Can Epikeia Be Used In The Pastoral Care Of The Divorced And Remarried Faithful? (1997)[1]

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In various quarters the hypothesis has been put forward that the traditional doctrine of epikeia might provide a different moral solution to the problem of the divorced and remarried faithful. Given the importance and sensitivity of this problem, the idea deserves careful consideration.

The tradition of Catholic moral theology has given ample room to epikeia. Following Aristotle, who should be considered the *locus classicus* in the matter, St Albert the Great, St Thomas Aquinas, Bl. John Duns Scotus, Cajetan, Suarez, the *Cursus Theologicus* of the Salamanca Carmelites, St Alphonsus and many 20th-century scholars have offered important explanations. While referring the interested reader to the analytical study of the sources published in the autumn issue of *Acta Philosophica* (1997), we will limit ourselves to a succinct exposition, which will nevertheless take into account the different emphases to be found in the above-mentioned doctors and theologians.

A study of the classical sources leaves no doubt that epikeia was seen, in every respect and in the strict sense, as a moral virtue (cf., for example, St Thomas, *Summa Theologica,* II-II, q. 120, a. 1), that is, as a quality belonging to one's moral formation. This fact has two important consequences. The first is that epikeia is the principle of decisions that are not only good but very good, even excellent: for Aristotle, "the equitable is the just, or even better than a certain form of the just"; for St Albert the Great, epikeia is *"superiustitia"*. So it is not something less good — a sort of *mitigatio iuris,* a "discount" or a departure from true justice, — which might be tolerated in certain cases. Epikeia is instead the perfection and completion of justice and the other virtues. The second consequence is that the shifting of epikeia to a different epistemological and ethical framework from that of classical virtue ethics calls for particular methodological caution.

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The original context of epikeia is that of actions governed by the laws of the polis, to which the Scholastics added forms of behaviour governed by canon law, or in any case, by perfectible human laws. Drawing faithfully on the thought of Aristotle and St Thomas, Cajetan succinctly explains the nature of epikeia in these words: *"directio legis ubi deficit propter universale",* a directing of the law where is it defective because of its universality. A well-formed person not only knows what kinds of behaviour are commanded or forbidden, but also understands why. Now, since the law is expressed in universal terms, something can occur that, despite appearances, does not fall under the universal norm and that the virtuous person realizes, because he understands that in this case the literal observance of the law would lead to an action that harms the *"ratio iustitiae"* or the *"communis utilitas",* which are the supreme principles inspiring every law and every lawgiver. Wherever the human lawgiver has overlooked some circumstance and missed the mark because he was speaking in general, it becomes necessary to guide the application of the law and to consider as prescribed what the lawgiver himself would say if he were present and would have included in the law if he could have known the case in question. And all this is done not because one cannot do better, but because it would otherwise be an unjust action that would harm the common good. Epikeia is not something that can be invoked out of kindness, and it has nothing to do with the principle of tolerance, but, when the case requires it, it becomes the rule that must be necessarily followed.

St Thomas even thinks that justice is predicated of epikeia *per prius* and of legal justice *per posterius,* since the latter is guided by the former; and, he adds, epikeia "a kind of higher rule for human actions" (*Summa Theologica,* II-II, q. 120, a. 2). Obviously this does not mean that epikeia lies beyond good and evil, but only that, when the ordinary criteria of judgement are inadequate for the reasons mentioned earlier, the action to be taken must be determined by a directive judgement, which St Thomas calls *"gnome"* and which must be directly based on higher principles *("altiora principia"):* the *"ratio iustitiae"* itself and the common good, bypassing the mediation of the precept that here and now is defective. Epikeia is a "higher rule", since it appeals directly to a higher level of moral principles in order to evaluate exceptional cases.

Everyone agrees (from St Thomas to St Alphonsus) that a law is not to be observed when, in an individual case, it is defective *aliquo modo*

contrarie and not only *negative.* That is to say, a law is not to be literally observed if its observance would lead to an action that is opposed in some way to justice or the common good; but epikeia cannot be invoked merely because the *ratio legis* does not seem to be particularly relevant or pressing in a concrete case (a merely negative cessation of the *ratio legis).* Along this line, St Thomas holds that when the literal application of the law would be harmful to the common good, recourse must be had to the lawgiver if the danger is not imminent. This observation shows that St Thomas was aware of a problem acutely sensed by the contemporary juridical and political mind. If everyone feels entitled to evaluate legal provisions according to his own idea of the common good or on the exclusive basis of his own circumstances, this would ultimately lead not only to arbitrariness but to the collapse of the whole legal system, both civil and ecclesiastical. The opinion that every citizen could appeal to his own situation would, like the sword of Damocles, threaten all juridical certitude, and life itself would become little less than impossible.

