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**Study on Homophobia, Transphobia and Discrimination on  
Grounds of Sexual Orientation and Gender Identity**

**Legal Report: Switzerland**

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## A. EXECUTIVE SUMMARY

### *General remark on case statistics:*

1. Cases concerning LGBT-persons are not separated, statistics are not available.

### *Ombudsman*

2. Switzerland does not have an ombudsman, or any similar office in charge of protection and promotion of human rights in the sense of the Paris Principles. However, from 2011 there is the Swiss Competence Centre for Human Rights which partly fulfils roles of a NHRS.<sup>1</sup>

### *Overall legal framework*

3. Currently, there is no law or federal act at all sanctioning specifically acts of discrimination against LGBT-people. Switzerland has neither a general anti-discrimination legislation nor any article included in another federal law prohibiting discrimination against LGBT people in a general manner using the concepts like sexual orientation or gender identity or any synonym. .
4. LGBT persons are protected mainly by:
  - Art. 8 Swiss Constitution, Equality before the Law
  - Constitutional catalogue of the other fundamental rights and freedoms
  - Art. 28 ff. Civil Code, Protection of personality
  - Some regional constitutions mention sexual orientation explicitly

### *Freedom of assembly and association*

- Gay pride parades and other demonstrations of LGBT-people and LGBT-organisations are accepted, granted permission and accompanied or - if necessary - protected by the police.
- LGBT organisations can be founded as associations under the Swiss Civil Code and are recognised as such without discrimination.

### *Freedom of expression*

5. LGBT persons are - like anyone else - protected by the Constitutional right to freedom of expression.

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<sup>1</sup> Swiss Competence Centre for Human Rights. <http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=34956>. Accessed 23. 02. 2011.

6. State authorities' interference with LGBT activities are usually reasoned by suspicion of illegal activities. Unnecessarily harsh treatment in connection with these interferences especially by the police is often reported.

#### *Hate crime - criminal law*

- The Swiss Penal Code contains no specific article concerning LGBT-people. It does not speak about or refer to sexual orientation or gender identity at all.
- Hate speech is classified as an offence
- Homo- or transphobia as an offender's motivation can lead to harder sanctions

#### *Family issues*

7. Same-sex couples can register their partnership under the Federal Act on Registered Partnerships. The duties are about the same as for married couples.
8. Key discriminations stated in the Federal Act are:
  - prohibition of adoption
  - prohibition of assisted reproduction
9. Some Cantons / courts still force transgender people to divorce as condition to change name and / or legal gender.
10. Theoretically, transgender women could store their sperm for later use in a heterosexual relationship. As surrogate motherhood is strictly prohibited, transgender men can not store their fertile eggs for future use.

#### *Asylum and refugee issues*

11. Sexual orientation is recognised as a factor in assessing the risk of persecution .
12. In the case of belief in the applicant's sexual orientation often the individuals risk in the case of his/her return was denied. This applies even for countries knowing death penalty for sodomy, 'crimes against nature' and other laws criminalising LGBT persons.
13. Family reunification and asylum for persons living in a close relationship are allowed.
14. Awareness for specific endangering of LGBT persons in asylum centers is low.
15. Fundamental ECHR guarantees like procedural fairness are not always granted.

#### *Social security, social care and insurance*

16. Same-sex couples living in a registered partnership almost enjoy equal protection to married couples. The main difference is the qualification of the surviving partner as widower in the case of one partner's death, resulting in lower benefits for lesbian widows without children.

17. Children of couples living in a registered partnership enjoy nearly the same benefits as children of heterosexual parents.
18. Additional optional health insurance can be and is often denied to transgender persons, leading to exclusion from treatment performed on a good standard.
19. Some insurance companies exclude gender reassignment surgery from coverage in the additional optional insurance categories.
20. Often, transgender persons do not feel treated in a fair way, or taken seriously, by public authorities.

#### *Education*

21. Education is in the competence of the Cantons resulting in 26 different educational systems, 26 different school curricula. Some Cantons do mention sexual orientation and / or gender identity in their curriculum concerning sexual education.
22. Most children go to public schools. These are bound by the Constitution, especially by the anti-discrimination article.
23. Transgender persons are usually denied receiving diplomas on their preferred name before a legal name change.

#### *Employment*

24. The Constitution and the Federal Act on Gender Equality protect the right to equal remuneration and equal factual treatment in all fields of employment as well for LGBT persons. The right to complaint is given.
25. The specific Federal Office for Gender Equality denies responsibility for LGBT-issues.

#### *Housing*

26. No issues reported.

#### *Health Care*

27. Unequal medical treatment based on one's sexual orientation is in general not allowed. The main differentiation in the standard of received care is based on different categories of health insurance coverage.
28. Gender confirming treatment in the highest attainable standard is available only for a small group of transgender people.
29. A specific key problem is in the treatments offered to transgender persons in public hospitals.
30. Same-sex partners are usually recognised as next of kin. Officially registered partners must be recognised as next of kin.

31. LGB people are not categorised as sick for their sexual orientation; in contrast to transgender people.
32. The constant specific awareness-raising programmes focus mainly on HIV prevention among men having sex with men (MSM).

*Access to goods and services*

33. No issues reported.

*Media*

34. Discrimination is specifically prohibited by the Federal Act on Radio and TV and the (private) Ethic Code of Journalists.
35. Complaints under the specific Act can be brought before the Media Ombudsman Service and the Independent Complaints Authority; complaints under the Civil or the Penal Code can be presented to the Civil and Penal Courts.

*Transgender Issues*

36. Key problems are
  - coercive sterilisation for name and / or legal gender change
  - hormonal/surgical requirements for name and/or legal gender change
  - forced divorce for legal gender change
  - unequal access to surgery in a satisfying quality, unsatisfying quality of psychological treatment
  - denied access to treatment and lack of support for young transgender people, especially children, and their families.

*Intersex issues*

37. Key problems are:
  - unlawful operations on newborn children
  - lack of neutral and sufficient information for parents of newborn intersex children

## B. Findings

### B.1. Overall legal framework

#### *Constitution*

38. Art. 7<sup>2</sup> of the Swiss Constitution states that "human dignity must be respected and protected," Art. 8 I<sup>3</sup> states that "everyone shall be equal before the law." A catalogue of the fundamental rights and freedoms follows these two articles. Few fundamental rights are found in other parts of the constitution.
39. Art. 36<sup>4</sup> regulates the restrictions on fundamental rights (legal basis, justified in the public interest or for the protection of the fundamental rights of others, proportionality, no harm of the essence of the fundamental right).
40. Art. 190<sup>5</sup>, applicable law, reads "The Federal Supreme Court and the other judicial authorities shall apply the federal acts and international law." This means that in case of a conflict between a federal act and the constitution, the federal act cannot be annulled by the Supreme Court. The latter can however state that the Federal Act is deemed unconstitutional. This sometimes leads to adaptation of the Act by Parliament.
41. Sexual orientation and gender identity are not explicitly mentioned in the constitution as possible grounds of discrimination. Art. 8 II Constitution (Equality before the law)<sup>6</sup> refers to

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2 Art. 7, *Menschenwürde*: "Die Würde des Menschen ist zu achten und zu schützen."

Art. 7, *Human dignity*: "Human dignity must be respected and protected."

3 Art. 8, *Rechtsgleichheit*: "Abs. 1 Alle Menschen sind vor dem Gesetz gleich. Abs. 2 Niemand darf diskriminiert werden, namentlich nicht wegen der Herkunft, der Rasse, des Geschlechts, des Alters, der Sprache, der sozialen Stellung, der Lebensform, der religiösen, weltanschaulichen oder politischen Überzeugung oder wegen einer körperlichen, geistigen oder psychischen Behinderung. Abs. 3 Mann und Frau sind gleichberechtigt. Das Gesetz sorgt für ihre rechtliche und tatsächliche Gleichstellung, vor allem in Familie, Ausbildung und Arbeit. Mann und Frau haben Anspruch auf gleichen Lohn für gleichwertige Arbeit. Abs. 4 Das Gesetz sieht Massnahmen zur Beseitigung von Benachteiligungen der Behinderten vor."

Art. 8, *Equality before the law*: "Par. 1 Everyone shall be equal before the law. Par. 2 No one may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability. Par. 3 Men and women shall have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women shall have the right to equal pay for work of equal value. Par. 4 The law shall provide for the elimination of inequalities that affect persons with disabilities."

4 Art. 36, *Einschränkungen von Grundrechten*: "Abs. 1 Einschränkungen von Grundrechten bedürfen einer gesetzlichen Grundlage. Schwerwiegende Einschränkungen müssen im Gesetz selbst vorgesehen sein. Ausgenommen sind Fälle ernster, unmittelbarer und nicht anders abwendbarer Gefahr. Abs. 2 Einschränkungen von Grundrechten müssen durch ein öffentliches Interesse oder durch den Schutz von Grundrechten Dritter gerechtfertigt sein. Abs. 3 Einschränkungen von Grundrechten müssen verhältnismässig sein. Abs. 4 Der Kerngehalt der Grundrechte ist unantastbar."

Art. 36, *Restrictions on fundamental rights*: "Par. 1 Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible. Par. 2 Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others. Par. 3 Any restrictions on fundamental rights must be proportionate. Par. 4 The essence of fundamental rights is sacrosanct."

5 Art. 190, *Massgebendes Recht*: "Bundesgesetze und Völkerrecht sind für das Bundesgericht und die anderen rechtsanwendenden Behörden massgebend."

6 Art. 8, *Rechtsgleichheit*: "Abs. 1 Alle Menschen sind vor dem Gesetz gleich. Abs. 2 Niemand darf diskriminiert werden, namentlich nicht wegen der Herkunft, der Rasse, des Geschlechts, des Alters, der Sprache, der sozialen Stellung, der Lebensform, der religiösen, weltanschaulichen oder politischen Überzeugung oder wegen einer körperlichen, geistigen oder psychischen Behinderung. Abs. 3 Mann und Frau sind gleichberechtigt. Das Gesetz sorgt für ihre rechtliche und tatsächliche Gleichstellung, vor allem in Familie, Ausbildung und Arbeit. Mann und Frau haben Anspruch auf gleichen

several groups who are seen as usual targets of discrimination, based not least on historical experiences. This list is not exhaustive. Of specific interest are "gender" and "way of life." Way of life<sub>is</sub> usually interpreted to cover claims by LGB and Roma people. It is widely acknowledged that gender shall be interpreted in a broader sense than man/woman and include gender identity.<sup>7</sup>

42. Art. 10 II<sup>8</sup> states the right to personal liberty and in particular to physical and mental integrity. This includes same-sex relationships and transgender people (see, for example, the decision of the Federal Supreme Court 119 II 264), the right to decide upon one's own body.
43. Art. 13,<sup>9</sup> Right to privacy, includes as well the right to live as a same-sex couple.

#### *Federal Law*

44. Currently, there is no law or federal act sanctioning specifically acts of discrimination against LGBT-people. Switzerland has neither a general anti-discrimination legislation nor any article included in another federal law prohibiting discrimination against LGBT-people in a general manner using words like sexual orientation or gender identity or any synonym.
45. Art. 28 ff. Swiss Civil Code states the protection of one's personality. A homophobic or transphobic offence may be prosecuted as civil suit under this article.
46. Art. 19 f.<sup>10</sup> Swiss Code of Obligations states that contracts must be within the limits of the law. Rules of Swiss legislation has to be read in a broad sense including all mandatory

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Lohn für gleichwertige Arbeit. Abs. 4 Das Gesetz sieht Massnahmen zur Beseitigung von Benachteiligungen der Behinderten vor."

Art. 8, *Equality before the law*: "Par. 1 Everyone shall be equal before the law. Par. 2 No one may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability. Par. 3 Men and women shall have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women shall have the right to equal pay for work of equal value. Par. 4 The law shall provide for the elimination of inequalities that affect persons with disabilities."

7 See e.g. Schweizer in Ehrenzeller et al. (eds.), *Die schweizerische Bundesverfassung, Kommentar*, 2nd edition, Zürich/Basel/Genf 2008, 208; Müller, Jörg Paul / Schefer, M., *Grundrechte in der Schweiz*, 4th edition, Bern 2008, 685; Freivogel in Kaufmann / Steiger-Sackmann (eds.), *Kommentar zum Gleichstellungsgesetz*, 2nd edition, Basel 2009, 61.

8 Art. 10, *Recht auf Leben und auf persönliche Freiheit*: "Abs. 1 Jeder Mensch hat das Recht auf Leben. Die Todesstrafe ist verboten. Abs. 2 Jeder Mensch hat das Recht auf persönliche Freiheit, insbesondere auf körperliche und geistige Unversehrtheit und auf Bewegungsfreiheit. Abs. 3 Folter und jede andere Art grausamer, unmenschlicher oder erniedrigender Behandlung oder Bestrafung sind verboten."

Art. 10, *Right to life and to personal freedom*: "Par. 1 Everyone has the right to life. The death penalty is prohibited. Par. 2 Everyone has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement. Par. 3 Torture and any other form of cruel, inhuman or degrading treatment or punishment are prohibited."

