his attempt to align his account of equity with the theological tradition on the point, Suarez maintained a distinction between traditional doctrines of interpretation and equity, restricted equity to restrictions of general rules, and – while finding a more direct link between the intention of the legislator and the intervention of equity – avoided all references to humanistic writings about *aequum et bonum* discussing that link at greater length. Suarez's theory would have a lasting impact for later theologians writing on equity, and, as shall be shown later, it is probably also due to his influence that canonists are found, by the eighteenth century to have assimilated aspects of the theological concept of *epieikeia* in their accounts of *aequitas*.

4.2.4.2. *The influence of Suarez on later theologians*

This last section provides an overview of the later development of the concept of equity among theologians in the seventeenth century. We shall first look at Lessius' rather peculiar approach to *epieikeia*, very much

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[693] See Suárez's general comments at n.685-689 above where he always refers to construing words according to an improper (as opposed to natural or civil) meaning. In his discussion of *interpretatio restrictiva*, Suárez always mentions restrictive interpretation as being *contra proprietate verborum*, but never more.

[694] Suárez, *ibid.*, p. 421, 432: 'Quarto potest cogitari extensio ultra omnem significationem verborum etiam impropriam, solum propter rerum, vel casum similitudinem, aut identitatem formalem in ratione legis.'

[695] See n.694 above.

[696] Suárez *ibid.*, p. 421, 432: 'Restrictio ergo, sicut extensio, accipi solet, vel per comparationem ad verba iuxta varias eorum significationes supra positas, scilicet aut propriam naturalem, aut propriam civilem, aut impropriam, vel per comparationem ad rationem legis'. It seems from this passage that the *comparationem ad rationem legis* could allow one to move beyond a *comparationem ad verba iuxta eorum impropriam significationem*.

[697] See [4.2.5.2] below.

entrenched in its theological, rather than legal, aspect. We will then move on to those authors who adhered more closely to Suarez's theory and developed it alongside legal concepts of interpretation. The latter would provide the hallmark for the development of *epieikeia* among both theologians and canonists in the centuries to follow.

4.2.4.2.1. Leonardus Lessius

In the first chapter of his *De Iustitia et Iure*, Leonardus Lessius (Lenaert Leys, d. 1623) identified *epieikeia* with *aequum et bonum* (as well as *aequitas*) and defined it as a *benignam sententiam* that goes against the words of the law, but in accordance with the wishes of the legislator.[698] These initial references to *aequum et bonum* and *benignam sententiam* suggest that Lessius was familiar with the language that humanists had introduced in legal discourse in matters of *epieikeia*. This approach would perhaps also be expected, in light of the fact that Lessius has often been recognised in recent scholarship as one of the theologians who was most concerned with reconciling theological doctrine and law.[699] However, and perhaps surprisingly, Lessius' account of *epieikeia* turns out to be entirely detached from that of contemporary jurists, reverting to a more orthodox understanding of *epieikeia* as being concerned with excluding the application of rules in cases where the law or the legislator would have no power to bind.

Lessius argued that the *benignam sententiam* involved when exercising *epieikeia* was the same that Thomas described in his *Summa* as *gnome*, i.e. the capacity to judge according to considerations other than the words of the law.[700] But, in his description of these considerations, it soon becomes clear that the intentions of the legislator play but a marginal role. Lessius mentions at the outset that the relevant considerations are what the common good or a reason of virtue may require.[701] The reference to the common good is similar to that found in all previous authors – in such a case, *epieikeia* intervenes because the law has no power to bind, the legislator could not pass a law that would harm the public good. As we have seen, however, previous authors including Soto and Suarez had found this limitation alone to be rather narrow. Soto had then extended it to cases involving the death of an individual.[702] Suarez, even more broadly, extended it to those where following the law would cause some form of unjust loss.[703] Lessius instead, grounds his understanding of *epieikeia* even more firmly in theology. Where no harm to the public good would follow from the application of the law, *epieikeia* will apply where the application of the words of the law would offend a virtue. Lessius makes it clear that, properly understood, *epieikeia* applies to those

[698] Leonardus Lessius, *De Iustitia et Iure* (1612), lib. 1, cap. 2, dub. 3; p. 9: 'Aequum et bonum (quod Graecis dicitur [*to epieikes*)], est quod cum sit contra verba legis (etsi non contra mentem Legislatoris)[…]. Universales enim Regulae in rebus practicis patiuntur multas exceptiones, hae exceptiones quia verbis legum comprehendi non poterant, relictae sunt iudicio prudentum, et vocantur [*to epieikes*], id est, aequum et bonum. […] Iudicium vero quo de [aequo et bono] iudicatur, vocatur Gnome, quod Latine benignam sententiam possumus nominare, hoc autem peti debet ex altiori consideratione, ob quam verba legis non sunt servanda.'

[699] Works that have recently made this point include Decock, *Theologians and Contract Law* and Sampson, *Grotius' Analysis of Delict*.

[700] See Lessius, *Iustitia et Iure*, lib. 2, cap. 47, dub. 9, p. 687: 'Iudicium, quo dirigitur [*epieikeiam*], vocatur *gnome*, sicut iudicium, quo diriguntur ea, quae sunt secundum verba legis, vocatur *synesis*.'

[701] See Lessius, *ibid.*,: 'Epieikeia est quando aliquid agitur contra verba legis, eo quod bonum comune, vel ratio virtutis id postulet.'

[702] See [3.3.1.1] above.

[703] See [4.2.4.1.2] above.

cases and not necessarily to cases of following the intention of the legislator.[704] Elsewhere, Lessius once more explains that *epieikeia* will apply when matters that have greater weight than that which the legislator intended by passing his law intervene.[705] Nevertheless, Lessius does at times refer to the exercise of *epieikeia* as giving effect to the intentions of the legislator. He often mentions it as an alternative motive to explain the intervention of *epieikeia*, where *epieikeia* remedies the offence of a virtue.[706] In this way, Lessius seems to revert to the ambiguity we previously observed in Soto and other authors, blurring the line between the power of human law and the presumed intentions of the legislator. It is clear that the emphasis of Lessius' analysis of *epieikeia* is on the former rather than the latter, taking it rather far away from its humanistic meaning. There is also, of course, no indication in Lessius that *epieikeia* could serve the purpose of extending a narrow rule, or that a lack of *ratio legis* could justify its intervention.

As an aside, one peculiarity of Lessius' theory of equity, and a consequence of his focus on equating *epieikeia* with the exercise of *gnome*, is that it seems to apply a further limitation to cases where *epieikeia* may take place. *Gnome* is an exercise of the virtue of *prudentia* which, for Lessius, would allow one to see whether there is indeed a clash between the words of the law and a higher virtue that would be violated by following them. It is therefore an essential requirement for the intervention of *epieikeia* that there should be the required exercise of *prudentia* to guide the judgment of whoever should depart from the words of the law,[707] whenever it is missing, either on account of the difficulties of the case, or on account of one's poverty of judgement, one should refrain from using *epieikeia*.[708] It is not clear whether Lessius envisaged this standard to be different in substance from the more orthodox one covering the distinction between certain, probable and doubtful judgment about whether the application of the words of the law would result in injustice.

4.2.4.2.2. Later theologians and Paul Laymann

While Lessius adopted a rather different line from that of Suarez, the latter's doctrine seems to have dominated the later development of *epieikeia* by seventeenth-century theologians. Martinus Bonacina (d. 1631) in his *De Legibus*, cites Suarez as the main source for his analysis, but seems to focus rather on the

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[704] Lessius, *ibid.,* pp. 687-8: 'quando lex propter suam generalitatem offensura esset aliquam virtutem, nobis eius verba sequentibus; illa virus [i.e. *epieikeia*] sufficiens est ut contra verba legis honeste agamus […]. Fatendum tamen est, quando aequitatem utimur, et a verbis legis recidimus intuitu altioris considerationis, nos id non facere principaliter ut nos menti legislatoris accommodemus (quamvis eo motivo uti possimus) sed ne aliam virtutem offendamus. Unde supra dixi, praetor virtutes particulares non esse distinctam virtutem (quae vocetur [*epieikeia*] seu aequitas) necessariam, sed quamvis necessaria non sit, est tamen utilis, ut quis etiam illo motivo operetur.' As hinted at the end of this passage, this peculiar analysis of *epieikeia* is part of the reason why Lessius comes to the conclusion that equity is not a single separate virtue, but rather a reason for the operation of other virtues.