In more concrete terms, when can a law be considered defective *aliquo modo contrarie?* There is no consensus on the precise meaning of *aliquo modo.* For St Thomas and Cajetan, observance of the law must be truly and really opposed to justice or the common good. For Suarez, this opinion is *"nimis rigida et limitata".* He holds that a human law is also deficient *aliquo modo contrarie* in these three cases: 1) when its fulfilment, although not unjust, would be very difficult and burdensome — for example, if it involves a serious risk to one's life; 2) when it is certain that the human lawgiver, although he could oblige even in this case, neither had nor has the intention of doing so; and 3) when observance of the law, even though it would in no way harm the common good, would harm the good of the individual in question, provided — Suarez stipulates — "the harm is serious and *no requirement of the common good obliges one to cause or permit this harm".* Regardless of the criticisms that could be leveled at Suarez on this issue from the theoretical standpoint, we must remember here that his position was later accepted almost universally by Catholic moral theology down to our own day, just as the Suarezian thesis that neither invalidating laws nor the divine-positive law could be corrected by epikeia was also peacefully accepted.

Now we come to the problem of the natural moral law. Cajetan was the first to raise the question explicitly. To explain why in his

commentary on the *Summa Theologica* he raised a question that St Thomas never did, we would have to study problems connected with the voluntaristic tendencies of the 14th century, which is beyond our scope. Can cases arise in which epikeia would have to correct the natural moral law? Cajetan, the Carmelite theologians of Salamanca and St Alphonsus say yes; Suarez however says no. But in reality the former and the latter maintain basically the same thesis. Cajetan notes that human laws can contain two kinds of elements of the natural law. Some are universally valid in such a way that they can never fail to apply, and he mentions among them lying and adultery (in other words, intrinsically evil acts); there is no place for epikeia with these forms of behaviour. Others, however, are generally valid requirements, but they may be wanting: for example, the command to return what has been entrusted for safekeeping; the application of norms of this sort will sometimes have to be governed by epikeia, in the sense that epikeia, by commanding that the law not be observed, will enable a virtuous and excellent act to be done where, given the infinite variety of human circumstances, a situation is created that obviously cannot fall under the *ratio legis*.

If we reflect on the sense of what Cajetan said, it is clear that by natural law he means natural morality, that is, the realm of actions governed by the moral virtues, which is quite different from that governed by the divine-positive law. More concretely, when he says that epikeia also has the natural law for its object, he is referring to positive laws that express in normative formulas of human language the consequences derived from the virtues, but not their essential demands or acts that contradict them (intrinsically evil acts), In this sense, it is obvious that epikeia applies to the realm of natural law. But that is not true — as Cajetan explicitly states — if by natural law we mean the norms that forbid intrinsically evil acts, i.e., acts that by their very nature are contrary to right reason.

Suarez' position is very systematic. He repeats Cajetan's distinction: the natural moral law can be considered in itself, i.e., as the judgement of right reason, or as contained and further determined by a human law. Suarez' thesis is that no natural precept considered in itself can need the direction of epikeia. To establish his thesis inductively, Suarez refers to the distinction between positive and negative precepts. The negative precepts are by nature such *"ut semper et pro semper obligent, vitando mala quia mala sunt"*. These norms cannot be corrected by epikeia in any

way. It can happen, however, that a change of the object or intrinsic circumstances leads to an essentially different moral act (*"mutatio materiae"*). The examples given are theft in the case of extreme need and an object entrusted for safekeeping. In these cases, the change of moral evaluation corresponds to the change undergone by the act in the *genus moris* and not, properly speaking, to epikeia. A very exceptional example would be the situation that would occur if, after a war, only one man and his sister were left on planet Earth, or a man, his sterile wife and another fertile woman. The acts that would have to be done in order to continue the human race would have an essentially different relationship to right reason and the natural law than what we know today as incest and adultery. Therefore, taking these exceptional situations into consideration, Suarez holds that it can be said with absolute and universal certainty that an act forbidden by a negative natural precept, *"stante eadem materia",* can never become morally permissible by virtue of epikeia.

The Carmelite theologians of Salamanca reason along the same lines as Cajetan and Suarez, and are explicitly cited by St Alphonsus when he deals with epikeia. In the light of what has been said, St Alphonsus' meaning is perfectly clear when he says that the direction of epikeia is sometimes necessary even with the natural moral law, when the circumstances eliminate the moral negativity of a concrete action (*"ubi actio possit ex circumstantiis a malitia denudari"*). St Alphonsus is thinking of the act of not returning an object entrusted for safekeeping, which would be evil in itself, but in certain circumstances not only becomes good but virtuous and obligatory.

