THE DEVELOPMENT OF FAMILY-LAW IN THE FEDERAL REPUBLIC OF GERMANY DURING THE LAST DECADES. FACTS AND OPINIONS.

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I

I should like to give you an account of what has been going on in the Federal Republic in the field of family law during the last decades. Now, before talking about family law I should probably say a few words about the German family, and that means, first of all, the West-German society in general.

The Federal Republic has some 60 million inhabitants and, by your standards, it is a very small country. Ethnically it is, for all practical purpose, homogenous. Of course, there are differences in character and dialects, but these differences do not reach into private law. As the name says, it is a Federal State and in some fields, there is considerable state legislation. But in private and family law in particular, jurisdiction lays with the federation.

Compared to Indonesia, there is also little diversity in religious faith. Almost all Germans are recorded as christians, slightly more
than half of them protestants, somewhat less than catholics. But, as far as family law went, the religious faith of an individual is irrelevant. To begin with, an outside observer would probably note little difference between catholics and protestants, although, seen from the inside, there is some difference, for instance in the attitude towards divorce. On the other hand, and this is the main point, family law is the same for every German national regardless of faith. Marriage, for instance, has to be concluded in the registry of marriages, births and deaths. It is a custom to go there first and then to church for the religious ceremonies, although it is not uncommon to have one's marriage solemnized in the towahall alone.

As for the family itself, it usually consists of the parents and one to three children. The size of the family has gradually declined since the second half of the last century. We know of our parents that then it was very frequent for grandparents and grandchildren to live in the same house and to be one of seven or nine brothers and sisters. This does of course not mean that there is no coherence at all beyond the very nucleus of the family, but it is much less marked than some generations ago.

Only two centuries ago, not only the peasants but also families in town tended, to a certain degree, to be economically self-sufficient. Of this, almost nothing is left nowadays. The only place you can find families as units of production is small-scale-agriculture and craftsmanship. Here, members of the family will work together to avoid the necessity of employing foreign labor, which may be too expensive.

For the remainder, the family in come is usually earned by the father, but about every married woman adds to the family income by doing part- or fulltime work, and in families of laborers and lower-class employees children often begin to earn at the age of about 16 years.

Until something more than 100 years ago, it was the family that provided for a certain degree of social security. In case of illness, accidents or loss of earning capacity due to old age, it would be the family that would do its best to care for its members. Now a days this function has entirely passed to the public institutions of social security, general health insurance, pension funds and so on.
To a certain degree the family has even lost its function of raising and educating children. Of course, small children are usually educated by their parents alone. But there is a tendency in our educational system to have children go to school or pre-school at the age of 4 or 5 and keep them there all day long, the main reason being, that this seems to be the only way to overcome social barriers in the upbringing of children and to give them an equal chance. Moreover, bringing up a person to meet the technical and social requirements of an industrialized society is considered to ask for more training than many parents have.

Now, taken together, all this seems to amount to the family gradually losing any importance it may have even now. Surprisingly, this not true. Psychologists and sociologists are almost agreed to state that, not withstanding the loss of so many functions, the family has retained and even gained vital importance in another direction. While the family has lost part of its old functions, it remains a decisive element in the emotional balance of man. The more our social environment is manganized and commercialized, the more psychological stability seems to require an area where a human being can communicate with other human beings without standardization and technical control or rationality and, possibly, find back to himself.

What ever the reason may be, the facts seems to indicate that the family as a social unit has a future. Paradoxically this, in the Federal Republic, is confirmed by divorce statistics. We have more then 10 divorces per 10 000 inhabitants per year, and that is 10 times as much as there were at the turn of the century. But if you look closer, you see that among people marrying, the percentage of divorcees has equally increased. This seems to indicate that it is not the state of matrimony which is refuted but that on the contrary people expect such a degree of personal fulfillment from marriage that they are prepared to disrupt an existing connection where this fulfillment is not found, and try another time.

Now, after this short review of the factual background, I should like to say a few words on the general frame of our family law.

Up to the beginning of the twentieth century, there were almost as many legal orders in Germany as there were more or less
independent kingdoms, duchies, counties and so on. Some of these were governed by ancient customary law, in others there were relatively recent civil codes that had been issued under the influence of rationalism. In other again you found the French civil code reigning as a trace of the Napoleonic wars. Alongside this diversity, the ancient Roman law as received and systematically developed by North-Italian and German lawyers was still studied and applied where ever there was no newer legislation.