[705] Lessius, *ibid.*: '[exampli gratia] si ieiunium graviter laederet valetudinem, gnome ex altioris principii consideratione iudicat verba legis non esse hic servanda, sed esse comendum; nempe ex eo, quod laedere valetudinem sit contra charitatem sui, et impediat obsequium Dei vel proximi; *quae cum sint maioris momenti, quam id, quod legislator in sua lege intendebat*, cessat obligatio verborum legis'. (my emphasis)

[706] See the reference to *quamvis eo motivo* (i.e. *mens legislatoris*) *uti possimus* at n.704 above. See also the reference to the intentions of the legislator alongside *aequum et bonum* at n.698 above.

[707] Lessius, *ibid.,* 687: 'illa virtus sufficiens est ut contra verba legis honeste agamus, *modo prudentia adsit, quae dirigat*'.

[708] Lessius, *ibid,*: 'ergo non est opus ad hoc aliqua peculiari virtute appetitus; sed solum prudentia, quae ostendat legis verba in hoc casu huic vel illi virtuti adversari; ac proinde tali modo et fine contra agendum ; quae prudentia multis deest, vel ob scrupolos, quibus impliciti, verbis legis ita praestringuuntur, ut rationes altiores ob quas in hoc vel illo eventu sequenda non sint, expendere nequeant ; vel ob iudicii tenuitatem.'

aspects of Suarez's doctrine dealing with the limits to the legislator's power, rather than his will, referring only to the presumed intention of the legislator as that which is relevant.[709] Johannes Malderus (d. 1633) instead followed Suarez's approach entirely accurately, distinguishing cases where the application of the law follows outside of the legislator's power from those where it falls outside his will.[710]

That said, the most original elaboration on Suarez's teachings is found in the account from the last theologian to consider *epieikeia* in our period, Paul Laymann (d. 1635). In his *Theologia Moralis* published in 1625, Laymann endeavoured to reconcile Suarez's approach to *epieikeia* even more clearly with both the medieval legal accounts of interpretation and the novel, humanist approach to *epieikeia* as *aequum et bonum*.[711] As we saw above, an important limitation of Suarez's account of *epieikeia* was that it left the distinction between *interpretatio restrictiva* and *epieikeia* unclear[712]. Laymann sought a different arrangement. First of all, like Suarez, Laymann did not see a perfect equivalence between *epieikeia* and interpretation – for instance, extensive interpretation would have nothing in common with *epieikeia*, which remained essentially confined to restrictions of universal rules.[713] Secondly, Laymann determined more clearly what the relationship was between *epieikeia* and *interpretatio restrictiva*. Probably under the influence of contemporary accounts of equity, Laymann relabelled *interpretatio restrictiva* as *restrictio legis secundum bonum et aequum*. Not every *restrictio secundum bonum et aequum* would be an instance of *epieikeia*, however. *Epieikeia* is defined more precisely by Laymann as standing to *aequum et bonum* not in a relationship of equivalence but in one of *species* to *genus*. This allowed Laymann to both make sense (i) of the accounts of *aequum et bonum* coming from humanist jurists, entirely focussed on the intentions of the legislator, and (ii) of the accounts of *epieikeia* by theologians like Cajetan and Soto, focussed on the power of human law.[714] In Laymann's account, when a case is brought outside the scope of a rule because the legislator would not have wished the law to apply to that case, that is a restriction according to *bonum et aequum*, but not one involving *epieikeia*. Instead, in a case where, regardless of the will of the legislator, the law would not be able to bind because it would exceed its power – either by

[709] Martinus Bonacina, *Opera Omnia* (1628), II, pp. 47-8: 'Cessante causa motiva, seu finali legis in totum, et respectu totius Communitatis, cessat obligatio legis, etiamsi non adsit aliud decretum […]. Tum quia lex non obligat ultra mentem, et voluntatem legislatoris, legislator autem non praesumitur velle obligare cessante in totum causa finali legis. […] Dixi, *respectu totius Communitatis*, ut adverterem obligationem legis non cessare, si causa cesset tantummodo respectu particularis personae […]. Hoc tamen intelligendum est, modo lex seu motivum legis cesset in casu particulari solum negative, non vero si cesset contrarie, ut bene docet Caiet[anus *ad* IIaIIae, q. 120, art. 1] […] et tunc certum est legem non obligare, cum Superioris praeceptum non obliget ad iniquitatem'.

[710] Johannes Malderus, *In Primam Secundae D. Thomae Commentaria* (1623), p. 423 : 'ut *epieikeia* uti subditus possit [...] unum ex tribus sufficit, ut vel observata Lex haberet aliquid illiciti, puta propter concursum Legis naturae versantis hic, et nunc propter mutatas circumstantias illud fieri quod Lex iubet : vel ut cederet in magnum gravamen observantis, quomodo iniustum esset velle obligare subditum, cum Lex humana debeat esse moralis facilitatis : vel denique, ut prudenter iudicare possis, noluisse hunc casum Legislatorem comprehendere. In quo tertio modo, maiori cautela est procedentum, consulendaeque circumstantiae, et praesertim usus, modus regiminis et mos interpretandi similes Leges, ut bene observavit Suárez lib. 6, cap. 7.'

[711] Paul Laymann, *Theologia Moralis* (1677), p. 82: 'Aequum et bonum opponitur juri stricto, verborum proprietati tenaciter adhaerenti: de quo sermo est [C.3.1.8] et [VI.5.*de reg. iur.,* reg. 90]. Hinc illud enatum; *Summum jus, summa injuria*.'

[712] See n.692 above.

[713] Compare Laymann, *ibid.,*, cap. 18 (on interpretation generally) with cap. 19 (on equity).

[714] Laymann, *ibid.,*, p. 82: 'Duplex est restrictio secundum aequum et bonum: I. per quam iudicatur, lege, voluntate testatoris etc. quamvis generalibus verbis posita, certum genus rerum, personarum omnino non comprehendi quia materia legis, alteriusve dispositionis; vel ratio eius adequata et intrinseca ad illud se minime extendit. [...] Altera restrictio secundum aequum et bonum dicitur epikeia, quae definiri solet; Benigna interpretatio, casum aliquem particularem, ob suas circumstantias, lege universaliter lata non esse comprehensum.'

violating natural or divine law, upsetting the public good, or subjecting a subject to excessive harshness– then this would be a case of restriction by *aequum et bonum* involving the exercise of *epieikeia*.[715] Unfortunately, Laymann's account of *epieikeia* is rather short, and he provides little more information beside this distinction. He remarks briefly that *epieikeia* is to be applicable mostly to cases where the law seeks to oblige one to do something (*legibus obligantibus*) rather than those that render a legal act (such as a contract, will, or marriage) invalid (*legis infirmantibus*).[716] He also provides greater detail as to when the application of *epieikeia* to the part of a law or a matter ancillary to it, may allow one to disregard the legal rule altogether.[717] Laymann's account of *epieikeia* is mostly valuable for finding a simple model incorporating the humanist and theological account of equity, his references to *aequum et bonum* and *benigna interpretatio* show that he was familiar with the language adopted by humanist jurists and the writers who followed them, and the place Laymann found for *epieikeia* within restrictions by *aequum et bonum* carved a satisfactory pocket for its intervention within the broader scope of equity in interpreting legal rules restrictively.

