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The Position of the Marriage Law Commission of the Protestant Church in Germany on the Draft Version of a Family Law (December 1952)

The Protestant and Catholic churches were active participants in the West German debate in the early 1950s on reforming the provisions of the Civil Code that dealt with marriage and family law. The Protestant church took a skeptical view of the planned abolition of the husband's decision-making authority in cases of conflict, because it saw in this the danger that the state might intervene in the family if the spouses could not reach an agreement, but it did not reject it outright. By contrast, Protestant church resolutely defended the authority of the father in questions relating to child rearing, since it supposedly derived from the paternal authority of God and the responsibility of men before God and thus could not be questioned.

After the appearance of the memorandum by the Federal Ministry of Justice about a family law bill, the Protestant Church in Germany appointed a commission of lawyers, theologians, and representatives of the Protestant women's organizations, which met continuously under the chairmanship of Professor Dr. Dr. Schumann at the Protestant Research Academy Christopherus Stift in Hemer/Westphalia. On the basis of the work of the Commission, the Council of the Church expressed its position on the main points of the memorandum in a detailed letter to the Federal Minister of Justice. In addition, after the publication of the government bill, the Commission expressed its expert opinion on additional individual legislative questions. Now that the government bill has passed the *Bundesrat* in the first passage and is before the *Bundestag* for adoption, the Commission sees itself compelled to present the results of its reflections in summary form.

I. Basic considerations
The Protestant Church is not part of the legislative bodies and therefore bears no formal co-responsibility for the upcoming change to the marriage and family law. For that reason, it also does not generally regard it as its task to make formulated proposals for these bodies. However, the Protestant Church cannot excuse itself from a factual co-responsibility, since the concerns and exigencies of state and church have always met on the ground of marriage by the very nature of the issue. We are dealing with two things here: first, the Church will have to make sure that the sphere for a Christian marriage is not constrained by state law when changes are made to the marriage and family law.

Second, the Church must be concerned that the essential structure of marriage as such, in which the Church recognizes a conserving order of God, is not endangered by legislative changes. All the more attention must be paid to this, because from an ethical and sociological

perspective, a far-reaching process of dissolution of marriage and family has already been under way for some time. It may be doubtful whether this kind of dissolution can be effectively countered with legislative means and the judicial system; however, there can be no doubt that this dissolution could potentially be accelerated, even if unintentionally, by a change in the law and the administration of justice following it.

The revision of the family law necessarily expresses itself, for the most part, in the reorganization of the subjective rights of husband and wife. The Church is primarily interested in seeing that in the reorganization of such mutual subjective rights, which it also recognizes as necessary, the now endangered institution of marriage and family is preserved and, if possible, strengthened. Marriage is a union between spouses on the basis of sexual difference, into which they enter without having command over it. Husband and wife enter into it with the risk of their entire person and swear all-encompassing love and fidelity to each other. That is why marriage is contracted as exclusive and in principle indissoluble. A union that would be contracted from the outset as dissolvable would not be a marriage. Marriage and family are the most primal human communities. They are enveloped by the mystery of their origin, which the Christian attributes to Jesus Christ, but this mystery must also be respected by non-Christians if one wants to defend against the destruction of life. The laws of the state do not control this essential framework, but presuppose it.

II. Equality and the Basic Law

An interpretation of the concept of equality in the sense of Article 3, Section 2, of the GG [Basic Law] proves difficult in this context. According to our conception of marriage and family, this article cannot be interpreted arbitrarily or without restrictions in the formal sense of the word. Rather, it can be applied only on the basis of an *a priori* understanding of marriage and family. Thus, Article 3, Section 2, of the GG cannot mean everything that is formally possible and could possibly be described as equality, but only what, presupposing the nature of marriage and family, is possible and meaningful within this institution. The nature of marriage and family thus forms the interpretive horizon of equality according to Article 3, Section 2, of the GG. The legislator of the constitution merely wanted to regulate certain legal consequences of marriage in accordance with the principle of equality, where this seemed possible without endangering the institution of marriage.

III. Main points of reform

The proposed changes to the law vary in scope. In the deliberations of the Commission, as in the public discussion of the same issues, two mutually interconnected questions were front and center: the decision-making power of the husband (§ 1345 BGB [Civil Code]) and that of the father (§§ 1627 ff., 1634)

A. (§ 1354): This clause already underwent an essential change in the drafts, and this clearly shows the difficulties of the subject matter.
Hagemeyer's memorandum stated as § b: "In all matters concerning the shared life, the spouses decide jointly." The government's draft proposed the following version (1354): "The spouses must regulate all matters pertaining to the marriage and family with mutual agreement.

Each spouse must give consideration to the real or presumed will of the other. If there are differences of opinion, the spouses must try to arrive at an agreement. If this is not possible, the husband is entitled and obligated to make the decision while taking his wife's views into account. A decision that does not correspond to the well-understood interest of the spouses is not binding for the wife."

The *Bundesrat* eventually chose the following version: "The spouses must regulate all matters that concern marriage and family with mutual agreement. Each spouse must take the real or presumed will of the other into account."

With this, an erroneous solution of the problem, often discussed up to that point, has dropped away.

