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SIMPOSIO EUROPEO DEI DOCENTI UNIVERSITARI

Anno internazionale della famiglia

La famiglia in Europa

Fondamenti – Esperienze – Prospettive

Esperienze e Problemi in Europa.

La Germania

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A. Marriage

Marriage is a life partnership between a man and a woman, which is stabilized through legal rules and is recognized by the church, by the state and also by the social environment. Nowadays we are confronted with a set of problems which come out of the essential elements of marriage: the duration, the indissolubility and the same-sex-partnership. The monogamous marriage is not a matter of discussion any more – perhaps it can be a matter of discussion in the Islam.

I. Duration / Indissolubility

One of the characteristics of marriage is its duration. In the canon law of the Catholic Church is a consummated marriage between two baptized Christians indissoluble. Under German Law marriage is also a partnership based on duration, which cannot be lawfully dissolved on the basis of consensus. One can dissolve a factual life partnership. In order to have a lawful separation of the partners which is recognized by the state one needs to appeal to the family court and obtain a divorce. This is the case also for same-sex-partnerships in Germany. The element of duration is contained even in the same-sex-partnerships.

II. A communion between man and woman

The fact that a marriage can be concluded only between a man and a woman is valid for the state law and for the canon law but this is not universally accepted any more. 2001 Germany has found a solution of this problem by issuing the Law for Life Partnership, which regulates the public relationship between same-sex-partners without adapting it to marital law. The social pressure and the pressure through developments of the European Union in the Western World will constitute the cause for future problems. A possible problem: the case of the Netherlands where same-sex-partners are permitted to adopt children. In the USA and in France we encounter the same tendencies.

III. Forms of Matrimony

The Obligatory Civil Marriage

Until the 19th century the matrimony in Germany was exclusively concluded in church. As a consequence of the "Kulturkampf" the obligatory civil marriage was first introduced in Prussia and in 1875 in the entire German Reich. This law had two clauses: 1. in order to conclude a valid marriage one has to do it in front of the civil marriage officer. Parallel with the introduction of civil marriage offices were opened. The registrar for births, deaths and marriages belongs to these offices. The Catholic Church has accepted this regulation in the Reichskonkordat of 1933. 2. The church marriage has to take place only after the civil marriage. Exceptions can be accepted in extreme cases – like death danger. The church servant who does not keep this rule is committing an offence. This double marriage-system raised a number of problems: from the point of view of constitutional law one has to question the relationship between church and state; from ecclesiastical point of view it is hard to accept that the administration of a sacrament is dependent on an act of the state or that catholic believers are not allowed to get married only in Church. This is why in Germany nowadays efforts are being made to introduce an optional civil marriage.

The number of marriages is in a steady decline in Germany. 2002 388.000 couples got married, 2003 the figure decreased with 1,4% up to 383.000. Many couples live nowadays together without going

through the civil act of matrimony. Nevertheless the meaning of matrimony has not lost its meaning.

IV. Conclusion

Even though the German Civil Law allows divorces, we can state that church law and state law have the same presuppositions of matrimony and that they have a similar understanding of matrimony. This will be valid until the consensual divorce will be introduced.

B. Family

Family. Concepts to understanding the role of the family from the point of view of juridical law and of systematic thinking

I. Historic Concepts

Historically speaking we have different concepts of the institution of family. 1. The family as an institution of divine law. The matrimonial law has to be drawn from the theological statements of Christianity even in its political and social point of view. 2. The Scholastics developed the concept of family as an institution of natural law. The theory of the family is accordingly a part of the state teaching. 3. The Enlightenment sees the family as a contract society, as an expression of individualism. 4. Since the 18th century a personal view on the family is being developed. 5. The civil compromise with its connection of the personal interpretation of marriage and family with stabilising elements brings about a personal understanding of the family, which is not opposed to the objective ethics.

II. The contemporary understanding of family

The concept of family is changing in the present day not only in every day language but also in its use by the sociological sciences. This change corresponds to the permanent change of society. Through the latest reform we encounter alongside marriage a juridical partnership between two parents of children who are not married to each other. The issues of non-matrimonial partnerships

do not belong to the family law but to the issues of the civil law. The same-sex- partners have been given a special juridical status of the “registered life partnership”, which has similarities with matrimony.

C. Children and the religious education of children

I. Institutions, responsible for the religious education of children

The religious education of children is in the first line the responsibility of parents, of the state or of the religious and philosophical communities. Parents and family are protected as educators. The caring for children and their education is a natural fundamental right of the parents. One has to mention here the protection of the individual freedom of belief, of conscious and of confession. The state supports the parents in their attempt to fulfil their educational activity towards the children and also takes legal decisions if the conflicts between the parents infringe on the education of the children. The role of the state is that of a “watcher” (Art 6, par. 2, sent.2. German Constitution -GG), who is interested in the welfare of the child. The state has a special role in the schooling of the children (Art. 7, par 1, German Constitution).