That said, and despite variations on it, Suarez's theory remained an influential source for theologians for a very long time. To provide an example from a very well known theologian, we can find Suarez's theory adopted, well into the eighteenth century, by Alphonsus Maria de' Liguori (d. 1783) in his *Theologia Moralis*.[718]

4.3. Legacy – a specific role for equitable interpretation?

As we have seen in this chapter, several attempts were made by theologians and lawyers of the later sixteenth and early seventeenth century to find a more precise role for equitable interpretation. These included the simpler approach of Bolognetus, which assimilated equitable interpretation with all interpretations *a sententia contra scriptum* available since the Middle Ages, the approach of Donellus and his followers who sought to subsume equity within already available medieval doctrines of interpretation, and the more complex approach of Suarez and later theologians, either adapting *interpretatio restrictiva* to fulfil the theological role of *epieikeia*, or carving a role for the latter distinct from *interpretatio restrictiva* altogether.

I have argued above that, while the majority of civil lawyers converged – by the end of the sixteenth century – towards the view of equity as interpretation put forward by Salamonius, most civil and canon law works dealing with equity throughout the period do so too briefly or vaguely to give us a clear idea of what role they thought equity should perform and whether it was distinct from other doctrines of interpretation. One of the main difficulties with assessing the success of the approaches identified in this chapter is

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[715] Laymann, *ibid.,* p. 83: 'Ad quem pertineat legem secundum epieikeiam interpretari? Respondeo et dico [quod si] manifestum sit, particularem casu generali legis sententia non comprehendi, sed aequitatis ratione excipi deberi; interpretationem hanc a quovis etiam privato secundum prudentiae legem fieri posse […]. Erit autem id manifestum primo; si lex servari non possit nisi violando aliam graviorem legem, puta naturalem, aut divinam: de quo regula traditur [...]. Secundo, si legis obsevatio a majore bono altioris virtutis impediat [...]. Tertio, si observatio legis, [e.g.] de jejunio, in aliquo casu nimis difficilis sit; ut certo constet Legislatorem non potuisse, vel saltem noluisse tanta severitate obligare'.

[716] Laymann, *ibid.* It is not entirely clear whether *leges infirmantes* is a synonym for *leges irritantes*, but it seems to be used in a similar context.

[717] Laymann, *ibid.,* pp. 83-4, nn. 5-7.

[718] Alphonsus Maria De' Liguori, *Theologia Moralis* (1849), p. 141

therefore that it is very often unclear which of them, if any, was influencing contemporary and later writers who mentioned equity in their commentaries. That said, insofar as the three main approaches identified here had rather different assumptions at their core, I have collected in this section the evidence I have found of their influence on later scholars. From the available evidence, it seems that the theories of Bolognetus and Donellus had a greater impact among civil lawyers, the latter in particular among treatise writers on interpretation, whereas the approach of Suarez and later theologians was more influential over canon-law writers, among whom it was felt well into the eighteenth century.

4.3.1. Later civil lawyers

4.3.1.1. General civil law commentaries

Among the more detailed treatments of equity identified earlier in this chapter, Bolognetus produced the only one wherein exercises of equity could both extend and restrict rules – the reason was rather trivial, Bolognetus thought equity simply provided a justification for the doctrines already recognised within the *ius commune*, one of which was that of *interpretatio extensiva*. Bolognetus' approach was therefore easier to reconcile with the earlier writings of Connanus and Duarenus, which had explicitly stated that extensions and restrictions of the law both constituted exercises of equitable interpretation.[719] There were a number among the later authors who dealt with equity as part of their broader civil law commentaries who agreed with these earlier statements by Connanus and Duarenus that equity should perform this role. Clear examples of this can be found in the Paduan jurist Angelus Matthaeacius (d. 1600), but also in Vinnius and Lyncker, both of whom we mentioned earlier.[720] Vinnius and Matthaeacius both explicitly maintained that equity performed both extensions and restrictions of the law, and Lyncker went so far as to mention *interpretatio extensiva* and *restrictiva* explicitly as exercises of equitable interpretation.[721] This view of the role of equity seems to have survived long enough to make it in some of the general late seventeenth and early eighteenth-century *compendia* of the *Usus Modernus*, like the 1670 *Jurisprudentia Romano-Germanica* by Struve and the *Introductio in Ius Digestum* of Justus Henning Böhmer (d. 1749), first published in 1704. Böhmer is very explicit in his account and tells us, after explaining the nature of *interpretatio restrictiva* and *extensiva*, that '[u]trumque sit ex aequitate, unde utraque dici potest interpretatio per aequitatem'.[722] These authors did not go in enough detail to specify whether associating doctrines of interpretation with exercises of equity was in any way to alter the way in which they ought to perform their function or whether, like Bolognetus, they thought equity ought merely to work as a justification for existing rules, without affecting their substance.

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[719] See [2.5.2-3] above.

[720] For Paduan humanism and Matthaeacius' role within it see Michele Pifferi, *Generalia Delictorum: Il «Tractatus Criminalis» Di Tiberio Deciani E La «Parte Generale» Di Diritto Penale* (2006), cap. 1.

[721] See also Angelus Matthaeacius, *De Via et Ratione Artificiosa Iuris Universi* (1591), *f.* 26v: 'Reliquum est, ut aequitatis utilitatem et effectus consideremus. Primus est, ut in legibus ex aequo et bono interpretandis, [*epieikeia*] utamur, illas rectae rationi accommodantes. Secundus eandem ad leges ampliandas, et ad similes species extendendas, quae legibus non contineantur, summopere exigit. Tertius cogit nos, ut in his, quae neque ex verbis, neque ex sententia legis colligi possunt, id sequamur, quod aequitas suggerit, etiam si iure scripto destituamur. Quartus, ut contra verba legis non contra mentem eius aliquid interpretemur.' Vinnius and Lyncker are referred to at n.432 and 434 above respectively.

[722] Georg Adam Struve, *Jurisprudentia Romano-Germanica* (1694), bl. 1, tit. 2, nn. 18-9. Justus Henning Böhmer, *Introductio in Ius Digestum* (1741). p. 5.

What can be said with some more certitude about these accounts of equity is that they were not convinced by the arguments of those legal writers who, influenced by scholastic theology, had limited the operation of equity to the restriction of rules.[723]

That said, it is clear that Bolognetus' account was to a certain extent directly influential for later writers, and authors can be found making their reliance on him explicit. One example is Friedrich Martinus (fl. ca. 1576-1592). Martinus had first published in 1576 a philosophical treatise on Aristotle's *epieikeia* as found in the *Ethics*, while he was a professor of philosophy in Ingolstadt; he then in 1596 published a similar, this time juridical treatise, based on a *disputatio* of *theses* on the same topic when he became a professor of law in Frankfurt. The philosophical work and the juridical one are closely aligned in the message they convey about equity, but in the later treatise, Martinus cites Bolognetus explicitly, and like the latter also draws on scholastic theologians like Azpilcueta and Covarrubias, to arrive at the conclusion that the recognised *ius commune* doctrines of *interpretatio extensiva* and *restrictiva* are equitable interpretations insofar as they interpret the law in accordance with the intention of the legislator.[724] Bolognetus' view was therefore one that, at least as far as my survey of later civil law commentaries is concerned, was often consistent with, and sometimes cited explicitly as a source in the theories of equity found in later civil law commentaries.

