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## National Report: Switzerland

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# NATIONAL REPORT: SWITZERLAND

PROFESSOR ANNELOT PETERS

**1. Legal framework: Please briefly explain the legal system used in your country. Include information about the type of Constitution (written; unwritten; modifiable by a Constitutional Tribunal, by Supreme Court decisions, by Congress only; etc.) Please do not use more than one page to provide your legal framework.**

Switzerland is a country of civil law tradition, mainly inspired by German law, but which also has elements of French tradition. As a federal country, the competences are divided between the Confederation and the 26 Cantons. Technically, all competences are left to the Cantons, except the ones that are explicitly stated in the constitution to be federal. Nowadays, most of the competences are federal. Cantons are still competent for several domains of material law (for example: schools, cantonal taxes . . . ) and for the majority of the procedures. Procedural law will, however, soon be centralized, as parliament has adopted a criminal and civil procedure code which will enter into force in 2011 or 2012.

Judicial authorities are to be found in every Canton, in a two-instance schema: decisions from the first instance can be revised by a cantonal Court. On a federal perspective are the Federal Supreme Court and some other Federal Courts, especially the Federal Penal Court and Federal Administrative Court (which have been created in the last few years), competent. The main tasks of the Federal Supreme Courts is to judge appeals against decisions from the cantonal courts (in last instance) and in this way to check, that the law is applied uniformly. The task of the other Federal courts is to judge, in first instance, some cases relating to material federal interests (for the Federal Penal Court, e.g. terrorism) or on the application of federal administrative law (Federal Administrative Court).

The Constitution now in force dates from 1999 (came into force on the 1st of January 2000). It replaces the old Constitution of 1874. It is a written Constitution.<sup>1</sup> The particularity of the Swiss system is the high importance

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1. The text of the Constitution (07.07.09), <http://www.admin.ch/ch/f/rs/1/101.fr.pdf> (in French), <http://www.admin.ch/ch/e/rs/1/101.en.pdf> (in English—please note that the English translation is not legally binding).

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of direct democracy in the country. The Constitution can firstly be revised by way of “popular initiative”: 100,000 citizens can initiate a procedure to add, change or delete an article in the Constitution; the procedure ends by a vote from the Swiss citizens. Secondly, every change of the Constitution (decided by the Parliament on its own initiative or on the initiative of the government) must be approved by the people by way of referendum. Thirdly, the introduction or changes of federal laws decided by parliament are subject to a facultative referendum (the procedure can be initiated if 50,000 citizens express their wish to do so by signing a declaration within three months of adoption of the law by the parliament). The Government (the Federal Council) can adopt regulations on the basis of federal legislation or in case of urgency.

**2. Constitutional regulations applicable to same-sex partnerships. Please be specific about the constitutional guarantees in your country that conflict/support same-sex marriage and those that can conflict/support same-sex unions in a format different than marriage. Explain each case.**

*Art. 10 (2) Constitution:*

The right to life and to personal freedom: “Everyone has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement.” This includes sexual development and freedom of development of human relations.<sup>2</sup>

*Art. 14 Constitution:*

Right to marry and to have a family: “The right to marry and to have a family is guaranteed.” This article cannot be invoked by same-sex partners to claim a marriage; marriage is still reserved to heterosexual partners (according to doctrine<sup>3</sup> and jurisprudence<sup>4</sup>). As the text of the constitution does not explicitly require the partners who want to get married to be heterosexual or of different sex, it is not excluded (though unlikely) that the scope of the article might change in the future.

Family law protects the same sex partners in the way that sexuality is not a criterion for the right to raise children. Therefore, the guardianship of a child cannot be taken from some-one because he or she is homosexual.<sup>5</sup>

The right to have children is limited to heterosexual couples. Medical

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2. Ziegler A.R. (ed.), *Droit des gays et lesbiennes en Suisse*, Berne 2007, p. 19.

3. *Supra* note 2, p. 29.

4. ATF 119 II 264, 3 mars 1993 which concluded that a marriage between homosexual couples is against the Swiss public order.

5. *Supra* note 2, p. 30-31.

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assistance for getting children is not accessible for homosexual couples. Adoption is forbidden for homosexual couples (*cf.* art. 28 LPart).

*Art. 8 (2) Constitution:*

Equality before the law: “Nobody may be discriminated against, namely for his or her origin, race, sex, age, language, social position, way of life, religious, philosophical, or political convictions, or because of a corporal or mental disability.” This provision, although not specifically mentioned in the text of article 8 (2) Constitution includes protection of homosexuals.<sup>6</sup>

The civil union is introduced to prevent the numerous discriminations between hetero- and homosexuals.