For a general shift of decision-making in cases of conflict to a third party standing outside the marriage would have to be resolutely opposed. In all cases in which it is not absolutely essential (see below), the legal participation of third parties is dangerous to the marriage and alien to its nature. It seems intolerable to make the state in principle into a partner in marriage by way of the guardianship judge. Moreover, the majority of disputes would not be justiciable and the decisions rendered would not be enforceable. Non-judicial third parties ("marriage support" of various kind) can be helpful in some respects, if they are staffed with good people, but only if they have the authority to provide counseling.

The Protestant Church has, of course, no reason to champion the unchanged preservation of the husband's general power of decision-making. It can certainly assent to a revision of § 1354 that obligates the spouses to decide jointly and that leaves the decision to the husband only in case of conflict. In this event, the explicit provision should come into play that the husband is legally obliged to attempt to arrive at a shared will under all circumstances, that the intentional failure to make such an attempt already constitutes an abuse of the husband's decision-making power, and that in this case the binding nature of his decision is abrogated. At the outside, the Protestant Church could even accept the complete elimination of the husband's previous decision-making right within marriage, on the condition that the modified decision-making power of the father vis-à-vis the children is maintained.

The Commission does not find itself compelled by the Protestant understanding of marriage to advocate the preservation of a decision-making right for the husband. Holy Scripture does not know a spiritual elevation of man over woman. The apostolic admonitions to woman to subordinate herself to man can therefore be applied to married life only for non-spiritual things. These admonitions cannot be rendered non-binding for the present by declaring them the product of their time. In spite of this concern, the Commission, even though an abolition of the husband's decision-making power would thus reveal a difference between the Protestant conception of marriage and the legal norm, does not simply regard the preservation of the husband's right of decision-making as called for as a legal norm for the internal relationship of the spouses. It acknowledges the concerns that are opposed to legalizing the relationship of Christ to the community that is – according to apostolic opinion – exemplary for the relationship

between husband and wife in marriage (see Eph. 5, 22, 23). It was further reinforced in its position by the fact that a legally normatized decision-making right for the legally hardly graspable relationship of the spouses to each other would confront the judge with what is for him an unsolvable task of determining and judging circumstances that often escape the judgment of those most closely involved.

B. (§ 1634): The relationship between parents and children is fundamentally different from that between spouses. Likewise, the authority of the father is different from that of the mother. In the formation of the marriage, there must be room for the office and authority of the father as much as for that of the mother. The father's and mother's authority are equal but not the same. They refer to each other, are mutually conditioned, and do not represent isolated rights. The Christian church, which venerates God as the father, cannot, with the elimination of the paternal decision-making power, abandon the conceptual content of this profession and the relevant apostolic admonitions.

No side has laid claim to the final decision-making right for the mother. If this final decision-making right is not to lie with the father, it can only be transferred to an authority outside the family. The same crucial concerns that were already presented for the sphere of relationships between the spouses speak against the general involvement of a third, especially governmental party in decisions concerning the children.

Guardianship judges, too, can make false decisions. In fact, in the view of the Commission, the danger that they decide in a thoughtless and cursory fashion is even greater than with the father. Added to this is that interference by the state into a sphere reserved for the family at a time and with a people who have not yet internally overcome the dangers of a state's totalitarian claim, and which [still] has the excesses of totalitarian state thinking before its eyes, contains particular dangers. The meaning and danger of such a regulation lies not only in the individual decisions of the court, but also in the fact that the expanded, constant possibility of invoking it influences the relationship of the spouses. In an emergency, it is unavoidable; as a rule, it is dangerous to the survival of the marriage. In this situation, in particular, it seems especially important to keep the necessary decisions within the family as much as possible.

If, in spite of these concerns, a complete formal equality of women were legally established, such legislation would simultaneously have the tendency to dissolve the existing privileges of women and the protection they still have today.

In regard to children, the Commission, like the Council of the Protestant Church in Germany, cannot relinquish the father's decision-making power as it would, at the most, the husband's decision-making power in the relationship of the spouses to each other. The easily understood relationship of parents to children, the crucial aspect of the welfare of the child, the decision of the united family for the sake of the child's welfare – these things are accessible to legislation and, unlike the husband's decision-making power within marriage, have already been largely assessed by the judiciary.

The family is the birthplace of authority and thus of freedom. After the unsettling of patriarchal authority over the course of the last centuries, after the unsettling of male authority in National Socialism and militarism, our nation faces the serious threat of men's flight from responsibility. Every father bears his responsibility before God. Flight to the decision of the guardianship judge would promise the danger of the father's flight from responsibility before God. In the face of these developments, we urgently advise against completely dissolving the legal expression of fatherhood.

Source: Stellungnahme der Eherechtskommission der Evangelischen Kirche in Deutschland (EKD) zu dem Entwurf eines Familienrechtsgesetzes (Dezember 1952) [The Position of the Marriage Law Commission of the Protestant Church in Germany on the Draft Version of a Family Law (December 1952)], BA/Bestand Nachlaß Lüders; reprinted in Klaus-Jörg Ruhl, ed., *Frauen in der Nachkriegszeit 1945-1963* [*Women in the Postwar Era, 1945-1963*]. Munich: Deutscher Taschenbuchverlag, 1988, pp. 165-70.

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