9 Art. 13, *Schutz der Privatsphäre*: "Abs. 1 Jede Person hat Anspruch auf Achtung ihres Privat- und Familienlebens, ihrer Wohnung sowie ihres Brief-, Post- und Fernmeldeverkehrs. Abs. 2 Jede Person hat Anspruch auf Schutz vor Missbrauch ihrer persönlichen Daten."

Art. 13, *Right to privacy*: "Par. 1 Everyone has the right to privacy in their private and family life and in their home, and in relation to their mail and telecommunications. Par. 2 Everyone has the right to be protected against the misuse of their personal data."

10 Art. 19 *OR, Bestimmung des Inhaltes*: "Abs. 1 Der Inhalt des Vertrages kann innerhalb der Schranken des Gesetzes beliebig festgestellt werden. Abs. 2 Von den gesetzlichen Vorschriften abweichende Vereinbarungen sind nur zulässig, wo das Gesetz nicht eine unabänderliche Vorschrift aufstellt oder die Abweichung nicht einen Verstoß gegen die öffentliche Ordnung, gegen die guten Sitten oder gegen das Recht der Persönlichkeit in sich schliesst."

Art. 19, *Determination of the contents*: "Par. 1 The content of a contract may, within the limits of the law, be established at the discretion of the parties. Par. 2 Agreements deviating from what is provided for by law are valid only if the law does not contain mandatory provisions which may not be modified, or where such deviation does not violate public policy, bonos mores, or basic personal rights."

Art. 20 *OR, Nichtigkeit*: "Abs. 1 Ein Vertrag, der einen unmöglichen oder widerrechtlichen Inhalt hat oder gegen die guten Sitten verstösst, ist nichtig. Abs. 2 Betrifft aber der Mangel bloss einzelne Teile des Vertrages, so sind nur diese nichtig, sobald nicht anzunehmen ist, dass er ohne den nichtigen Teil überhaupt nicht geschlossen worden wäre."

rules of private and public law. Therefore as well the fundamental rights and values of the Swiss Constitution like Art. 8 II, equality before the law, have to be taken into consideration. This barrier of freedom in content affects the subject-matter of the contract, the treaty-making and the contracts aim.

### *Awareness raising*

47. To the national lesbian and gay associations' knowledge, the government has not undertaken specific programmes, measures or action to raise awareness or combat homophobia and transphobia. In 2005, clear public statements were made by the Federal Council and many politicians promoting the Federal Act on Registered Partnership. Gender identity in general and more specifically the existence of gender identities exceeding the binary system of "male" / "female" (for example, a person identifying as both or as neither male nor female) are no big issues, most probably due to lack of awareness, and no awareness-raising has been undertaken by state offices.

## **B.2. Freedom of assembly and association**

48. Freedom of assembly is guaranteed in art. 22 Swiss Constitution, freedom of association, in terms of associations with a non-profit aim, regardless of their legal form, in Art. 23. The latter protects only associations with an idealistic aim; forbidden are unlawful or seditious associations.<sup>11</sup> The right to demonstrations is not explicitly stated in the Constitution but is based on Art. 22 and Art. 16, freedom of expression and of information.
49. LGBT organisations can be founded as associations under the Swiss Civil Code and are recognised<sup>12</sup> as such without discrimination. LGBT organisations do qualify as associations with a non-profit aim and therefore they are protected under Art. 23 Swiss Constitution.
50. The national gay and lesbian organisations do not receive funding from the government.<sup>13</sup> Financial support for specific projects, for example, on health issues, is sometimes given.
51. Gay pride parades and other demonstrations of LGBT-people and LGBT-organisations are accepted, granted permission and accompanied or - if necessary - protected by the police. Like any other demonstration, LGBT-demonstrations need permission for use of public ground, though spontaneous demonstrations have been tolerated in the past.<sup>14</sup> Using public ground for a demonstration is seen as necessary for making use of one's fundamental rights, leading to a "conditional entitlement" to get the permission (usually from the police). Denying this permission would be classified as limiting one's fundamental constitutional rights and therefore needs to meet the conditions set by Art. 36 of the Constitution.
52. Counter-demonstrations are allowed to take place as well. In the last few years, several times fundamental Christian organisations have organised demonstrations and/or prayers against homosexuals and homosexuality close to a gay parade,<sup>15</sup> during the Europride

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Art. 20, *Nullity*. "Par. 1 A contract providing for an impossibility, having illegal contents, or violating bonos mores, is null and void. Par. 2 If such defect only affects particular parts of the contract, however, then only those parts shall be null and void, unless it is to be presumed that the contract would not have been concluded without the defective parts."

11 LGBT organisations are not qualified as unlawful or seditious.

12 Founding an association does not ask for official recognition or registration.

13 The national organisation TransGender Network Switzerland has not yet applied for governmental funding as it is just on the way to be founded as an association.

14 A fine example of tolerance was a spontaneous demonstration of queer people during the day of Europride 2009 in Zürich that was not part of the official parade, had no permission but was tolerated by the police.

15 Sion 2001, Lucerne 2005.

2009 in Zürich they handed out flyers to pride participants. This is seen as part of democracy, freedom of expression and freedom of association. As long as there is no violence, no harassment involved, counter-demonstrations have the same right to take place. In the case of violence, it is police duty to protect health, public order and safety. Therefore, demonstrations can be dissolved if this is the proportionate answer to a violation (as well according to Art. 36 of the Constitution).

*Explanations to the table:*

- 53. This table includes only the bigger demonstrations because there is no national archive of all activities of all LGBT-groups. It is likely that additional smaller local events have taken place.
- 54. As far as the author of this report and the national LGBT organisation know, no demonstration or public event organised by LGBT persons was denied permission.
- 55. Statistics about demonstrations against LGBT persons and/or their rights are not available.
- 56. Year 2005: In the first half of the year, the national campaign for the Federal Act on Registered Partnership included an uncounted number of smaller public events. For example, in the Canton of Zürich alone around five lobbying actions on public places were organised per week. Beside the annual Gay Pride and the Christopher Street Day Zürich, two large public events took place.

	2004	2005	2006	2007	2008
Number of demonstrations in favour of LGBT persons / LGBT rights, gay pride parades, etc.	3	countless	3	1	2
Number of demonstrations against LGBT persons / LGBT rights					
Number of planned demonstrations / public events organised by LGBT persons denied	0	0	0	0	0

**B.3. Freedom of expression**

- 57. Freedom of expression and information are granted in Art. 16 Swiss Constitution in a general way in the catalogue of fundamental rights. Art. 17 contains the freedom of medias, including the prohibition of censorship. These rights are applicable to LGB and transgender people in the same way as to anyone else.
- 58. Restrictions are possible under the conditions of Art. 36 Swiss Constitution, restrictions on fundamental rights.<sup>16</sup> Complementary, civil and penal law restrict freedom of expression as

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16 Art. 36, *Einschränkungen von Grundrechten*: "Abs. 1 Einschränkungen von Grundrechten bedürfen einer gesetzlichen Grundlage. Schwerwiegende Einschränkungen müssen im Gesetz selbst vorgesehen sein. Ausgenommen sind Fälle ernster, unmittelbarer und nicht anders abwendbarer Gefahr. Abs. 2 Einschränkungen von Grundrechten müssen durch

a necessity to protect other person's honour and privacy. Important are Art. 28 ff. Civil Code, Art. 41 ff. Code of Obligations and Art. 173 ff. Penal Code (see Chapter Hate Crime, Criminal Law).

59. States interference with LGBT activities like search in or closing down of gay clubs, chat rooms, etc. are officially not triggered by the fact that they are LGBT activities but caused by the assumption of illegal activities like drug dealing, residence without permit, failure to protect minors etc. But: It is at least to question if in some cases the state representatives, especially single police (wo)men, did not overreact in their interventions in LGBT activities *specifically* because of the sexual orientation, gender expression or gender identity of the respective persons.<sup>17</sup>

*Case law:*

60. In a decision from 13 April 2000, the Administrative Court of the Canton of Zürich prohibited the use of a homophobic poster (VwGer ZH Decision from 13.4.2000, VB.2000.00005, in ZBI 2001, 103 ff.). An association was asking the city of Winterthurs police for permission to make use of public ground by distributing written religious and political statements and setting up four posters. One of the posters read as follows: "Europe your way to hell is: porn, brutality, drugs, abortion and homosexuality." The permission to set up this poster was denied for reasons of protecting homosexual people's fundamental rights (based on Art. 8 II Constitution, equality before the law).
61. In a decision from 18 November 2008, the High Court of the Canton of Zürich had to decide if a tiny darkroom, separated only by a curtain from the rest of a small gay-bar situated in the basement, was illegal or not. The first instance had decided against the owners of the bar, reasoning that he failed to fulfil his legal duty to sustain order and good morality in his location.
62. As second instance, the High Court argued that no visitor would just by accident enter this bar, that they would all knowingly enter a gay bar with a darkroom. The Court stated that the term "good morality" has to be interpreted for each individual case, that different ways of living are a reality. Concluding that the kind of sexual activity by adults in question was just one of several ways that have to be accepted in our society.<sup>18</sup>
63. In a decision from 3 June 2005 the Federal Supreme Court had to decide on pictures of genitals in personal profiles in an online gay dating platform (gaynet.ch). The key point was the protection of minors from accessing the respective platform. A user (or several) was accused of pornography. The appeal was rejected. Amongst other arguments, the Court

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ein öffentliches Interesse oder durch den Schutz von Grundrechten Dritter gerechtfertigt sein. Abs. 3 Einschränkungen von Grundrechten müssen verhältnismässig sein. Abs. 4 Der Kerngehalt der Grundrechte ist unantastbar."

Art. 36, *Restrictions on fundamental rights*: "Par.1 Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible. Par. 2 Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others. Par. 3 Any restrictions on fundamental rights must be proportionate. Par. 4 The essence of fundamental rights is sacrosanct."

<sup>17</sup> These statements based only on interviews with several gay men affected by police controls, their individual experiences. Inappropriate behaviour of police officials against homosexual persons in various situations was admitted, , by several gay men, from Swiss residents with academic backgrounds to migrant prostitutes. However, it is not based on proof like case law or academic research as the affected persons do not report these incidents and such research was never done. Some police corps are aware of this issue and include lessons on how to treat LGB persons in a correct manner in the training (e.g. the community police of the city of Zurich).

<sup>18</sup> OberGer ZH Decision from 18 November 2008 in ZR 108 (2009) 69 ff.

stated that the age of users has to be rechecked; mere warning signs are not seen as sufficient.<sup>19</sup>

#### **B.4. Hate crime – Criminal law**

##### *Penal Code in general*

64. The Swiss Penal Code contains no specific article concerning LGBT-people,<sup>20</sup> neither as aggressors nor as victims. It does not speak about or refer to sexual orientation or gender identity at all. Neither does it cover it by expressions like "other status" or any similar expression. Therefore, any crime relating to LGBT-people has to be covered under more general provisions under a "general" article.
65. Art. 47 Swiss Penal Code, award of punishment, states that the level of culpability has to be taken into account. The aggressor's fault comprises among other factors, his aim and motivation, if one has to assume that social consensus would condemn such a motivation or aim.<sup>21</sup> For Switzerland, it can be said that homophobia qualifies as such a socially condemned motivation. Additionally, special circumstances of a criminal act such as a weak, helpless victim shall be taken into account against the aggressor, as well according to Art. 47 II PC.<sup>22</sup> An LGBT victim can (but does not necessarily have to) qualify as such. As an example see the decision made by the Criminal Court Basel from January 1993 below.

##### *Hate Speech*

66. Hate speech can be classified as insult (Art. 177 Penal Code), defamatory remark (Art. 173 Penal Code) or libel (Art. 174 Penal Code).
67. Insult means a negative value judgment attacking one's honour addressed only to the victim. Bearer of the object of legal protection are defined or at least definable natural persons and legal entities / associations. The anonymous masses of lesbian, gay, bisexual or transgender persons do not qualify as such, except their associations. It does not have to be expressed verbally (for example, picture or gesture). Especially expressions namining one's sexual orientation or gender identity with a negative connotation (like faggot or tranny) are classified as insults.<sup>23</sup>
68. Defamatory remarks and libel refer to allegations of facts addressed to third persons attacking the victim's honour. In the case of a libel, the aggressor knows that what he expresses is not true. Expressing someone's (true) sexual orientation or gender identity is therefore usually not a crime under Art. 173 or 174 Penal Code. An exemption is possible in the case of a combination with an explicit reproach on the person's lack of morality or perversion.
69. But: abusing a neutral expression like "homosexual" or "transgender" with the goal to portray someone as abnormal, less valuable, weirdo, can be classified as harming one's

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19 6S.26/2005 Decision from 3 June 2005

20 In contrary to racial discrimination, prohibited in Art. 261bis *Penal Code*.

21 Wiprächtiger, H., *Basler Kommentar Strafrecht I*, Art. 47 N 127, 2nd edition, Basel 2007.

22 Wiprächtiger, H., *Basler Kommentar Strafrecht I*, Art. 47 N 81, 2nd edition, Basel 2007.

23 In March 2010, a decision made the same month by a court in the Canton Valais was brought by gays and lesbians to the *Federal Supreme Court*. Now, the case is pending there. A political party published several times insulting statements against gay and lesbian people using very rude wording.

honour. But the classification is relative; the circumstances of each single case have to be taken into account.<sup>24</sup>

70. As a restriction on freedom of expression, according to Art. 36 III Swiss Constitution, forbidding hate speech is possible as protection of the fundamental rights of others.<sup>25</sup>
71. One specific case are reggae concerts of artists with a well-known homophobic background and homophobic texts (so called batty man tunes). These acts still happen, especially in locations run by owners tolerating or sharing the artists' attitude, but awareness has been risen. Several concerts have already been cancelled as a result of campaigning organisations like Stop Murder Music. Usually, artists are forced to sign the Reggae Compassionate Act to be allowed to play and concerts are monitored by activists.<sup>26</sup>
72. The role of states authorities differs. For example in 2009, a concert in a club which is supported financially by the city of Zürich was forbidden by state authorities unless the band signed the Reggae Compassionate Act. But there is no general prohibition implemented by state authorities.

