Family Law in Switzerland: Recent Reforms and Future Issues – an Overview

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A. Introduction

I. Family Reality

In Switzerland, as in all other European countries, family reality has gone through major changes in recent decades: the number of divorces, the number of people living in a consensual union, the number of single persons and lone parents are all steadily increasing, as is the rate of birth out of wedlock. The average age of marriage and mother's age at first birth is increasing as is the rate of childlessness. Nevertheless, the change is moderate: Switzerland is characterized by an extraordinary stability in demographic as well as household and family structures.[1] In fact there are some particularities of family life and family policy in Switzerland in comparison to other European countries, which are worth mentioning. They are an aid to understanding some of the special features and curiosities of this country in the middle, and yet at the edge of Europe.

In comparison with other European countries Switzerland lacks family policies and governmental support for families. Switzerland does not have a department or ministry for family affairs within the Federal Government: 'Generally speaking, family policy does not exist at a national level in Switzerland, neither as a concept nor as a de facto policy, and corresponding activities have a non-institutional base in Switzerland'.[2] Childcare is a private matter and there are only very few institutionalized child-care provisions, which moreover are very heterogeneous and comparatively expensive.[3] Parents have to find individual solutions, relying on private care providers or on the family network. Furthermore, Switzerland still does

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1 B. Fux, 'Family Change and Family Policy in Switzerland' in *Family Change and Family Policies in Europe, Vol II* (Flora (ed.)) (Oxford) (in print) at pp. 30–31.

2 Ibid. at p. 99. Therefore in Switzerland there are 26 different family policies according to the number of cantons.

3 Upon the underdeveloped child care system in Switzerland see in detail B. Fux, *supra* note 1, at pp. 45–49.

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not have a maternity leave system. In June 1999 a majority of Swiss citizens rejected a fifth proposal for the introduction of maternity insurance.[4] Family allowances, although the most important element in the entire family policy system, lie mainly in the domain of private associations, and show a confusing heterogeneity and complexity. The total sum of family allowances is by European comparison very low.[5] Briefly, 'Families are undoubtedly the stepchildren in the Swiss system of social services'.[6]

This minimal state intervention has influenced family-related behaviour. It may for example explain why Switzerland has, in comparison to other European countries, a very low rate of births out of wedlock[7] and low full-time participation of women in the labour force.[8] The former is also an indicator of the degree of institutionalization of marriage,[9] which is still very high in Switzerland. Couples frequently decide to transform their cohabitation into marriage when they become parents, and marriage is the preferred form of partnership and family in Switzerland. In other words, the child-oriented marriage is dominant.[10] Traditional household structures and living arrangements facilitate the organization of family life. These accommodations often take place comparatively late in life: the average age at first marriage and at first birth is higher than in other European countries, the same holds for the proportion of women remaining childless. The lack of family-related policies encourages postponing or even forgoing marriage and parenthood.[11] Reconstituted families are comparatively frequent.[12]

Within marriage or cohabitation the traditional gender division of labour is prevalent: women are responsible for housework and childcare while men are the breadwinners.[13] The persistence of a comparatively traditional division of household labour can be explained primarily by the lack of government assistance in the field of childcare, which makes it very difficult for women to combine employment and

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4 O. Guillod, 'A New Divorce Law for the New Millennium' in The International Survey of Family Law 2000 (Bainham (ed.)) (Bristol, 2000) at pp. 357–368, at pp. 364–365.

5 B. Fux, *supra* note 1, at p. 55.

6 Ibid. at p. 87.

7 Ibid. at pp. 23–24.

8 So Ibid. a. p. 13: 'The process of family formation therefore indicates accommodation strategies of couples rather than a fundamental conservatism in behaviours and beliefs'.

9 For an analysis of this correlation in general see F. Rothenbacher, 'Social Change in Europe and its Impact on Family Structures' in *The Changing Family. International Perspectives on the Family and Family Law* (Ekelaar and Nhlapo (eds)) (Oxford, 1998) at pp. 17–18.

10 At birth of the first child around 90 per cent of the women are married: Federal Commission For the Co-ordination of Family Matters, *Familien im Wandel. Informationen und Daten aus der amtlichen Statistik* (Bern, 1998) at p. 16.

11 B. Fux, *supra* note 1, at pp. 24–25.

12 Ibid. at p. 19.

13 Federal Statistical Office, *Unbezahlt – aber trotzdem Arbeit. Zeitaufwand für Haus- und Familienarbeit, Ehrenamt und Freiwilligenarbeit und Nachbarschaftshilfe* (Neuchâtel, 1999) at pp. 12, 16.

family life, but also by dominant values, which still favour the traditional division of labour. The integration of women into the labour force took place late and was, and still is, a reluctant move. Moreover the Swiss labour market is one of the most gender-segregated in Europe.[14] The proportion of women in paid work has been increasing for years, but entirely due to part-time work. Women in Switzerland do not always have their own, individual sources of income, and the financial risk in the case of a marriage breakdown is not covered by welfare provisions.

This short and undoubtedly superficial description of the family circumstances in Switzerland should help to understand the importance of some of the family law institutions. The very traditional division of labour in families, the high rate of divorce and the absence of the state in the area of family policy and support show clearly the significance, particularly for women, of family law provisions such as rules on maintenance or pension splitting, which guarantee financial security to a certain extent.

II. Family Law

Not only are family circumstances changing, but the law has also undergone considerable changes over the past decades. However, in contrast to almost all other legal systems of Western cultures, where fundamental reforms of family law have already been tackled in the 70s of the 20th century, Swiss family law as set out originally in 1907/1912 remained unchanged in many areas for a long period.

The codification of civil law started in most cantons around 1800, but there was a strong legal segmentation, dependant on language, traditions and cultural affiliations of the cantons.[15] Civil marriage was introduced on a federal level in 1874, and at the same time almost all marriage restrictions were abolished. In 1912 the Swiss Civil Code (CC) came into force, a piece of legal work acknowledged to be outstanding and progressive for its time. It respected different legal traditions, it abolished legal obstacles to marriage, it accepted a comparatively wide range of divorce grounds, it gave children extended rights and – at the time – it provided far-reaching equality between the spouses, granting the wife full legal status, equal parental authority and control over her income.[16]

This, however, should not hide the fact that the Civil Code of 1907/1912 determined marriage as a solid patriarchal relationship, and codified the husband's supremacy. The husband was the head and representative of the family to the outside, and the wife was only allowed to take up paid work with her husband's consent. Thus gender-specific allocation of space and work was laid down in federal law.