The accounts of equity in later civil law commentaries just mentioned were clearly at odds with the more limited role recognised by the other authors examined in this chapter for equity, as meant. However, one should not forget that equity remained throughout the early modern period a contested legal concept, and no single view earned universal approval. Indeed, as dealt with in the second chapter, some views expressed about equity by later authors are hard to square with any of the existing traditions we have dealt with.[725] Consistently with this, it is possible to find some later civil law commentaries adopting a more limited view of equity, inconsistent with the account of it provided by Bolognetus. I have found two examples works that excluded a role for equity in extending rules explicitly, and in that respect they seem particularly well aligned with the arguments of Donellus. An unambiguous source in this sense is the *Disputatio Iuris Civilis* of Leopoldus Hackelmann (d. 1619), published in 1593, in which we find Donellus' view relied upon word for word.[726] What is perhaps striking is that Hackelmann was a Lutheran jurist who relied heavily on the work of Oldendorpius for other aspects of his legal analysis, but the extensive writings of the latter on equity both in Latin and in vernacular went unmentioned when it came to equity.[727] The second example are the writings of Samuel von Pufendorf (d. 1694), in particular his *De Officio hominis et civis* first published in 1673. Pufendorf discusses equity in his chapter *De Interpretatione*, where he seems to see it as a particular instantiation of *interpretatio restrictiva*. Pufendorf divides *interpretatio restrictiva* in cases where the intention of the legislator was missing from the time the law was created (*ex defectu voluntatis originario*) and cases where the intention to bind only ceased upon emergence of a particular case which is at odds with

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[723] See [4.2.3-4].
[724] See for equity's role in extending laws, Fredrich Martinus, *De Summo Iure et Aequitate Theses Iuridicae* (1623), th. 14, where he refers to Aristotle, Azpilcueta and Bolognetus.
[725] See [2.5.4] above.
[726] Leopoldus Hackelmann, *Disputatio Iuris Civilis Prima De Principiis Iuris* (1593), titt. 33-36.
[727] See for instance, Leopoldus Hackelmann, *Theses Disputationis Tertiae Secundae Partis Pandectarum* (1594), titt. 33-5, 39-40.

the legislator's will (*ex casus emergentis cum voluntate repugnantia*). Aside from the consistency of this distinction, he sub-divides the latter kind of cases in those where one can gather that the legislator's intention is at odds with the case by natural reason (*ex naturali ratione*), or by some sign of the legislator's will (*ex aliquo signo voluntatis*), specifying that the first case occurs if following the words of the law would lead one to depart from equity unless certain cases were exempted from its application. He also defines equity as a correction of that in which the law suffers from a defect of universality (*ob universalitatem*). Pufendorf may have been influenced by Donellus, but puts much more emphasis than the latter on the link between this kind of restrictive interpretation and the *epieikeia* of theologians, emphasising that 'ad isthanc tamen aequitatem decurrere non licet, nisi sufficientia indicia subigant. Inter quae certissimum est, si adpareat, violatum iri legem naturalem, ubi presse quis literam legis humanae sequi velit. Proximum ad hoc, si non quidem illicitum sit verba legis sequi; sed tamen rem humaniter aestimanti id nimis videatur grave et intolerabile, sive in universum omnibus hominibus, sive certis personis'.[728] In this way, Pufendorf may have sought to reconcile the great emphasis placed by Grotius – a known influence over his work[729] – on the theological writings of Soto and Donellus' attempt to fit equitable interpretation within readily recognisable cases of *interpretatio restrictiva*.

4.3.1.2. The case of treatises on interpretation

While its impact on general civil law commentaries was rather limited, it seems that Donellus' theory enjoyed most success, at least in the short term, in influencing treatises focussed on legal interpretation. This is evidenced most clearly by looking at two treatises on interpretation published shortly after the publication of Donellus' commentaries. One is the treatise *De Interpretatione Iuris* of Valentin Wilhelm Forster (d. 1620) published in 1613, and the other is the *Tractatus de Authoritate et Interpretatione* of Helfrich Ulrich Hunnius (d. 1635), published in 1615.[730] Hunnius' account is a better developed version of that found in Valentin Wilhelm Forster's, and it is therefore more expedient to deal with Hunnius' only.

Hunnius' account starts, rather conventionally, with reference to the role of equity as interpretation, related to cases of interpretation of the law beyond its letter and in favour of its *sententia*.[731] Hunnius followed Donellus in reading equity as a sub-species of interpretation, and he categorised the kinds of *interpretatio restrictiva* available in a similar way. For Hunnius, there are seven ways in which one may interpret

[728] Samuel Pufendorf, *De Officio Hominis et Civis*, (1758), pp. 379-81.
[729] See generally Gordley, *The Jurists*, ch. 5.
[730] Wilhelm Forster, *Interpretes Sive De Interpretatione Iuris* (1613), pp. 219-342. Helfrich Ulrich Hunnius, *Tractatus de Authoritate et Interpretatione* (1615).
[731] Hunnius, *ibid.*, pp. 2-3: 'Nam primo Constantinus Imperator in [C.3.1.8] [...]. Quae verba ad iudices dirigi, vel ex eo colligitur, quod lex illa postia est sub eo titulo, qui de iudiciis inscribitur: Competit itaque iudicibus potestas ex aequitate ius interpretandi, et propter aequitatem a scripto et stricto iure recedendi. [...] Et sane comprobant id ipsum omnes etiam Regulae iuris, quibus docetur, qualiter una lex ex altera explicari, restringi, vel extendi debeat. [...] Nec tamen ita his iura interpretari permissum existimari debet, ut quovis modo, ac pro lubitu suo, iura flectere et ex suo arbitrio proprioque cerebro interpretari valeant; sed ut ex ratione, sententia et regulis iuris rectaque ratione, id quod in legibus obscurum est, explanent. [...] Neque huic sententiae quicquam refragatur quod Constantinus [in C.1.14.1 ait]. Sicut nec illud quod Valentinus ac Marcianus scribunt in [C.1.14.9] et quod Leo Imperator ait in [C.1.14.10]. Quodque Justinianus prolixa oratione testatur in [C.1.14.12.2]. Et denique quo Ulpianus in [D.40.9.12.2] aperte profiteatur.'

a law restrictively, and, just like in Donellus, equity is but one of them.[732] The other six are (i) to find that the *ratio legis* is narrower than its words, (ii) to find inconsistencies with preceding or following parts of the same law, (iii) to deduce it from another law, or (iv) from the subject matter, or (v) on account of an absurd result and, finally, (vi) from the proper reading of the words. Hunnius agreed with Donellus that equity is a sub-kind of interpretation concerned with avoiding the application of rules in circumstances where they would cause injustice.[733] The reasoning is straightforward for Hunnius, C.5.14.8 and D.1.3.18 are evidence that Emperors always intend their laws to achieve justice and to be benign. The reasoning is the same as in Donellus – equity as *epieikeia* is merged with its medieval concept as justice and mercy and its role is confined to the amendment of law beyond its words (the *epieikeia* element) on account of the injustice or harshness that applying the rule would cause (the medieval *aequitas* element).[734]

Further, just like Donellus, Hunnius argues that equity operates always subject to the intentions of the legislator. If doing equity would be contradicting the clear meaning of the words of the law or an expressly stated *ratio* legis, the law will have to be followed regardless of the unjust result that would follow. Interestingly, in explaining how the words of the law may indicate the clear intention of the legislator, Hunnius draws on the writings of Bolognetus – borrowing the latter's argument that equity will not be available if the letter would have to be vitiated in order to accommodate the equitable result.[735] In all cases where an equitable interpretation is not available for these reasons, one will need another kind of interpretation which simply roots out the law as altogether inequitable, performed by the legislator.[736]

There is another respect in which the writings of Hunnius may have been influenced by Bolognetus. The real development Hunnius applied to Donellus' theory, was in arguing that interpretations of equity would also apply in cases of *interpretatio extensiva* – thus taking a further step away from the doctrine of theologians, without however assimilating equity with all interpretations beyond the letter.[737] The argument is not developed deeply enough to clarify exactly how Hunnius thinks equity would operate – the idea that the application of a broad rule to a particular case may cause injustice is relatively straightforward, but a law causing injustice by failing to cover a case is not. The conceptual difficulty underlying equity's capacity to cause injustice by omission was precisely what held late scholastic theologians back from

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[732] Hunnius, *ibid.*, p. 9: 'porro quaeritur, quibus modis deprehendatur legis sententia angustior verbis? Et quamvis sint qui id nulla ratione aut regula certo definiri posse existiment: Tamen putarim id ex sequentibus circiter caussis diiudicari posse.'

