

### Conclusion

Dans la mesure où la vie familiale a été source d'insécurité affective la qualité du *self* (capacité à être soi-même dans la continuité), de l'identité et du sens de la filiation est mise en question chez de nombreux sujets. Ils manifestent un besoin constant d'être rassurés, protégés, valorisés et confortés là où leur vie affective n'a pas pu s'étayer sur des adultes fiables et repérés comme tels. Le divorce met en question le sens de l'institution matrimoniale et donc de l'engagement, du couple générationnel et le sens de la famille comme communauté humaine de transmission de la vie. Dans ce contexte, il n'est pas étonnant que des jeunes aspirent à la fois à construire un couple et une famille comme facteur d'harmonie et de sécurité affective, mais soient également inquiets et hésitants à l'idée de s'engager dans une réalité où les adultes leur donnent le sentiment d'échouer. Après avoir été ainsi malmenées affectivement, c'est le défi que les générations futures auront à relever.

#### The Child, Victim of the Divorce?

The familial conflicts, the separations, the lack of reference points in filiation and the identity crises linked to certain sexual tendencies bring about numerous interrogations of which the children are not immediately aware. They may express certain incoherences and deficiencies of which they are victims; but it is only in the long term that they discover the psychological effects of what they have gone through. Contemporary society does not always have the sense of time and of the consequences of the words and adult behaviours on the psychological future of a child. There are laws and a dominant conformism that maintain a crisis and even increase it instead of evaluating the determinants and dealing with them. The contribution tries to show that the problem and the stakes are set in terms of relational structures and not only in sentimental terms. Depending to what extent familial life has been a source of affective insecurity, the quality of the *self* (capacity of being oneself in continuity), of the identity and of the sense of filiation, is put into question. The divorce puts into question the meaning of the matrimonial institution and thus the meaning of the engagement, of the generational couple and of the meaning of family as a human community of transmission of life.

## The Position of Children with Regard to Marriage, Divorce and Remarriage A Canonical Perspective

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The organizers of the Conference on "Marriage – Divorce – Remarriage" have asked me to speak about the position of children from a canonical perspective. I have decided to focus on three themes: The first one concerns marriage itself: What role do children play within the current canonical understanding of marriage? The second part focuses on the question: What is the canonical position of children in case of extreme violence within a marriage, in a divorce, and in a marriage that is declared invalid? The final section attends to the question: How does the church protect the rights of children when one or both of their parents remarry?

### Children and Marriage

"But how can you determine that a marriage is null when there are three children?!" Often people react with this question when they hear about marriage tribunals. They think that 10 years of marriage and three children should prevent any possibility of ever establishing the invalidity of a marriage. Maybe you think this as well. May I invite you to reflect for a moment on this statement and ask yourself the question: what concept of marriage lies beneath this? Does it not indeed display that it operates on the thinking that three children are an indication that the marriage is consummated and that thus there is ample proof that both parties did not suffer from the impediment of impotence? Is it therefore not based on the concept that the sole purpose of marriage is to be able and open to getting children? Such an understanding by anyone younger than 60 years of age in particular is remarkable, because 40 years ago the Catholic Church reconsidered and revised its understanding of marriage and expressed it in the Pastoral Constitution on the Church in the World of Today, *Gaudium et spes*. The new understanding

changement: les juges et les pasteurs agissent-ils en accord avec la vision proposée par l'Église dans sa doctrine et sa législation? Ce sera la tâche des pasteurs et des juges de se faire les "avocats" des petits lorsque leurs parents se séparent et se remarient.

## Mariage, divorce et remariage dans l'Église orthodoxe Économie et accompagnement pastoral

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### Introduction

On pose souvent la question de la position or-  
mariage. La réponse doit être cherchée dans la doctrine  
*mystère ou le sacrement* du mariage. Nous savons que  
romaine considère le mariage comme un sacrement. Mais  
une différence importante, qui mérite d'être soulignée:  
catholique romaine affirme que le mariage est, pour a-  
les conjoints eux-mêmes, lorsqu'ils consentent l'un à l'autre. Dans l'Église  
orthodoxe, c'est le prêtre ou l'évêque qui bénit le mariage.  
de la communauté, invoque Dieu, lui demandant d'enrichir  
(*epiclèse*) sur l'homme et la femme, et les faisant donc  
Dans cette perspective, le mariage est, pour l'Église orthodoxe,  
*chemin spirituel*, une *recherche de Dieu*, le *mystère d'une*  
*participation du Royaume de Dieu*, plutôt qu'une exigence

### Le mariage chrétien mystère – sacrement<sup>1</sup>

Le mariage est un mystère/sacrement qui, grâce à Dieu, est instauré dès la création. Le peuple élu le considéra donc comme un mystère qui fut inauguré dès la création divine. Ceci est d'ailleurs confirmé par le Christ qui a dit "Au commencement du monde Dieu les fit mâle et femelle; c'est pourquoi l'homme quittera son père et sa mère, et s'attachera à sa femme, et les deux ne feront qu'une seule chair" (Mc 10:6-8).<sup>2</sup>

1. En grec, le terme "mystère" est employé pour "sacrement."

2. Les textes bibliques du Nouveau Testament sont reproduits à partir de la *Traduction œcuménique de la Bible. Nouveau Testament*, 2000. Pour l'Ancien Testament, on se base sur la *Traduction œcuménique de la Bible: Le Pentateuque*, 2003.

found its way in the 1983 *Code of Canon Law*<sup>1</sup> and in the jurisprudence when it came to declaring the invalidity of marriages.