Family law adhered to this deeply patriarchal order for a long time and was dominated by strong institutionalized thinking. For more than 60 years, Swiss family

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[14] B. Fux, *supra* note 1, at p. 39.
[15] Ibid. at p. 7.
[16] Ibid. at p. 8 and pp. 14–15.

law remained unchanged. It was only after the introduction of the women's vote in 1971 that revisions became inevitable.

The stability of the family structure and conservative values regarding gender roles are not the only important factors explaining why successful reform activity came about so late. The particular instruments of direct democracy give the 26 cantons and the various political pressure groups great influence over political decision-making, which means that a reform has to be well balanced to receive the assent of the majority of citizens – people living in different regions, with different religious backgrounds, languages and surroundings, undoubtedly a difficult task in a sensitive area like family values and norms.[17]

Since the 1970s Swiss family law has undergone a general revision in stages. The first major reform concerned the parent-child relationship, with a new adoption law in 1973 and a revised child law in 1978. The child law reform removed the distinction between legitimate and illegitimate children and improved the execution of child maintenance. A new marriage law came into force only in 1988, which abolished the concept of the head of the household and realised formal equality between husband and wife. The marriage law reform abolished the legally established gender-specific division of labour. The new law also introduced the property system of deferred community that should give better protection of the housewife in the case of divorce. The latest in this series of reforms is the reform of the requirements for contracting marriage, on void marriages, divorce and other issues, which came into effect on 1 January 2000. A revision of the law on guardianship is planned, and will complete the series of revisions of family law.

First, this article will describe the last major reform, especially in relation to divorce law – the core of the reform – and secondly show in which areas of family law, it is submitted, there is still a need for reform. This contribution cannot be more than a mere outline of Swiss family law, but it is hoped that it will open the door slightly to allow a foreign look into Switzerland's family-related legal landscape.

B. The Latest Reform: Divorce Law and Other Issues

I. Historical Annotations to Divorce Law and Objectives of the Last Reform

Traditionally, divorce law differed between Catholic and Protestant cantons. In Catholic regions divorce was prohibited until 1874 by canon law. In Protestant regions divorce had been permitted since 1525.[18] In 1874 a federal divorce law based on liberal doctrine was introduced. The federal civil law of 1907/1912 extended the

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[17] Concerning the period until the first revision of family law: C. Hegnauer, 'Entwicklungen des schweizerischen Familienrechts' in (2000) *FamPra.ch*, at pp. 2–3.

[18] B. Fux, *supra* note 1, at p. 25.

list of divorce grounds. Grounds for divorce were adultery, maltreatment of the partner or children, dishonourable life of the partner, desertion and marriage breakdown. In order to respect the interests of the Catholic areas, legal separation was introduced. Marriage and divorce law was – as with the entire family law of that time – characterized by institutionalized thinking, and marriage was protected as a supra-individual institution.[19]

The task of adapting divorce law to the changing social circumstances was mainly within the jurisdiction of the Federal Court and legal practice. In the area of grounds for divorce, first instance practice had widely recognized divorces by mutual consent, and in the area of post-nuptial maintenance, from the 1970s onwards, courts viewed the fault principle with regard to the person claiming in more relative terms.[20] The gap between law and practice became increasingly obvious and, of course, practice in the various cantons varied a great deal.

The strong institutionally oriented concept of marriage was relaxed by the revision that came into force on 1 January 2000, which embraced marriage and divorce law, with the core of this reform dealing with divorce. This last general revision had the following aims: to remove fault in the areas of both divorce grounds and financial consequences of divorce; to improve legal procedures by facilitating divorce by mutual consent; to reduce gender-specific imbalances in the financial consequences of divorce; to introduce shared custody rights for both divorced partners and unmarried parents; to improve rights for children of divorced parents through the use of hearings and child advocates.

II. Grounds for Divorce

The abolition of fault within the scope of divorce and the accomplishment of a legal basis for divorce by mutual consent was one of the main aims of past divorce reform. The new law now provides three grounds for divorce. The main ground for divorce is the mutual agreement of both spouses (Articles 111 and 112 of the CC). There are also two cases in which an individual spouse may seek divorce: separation of the spouses of a duration of at least four years (Article 114 of the CC), and serious grounds not attributable to the petitioner that make the continuation of marriage unacceptable (Article 115 of the CC). All three grounds for divorce are based on the principle of entitlement to divorce in cases of irretrievable breakdown. Divorce based on mutual agreement and divorce granted after a four-year separation period are mainly formalized divorce grounds, which make an investigation of the causes of the marriage breakdown dispensable.

If the spouses agree to divorce and on all the consequences of divorce, there is a complete agreement in terms of Article 111 of the CC. After the spouses have

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[19] I. Schwenzer (ed.), *Praxiskommentar Scheidungsrecht* (Basel/Genf/München, 2000) Introduction, Nos 1–4, at pp. 1–3.

[20] Ibid. Introduction, Nos 5–9, at pp. 3–4.

submitted their petition for divorce, the agreement on the consequences of divorce and the common proposals relating to the children, the court will hear them jointly and separately. Subsequently the court has to judge whether the petition for divorce and the agreement rest upon free will and mature reflection, and if it can be presumed that the agreement can be consented to. If the judgment proves to be positive, after a two-month period of reflection both spouses must confirm their petition for divorce in writing and the agreement on the consequences of divorce, upon which the court must grant the divorce.

One of the main aims of the divorce reform was the promotion of understanding between the spouses on the issue of divorce. Therefore the law submits the divorce by mutual consent when the spouses agree on the question of divorce, but are not able to reach a comprehensive understanding with regard to the consequences of divorce (Article 112 of the CC).

