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MICHELLE COTTIER, BINDU SAHDEVA AND GAËLLE AEBY

I. INTRODUCTION

In Switzerland, as in most countries today, the great majority of divorces are resolved through 'private ordering' and are based on mutual consent and a full agreement. According to the influential analysis by Mnookin and Kornhauser (1978–1979), the negotiation of divorce agreements takes place 'in the shadow of the law'. Therefore, the main role of the family justice system is to provide, together with the legislator, the normative framework or, according to Mnookin and Kornhauser, the 'bargaining chips' for the spouses' negotiation.

Previous research has been interested in the impact of the normative framework on the negotiation of private agreements from a gender perspective. According to some studies, the indeterminacy of divorce law might work to women's disadvantage because it sets few boundaries for negotiations, and women are less likely than men to exploit ambiguity to their own advantage (Rebouché, 2016; Wilkinson-Ryan and Small, 2008). A statutory legal framework with clear principles and guidelines, based on formal equality between husband and wife, has been shown to limit negotiations of private agreements to these formal-egalitarian arguments, making it more difficult to achieve agreements favouring the primary carer (Mair, Wasoff and Mackay, 2015).

In Switzerland, we observe that different interpretations of gender equality are currently competing in divorce law and sometimes contradicting each other, just as in other Western countries (see Bessière, Biland and Fillod-Chabaud, 2013; Boyd, 2015; Côté and Gaborean, 2015; Glennon, 2010; Scheiwe and Wersig, 2011; Smart, 2013; Wersig and Künzel, 2008). This reflects the coexistence of change, and the persistence of family-related gender norms in Western

societies more generally (Maihofer, 2014). Indeed, in Switzerland, the predominant family arrangement is a gendered division of tasks. Due to the lack of childcare institutions, the wage gap between women and men, and the lack of policies for balancing work and family life, after becoming parents most couples adopt the model of the father as breadwinner and the mother working part-time in the labour market (Le Goff and Levy, 2016). In the event of divorce, the division of labour practiced during the marriage is in most cases continued. That means that, on the one hand, a majority of divorced fathers are at greater risk of seeing their children less often. On the other hand, a majority of divorced mothers have to shoulder day-to-day child-rearing responsibilities alone, which puts them into a difficult position in relation to labour market participation, economic security, old age provision and health (Cottier, Widmer, Tornare and Girardin, 2017).

In view of this predominantly still very gendered division of labour before and after divorce, the implementation of the guarantee of gender equality enshrined in article 8 section 3 of the Swiss Federal Constitution as well as in the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by Switzerland in 1997, has an important function and task in the Swiss family justice system. However, in accordance with the ideal of 'divorce based on mutual agreement' an estimate of 90 per cent of all divorces in Switzerland are based on a full settlement agreed by the spouses.[1] The role of the family justice system is in these cases reduced on the one hand to providing the normative framework, or to quote Mnookin and Kornhauser (1978–1979) the 'bargaining chips' for the spouses' negotiation, and on the other hand to exercising judicial control of the final divorce agreement. After a brief overview of the main developments in divorce law in Switzerland since the turn of the twenty-first century, we will explore the different interpretations of gender equality in spousal and child maintenance law based on nine court decisions published by the Swiss Federal Supreme Court (SFSC). More precisely, we will investigate how and to what extent the SFSC fulfils its task of implementing gender equality in divorce law based on its interpretation of gender equality. Combining a legal and a sociological approach, we will do so by, first, uncovering how themes related to gender equality are interlinked with one another and, second, how the bargaining chips are distributed between parties regarding the issue of maintenance. This will allow us in conclusion to assess the prevailing interpretation of gender equality in divorce law.

[1] Statistics on the grounds for divorce collected by the Federal Statistical Office from cantonal civil courts, available only until 2010, show that every year around 90% of all divorces in Switzerland involved full agreement by the spouses. In 2010: 19,675 out of a total of 22,081 divorces, ie 89% (Federal Office of Statistics, 2021).

II. DIVORCE AND GENDER EQUALITY SINCE THE TURN OF THE TWENTY-FIRST CENTURY

A. 2000: The Reform of Divorce Law

In Switzerland, 2000 was a turning point for divorce law with a critical reform placing gender equality at the centre stage and abolishing fault-based divorce (Schwenzer, 2011; Federal Council, 1996). During the period of the reform discussions in the federal parliament in the late 1990s, a study was published that highlighted the fact that Swiss cantonal courts relied on different interpretations of gender equality in their divorce practice and that certain interpretations disadvantaged women in terms of the financial outcomes of divorce (Binkert and Wyss, 1997: 302). The authors identified three interpretations of gender equality. The *traditionalist* interpretation sees the gendered division of labour as given by nature, ensuring that the husband's economically privileged position is not questioned, meaning his interests generally prevail. The *formal-egalitarian* interpretation demands that the wife should speedily achieve financial independence, ignoring the reality of unequal distribution of childcare responsibilities after separation, and leads to low levels of spousal maintenance after divorce. In contrast, the *compensatory* interpretation sees mothers as the primary caregivers, who need to be compensated through generous maintenance payments for their care work, with the disadvantage of reinforcing their position as caregivers and mothers and therefore delaying their transition to financial independence. Binkert and Wyss recommended an approach close to the compensatory interpretation, based on *substantial (material) equality*, which aims at equalising economic advantages and disadvantages due to the division of roles between husband and wife, through adequate maintenance payments, but without fixing women in their gendered role as mothers. Namely, the authors suggested that post-marital maintenance payments should finance (continuing) education measures to improve the earning capacity of the spouse who has been (partly) absent from the labour market due to childcare (Binkert and Wyss, 1997: 295–96).