#### *Influence on sanctions*

73. The Swiss Penal Code does provide specifically for a crimes committed with a homophobic/transphobic background, neither concerning the question of mitigation. Under Art. 47 Penal Code (see above) the court can and shall take homophobia or transphobia as motivation into account, leading to higher sanctioning.
74. In a decision from 19 January 1993, the Criminal Court of the Canton of Basel-Stadt as court of first instance had to decide a case of heavy physical injury by burning and coercion against a gay victim. In its deliberations on the punishment, the court mentioned the aggressor's homophobia and took it into account for augmenting the sanction (Strafgericht Basel-Stadt, Dreiergericht, Urteil vom 10. Januar 1993, in Sachen R.S.). The second instance ("Appellationsgericht") affirmed this decision on 20 May 1994.

## **B.5. Family issues**

### *Federal Act on Registered Partnership*

75. In June 2005, in a nationwide public vote, a majority of 58 percent voted in favour of the Federal Act on Registered Partnership for same-sex couples. It does not form part of the Civil Code and differs in rights and obligations from the law on heterosexual marriage. The main difference is the subject of children (see below).

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24 In the decision nr. 21 04 216 from 8.2.2005 the *Court of the Canton Lucerne* stated that calling a married person homosexual can harm the victim's honour depending on the social context.

25 Art. 36, *Einschränkungen von Grundrechten*: "Abs. 1 Einschränkungen von Grundrechten bedürfen einer gesetzlichen Grundlage. Schwerwiegende Einschränkungen müssen im Gesetz selbst vorgesehen sein. Ausgenommen sind Fälle ernster, unmittelbarer und nicht anders abwendbarer Gefahr. Abs. 2 Einschränkungen von Grundrechten müssen durch ein öffentliches Interesse oder durch den Schutz von Grundrechten Dritter gerechtfertigt sein. Abs. 3 Einschränkungen von Grundrechten müssen verhältnismässig sein. Abs. 4 Der Kerngehalt der Grundrechte ist unantastbar."

Art. 36, *Restrictions on fundamental rights*: "Par.1 Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible. Par. 2 Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others. Par. 3 Any restrictions on fundamental rights must be proportionate. Par. 4 The essence of fundamental rights is sacrosanct."

26 Stop Murder Music, [www.stopmurdermusic.ch](http://www.stopmurdermusic.ch), accessed 18 September 2010.

76. Registered partners have no right to use the same official last name. Ending a registered partnership against one partner's will is possible after one year of living in separate households (civil marriage: two years). The right of maintenance after ending the registered partnership is subject of conditions differing from civil marriage (leading to support in fewer cases).
77. The normal system of marital property for registered partners is the separation of goods, with the opportunity to stipulate an individual property contract or to choose community of property acquired during registered partnership. In a civil marriage, without individual regulation by the couple, community of property acquired during the marriage comes into force. Additionally, married couples can choose among more systems of marital property for marriage than registered partners can.
78. Registered partners too have a duty to support each other (in a material and immaterial sense) and a duty to give information to their partner on their income, their debts and owning. Their home enjoys the same legal protection as the family home of married couples. Competence of representation is regulated according to marriage. Equal rights are given to registered partners in hereditary right and provision right. Tax duties are equal as well.
79. Civil marriage is not open to same-sex couples, registered partnership is not open for heterosexual couples.
80. The civil status is called "in registered partnership". As this labels same-sex couples as such, in all likelihood several couples prefer not to profit from the new law for fear of forced coming-out.
81. Additionally, several practical issues are not yet solved in a satisfying, respectful manner. For example, several cantons still use the same tax declaring forms for married and registered couples - calling one partner "husband" the other "wife".

#### *Co-habiting Partners*

82. Cohabitation of couples is recognised; for same-sex couples too it is perfectly legal. The legal consequences are debated and not really clear. There are no specific duties and rights for couples living in the same household, but they have some possibilities to make arrangements under the Civil Code as any other private party.
83. The only difference is in the case of engagement, a pre-phase existing only in the case of civil marriage not of registered partnership. Engagement leads to the status of closely connected persons. In the case of one partner's death, the surviving-one can claim for reparation payment. In the case of investments, made with regard to an upcoming marriage that is annulled, the investing partner can demand a financial share. Gifts can be reclaimed.

#### *Adoption / Children*

84. Adoption is explicitly prohibited for persons (couple or single person adoption) living in a registered partnership, Art. 28 Act on Registered Partnership. Adoption as a couple is according to Art. 264a I Civil Code explicitly reserved for married couples. Neither same-sex registered couples nor any other not married couple - be it homo- or heterosexual - is allowed to adopt jointly.

85. An adoption done in a foreign state by a same-sex couple is not seen as contrary to the Swiss public order and therefore acknowledged.
86. Adoption as a single person is reserved to persons neither married (except under certain specific very limited circumstances) nor in a registered partnership. Second parent adoption is allowed after five years of marriage (Art. 264a III Civil Code), but not in the case of a registered partnership. The prohibition of adoption based solely on sexual orientation is discriminatory.
87. Additionally, it has to be said that according to Art. 27 Act on Registered Partnership a partner has the same duties in supporting children of his / her same-sex partner as a spouse in a civil marriage. In the case of dissolution of a registered partnership, the non-parent partner and the child may under certain circumstances get the right to stay in touch.
88. As the law does not regulate the right of transgender persons concerning adoption explicitly, they should be treated as anyone else according to their registered gender. See as well case 5A\_66/2009<sup>27</sup> at the end of this chapter.

#### *Assisted Reproduction*

89. Assisted reproduction is allowed and available in Switzerland. It is mainly regulated in the specific Federal Act on Assisted Reproduction. Art. 28 Act on Registered Partnership prohibits assisted reproduction for persons living in a registered partnership.
90. The Act on Assisted Reproduction states in Art. 3 that assisted reproduction is only available for couples who can be parents according to the Civil Code (not necessarily married couples). This does not include registered same-sex couples and excludes unregistered homosexual partners as well as single homosexual persons. Surrogate motherhood is not allowed at all in Switzerland. As a result, gay men and lesbians are de facto excluded from assisted reproduction.
91. The basic idea of the Act on Assisted Reproduction is to help different-sex couples overcome infertility. This means that despite regular sexual intercourse, the couple do not - for any medical reason - conceive. Not allowed at all is donation of fertile eggs: the pregnant woman has to be the genetic mother of the child. Therefore, transgender men are de facto excluded from storing their fertile eggs for future use. In contrary, sperm donation is allowed under certain conditions. This means, that the legal father does not have to be the biological-one. Theoretically, it could be seen as according to the law, that transgender women store their sperm for future use in their relationship with a woman (i.e. her partner would carry the child) or another infertile woman in a straight partnership. As the official explanations on the Act on Assisted Reproduction state clearly that these technologies shall be limited to help straight couples, it might be that a transgender-lesbian couple might be denied access to assisted reproduction. This would highly depend on the treating doctor's decision.

#### *Family Reunification*

92. The laws concerning foreign nationals treat same-sex partners equally to different-sex partners. Registered partnerships are equal to marriages for immigration purposes, non-married couples are equal to non-registered couples.

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<sup>27</sup> Federal Supreme Court, *11e Court de Droit Civil*, 5A\_66/2009, Decision from 6 April 2009.

93. Based on the constitutional right to privacy, the legislation allows family reunification for same-sex partners not living in a registered partnership. The conditions to have a right to live together in Switzerland that have to be met according to the Swiss Federal Court (see 126 II 425) are: Swiss citizenship or secured right to presence of one partner, close, real and de facto lived relationship. This decision was made before the entry into force of the Act on Registered Partnership. Nowadays, the conditions have to be equal for homo- and heterosexual couples. Therefore, additionally the couple has to prepare the registration of their partnership.
94. Registered partnerships and marriages validly contracted in a foreign jurisdiction are both acknowledged in Switzerland as registered partnerships, as long as the effects of the foreign regulation are comparable to the ones in the Swiss legislation. Acknowledgment as civil marriage is not possible.

*Transgender persons:*

95. Deciding on legal change of first name is in the competence of the Cantons, deciding on legal gender change lays in the hands of the courts of first instance. As there are no conditions defined on the federal level, the courts and offices in charge set them in different ways. Some courts do not require that the applicant be neither married nor in a registered partnership, some do require it.
96. According to Art. 104 Civil Code, what has to be respected by the Cantons, the list of the reasons for an annulment of a marriage is exhaustive. Legal change of name/gender is not listed. Therefore the requirement of divorce is in breach of the national law. But as mentioned above, the reality is that some Cantons / courts do force transgender persons to divorce. See as well Chapter 14 Transgender Issues.
97. Marriage and registered partnership are open to transgender persons in accordance with the rules for their registered/legal gender, i.e. after legal gender change they are treated as anyone else of the same legal gender. The written law does not touch this question at all.

*Cases*

98. In 5A\_66/2009<sup>28</sup> the Swiss Federal Court had to decide on an appeal concerning the placement of a newborn baby-girl. The appeal was filed by a woman willing to become the foster mother of the baby. Her wish was corresponding with the biological mother's wish to see her girl growing up with the appealing woman as foster mother. The baby's nine year-old brother ( the son of the same biological mother as the baby-girl) was already adopted by the appealing woman, living with her and her husband. A few months before the girl's birth, in summer 2008, the claimants husband underwent gender reassignment surgery.<sup>29</sup>
99. The first instance decided it was not in the best interest of the child to grow up with two elderly women, in a household lacking a male role model. Growing up with a homosexual couple, including a transsexual co-mother, who would be legally her brothers step-father, was qualified as a too complex situation for the child and therefore not in favour of the child. Based on this reasoning, the courts of first and second instance denied the claim.
100. The Swiss Federal Court turned down the appeal and confirmed the first instances argumentation. Especially the Federal Supreme Court stated that it does not matter that

<sup>28</sup> Federal Supreme Court, *11e Court de Droit Civil*, 5A\_66/2009, Decision from 6 April 2009.

<sup>29</sup> I refer to this transgender woman as "husband" because this is the terminology used in the Federal Supreme Courts decision.

the husband's legal gender is still male but that the change of his sex and identity has to be taken into account.

## B.6. Asylum and refugee issues

### *LGBT persons as refugees*

101. Art. 3 Asylum Act defines the term refugee as follows: "Refugees are persons who in their native country or in their country of last residence are subject to serious disadvantages or have a well-founded fear of being exposed to such disadvantages for reasons of race, religion, nationality, membership of a particular social group or due to their political opinions." Homosexuality<sup>30</sup> and transgender identity<sup>31</sup> are recognised as membership of a particular social group.
102. At least in the cases of gay men,<sup>32</sup> asylum is rarely granted even in case of exposure to serious disadvantages based on homophobia because other conditions are not met. Other conditions which need to be met: in the case of private aggressors, a lack of the State's will or ability to protect; severe persecution (simple discrimination is not enough); the asylum seeker can be singled out as a persecuted individual, specific target; causal connection between the aggressors motivation and the asylum seekers disadvantage.<sup>33</sup>
103. Therefore it cannot be said that sufficient protection for homosexual refugees is granted. Concerning transgender people there are not enough cases to make a statement.
104. Theoretically, persons "in a close relationship" to a refugee can get asylum (Art. 51 Asylum Act). This includes - at least according to legal literature<sup>34</sup> - same-sex partners no matter if the couple is living in a registered partnership or not.
105. About specific protection in asylum centres we do not know much, but there seems to be a lack of awareness and as a consequence, a lack of measures.<sup>35</sup>
106. Only recently, a transgender organization was asked about protection measures for a Cuban transgender woman asking for asylum because she was facing harassment in the asylum centre. The advice was to give her the chance to live on her own in a flat and not in the asylum centre as soon as possible and to make sure she gets professional medical care like hormonal treatment. The advice was welcomed; now she is living on her own in a

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30 See cases below and Bertschi in Ziegler et al. (ed.), *Rechte der Lesben und Schwulen in der Schweiz*, Bern 2007, 344. Reetz, C., *Homosexuelle haben keine Chance auf Asyl*, Plädoyer 6/09, 28, comes to the conclusion that an amendment of Art. 3, adding sexual orientation and gender identity explicitly, is necessary to reach a satisfying protection for LGBT-people.