If the spouses fail to agree on the question of divorce, a spouse alone must file a lawsuit for divorce. One spouse alone can petition a divorce if the parties have lived separately from one another for at least four years at the time of the matter being brought before a court (Article 114 of the CC). This regulation bases on the assumption that after a four-year period of separation the breakdown of marriage is irretrievable. A divorce that can be gained solely on the ground of living separately, one-sided and independent of fault, is a completely new concept compared to the law that was in force up to then.[21]

Even before the period of four years has elapsed, a divorce can be petitioned if there are serious grounds, not attributed to the petitioner, that make the continuation of marriage unacceptable (Article 115 of the CC). This regulation provides a hardship clause in favour of the innocent spouse petitioning divorce, as opposed to German or French law, which provide hardship clauses in favour of the innocent spouse who does not want to divorce.[22] This clause has the character of an extraordinary provision, and was given a restrictive form, in order to avoid formalized divorce grounds loosing their significance. The continuation of marriage ties during the period of separation must be unacceptable.[23]

It is feared within the doctrine that, due to the long separation period in the case of a one-sided divorce, practice would switch to Article 115 of the CC, thus continuing to consider fault as a decisive factor with regard to divorce grounds.[24]

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[21] Under previous law a spouse could resist the claim for divorce, if the petitioner was predominantly responsible for the breakdown of marriage. The Federal Court only presumed an abuse of law after a fifteen years' separation period (see for instance Federal Court, Vol. 111 II at p. 109 and Vol. 109 II at p. 363).

[22] Germany: § 1568 of the CC and France: art. 240 of the CC.

[23] Federal Council, 'Report on the Reform of the Swiss Civil Code of November 1995' in (1996) 1 *Bundesblatt*, at pp. 82–83, and pp. 92–93.

[24] I. Schwenzer, *supra* note 19, at Introduction, No. 18, at. pp. 6–7.

However, up to now, practice has used Article 115 of the CC mostly restrictively.[25] Nevertheless there is a great lack of confidence, and the practices of the various cantons are quite different. This seems to be due mainly to the fact that the only possibility for spouses who want to divorce against the will of the partner is a four-year separation period, which, especially for young persons, who have been married only for a short time, seems excessively long. A recognized divorce ground according to Article 115 of the CC, is above all violence of a partner, but not adulterous behaviour or breakdown of marriage for other reasons. The Federal Court also decided on restrictive use in a first ruling,[26] in the second ruling, however, this practice had already been eased.[27]

From an international perspective it must be noted that Swiss law is quite backward in its development: one-sided divorces entail very high requirements. A four-year separation period is among the stricter requirements within Europe.[28] Additionally, the fault principle was not completely banned from the law of divorce grounds. Part of the doctrine and individual judges also criticize the two-month period of reflection on the occasion of a mutually agreed divorce as an unnecessary obstacle.[29]

III. Financial Consequences of Divorce

1. Post-Nuptial Maintenance

One of the most important areas of every divorce law reform is the law of maintenance. Many married couples petitioning divorce have no considerable property that needs dividing between the parties, according to marital property law. The purpose of maintenance must be to allocate the financial consequences of marriage and divorce in the fairest way possible. Post-nuptial maintenance is of great importance in Switzerland, since the traditional division of labour between spouses is still quite common.[30] The rate of female gainful employment is low, due to women working mostly part-time, and state child benefits are restricted.

As divorce law was reformed, the concept of post-nuptial maintenance was amended, as the fault principle was generally banned from law, an aspect which indeed had been widely adopted by practice even before the reform.[31] Unfortunately,

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[25] T. Geiser, 'Ein Jahr neues Scheidungsrecht: Überblick über die Rechtsprechung' in (2001) *FamPra.ch*, pp. 174–178.
[26] Federal Court, Vol. 126 III at p. 404.
[27] Federal Court, Vol. 127 III at p. 129.
[28] France (six years: art. 237 of the CC) and Belgium (five years: art. 232 of the CC) require a longer separation period. In other countries, especially in Scandinavian countries, the required time of separation is substantially shorter.
[29] The idea of a reflection period was borrowed from the French legislation (art. 231 para 2 of the CC).
[30] Approximately 40 per cent of women are entitled to maintenance at divorce.
[31] I. Schwenzer, *supra* note 19, at Introduction to Arts 125–132, No. 4, at p. 238.

there has been only very limited discussion on how the discontinuation of the fault principle would effect the grounds and justifications for post-nuptial maintenance. Legislation and theory recur to different, partly contradictory principles to justify maintenance after divorce. The clean break-principle, that is to say the independent financial responsibility of both spouses after divorce, the balance of the divorce damages, the balance of marriage-related disadvantages, and post-nuptial solidarity, in the framework of theoretical discussion, are all principles used to justify or limit the right to post-nuptial maintenance.[32]

In the area of post-nuptial maintenance, Swiss law provides a blanket clause: an adequate amount is owed, if it is unacceptable for a spouse to come up for his or her own adequate maintenance, including an appropriate old-age pension (Article 125 paragraph 1 of the CC). The decisive factor is indigence of the person claiming, and the ability of the obligated person to pay. Post-nuptial maintenance is owed on the grounds of a concrete situation of need created by the marriage: generally, the principle of self-responsibility applies. However, the person entitled to receive maintenance is not entitled just to have his or her basic needs covered, but has a right to appropriate maintenance. In principle the following must apply: a couple is to be divorced on the basis of how they lived during their marriage.

The law (Article 125 paragraph 2 of the CC) states the following aspects which must be considered when deciding as to amount and period of time for which maintenance is owed: the division of labour during the marriage; the duration of the marriage; the standard of living experienced during the marriage, as well as age and health of the spouses; income and assets of the spouses; scope and time still needed for children to be reared by the spouses; professional education and earning capacity of the spouses, as well as the presumed expenses accruing in the integration of the person claiming into gainful employment; the expected pensions from the Swiss Old-Age, Survivors and Disability Insurance and occupational pension schemes, and from other private or state provisions, including the predicted results of the apportionment of pension values. This list is not intended to be conclusive, and the order of criteria is not meant to indicate any prioritization.