The religious and the philosophical communities participate at the religious and philosophical education of children on the basis of their corporate freedom of religion and of participation (Art 4 GG, Art 140 GG compared to Art 137 the Constitution of Weimar). In the domain of children’ aid certain religious and philosophical communities can take over some educational aims, whereas their participation in the schooling system is granted to them as a fundamental right (Art 7, par 1.4 and 5). The religious and philosophical education of children is settled through legal norms and through state norms for the domains of family, children aid and education.

II. The parental right of decision

The parents have the final responsibility for the religious education of their children. One has to mention here not only the daily religious practice but also the other influences as far as ethical

values are concerned, which have an influence on the future of the child.

The decision-making of the parents as far as the religious education has to be done in a mutual accord. This decision is expressed at first sight through a formal act (circumcision or baptism), which is not sufficient enough for the future development of the child. This formal act is only an indication for the values of the parents.

The parental right of decision about the religious education of the children is included in a law about the religious education of children. The parents are completely free in their decision and should not stay under any pressure from the state or the church or any religious community.

D. The German Way on Pregnancy Counselling (S. 10)

I. Pregnancy Counselling. The Dispute over the counselling certificate

The Pope has imposed on to the German Bishops that they have to withdraw from the pregnancy counselling system. He has done that through a letter addressed to the German bishops on 11.01.1998 where he expressed his worries that the implication of the dioceses in the pregnancy counselling could be interpreted as lack of clarity as far as abortion is concerned. The dispute over the counselling certificate is being well documented in the meantime. The dioceses (except Limburg) have withdrawn by the end of the year 2000 from the system of counselling certificates. Nevertheless is the pregnancy counselling still an important issue for the churches in Germany.

II. The association "Donum vitae"

The decisions of the Bishops to withdraw from the issuing of counselling certificates (which could enable women to abort legally) has determined laypeople to become themselves active. It was important for them to continue the catholic pregnancy counselling which enabled them to issue a stately recognized certificate. Laypeople, members of the Central Committee of German Catholics have founded the association "Donum viatae". This association is in

the meantime developing its activity in the majority of German provinces. The letter of the Pope does not affect the association, as it is an association grounded on state law.

E. The Same-Sex-Partnership-Law

I. The Same-Sex-Partnership Law

The “birth” of the same-sex-partnership Law was very difficult. The Law makers found themselves faced with the difficulty of allowing same-sex-partners to enter a legal marriage. This is why the form they chose is a partnership which has some similarities with marriage but is in the same time very different to marriage. As it was pointed out by Gerhard Robbers the dispute was not centred on quality questions. The official naming of the law is: “The law for the ending of discrimination of same-sex-partnerships”. The main issue of the law is to offer the chance of a legally recognized partnership to people of the same sex who want to take the responsibility for each other. If two people want to bind themselves life long they should have the chance of doing so. The law should offer space for freedom and responsibility.

II. The Position of the Catholic Church

The German Bishops have taken the issue very seriously and have taken position on this important matter.

1. The Catechism of the Roman-Catholic Church

The attitude of the Church to this topic is included in the Chapter: Ascetism and Homosexuality (2357 – 2359).

2. The Conference of German Bishops

The Conference of German Bishops has taken position to the law on same-sex-relationships in its meeting in autumn 2000. The arguments brought upon by the Conference have socio-political and constitutional aspects. It underlines that the law maker is obliged to protect marriage and family and not to endanger its existence. They relate themselves to the German Constitution. According to them the law does not respect the German Constitution. The law does not

offer any sort of protection to the understanding of matrimony and also is about to change the entire meaning of matrimony. The Bishops also stress the fact that the law is in contradiction to the catholic understanding of marriage.

3. Labour Law of the Church

The Position of the German Bishops about the implications of the same-sex-partnership-law in the labour law of the Church

The Catholic Church has taken position on the implication of this law in the labour law of the Church in 2002. The legal institute of the same-sex-partnership contradicts the main values of the Catholic Church in as far as marriage and family is concerned. If a church employee does not correspond to the requirements of the Church any more and does not represent the values of the church, the employer must try to find out through counselling whether the employee can change his views or if not the person has to be dismissed from his current position. First of all the employer has to lead a clarifying dialogue with the person who implicated in the conflict, then several other measures can be taken – like changing of the working department, and as a last resort he has to apply the dismissal. The possibility for the continuation of the employment is dependant on many situations: if the through the activity of that particular person the credibility of church is endangered, whether that person is implicated directly in catechetical activities or on the degree up to which the employee has affected the position of the church in the social environment.

F. The Reform of the Matrimonial Name Law

The Constitutional court has decided this year on the 18th of April that a reform of the matrimonial name law is needed. The Civil Law § 1355, par 2 stipulates that only the birth name of one of the partners can be adopted as a future common name of the family. The Court has decided that the present name of the partners can be adopted as a common name (Art 2 par 1 combined with Art 1 par 1 of the German Constitution). Marriage partners can take as a common matrimony name the name that they gained through a previous marriage. Until the 31st of March 2005 has the law maker

time to decide on this issue. Till then the following regulation is valid (according to § 1355, par 2): If one of the partners holds the name of his previous marriage partner and marries again and the new partner wants to take over this name, till the new law is being issued both partners have to keep the names they hold at that time.

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