The reform of divorce law introduced no-fault divorce and the ideal of divorce based on mutual agreement into the Civil Code. As empirical research had shown, this corresponded to the living law applied by cantonal courts (Bastard, Cardia-Vonèche and Perrin, 1987). In the reform process, explicit reference was made to the constitutional obligation to implement substantial gender equality in the family. However, although the CEDAW Convention had been ratified by Switzerland in 1997, no reference was made to it in the reform process (Pfaffinger and Hofstetter, 2015: N 11).

In spite of the explicit aim of furthering substantial gender equality, the legislator did not follow Binkert and Wyss's recommendation of a spousal maintenance law based on substantial equality and favoured a financial 'clean break' at the moment of divorce, thereby stressing formal equality. The clean

break in relation to post-divorce financial independence was made more viable by the new obligation to equalise pension rights accrued by husband and wife during the marriage, resulting in most cases in a transfer of pension assets from the husband's to the wife's pension fund at the moment of divorce. This was and still is of great importance, as in most Swiss divorces, pension assets are the only savings the couple has, since in Switzerland a majority of people rent their homes and do not own them.[2] However a subsequent evaluation showed that pension assets were not always correctly divided and that women often renounced their rights without courts intervening to protect them (Baumann and Lauterburg, 2004: 76). The reform finally introduced the possibility of joint parental responsibility after divorce, on request from both parents.

The strong focus on the clean break principle in maintenance law, and the problems with the implementation of the law on the equalisation of pension assets led to a reaction of the CEDAW Committee. In its Concluding Observations from 2009 concerning Switzerland's third periodic report on the measures adopted to give effect to the provisions of the CEDAW Convention,[3] it expressed concern at the inability of Switzerland's divorce law to adequately address gender-based economic disparities between spouses resulting from traditional work and family-life patterns.[4]

B. 2014: The Reform of the Law on Parental Responsibility

Following the implementation of the divorce law reform, an interdisciplinary study published in 2009 on post-divorce parental responsibility arrangements (Büchler et al, 2009), showed the persistence of unequal distribution of care work and low satisfaction of mothers in the case of joint parental responsibility. As parenting was only truly shared and, therefore, deemed satisfactory, in 5 per cent of cases, the authors recommended implementation of joint parental responsibility with very limited joint decision-making (Büchler et al, 2009).

However, the legislation again chose to disregard recommendations from socio-legal research. It adopted a reform of parental responsibility based on formal equality, that came into force on 1 July 2014. It declared joint parental responsibility (*autorité parentale conjointe/gemeinsame elterliche Sorge*) the rule, and sole parental responsibility the exception (Federal Council, 2011; Schwenzer and Keller, 2014). Differing from what had been recommended by

[2] According to the latest available statistics from 2017, only 38% of all residents of Switzerland own the property they live in, see Federal Office of Statistics (2019b).

[3] See art 18 CEDAW for the details of the reporting procedure. See also Freeman, Chinkin and Rudolf (2012).

[4] CEDAW, Concluding Observations Switzerland, no 3/2009 (UN Docs CEDAW/C/CHE/CO/3), para 41.

Büchler et al (2009), parliament adopted a strong consensus model (Scheiwe, 2019: 158), in which joint exercise of parental responsibility is the general rule for important decisions and for legal representation of the child, whereas the primary caretaker can act alone only exceptionally. The reform was strongly influenced by the political activism of father's rights groups who insisted on shared parenting, thereby advancing arguments of gender equality (Gisler, Steinert-Borella and Wiedmer, 2009).

The CEDAW Committee, in its Concluding Observations from 2016 concerning Switzerland's fourth and fifth periodic report expressed its concern that the default rule of joint parental authority and preference for shared custody might lead to a reduction in the number of child maintenance orders, with no mechanism to ensure that shared custody is indeed practised, and reflects the reality of time and cost allocation between parents.[5]

C. 2017: The Reform of Child Maintenance Law and of the Law on the Division of Pension Assets

A swing back to a stronger focus on compensation and substantive equality was brought about by the new law on child maintenance, that came into force on 1 January 2017 (Federal Council, 2014). The innovation in this reform is the introduction of a new component of child maintenance aimed at covering the 'indirect costs' of childcare, ie the loss of income of the primary parent caring for the child. This new component is called 'childcare maintenance' (Article 285 para 2 CC) (Federal Council, 2014). The approach is rather original and unique as it recognises the loss of income due to care work and the need for legal remedies to equalise these costs among the two parents. As a gendered division of roles prevails in Switzerland with mothers working part-time in the labour market and fathers full-time (Federal Office of Statistics, 2019a), mothers more often than fathers are entitled to this 'childcare maintenance'. The reform goes back to claims advanced by women's interest groups as well as legal scholars insisting on the need to compensate economic losses due to the division of labour among spouses and cohabiting partners (Schwenzer and Egli, 2010). In divorce law, the reform means that former components of spousal maintenance are now elements of child maintenance, which implies some advantages, such as protection against loss of maintenance rights in case of remarriage and the right to receive advance payments from the state, which are in most cantons only available for child maintenance. What is however quite surprising is that in the course of the reform process reference to gender equality has practically completely