In the framework of the revision, the fault principle as such has been abolished. However, it is still possible to cut or deny maintenance payments in cases of obvious inequity (Article 125 paragraph 3 of the CC). This particularly applies if the person entitled to maintenance has seriously violated his or her duty to contribute to the maintenance of the family, or if he or she wantonly created his or her indigence, or if he or she committed a serious offence against the obligated person or against someone who is closely related to this person. This equity clause is problematic for various reasons: firstly, it states facts that justify its use, by giving examples only, thus opening up widely the possibility of applying the fault principle; secondly, the equity clause contradicts the view that the purpose of post-nuptial maintenance is to

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[32] For a critical analysis in that respect, see I. Schwenzer, 'Über die Beliebigkeit juristischer Argumentation' in (2000) FamPra.ch, at pp. 28–35.

balance marriage-related disadvantages; thirdly, maintenance can only be denied or cut, but not raised.[33] The last means that the regulation is one-sided to the disadvantage of the person entitled to maintenance, usually the woman. In my opinion, the Federal Court quite rightly decided in its first ruling to use this provision restrictively: longstanding adultery of the wife is no reason to cut or deny her maintenance after divorce.[34]

There is no general answer to the question as to what sum constitutes adequate maintenance, even though practice has developed various formula-type calculation methods.[35] As an expression of the principle of self-responsibility, post-nuptial maintenance is in most cases limited, and ends with re-integration into gainful work.[36] Usually a monthly sum is payable, although a lump sum payment can be made (Article 126 of the CC). In principle the standard of living at the end of the marriage is decisive. In short, childless marriages of less than five years, it is not the nuptial standard of living, but the pre-nuptial situation that must be referred to, provided that the marriage is not considered to have effected the circumstances of living substantially.[37] Adequate maintenance includes provision for an appropriate old-age pension scheme. Post-nuptial childcare is the most frequent reason for gainful employment to be unacceptable, therefore justifying a maintenance claim. The Federal Court developed the following principles with regards to this: full-time gainful employment is only reasonable if the youngest child has reached the age of sixteen. However, part-time gainful employment can generally be expected as soon as the youngest child has reached the age of ten, when he or she is no longer considered a small child.[38]

With considerable and lasting changes of circumstances the payments can be reduced, discontinued or temporarily suspended (Article 129 paragraph 1 of the CC). In the framework of this regulation, unmarried cohabitation of the person entitled to maintenance will also be taken into consideration. Unless the parties have agreed otherwise, the obligation will cease as soon as the person entitled to maintenance contracts a new marriage (Article 130 paragraph 2 of the CC). On the other hand, the person entitled to maintenance can request the payments to be reassessed or raised only within five years of the divorce, and then only if the decree stated that no payments could be fixed that would cover adequate maintenance, and if the financial

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[33] So also I. Schwenzer, *supra* note 19, at Art. 125, Nos 81–82, pp. 275–276.
[34] Federal Court, Vol. 125 III at p. 65.
[35] See thereto I. Schwenzer, *supra* note 19, at Art. 125, Nos 69–79, pp. 271–274.
[36] Only little more than 10 per cent of the maintenance orders are unlimited in time. See also the decision of the Federal Court, Vol. 127 III at p. 136: the Court decided in this contentious ruling that a woman 45 years of age living with her 15 year old son has to be self-sufficient within 4 years after divorce, even if husband and wife lived a traditional marriage. The Court based the decision on the clean-break principle.
[37] I. Schwenzer, *supra* note 19, at Art. 125, Nos 4–7, pp. 251–253.
[38] With regard to the practice under the previous law see Federal Court, Vol. 115 II at p. 6, Vol. 109 II at p. 289, Vol. 114 II at p. 301.

circumstances of the obligated person have improved sufficiently (Article 129 paragraph 3 of the CC). The underlying principle of this latter rule is the clean break, which is used in a one-sided way to the disadvantage of the person entitled to maintenance.

2. *Equalization of Pensions*

Occupational pensions are assets of great importance. One of the most significant innovations brought about by the divorce law reform concerns the apportionment of occupational pensions in the case of divorce. While, in the previous version, the law foresaw apportionment only in the framework of the regulations regarding post-nuptial maintenance and loss of expected property, the new law provides for independent claims for the equalization of pensions.[39] On divorce, both spouses must share the cash transfer value accrued during marriage, in the sense of the law on pension entitlements (*Freizügigkeitsgesetz*) (Article 122 paragraph 1 of the CC). At the time of the divorce, the cash transfer value at the point of solemnization of marriage, including the interests accrued up to that time, has to be deducted from the cash transfer value at the time of divorce. The spouse of the person entitled to retirement benefits is therefore entitled to half of the amount calculated in this way. If both spouses belong to a pension scheme, the difference is divided (Article 122 paragraph 2 of the CC). The balance is, in principle, not paid in cash, but is paid into blocked accounts of a pension scheme for the purpose of old-age provision.

The equalization of pensions cannot be contractually avoided in advance, thus a marriage contract to this effect is not legally binding. One spouse can, however, forgo partly or completely his or her claim in the divorce settlement, if adequate old-age and disability provision is guaranteed in some other way (Article 123 paragraph 1 of the CC). Moreover, the court can refuse the sharing of the balance partially or entirely, if this would obviously be inequitable on grounds of matrimonial property law or financial circumstances (Article 123 paragraph 2 of the CC). Here, the question of fault is not considered a factor.

When introducing the family law institution of equalization of pensions, Switzerland followed above all the German example, which had already introduced this back in 1976.[40] Switzerland, however, has taken it a significant step further, and can be considered pioneering in international terms, since equalization of pensions is not at the discretion of the parties. Only under restrictive preconditions is it permitted to deviate from dividing the provisions into halves. This takes into consideration the fact that both spouses have indirectly contributed their share in some way or other to the marriage in order to begin and to further occupational pension schemes. Unfortunately, after the dissolution of the marriage, participation in the occupational pension of the partner, especially if one partner is

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[39] See for instance in detail M. Trigo Trindade, 'Prévoyance professionnelle. Divorce et succession' in (2000) *Semaine Judiciaire*, at pp. 476–495.

[40] §§ 1587a–1587p of the CC.

exclusively responsible for the care of the children, is not foreseen. This must be accounted for in the framework of post-nuptial maintenance assessment.

III. Innovations Regarding Children

1. Joint Parental Custody

Another significant amendment to Swiss family law concerns joint parental custody for divorced and unmarried partners. According to the previous legislation, custody rights could not be shared between parents after a divorce.[41] The new law clearly adheres to the same principle of allocating parental custody to one spouse only after divorce (Article 133 paragraph 1 of the CC), and as in the previous version of the law, the child's welfare has the utmost priority (Article 133 paragraph 2 of the CC). However, partners can now continue to share parental custody by meeting three preconditions (Article 133 paragraph 3 of the CC). Firstly, the parents have to apply jointly, which is a measure to ensure their ability to co-operate. The court cannot order joint parental custody against the will of one parent. Secondly, the parents must submit an agreement to the court for approval, from which it can be seen how they have arranged the division of future childcare and the distribution of maintenance costs between them. Thirdly, the court must come to the conclusion that joint parental custody is in the best interests of the child.