31 In 2005, a Turkish transgender woman was asking for asylum. Supported by Amnesty International she was granted asylum based on her being transsexual.

For reasonings in legal literature see: Kälin, W., *Die Bedeutung geschlechtsspezifischer Verfolgung*, Asyl, 2/01, 15. Kälin supports a flexible use of the term "gender", a vision of gender as "social construction". He classifies gender as relevant for asylum if it leads to a perception as member of a group less valuable in the eyes of others. See as well Stöckli in Uebersax, Peter et al. (ed.), *Handbuch für die Anwaltspraxis Band VIII*, Ausländerrecht, 2nd edition, Basel 2009; Bertschi, Martin, *Die asylrechtliche Behandlung der Verfolgung wegen Homosexualität*, Asyl 4/07, 4 f.

32 As we have very few knowledge about the de facto situation of transgender asylum seekers, no statement about their de facto being granted asylum or not can be made.

33 Bertschi in Ziegler et al. (ed.), *Rechte der Lesben und Schwulen in der Schweiz*, Bern 2007, 344 f.

34 Bertschi in Ziegler et al. (ed.), *Rechte der Lesben und Schwulen in der Schweiz*, Bern 2007, 343.

35 For further information see: Preiswerk, S., *Queer refugees - Homosexualität als Asylgrund*, Bachelorarbeit Soziale Arbeit, Zürich 2008; for an extract in german see [www.queeramnesty.ch/docs/AA\\_Preiswerk\\_Simone\\_FS08\\_Zusammenfassung.pdf](http://www.queeramnesty.ch/docs/AA_Preiswerk_Simone_FS08_Zusammenfassung.pdf), accessed 18 February 2009.

flat and since then the harassment she was a victim of in the asylum centre has come to an end.<sup>36</sup>

*ECHR guarantees:*

107. LGBT cases are not listed separately by administration and courts. Therefore it is hard to say if specific guarantees are granted or not to LGBT persons in a different manner than to any other asylum seeker.
108. Switzerland does not always respect the fundamental rights of refugees / asylum seekers. Fair procedure is not granted in every case, for example, asylum seekers have been expelled by the Federal Migration Office based on not properly inaugurated dismissals, before they had a chance to appeal, in breach with the right on due process of law. In a decision from 2 February 2010 (E-5841/2009) the Federal Administrative Court concluded this practice as unlawful.
109. What eye-witnesses reported several times were controls by the police in gay bars known as meeting places for male non-Swiss sex workers. The usual goal of these controls is to pick out undocumented immigrants. Some of those detained by the police told the author in private conversation<sup>37</sup> about inappropriate treatment like many hours without drinking water.

*Statistics:*

110. As written above, there are no official statistics available. Bertschi states in 2007 that since 1993 about 50 cases of asylum seekers concerning the questions of homophobia or fear of acts of homophobia were decided by the Federal Office in charge and had become res iudicatae. In her paper Carola Reetz<sup>38</sup> counts 71 cases published online by the Federal Administrative Court ("Bundesverwaltungsgericht") between 2007 and November 2009. None of them was decided positively in the question of asylum or granting provisional acceptance. Only five of these 71 were women.
111. According to both authors, granted asylum based on the grounds of ones sexual orientation or temporary protection for reasons relating to the sexual orientation are generally very rare.<sup>39</sup>

*Case law:*

112. Searching for "homosexual" in the online collection of decisions by the Federal Administrative Court shows that almost all appeals were rejected in recent years.
113. The main reason is disbelief in the applicant's stories, their being homosexual. Reetz divides the reasoning into three categories: lack of credibility of the statements, lack of proof, lack of intensity of survived or feared persecution.
114. To find out about their sexual orientation the following criteria / questions are mostly used: Knowing details of one's life as a homosexual in his home country, knowledge of the

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36 The organization involved was the Fondation Agnodge, based in Lausanne.

37 These statements base only on what I was told by several gay migrants affected by such police controls, their individual experiences. It does not base on proof like case law or academic research. See as well fn. 16.

38 Reetz, Carola, *Homosexuelle haben keine Chance auf Asyl*, Plädoyer 6/09, 26 ff.

39 Bertschi in Ziegler et al. (ed.), *Rechte der Lesben und Schwulen in der Schweiz*, Bern 2007, 344.

situation of other homosexual persons, knowledge of details of factual discrimination, problems and struggles in daily life, legislation concerning homosexuality in their home country, knowledge of gay meeting points and gay organisations in their home country, details about their personal coming-out, details about relationships and sexual relations. The logic behind these questions is the assumption that one who does not frequent the world of homosexuals in his home country, is rather not homosexual (Federal Administrative Courts wording).

115. Even in cases where courts or administrations believe in the applicant's homosexual orientation, this does not mean that asylum is granted automatically. Often, the individual's risk in the case of return was denied or the psychological pressure of not being able to live the respective sexual orientation was not qualified as unendurable. Reetz cites, as another example, the argument that classification of homosexual acts as crime in their home-country was approved, but that the applicant had only acted gay in Switzerland.
116. Even citizens from countries like Cameroon, Nigeria, Gambia or Uganda were rejected asylum. Usually the court comes to the conclusion that some cities or areas were safe enough for the homosexual person to return.
117. Examples concerning Nigeria:
  - Federal Administrative Court, Court V. Decision from 23 September 2008<sup>40</sup>
  - Federal Administrative Court, Court IV. Decision from 18 February 2008<sup>41</sup>
118. Examples concerning Iran:
  - Federal Administrative Court, Abteilung IV. Decision from 12 December 2008<sup>42</sup>
  - Federal Administrative Court, Abteilung IV. Decision from 22 December 2008<sup>43</sup>
119. ("The relevance of the homosexuality for granting asylum has to be denied." The fact of death penalty for homosexuals in Iran, based on the Sharia, was approved, but systematic persecution, and as a result specific danger, were denied.)

*Cases of specific interest:*

120. Federal Administrative Court, Court IV. Decision from 4 September 2009<sup>44</sup> The asylum seeking applicant was the boyfriend of a transgender woman from Ukraine. The relationship was lived, partly undercover, in Georgia. He had suffered insults and was beaten up, based on homophobia, in Georgia; his transgender girlfriend had already been murdered in Georgia. The appeal was rejected, he was not granted asylum. The reasoning of the Federal Administrative Court (as court of appeal) contains: That the prejudice were not strong enough, that the applicant failed to show that he was facing disproportionately severe pain caused on motivations accepted by the law on asylum (in casu: being in danger because of the sexual orientation), that homosexuality is legal in Georgia, that he has access to structures able to protect him (specifically in the capital city).
121. Federal Administrative Court, Court III. Decision from 19 June 2009<sup>45</sup>

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40 E-1323/2008

41 D-893/2008

42 D-4299/2006

43 D-4300/2006

44 D-7074/2008

45 C-213/2006

122. HIV+ applicant from Thailand who had permission to study in Switzerland. After finding out about his infection he got permission to stay for a while even without studying. Later prolongation was denied, HIV treatment was not accepted as reason to stay, even if he was quite well integrated and worked.
123. Federal Administrative Court, Abteilung IV. Decision from 12 December 2008<sup>46</sup> and Federal Administrative Court, Abteilung IV. Decision from 22 December 2008<sup>47</sup>.
124. The applicant told at the first interview right after arrival in Switzerland that he left Iran for political reasons, for having been imprisoned after taking care of wounded protesters. He flew together with his male partner, whom he claimed to be his travel companion. Later, he told the real reason for their escaping Iran, their being homosexual and that he was too ashamed of his sexual orientation to tell about right away in the first interview. The Federal Administrative Court did not accept his shame as excuse for his delayed coming-out.
125. Furthermore, the Court reasoned that homosexuals do not have to show their sexual orientation in public, that homosexuality practiced only at home is tolerated and that behaving like this, usually, homosexual persons can stay unmolested. As long as state officials presumably do not know about the asylum seekers sexual orientation, it is seen as safe enough to turn his request down.

#### *Medical treatment for transgender refugees*

126. Asylum seekers are insured by the Canton they are living in the basic category of health insurances. They should get access to more or less the same treatment as Swiss people. In practice, as far as we have knowledge, coverage of the costs for hormones is given.

### **B.7. Social security, social care and insurance**

#### *General explanations*

127. The Swiss pension system is based on the so called system of three pillars.
128. The first-one is mandatory and covers a very basic standard of living. It is regulated in the Federal Act on the Old-Age and Survivors' Insurance, "Bundesgesetz über die Alters- und Hinterlassenenversicherung" (AHVG).
129. The second-one depends on one's income. It is mandatory for all employees over the age of 17 receiving a salary higher than a certain amount per annum. An employee not fulfilling these criteria may get the insurance of the second column on one's free will. The goal is to keep one's standard of living in the case of old-age, death or invalidity. It is regulated in the Federal Act on Occupational Old-Age, Survivors' and Invalidity Insurance, "Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge" (BVG).
130. The third pillar is provision on one's free will. It is of no real interest for this report.
131. The health insurance system is in the hands of private companies.

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46 D-4299/2006

47 D-4300/2009

132. A basic coverage is mandatory, a proposal to contract may not be denied by the insurance companies. The insurance companies are classified as acting on behalf of the State. Additional coverage - different additional services for additional costs - are offered by the same insurance companies. In this section, the companies act as private parties under the private law, incl. contractual freedom.

### *Social Security Legislation*

133. Art. 13a of the Federal Act on the General Part of Social Security Legislation<sup>48</sup> says that registered partnerships are equal to civil marriages and ending a registered partnership is equal to a divorce.<sup>49</sup> In the case of one partners' death the surviving-one, male or female, is equal to a widower.<sup>50</sup>
134. Widows are entitled to a pension if they are 45 years old before their husbands death and were married for at least five years, no matter if they have children or not (Art. 24 AHVG). Widowers get pension entitlement under the same conditions but only when having children (Art. 23 I AHVG). This leads to a privilege for heterosexual women compared to lesbian women. The reasoning behind this rule is the legislators conception that homosexual couples do not raise children and each partner earns enough to make a living. Therefore, they are not dependent on the protection a heterosexual woman, who is pictured as housewife and usually mother, needs.
135. A partner's children living in the same household as the widow/er are equal to his or her own children under the condition of acceptance as foster children or adoption.
136. Non-registered same-sex couples are in almost all cases equal to non-married heterosexual couples.<sup>51</sup>
137. Of specific interest are services for children respectively their parents or adults taking care of them.
138. Educational credit ("Erziehungsgutschrift", art. 29sexies AHVG):
139. The instrument of educational credit takes into account parental care as unpaid working time in the calculation of one's pension. It is granted - briefly said - to persons enjoying parental custody or who could potentially have parental custody. Same-sex partners of parents, even if they do raise or do co-raise the children, have no right to educational credit.
140. Care credits ("Betreuungsgutschrift", art. 29septies AHVG):
141. An assisting person living in the same household as the person in need of assistance (for example, one partner's parents, sisters, children) is entitled to care credits. Assisting partners living in a registered partnership have the same rights as partners in a civil marriage.
142. Families are entitled to special financial support ("Familienzulage") per child. The term children includes inter alia step children. Art. 4 II FamZV states explicitly that children of a

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48 This Federal Act does not constitute an individuals rights or duties. Its aim is the coordination of federal social security legislation. The rights and duties are regulated in the specific acts.

49 For those parts of social security law for which the General Part does not apply, the respective Acts were amended in the same sense.

50 The BVG is gender neutral and therefore this distinction is not made.

51 Accepted as clarification of e.g. art. 20a BVG in the Federal Supreme Courts decision 134 V 369.

partner living in a registered partnership are treated as step-children and therefore lead to the entitlement of families' support for the co-parent.

143. Orphan pension:
144. The legal relationship between a registered co-parent and the partners children is equal to the relationship step parent - step children. Step children have a right to orphan pension under the same conditions as foster children have (unpaid and permanent care and education). In the case of a registered co-parents death, children are entitled to orphan pension under the condition of the deceased's unpaid and permanent care and education in his/her lifetime (Art. 25 III AHVG i.c.w. art. 49 AHVV).
145. Art. 20 BVG (Federal Act on Occupational Old-Age, Survivors' and Invalidity Insurance) sets the additional condition that the deceased partner contributed the amount of three quarters of child support. The same applies to the regulations on foster children in the Federal Act on Accident Insurances.

#### *Social Care*

146. Poverty reduction strategies are mainly in the hands of the public social care system. Equal treatment according to the Swiss Constitution (Art. 8) is mandatory for the public social care. In practice, it does not look like discrimination based on sexual orientation is an issue of concern in these services.