[5] CEDAW, Concluding Observations Switzerland, no 4-5/2016 (UN Docs, CEDAW/C/CHE/CO/4-5), para 48.

disappeared from the argument, whereas the child's best interest has been stressed as a rationale for the reform (see Cottier and Muheim, 2019).

On 1 January 2017, a reform of the division of pension rights also came into force (Federal Council, 2013), which weakens, in the name of 'autonomy of the spouses', the original idea of equalising pension assets, but introduces, in a move in the opposite direction, the idea of compensation for post-divorce disadvantages into this area of the law. On the one hand, the strict principle of equal division of pension rights is eased, meaning that spouses can more easily renounce their rights; on the other hand, the possibility to confer more than half of pension rights to the parent who takes care of children after divorce is possible, thereby allowing for compensation of post-divorce disadvantages in terms of possibilities to save for old age, due to reduced activity in the labour market.

The CEDAW Committee is currently reviewing again the progress Switzerland has made in implementing the CEDAW Convention (Cottier, 2021). In its 'list of issues of questions prior to reporting' from November 2019,[6] divorce law has again been among the issues addressed.[7] On this basis, Switzerland has presented its sixth periodic report,[8] and the Concluding Observations by the Committee are expected in 2022.

III. METHODOLOGY AND DATA

A. Context of the Study

The results presented in this article are preliminary results from a four-year research project looking into gender equality in the Swiss family justice system. The project is entitled 'The negotiation of divorce agreements and gender (in) equality in Switzerland' (Cottier and Widmer, 2019–2023) and is funded by the Swiss National Science Foundation. This project encompasses three parts following a sequential explanatory design: (1) an analysis of written law; (2) a survey aimed at divorce lawyers; and (3) qualitative interviews with lawyers and divorcees. These preliminary results are based on the first part of this project dedicated to an extensive analysis of legislation, case law and legal writing.

[6] Since 2018, a simplified reporting procedure has been available on request of the State parties. Under the simplified reporting procedure, the Committee transmits a 'list of issues prior to reporting' (LOIPR) to the State party concerned prior to the submission of its report. The replies of the State party to the list of issues prior to reporting constitute its periodic report under art 18, para 1(b) CEDAW. See www.ohchr.org/EN/HRBodies/CEDAW/Pages/ReportingProcedures.aspx.

[7] CEDAW, LOIPR Switzerland, no 6/2019 (UN Docs CEDAW/C/CHE/QPR/6), para 24.

[8] CEDAW, Periodic Report Switzerland, no 6/2020 (UN Docs CEDAW/C/CHE/6), paras 181–87.

B. Body of Data: Decisions of the Swiss Federal Supreme Court in the Area of Maintenance

The data consists of nine decisions of the Swiss Federal Supreme Court (SFSC)[9] published on the official website (www.bger.ch) and freely accessible to the public (see Table 4.1 in section III.B below). In family law cases, the SFSC is the court of third instance, deciding on appeal by one of the parties, after the first instance cantonal civil court, and the cantonal appeals court. The selection of decisions is limited to cases on issues of child maintenance and/or post-divorce (spousal) maintenance. We selected fundamental rulings in areas sensitive to gender equality in divorce law, namely rulings which are notable for bringing changes in case law, clarifications of earlier case law or the confirmation of older case law after an extended period of time. Criteria also included how often a particular decision was cited in the legal literature; whether it summarised the case law on a topic; whether it was mentioned as important in the media communications of the SFSC; and whether it was exemplary for a particular topic or problem. On the basis of these criteria, we compiled a list of decisions. Using our expertise in the field of divorce law, from that list we made a selection of nine Federal Supreme Court decisions, numbered in Table 4.1 from no 1 to no 9 by year of publication. The length of the decisions varied from 1191 words to 6595. The nine decisions cover the years between 2006 and 2018. As previously mentioned, several important legislative reforms occurred during this period: in 2014, the reform on joint parental responsibility (Federal Council, 2011), and in 2017, the introduction of a provision favouring shared parenting (alternating residence of the child) (Federal Council, 2014) as well as the reform on equitable division of pensions (Federal Council, 2013).

Table 4.1 Summary of the Data

No	Decisions	Year	LG	Size (words)	Nbr codes	Main topic
1	BGE 132 III 593	2006	GE	1376	63	Child maintenance and spousal maintenance (with solvent debtor)
2	BGE 135 III 59	2008	GE	2468	61	Pre-marital cohabitation and qualification of a marriage as 'life-shaping'
3	BGE 135 III 66	2008	GE	4615	113	Rules on who bears the deficit in case of insufficient financial means

(continued)

[9] In German: Bundesgerichtsentscheide; in French: arrêts du Tribunal fédéral.