In this first section of my presentation I will present the new canonical understanding of marriage in comparison to the old one and will do so with particular consideration for children.

The change from the old to the new can be characterized with the following phrase: from bodies to persons. The 1917 *Code of Canon Law* determined that marriage was a contract and that the primary end of this contract was to procreate and educate offspring (*procreatio atque educatio proles*).<sup>2</sup> The second end was mutual support and a remedy for concupiscence (c. 1013 CIC/1917). Matrimonial consent was understood as an act of the will whereby each party gives and accepts perpetual and exclusive rights to the body for those actions per se apt for the generation of offspring (c. 1081 §2 CIC/1917). Marriage was thus very much seen as a contract between two bodies – a male and a female – that had to cooperate in acts that were per se apt for and open to the generation of children. In order to validly marry it was thus particularly necessary that both parties were physically able to consummate the marriage. Hence, an important ground for a declaration of nullity was the impediment of impotence. Another important ground for establishing the nullity of marriage was the exclusion of acts per se open to offspring (c. 1086 §2 CIC/1917).

Vatican II changed the understanding of marriage drastically: the church moved away from a physical and contractual understanding of marriage to a more personalistic view: "The covenant, or irrevocable personal consent, of marriage sets up an intimate sharing of married life and love as instituted by the creator and regulated by God's laws. Thus, the human action in which spouses give themselves to each other and accept each other results in an institution which is stable by divine ordinance and also in the eyes of society. This sacred bond, aimed at the good of the couple and their children and of society, does not depend on human decision... The institution of marriage and married love are,

1. *Acta Apostolicae Sedis* 75 (1983), pars II. English translation: *Code of Canon Law, Latin-English Edition, New English Translation* (Washington, DC: CLSA, 1998).

2. Canonical terminology of the 1983 Code refers with different words to children: *Proles* refers exclusively to children as offspring of their parents. *Minor* refers to all persons from the moment of conception to the completion of their eighteenth year of age. Within the category of minors is the *infans*, that is, a person who has not completed seven years of age and that is presumed not to be responsible for itself (*non sui compos* – c. 97 §2). See Michael Smith Foster, "The Promotion of the Canonical Rights of Children," *Canon Law Society of America (= CLSA) Proceedings* 59 (1997) 163-203, 167-169.

of their nature, directed to the begetting and upbringing of children and they find their culmination in this."<sup>3</sup>

The legislator 'translated' this understanding of marriage into canonical norms by describing<sup>4</sup> marriage as follows: "The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life (*totius vitae consortium*) and which is ordered by its nature to the good of the spouses (*bonum coniugum*) and the procreation and education of offspring (*procreatio et educatio proles*), has been raised by Christ the Lord to the dignity of a sacrament between the baptized" (c. 1055 §1 CIC/1983). Furthermore, the conciliar understanding of marriage is expressed in the determination how a marriage comes into existence: "Matrimonial consent is an act of the will by which a man and a woman mutually give and accept each other (*sese mutuo tradunt et accipiunt*) through an irrevocable covenant" (c. 1057 §2).

This new vision on marriage deserves attention: whereas the pre-Vatican II understanding had the procreation and education of children as primary end, the new understanding sees marriage as a partnership of the whole of life (*totius vitae consortium*) ordered equally to the good of the spouses and the procreation and upbringing of children. As a consequence of this understanding the new legislation and jurisprudence does not focus so much any more on the contract and the capacity to unite physically with the partner, but on the capacity to enter into and establish a communion of life with the partner that is geared towards the good of the spouses and the procreation and education of children. Such a communion of life consists in "mutually giving and accepting of each other" as a person and not just as a body. As a consequence, the new Code does not refer any more to the right over the body or the right to the conjugal act (c. 1086 §2 CIC/1917), but speaks about "mutually giving and receiving of each other." Indeed there is a change from bodies to persons.

As a further consequence of the new understanding of marriage a canon was introduced which attends to what may be seen as the other side of the coin, namely the (in)capacity of a person as person to contract a marriage. Hence, this question of (in)capacity touches the whole

3. *Gaudium et spes*, 48. English translation taken from Norman P. Tanner (ed.), *Decrees of the Ecumenical Councils* (Washington, DC/London: Georgetown University Press/Sheed and War, 1990).

4. During the drafting of the Code it was decided to omit definitions, because a Code would not be a textbook for education and in law definitions would be dangerous; cf. *Communicationes* 16 (1984) 38.

person and not just the physical dimension.<sup>5</sup> The 1983 Code states in c. 1095: "The following are incapable of contracting marriage:

1. Those who lack the sufficient use of reason;
2. Those who suffer from a grave defect of discretion of judgement concerning the essential matrimonial rights and duties mutually to be handed over and accepted;
3. Those who are not able to assume the essential obligations of marriage for causes of a psychic nature."

Whereas the first heading is a rather seldom invoked *caput nullitatis*, the latter two are very often tried, especially in the Western World. Hence, besides the law there is now more than 40 years of jurisprudence on this new understanding of marriage.<sup>6</sup> Canonists also refer to the second ground as the incapacity to enter into the contract of marriage, as it focuses on the decision to marry a concrete person. This decision implies a discretionary faculty and a capacity to act in agreement with the outcome of the discretionary process.<sup>7</sup> The Germans refer to this ground often with the word *Eheschließungsunfähigkeit*.