The authority of St Alphonsus and his reflection on epikeia have recently been invoked to criticize the teaching of the Encyclical *Veritatis splendor* on the existence of intrinsically evil actions and, thus, on the universal value of the negative moral norms prohibiting these actions. The objection belongs to a moral perspective foreign to St Alphonsus and the Catholic moral-theological tradition. Behind this objection, on the one hand, is the idea that *categorical* moral norms, i.e., those that determine what concretely accords with justice, chastity, truthfulness, etc., are simply human norms (cf. *Veritatis splendor,* n. 36). It also has the defect of describing the object of human actions in a physicalist way — and thus necessarily premoral (cf. *Veritatis splendor,* n. 78), so that the same norm is applied to physically similar (genus *naturae)* but morally heterogeneous (*genus moris)* actions, with the inevitable result that every

negative moral norm would have many exceptions. By describing actions without paying attention to their intrinsic intentionality *(finis opens),* viewed in relation to the order of reason, some claim that legitimate defence is an exception to the fifth commandment, but the same logic would lead them to maintain the ridiculous thesis that the holiness of marital relations is an exception to the norm "do not fornicate" (cf. on this problem *Summa Theologica,* I-II, q. 18, a. 5, *ad* 3).

But above all, it is an error of perspective to transfer without the necessary caution a concept belonging to the ethics of virtue, such as epikeia, to a normativistic context centred on the dialectical relationship of law and conscience, in which the good is based on law (remember what Kant calls the *"paradox of the method of a critique of practical reason"),* and not vice versa. The ethical framework that led to the concept of epikeia is quite different. In this framework the virtues are overall goals of absolute and universal validity which, since as they are stably desired by the virtuous person, enable practical reason (prudence) to identify — almost connaturally — the particular action that *hic et nunc* can achieve those goals. Epikeia belongs to this context of prudent realization of the desired goal through virtuous habit. When an ethical requirement, which is fundamentally a requirement of virtue, is expressed in a normative formulation of human language that does not foresee the exceptional circumstances in which the agent finds himself, epikeia allows a perfect adaptation of the concrete action to the *ratio virtutis*. The object entrusted for safekeeping must be returned, since returning it is an act of the virtue of justice. In the exceptional cases in which returning the object is no longer an act of justice but would instead be an act opposed to justice, the virtue of epikeia enables one to make the prudential judgement that here and now the object must not be returned. The just person (the one who possesses the virtue of justice) cannot fail to take account of this. If to express this reality we say that the moral norms concerning justice allow exceptions, or that they do not have universal value, we are creating confusion, because the virtues — that is, the practical principles of reason as fundamental ethical requirements — do not allow exceptions. Epikeia is necessary precisely because — regardless of what the letter of the law says — justice and the other ethical virtues do not allow exceptions. Strictly speaking, epikeia must not be conceived in terms of exception, tolerance or dispensation. Epikeia is the principle of an excellent decision and does not mean, nor has it ever

meant, that it is morally possible, by way of exception, to allow a little injustice, a little lust, etc., to the point of reaching the desired compromise with current cultural trends.

Now we come to the specific problem of the reception of the sacraments by the divorced and remarried faithful. Some have objected that the solution to the problem given in *Familiaris consortio,* n. 84 and reaffirmed by the *Letter* of the Congregation for the Doctrine of Faith on 14 September 1994 does not take epikeia into account. In many cases epikeia has been appealed to in a general way — probably confused with an equally imprecise principle of tolerance — without indicating the ecclesiastical law that in their opinion is deficient because of its universality or the possible cases in which this occurs. As long as the necessary clarifications are not made, the objection cannot be addressed theologically and canonically, and it seems impossible to consider it. Others, however, have explicitly objected to canon 1085, §2: "Even if the prior marriage is invalid or dissolved for any reason whatsoever, it is not on that account permitted to contract another before the nullity or the dissolution of the prior marriage has been legitimately and certainly established". The objection would thus be limited to the so-called "good faith" case: if one of the faithful is convinced that his first marriage was null, even though he was unable to obtain a declaration of nullity, on the basis of epikeia he could contract a second canonical union and, on the same basis, the Church should allow it.