Table 4.1 *(Continued)*

No	Decisions	Year	LG	Size (words)	Nbr codes	Main topic
4	BGE 135 III 158	2008	GE	1191	42	Spousal maintenance calculation method (with old age provision)
5	BGE 137 III 102	2010	FR	4423	122	Principles applicable to the calculation of post-marital maintenance
6	BGer 5A_373/2015	2015	FR	3467	50	Suspension or termination of post-marital maintenance in case of former spouse cohabitating with a new partner
7	BGE 141 III 465	2015	GE	2222	94	Maintenance to ensure standard of living in case of earlier retirement of the creditor spouse
8	BGE 144 III 377	2018	FR	3974	84	Calculation method for covering indirect costs of childcare (new childcare maintenance)
9	BGE 144 III 481	2018	GE	6595	190	New rules on obligation of caregiver to re-enter the labour market based on child's school age
Total				30,331	819	

Notes: LG = language of decision; GE = German; FR = French; Nbr codes = number of codes attributed.

C. Methods: A Combination of a Legal and a Sociological Approach

To shed a new light on the recurring themes across the nine selected decisions, we combined a legal and a sociological approach in a 2-step process. First, we systematically coded the data using a computer-assisted qualitative data analysis (QDA) software drawn from a content analysis approach inspired by Mayring (2000). Content analysis consists of a bundle of techniques for systematic text analysis applied to empirical data of various types. The approach we developed for this analysis is based on a deductive application of predefined categories, but enriched through the data coding procedure. Three researchers discussed the categories and one main researcher coded the data line by

line. At different stages, meetings were held with the two other researchers to ensure the reliability of the coding system. Within a feedback loop the codes were revised and eventually regrouped into main categories. When looking at the distribution of codes across decisions (see Table 4.1), there is a mean of 91 codes applied by decision with a minimum of 42 for the shortest (BGE 135 III 158) and a maximum of 190 for the largest (BGE 144 III 481).

Applying the coding procedure described above, we were able to identify 25 recurring themes that we grouped into eight main categories in Table 4.2. Standing out are the codes relating to the different types of maintenance existing in the Swiss system (post-divorce maintenance, child maintenance and childcare maintenance introduced in 2017) as well as situations where maintenance has to be reconsidered due to changing circumstances. In second position are the codes relating to children linked more specifically to childcare arrangements, children's age, and the principle of children's wellbeing. In third position, the situation of the 'creditor/recipient' parent (in all our cases women) appears and especially earning capacity and return to paid work. The situation of the 'debtor' parent (in all our cases men) is less prominent, but still emerges in relation to both earning capacity and risk of deficit. We created a code category exclusively for issues related to pension in old age after retirement. Similarly, a specific code category was created for the use of references to interdisciplinary knowledge stemming primarily from socioeconomic science and also to some extent from the field of child psychology. In the category 'gender principles', we grouped mentions of overarching principles related to different interpretations of gender equality, used as justifications to back up the arguments of the SFSC. Interestingly gender equality was not mentioned verbatim in any of the decisions, but was indirectly hinted at with principles such as clean break, post-divorce solidarity, etc. Finally, the last category of codes relates to the economic situation of the family, distinguishing low, medium and high income.

Table 4.2 Overview of the Coding System of 25 Main Codes

Different types of maintenance (n=239)	
Post-divorce maintenance (*MaintenancePostDivorce*)	102
Child maintenance (*MaintenanceChild*)	39
Childcare maintenance (*MaintenanceChildcare*)	39
Change in the maintenance amount (*MaintenanceChange*)	31
Termination of maintenance due to repartnering (*MaintenanceConcubinage*)	28
Children (n=165)	
Childcare arrangements (*ChildCare*)	91
Age of the child, minor and adult children (*ChildAge*)	43
Child wellbeing, child's best interest (*ChildWellbeing*)	31

(continued)

Table 4.2 ***(Continued)***

Situation of the 'creditor/recipient' parent (n=123)	
Capacity to earn an income, also associated with hypothetical income (*CreditorCapacity*)	56
Return to paid work, also associated with 'school level system' *(CreditorActivity)*	44
Age *(CreditorAge)*	23
Situation of the 'debtor' parent (n=65)	
Capacity to earn an income, also associated with hypothetical income *(DebtorCapacity)*	29
Deficit, also associated with protection of debtor's subsistence minimum (*DebtorDeficit*)	20
Age (*DebtorAge*)	16
Pension in old age *(Pension)*	40
Interdisciplinary knowledge *(Expertise)*	35
Gender principles (n=115)	
Arguments related to clean break and self-sufficiency *(P_CleanBreak)*	33
Preservation of the living standard *(P_LifeStandard)*	24
Principle of trust *(P_Trust)*	23
Compensation of disadvantages *(P_Compensation)*	13
Post-divorce solidarity *(P_Solidarity)*	12
Right to the same living standard for both ex-spouses (*P_SameLife*)	10
Family socioeconomic situation (n=37)	
Low income (*SituationLow*)	20
High income (*SituationHigh*)	12
Medium income (*SituationMedium*)	5

Notes: Total number of applied codes = 798819. The shorter code names that will be used in the PCA analysis are shown in brackets and italics.