Canon lawyers refer to the third ground also as the incapacity to assume the obligations arising from marriage. The Germans use for this ground the word *Eheführungsunfähigkeit*.<sup>8</sup>

What have children to do with these two capacities of their parents? The Code mentions in c. 1055 §1 not only the procreation, but also the upbringing (*educatio*) of children. The *educatio prolis* is thus not only an ethical imperative, but it belongs to the juridic concept of marriage itself.<sup>9</sup>

5. While drafting the 1983 Code the canons 1055, 1057 and 1095 were always considered and revised together.

6. Canon 1095 finds its origin in developments in jurisprudence even before the council.

7. A person might have discretionary power, but is unable to act accordingly. An example: a woman concludes that she should not marry a particular person, but everything is prepared and the invitations sent out. She lacks the internal freedom to act in agreement with her conclusion.

8. The open ended formulation of these canons leaves room for receiving developments in theology, anthropology, psychology, psychiatry, etc.

9. Antoni Stankiewicz, "L'esculsione della procreazione ed educazione della prole," *La simulazione del consenso matrimoniale canonico*, Studi giuridici, 22 (Vatican City: Libreria Editrice Vaticana, 1990) 166. Some authors hold that the *educatio prolis* does not belong strictly to the spouses as spouses, but to the relationship between the spouses (as parents) and their children. "That is, the right-duty to educate offspring comes into existence out of the relationship between parents and children which derives from *procreation*, and not because of the relationship, rights, and duties that derive from *marriage*." Kenneth W. Schmidt, "The 'Raising of Children' as an Essential Element of Marriage," *CLSA Proceedings* 59 (1997) 223-266, 234.

Canonists thus discuss the meaning of *educatio prolis* also in light of the discretion necessary to contract a valid marriage; the appropriate discretion of judgement implies that a person must also possess sufficient capacity to render an evaluation concerning the essential obligations arising from *educatio prolis*. The person who marries must thus be able to understand what *educatio prolis* means and must be able to render a judgement about the capacity of both partners to realise the *educatio prolis*.<sup>10</sup>

In relation to the capacity to assume the essential obligations that arise from a marriage, (c. 1095, n. 3) again, the *educatio prolis* would be an important aspect. If either of the parties would lack the capacity to assume the obligation of protecting and caring for their offspring, the marriage would be invalid. A cause might be an incestuous anomaly.

I have been using the term *educatio prolis*, but what does it mean? The *Code of Canon Law* uses the term *educatio* in an equivocal manner. At times it corresponds to the English word 'education' in the sense of instruction and teaching, such as in schools or programs (c. 796 §1). At other times, it has a much broader meaning and refers to what in English could be expressed with words such as 'raising' and 'upbringing'. The latter seems to be the meaning when the phrase *procreatio et educatio prolis* is used in c. 1055 §1. So what could this raising or upbringing mean? The legislator does not say. Canonical tradition<sup>11</sup> differentiates with respect to *educatio prolis* between the physical good of the children and their moral and spiritual well-being. The first refers to the conception, birth and protection of the life of the children. Abandoning children or mutilating them would violate the *educatio prolis*. The second aspect refers to a moral or religious upbringing which may be either Christian or – more specific – Catholic.<sup>12</sup>

10. An element that certainly would contribute to determining the lack of discretion would be, for example, when a person believes that having a child will increase income, because of state support for children.

11. See Peter Huizing, "Bonum prolis ut elementum essenziale objecti formalis consensus matrimonialis," *Gregorianum* 43 (1962) 657-722. He describes the development of the *bonum prolis* in the course of history. For an update for the time after 1962 see Heinz Mussinghoff, "Ausschluss der Erziehung als Ehenichtigkeitsgrund," *Archiv für katholisches Kirchenrecht* 156 (1987) 63-94.

12. Canonists differ in their opinion whether the denial to a religious upbringing to the offspring causes the marital consent to be invalid. See for this discussion Schmidt, "The 'Raising of Children' as an Essential Element of Marriage," 235-237. Furthermore, Schmidt writes: "Rotal Jurisprudence establishes that *educatio prolis* belongs to the essence of the *bonum prolis*. It also recognizes that the education of offspring constitutes an essential object of marital consent. But jurists do not agree yet: (1) what constitutes *educatio prolis*, and (2) whether the *educatio prolis* or certain aspects of it have any relationship to

Even though the legislator does not define what *educatio prolis* would concretely mean, an indication of it can be found by taking recourse to other norms. The law states, for example, that parents and those who take their place have the most grave duty and the primary right to take care of the physical, social, cultural, moral and religious upbringing (*educatio*) of their children (cf. cc. 226 §2, 793 and 1136) as good as they can.<sup>13</sup> In line with Vatican II, the law determines about *educatio* in a section dealing with Catholic education: "Since true *educatio* must strive for complete formation of the human person that looks to his or her final end as well as to the common good of societies, children and youth are to be nurtured in such a way that they are able to develop their physical, moral, and intellectual talents harmoniously, acquire a more perfect sense of responsibility and right use of freedom, and are formed to participate actively in social life." (c. 795).<sup>14</sup>