[733] Hunnius, *ibid.,* pp. 14-5. In the 1630 edition of this work, references are added for this statement to Johannes de Castillo (Juan Bautista del Castillo y Sotomayor, fl. 1617-28), *Tractatus de coniecturis, Vol. 4*, cap. 3, n. 71 (this reference is inexact and I have not found the section of this work which Hunnius had in mind), Hartmann Pistoris, *Quaestionum Iuris Tam Romani Quam Saxonici* (1584), quaest. 44, p. 694 (Pistoris simply mentions that contracts have to be read *ex bono et aequo* which means to read their words narrowly, even improperly) and, predictably, Donellus' *Commentarius Iuris Civilis*, 1.13.

[734] Hunnius, *ibid.,* p. 15: 'Id autem sensisse et voluisse intelligitur, quod aequum, quod benignum, quod quae humanum est: siquidem praecipientibus *Theodosio et Valentiniano* Imperatoribus in [C.5.14.8]. Conditores legum aequitatis convenit esse fautores: Indeque *Celsus Iurisconsultus* benignius ait leges interpretandas esse, quo voluntas illarum conservetur [D.1.3.18]. [...] Unde colligitur officium aequitatis, in eo consistere, ut id, quod scriptum est, laxet, remittat, restringat, vel distinguat, prout caussae vel circumstantiae postulant.'

[735] Hunnius, *ibid.*, p. 19. Confront with Bolognetus, n.551 above. The argument in Hunnius is supported by reference to D.33.10.7.

[736] Hunnius, *ibid.,* pp. 4-5.

[737] Hunnius, *ibid.*, pp. 67-8.

thinking that *epieikeia* could be used to extend rules.[738] There are two ways in which Hunnius sees equity as applying in this case. In a sense, where justice would not be served if a rule did not cover a certain case, then the appropriate rule can be extended to it – this would presumably be a case not governed by any other rule. In the second sense, a rule may be extended to another case by equitable interpretation in cases where the 'same equity' applies. While the second argument would have potential for further development, Hunnius does not explain what he means by a law's equity, and how it would differ from – most problematically - an extension of the law's *ratio*.[739] In fact, the example adduced by Hunnius at the end of this paragraph, drawn from D.9.2.32, seems to be entirely explainable in terms of extending one rule's *ratio* to a case covered by it, but not by the letter. The reasoning is as follows. There was in Roman law a rule that, where a group of slaves belonging to the same master joined up as a gang of thieves to steal something from another, the master's liability would be capped at the amount which would have been owed if one slave alone had committed the theft. In D.9.2.32 that rule is extended to a case where a gang of slaves damages another's property – according to Gaius, 'the reasoning in the action for theft is that the owner of the slaves should not lose his whole household because of one delict; and the same reasoning being similarly applied to a case of wrongful damage, it follows that the same assessment of damages should be made, especially as this form of delict is often less serious'.[740] Gaius seems specifically to be extending the *ratio* of the rule for theft to the case of wrongful damage, and it is not clear where Hunnius sees a difference.[741] One possibility is that, since the original rule for theft excluded the application of the normal assessment of damages on account of 'equity' (in the sense of justice), Hunnius was tempted to view the extension of such an exclusion as an extension of the 'equity' on account of which the first rule was introduced. The reasoning is not illuminated further. Hunnius also adopts Duarenus' view of the distinction between natural and civil equity as relating to the source of justice, Hunnius specifically distinguishes the two depending on whether one should look to justice (or injustice) by reference to natural law, or by reference to public utility.[742]

The adoption of Donellus' approach in treatise such as that of Hunnius and Forster may have been encouraged by the fact that Donellus' views fitted very neatly existing approaches to interpretation – indeed, as we have seen it was very close to certain statements about *interpretatio restrictiva* made by certain medieval

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[738] Though it is worth noting that some theologians, like Azpilcueta, rejected that view and explicitly denied that using *epieikeia* to extend rules posed conceptual difficulties. See [3.3.2.1] above.
[739] Hunnius, *ibid.*, p. 67: 'Videamus nunc quemadmodum stricta legis verba ex aequitate ad alios casus et personas porrigantur. Qua de re hiuismodi regula traditur: Legem de certa specie, casu, caussa et persona scriptam extendi ad alias, cum id fieri aequitas postulat. Cum enim in toto iure aequitas dominetur ac principem locum obtineat [C.3.1.8, D.50.17.90] [...] certe consequens est, ut id omne leges praecipere, permittere ac prohibere credantur quod aequitas dictat, licet verbis in lege non reperiantur expressa. Ac proinde si aequitas latius se diffundat quam verba legis, tum facienda est extensio legis, stricte loquentis ad alias personal vel casus, in quibus par aequitas militat'.
[740] D.9.2.32. Translation from Watson's *Digest*.
[741] Hunnius, *ibid.*, p. 68: 'Qua propter cum ex furto, ab alicuius familia admisso, non in singulis servis daretur poenae persecutio; sed sufficeret id praestari, quod praestandum foret, si id furtum unus liber fecisset: eo quod aequum et humanum videretur, ex uno delicto tota familiam dominum non privari: Eademque aequitatis ratio in delicto quoque damni iniuriam dati obtineret, concludig Iurisconsultus Gaius id quod ex aequitate in furto observatur, idem quoque in damni a familia, iniuriam dato ob parem aequitatem recipiendum [D.9.2.32].'
[742] Hunnius, *ibid.*, p. 18.

commentators.[743] It has already been noted that treatises on interpretation from early modern times onwards generally featured – when dealing with interpretations that sought to contrast the words of the law with the intention of the legislator – a list of the available evidence from which to derive such an intention, and simply adding equity in Donellus' sense as such an evidentiary source to the list would have seemed relatively straightforward.[744] The argument is necessarily speculative, but the other sources explored above seem less likely candidates to provide a place for equity within treatises on interpretation. That of Bolognetus would not have contributed much in terms of substantive content, merely providing a label for existing arguments and doctrines of interpretation. That of authors seeking to align their theories with scholastic theology to a greater extent, such as Suarez or Laymann, would have required an overhaul of the orthodox treatment of restrictive and extensive interpretation.

However, it is not clear that Donellus' view maintained its hold on treatises of this sort for very long. My analysis has been confined to examining the main works of this sort for the later seventeenth and eighteenth century, and a more thorough analysis will be needed to corroborate this point further. If one looks at later treatises on interpretation, it appears that the attempts explored above to find a convincing role for equity alongside other theories of interpretation was not extremely successful. The *Tractatus de Scientia Interpretandi* of Johann von Felden (d. 1668), for instance, discusses equity in no place – not in relation to *interpretatio restrictiva* or to any other kind of interpretation.[745] The same can be said for the *De principiis interpretationis legum adaequatis*, published in the 1730s by Johann Holderrieder (d. 1794).[746] More research on the later development of equity is required to clarify this point, but this does not seem related to a change in treatises on equity specifically which, as late as the 1740s, continued to deal with equity as a concept of legal interpretation.[747]

4.3.2. Later canon lawyers

I deal separately with later canon law sources. The reason for this is that canon law accounts of equity were influenced by theological sources – and in particular by the writings of Suarez and later theologians – to a much greater extent than those of civil lawyers. Indeed, while we have seen in the previous sections that most later seventeenth and eighteenth-century civil law works were dealing with equity following the imprimatur of either Donellus or Bolognetus,[748] the commentaries on canon law of the later seventeenth and eighteenth century, became very clearly reliant on the writings of theologians to support their accounts of equity. These authors seem to have been influenced by those later theologians who had sought to distinguish *epieikeia* from other types of interpretation, or who, like Laymann, had sought to carve a more specific role for theological *epieikeia* within existing doctrine.