On the basis of equal treatment for children of married or unmarried parents, legislation (apart from legalizing joint parental custody for divorced parents) also introduced joint parental custody for unmarried parents. Under the same preconditions, as apply for divorced parents (joint application, approvable agreement and compatibility with the best interests of the child), unmarried parents can apply for joint custody with the guardianship authority (Article 298a paragraph 1of the CC).

Practice is divided about which requirements should be met in joint parental custody, namely whether actual childcare by both parents, beyond the usual right of access, is required. Even if it is legally possible for divorced and unmarried parents to have joint custody of their children, it is foreseeable that in the majority of cases just one parent will be given parental custody. In this respect, Swiss law clearly lags behind the reforms of other countries, which have abolished state intervention in questions relating to the granting of custody rights after divorce, and only grant parental custody to one parent alone if it is applied for, and if child welfare requires it.[42]

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[41] For instance Federal Court, Vol. 123 III at p. 445.

[42] So for instance in Germany: § 1671 of the CC; England: s. 2(1) of the Children Act 1989, France: art. 371–1 of the CC; Belgium: art. 302 and art. 387*bis* of the CC; Sweden: Kap. 6, § 3 para 2 and § 5 of the Parent Act.

2. Children's Rights in Divorce Proceedings

The divorce law reform of 1997/2000 also introduced modifications with regard to child participation in divorce proceedings. If, in a divorce case, orders have to be made with regard to children, the children in question, as well as their parents, must be heard in person (Article 144 of the CC). A hearing for children is not imperative if their age or other important factors make this unreasonable. While parents must be heard in court, children have the choice of being heard in person in court, or by a third person appointed to do so. The child's right to be heard is, of course, given by Article 12 of the Convention of the Rights of the Child,[43] which is, according to the Federal Court, directly applicable.[44]

In practice there is a great lack of confidence with respect to the hearing of children. The application of the provision depends on personal circumstances, especially the child's age and ability to understand. The provision is handled very differently by each canton and each judge. It is not clear, from what age children should be heard (the range is between seven and twelve years), how to proceed if parents do not wish their children to be heard, and who is to carry out the hearing. In some instances – against the letter of the law – children are not heard if their parents mutually agree on parental custody as well as right of access.[45] The Federal Court decided in its first ruling on the subject that to hear a nine and a half years old boy was consistent with the new law.[46]

Child representation was also introduced. If important reasons are given, a court may order a child to be represented by a child advocate (Article 146 paragraph 1 of the CC). The order for representation in court proceedings must be considered particularly if parents do not agree on custody, or important questions of personal relationships; if required by the guardianship authority; if the hearing or other factors give grounds for considerable doubts as to the adequacy of a joint parental application for custody, or as to right of access; or if there are grounds to consider child protection measures (Article 146 paragraph 2 of the CC). Representation is imperative however if it is requested by a child, who is able to discern (Article 146 paragraph 3 of the CC). The representative must be a person with experience in welfare and legal matters (Article 147 paragraph 1 of the CC). He or she must represent the interests of the child and must be independent. Here also, practice at canton level still hesitates to apply this provision consistently. Moreover, it is incomprehensible why legislation has not foreseen child representation for all procedures involving children, and not just for divorce proceedings, above all for child protection proceedings.

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[43] The Convention on the Rights of the Child 1989 was ratified by Switzerland in 1997 and took effect in the same year.
[44] Federal Court, Vol. 124 III at p. 90.
[45] In Plädoyer, 2000, at p. 9.
[46] Federal Court, Vol. 126 III at p. 497.

IV. The Family Home

Further amendments were introduced with regard to the family home. To this end the court is now empowered to transfer the rights and duties of the tenancy agreement of the family home solely to that spouse who, on account of the children, or for other important reasons, depends on the family home, as long as this is acceptable to the other spouse (Article 121 paragraph 1 of the CC). The interests of the lessor are taken into account in so far as that spouse, who ceases to be a tenant, is jointly liable for the payment of the rent until the tenancy ends, or can be ended by contract or by law, for a period, however, not exceeding two years (Article 121 paragraph 2 of the CC). If the family home is owned by one of the spouses, the court can concede a temporary right of residence to the other spouse, under the same preconditions and with payment, or off-set against maintenance payments (Article 121 paragraph 3 of the CC).

Even though it is the interests of the children and the maintenance of a familiar environment rather than the marital status that is the important motive for this provision, unfortunately legislation has failed to foresee allocation of the family home in the case of the dissolution of a consensual union. If a consensual union is dissolved, principles of tenancy and property law apply exclusively. The legal situation in other European countries might well have served as an inspiration to meet the interests of children of unmarried couples,[47] but this was not the case.

V. Modifications with Regard to Marriage Law

A few points were also amended in the area of law governing the solemnization of marriage: the statutory provisions on betrothal have been slightly modified, but they have not been abolished (Articles 90 – 93 of the CC); the personal requirements for contracting marriage have been simplified, preserving only two marriage impediments: a previous, non-dissolved marriage, and a close relationship (Articles 94 – 96 of the CC); and the procedure leading to the solemnization of marriage has been significantly simplified, since the procedure of publication of the planned marriage has been abolished (Articles 97 – 103 of the CC).

VI. Summarizing Comments

At its core, the new divorce law adopts a fundamental change of direction. However, practice had largely implemented these modifications before the law was amended. The new divorce law, therefore, essentially bridged the gap which had existed between practice and the formal provisions for divorce. Because, from a European perspective, the Swiss revision took place very late, it borrowed from reforms which had already taken effect in other European countries – especially in Germany and

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[47] For example Sweden: The Cohabitees [Joint Homes] Act 1987 and Norway: Act Nr. 45 of the 4 July 1991 Concerning the Joint Habitation.

France – in the last 25 years. The new Swiss law is therefore not very original, its guidelines rather coincide more or less with those of many foreign reforms.[48]

During the first one and a half years of the new law being in force, its implementation by the courts has been characterized by lack of confidence. Cantons and courts apply the law in a very inconsistent manner. In practice, headaches are caused particularly by the four-year separation required in one-sided divorce cases, the two-month reflection period after the first hearing, and the hearing of children. There is some criticism with regard to the fact that in many cases divorce is more difficult to obtain under the new law than it was previously. Motions have already been submitted in parliament, requesting reports on legal practice, and if necessary the initiation of another early law reform. These motions mainly concern the four-year separation period, which – according to some spokespersons – should be significantly reduced.