Hence, assuming the obligations of marriage would imply the ability to raise children, that is, to provide for and assist them in their development and formation as a physical, social, cultural, moral and religious persons.<sup>15</sup> The American canon lawyer, Kenneth Schmidt, has studied Rotal jurisprudence concerning *educatio prolis*. He identified several rights and obligations vis-à-vis children after their birth, such as permitting the birth and accepting the child, not killing the offspring after birth, feeding and educating the offspring, not neglecting, abandoning, or exposing the offspring to danger of death, not mutilating the offspring, not raising the offspring in prostitution.<sup>16</sup>

Besides the capacity to exercise a discretion of judgement with regard also to the *educatio prolis* and the capacity to assume the duties arising from it, there is another ground that touches the possible validity of a

the validity of marital consent. So most of the cases consider *educatio prolis* solely in *iure*." Schmidt, "The 'Raising of Children' as an Essential Element of Marriage," 237.

13. This is repeated in another section of the Code which addresses Catholic education, c. 793 §1: "Parents and those who take their place are bound by the obligation and possess the right of educating their offspring."

14. This norm finds its origin in Vatican II's Declaration on Christian education, *Gravissimum educationis*, no. 1.

15. Some mental disorders might have a severe influence on the knowledge, critical faculty, capacity to render decisions with regard to a healthy upbringing of children. In marriage nullity cases where this is discussed, judges must invoke the assistance of experts, e.g. in psychiatry (cf. cc. 1574 and 1680).

16. Schmidt, "The 'Raising of Children' as an Essential Element of Marriage," 238-240. He mentions many more elements and refers to Rotal sentences. Some sentences refer to the pre-Vatican II time where e.g. ecumenism was understood differently and where thus the discussion on *educatio prolis* could include not raising the offspring in a mixed marriage in the religion of the spouse who is not Catholic.

marriage, and it concerns the exclusion of an essential element or essential property<sup>17</sup> of marriage by a positive act of the will (c. 1101 §2). A person invalidly contracts a marriage when he or she excludes the procreation and/or education of offspring. With regard to the exclusion of the procreation, a marriage would be invalid when a person excludes children or reserves to him or herself the exclusive right to decide if and when children will be allowed. Many canonists hold that should a couple together and in mutual agreement arrive at the decision to refrain from acts open to the generation of children, the validity of the marriage would not be touched.<sup>18</sup> This latter understanding of the exclusion of the *procreatio* is directly and intimately related to the new understanding of marriage where the concrete realisation of the *bonum prolis* is to be found within the context of the *bonum coniugum*.<sup>19</sup> Besides excluding the *procreatio*, there can also be an exclusion of the *educatio prolis* or a person can substitute the concept of *educatio prolis* with another concept that is not consonant with the teaching of the church. An example of the exclusion of *educatio prolis* would be when a person would consent to the birth of the child, but would intend to sell it afterwards.<sup>20</sup> Such an exclusion would be a total exclusion of *educatio prolis*. Another variety is a partial exclusion of the *educatio*.<sup>21</sup> An example: a person would be willing to

17. Unity and indissolubility are essential properties of marriage. The legislator has not determined what the essential elements are. Jurisprudence treats under the properties and essential elements the indissolubility of marriage, marital fidelity, the *bonum coniugum* and *bonum prolis*.

18. Canonical jurisprudence differentiated already before Vatican II between the *ius* and the *usus iuris*. After Vatican II the debate continued in light of the *donatio et acceptatio* of the parties (c. 1057) which was also necessary in light of "responsible parenthood" as pope Paul VI mentioned it in *Humanae vitae*, no. 10. Moreover, already the Nuptial Blessing in *The Rite of Marriage* of 1970 allowed for omitting any reference to children e.g. when circumstances suggest it. For a report on the canonical debate see e.g. James H. Provost, "Simulated Consent: A New Way of Looking at an Old Way of Thinking," *The Jurist* 55 (1995) 712-720; Klaus Lüdicke, "Ehenichtigkeit und Nachkommenschaft," *De Processibus Matrimonialibus* 8, no. 1 (2001) 243-264; Bernhard Fraling, "Ehe und Nachkommenschaft: Naturale und personale Aspekte moraltheologischer Bewertung," *De Processibus Matrimonialibus* 8, no. 1 (2001) 89-112.

19. Thus if a couple mutually consents to refrain from – which is not the same as to refuse – acts open to procreation due to a hereditary disease in the family the marriage would be valid. If, however, at the time of the wedding one partner reserves the right to decide to being open to procreation, the marriage would be invalid.

20. Adoption does not constitute a *non educatio*, because the adoption is to be seen as a form of providing for the *educatio*. Cf. Mussinghoff, "Ausschluss der Erziehung als Ehenichtigkeitsgrund," 92.

21. Schmidt refers to several authors and Rotal Decisions to support the position that there can be a partial exclusion of the *education* as well. Schmidt, "The 'Raising of Children' as an Essential Element of Marriage," 249. The jurisprudence has always discussed

accept a child, feed it and provide it with clothes, but would refuse to give it an education.<sup>22</sup>

It is true that the legislator has very much taken the perspective of marriage to discuss the position of children. Is it possible to rephrase the aforementioned from the perspective of children? It may be concluded that the legislator very much intends to protect the rights of children with regard to their birth and *educatio*. They have a right to an overall *educatio*, which is geared towards their physical, intellectual, social, religious and moral development and well-being. The first responsibility to provide for that lies with the parents, who at the same time also enjoy the primary right to decide in these matters.