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[743] Compare Donellus' approach with that of Baldus at [1.1.4.2] above.
[744] See Schröder, 'The Concept and Means of Legal Interpretation', pp. 92-4, 96-9.
[745] See e.g. the chapter on *interpretatio restrictiva* at Johann von Felden, *Tractatus de Scientia Interpretandi* (1689), pp. 961-8.
[746] Johann Holderrieder, *De Principiis Interpretationis Legum Adaequatis* (1736), p. 33.
[747] See e.g. Leonard Carlier, *Dissertatio Inauguralis Juridica de Aequitate* (1743), pp. 6-10.
[748] See [4.3.1.1] above. One exception in this sense may be Pufendorf – and this may be attributable to the influence of Grotius. See n.728 above.

One of the earliest works in this sense is the *Summa Iuris Canonici* of Johannes Streinius (d. 1662), published in 1658.[749] Streinius refers almost exclusively to theologians in his account under the title *de aequitate iuris*, and, though he refers to equity as a *benigna interpretatio* of the law, his discussion of it is entirely consistent and derived from that of Suarez – sub-dividing, as Suarez does, between taking laws outside of the power of the legislator, or of his will, and not mentioning *interpretatio restrictiva* at all. Streinius tells us that 'omnis enim interpretatio aequitas est sed non omnis interpretatio aequitas, seu epyeikia [...]. Igitur non secundum verba legis, sed aequitatem seu [*epieikeiam*] iudicandum est in his quinque casibus. Primus est quando lex, aut simpliciter aut secundum aliquid ratione loci, temporis aut personae redditur iniqua. Secundus, quando observatio legis obesset bono communi. Tertius cum praesumere prudenter licet, ipsum legislatorem, si adesset, contra tenorem legis suae acturum, vel quod petitur, concessurum esse. Quartus, cum apparet, aliam exitisse auctoris mentem. Quintus denique quando de dispensatione Principis constat.'[750]

Another similar source is the Franciscan theologian and canon lawyer Anaklet Reiffenstuel (Johann Georg Reiffenstuel d. 1703), who, in his *Ius Canonicum Universum* published at the turn of the century identified *epieikeia* as a *benigna interpretatio*, but defined it entirely by reference to the Suarezian approach to equity.[751] Reiffenstuel puts it as follows: '*Epicheia* differt ab interpretatione legis potissimum in hoc, quia per hanc interpretamur verba legis, quando sunt obscura, seu ambiguum sensum reddunt: per Epicheiam vero interpretamur mentem Legislatoris, ubi constat de universali verborum sensu, dubitatur autem de mente Legislatoris, utrum nempe is talem casum particularem ob certas circumstantias voluerit, vel potuerit comprehendere sub generali locutione legis.'[752] The distinction from interpretation, and the identification of the two branches of *epieikeia* relating to the power and the will of the legislator, are unmistakably similar to Suarez's theory.

Some canon lawyers seem to have followed Suarez more loosely, perhaps seeking to find some consistency with Donellus' theory of equity. One example is the Jesuit canon lawyer Francis Xavier Schmalzgrueber (d. 1735). In his *Ius Ecclesiasticum Universum*, Schmalzgrueber identified *epieikeia* with a type of *interpretatio restrictiva*, but used Suarez's approach to equity to define its content. He said that an 'interpretatio restrictiva legum per Epiikiam' can be had 'in his tribus casibus. 1. Si alioquin in casu particulari Lex evaderet iniqua, et praeciperet aliquid illicitum [...]. 2. Si lex in casu particulari praeciperet aliquid nimis arduum, et supra potestatem humanae Legis [...]. 3. si prudenter credi possit, quod Legislator in hoc, vel illo

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[749] See Ioannes Streinius, *Summa Iuris Canonici Prolegomena* (1659), pp. 45-8: 'Aequitas, seu [*epieikeia*] vocatur moderatio iuris, mitigatio legum, ius temperatum [...]. Laxare dico, non per dispensationem, sed benignam interpretationem, a [Iodocus Damhouderius, *Praxis Rerum Criminalium* (1555) cap. ult.] ita definitur, "Aequitas est temperata iustitia cum dulcedine et misericordia facta consideratione diligenti, et discretione circumstantiarum" [...]
[750] Streinius, *Summa Iuris Canonici Prolegomena*, pp. 46-8.
[751] The distinction, for Reiffenstuel (and probably Suárez too) seems to have been centred on the fact that *interpretatio restrictiva* sought a plausible construction for the words of the law, whereas *epieikeia* simply dealt with their binding power, regardless of their meaning. See Anaklet Reiffenstuel, *Jus Canonicum Universum* (1700), p. 156.
[752] Reiffenstuel, *Jus Canonicum*, p. 156: 'Epicheia differt ab interpretatione legis potissimum in hoc, quia per hanc interpretamur verba legis, quando sunt obscura, seu ambiguum sensum reddunt: per Epicheiam vero interpretamur mentem Legislatoris, ubi constat de universali verborum sensu, dubitatur autem de mente Legislatoris, utrum nempe is talem casum particularem ob certas circumstantias *voluerit, vel potuerit* comprehendere sub generali locutione legis' (my emphasis).

casu Lege sua non voluerit obligare.'[753] The distinction between an intervention of *epieikeia* that takes a case outside of the power of the legislator and one that takes it outside of the will of the legislator is clearly there and derived from Suarez's theory, but Schmalzgrueber does not distinguish it from *interpretatio restrictiva*. Like Donellus, he seems to identify it as a species of restrictive interpretation, though he clearly thought that the writings of theologians formed a better basis on which to ground that doctrine. Schmalzgrueber's approach of merging to some extent interpretations by equity and *interpretatio restrictiva* is sensible if we recall that the distinction Suarez posed between *interpretatio restrictiva* and *epieikeia* was but a tenuous one.[754] Indeed we have seen that Suarez's successor Laymann had already rejected the distinction, and it is possible that the latter was himself an influence over Schmalzgrueber for his decision to do the same.[755]

This final part of my study only scratches the surface of later seventeenth and eighteenth-century writings on equity by canon lawyers. I have mentioned in the second chapter that canon lawyers can be found in this period simply adopting the position set out by humanist jurists earlier, without expanding on the role of equitable interpretation or *epieikeia*.[756] And indeed, at least two of the authors quoted in this section borrowed the identification of *epieikeia* with *benigna interpretatio* from earlier humanist accounts of equity. Further research will be needed to determine how far the theories of Suarez, or of other legal writers juxtaposing scholastic theological and civil law accounts of equity, influenced canon law *Summae* and commentaries in the later period. However, the available evidence suggests a strong link between the more theologically inclined explanations of equitable interpretation found in Suarez and Laymann and canon law writings.

[753] See Franz Xavier Schmalzgrueber, *Jus Ecclesiasticum Universum Tomus Primus* (1738), p. 68.
[754] See n.692 above.
[755] See n.712 above.
[756] See [2.5.3] above.

Conclusion

In his work on legal scholarship in the age of Erasmus, Guido Kisch suggested that equity may have been one of the concepts most deeply affected by the innovations of legal humanism. It is possible to say with confidence, at the end of our excursus, that his inkling was well founded. From the publication of Budaeus' *Annotationes in Pandectas* onwards the concept of equity became for the first time the object of detailed study in legal treatises and commentaries. As we have seen throughout this thesis, this was caused by the association of *aequitas* and *epieikeia*. The introduction of this equation by legal humanists triggered a change in the way equity was perceived by civil and canon lawyers that was as radical in its break with the past as it was swift in its spread among legal writers around Europe.