#### *Insurances*

147. Due to the mandatory basic health insurance in Switzerland, all insurance companies have to accept anyone for the basic health insurance coverage, a legal relationship regulated by public law.
148. Only for additional services - which fall under the private law - companies enjoy a wider range of contractual freedom, including the freedom to choose their contractual partner. The limit is set by the Swiss Code on Obligations i.c.w. the Swiss Constitution which denies the right to exclude a proposer based on his/her sexual orientation, living in a same-sex partnership or - theoretically - gender identity. As part of their risk calculation, insurance companies ask any proposer questions about his/her health condition. Declaring a transgender identity will lead to refusal of the contract. This way, they can refuse transgender people because they are perceived to cause higher costs to health insurance companies. The key problem is the fact that the costs for the good surgeons are only covered by these private insurance contracts. Higher costs the insurance companies try to avoid - but the state of the art standard of surgery transgender people should absolutely have access to.
149. The additional insurances under the private law, receivable for much higher premiums, cover a wider range of benefits. But: some insurance companies exclude gender reassignment surgeries explicitly in the catalogue of these benefits.
150. Many transgender people cannot afford the higher categories of insurance.

### *Treatment in Social Service system*

151. What is heard of more often are complaints by transgender persons.<sup>52</sup> At least in their experience, they are treated as crazy, not taken seriously and any other issues like depression, unemployment, invalidity caused by accidents, relationship problems etc. are seen in the light of the fact that they are transgender. No matter if these other circumstances in their lives are caused by their gender identity, as secondary problems or are in no relation to it, (negative) interrelations are usually made without properly analysing and discussing these issues with the respective person. A transgender identity is used to justify decisions that are in no relation to the respective persons gender identity and can - from an impartial point of view - not be justified that way. Very often, this strikes transgender persons who have either no money, or lack the necessary energy or support to defend themselves in a successful manner.

### **B.8. Education**

#### *General protection*

152. Most children go to public schools. These are bound by the Constitution, especially by the anti-discrimination article.
153. Private schools are supervised by the State and need permission by the Canton. The extent to which they are bound by the constitutional fundamental rights has to be clarified in each individual case.
154. Staff and teachers are as well protected against all forms of discriminations. Being fired for being gay as a teacher would be against the law. In fact, this is not a problem homosexual teachers face nowadays. If there are actual cases, then they are very rare. But: we do not know, if this is based on real acceptance of teachers sexual orientation or if teachers do not come out and therefore are not facing problems based on their homosexuality.
155. The umbrella organisation of Swiss teachers gave itself rules of professional conduct. These are private rules and therefore not enforceable by the State. In case of a teacher's acting in contradiction to these rules, it is up to the school he/she is working for to make use of the rules of professional conduct and sanction the act. Rule number 9, respecting human dignity, states that disadvantaging pupils systematically, intentionally or negligent for their gender or sexual orientation is not admissible.<sup>53</sup>

#### *Different Education Systems*

156. According to Art. 62 Swiss Constitution, the Cantons are responsible for the system of school education. This leads to 26 different educational systems, 26 different school curricula. Some Cantons do mention sexual orientation and / or gender identity in their curriculum concerning sexual education.<sup>54</sup>

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<sup>52</sup> These statements based on eye-witness reports of individual experiences by several transgender persons. There is no case law or academic research.

<sup>53</sup> LCH Standesregeln, verabschiedet von der Delegiertenversammlung vom 7. Juni 2008, Standesregel 9, respektieren der Menschenwürde: "Nicht statthaft sind systematische, willentliche oder fahrlässige Benachteiligungen von Lernenden wegen deren (...) Geschlecht und geschlechtlicher Orientierung (...)."

<sup>54</sup> Positive examples are Bern and Central-Switzerland.

157. Whether or not sexual orientation and gender identity are taught at university level depends on the university and / or the individual professor. It is neither mandatory nor forbidden to talk about sexual orientation and gender identity at a university, but mainly depends on the subject one studies. There are subjects where it is hard to imagine if not impossible not to talk about LGBT-issues, for example, in gender studies, psychology or law. For other subjects it might be simply of no relevance and therefore not part of the curriculum.

#### *Transgender issues*

158. Nine years of attending school are mandatory. Excluding a pupil after a social or legal gender change is not allowed by any means.
159. Whether or not diplomas are handed out on the desired name and gender before a legal name or gender change depends on the institutions policy. At least at university level, it looks like practice is rather arbitrary. For example, students' cards at the University of Fribourg can easily be changed while at the University of Zürich, this is not possible without a court decision.

### **B.9. Employment**

#### *General protection*

160. The right to equal remuneration and to legal and factual equality for men and women, especially in matters of employment and occupation, is stated in Art. 8 III Swiss Constitution. This article is an exception in the sense that it is applicable for private parties the same way as for the government. Art. 8 II binds only public authorities in a direct way. Therefore, private company employees are less protected by the Constitution. To overcome this unsatisfying situation, in 1995, based primarily on Art. 8 (former Art. 4), the national assembly decided on the Federal Act on Gender Equality.
161. Art. 3 I Gender Equality Act states that "employees must not be discriminated against on the basis of their sex, whether directly or indirectly, including on the basis of their marital status, their family situation or, in the case of female employees, of pregnancy." This list is not exhaustive: discrimination on the ground of sexual orientation is explicitly listed in the Federal Council's commentary as another reason.<sup>55</sup> Beside sexual orientation, discrimination based on gender reassignment is seen by some authors of commentaries as an additional form of direct discrimination on the basis of sex.<sup>56</sup>
162. Art. 3 II Gender Equality Act lists only examples ("in particular") of the scope of application: hiring, allocation of duties, setting of working conditions, pay, basic and advanced training, promotion and dismissal. Some issues are regulated as well in the Swiss Code of Obligations, the general law on employment, in a more general language. Sexual orientation and gender identity are not mentioned there but are included through interpretation.
163. Asking for one's sexual orientation in a job interview can be legitimate in the case of a company with specific ideological goals, for example, a religious background that does not

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55 BBI I 1297.

56 Freivogel, Elisabeth in: Kaufmann, Claudia / Steiger-Sackmann, Sabine (ed.), *Kommentar zum Gleichstellungsgesetz*, Basel 2009, 61.

accept homosexuality.<sup>57</sup> In any other case, the candidate does not have to answer questions about his or her private life correctly if the information is of no relevance for the job.

164. Complaints procedures available for victims of discrimination on the ground of sexual orientation or gender identity.
165. Against another employee in the case of mobbing or sexual harassment:
166. Law suits based on Civil Law, especially protection of ones personality Art. 28 Civil Code, and based on the Penal Code are possible. This includes the possibility to claim for satisfaction payment.
167. Against the employer
168. In the case of bullying or sexual harassment, law suits against the employer can be based on Art. 328 Swiss Code of Obligations and Arts. 3-5 Gender Equality Act as consequence of the employers duty to protect the employees. The victim has the following options: step down from his work at least as long as the infringement lasts by full remuneration, demanding compensation (unless the employer proves that he has taken appropriate measures of prevention), demanding measures of protection, terminate employment without notice.
169. Art. 5 Gender Equality Act states in a more general way the employees' rights:
170. "Anyone who is the victim of discrimination within the meaning of Articles 3 and 4 may apply to the court or to the administrative authority for an order:
  - prohibiting or stopping threatened discrimination;
  - requiring existing discrimination to cease;
  - confirming that discrimination is taking place if it is continuing to have a disruptive effect;
  - for the payment of any salary due."
171. Furthermore, the Gender Equality Act foresees the following procedural facilitations in favour of employees: reduced burden of proof (art. 6), free conciliation proceedings (art. 11), civil procedures free of charge (art. 12 II Gender Equality Act i.c.w. Art. 343 Swiss Obligation Code) and special protection against dismissal during a complaint procedure and six months after (Art. 10).

#### *Public service*

172. In contrast to the private sector, all fundamental (constitutional) rights are directly applicable. But: In the specific field of employment, thanks to the Gender Equality Act and the direct applicability of Art. 8 III Swiss Constitution, this does not lead to a significant broader protection compared to the private law.

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<sup>57</sup> Baur, François E. / Rossinelli, Michel in Ziegler et al. (ed.), *Rechte der Lesben und Schwulen in der Schweiz*, Bern 2007, 368 f.

### *Equality body*

173. There is no specific equality body dealing with discrimination on the ground of sexual orientation or gender identity. On a national level, there is the Federal Office for Gender Equality ("Gleichstellungsbüro") in charge of the promotion of gender equality. Art. 16 II Gender Equality Act describes its tasks and power:

- " it provides the general public with information;
- it advises authorities and private individuals;
- it conducts studies and recommends suitable measures to authorities and private individuals;
- it may participate in projects of national importance;
- it participates in the drafting of federal legislation in the event that such legislation is relevant to gender equality;
- it examines applications for financial aid in accordance with Articles 14 and 15 and supervises the implementation of promotional programmes."

174. The Office for Gender Equality does not have the power to assist individual victims of discrimination.

175. In contrast to the commentary by Kaufmann, Claudia / Steiger-Sackmann, Sabine (ed.) on the Gender Equality Act, the Federal Office for Gender Equality qualifies this Federal Act as not applicable on questions concerning sexual orientation or gender identity. Therefore they do not work on this field or support cases.

### *Civil society organisations*

176. According to Art. 7 Gender Equality Act, organisations are under certain restrictions entitled to have a finding of discrimination declared in their own names. The organisations must have been in existence for at least two years and have as their statutory object the promotion of gender equality or safeguarding the interests of employees. The outcome of such a finding of discrimination must have an effect on a considerable number of jobs.

### *Statistics:*

177. Case law concerning the sexual orientation or gender identity of an employee is very rare. This does not mean that they are no problems, but according to a study from 1999 victims of discrimination on grounds of sexual orientation rarely take legal action.<sup>58</sup>

## **B.10. Housing**

178. Housing (selling of property, tenancy, mortgage etc.) is usually regulated by contracts between the parties and as such, it forms part of the private contractual law. Therefore, Arts. 19 and 20 Code of Obligations, which includes prohibition of discrimination based on homophobia or transphobia, is applicable (see footnote 8). The Act on Registered

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<sup>58</sup> VoGay, Association vaudoise des concernés par l'homosexualité (ed.), *Enquête VoGay sur les discriminations envers les gays et lesbiennes en Suisse romande*, Lausanne 2001.

Partnership erased the differences between heterosexual and homosexual partners (see Chapter family law).

179. Discrimination based on homophobia/transphobia in the field of housing, rent, eviction or mortgage is no big issue.<sup>59</sup> It is likely that some private flat owners do not like to rent their flat to homosexual or transgender people, but usually sexual orientation or gender identity does not lead to dismissal. In Switzerland, most people live in rented apartments / houses and their protection before the law is on a good level. Tenants classify as the weaker contractual partner (like e.g. employees or consumers) and therefore benefit from special legal protection for social-political reasons. Additional specific protection for LGBT persons renting a house or flat is not granted. The law of tenancy respects as well the general part of the Code of Obligations, including art. 19 ff.<sup>60</sup>
180. Advertising published by banks for mortgage started to show as well (male) same-sex partners in their happy home they bought with the banks mortgage. Mortgages are not denied to homosexual couples. On the contrary: Homosexual couples – especially male homosexual couples - are specifically targeted by banks. They are seen as interesting customers because they are generally wealthier than heterosexual couples. A much higher percentage of homosexual couples, especially gay men, have no children and are both fully employed.

## B.11. Health care

### *General situation / Enjoyment of the right to the highest attainable standard*

181. Differentiation of patients' treatment based on the different categories of insurances (see Chapter Social Security, Social Care and Insurance) is the most important-one in Switzerland. Unequal treatment based on sexual orientation or gender identity is in general not allowed (Art. 8 Constitution) - except for legitimate reasons (Art. 36 Constitution) - as it would be a discrimination.
182. Public services like hospitals are bound by the constitution. Private services are free to choose their contractual partner as long as they do not act against the law. Refusing to someone a treatment or a standard of treatment that is provided to all others solely on the ground of his or her sexual orientation and/or gender identity, would be such an act against the law (see chapter Overall Legal Framework, Art. 19 Codes of Obligation, fn. 8). But, rejecting a request for a private insurance contract is legal and usually done in case of foreseeable medical treatment. On this ground, transgender people are not accepted as contracting partners of health insurance companies. This leads indirectly - as costs for the treatment would not be covered - to an exclusion from the highest attainable standard of gender reassignment surgery in Switzerland's private hospitals.
183. It is not against the law to exclude certain treatments from private insurance coverage.<sup>61</sup> Several insurance companies exclude gender reassignment surgery in that way.

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59 See e.g. for refused rent: VoGay, Association vaudoise des concernés par l'homosexualité (ed): *Enquête VoGay sur les discriminations envers les gays et lesbiennes en Suisse romande*, Lausanne 2001.

60 Art. 13, *Schutz der Privatsphäre*: "Abs. 1 Jede Person hat Anspruch auf Achtung ihres Privat- und Familienlebens, ihrer Wohnung sowie ihres Brief-, Post- und Fernmeldeverkehrs. Abs. 2 Jede Person hat Anspruch auf Schutz vor Missbrauch ihrer persönlichen Daten."

Art. 13, *Right to privacy*: "Par. 1 Everyone has the right to privacy in their private and family life and in their home, and in relation to their mail and telecommunications. Par. 2 Everyone has the right to be protected against the misuse of their personal data."