### Children and Separation and Nullity of a Marriage

This conference is entitled "Marriage – Divorce – Remarriage." The word "divorce" is used. Whereas a divorce occurs in the civil realm, the Church considers in its legal system two additional situations: the first one concerns separations in cases of unbearable situations, for example, for the children; the other concerns the declaration of nullity of a marriage. I will attend to these three situations with special regard for the position of children.

#### Divorce

Whereas the Church does not recognize a civil divorce in the sense of terminating a marriage implying at the same time that both partners are free to marry again, it does recognize the fact that people separate and obtain a civil divorce. In the previous section, I focused on the *educatio prolis*: the education of children is an obligation that arises not so much from marriage, but from parenthood. Therefore, irrespective of the fact

the exclusion of the religious upbringing, but did not arrive at unanimous conclusions. This is probably due to the context in which it was discussed. In the former law a non-Catholic person marrying a Catholic had to promise that children would be baptized and brought up in the Roman Catholic Church. If a person had made a positive act of the will not to do so, the simulation was not discussed in relation to the act of the will for the marriage, but more in relation to the validity of the dispensation granted for the impediment of *disparitas cultus*.

22. An interesting aspect is the refusal to provide a child with a religious upbringing or the pertinent intended refusal to have a child baptized.

whether people were, from a canonical perspective, validly married or not, the obligation towards the children remains. The Church affirms this, as we shall see with regard to remarriage to the separation of spouses. If the Church affirms this for those situations, it does so implicitly also when there is a divorce.

#### Unbearable Situations

The second situation concerns unbearable violent situations, for example, with regard to children within a marriage. When one of the spouses would cause grave mental or physical danger to the other spouse or the children, a canonical separation might be granted. Such a separation would imply that the spouses no longer have to fulfil the obligation to maintain a conjugal life (c. 1153 §1). It would also imply that the children are safe. In fact, one could argue that when a child lives in physical or grave mental danger inflicted by one of the parents, the other parent would have an obligation in light of the *educatio prolis* to discontinue the conjugal life for the sake of the child. Hence, the legislator does not accept physical or mental violence.

A real-life situation: a woman turns to a marriage tribunal, because the husband is beating her and her children. She cannot take it anymore and goes to her parents for help, who respond that she married "for better or worse" and that she must return to him, because spouses are supposed to live a conjugal life. She, however, fears for her life and that of her children. She asks the tribunal whether being beaten is part of the "better or worse." In such a situation the marriage tribunal – or other Church institutions – could inform her that the Church does not tolerate violence<sup>23</sup> and could offer her besides e.g. family therapy, information about a canonical separation. At times, women need this support by the Church. This seems to be the case particularly in marriages where women become spouses due to trafficking and where they therefore do not have family members who could assist them.

23. Another example of non toleration of violence can be found in the requirement that the consummation must be in a human manner (*humano modo*). It must be virtually voluntary which implies that it was not extorted through violence. Hence, true consummation presumes that there was no physical or moral violence. Congregation for the Sacraments, *Circular letter*, 20 December 1986, Prot. No. 1400/86, infra 123-129. So far the Holy Father has indeed dissolved marriages that were considered to be not consummated because e.g. the wife was forced to have intercourse with her husband under extreme pain.

The Church thus recognizes and provides for a legitimate separation, but the Church does not leave it at that, because it determines that after the separation has taken place, "the adequate support and education of the children must always be suitably provided" (c. 1154).

### *The Declaration of Nullity*

The third issue concerns the canonical position of children during and after a declaration of the nullity of the marriage of their parents. First of all, in the process of investigating the possible nullity of a marriage most tribunals do not hear the children even though parents might and may legally present them as witnesses.<sup>24</sup> Besides the point that children usually can only report from the time after the wedding – which is for the tribunal often of less relevance – tribunals do not admit them as witnesses because they want to avoid that children are drawn into a conflict between the parents and are forced to testify against one of the parents.<sup>25</sup> Yet, tribunals accept reports that might have been issued in relation to, for example, child custody matters, because such reports may provide vital information for determining the capacity of a person to assume the obligations related to the *educatio prolis*.

The legitimacy of their children is a great concern for many people who have their marriage declared null. Sometimes the only reason they got married was to see to it that the children are born legitimately and they are afraid that the declaration of nullity of the marriage will have the effect that their children become illegitimate. Any child born in a marriage where at least one of the parents believed at the time of the procreation or birth that the marriage is valid (putative marriage – c. 1137) is legitimate. A declaration of nullity does not change this. Moreover, even though the Code still contains a norm determining which children are legitimate, the universal law does not draw any consequences any longer from being either legitimate or illegitimate.<sup>26</sup> With respect to

24. Hearing children entails the danger of asking them to take sides. Hence, many judges do not admit children as witnesses. Cf. Raffaele Coppola, "La tutela dei minori nel diritto canonico processuale e penale," *Tutela della famiglia e diritto dei minori nel Codice di Diritto Canonico*, Studi Giuridici, 53 (Vatican City: Libreria Editrice Vaticana, 2000) 77-88.

25. For similar reasons tribunals often suggest that parents be careful informing their children about the grounds of the nullity, the process and the content of the sentence.