In a second step, we could use this coding system to conduct an analysis of the data at two levels. At the first level (see section IV.A), we followed a sociological approach and performed a principal component analysis (PCA), analysis technique for quantitative data,[10] to build up a bi-dimensional map, taking into account simultaneously various variables without assuming causal direction.

[10] All computations were made using the R statistical environment (R Development Core Team, 2020) and the package 'FactoMineR' for the principal component analysis (Lê, Josse and Husson, 2008).

The objective was to analyse the pattern of relationships between several variables simultaneously and, by doing so, to represent the underlying structures of a dataset. The PCA was performed on an individual/variable matrix, where the rows represented individuals (here the nine decisions) and the columns represented the variables (here the 25 thematic codes). With PCA, we obtained a bi-dimensional map on which it was possible to visualise proximities between variables in a geometric space. At a second level (see section IV.A), we conducted a legal analysis of the decisions.

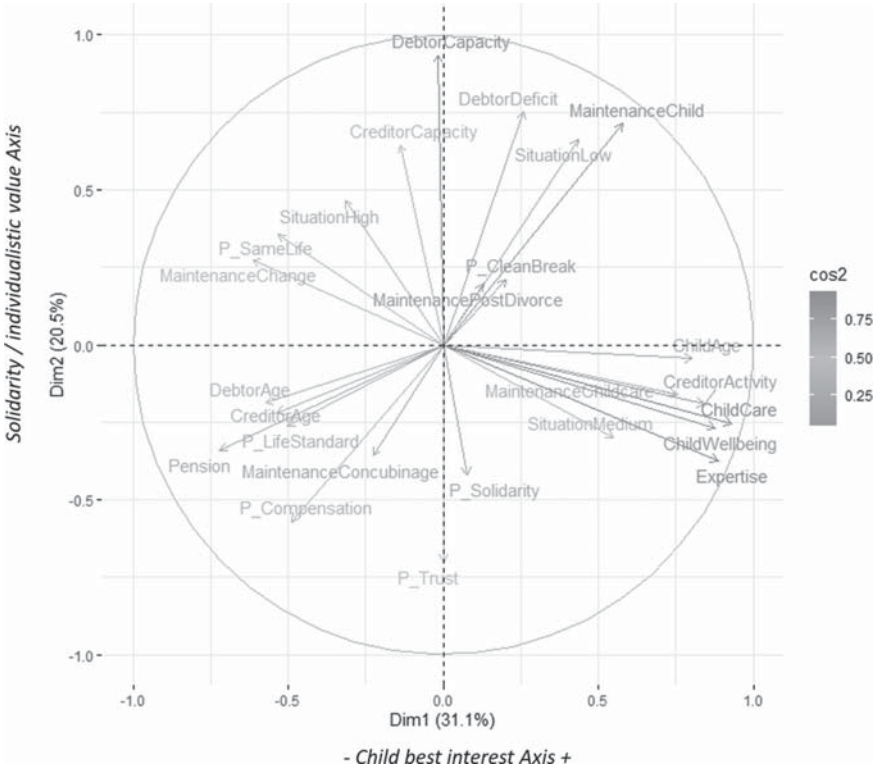
IV. RESULTS

A. Interlinked Themes Related to Gender Equality: The Best Interest of the Child and Individualistic/Solidarity Value Considerations

Our first research question regarding gender equality in SFSC decisions concerned recurring themes across the nine selected decisions. In a first subsection, we describe and discuss the recurring themes, and, in a second subsection, we analyse how they relate to one another.

Moving beyond the number of occurrences (Table 4.2), it is important to look at how the different themes relate to one another with the help of the aforementioned PCA. Figure 4.1 shows the bi-dimensional map we obtained. The contributions of the variables to the map are indicated, as well as the tests indicating whether a variable contributes significantly to the definition of the axes. Concerning the first dimension represented by the horizontal axis, the main themes characterising it are located on the right side of the map and are related to children (*childcare*, *child wellbeing*, *child age*) and to both *childcare maintenance* and *return to work* of the creditor parent. Interestingly, the theme *expertise* (interdisciplinary knowledge) was also associated with this axis. In contrast, the theme *pension* was at the left side of the map. We interpreted this horizontal axis as that of considerations relating to the 'child's best interest' stretching from an absence of the topic (left side) to a high focus on the topic (right side). Concerning the second dimension represented by the vertical axis, the upper part was characterised by the situation of the debtor parent regarding their *earning capacity* and *deficit* and, to a lower extent, by the parallel issue of the *earning capacity* of the creditor parent as well as *child maintenance*, while the lower part was characterised by the themes *trust* and, to a lower extent, *compensation*. We interpreted this vertical axis as that of considerations relating to 'individualistic versus solidarity values' with topics related to individual needs and economic circumstances in the upper side and topics related to the commitment achieved during marriage in the lower side.