61 This exclusion is not allowed for the basic insurance, the one that forms part of public law.

184. Not attainable is assisted reproduction (for more details see chapter Family Issues).
185. Special awareness raising programs are constantly undertaken by the Federal Office of Public Health trying to prevent especially MSM from HIV.
186. A highly debated issue is the prohibition to donate blood for all men who had sexual contact with other men after 1977.
187. In bigger cities, private organisations offer HIV- and other STIs tests for free or a low price addressing their offer explicitly as well or only to MSM.
188. A sub-organisation ("Medigay") of the national LGB associations offer a list of therapists / doctors who are LGB themselves or explicitly LGB-friendly.
189. Despite all these measures, a higher number of LGB people suffer from psychological and/or medical problems like depressions, (social) phobias, alcohol and/or drug dependence, and a higher number of them does not visit a specialist.<sup>62</sup>

#### *LGB as sick diagnosis*

190. Cases where LGB people are diagnosed as sick because of their sexual orientation and treated are not present to my knowledge. It is likely that, for example, parents still search for a cure for their child and that, for example, religious groups still make such offers, but in the professional health care sector it is acknowledged that LGB people are not sick.

#### *Gender confirming treatments*

191. Gender confirming treatment is provided under very limited conditions and at a unsatisfactory level of quality. For this reason, those transgender persons who can afford it, often go abroad to get their gender reassignment surgery, e.g. to specialists in Thailand.
192. Several public university hospitals are offering psychological care, hormonal and surgical treatment for transgender people in so called "Centres of Competence". Often, in these centres transgender people do not get supportive and dignified treatment from psychologists. Some of the Swiss surgeons providing gender reassignment surgeries in these centres are those obtaining the worst and most shameful results.<sup>63</sup>
193. Some competent specialists exist but most of them do not perform surgeries in public hospitals. Access to them is therefore prevented for most transgender people as they do not fall under the requested categories of insurants.
194. Theoretically, approximately 90 percent<sup>64</sup> of gender transition treatment is covered by the insurances. But – except for those few transgender patients with voluntary better coverage – the patient can not freely choose the surgeon. Transgender people who cannot afford to choose their surgeons therefore end up having to choose between a gender reassignment

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<sup>62</sup> Wang, Jen et al.: *Geneva Gay Men's Health Study*, 2007.

<sup>63</sup> One of the very few trans persons who talked in public about this issue is Nadia Brönimann. See e.g. the documentary film made by Alain Godet in 2004 "Sex Change – Wie Christian zu Nadia wurde". Trans and lesbian non governmental organizations mentioned this problem in their 2009 shadow report on the country report on the implementation of the CEDAW, [www2.ohchr.org/english/bodies/cedaw/docs/ngos/Transgender.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Transgender.pdf), accessed 18 September 2010.

<sup>64</sup> 10 percent is the normal percentage, the normal retention, the patient has to pay. This retention has to be paid for every treatment by doctors or nurses, tests, medication, etc. Beside that fixed percentage, everyone can choose to cover all costs up to a certain amount per year by one-self. The higher this amount, the lower the insurance premium.

surgery performed at a public hospital at an unacceptably low standard of quality or no gender reassignment surgery at all.

195. Since a judgment by the Federal Supreme Court in 1988<sup>65</sup>, health insurances require two years of psychotherapy before gender reassignment surgery has to be refunded. In January 2009, the European Court for Human Rights declared in the Schlumpf vs Switzerland<sup>66</sup> judgment this practice as in breach with the European Convention of Human Rights. At this point in time, it is still unclear if and how this ruling will be respected by health insurance companies as well as federal and Cantons courts. During the one year since the Schlumpf judgment, several transgender persons have been granted coverage without seeing a therapist for two years, but there were not enough cases to make a clear statement if the judgment will fully be respected.
196. Since the 1970s, in several judgments the Federal Supreme Court developed the range of treatments which have to be compensated by insurance companies. Nowadays, all gender confirming treatments are included. Exceptions are possible in the area of private law (see above). Some treatments like permanent hair removal or speech therapy can be limited to a certain amount of sessions. See Chapter Transgender Issues.
197. As for the hormonal treatment, the health insurance companies and the state of Switzerland make an arbitrary difference between medications. For neither economic nor medical reasons only a few specific ones are refunded by the health insurances. This leaves again mainly transgender people on basic insurance coverage with no choice of preparation.<sup>67</sup> As not every patient tolerates all hormonal preparations, getting the choice is basic for the effectiveness and appropriateness of this treatment.
198. In 1988, the Federal Supreme Court<sup>68</sup> stated that health insurances do not have to pay for gender reassignment surgery performed on persons under the age of 25. Based on this judgment, young adults under the age of 25 are often denied surgical treatment. Nevertheless, de facto some young transgender persons got the expenses for surgery covered. This case by case handling results in an arbitrariness and young adults' dependence on the goodwill of ones health insurance. Puberty inhibitors are theoretically available in Switzerland but most specialists refuse to inform parents and children of this possibility, not even considering the monitoring of such treatment. Additionally, some psychologists still speak out in public against such state of the art treatment and deny the children and young teenagers of their right to experience and understand their gender variance. Transgender children and teenagers make very different experiences, depending on various factors like psychologists, parents etc. Some get adequate treatment, including access to puberty inhibitors, some do not.

#### *Same-sex partners as next of kin*

199. Partners living in a registered partnership are recognised as next of kin equal to married partners.
200. The term "next of kin" is not defined in a congruent way for all Federal Acts, but in the most important-ones like the Civil Code and the Penal Code living in a close factual relationship leads to the status of next of kin regardless of the partners gender.

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65 BGE 114 V 153, E. 4a.

66 *European Court of Human Rights*, Schlumpf c. Suisse, Application Nr. 29002/06, Decision from 8 January 2009.

67 For transgender men only "Nebido" is covered by the basic insurance. Nebido is testosterone that is injected only once in three months, a preparation working as a depot.

68 BGE 114 V 153, E. 4a.

201. An important part of acts on health care are in the competence of the Cantons, especially regulations on hospitals' patients. Many of these Cantonal Acts recognise same-sex partners as next of kin.
202. In a few years (probably 2013), a greater revision of the Civil Code will enter into force. The new part about Protection of Children and Adults will give the possibility to issue an advance directive. In such an advance directive, one will be allowed to name the person of his / her choice as the person to take medical and / or other decisions in case of absence of discretion. This leads to a status comparable to next of kin. A not registered same-sex partner can be chosen as the person taking the respective decisions.

*Case-law on gender reassignment surgery*

203. See chapter Transgender Issues

**B.12. Access to goods and services**

204. It is likely that refusal of access to goods and services based on homo- or transphobia still happens, but it cannot be said to be a general problem (beside what has been written in the other chapters like private health insurance for transgender persons).
205. No recent cases are documented.

**B.13. Media**

*Federal Act on Radio and Television*

206. The Federal Act on Radio and Television states in Art. 4 I: "All radio or television programmes must respect fundamental rights. In particular, programmes must respect human dignity, must be neither discriminatory nor contribute to racial hatred, nor endanger public morals nor glorify or trivialise violence." All radio or television means state-run and private ones. Advertising encouraging behaviour prejudicial to personal safety is prohibited as well (art. 10 IV lit. c RTVA).
207. At first instance, a complaint about the editorial program can be placed at the ombudsman service (Art. 91 RTVA).
208. Those who were involved in the report procedure before the ombudsman service and demonstrate a close relationship with the subject have, as a next step, the possibility to place a complaint about the editorial programme at the Independent Complaints Authority ("Unabhängige Beschwerdeinstanz" UBI).
209. These instances have to decide on the compliance with the Swiss law, including prohibition against discrimination.
210. Airing programmes with LGBT-content is not a problem: movies, soap operas, interviews, news etc. with an LGBT content are broadcasted frequently.

### *Penal and Civil Code*

211. Law suits against any media in the event of a breach with the Penal Code (for example, defamatory remarks) can be prosecuted under the specific Art. 28 Penal Code, Criminal liability of the Media<sup>69</sup>. The term media includes all kind of media.
212. In the case of a breach with the right of personality, a civil law suit under Art. 28 ff. Civil Code is possible as well against media.
213. As stated in the general remarks, none of these articles in the Penal and the Civil Code prohibit discrimination of LGBT-people specifically. These are the general articles applicable to anyone.

### *Ethic Code*

214. Beside the legal measures, there is the journalists' ethic code "Declaration of journalists rights and duties". In order to obtain the media identity card, it is mandatory to sign this Declaration. A breach of it can be denounced by anyone in a complaint to the "Presserat", the press council. The council has no authority to impose sanctions. It can only deliver its statement and make this-one public. One example of a refused complaint concerning a commentary on surgery for transgender men: <http://www.presserat.ch/22430.htm> (visited: 10 February 2010).
215. Art. 8 of the Declaration states the duty to respect human dignity and the renunciation of discriminating allusions to gender, sexual orientation, etc. be it in a text, in pictures or sound.

## **B.14. Transgender issues**

### *Change of Name*

216. Art. 30 I Civil Code states that it is the competence of the government of each Canton to authorise a person to change her/his name in cases "where there are material grounds for the change". Transsexuality is recognised as a material ground, but the concrete conditions are set by the Cantons and differ highly. Therefore, no general comment can be made for Switzerland. In some Cantons, gender confirming surgeries and sterility are still required. There are Cantons allowing a change of name only when connected with a change of legal gender. As a result, in these cantons no legal change at all is possible without gender confirming surgeries and sterility.

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<sup>69</sup> Art. 28 StGB, *Strafbarkeit der Medien*: "Abs. 1 Wird eine strafbare Handlung durch Veröffentlichung in einem Medium begangen und erschöpft sie sich in dieser Veröffentlichung, so ist, unter Vorbehalt der nachfolgenden Bestimmungen, der Autor allein strafbar. Abs. 2 Kann der Autor nicht ermittelt oder in der Schweiz nicht vor Gericht gestellt werden, so ist der verantwortliche Redaktor nach Artikel 322bis strafbar. Fehlt ein verantwortlicher Redaktor, so ist jene Person nach Artikel 322bis strafbar, die für die Veröffentlichung verantwortlich ist. Abs. 3 Hat die Veröffentlichung ohne Wissen oder gegen den Willen des Autors stattgefunden, so ist der Redaktor oder, wenn ein solcher fehlt, die für die Veröffentlichung verantwortliche Person als Täter strafbar. Abs. 4 Die wahrheitsgetreue Berichterstattung über öffentliche Verhandlungen und amtliche Mitteilungen einer Behörde ist straflos."

Art. 28, *Criminal liability of the media*: "Par. 1 If an act liable to punishment is committed and consummated in the form of a publication in a media, only the author shall be punishable, subject to the following provisions. Par. 2 If the author cannot be identified or if he cannot be tried in Switzerland before a court, the responsible editor shall be punishable by virtue of Article 322 bis. In the absence of a responsible editor, the person responsible for publication shall be punishable by virtue of Article 322 bis. Par. 3 If the publication was made without the knowledge or against the will of the author, the editor, or, in the absence of such editor, the person responsible for the publication shall be punishable as offender. Par. 4 The author of a truthful report on public debates and official notices by an authority shall not be subject to punishment."

217. The other requirements for change of name (only name, not connected with change of legal gender) are as follows:<sup>70</sup>

- hormonal therapy (minimum requirement of up to two years): required in about half of the documented cantons
- psychological / psychiatric opinion: required in about half of the comprised cantons
- psychological / psychiatric counselling (up to a minimum of two years): required in about one third of the comprised cantons
- physical appearance according to the new name's gender connotation: required in about one third of the comprised cantons
- only gender neutral name: required in about one third of the comprised cantons
- approval of use of the desired name for (two -) three years: required in about one quarter of the comprised cantons
- persistence of the previous ("old") name: required only in very few cantons
- daily 'real life' test: required only in very few cantons
- neither married nor in a registered partnership: required only in very few cantons

#### *Change of Legal Gender*

218. Change of gender is as well in the competence of the Cantons or even smaller regions. The federal law does not regulate this question or part of it except for procedural details like competence of courts or registering the change in the national electronic system "Infostar". The conditions differ comparably to name change and therefore no general comment for Switzerland is possible.

219. Hot topics are surgeries and forced divorce (see as well case law and Chapter Family Issues). Only one court of first instance does demand neither gender reassignment surgery nor infertility / sterility. Another court answered that gender reassignment surgeries are still required, but this demand is highly questioned amongst their judges.

220. While transgender persons usually are afraid of getting confronted with the dilemma of either staying married to their partner or getting their legal gender changed, only few courts still require a divorce.<sup>71</sup> In 1997, the Federal Office in charge of Civil Law Issues published an order forcing the Cantons to refuse legal gender change of married persons because the Swiss law does not allow same-sex marriages. Although their number was small, some Cantons did ignore that order (see case law). In a case dating end 2009/ beginning 2010 the Federal Office seems to have changed its opinion.<sup>72</sup>

221. The requirements for change of legal gender are as follows:<sup>73</sup>

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70 These data are being collected in an actually ongoing research project. At the moment, the answers of 14 out of the 26 Cantons are on hand.

71 It has to be kept in mind that less than half of the courts and administrative offices are included in these data. These statements based on eye-witness reports of individual experiences by several transgender persons. There is no case law or academic research. Therefore it must not be read as forced divorce is surely no problem anymore in Switzerland.