Canon 1085, §2 is not an invalidating law. In truth, only the validity of the first marriage according to the *veritas rei* can determine the impediment of *ligamen.* However, we are dealing with a marriage (*CIC* 1060), we must also presume that the parties (one or the other) who contracted it are incapable of contracting a second canonical union, which is rightly forbidden by the Church until it has been established with certainty according to law whether there is an impediment of divine law, from which the Church cannot dispense, such as that of a prior bond (*CIC* 1085, §1). At any rate, since canon 1085, §2 is neither a divine-positive law nor an invalidating law, one can legitimately ask whether this law could be corrected in some cases by epikeia.

The condition sine qua *non* for legitimately appealing to epikeia is the existence of a situation in which canon 1085, §2 *deficiat proper universale all-quo modo contrarie.* In other words, it must be a question

of a concrete case, neither foreseen nor foreseeable by the lawgiver, which therefore cannot fall under canon 1085, §2, and which the lawgiver himself would not have included in the canon, if he could have known of it. According to the broadest thesis, that of Suarez, this kind of case would occur if observance of *CIC* 1085, §2 in that particular case: a) would be contrary to the common good of the faithful; b) would impose a heavy or unbearable burden not required by the common good; and c) it was obvious that the lawgiver, although being able to obligate even in that case, did not intend to do so. Let us examine each of the three suppositions, beginning with the two simpler ones.

As for the first supposition, a), there seems to be no case in which observance of canon 1085, §2 could harm *contrarie* the common good of the faithful. This canon is meant to guarantee that the *veritas rei* is attained in a matter of extreme importance, for both the natural and the divine law, in order to avoid adulterous unions. Moreover, this canon ensures the sacrament and many times also the direct right of the other party and the children against subjective arbitrariness; it guarantees the certainty of law in a matter with great social impact; and, lastly, through it the Church fulfils her duty to safeguard an ecclesial and public reality such as Christian marriage. We should add that in present-day circumstances, when the indissolubility of marriage is losing ground in countries with a long Christian tradition because of the culture and divorce laws, the common good of the faithful demands of the Church ever more attentive and firm concern for this value, without giving in to the strong pressure of a non-Christian culture, which, to the extent that also affects the faithful, is the real reason for the sad situations which everyone laments.

As for the third supposition, c), given the literal expression of canon 1085, §2 and its place in canon law, it does not seem that the mind of the ecclesiastical legislator intended or intends to leave the determination of the validity of the first marriage in any case to private judgement. In his *Address to the Roman Rota* on 10 February 1995, the Roman Pontiff, who exercises the supreme legislative and judicial authority in the Church, expressed his *mens* in unequivocal terms, reaffirming the unsurpassable reasons for the validity and appropriateness of canon 1085, §2, to the point — as the Roman Pontiff stated on that occasion — that "whoever would presume to transgress the legislative provisions concerning the declaration of marital nullity would thus put himself outside, and indeed

in a position antithetical to the Church's authentic Magisterium and to canonical legislation itself — a unifying and in some ways irreplaceable element for the unity of the Church". Therefore, care should be taken to "avoid answers and solutions 'in foro interno', as it were, to situations that are perhaps difficult but which can be dealt with and resolved only by respecting the canonical norms in force". Lastly, the Holy Father reminds everyone of "the principle that, although the diocesan Bishop has been granted the faculty to dispense, under specific conditions, from disciplinary laws, he is not permitted however to dispense from procedural laws' (can. 87, §1)". We must conclude, then, that the mind of the lawgiver is absolutely clear in this regard, and the clarity of the words used emphasizes that it is a very important question concerning the common good of the faithful. Moreover, as is the case with civil legal systems, an infraction of the procedural norms is almost always tantamount to injustice or, at least, equivalent to a denial of the guarantees that the law establishes for the benefit of individuals and the entire community.

Finally, we consider the second supposition, b), that a particular case does not fall within law if observance of the latter would involve great harm, which human law is commonly thought not to impose, or considerable personal harm not required by the common good. Here a few clarifications are in order. In order for it to be morally possible to use epikeia, the defect in the law must stem from its universality, and only from this; in other words, the generality of the law's terms prevent it from including certain cases that really exist. This means that one cannot allege that in a particular case the unity and indissolubility of marriage make difficult demands. Nor is it enough that an unsuccessful declaration of nullity by an ecclesiastical tribunal does not meet the expectations of the petitioner or the respondent: this always happens, because otherwise neither would the petitioner have initiated the case nor would the advocate have accepted the role of defender. It would be possible to appeal to epikeia only if, due to exceptional circumstances, a capable person were denied the exercise of the *ius connubii,* in a way not foreseen or foreseeable by the lawgiver and without it being required by the common good of the faithful, the common good that — perhaps today more than ever — calls for the careful safeguarding of the indissolubility of marriage.