I have examined above both the cause for this change and the consequences of it. The cause, I have argued, was the eagerness of humanist jurists to align their legal commentaries with the work of fellow scholars in the field of humanistic philology, drawing in particular from those early modern Latin editions of Aristotle that translated references to *epieikeia* with the binomial pair *aequum et bonum*. The arguments of humanist jurists implied that the medieval *ius commune* tradition on *aequitas* was based on a misunderstanding of the meaning and nature of equity. By the mid-seventeenth century, the view that *aequitas* and *epieikeia* were closely related, or indeed synonymous, terms was almost unanimously accepted among civil and canon lawyers.[757] The main consequence of this was that early modern jurists had to find a new role for *aequitas* as a legal doctrine. The first generation of writers on the topic was provided with a clean slate to do so, for it could find but little guidance in the medieval legal tradition on the topic. However, while it undermined the legacy of medieval legal scholarship on *aequitas*, the assimilation of equity and *epieikeia* opened the door to interactions with another branch of learning, that of the writings of scholastic theologians on *epieikeia*. A second consequence of the conceptual change examined in this thesis was therefore the breakdown of the barrier that had separated lawyers and theologians on the subject of equity. Contact between those two groups of scholars was neither constant nor consistent - not all legal writers seized the opportunity to refer to the writings of scholastic theologians to cast light on the nature of equity and those that did not use them for the same purposes. The same is true of theologians drawing on lawyers. However, a number of lawyers and theologians could, by the end of the sixteenth century, refer to both traditions as belonging to one branch of scholarship - borrowing elements from either in the construction of their theories of equity.[758] The effects of the early modern association of *aequitas* with *epieikeia* were arguably permanent, certainly long-lasting. Well into the eighteenth century, legal writers can be found drawing on the theories of equity examined in this thesis, and treating theological and legal scholarship of equity as one branch of learning.[759]

I have argued that the many lawyers and theologians came to agree, by the end of the seventeenth century, that the operative role of equity, most of the time interchangeably referred to as *aequitas*, *aequum et bonum* or *epieikeia*, was that of a doctrine of interpretation of the law beyond the letter. When it came to find

[757] See [2.4.1] above.
[758] See [3.3.2] and generally chapter 4 above.
[759] See [2.4.1], [4.3] above.

a definition of exactly what circumstances would warrant the intervention of equity, views differed. Lawyers tended, as we have seen, to emphasise the role of the intention of the legislator. Theologians emphasised instead the limits of the power of human law. However, we have seen theologians like Azpilcueta, Covarrubias and Molina favouring the approach of lawyers, and vice versa authors like Mendoza, Turaminus and Grotius preferring the views of theologians. As the two traditions merged together, some writers chose to adopt a hybrid approach – Donellus sought to fit the approach to *epieikeia* of theologians within the bounds of the traditional *ius commune* doctrine of *interpretatio restrictiva*. Suarez on the other hand sought to carve a space for the *aequitas* of lawyers within theological theories of *epieikeia*. It does not seem that, at least by the early eighteenth century, a single approach had gained universal approval. Some clusters of scholars can be found favouring one or the other, or indeed none at all. Eighteenth-century canon lawyers were attracted by the approach of Suarez. civil law treatise-writers on interpretation to Donellus. Other legal writers like Domat could instead put forward theories of equity based on no previously recognised role or theory.[760] What emerges from this analysis is that, while from later sixteenth century onwards an understanding had emerged among the majority of legal and juridico-theological writings about the role of equity at a rather high level of generality, the details of its nature, role and application remained contested for the entirety of the early modern period, and probably beyond.

In conclusion, I will deal briefly with what this research implies for broader scholarship encountering the concept of equity, and with the questions which this thesis has left unanswered.

Regarding broader scholarship dealing with equity, as anticipated earlier in the introduction to this thesis, the main flag raised by this research is that it is important for early modernists to bear in mind the great divide that existed between the analysis of equity by legal scholars before and after the sixteenth century. The dividing line moves forwards or backwards in time depending on the circles of scholars concerned. The majority of civil lawyers had turned their back to the medieval learning on equity by the second half of the sixteenth century. Canon lawyers, with the exception of those canon lawyers who were also theologians, seem to have taken about a century longer to adopt *epieikeia* as their model for equity.[761] It would therefore be a mistake for scholars to treat the two periods, medieval and early modern, as enjoying some kind of scholarly continuity when it comes to *aequitas* or *epieikeia*. It would also be a mistake to assume that early modern lawyers all spoke of equity as part of a common discourse and understood it in exactly the same way - different authors could easily understand equity extremely differently depending on whether they were influenced by the early humanistic writings on equity, by the writings of theologians, by both or indeed by neither.

To provide an example of the relevance of this point, it may be useful to engage in a short digression and refer to the contemporary research being carried out on the adoption of the concept of equity as *epieikeia* in English early modern legal scholarship. In England as in Europe, equity enjoyed a revival through the early modern period, when it came to be used by legal scholars to explain the jurisdiction

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[760] Cf [2.5.2], [2.5.3], [2.5.4], [4.3.1.1], [4.3.1.2] and [4.3.2] above.
[761] See [2.5.2] and [2.5.3] above.

of courts of equity or exercises of statutory interpretation. As mentioned in the introduction to this thesis, David Ibbetson has shown in recent research that English legal writers relied heavily on contemporary *ius commune* sources to construct their theories of equity.[762] Part of his argument is that these authors never succeeded in developing a consistent theory of equity – it was a contested concept across early modern England to start with, and 'the incorporation of foreign fragments into English texts served only to add to the confusion.'[763] One of the sources Ibbetson refers to in the course of his study is an anonymous manuscript which 'giv[es] express citations to Duarenus, Oldendorp, Covarruvias, Baldus and Zasius' as references to for its theory of equity'.[764] Based on our excursus throughout this thesis, it is clear that these are all authors who would have understood equity rather differently: Covarruvias and Duarenus as an interpretation of the law in accordance with the intention of the legislator;[765] Zasius and Baldus in the more traditional, medieval sense of justice;[766] Oldendorpius as the provision of justice in accordance with the circumstances of a particular case, whether or not amending and interpreting a written rule.[767] Was the anonymous author aware he was drawing on theories that were inconsistent with each other? Did he engage with them meaningfully? These questions are impossible to answer without referring back to the context of early modern *ius commune* scholarship on equity.

Coming now to matters for further research, there are a number of issues that this thesis raises, but which went beyond its scope and remain unanswered.

First is the question of whether the sixteenth-century assimilation of equity and *epieikeia* had any impact in practice. One way to answer this question is to ask whether authors who dealt with equity at length in their writings put their theories into practice in their *consilia*. This alone went beyond the scope of this work, but it would in any case give only part of the answer – a fuller account can only be sought by asking whether courts more generally in the jurisdictions examined made any meaningful substantive use of equity as *epieikeia*. It should be noted that, in general, studies on the practical uses of equity have not been forthcoming. Indeed, despite the detailed coverage of the *ius commune* development of medieval approaches to equity,[768] little is known of its use in practice.[769] For the early modern period, an interesting attempt to trace uses of equity among sixteenth and seventeenth-century German-speaking sources is that of Schröder. Results from his sample show uses of equity to have been few and rather superficial, but it should be noted that Schröder did not acknowledge as the basis of his study that the main role of equity would in this time have been one of interpretation, and he – for instance – dismisses a source without further analysis because 'es handelt sich also nicht um eine Entscheidung contra oder praeter legem,

[762] See n.9 above.
[763] Ibbetson, 'A House Built on Sand', p.77.
[764] See Ibbetson, *ibid.*, p. 68.
[765] See [2.3.4] and [3.3.2.2] above.
[766] See [1.1.2] and [2.4.3.1] above.
[767] See [2.3.3.2] above.
[768] See nn.15-16 above.
[769] One of the few attempts to trace uses of medieval equity in practice is found in Sarah B White, 'Procedure and Legal Arguments in the Court of Canterbury, C. 1193-1300', Unpublished PhD Thesis, St Andrews, Dec 2017. White found no meaningful uses of equity in her sources.

sondern nur um eine [...] 'billige' Vertragauslegung'.[770] One cannot therefore rule out that further, better focussed research on early modern uses of equity as a doctrine of interpretation might yield more interesting results.

Secondly, a question related but not identical to the previous one concerns the use of equity in the context of courts, processes and judgments 'by equity'. We have dealt in the first chapter with the role that equity played in explaining judgments *ex aequo et bono* in the medieval period. What seems striking about uses of equity throughout early modern treatises and commentaries is the lack of any reference to this aspect of it. The reason may be straightforward. Once equity is understood as a doctrine of interpretation of the law beyond the letter, and as one to be exercised by any judge and in whatever court, then the idea of courts or judgments 'of equity' becomes either untenable or redundant. We have encountered one such argument being put forward explicitly by Turaminus, who argued that the association of equity as *epieikeia* was of no relevance to judgments *ex aequo et bono*.[771] I have not, however, in the course of my own research dealt specifically with such courts or jurisdictions – a study of a different nature would be required in order to do this thoroughly.