This variety is reflected in family law. But there, we find still a other element, namely religious law. This was true particularly for marriage law in large parts of German until 1871. That year brought the introduction of a unified system of civil marriage all over Germany, and 30 years later the German civil code was enacted and German family law as well as private law in general, finally unified.

As for the content and the development of this unified law, I shall give some details later on. Concerning the general technique and the ideology one can say this much. You can read everywhere that in Germany as in the greater part of the European continent we do not have judge-made law with sparsely intermingled statutes, but general codes comprising all fields of life. Of course, this is correct. But it should not lead to the conclusion, that judgements rendered by the higher courts are without importance as factual sources of law.

There are great areas of private law, where the legislator has given so general rules or where development has taken a so unexpected or unforeseeable turn that complete turmoil would result if there were not dozens and hundreds of judgements rendered by higher courts that give and modify specific rules to abide by. This is also true of family law, divorce law for example.

As for the ideological development of German private law in general during the last century, it might in general terms be deemed as a transition from liberal to social philosophy. The German civil code is, as most great codes are, not a beginning, but rather an end. It draws the sum of a development which was marked by the access to power of a wealthy and self-confident bourgeoisie. This bourgeoisie asserted its claims against the formally absolut monarch, among
other ways, by drawing up walls against state influence in its main sphere of activity, commerce and industry namely. The function of the state was conceived as that of a night-watchman, who should merely guarantee the free movement of the intrinsic forces within society. Two of the great catchwords of liberalism where taken from the famous slogan of the French Revolution: "Freedom" and "Liberty". But they had forgotten the third element, "Brotherhood" and replaced it, in a way, by its contra position: "free competition".

It is probably not necessary to spell out the results of this policy in detail. While it worked quite well for the wealthy bourgeoisie that had developed it, freedom and equality meant little to those who were economically unequal and had but the freedom to sell their labor at the price they were given. So, the development of German private law since the enactment of the civil code may be termed as a slow and painful renaissance of the idea of brotherhood which can be traced in almost all parts of our legal system.

Surprisingly, at least on the surface, the development of family law was otherwise. At the turn of the century, instead of individual freedom, there was strict subordination under the institutions and ideals of family life that were in their turn strongly influenced by the churches, and also under the patriarchal power of the pater familias. Instead of equality we find hierarchy from the pater familias down to the illegitimate child. Here, the secular has been towards more equality, particularly for women, and more freedom in the sense that for instance, marriage is not so much thought of as an institution human beings have to serve than as a contract which serves the interest and the personal fulfillment of human beings. At the same time, we find a tendency, particularly in divorce law, a way from subservience to the ideas of guilt, crime and punishment or, on the other side, responsibility and free will in the direction of social engineering and responsibility.

I think it will be easy to detect the marks of this secular evolution in some particular developments I should now like to draw your attention to.

III

Probably the most important amendment of German family law since the enactment of the civil code in 1900 were probably the
provisions concerning the equality of men and women. The new constitution of the Federal Republic of Germany, the so-called "basic law" of 1949, had ordered the legislator to revoke all legal provisions contrary to this principle within a relatively short time. Even so, it was only in 1958 that the consequences were drawn in the field of family law. This means that nowadays husbands and wives have equal rights to decide in any matter concerning the whole of the family, the upbringing of children, maintenance — mutual and children-and finally property law. As far as the family name goes, we still follow the old custom that the wife, upon marriage, takes the family name of her husband. But she can, by means of a simple declaration before the registry office, add her maiden-name and so bear a double name.

Before the date I have mentioned — 1958 — the final decision in all family affairs was for the husbands to take, and there was a variety of systems with regard to family property. Now, when husband and wife cannot find an agreement on family matters, they have to ask the family court for a decision. In property law, the prevailing system is that of sideration of property. However, the position of the law is, that any property acquired during the time of a marriage is due to the common endeavours of both spouses and should therefore not profit only one of them. Therefore, in case of a divorce, any "surplus" that appears upon comparison of the state of property of the spouses at the time of marriage to the state at the time of the divorce should be shared, and the less fortunate spouse has a claim against the other for half of the value of the surplus.

In the normal case of dissolution of a marriage by death, the legislator has adopted a system which is rather simple but less logical. The hereditary portion of the surviving spouse is simply increased by one quarter, regardless of the existence of an actual surplus.

I should probably not close this chapter without repeating that, although the law is now the same for men and women, we have still some way to go towards full equality of men and women in all fields of public and private life.
In 1970 the law concerning illegitimate children has also been reformed. This too, was due to an order of the constitution. To understand the issue of this reform, one should probably take a look at the state of affairs towards the beginning of the century. Class difference was much more marked then, than now. An illegitimate child almost always belonged to the lower classes. Even where the mother had belonged to the upper class, she was very likely to loose her status precisely owing to her giving birth to an illegitimate child. The father, meanwhile, in many cases belonged to the upper class, and it was not hnommon for him to free himself from more obligations towards the child by a settlement in cash.