**3. Legal statutes: Does your country have a specific law allowing same-sex marriage? If yes, please give exact information about such law, its place among the authoritative sources of law and relevant information about its history.**

No, there isn't any institution allowing same-sex marriage in Switzerland.

**4. If your country regulates same sex marriage, is there any formal difference in the treatment between different sex and same-sex marriages? In other words, does the law that regulates same-sex marriage provide grounds for any differential treatment? What are those formal differences?**

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**5. If your country does not have a same-sex marriage regulation. Please specify if your country has some sort of civil union regulation. If so, please specify the statute, its place among the authoritative sources of law, and the conditions for entering into a civil union.**

Switzerland introduced a civil union regulation in 2004. The law (*Loi fédérale sur le partenariat enregistré entre personnes du même sexe*, hereinafter to be referred to as LPart<sup>7</sup>) entered into force on 1 January 2007. The LPart is a federal law. It has then a derogatory force against cantonal law and federal *ordonnances* (by-laws: regulations made by the government). It also modifies several laws to make them applicable to civil unions, see article 36 LPart for the list of the modifications of existing laws like the Swiss code civil and the Swiss penal code.

The conditions for entering into a civil union are prescribed in articles 3

6. *Supra* note 2, p. 33-34.

7. See [http://www.admin.ch/ch/f/rs/c211\\_231.html](http://www.admin.ch/ch/f/rs/c211_231.html) (07.07.09).

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and 4 LPart: the two partners have to be of a minimum age of 18 years old and to be able to judge (*capables de discernement*). An incapacitated person needs the approval of the legal representative. In case the legal representative declines, a judge will decide. A civil union is forbidden between (see article 4 LPart) direct descendants as well as between brothers or sisters and half-brothers or half-sisters. Last but not least, every partner needs to prove that he or she is not already bound by an existing civil union or a marriage. The procedure to conclude a civil union resembles the one for a marriage (e.g. same authority is competent, formal celebration), though there are differences in detail (e.g. no witnesses, no legally required term between the preparation and the conclusion; see articles 5-8 LPart).

**6. If your country has a civil union regulation, please specify if this is open to heterosexual couples or only to same-sex couples.**

The civil union is not open to heterosexual couples (see art. 2 (1) LPart): only two partners of the same sex can officially register their partnership. The foregoing implicates that the civil union is only possible for same-sex couples.

**7. If the civil union statute is open to heterosexual and same-sex couples, please specify if there is any formal differential treatment between both types of couples within such legal framework.**

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**8. If your country does not have a specific regulation on same-sex partnerships, please indicate if there are other legal statutes that specifically recognize same sex partners for specific purposes, i.e.: domestic violence act, inheritance rights act, adoption laws, etc.**

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**9. Is your country discussing future regulation on same-sex marriage? If so, please explain the type of regulation being proposed, at what level (constitutional, legislative, administrative, etc.), in what stage the discussion is at present, what are the chances of being passed and when.**

To our best knowledge, no discussion about same-sex marriage takes place at the moment. The introduction of the law on civil unions for heterosexuals has put end to the debate.

**10. Is your country discussing future regulation on same-sex unions in a format different than marriage? If so, please explain the type of regulation being proposed, at what level (constitutional, legislative, administrative, etc.), in what stage the discussion is at, what are the**

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**chances of being passed, and when.**

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**11. Non legislative regulations: does your country provide specific benefits/rights to same-sex couples via administrative acts? i.e.: death pension for the surviving partner; hospital visitations or the right to make decisions when one of the partners is incapacitated to make them. Please provide details.**

The LPart institutes the same rights to civil partners as to heterosexual couples in several domains like successions, taxes, hospital visitations and property rights.

Article 462 Swiss Civil Code gives the same rights as married couples have, to registered partners regarding **inheritance law**. According to article 31 LPart, the dissolution of the registered partnership has the effect that legal inheritance laws do not apply anymore.

According to article 9(1) of the Federal Direct Tax Law (*Loi fédérale sur l'impôt fédéral direct 'LIFD'*), the income of married couples is added up to calculate their combined income which is then relevant for the fixing of their (mutual) tax duty. Article 9 (2) Federal Direct Tax Law expands this rule to registered partners. See also article 12 (2) regarding fiscal succession and article 109 (1b) Federal Direct Tax Law regarding *recusation* for expansions to registered partners.

For hospital visitation, article 2 (2) of the Patients law of Zurich prescribes that if the patient has not defined his 'person of attachment' (meaning the person who takes care of somebody, mostly parent, wife or husband et cetera) then this 'person of attachment' is (by law) defined as firstly the life partner—this includes also homosexual partner – and second line relatives.