26. In the 1917 Code illegitimacy had negative implications in particular for admission to the priesthood, cardinalate, episcopacy. This has been abandoned in the 1983

legitimacy, it might be mentioned that the universal legislation of the Church provides a rule on who is considered to be a father: it is he whom a lawful marriage indicates unless clear evidence proves the contrary (c. 1138 §1). Moreover, children born at least 180 days after the day when the marriage was celebrated or within 300 days from the day of the dissolution of conjugal life are presumed to be legitimate (c. 1138 §1).

We saw earlier already that irrespective of the separation of the spouses, the obligations towards the children remain nevertheless. The same goes for a declaration of nullity, be it established in a contentious trial or a documentary process. In the Code of 1983 the legislator has issued a new norm concerning the welfare of the children once the nullity is established. The norm reads: "In the sentence, the parties are to be reminded of the moral and even civil obligations which may bind them both toward one another and toward their children to furnish support and education" (c. 1689).<sup>27</sup> This norm did not exist in the 1917 Code; it was introduced in the schema for the Code in 1979 after some consultants voiced a concern for the fulfilment of obligations that the parties might have toward each other or towards the support and education of their children.<sup>28</sup> Their concern found its way in this norm; it implies that the sentence should include a reference to the fulfilment of the obligations. The legislator thus positively emphasises the rights of the children vis-à-vis their parents, also when the nullity of the marriage has been established. The reminder is a moral exhortation. Should one of the parents want to remarry, the fulfilment of the obligations will be attended to again as we shall see below.

### **Children and Remarriage of the Parents**

A third point in these considerations concerns the position of children once their parents marry after a divorce and declaration of nullity. Besides the new canon determining that in a sentence mention should be made of the obligation to support and educate the child, the Catholic

Code. The canons on legitimacy were kept because particular law might refer to it and it would highlight the sanctity of marriage. Cf. *Communicationes* 15 (1983) 240.

27. Canon 1689 only applies to cases declaring a nullity of a marriage and not to establishing a lack of form, because for the latter the documentary process mentioned in c. 1686 does not have to be used. The prenuptial investigation suffices *Acta Apostolicae Sedis* 76 (1984) 747.

28. *Communicationes* 11 (1979) 271-272.

Church has also introduced a new canon protecting rights of children when a parent (re-)marries. The norm appears in the section on the pastoral care and on that what must precede the celebration of a marriage (cc. 1063-1072). That particular section holds a few norms concerning persons who may assist at a marriage.<sup>29</sup>

As this section was drafted several consulters voiced their concern for the children from a previous union and expressed their view that a growing number of parents who remarry do not fulfil their responsibility to support their children from a previous union.<sup>30</sup> In order to better protect the children, they decided to determine the following norm: "Except in a case of necessity a person is not to assist [at a marriage] without the permission of the local ordinary at: [n. 3] a marriage of a person who is bound by natural obligations toward another party or children arising from a previous union." (c. 1071 §1 n. 3).<sup>31</sup>

A few things should be noted:

- The norm speaks about a "previous union": this terminology indicates that children from a previous relationship, not necessarily only a previous marriage, are meant.
- The norm is addressed to the person who assists at the wedding. It is not addressed to the person who asks to be married.
- The norm leaves it to the local ordinary to grant the permission. The local ordinary is the diocesan bishop, the vicar general or the episcopal vicar. It would be possible to delegate this power to the parish priest or even to the person who can legally assist at the wedding.
- The canon does not state that the obligations must be fulfilled. It only states that a person may not assist at a marriage where there are obligations towards children. Some canonists hold that the permission is

29. "To assist at a marriage" is a technical term. C. 1108 §2 determines: "The person who assists at a marriage is understood to be only that person who is present, asks for the manifestation of the consent of the contracting parties, and receives it in the name of the Church."

30. See *Communicationes* 9 (1977) 144-145.

31. The norm did not appear in the 1917 Code but a similar formulation appeared in the Instruction by the Congregation for the Doctrine of Faith, *Ut notum est*, 6 December 1973, for the dissolution of marriages in favor of the faith. The introduction preceding the norms says: "[It is required:] §5. That the party seeking a dissolution take care that children who may have been born from the previous marriage be brought up in a religious manner; §6. That equitable provisions be made according to the laws of justice for the abandoned spouse and for the children who may have been generated" (1178). Norm 12 of the Instruction states the following: "The judge or Ordinary should likewise report how the petitioner has made plans or intends to plan equitably, in accord with the laws of justice, for the abandoned spouse and children who may have been born" (1183). *Canon Law Digest*, vol. 8, 1177-1184.

only required in cases of neglect or when parental obligations would be endangered by the intended marriage.<sup>32</sup> Others argue in favour of proof that the person at least intends to fulfil the obligations. Sometimes a person intends to fulfil the obligations, but is impeded for one or another reason to do so.