The provisions of our civil code gives the impression that they were made precisely for such a case. Maybe I should say here, that "illegitimate child" in German law means any child born out of wedlock. There is no distinction, as in some countries, between such parents as might have married sooner or later and others. Particularly in view of this, the old rule seemed harsh. The father owed maintenance in cash according to the circumstances in which the mother lived. While in general, settlements in cash are not admissable in German maintenance law, here an acception was made.

For the assumed father, it was sufficient defence to prove that the mother had had relations with other men around the time of conception.

The new law has endeavoured to ameliorate the state of affairs in all these respects. There is dispute as to the degree in which this has been achieved. The claim for maintenance of the illegitimate child has been fortified and amplified. Now, it is not only the position of the mother which determines the amount of maintenance, but also the position of the father. Evidence problems have been eliminated by providing the government with competence to fix a certain minimum amount, in accordance with the general cost of living, for every case of maintenance. The notorious defence "plurium" has been abolished in favour of scien tiic research of paternity. Now, the father-child-relationship is established by two means: either by recognition or by judgement. The judgement is
rendered on a refutable presumption that he who has had relation-
ship with the mother during the legal period of conception is the
natural father. The refution of he presumption maybe done by
medical expertise. — Contrary to the old law, the illegitimate child
has hereditary rights against the father. If the deceased father is
survived by a spouse and legal off-springs, the illegitimate child
will have a claim amounting to the value of half the hereditary
portion it would be entitled to as an heir, if it were legitimate. If
there is no spouse and or legal offspring, the illegitimate child
inherits as if it were legitimate. The illegitimate father has similar
heredity rights to the child.

Here too, I should not conclude this paragraph without pointing
to the fact, that the new law is a condition for, but not the solution
it self of, the problem of illegitimate children. The roots of this
problem lay in the frequent lack of family surrounding during the
first years of a persons life and in the inequality of opportunities.
It can not be a mere coincidence, for example, that criminality is far
more widespread among persons of illegitimate birth than among
others. Birthcontrol will certainly reduce the size of the problem
within the next years, but it will continue to exist.

V

In the field of divorce, I can not report of any recent legislation,
but only of the long-term-development and of some new plans for
imminent reforms.

The development of our divorce law from the enactment of
our civil code to the now imminent reform can be termed as a
farewell to the fault principle.

Before the civil code, there was considerable variety of
legislation in this field. Alongside with the rather strict canonistic
marriage law we find relatively liberal rules, just as the old custo-
mary German law had been comparatively liberal. The civil code
leaned to the strict side, rather. Divorce could be declared by
judgement only. As a rule, divorce was conditioned to morally
disapproved conduct on be half the defendant. The only exception
was insanity. In 1938, an amendment was enacted under the number
of grounds for divorce, for reasons of population policy mainly.
Among other possibilities, it was now sufficient to prove that the marriage had proved a failure, that relations between the spouses were wrecked and that they had lived separately for more than 3 years. In this case, the only defence was that, for particular reasons, the claim was against good faith.

In 1946 the allied control council enacted a statute on marriage that, in a way, purified the then existing marriage law but expected the just mentioned provision allmost without change. What did change now, though, was the doctrine of the courts. While the old German high court had taken a rather liberal attitude, our Federal high court, since 1955 at latest, took the stand, that marriage was in principle indissolvable. Contrary to the old doctrine the defence of the claim being contrary to good faith was now, as a rule, expected. It was not until some few years ago that the tendency was revolted again.

So much for the conditions of divorce. As for the consequences there is first the problem of care for children. It is clear now that the decision of the family court is exclusively towards the well-being of the child. But it should generally not disregard a proposal made by both parents and shall not without grave reason confer guardianship and care to the guilty part.

As concerns maintenance among the divorced spouses, we have to distinguish between divorce for breach of marital obligations and divorce in the just mentioned case of objective failure of a marriage. In the first case the guilty husband will, in principle, have to maintain the wife if the proceeds of her property and, as the case may be, an appropriate work will not suffice for her needs. The wife will have to pay maintenance to the husband only if he is incapable of maintaining himself. If there is guilt on behalf of both parts, or if the divorce has been for failure of marriage, then maintenance is only due if, for particular reasons of the case, this seems acceptable.