The reform of divorce law was, without doubt, of the utmost necessity. However, since legislative work takes a long time in Switzerland, it is deplorable that Switzerland did not fully endorse the ideas that lay behind the reform. In several areas the reform went only half way: the fault principle, as an aspect of divorce grounds and post-nuptial maintenance, was not entirely abolished. The new law distinctly lacks consistency in several areas, particularly in the area of post-nuptial maintenance, to the detriment of equal opportunities for both sexes.[49] In important areas, such as child rights in proceedings, maintenance, renouncement of equalization of pensions, and joint parental custody, the law will need consolidation through practice. It is hoped that the courts will soon develop coherent and predictable practices.

C. Future Issues and Further Reforms Needed

I. Introductory Remarks

Despite the latest wide-ranging reforms, there are many issues of family law that will have to be addressed in the near future. A few of them are already on the political agenda.

In the area of marriage law, a reform concerning the family name just failed. The issue nevertheless will have to be discussed again in the near future. From this author's point of view, the need for further reform concerns consensual unions above all, which are not visible within Swiss law. With regard to same-sex couples, the first steps have been taken in what will be an extensive legislative process.

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[48] So also O. Guillod, 'A New Divorce Law for the New Millennium' in The International Survey of Family Law 2000 (Bainham (ed.)) (Bristol, 2000) at p. 359.

[49] For a critical analysis see I. Schwenzer, 'Über die Beliebigkeit juristischer Argumentation' in (2000) *FamPra.ch*, at pp. 27–38.

The rights of the child, as mentioned earlier, was fundamentally reformed in 1972 (adoption law) and 1976 (the remaining child law). Moreover, changes were realised through the 1997/2000 reform, such as the introduction of joint parental custody, and restrictions on the presumption of paternity in cases of dissolution of marriages of parents (Article 255 of the CC). In addition, on 1 January 2001, the new federal law on medically assisted procreation came into force,[50] leading to a small change in the area of parentage law (Article 256 paragraph 3 of the CC).[51] Furthermore, a revision of the law of guardianship is planned, a committee of experts is currently preparing the first draft.

Nevertheless, in many matters relating to child law, legal developments abroad go far beyond the scope of the Swiss law reforms. Within the doctrine there is a demand for a general reform since there is a lack of an overall concept in child law.[52] In the area of parentage law, specifically in matters relating to contested paternity, there are distinct differences in the treatment of children of married and unmarried parents.[53] The priority is to further develop child law in such a way that new family structures, such as stepfamilies, can also be accommodated.

In the following those areas of law considered particularly problematic will be discussed, such as issues relating to family name, unmarried cohabitation, same-sex partnerships, and stepfamilies. These are all areas for which the need for reform has already been recognized, or for which, in my view, solutions will be necessary in the near future. The selection of areas, however, is relatively arbitrary, since there are also other issues which will, or should, form part of the discussion on family law in the future.

II. Family Name

The question concerning the family name is a difficult one in Swiss law, which still adheres to the concept of a uniform family name. Through marriage, the wife receives her husband's family name (Article 160 paragraph 1 of the CC). With the 1987 marriage law reform, the possibility was introduced for the wife to place the

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[50] Federal Act on Medically Assisted Procreation of 18 December 1998. See thereto R. Reusser, 'Die gesetzliche Regelung der medizinisch ünterstützten Fortpflanzung in der Schweiz' in (2000) *DEuFamR*, at pp. 222–230. The new law forbids surrogate motherhood and donation of human embryos and eggs and also pre-implantation diagnostic tests. Data concerning sperm donors are to be kept safe in a central register, and there are strict regulations governing the right of any child born as the result of assisted reproduction with sperm donation from a donor to obtain information on the donor concerned.

[51] The amendment concerns the possibility of the child to contest paternity in cases of sperm donation.

[52] For instance I. Schwenzer, *supra* note 19, at Introduction, No. 31, at pp. 11–12.

[53] The conditions to contest paternity are very restrictive in cases of married couples, and basically only the husband is entitled to dispute his paternity, whereas the recognition of a child born out of wedlock can be contested by anyone with an interest (art. 256 para 1 and art. 260a para 1 of the CC).

name she had prior to the marriage before that of her husband's, creating a double-barrelled family name (Article 160 paragraph 2 of the CC). However, Article 30 paragraph 2 of the CC, provides the legal framework for the wife's name to be authorized as her family name if grounds worthy of consideration are given. As a consequence of a 1994 decision by the European Court for Human Rights,[54] in such a case the husband is also permitted to have a double-barrelled family name.

As a result of parliamentary motions, provisions with regard to the family name have recently been investigated. There has been a long and highly emotional discussion as to whether or not the double-barrelled family name should be abolished. The Federal Council and the Law Commission of the Council of States wanted to retain it, but alter the existing law to the effect that both spouses, and not just the wife, would be free to retain the names they had before the marriage as part of a double-barrelled family name. The Law Commission of the National Council, however, wanted to abolish double-barrelled family names, thus enabling future spouses to jointly choose a family name by adopting the name of the bride or the bridegroom, or to declare that they wish to continue to use the names they had up to then. Further disagreements concerned the names of the children: who is to choose the family name of the children, in cases where parents have different names and they cannot agree on their children's family name? In the end the two Councils agreed on the solution that the child protection authorities should choose the family name of the children if the parents disagreed. Nevertheless, due to a conservative opposition the reform failed altogether in the final parliamentary vote.

The current Swiss law on family name is contrary to the equal rights clause, and a revision of the law is therefore still indispensable. However, to encompass the principles of uniformity of family name, equality of the sexes and respect of personal rights at one stroke is an enterprise that is bound to fail. A clear and simple system is needed, which provides the spouses with a free choice and respects their individuality.

III. Unmarried Cohabitation

In Switzerland, as in other countries, there is a rise in the number of people who live in permanent non-marital unions.[55] However, there is no legally organized status for cohabitees, since the law is tied to the formal band of marriage. Even in cases where the nature of the interests involved is identical with that of married spouses, such as the allocation of the family home in the case of separation, legislation has refused in recent years to extend marital rights to relationships between cohabitees. This contrasts with developments in other countries, where 'the boundaries of marriage as

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[54] *Burghartz v. Suisse, Publications of the decisions of the European Court for Human Rights* (1994) Serie A, No. 280.