The response by episcopal conferences to this norm has been quite diverse. Some have issued particular law, others did nothing. In fact, the norm should find a way into the form that is used for determining the *status liber* when persons want to get married. To illustrate the difference in provisions, I have checked a few episcopal conferences. The forms for establishing the *status liber* of a person who wants to get married in Belgium do not make any reference to children or obligations from a previous union. The guidelines for the priests who are to fill out the form do not mention anything either. The Dutch episcopal conference does not have particular legislation in this regard and writes only in its form determining the *status liber*, a question to be addressed to the parties: "Do you see any reason that may prohibit your marriage?" The *Memorandum* to the marriage form explains that a reason could be "obligations arising from a previous marriage."<sup>33</sup> Even if the answer would be affirmative, the form does not indicate what then should be done or that the person would then be prohibited from assisting at the wedding. There is no mention of a required *nihil obstat* by the local ordinary. The conference of bishops of Germany determined that when the *status liber* of the parties is to be established, the minister who ascertains the *status liber* has to clarify whether the intended marriage will not endanger the fulfilment of obligations. The German bishops decided that the permission to assist at the marriage is automatically granted when this is established. Only when the minister has not obtained moral certainty about the future marriage not endangering the fulfilment of the obligation does he have to submit the case to the local ordinary.<sup>34</sup> A different approach is taken by the Austrian conference of bishops: it requires a written statement of the person who has the right to educate the child that the person

32. See e.g. Thomas P. Doyle, "Title VII: Marriage," *The Code of Canon Law: A Text and Commentary*, ed. James A. Coriden, et al. (New York/Mahwah, NJ: Paulist Press, 1985) 754. Not all authors agree with this position, see e.g. Michael Smith Foster, "Divorce and Remarriage: What about the Children?," *Studia canonica* 31 (1997) 156.

33. *Verklaring voor de kerkelijke huwelijksluiting* and *Memorandum voor het opmaken van de verklaring voor de kerkelijke huwelijksluiting en voor de regeling van de huwelijksluiting* (Hilversum: Gooi en Sticht, 1986).

34. See e.g. *Kirchliches Amtsblatt für die Diözese Münster* 89 (2005) 201.



who wants to get married does not neglect his or her obligations; this statement must be submitted to the local ordinary in order to obtain the permission.<sup>35</sup>

The American canon lawyer Michael Smith Foster understands c. 1071 §1, n. 3 as referring to fulfilling the obligation. He proposes that the norm "be pastorally implemented as a means of encouraging and educating parents in the fulfilment of their responsibilities. A discussion between the priest or deacon who requests permission to assist at the wedding and the parties to the future marriage can be a means of promoting the church's concern for the welfare of the children involved."<sup>36</sup> Such a discussion, he writes, should include a reference to the broad parental responsibilities as mentioned in c. 1136: the physical, social, cultural, moral and religious upbringing of the children. Smith Foster suggests that the investigation is done at the parish level and that the Church's concern for the children is the reason for discussing the subject. He also suggests that this discussion takes place in the presence of the future spouse, so that he or she is aware of the obligations of the parental party.<sup>37</sup> He writes that this investigation should be seen as a time for education, not as a time for policing: it is not the time for the minister to enforce civil law obligations, because such a task remains with the competent civil law authority. "For a priest or deacon to become embroiled in child support awards, the determined arrangements of visitation rights, or reasons for ex-spousal hostility, is inappropriate. It is also inappropriate for the minister to use this time as a means to enforce the fulfilment of canonical obligations. Rather, the necessary permission allows him the opportunity to educate the party regarding the importance of fulfilling canonical responsibilities. The discussion will enable him to determine if the party is fulfilling responsibilities to the best of his or her ability, given the particular situation."<sup>38</sup> Smith Foster proposes that the discussion leads to a written document in which the minister declares that he discussed the matter with the parent and indicates whether and how the

35. Joseph Prader & Heinrich J. F. Reinhard, *Das kirchliche Eherecht in der seelsorge-rischen Praxis: Orientierungshilfen für die Ehevorbereitung und Krisenberatung: Hinweise auf die Rechtsordnungen der Ostkirchen und auf das islamische Eherecht* (Essen: Ludgerus, 1991) 104.

36. Foster, "Divorce and Remarriage," 160.

37. In discussing this in the presence of the future spouse other grounds that might lead to an invalid marriage can also be prevented such as deceit about natural obligations (c. 1098) or error concerning a quality of the person (c. 1097 §2).

38. Foster, "Divorce and Remarriage," 162.

39. Smith Foster attaches the forms to his article and differentiates in them between

obligations are fulfilled or to what extent the parent neglects them and has no intention of fulfilling them. The minister conveys this information to the local ordinary, who subsequently decides whether permission for assisting at the marriage is to be granted or not. If the permission is denied, the priest or deacon should deny assisting at the marriage (cc. 1066 and 843 §1). However, the denial of the permission normally would and should not occur, because c. 1071 §1, 3 does not intend to punish, but to promote the welfare of children. In very severe cases, however, the local ordinary may consider imposing a prohibition for the person to enter into marriage for as long as the reason exists (c. 1077). Smith Foster has drafted forms for implementing his ideas.<sup>39</sup> In the archdiocese of Boston, where he worked for a number of years as judicial vicar, the special position was set up: the "Court Guardian for Children" has the task to see to the position of children when a marriage is declared null or when persons want to (re-)marry.

So far, we saw that the church has two new norms concerning the welfare of children when a marriage is declared null or when a person wants to marry while having obligations towards a child from a previous union. The question remains though how adequately these norms are implemented on the diocesan level. When the judicial admonition remains only a sentence in the final promulgation of the sentence or decree, or when the concern at the time of the wedding remains only a question on a marriage form determining the *status liber*, than "the procedures fail due to neglect, i.e. a lack of action. They do not serve the children of divorce."<sup>40</sup> Hence, it all depends how dioceses implement this.