72 The referred unpublished case concerns a married transgender woman who has had complete gender reassignment surgery. She and her wife wanted to stay married. The case was decided in their favour by a court of first instance in the Canton of Basel-Land after asking the Federal Office on their opinion.

73 These data are being collected in an actually ongoing research project. At the moment, the answers of 57 out of the 128 courts and administrative offices in charge are on hand. More than the half of these 57 were not yet confronted with a

- gender reassignment surgery and / or permanent infertility / sterility reached through surgery are required nearly everywhere
- only in combination with change of first name: required very often

222. Not very often required:

- psychological / psychiatric opinion
- physical appearance according to the demanded legal gender
- neither married nor in a registered partnership

223. Required only by very few courts:

- infertility / sterility, not necessarily as a result of surgery
- hormonal therapy (it is likely, that this condition is hardly ever required because of the requirement of gender reassignment surgery)
- psychological / psychiatric counselling
- minimal age of 18 years
- gender specific first name only accepted

224. Parents may give their child a gender neutral name in Switzerland and there is no need to add a clarifying middle name. In contrary to newborns, the research shows that this rule is not applied everywhere in the case of transgender people choosing their own name as adults.

### *Procedures*

225. For name change, in all of the Cantons the request has to be sent to an office of the administration. The procedure of name change not combined with legal gender<sup>74</sup> change is therefore an administrative-one.

226. For legal gender change, usually the courts of first instance are in charge.<sup>75</sup> Therefore, it's a court case. A combined procedure name and legal gender change is usually as well a court case.

227. Whether a hearing is required in all cases, just required under certain circumstances or not required at all (procedure in written), differs amongst the courts / administration offices.

228. The costs differ extremely. The data, that are available at the moment, show a range from CHF 150.- up to CHF 7,000.-. The latest is absolutely unique, the second highest answer is CHF 2,000.-. Normal at the courts and administrations, that have taken part in the ongoing research project so far, is an amount of around CHF 200.- up to CHF 1500.-.

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request for change of legal gender or only once - usually more than ten years ago, as the numbers of requests in the last ten years were asked - and therefore did not answer the questions.

74 As stated already above, changing name separated from changing legal gender is not possible in all of the Cantons.

75 Only in about three Cantons an administrative office is in charge of legal gender change. According to the federal law it should be a court.

229. The procedure takes less than 12 months, in several cantons or courts, less than three months. These data are based on the self-declaration, but excessive waiting times are not a problem transgender people are complaining about.

#### *Status without reassignment procedures*

230. As written above, it depends on the Canton if name change is possible without gender reassignment procedure. Legal gender change is almost everywhere impossible without sterilisation or infertility.
231. Using a first name of ones preferred gender in every day life is possible. It depends on the social environment, but at least several transgender men live their life under their male name without having their legal name changed. Even changing one's health insurance policy or being a political candidate under the first name of the preferred gender was possible in single cases.<sup>76</sup> As there is no legislation, before legal name and gender change it is a question of luck or arbitrariness where a transgender person is recognised in his or her gender and name.

#### *Privacy Protection*

232. Art. 28 ff. Civil Code is applicable as well for transgender persons, including their gender-past.
233. The Federal Act on Data Protection defines in Art. 3 lit. c in a list sensitive personal data falling under the Act. This short list includes health and intimate sphere. Data falling under this Federal Act must be protected better in the case of processing by private persons or federal bodies.
234. Based on the court's decision on change of gender, the administrative office in charge will change the entry in the national electronic register ("Infostar"). The documents directly based on the data collected in Infostar can be changed. The most important ones are passport, identity card, birth certificate, marriage certificate, family certificate, certificate of residence. The person will get a new document clean in terms of his or her past / transgender identity. If this is really the case as well for the birth certificate cannot be said doubtlessness, information given are inconsistent.
235. Change of all other documents like driving-licence, credit cards etc. lies in the hand of the respective office or company in charge of these documents.

#### *Health insurance coverage*

236. After about 20 years of developing the law, in the decision 120 V 463 (7.6.1994) the Federal Supreme Court stated the following change in the case law:
237. "Gender reassignment. In the case of the necessity of surgery to treat real transsexualism the health insurance companies not only have a duty to cover the expenses to remove genitals (see 114 V 153 and 162) but also a duty to cover the expenses of plastic and reconstructive surgery to provide the respective person with new genitals.

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<sup>76</sup> This was the case of Esther Brunner, candidate in the Canton of Zürich running for the national elections in 2003. Just recently, in December 2009, the City of Zürich reaffirmed this practice in the case of Alecs Recher for the elections for the city's parliament taking place in March 2010. Denied in 2004 in the Canton of Solothurn, see Federal Supreme Courts decision 1P.94/2005 from 17 May 2005.

238. If the conditions precedent to a surgical intervention are fulfilled, health insurances have a duty to cover the costs of additional measures to transform secondary sex characteristics, provided that clear medical indication and cost-effectiveness are given."
239. In K 142/03<sup>77</sup>, the Federal Insurances High Court denied the insurances duty to cover facial hair removal before the diagnosis transsexualism was fixed and an individual plan of cure was elaborated. The Court did not deny that there may be a duty to cover the expenses in the case of meeting these conditions.
240. K 142/03 is irreconcilable with the (newer) Schlumpf v.s. Switzerland decision.
- The political debate challenging health insurance coverage for gender reassignment surgery was launched by a member of the national parliament in 2009<sup>78</sup>.

#### *Statistics*

241. They are no statistics on change of name or legal gender available.<sup>79</sup>
242. A special problem is that no specific academic research on transgender people's daily life situation has been done so far. We do not have ascertained knowledge on subjects like hate crimes, (un)employment, housing, education, family relation, social support etc. Neither are statistics on court cases available (see as well executive summary).

#### *Case law:*

243. For the leading decisions concerning coverage of surgery expenses see above
244. In a decision from 3 March 1993 (BGE 119 II 264, 270) the Federal Supreme Court had to decide on a marriage between a Swiss resident and his Brazilian transsexual wife. She was legally still male, according to the register in her home country, but she has had gender reassignment surgery. They got married in Denmark, as a heterosexual couple. The question in concern was recognition and registration of their marriage in Switzerland. The appeal was rejected. Back in 1993, a marriage of two legal men was seen as against the Swiss public order. As shown above, nowadays (after implementation of the registered partnership) this argumentation is not supported anymore by a lot of courts.
245. In its reasoning, the court stated as well that change of legal gender requires a non-reversible change of gender, read: gender reassignment surgery.
246. In a decision from 26 November 1996, the Court of First Instance ("Bezirksgericht") St. Gallen and in a decision from 29 July 2005 the Court of Appeal ("Appellationshof") of the Canton of Bern have decided that a change of gender of one spouse does not lead to annulment of a marriage. The result, a same-sex civil marriage, has to be accepted albeit the fact that the Swiss law does not warrant it.
247. In a decision from 18 October 2006 (GE.2005.0219) the Administrative Court of the Canton Vaud accepted a legal change of first name (from male to undoubtedly female) without legal gender change in the case of a married transgender woman.

<sup>77</sup> *Federal Insurances High Court*, K 142/03, Decision from 24 June 2004.

<sup>78</sup> 09.3524, Motion Peter Föhn: Streichung von Geschlechtsumwandlungen aus dem Leistungskatalog.

<sup>79</sup> Collecting these numbers is part of an ongoing research project, but I do not have enough answers yet to make a statement about. From the answers we have at hand at the moment, it seems that a rather small percentage of the population, self-identifying as transgender, had their legal gender and/or name changed.

248. In a decision from 17 April 2007, the Direction of Police and Military of the Canton of Bern accepted the change of first name without gender reassignment surgery.

249. These decisions made by cantonal courts are not binding for any other Canton.

### **B.15. Intersex issues<sup>80</sup>**

#### *Surgeries on newborns, parents' (non)information*

250. Whether or not an intersex child gets gender assignment surgery or not is a decision the parents have to take. Usually, they have very little knowledge on the subject. In most cases, doctors are putting them under pressure to agree on operations "in the best interest of their child". As a consequence, it is still rare that parents deny these surgeries.

251. From a legal point of view, lawfulness of these operations is denied by some experts.<sup>81</sup> An operation is always a violation of one's bodily integrity. A person not seen as able to realise the impact of such a grave operation (absence of discretion concerning this specific question),<sup>82</sup> cannot consent on these operations. An exception where no agreement from the patient is needed, is the case of emergency, an operation absolutely necessary from a medical point of view in the child's best interest. Only under these strict conditions, parents can agree as representatives for their child. As many intersex children's bodies are completely able to live their life without gender assigning operations - as the experience of non-operated children show - from a legal point of view, the lawfulness of parents' agreement on behalf of their child has to be denied.

252. It is still not the usual process that parents are really told that their child is intersex, what that means, what possibilities they have, etc. The approach to explain the syndromes to parents still seems to be a highly pathological one. Information material from intersex self supporting groups is usually not handed out by clinics to parents and parents of newborns are not actively given the chance to talk, for example, to other parents of intersex children or to intersex people to learn more before deciding. As long as this is not the case it seems wrong to say they agreed based on informed consent.

253. So far, no law-suit against a doctor has been decided in Switzerland. The problem usually faced is that the cases fall under the statute of limitations of the Penal Code.

### **Change of name and/or gender marker**

254. After birth, within three days every child has to be registered, including name and gender. There has to be made a decision between male or female, the register does not allow any other gender marker. The first name given to the child may be a gender neutral one.

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<sup>80</sup> Many Intersex people strongly disagree that intersex has anything to do with sexual orientation and gender identity, the subject of this report.

<sup>81</sup> See e.g. Büchler, Andrea / Cottier, Michelle: Intersexualität, Transsexualität und das Recht - Geschlechtsfreiheit und körperliche Integrität als Eckpfeiler einer neuen Konzeption, Freiburger Frauenstudien, Zeitschrift für interdisziplinäre Frauenforschung (17/2005) 115 ff; Thommen, Marc, Medizinische Eingriffe an Urteilsunfähigen und die Einwilligung der Vertreter - Eine strafrechtliche Analyse der stellvertretenden Einwilligung, Diss., Basel, 2004.

<sup>82</sup> In the case of gender reassignment surgery for transgender persons, the legal age of eighteen years is usually seen as limit.

255. For change of name and/or gender marker later on, there is no specific legislation, i.e. the same rules as for transgender persons might apply. What conditions a Canton would set in the case of an intersex person is not known. There is no case-law.

### **B.15.1. ANNEX**

#### *Presentation of Case Law*

256. **Case title: BGE 119 II 264**
257. Decision date: 3 March 1993
258. Reference details: Federal Supreme Court / Bundesgericht
259. Key facts of the case:
260. Marriage between a man of Swiss residency and his Brazilian transsexual wife. She was legally still male, according to the register in her home-country, but has had gender reassignment surgery. The marriage has been completed in Denmark, as a heterosexual marriage. The question in concern was recognition and registration of their marriage in Switzerland.
261. Main reasoning/argumentation:
262. The Court focuses very much on the previous ECHR decisions concerning transgender persons.
263. The Swiss public opinion, culture, tradition accept only heterosexual marriages. Therefore, same-sex marriages are against the public order.
264. Legal change of gender must not be based on the persons feelings but on a courts decision to grant legal certainty. Especially because otherwise the conditions for the traditional marriage could get infiltrated.
265. Key issues clarified by the case:
- A marriage between two persons of the same sex was seen as against the Swiss public order (this was before the Federal Act on Registered Partnership).
  - Requirement of a non-reversible change of gender (= gender reassignment surgery) for legal change of gender.
266. Results (sanctions) and key consequences or implications of the case:
267. Different acceptance of the case in the cantons / regions. Nowadays, some still require - based on this decision - divorce and/or surgery for change of legal gender, others do not anymore.
268. **Case title: VB.2000.00005**
269. Decision date: 13 April 2000

270. Reference details: Administrative Court Canton of Zürich / Verwaltungsgericht Zürich
271. Key facts of the case:
272. An association was asking the city of Winterthur's police for permission to make use of public ground by distributing written religious and political statements and setting up four posters. One of the posters read as follows: "Europe your way to hell is: porn, brutality, drugs, abortion and homosexuality."
273. Main reasoning/argumentation: The permission to set up this poster was denied for reasons of protecting homosexual peoples fundamental rights. It was based on Art. 8 II Swiss Constitution, equality before the law.
274. Key issues clarified by the case:
275. Freedom of expression, use of public space, can be limited to protect homosexual people against discrimination.
276. Results (sanctions) and key consequences or implications of the case:
277. The respective poster could not be used in public, the permission was denied.
278. **Case title: (none) published in ZR 108 (2009) 69ff.**
279. Decision date: 18 November 2008
280. Reference details: High Court Canton of Zürich / Obergericht Zürich
281. Key facts of the case:
282. In a small gay-bar, a tiny darkroom was separated only by a curtain from the rest of the venue. The owners were fined for this. The first instance had reasoned that he failed to fulfil his legal duty to sustain order and good morality in his locations.
283. Main reasoning/argumentation:
284. As second instance the High Court argued that no visitor would just by accident enter this bar, that they would all knowingly enter a gay bar with a darkroom.
285. The Court stated that the term "good morality" has to be interpreted for each individual case, that different ways of live are a reality. Concluding that the kind of sexual activity by adults in question was just one of several ways that have to be accepted in our society.
286. Key issues clarified by the case:
287. Darkrooms in gay bars are legal.
288. Results (sanctions) and key consequences or implications of the case:
289. The case has to be seen in the light of longer discussions between bar-owners and the police / politics about lawfulness of darkrooms in the city of Zürich. This decision was important to get a statement from a legal authority about darkrooms in general.
290. **Case title: 6S.26/2005**