[55] In the great majority of cases, however, the non-marital union is just a preliminary phase to marriage. See B. Fux, *supra* note 1, at pp. 23–24, 26–29.

a (weakened) institution have been extended beyond the boundaries of the legal term "marriage" '.[56]

The Federal Court, nevertheless, adopts the stance that in cases where the partners wish to subordinate their own position to their common purpose, in the spirit of a joint contribution to the union, it is justified to apply the provisions of partnership law (Articles 530 – 551 off the Law of Obligations – the partnership as an entity without legal personality), particularly to enable reasonable handling of the property acquired during the union.[57] However, this enables satisfactory solutions only in certain cases. Considering the actual developments, Swiss legislation will therefore have to question whether it is still justified to draw such an impermeable borderline between married and unmarried couples, without considering the actual problem. From my point of view provisions are necessary, not only in terms of the family home, but also with regard to property equalization and financial claims after the dissolution of a union. Particularly in cases where, by mutual consent, one partner gives up financial independence in favour of childcare, equalization of disadvantages brought about by the union must be assessed. It cannot be that the person taking on childcare must solely bear the losses created through joint decisions and the dissolution of the non-marital union. This is also a matter of equal treatment of children of married and unmarried parents.

IV. Same-Sex Couples

Same-sex couples have no legal status either. There is an important difference between the situation of heterosexual cohabitees and that of same-sex couples: the latter cannot marry, even if they wish to do so. They are denied the possibility of formalizing their relationships and acquiring those rights and responsibilities which are related to marriage. In 1999 the Federal Department of Justice and Police published a paper on the legal situation of same-sex couples in Switzerland.[58] The report presents the unsatisfactory situation in detail, and found that the unequal treatment of same-sex couples, as compared to that of married couples, is not always justified. Apart from family law, this is particularly true with regard to the law concerning foreign nationals, inheritance law, tax law, in the areas of social welfare and social security law, as well as tenancy law. The report discusses various approaches towards solutions: selective legal intervention in terms of revision of particular acts and provisions; legally binding partnership contracts with certain effects with respect to third parties and the state; registered partnerships with either relatively autonomous or very marriage-like effects; the possibility of marriage for

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[56] H. Willekens, 'Long Term Developments in Family Law in Western Europe: an Explanation' in *The Changing Family. International Perspectives on the Family and Family Law* (Eekelaar and Nhlapo (eds)) (Oxford, 1998) at p. 56.

[57] Federal Court, Vol. 108 II at p. 204.

[58] Federal Office of Justice, *Die rechtliche Situation gleichgeschlechtlicher Paare im schweizerischen Recht. Probleme und Lösungsansätze* (Bern, 1999).

same-sex couples. The report had already presented the last as problematic and undesirable.

The necessity for legislative action was practically undisputed by the official statements on the report of the Federal Department of Justice and Police. A clear majority were in favour of the introduction of a registered partnership. An initial statement by the Federal Council favoured the introduction of a registered partnership with relatively autonomous effects. A new law entity is to be created, enabling state recognition of same-sex couples and the legal safeguarding of their relationship. In contrast to the Nordic countries, however, the law applying to married couples is not simply to be extended to same-sex couples. New independent provisions are to be created, which will, as far as necessary, take into consideration the particularities of same-sex couples, and differentiate the registered partnership from marriage. In contrast to the laws of The Netherlands, Belgium and France, registered partnerships are intended to be made available for same-sex couples only. The Federal Council commissioned the Department of Justice and Police, to produce a preliminary draft by the end of 2001, when official announcements will be made as to more concrete proposals.

The efforts made toward legislative changes with regard to the legal position of same-sex couples principally correspond with international developments. It is a gratifying fact that the creation of a new law entity for same-sex couples, and therefore the institutional safeguarding of their relationships, is supported by the Federal Council and most parties.[59] Unfortunately, however, this initial statement by the Federal Council has put Switzerland behind in a European context. Its proposal is fairly restrained, since instead of adopting the most obvious solution, which has been tested in other countries, namely to place the registered partnership within a legal framework, bringing it into line with marriage, a special legal position with particular legal effects is to be created for same-sex couples. While in The Netherlands marriage is now available to same-sex couples, here the distinguishing between same-sex couples and married couples is in the forefront of the discussions. Nevertheless, further legislative activities and public discussions are anticipated with some enthusiasm.

While the Federal Government is looking for a national solution, the canton of Geneva has recently decided to introduce registered partnerships for same-sex, as well as for different-sex, couples.[60] Cohabiting couples can declare their status with the state chancellery or a notary, and have their relationship officially recognized. With regard to their dealings with authorities, this new status allows couples to be treated in the same way as married couples. In the areas of taxation and social welfare, the law creates the possibility of introducing provisions that would treat

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[59] The author would like to go a step further, and question the legal institution of marriage as such. In my opinion there are not many good reasons nowadays to privilege marriage compared to other social relationships. While the abolishment of marriage is not achievable at present, it is necessary to reduce discrimination of same-sex couples by implementing a legal framework equitable to marriage law.

[60] *Loi sur le partenariat* of the 14 February 2001.

same-sex couples in the same way as married couples. The solution in Geneva is therefore in line with the French PaCS (*Pacte civil de solidarité*). It is very restricted in its effect, however, due to the limited cantonal powers. In its present version its character is mainly symbolic. However, initiatives at cantonal level generally act as important signals for the Federal Government.

V. Stepchildren

The rising number of divorces also leads to a rising number of step-relationships.[61] A step-relationship according to Swiss law is established by a biological parent-child relationship, and by marriage between a natural parent and a third person.[62] A parent-child relationship between a step-parent and child, however, is not established: Swiss law does not recognize a step-relationship as an inclusive legal relationship. As a result only isolated provisions apply to the step-relationship, even when there is a close socio-psychological relationship between the step-parent and stepchild. It is merely the step-parent's duty to assist which creates a certain legal framework: according to Article 278 paragraph 2 of the CC, a spouse must assist the other spouse to meet the maintenance obligations to an adequate extent. This is a marital duty, and does not create direct claims by the stepchild. Additionally, according to Article 299 of the CC, the step-parent is obliged to assist the natural parent in exercising parental care, in an adequate way and to represent him or her, if the circumstances require this. This is also an aspect of the marital duty to assist. The step-parent, however, cannot be considered as a bearer of parental custody, since, according to Swiss law, parental custody requires a legally recognized parent-child relationship. The parent-child relationship, as lived in the actual family situation, is not considered a criterion to justify recognition as a parent, mere psychological parents are denied legal parental status.