Figure 4.1 Map of the Themes, using PCA



Regarding the organisation of themes on the map along these two axes, we can distinguish three subgroups. The first group (middle to lower right square of the map) shows an association between themes related to the creditor parent – here women – and to the child's best interest. It shows that the question of whether women return to work and become financially independent is directly linked to their role as primary care givers. This is clearly linked to the gender division of roles still prevailing in Swiss society and persisting after divorce. The second group (lower left square of the map) consists of themes such as life standard, pension in old age, the principle of compensation, and the age of the two parents (debtor and creditor). Those concerns seem to be related to situations without children, or more probably, situations where children are grown up and no longer represent a main concern. In those cases, also characterised by a long marriage and the development of trust, there is more concern for ensuring pension payments and the upholding of the wife's living standard. Finally, the third and last group of themes (middle upper part of the map) is about the situation of the debtor parent – here men – and also family situations with low income and the creditor parent's hypothetical ability to work to earn an income. It shows that men's situations are often

considered on their own, as if they were disconnected from considerations other than financial ones. In Swiss law, this is reflected in the principle of the protection of the subsistence minimum for the debtor[11] which means that in most cases the economic consequences of a divorce lay on women's shoulders when means are scarce.

To sum up, this first analysis of the main themes related to gender equality shows that women are in a critical position as their position after divorce is bound up with that of their children, whereas the men's position is considered separately.

B. Controversial Issues of Maintenance and the Unequal Distribution of Bargaining Chips

We then conducted a classical in-depth legal analysis of the decisions regarding the three main controversial issues linked to the different types of maintenance. In particular, we focused on the presence in the SFSC decisions of the three interpretations identified by Binkert and Wyss (1997) (*traditionalist, formal-egalitarian, compensatory*) presented in the introduction (section I).

i. Spousal Maintenance: Trust in a Life-shaping Marriage, but with Multiple Hidden Conditions

Four of the decisions we selected for in-depth analysis touch on the issue of spousal maintenance. Two main themes are highlighted by the analysis: the importance of pre-marital and post-marital cohabitation (BGE 135 III 59 and BGer 5A_373/2015) and the calculation of maintenance in cases of a gap in old age provision (BGE 135 III 158 and BGE 141 III 465).

The Importance of Pre-marital and Post-marital Cohabitation

In the decisions addressing the subject of spousal maintenance, cohabitation plays a role in two out of three decisions. In the decision BGE 135 III 59, the period of cohabitation prior to the marriage was not considered sufficiently formative for the couple's relationship to qualify the following, relatively short marriage as 'life-shaping', and therefore the wife was not awarded higher spousal maintenance of longer duration (which is usually due in marriages that have a lasting impact on the spouse's economic situation).

In BGer 5A_373/2015 of 2 June 2016, the issue was the suspension or termination of spousal maintenance in the case of post-marital cohabitation of the

[11] In German: Schutz des Existenzminimums des Unterhaltsschuldners; in French: protection du minimum vital du débirentier.

spouse entitled to post-marital maintenance. As in most cases women are the maintenance creditors, the suspension or termination of spousal maintenance mainly affects women (Federal Office of Statistics, 2020). In this specific decision, the cohabitation of the wife with a new partner after the divorce was taken into account for the termination of spousal maintenance.

When comparing these two cases, we can observe contradictory argumentation. In the case BGE 135 III 59, the consideration of pre-marital cohabitation could have been a reason for a higher post-marital maintenance payment. This would have been advantageous for the economically weaker spouse (the wife), but the duration of cohabitation of 10 years was not considered long enough to establish sufficient trust in the support community of the subsequent marriage. In the other case, where consideration of post-marital cohabitation disadvantaged the economically weaker spouse (the wife), five years of cohabitation were considered sufficient to justify the termination of spousal maintenance after a life-shaping marriage. The SFSC's interpretation is each time disadvantageous for the economically weaker spouse, ie usually the wife (Cottier and Muheim, 2019: 65). This practice weighs all the more heavily when one considers that cohabitation in Switzerland offers no legally regulated protection for the economically weaker partner, ie cohabitants have no legal obligation to support their partners during or after the relationship (cf Diezi, 2014: 259). In summary, the Federal Court's reasoning on the legal basis for the maintenance claim seems to be not the marriage per se but rather post-marital solidarity (Schwenzer and Büchler, 2017). This interpretation of the SFSC distributes the bargaining chips to the disadvantage of the economically weaker maintenance creditors, who then have to consider whether they can 'afford' cohabitation at all.

Maintenance in Cases of Gaps in Old Age Provision

In the area of spousal maintenance, the issue of the method of calculating the maintenance pension to cover the gaps in old age provision that arise *after* the divorce due to childcare (Geiser, 2012: 356) came up in the decision BGE 135 III 158. The SFSC enumerated the various methods of calculation and took the spouses' standard of living as the basis for calculating the pension. The rationale for awarding the wife a contribution to the build-up of her old-age pension lies in a compensatory idea. The wife, who foregoes gainful employment to raise the children and run the household, is to be placed largely on a substantially equal footing with the husband through contributions to the pension. The wife entitled to maintenance has a claim to continuation of the standard of living during the marriage if the financial means allow it.