It should be noted that the little insight one can have on the matter suggests that the impact, if any, was not great. First, I have referred above to Charles Donahue's work on Stracca's *De Mercatura* – an early modern author dealing with courts of merchants, often referred to as courts of equity. Donahue shows that Stracca does refer to the early modern development of equity as *epieikeia* by humanist jurists, but then reverted to the medieval treatment of courts of equity by Bartolus and Baldus when it came to deal with substantive doctrine. As he puts it, 'the humanistic material contributes only at a rather high level of generality.'[772] Secondly, I have in the course of my own research encountered one author engaging with the early modern scholarship on equity as *epieikeia* in the context of proceedings by equity. The source in question was a *consilium* by Jacobus Menochius (d. 1607).[773] The matter Menochius advised on concerned a *compromissum* seemingly referring a dispute to arbitration, specifying that the matter should be adjudicated *ex aequo et bono*.[774] Menochius referred to Joannis Baptista Perusinus' (d. 1483) *Tractatus de Arbitris*, where Perusinus discusses the effect of adding the words 'quod secundum aequitatem, vel de aequitate procedatur' to a *compromissum* appointing an arbiter.[775] Menochius then proceeded to refer to the early modern scholarship linking equity/*aequum et bonum*/*epieikeia* and interpretation of the law according with the wishes

[770] Schröder, 'Aequitas', pp. 279-80.
[771] See n.595 above
[772] See Donahue, 'Courts of Merchants', p. 5.
[773] Jacobus Menochius, *Consiliorum Sive Responsorum Liber Tertius* (1625), cons. 120.
[774] See, Menochius, *ibid.*, 102: 'Cum gravissimae iam diu agitatae causae inter Illustrissimus Comites Corrigienses iudicium sit tandem pro bono et aequo diffiniendum a Caesarea Maiestate [...] ex compromisso in Maiestatem Caesaream facto, ut pro bono et aequo causam hanc diffiniat'. For a history of the development of the *compromissum* and its role in arbitration awards 'ex aequo et bono' in the *ius commune* see Rheinhard Zimmermann, *The Law of Obligations* (1996), pp. 526-30 and Helmut Coing, 'Zur Entwicklung Des Schiedsvertrags Im Ius Commune - Die Amicabilis Compositio Und Der Schiedsspruch Ex Aequo et Bono', *Festschrift für Heinz Hübner zum 70. Geburtstag am 7. November 1984* (1984), pp. 35-7..
[775] Joannes Baptista Perusinus, 'Tractatus Egregius de Arbitris et Comrpomissis in Libros 13 Divisus', *Tractatus Universi Iuris* (1584), *ff.* 224v-294v, 280r-280.

of the legislator.[776] Menochius seems to unproblematically follow authors from different early modern traditions, thus juxtaposing in the course of his analysis the definitions of equity of Duarenus and Oldendorpius – he therefore defines equity both as a *benigna interpretatio* which moves beyond the words of the law to follow the intention of the legislator, and as a judgment that accommodates the circumstances of a particular case.[777] It is not clear what link Menochius saw between proceedings *ex aequo et bono* and the early modern understanding of equity, and indeed the latter seems to play no substantive role in either explaining the jurisdiction *ex aequo et bono* of the arbiter -Menochius ultimately solves the case before him by applying rules from the *ius commune*. It should be pointed out that Menochius did not discuss equity in any detail in his other works, and in another of his *consilia* we find him referring to the medieval notions of *aequitas scripta* and *non scripta*, without acknowledging any early modern sources at all.[778] Nevertheless, read alongside Donahue's analysis of *Stracca* mentioned earlier, the theory of equity of early modern lawyers does not seem to have been easy to square with proceedings by equity, and references to early modern scholarship on equity in both Stracca and Menochius are merely cosmetic. Whether further research can unveil anything more significant remains to be seen.

I conclude with a third avenue for further research, no doubt the broadest. The point made in this thesis that equity became a contested concept in the early modern period seems to be well aligned with findings by Mark Fortier regarding equity in early modern England. Fortier, though geographically confining his study to England, went far beyond the scope of this thesis by examining the concept of equity as encountered in contexts beyond the legal one – its use in poetry, sermons, theatre and politics to name but a few. There are signs that Fortier's findings for England may well hold true for the rest of Western Europe. One of the few writers whose writings on equity in a context other than legal have been studied in detail is Jean Bodin (d. 1596). Bodin wrote in the context of political theory rather than law. Interestingly, the approach of Bodin seems to have little in common with those we have found in the works explored in this thesis. Research by Ian Williams and Adolfo Giuliani shows that Bodin dealt with equity by adopting a musical metaphor. As Giuliani puts it: 'Bodin pictured equity with a mathematical formula, an algorithm which indicated perfect musical consonance and, for the jurist, the middle way between strict law and judicial discretion.'[779] For Bodin, the 'equity of the Prince', the jurisdiction of courts able to judge unbound

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[776] Menochius, *ibid.*, p.20: 'Disseramus nunc, quid sit hoc bonum et aequum, quod alii aequum bonum, alii aequitatem appellant. Et vero cum multorum sint hac de re interpretationes, tum maxime recentiorum, nempe Budaei, Alciati, Salamonii, Duareni, Connani, Oldendorpii, Corasii, ac Alberti Bologneti, difficile mihi visum fuit hoc paucis posse pro re, qua de agimus, explanare atque concludere [...]. Dicimus itaque bonum et aequum esse iustitiam et aequitatem, non verbis aut literis legum conclusam, sed in mente ac ratione legis positam [...] Graeci uno verbo dicunt: [*epieikeia*], i.e. convenientiam et aequalitatem, quasi quae legem ipsam ad aequitatis normam revocet.'

[777] Menochius, *ibid.*, pp. 20-1.

[778] Jacobus Menochius, *Consiliorum Sive Responsorum Liber Decimus* (1625), *Cons*. 914, n. 5, p. 66: 'Quarto hoc idem suadet *aequitas*, ut [...] quod tibi non nocet, et alteri prodest, facile concedi debet [...]. Repugnat, quod obiicitur, non esse spectandam aequitatem, quando adest rigor iuris, quia respondetur, tunc rigor praefertur aequitati quando scriptus est, ut post alios docuit Iason [de Maino *ad* C.3.1.8]. Quo in casu nos non versamur. Non enim extat nostro in casu aliquis rigor scriptus.'

[779] Adolfo Giuliani, 'Metaphors of Justice. A Mathematical-Musical Image in Jean Bodin', unpublished paper presented at the 2009 British Legal History Conference. See also Ian Williams, 'Developing a Prerogative Theory for the Authority of the Chancery: The French Connection' in *Law and Authority in British Legal History, 1200-1900* (2016), pp. 22-4. Though it should be noted that, in places and on a more general level, Bodin discusses equity in a way consistent with how it is examined in this thesis. See e.g. Jean Bodin, *Les Six Livres de la République* (1961), lib. 6, cap. 6, p. 1023.

by laws, is a necessary ingredient within a well-ordered legal system to provide what he defined as 'harmonic justice.[780] Bodin thus presents us with an unfamiliar metaphor and a different meaning for equity, despite writing at the height of the influence of equity as a theory of interpretation of the law in accordance with the wishes of the legislator. My project was not so ambitious as to explore the degree of variation that uses of equity enjoyed across different fields and spheres of learning, but is likely to prove a fertile avenue of research for literary, intellectual and political historians.

[780] See Giuliani, 'Metaphors of Justice', pp. 1-2, 6. The pages refer to Dr Giuliani's draft paper, which he has kindly shared with me.

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