Situations of this sort could occur in countries where, because of unusual political circumstances, Catholics were left isolated, without being able to communicate with ecclesiastical authorities. I think reference was made to situations of this sort in the response of the Holy Office on 27 January 1949, which determined the validity of the marriages of Chinese faithful who, on the one hand, could not observe certain ecclesiastical impediments without serious inconvenience and, on the other, could not refrain from or postpone the celebration of marriage. The reply made it clear that it had to be a question of *impediments from which the Church normally dispenses.* Today special administrative procedures are in force for cases in which the nullity is very obvious, but for various reasons it is impossible to instruct the case: see the *Declaratio de competentia Dicasteriorum Curiae Romanae in causis nullitatis matrimonii post Const. "Regimini Ecclesiae Universae",* published by the Apostolic Signatura on 22 October 1970.

In view of the norms laid down in the 1983 *CIC* (can. 1536, §2 and 1679) and in the *CCEO* (can. 1217, §2 and 1365) concerning the probative force of the declarations of the parties in nullity trials, it is difficult to imagine other situations which, because of their unusual circumstances, would not fall within the current canonical norms. As we have said, the subjective conviction of the parties does not entitle one to think that the ecclesiastical law *deficit propter universale* in such a case. Asserting the contrary would mean granting absolute primacy to the subjective conviction about one's own case, as if that conviction gave much more reliable access to the *veritas rei* than the judicial process or, as the case may be, the documentary process (can. 1686-1688). It is true that the good faith of the parties is presupposed, but it is also true that, if their subjective conviction about the nullity of their first marriage is well founded, *there seems to be no reason why the parties and the defence cannot convey that to the judges,* and that it is one thing to know an internal fact (a possible defect of consent, for example) and another to be able to determine it juridically. Pius XII's warning still rings true: "As for *declarations of marital nullity* ... who does not know that human hearts are, in many cases, all but too inclined ... to try to free themselves from a conjugal bond already contracted?" (*Address to the Roman Rota,* 3 October 1941, n. 2).

That granting the interested parties a sort of faculty of self-declaration of nullity is a juridically and morally unacceptable proposal is

in some way highlighted by the fact these recent proposals in favour of the "good faith" case require the intervention — according to some — of an expert priest and — according to others — of a special diocesan office of a pastoral nature. It is hard to understand, then, how a priest or a diocesan office could arrive at a *veritas rei,* which, on the other hand, could not be reached by a tribunal of the same diocese or a tribunal of the Holy See. All this makes one think that we are dealing merely with a well-intentioned attempt to solve a difficult problem by skirting the current law of the Church. We should add that highly competent people of broad experience believe that with the current canonical norms there is, practically speaking, not one case in which the nullity of an invalid marriage cannot be proven in the judicial forum.

On the basis of these considerations, we can state that it remains to be shown whether there are real, concrete cases, which are not included, according to justice, in what has been established by the current canonical legislation. Certainly no one can absolutely exclude the future possibility that exceptional, unforeseen circumstances might create situations of the sort. But even on this supposition, given the sacramental and public nature of Christian marriage, if it is possible to wait, one should have recourse to the competent authority, which in every case can deal with the situation through decrees or dispensations, as was already done in the past with the China case mentioned above.

Lastly, we note that probably some of those who have generically appealed to epikeia were thinking not so much of the validity of the second union but of the possibility for the divorced and remarried faithful whose first union was certainly valid to receive the Eucharist. Even if the reception of the Eucharist by these faithful is sometimes the only thing mentioned, the real problem is whether these faithful can receive the sacrament of Penance, that is, whether they can *validly* receive sacramental absolution. This final question must be asked, even about the other sins these faithful may have committed in the past, because one cannot appeal to epikeia in regard to the need of the state of grace for receiving the Eucharist, since this necessity corresponds to divine law and is in the very nature of things. The law and Catholic morality make explicit provision for cases in which prior sacramental confession is not possible, stating that in these cases it is necessary to make an act of perfect contrition, which includes the intention of confessing as soon as possible (CIC 916) and of avoiding sin in the future.

At the end of these considerations, we can note that epikeia is the moral virtue that identifies the action to be taken in *individual situations,* which, by their exceptional nature, do not fall within the ordinary provisions of canon law. The recent proposals regarding the divorced and remarried faithful invoke it instead as a possible basis for an alternative solution to a *general problem,* which shows that their appeal to epikeia is very inappropriate and certainly foreign to the great tradition of Catholic moral theology. What these proposals envisage is a new general criterion of tolerance, whose compatibility with the indissolubility and sacramentality of Christian marriage remains to be shown, and seems rather to stem from an idea of conscience that the Church cannot accept *(cf. Veritatis splendor* nn 54-64)