Altogether, the present state of the law in the Federal Republic might be described as follow: there is divorce based on the principle of fault in cases of adultery and of other grave infringements of marital obligations then there is divorce on the grounds of objective
failure of marriage after a period of 3 years separation. These conditions are also reflected in the law of maintenance. According to the law, there is no divorce based on the mere consensus of the parties.

Now if one takes the state I have described as the law in our country and then, living in the country and having some professional knowledge of the divorce scene, one cares to have a look at divorce statistics, one is apt to be startled. For, according to statistics, in 91% of all cases the claim is for grave offenses against matrinnial conduct. Not more than 2.5% of all divorces are for adultry, contrary to expectations, not more than 4.5% for objective failure of marriage. The explanation is that these statistics, and that means: the judgements, do reflect the factual motives of divorce.

According to dependable calculation about 90% of all divorces in the Federal Republic are de facto to consensus. This means, the spouses have consented to get a divorce, and because the law does not allow for conventional divorce, they prepare to act a drama before court. It is quite normal for spouses to conclude a contract before initiating judicial procedures in which it is convened which of them shall sue the other, which grounds for divorce shall be put forth and that the defendant shall not bring forth any defence. The real reason for divorce will, thus, not be invoked at all. One of the reasons for this procedure is that the mentioning of a third-party adulter in judgement may lead to an impediment of marriage between him and the infidel spouse.

Contracts of this kind are bargained as all contracts are. There is pressure close to blackmail, there is bluff, there may be a certain degree of intimidation. It is common practice to promise to admit guilt in order to have the other spouse renounce maintenance. There can be no doubt that these contracts lead to circumvention of the law. Their validity was therefore strong under dispute. To a certain degree they are recognized by the courts and anyway, they are common practice. This circumvention of the law in the end, it is sanctioned by the courts that do not go deeper into the matter when they are presented with a case of kind although they might have suspicions. On the other hand there are considerable differences between different court and even between different chambers of the same court in this respect. But that does not make it any better.
There are two ways of mending this deplorable state of affairs. One could strictly adhere to the law as it is and open a complaint against divorce by factual consenses. But as this form of divorce is practically normal in the Federal Republic, such action would be hopeless and, I may add, unadvisable for other reasons too.

The second position would be to amend our law and that means to adapt it to the view of the great majority of the population. Fortunately the Federal Government has recently taken steps in this direction, and although there will surely be resistance from various quarters, it is highly probable that in a few years there will be no more divorce for faultive conduct but only for objective failure of marriage in the Federal Republic. The law now prepared for parliament will re-incorporate marriage law back into the civil code and recognize, as grounds for divorce, exclusively the "wrecking" or "failure" of a marriage. It is not yet quite clear, when a marriage shall be considered a failure and that means first of all what is a way of an external indicator must be proven. Almost certainly, living separately for a certain period of time, there years for instance, will recognized. According to the bill, one year should suffice if there is consensus among the spouse over the divorce. — There is much dispute about the insertion of a hardship-clause: this means that a couple should not be divorced, even if the marriage is wrecked, whenever this would present grave iniquity to one spouse because of extraordinary circumstances. While some feel that even this clause would not be enough and there should be a defence to the divorce claim as there has been heretofore, other feel that there should be no such clause at all.

If divorce is granted without regard to fault, the question of maintenance is particularly thoray. It would not do for every spouse to care for himself after the divorce even if there would be special provisions for the care of children. The main problem is that in ordinary family in the Federal Republic the wife would have given up earning money after the birth of the first or second child at latest and would have devoted herself entirely to her family. The husband would then have been able to develop his professional position during the time of matrimony. After a divorce, the wife would have to begin a new and would have alone sacrificed part of her strength
and her life to the family. In the case of elder women it is of particular importance that the husband will usually have acquired claims to public pensions and so on during the time of his marriage that accrue to himself only. So there is a risk that a woman who has sacrificed the best years of her life to her family would after a divorce be left without professional schooling, without earning capacity and without any claims to social security. This problem has certainly not been solved satisfactorily so far. According to the will, in the case of divorce at a relatively young age of the spouse, as the case may be, would be entitled to maintenance by the other in order to have the opportunity to complete or continue instruction for some profession. It goes without question, that there is a claim for maintenance as long as she (or he) has to care for small children. In the case of a divorce at an advanced age the spouse, usually the husband, who during the time of marriage has acquired claims to social security pension and so on shall have to transfer parts of his rights to the other. In accordance with the numerous forms of pensions and so on the details of this regulation would be rather complicated. Discussion is still going on, here as with reference to the other problems.
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