In BGE 141 III 465, the SFSC had to review the question of whether the wife, who was 10 years older than the husband, was protected in her trust in the community of care of their life-shaping marriage beyond her retirement age even if there was a temporary ability to provide for herself during her active years. The SFSC ruled that for the time the wife was temporarily capable of providing

for herself, the maintenance payments could be suspended, but that there was no reason to terminate the maintenance obligation permanently. Thus, the wife was entitled to maintenance payments after reaching retirement age. For the SFSC the fact that at the time of the wedding, the couple was aware of their age difference of 10 years, was significant in this context. As the couple had no children, the main argument was not a compensatory, but a conservative one: the trust in a long-lasting marriage as a support community for the economically weaker spouse must be protected.

ii. Childcare Maintenance: Stripping a Compensatory Idea to the Strict Minimum

Following the reform of child maintenance (see section II.C), the two decisions on childcare maintenance in our sample (BGE 144 III 377 and BGE 144 III 481) were issued shortly after each other and clarified the calculation basis for the new component of child maintenance (Federal Council, 2014).

In the first decision, BGE 144 III 377, the SFSC clarified that the so-called 'cost of living method' is the method of choice to calculate the new childcare maintenance. This means that it is not calculated on the basis of the loss of income of the parent who mainly cares for the child(ren), which would mean a calculation on the basis of the actual salary. Rather, the childcare maintenance owed by the other parent is only supposed to supplement the amount the caregiver is not able to cover with their own income in order to meet the minimum subsistence level. So-called 'childcare maintenance' is thereby interpreted in the most restrictive way possible, benefiting only caregivers in low wage occupations who cannot cover their subsistence level by part-time employment. Carers with higher qualifications do not benefit from this new instrument. The idea of compensation for income loss due to childcare is reduced to the minimum impact. In essence, this new form of maintenance primarily relieves the burden on social assistance, which does not have to be paid to the main caregiver who cannot provide for their own maintenance, since social assistance is subsidiary to maintenance obligations under family law (CSIAS, 2020).

In the other decision, BGE 144 III 481, the SFSC goes a step further and establishes new rules regarding the primary caregiver's obligation to re-enter the job market. Whereas under the older '10/16 rule', the divorced primary caregiver could ask for maintenance payments to allow them to take care of their youngest child until the age of 10 and only work in a part-time, 50 per cent occupation until this child's sixteenth birthday, a faster reintegration into the job market is now expected: The standard percentage of gainful employment since then is: 50 per cent from compulsory schooling of the youngest child (from age four, depending on the cantonal legislation); 80 per cent from the date of transition to lower secondary education (usually at age 12); and 100 per cent from age 16.

Both the calculation method and the introduction of the new system of 'school levels' mean that the primary caregivers, mostly women, have to return to

work earlier and, on balance, receive less maintenance. The original compensatory approach has been transformed into a formal-egalitarian rule through case law. In terms of the 'bargaining chips' at the parties' disposal, it will be difficult for the party who suffers financial losses due to childcare to adopt a compensatory argument in divorce negotiations in the area of childcare maintenance.

iii. The Interdependency between Child and Spousal Maintenance: The Importance of the Economic Situation

In our sample, child maintenance was systematically discussed in direct relation to spousal maintenance. This seems logical, given the need to align the claims of various maintenance creditors. The hierarchy among maintenance creditors is particularly important: where the resources available to the maintenance debtor are insufficient, not all maintenance contributions can be fully funded. There are big differences between cases where the economic situation is very good and those where there is just enough money to cover the maintenance debtor's subsistence minimum. The three decisions BGE 132 III 593, BGE 135 III 66 and BGE 137 III 102 illustrate this in an exemplary manner.

The two decisions BGE 132 III 593 and BGE 137 III 102 deal with cases in which the economic situation is very good. Thus, the maintenance claims can be covered without further ado, even if the rules on the limitation or graduation of spousal maintenance apply, which expect the creditor spouse's to be fully or partially self-supporting after a certain period of time (BGE 137 III 2, cons 4.1.2). Both cases involve marriages with a traditional role division. Typically, women in marriages with traditional role division can often only maintain their standard of living after divorce if they receive spousal maintenance. However, the rather generous case law should be read in conjunction with the aforementioned case law on termination of spousal maintenance when in cohabitation with a new partner. After a long marriage with a traditional division of roles, the temporary suspension and annulment of spousal maintenance can be particularly drastic. This means that when choosing to cohabitate with a new partner, there is a risk that spousal support will cease after three or five years, which in turn can result in a significant reduction in the standard of living. Even if the new partner lives in tight economic circumstances, there is no entitlement to preservation of the marital standard (Hofmann and Mordasini-Rohner, 2018). Which may lead to a situation where a woman has to choose between preserving a good standard of living – the loss of which would also affect their children – or taking up and remaining in a cohabitating relationship.