With regard to property rights, article 25 LPart states that if there is a contract in place regulating the possible dissolution of the registered partnership, parties can choose the applicability of the rules of *les règles du régime de la participation aux acquets*, meaning the general matrimonial property rules for married couples in Swiss law.

**12. Judicial construction of the law: Are there any relevant decisions in your country that had or may have future impact in the legal construction of same-sex marriage or in the legal recognition of same-sex unions/partnerships? Please provide the date and name of the case, and briefly explain the case and its relevancy for this topic.**

Because the possibility of registering a civil union (based on the LPart) only exists since 1 January 2007, there are not many cases concerning the LPart. Moreover there is no relevant decision that could lead one day to a

same-sex marriage.

**13. Additional comments: Please feel free to include additional comments on the topic that you consider relevant to the specific situation of your country.**

*Acknowledgement in Switzerland of same-sex marriages or civil unions concluded abroad*

Due to article 45 (3) of the Swiss federal law regarding international private law<sup>8</sup> a same-sex marriage that is legally concluded abroad in one of the countries where same-sex marriage is provided for by law, is considered as a civil union in Switzerland. Therefore, two persons of the same sex who married in a country where that is allowed, are not considered married in Switzerland but as registered partners.

If two persons of the same sex officially entered into a civil union abroad, the civil union construction will only be acknowledged in Switzerland if the civil union construction resembles the Swiss civil union construction as laid down in the LPart.

*A general and short overview of differences and similarities between Swiss marriages and civil unionships*

	Differences Marriage	Differences Civil unions	Similarities
<b>General</b>	Extensive regulation in Swiss Civil Code	Simple regulation in separate law: LPart	
<b>Preparation/procedure</b>	Preparation of the marriage and wedding regulated in law in more detail	Preparation of the civil union arranged for in law in less detail	Civil registry office is responsible for registration or marriage Both procedures are public Both are registered in the family register
	Mandatory term (10 days to 3 months)	No mandatory term between preparation and	

8. Loi fédérale du 18 décembre 1987 sur le droit international privé.

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	between preparation and celebration	celebration	
	Free choice of registry office for celebration, home office of one of the spouse for preparation	Free choice of registry office for celebration, home office for preparation	
	Wedding with witnesses	No witnesses	
	Creation of the marriage by the so called 'yes word'	A declaration of intent is needed	Practically there are little differences
	There are 5 different marital status: single, married, divorced, unmarried, widowed	There are 2 different marital status, single or registered	
<b>Invalidity reasons</b>			Same reasons for invalidity.
<b>Effects</b>	Mutual name	No mutual name	Same procedure. Duty to strive for the well-being of the family. Substantial / material measures of protection through the court. <b>Equalization of marriage and registered partnership:</b> Inheritance law Tax law Social security law Pensions Immigration Citizenship rights



			Code civil: tenancy law, employment law, guarantees et cetera Insolvency Civil procedure Federal civil procedure Federal penal procedure Military law Military procedure law
	Same citizenship Duty of faithfulness Equality of the housekeeping person (articles 164 and 165 Swiss Civil Code) Existence of an own chapter regarding marriage protection Simplified procedure and conditions for naturalization	No same citizenship No duty of faithfulness No equality of the housekeeping person  No provisions regarding protection of civil unions  Simplified conditions (as for marriage) for naturalization, but not simplified procedure	
	Social security: surviving spouse treated as widow	Social security: surviving partner treated as widow/widower	
<b>Property rights</b>	Usual	Usual	Possible to make a

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	matrimonial property regime Two alternative regimes: Separation and collective regime	separation of property  Contract possible but claims of relatives need to be taken into consideration; Usual property regime can be chosen Collective regime not possible	contractual situation
<b>Children</b>	Access to so called 'reproduction medicine'	No access to reproduction medicine	With regard to children from previous relationships: Maintenance obligation for spouses as well as for registered partners.
<b>Divorce/dissolution</b>	Adoption possible Extensive regulation	No adoption  Simple regulation in LPart	Responsibility of the court. On mutual request. Right to maintenance. Both possibility for appointment family or mutual house. Same inheritance effects. Pensions: for both regimes they follow the rules of divorce law. Both have possibility to agree on certain effects

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		of the divorce/dissolution Same rules regarding social security.
Divorce through legal action 2 years after separation	Dissolution after 1 year separation	
Unacceptability as the third reason for divorce	Unacceptability is not a reason	
General right for maintenance after the divorce	Narrow requirements for maintenance after dissolution	

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