Yet, there is one final option available to see to the rights of the children: a person might be prohibited from marrying. At times tribunals impose a *vetitum*, a prohibition, for one of the parties to marry again after the court has established the nullity of a marriage (cc. 1684 §1 and 1685). The reason for the prohibition is usually closely related to the ground on which the marriage was declared null. Thus, if, for example, a person is incapable of fulfilling the obligations arising from marriage due to a severe alcohol abuse problem or due to a mental disorder that would prevent the person from taking care of him or herself and thus of a partner and children as well, a court may impose such a prohibition. A court might also impose a prohibition when a party vehemently declares that

Catholic parents and non-Catholic parents and between Catholic children and non-Catholic children (188-190).

40. Foster, "The Promotion of the Canonical Rights of Children," 193.

41. See also Craig A. Cox, "Certain Special Procedures," *New Commentary on the*

he or she excludes offspring or the *educatio* of offspring. This could be the case when a person has insisted on an abortion and continues in his or her intention to have any future pregnancy terminated by an abortion as well.

Although a prohibition does not touch the validity of a marriage, it is nevertheless a strong indication for the person who prepares the couple for marriage to address the provisions of the *vetitum*. Prohibitions may serve several purposes such as indicating to the parties upon whom they are imposed that they should address the issues that caused the breakdown of their former union. It may also protect the person who wants to marry someone upon whom a prohibition has been imposed. Indeed, it may indirectly serve possible future children. The *vetitum* also reveals that the Church upholds the sacredness of marriage.<sup>41</sup>

Even when there has been no previous marriage, a local ordinary may also impose a prohibition by way of an administrative decision: "In a special case, the local ordinary can prohibit the marriage for his own subjects residing anywhere and for all actually present in his own territory but only for a time, for a grave cause, and for as long as the cause continues." (c. 1077 §1).<sup>42</sup> A prohibition is thus always for a specific person, due to a specific cause and only for as long as this cause exists. In relation to the generation and education of offspring a prohibition to marry could fulfil its own purpose.

### Concluding Remark

I was asked to speak about canonical considerations on the position of children when their parents separate and remarry. My presentation reveals that with Vatican II the Church turned to a more personalistic understanding of human beings. The legislator has translated this view

into canonical norms first of all with respect to marriage. The procreation and education of children is not the primary end, but marriage is understood as a partnership of the whole of life ordered towards the good of the spouses *and* the procreation and education of offspring. The legislator allows tribunals to judge the capacity and willingness to realize the procreation and education of offspring of those who married. Moreover, the legislator protects children when violence directed towards them is a ground for a separation of the spouses. The legislator is also attentive to the rights of children vis-à-vis their parents to obtain an education when their parents separate and remarry. Hence, the legislator indeed promotes the rights of children and now leaves it to those who are to act on the law to implement this.

It is therefore not on the level of the legislator, but on the level of those who implement the law where the major challenge for the Church lies: are judges and pastors acting in agreement with the vision that the church has already expressed in its doctrine and legislation? It will be for pastors of the church and judges to become "advocates" of the little ones when their parents separate and remarry. A noble task indeed!

### La situation des enfants dans le contexte du mariage, du divorce et du remariage. Une approche canonique

La contribution est centrée sur trois thèmes: (1) Quel rôle jouent les enfants à l'intérieur de la compréhension canonique courante du mariage? (2) Quelle est la position que le droit canonique reconnaît aux enfants dans les cas d'extrême violence conjugale, de divorce ou d'un mariage déclaré invalide? (3) Comment l'Église protège-t-elle les droits de l'enfant lorsqu'un ou deux parents se remarient?

Depuis Vatican II, l'Église s'est ralliée à une vision plus personnaliste du mariage. Le législateur l'a traduite en normes canoniques: ce ne sont plus la procréation et l'éducation des enfants, qui constituent la fin première, comme c'était le cas dans la législation antérieure. Le mariage est désormais conçu comme un partenariat pour la vie, orienté vers le bien des époux *et* la procréation/éducation des enfants. Ce changement de perspective a des conséquences quant aux cas de nullité, spécialement en ce qui concerne la capacité de réaliser un partenariat pour la vie et l'éducation des enfants. En outre, la violence infligée aux enfants peut constituer un fondement pour la séparation des époux. Le législateur est aussi attentif aux droits des enfants d'obtenir une bonne éducation dans le cas d'une séparation et d'un remariage des parents. En conséquence, le législateur promeut vraiment les droits de l'enfant et il confie à ceux qui doivent exécuter la loi, le soin de veiller à son application. Ce n'est donc pas au niveau du législateur, mais bien à celui de ceux qui ont à l'appliquer que se situe le principal

*Code of Canon Law*, ed. John P. Beal, James A. Coriden, Thomas J. Green (New York/Mahwah, NJ: Paulist, 2000) commentary to c. 1684. Cf. John Lucas, "The Prohibition Imposed by a Tribunal: Law, Practice, Future Development," *The Jurist* 45 (1985) 588-617. The *vetitum* is strongly debated among canonists. It is somewhat unclear who may impose it, whether the imposition attached to a sentence is a judicial or an administrative act, and who may lift it. Cf. Lynda Robitaille, "The *vetitum* and *monitum*: Consequences of Marriage Nullity or Pastoral Preparation for a New Marriage?," *Studia canonica* 38 (2004) 37-64.

42. This touches on the question whether mentally impaired persons should be allowed to marry and have children.