This modest legal ruling with regard to step-relationships is in many ways problematic. The problematic situation is emphasized particularly with the dissolution of a stepfamily in which parental custody does not form part of the divorce proceedings. If a step-parent is to take on parental responsibilities, parental custody must be withdrawn from the natural parent (Articles 311, 312 of the CC) in order to make the step-parent the guardian of the stepchild. This, however, only applies as *ultima ratio* if the child's welfare is at stake. Maintaining an evolved psychological parent-child relationship between stepchild and step-parent is, in principle, only possible by means of right of access (Article 274a of the CC).[63]

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[61] However, stepfamilies are not a phenomenon of the modern society. In earlier days, reconstituted families resulting from the early death of one parent and a second marriage were a common occurrence in Europe. The widow-stepfamily was gradually replaced by the divorce-stepfamily. See A. Boos-Hersberger, *Die Stellung des Stiefelternteils im Kindsrecht bei Auflösung der Stieffamilie im amerikanischen und im schweizerischen Recht* (Basel/Genf/München, 2000) at pp. 3–7.

[62] If there is no marriage-tie between the persons there cannot be a legal step-relationship.

[63] Critical A. Boos-Hersberger, *supra* note 60, at pp. 142–143.

Adoption of stepchildren is *de lege lata* the only possibility for step-parents to gain parental custody during and after the dissolution of a stepfamily. However, adoption only makes sense in those cases where relationships between children and natural parents have been irretrievably broken, since the stepchild adoption ends legal family bonds with the biological parent and his or her relatives. Since the child usually also maintains a relationship with the second biological parent, adoption of a stepchild is an unsuitable and inappropriate measure to protect the social relationship between stepchild and step-parent, especially since the marriage breakdown of step-parents is highly probable.[64] The divorce law reform therefore also made the adoption of stepchildren more difficult, and replaced the two-year period of marriage, required for adoption, by one of five years (Article 264a paragraph 3 of the CC).

The problem of stepfamilies lies at the interface of marriage law and child law, and serves as an example of the changes in families and family law. Legislation is required to produce a solution, which improves recognition and protection of, in some cases very intensive, psychosocial relationships between stepchildren and step-parents, in the best interests of the child. To this end it is necessary to rethink the conceptional linkage between custody and parentage, or adoption, and (or) allow more than two persons to be entrusted with parental responsibility.[65] Here too, there are European systems that can serve as examples.[66]

D. Concluding Remarks

This latest family law reform allowed Switzerland to catch up with international developments. However, Switzerland failed to reach the position at the top of the international community it had once held at the beginning of the 20th century. Switzerland's response to general social changes came late, and Swiss family law still needs many reforms before actual social reality is incorporated. Finally the following sets out a few concluding remarks to the above.

How can the slowness of today's Switzerland be explained, bearing in mind its history of early industrialization and integration in the world market, early modernization of family and household structures, as well as marital and reproductive behaviour?[67] Why do modern family-relevant projects, such as

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[64] So ibid. at p. 120 and Federal Council, 'Report on the Reform of the Swiss Civil Code of November 1995' in (1996) 1 *Bundesblatt*, at pp. 156–157.

[65] See the proposals in A. Boos-Hersberger, *supra* note 60, at pp. 156–164.

[66] In England it is possible, that more than two persons have parental responsibility (s. 2(5), (6) and s. 12(2) of the Children Act 1989) and in The Netherlands parentage and custody are not necessarily linked, so as to allow for example same-sex couples to have joint custody of the children.

[67] About the early modernization and the low marriage rate and high divorce rate until 1980 connected with it see B. Fux, *supra* note 1, at pp. 16 – 17.

maternity insurance, fail despite (too) low birth rates, while Switzerland is an innovative dynamic country which takes a leading position in terms of economic developments and is ready for globalization? The distinctive democracy was mentioned earlier as an obstacle to quick, dynamic processes. Socio-political and legal changes require a solid majority in the population, and conservative, traditionalist pressure groups are able to influence and slow down processes considerably. It is a difficult task to promote family law reforms which are widely accepted throughout the country, while the globalized market is to a great extent beyond democratic control. However, another aspect, which characterises Switzerland, is the strongly anchored concept of privacy. The lack of active family policies is mainly due to the fact that separation of the public and private sphere is emphasized strongly in Switzerland. This may well explain the lack of maternity insurance.

The private sphere which enjoys the recognition of the state is narrowly defined. Marriage is still a highly privileged institution in comparison to consensual unions, and child law is deeply rooted in biologism. This in turn results in the fact that, due to the lack of alternatives, many couples contract marriage at the latest with the birth of their first child, and often adhere to rigid marriage norms: 'Couples who are forced to develop accommodation strategies in order to comply with restrictive societal conditions seem to choose traditional solutions (. . .)'.[68] The normative ideal is conservative and based on a strong belief in formal structural elements. Institutional thinking seems to create security and promise some stability in the private sphere, while many perceive societal and economic developments as intimidating and too rapid. Also, it must not be forgotten that women's right to vote and to be elected was only introduced as late as 1971. Considering this fact, family and socio-political changes seem to happen very fast, even according to Swiss standards. In the meantime, an increasing number of people have adopted new, legally hardly acknowledged family forms, and the normative and binding character of traditional family and marriage patterns is receding.

The law must take into account the changing requirements of an evolving reality, in order to give orientation and function as a model. The author hopes that Swiss legislation, and in Switzerland this is all of us, will in the future dare to look increasingly across the borders, across country borders as well as disciplinary borders. I am convinced that this would make it a lot easier to leave institutional thinking behind and to put real-life social relationships into the foreground. However, this requires discussion of the objectives of family law, which would undoubtedly be beneficial, since nowadays, legal arguments in too many cases refer to hardly reflected positions beyond the law.[69] Modern family law must provide an equalization system to compensate for union-related disadvantages, it must protect the weaker party, and must provide support for the resolution of conflicts, while

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[68] Ibid. at p. 17.

[69] See also I. Schwenzer, 'Über die Beliebigkeit juristischer Argumentation' in (2000) FamPra.ch, pp. 38 – 39.

simultaneously guaranteeing freedom of action. Therefore, a view that is solely in accordance with civil status and parentage can hardly be given a place within such an understanding of family law.

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