The problem is quite different in low-income situations. In the decision BGE 135 III 66, with the least favourable economic situation, the SFSC dealt with the various arguments of legal doctrine concerning the question of how maintenance payments should be determined when the means of the debtor are not sufficient to cover the subsistence level of all family members after the divorce. The practice to date has been to leave the debtors with enough

of their income not to rely on welfare, thereby putting the burden of welfare dependency entirely on the economically weaker parties, ie the primary carer and the children. Several authors had argued that it constituted indirect gender discrimination to proceed in this way, since the primary caregivers were mostly women (Bigler-Eggenberger, 2002; Freivogel, 2007). They had suggested a new rule, according to which the shortcoming of financial means would be shared between debtor and creditor(s). The SFSC agreed that the unequal treatment of the debtor and the creditor of maintenance payments in cases of insufficient means was problematic, but denied a problem of discrimination based on gender. The SFSC argued that men and women were submitted to the same rules if they were maintenance creditors, thereby demonstrating a lack of awareness of the concept of indirect discrimination and reducing gender equality to the formal-egalitarian interpretation, leading to criticism from the CEDAW Committee in 2016.[12] In terms of bargaining chips, as the minimum subsistence level of the maintenance debtor is protected in any case (see BGE 135 III 66), this makes it impossible for the party demanding higher maintenance to negotiate a divorce agreement which would result in both parties bearing the deficit (and both parties depending on social welfare).

V. CONCLUSION: INTERPRETATIONS OF GENDER EQUALITY AND (STILL) LIMITED IMPLEMENTATION OF THE CONSTITUTIONAL MANDATE

After this in-depth analysis, we can return to our research questions of the extent to which the SFSC fulfils its task of implementing gender equality in divorce law based on its interpretations of the principle. The interpretations of gender equality are reflected in the decisions of the SFSC in various forms. In the interplay of doctrines, court practice, facts of the cases and arguments, the SFCS's stance on gender equality is not directly discernible. It was only through the analysis of several cases that regularities became apparent, and patterns emerged (Gilgun, 2005).

During the period of the SFSC rulings we examined, Swiss divorce law was reformed and changed in many ways (see section II). The case law reflects this change in the legal foundations, just as it reflects changing social values in the areas of marriage, family and divorce. Among the arguments present in the legislative process, in legal doctrine and in society at large, however, it makes a selection and thereby narrows down the possible acceptable arguments in the day-to-day resolution of divorces.

We have uncovered that in many cases arguments made by doctrine for a compensatory interpretation of spousal and child maintenance were listed, but

[12] CEDAW, Concluding observations Switzerland, no 4-5/2016 (UN Docs CEDAW/C/CHE/CO/4-5), para 48.

in the end the decision in the specific case was not motivated by these arguments and a less compensatory direction was chosen (BGE 135 III 59, BGE 135 III 66, BGE 137 III 102, BGer 5A_373/2015, BGE 144 III 377; see section IV.B.i) which in our sample led to men winning the appeal to the Federal Supreme Court more often than women. The arguments of practical feasibility (BGE 135 III 66, cons 7), legal certainty and social views are cited by the SFSC as arguments against a change in practice towards more substantive equality. In some cases, procedural reasons were the key factor in the decisions. This demonstrates the ongoing tension between social change and 'institution' stability (in legal terms 'legal certainty'). With regard to gender equality, even though the SFSC acknowledges existing problems of substantive inequality due to the unequal division of care and prevailing societal structures of gender inequality in general, it does not take the lead in bringing about possible changes in the current legal system, but rather passes the responsibility to the legislator (BGE 135 III 66, cons 7 *in fine*).

We argue that in the context of the negotiation of an agreement concerning maintenance payments upon divorce, the normative framework provided by the SFSC seriously restricts the 'bargaining chips' available to spouses who have reduced their income in the labour market due to childcare, ie mostly mothers. Indeed, in all analysed maintenance situations (spousal and child), the bargaining chips were to the disadvantage of the creditor party, and this was specially the case for less favourable economic situations. Here, women will not be able to back up their claims based on arguments of substantive gender equality by reference to the SFSC case law but must rely on other sources of legal authority, such as the recommendations of the CEDAW Committee, which are, however, seldom referred to even by specialist lawyers. Finally, we noticed that since the reform of marriage law in 2000, the discussion has shifted away from the issue of gender equality towards the principle of child wellbeing, especially strikingly in the discussion of the new component of childcare maintenance introduced in 2017 (Federal Council, 2014). This 'tossing aside' strategy may be cause for concern given the aim of implementing gender equality of the Swiss family justice system.

Further research is needed to understand better the implications of these findings. In the currently ongoing project 'The negotiation of divorce agreements and gender (in)equality in Switzerland' (Cottier and Widmer, 2019–2023), we will further explore how the different concepts of gender equality found in written law are interpreted by lawyers specialised in divorce law. We expect that their understanding of gender equality is closely related to their professional style, which in turn influences the process of negotiating divorce agreements with their clients. In the next step, divorcees' personal life trajectories will be examined. Taken together, the three sets of analyses will allow us to understand better the configuration of cooperation and tension among actors in which divorce agreements are framed in terms of gender equality.

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