291. Decision date: 3 June 2005
292. Reference details: Federal Supreme Court / Bundesgericht
293. Key facts of the case:
294. The police has seized the computers and servers of an online gay dating platform. On the respective platform, users had the possibility to show and view pictures of genitals.
295. The claimant, a user, was accused of pornography. He had in his dating profile a picture of an erected penis.
296. Main reasoning/argumentation:
297. The qualification of the picture as pornography was affirmed without further reasoning.
298. The key-question was the protection of minors from accessing the respective platform. The court stated that the age of users has to be rechecked; just warning signs are not seen as sufficient protection for minors. Any user was seen as realising that lack of protection, the easy accessibility of pornographic pictures even for minors.
299. Key issues clarified by the case:
300. Minimal standard barriers that have to be implemented by online dating platform providers to keep minors out. Qualification of pictures of users genitals, as part of their profile on such platforms, as pornography.
301. Results (sanctions) and key consequences or implications of the case:
302. The claim failed and the user had to pay the fine (CHF 500.-), beside the costs of the proceedings.
303. The rather rude action by the police at the beginning of this case and the negative court decisions led to fear amongst gay users of any online platform and to reproaches of homophobia because such intervention was not known against a heterosexual dating platform.
304. **Case title: J 671/89**
305. Decision date: 10 January 1993
306. Reference details: Criminal Court Canton of Basel-Stadt / Strafgericht Basel-Stadt
307. Key facts of the case:
308. A group of young men decided, after having been drinking heavily, to beat up some gay men. The incident happened in a public toilet, known as meeting place for gay men looking for sex. The drunken group, by shouting and insulting, tried to make their victim, locked-in in a stall, to come out. After not achieving their goal, one of them poured gasoline in the stall and enflamed it. The victim was heavily burnt.
309. Main reasoning/argumentation:
310. Homophobia as motivation and the suspect's knowledge about the groups target was clearly affirmed by the court.

311. Prior attacks against homosexuals, as they are seen as a group which is easily frightened, show contempt resulting from the aggressors own inferiority.
312. Key issues clarified by the case:
313. Homophobia as motivation for a criminal act is taken into account for augmenting the sanction.
314. **Case title: BGE 126 II 425**
315. Decision date: 25 August 2000
316. Reference details: Federal Supreme Court / Bundesgericht
317. Key facts of the case:
318. A Swiss citizen and a British and New Zealand citizen met in New Zealand in 1994. Since then, the lesbian couple lived together in Switzerland, New Zealand and Britain. In 1998, an application for a residence permit in Switzerland was turned down. The Administrative Court of Zürich reasoned that the couple could live their relationship abroad and that the public interest of protection against foreign infiltration was higher than her wish to stay in Switzerland.
319. Main reasoning/argumentation:
320. Same-sex relationships are not protected in the same way as civil heterosexual marriages are. They form only part of the right to privacy, not to family life. If a couple has no possibility to live their relationship without getting residence permit, the result might be in breach with the right to privacy. Nevertheless, a European tendency for better protection of same-sex couples is mentioned.
321. Additional conditions to have a right to residence permit are: Swiss citizenship or secured right to presence of the partner, close, real and de facto lived relationship.
322. Each decision has to take into account all specialties of a case, especially with regard to losses coming with the leaving of the country and possibilities or challenges to live in another country.
323. It was seen as perfectly possible for the couple to live together outside Switzerland or live separately, visiting each other.
324. Key issues clarified by the case:
325. Same-sex partners of Swiss citizens had no general right to get residence permit.
326. Results (sanctions) and key consequences or implications of the case:
327. Since the Federal Act on Registered Partnership came into force, the situation has changed a lot. A couple like the applicants could get registered and reach the right to live together in Switzerland.
328. **Case title: BGE 134 V 369**
329. Decision date. 20 August 2008

330. Reference details: Federal Supreme Court / Bundesgericht
331. Key facts of the case:
332. A lesbian's partner died. The mother and sister challenged the deceased's last will according to which her surviving partner should be the sole inheritor.
333. Main reasoning/argumentation:
334. The federal supreme court states clearly and short that society has changed, that homosexual relationships are respected as being of the same value as heterosexual-ones. One specific argument is the public vote on the Federal Act on Registered Partnership.
335. Key issues clarified by the case:
336. Homosexual partnerships are equal to heterosexual ones in many areas of the (social security) law, that partnerships have to fulfil the same conditions to qualify as such.
337. **Case title: BGE 120 V 463**
338. Decision date: 7 June 1994
339. Reference details: Federal Supreme Court / Bundesgericht
340. Key facts of the case:
341. The applicant was asking the insurance company to cover the costs for adamectomy, dermatological surgery around the mouth, facial hair removal and gender reassignment surgery. At the time of the Federal Supreme Courts decision, the interventions were already performed and the applicant was legally recognised in the preferred gender.
342. Main reasoning/argumentation:
343. The desire to have a body of the opposite sex is the basic fact of transsexualism and therefore it is not enough to remove genitals. The desire for reconstruction of genitals of the lived gender is inherent in transsexualism.
344. As genitals are removed and reconstructed in the same intervention, dividing the costs would be nonsense.
345. For transsexual individuals, secondary gender characteristics are not less important than primary-ones.
346. Key issues clarified by the case:
347. Health insurances' duty to cover the expenses of gender (genital) reconstructing surgery and of esthetical surgical interventions.
348. Results (sanctions) and key consequences or implications of the case:
349. This is a landmark decision, a change in jurisdiction. Since then, health insurances have to cover the costs for gender reconstructing surgery, not only for genital removal surgery, and for esthetical interventions on secondary gender characteristics.
350. **Case title: K 142/03**

351. Decision date: 24 June 2004
352. Reference details: Federal Insurances Court / Eidgenössisches Versicherungsgericht
353. Key facts of the case:
354. The applicant is a transsexual woman. Since 2001, she has been seeing a psychiatrist. In 2002, she had facial hair removal over a period of about ten months. Her health insurance (the mandatory basic coverage) refused to cover these expenses.
355. Main reasoning/argumentation:
356. The Federal High Court demanded a period of two years of psychiatric treatment before insurances' obligation to cover the costs for gender reassignment surgery based on the assured diagnosis "severe real transsexualism". The question was whether facial hair removal is falling under this two-year clause as well or is rather to qualify, similar to hormonal treatment, as part of real-life experience supporting the setting of the diagnoses after two years. Facial hair removal is seen as supporting a female appearance, supporting the real-life experience, but on the other hand as well as an irreversible intervention and therefore not to classify as supporting the setting of the diagnosis. But: facial hair removal is accepted as effective, functional and economical part of the general medical treatment for transgender women. Therefore, the expenses have to be covered equal to surgical interventions.
357. Key issues clarified by the case:
358. The costs for facial hair removal have to be covered by health insurances under the same conditions as gender reassignment surgery.
359. Results (sanctions) and key consequences or implications of the case:
360. As it is a decision taken on federal level, concerning the mandatory basic health insurance, it states clearly that facial hair removal has to be treated equal to surgical interventions.
361. **Case title: GSR 302/325**
362. Decision date: 26 November 1996
363. Reference details: Court of First Instance St. Gallen / Bezirksgericht St.Gallen
364. Key facts of the case:
365. The applicant transgender woman had undergone gender reassignment surgery in 1995. She was married to her wife since 1990 who supported her transition. The key question when she applied for change of name and legal gender was the future of their marriage. Both partners wanted to stay together and married.
366. Main reasoning/argumentation:
367. Change of her legal gender would lead to a same-sex marriage, something not foreseen at all in Swiss law.
368. Swiss law does not know coercive divorce. The dilemma of one partner to choose between change of legal gender and marriage does not meet the conditions of a divorce (incurable breakup of the relationship or unacceptable ongoing of the marriage for one/both partner).

Reasons for nullity of a marriage are listed in an exhaustive list, not including a transition. Non-existence of the marriage is only possible in the case of a defect existing already at the registering of the marriage.

369. The public opinion concerning same-sex partnerships is changing towards more tolerance.
370. A relaxed living in the new gender is only possible after legal recognition. Otherwise, the respective person is forced to coming-outs in the daily live.
371. Conclusion: The public interest to interdict same-sex marriages is less important than the interest of the two partners and the public interest in well functioning relationships.
372. Key issues clarified by the case:
373. Change of legal gender this not lead to forced divorce, to nullity of a marriage or by any other means to a change of the partners marriage. In these rare cases, same-sex marriages have to be accepted.
374. Results (sanctions) and key consequences or implications of the case:
375. This was a landmark decision, the first decision on this question. The Federal Office reacted with a statement, an order given to all courts, that change of legal gender must not be granted for married persons before divorce. Some courts followed this orders, others did not.
376. **Case title: APH 05 303**
377. Decision date: 29 July 2005
378. Reference details: Court of Appeal of the Canton of Bern / Appellationshof Kanton Bern, I. Zivilkammer
379. Key facts of the case:
380. The applicants married in 1990. In 2002, the "wife", a transgender man, completed gender reassignment surgery. In 2003 his change of name and legal gender were accepted by the court of first instance. Challenged was the question if the marriage has to be classified as dissolute.
381. Main reasoning/argumentation:
382. At the time of marriage, partners had to be of the opposite sex, otherwise the marriage would be null and void. An automatic conclusion by analogy in the case of a later gender change of one partner is not proper. There is no legal base for forced divorce or declaration of the marriages invalid. A non-marriage is only possible based on facts at the time of marriage.
383. Key issues clarified by the case:
384. A change of one partners gender does not lead to nullity of a marriage.
385. Results (sanctions) and key consequences or implications of the case:
386. The decision confirms the reasoning that change of one partner's gender does not lead to a marriages invalidity or forced divorce. It has to be kept in mind that it is not binding for other

cantons. But as they are only few cases concerning the same questions, decision-making bodies do consider reasonings made in other cantons.

387. **Case title: GE.2005.0219**

388. Decision date: 18 October 2006

389. Reference details: Administrative Court of the Canton of Vaud / Tribunal administratif de canton de Vaud

390. Key facts of the case:

391. The applicant is a transsexual woman asking for change of name. She received hormonal treatment but has not had gender reassignment surgery. She was asking for change of name to get a clear female first name.

392. Main reasoning/argumentation:

393. The applicant was accepted under her female identity, including first name, by her family, her social environment and at work. Her interest in legally changing her name was accepted as high, as necessary to grant continuity in her process. Using a female name as transgender woman is not abusive. A gender neutral name could lead to more confusions on the applicants gender as transgender persons often have an unclear appearance. Refusing her request and asking for a gender neutral name would lead to another interruption of the development of her identity and her social life.

394. Key issues clarified by the case:

395. The rules and limits in the parent's choice of name to protect the child are not applicable on transgender adults.

396. Having a first name corresponding with ones physical gender appearance is of higher value than the congruence of legal gender and first name.

397. Results (sanctions) and key consequences or implications of the case:

398. As it is a decision only on the level of the Canton, it is not binding for other cantons. But several of them do refer to it. See case below.

399. **Case title: BD 120/06 Ho**

400. Decision date: 17 April 2007

401. Reference details: Direction of Police and Military of the Canton of Bern / Polizei- und Militärdirektion des Kantons Bern

402. Key facts of the case:

403. The applicant transgender woman was asking for change of name to get a clear female first name while keeping her legal gender male. She got hormonal treatment, but refused to have gender reassignment surgery because of the high risk coming with these interventions. The office in charge had refused her request reasoning that it would be against the public order to allow a person registered as male to have a female first name. The office had accepted a gender neutral name, what the applicant refused.

404. Main reasoning/argumentation:

405. The prohibition for parents to give their child a first name of the opposite sex is not applicable in the case of an adult asking for change of name to hold a first name corresponding to his or her appearance. The argument of child's well-being makes no sense in these cases.

406. There is simply no fundamental Swiss rule or value (public order) to justify a refusal of the change of legal name. A gender neutral name could lead to more confusions on the applicant's gender as transgender persons often have an unclear appearance. The applicant proved use of the female first name over a period of three years. Refusing her request and asking for a gender neutral name would lead to a second change of name.

407. Key issues clarified by the case:

408. The rules and limits in the parents' choice of name to protect the child are not applicable on transgender adults.

409. Having a first name corresponding with one's physical gender appearance is of higher value than the congruence of legal gender and first name.

410. Results (sanctions) and key consequences or implications of the case:

411. This case confirmed the decision above. As it is as well a decision only on the level of the Canton, it is not binding for other cantons.