
Human Rights of Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) Persons in Switzerland

A Legal Analysis of Weaknesses in the Swiss Legal System According to ILGA-Europe's Rainbow Index

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Introduction

Rankings have become very popular in recent years – also in academia. On the other side, these rankings are normally very superficial and simplistic instruments. To understand their meaning requires at least specific explanations on the methodology and the potential shortcomings. To rank countries according to their performance with regard to the protection of certain minorities suffers from the same weaknesses. Nevertheless, one can say that the so-called Rainbow Index prepared by the International Lesbian and Gay Association's European Branch (ILGA-Europe) – an NGO active in the defense of

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lesbians, gays, bisexuals, trans and intersex¹ (LGBTI) persons – is a powerful instrument that gives the public and legislators some hints on where a country stands and whether human rights of LGBTI persons are taken seriously. It can certainly constitute an interesting starting-point to inquire which should be the priorities for a society when it comes to improving the human rights situation of these minorities.² A comparison – even if based on a simplified index and – from an international (European) perspective may help domestic writers to make their opinion heard.³

The ranking referred to as Rainbow Europe ranks the Member States of the Council of Europe based on laws and policies that have a direct impact on the LGBTI people's human rights. It uses six categories: 1. equality and non-discrimination; 2. family; 3. bias motivated speech/violence; 4. legal gender recognition; 5. freedom of assembly, association and expression; and 6. asylum. Under each category a number of indicators have been included, often separated for the different sub-groups (lesbian and gay persons, trans persons and intersex persons⁴), i.e. referring to the particular criterion for the definition of the respective groups (sexual orientation, gender identity, and intersex). For each criterion a State gets either a positive entry (and thus all the associated points) or nothing - a necessary simplification to make the index operational but obviously a shortcoming for a detailed legal analysis. Only in some areas (like marriage against registered partnerships), the index itself provides for differentiations.

¹ The more traditionally used term of « transsexual » is increasingly replaced by the term « trans ». At the same time, the still widely used term « intersex » is also increasingly criticised and often replaced with more technical terms like persons showing « Variations of Sex Development » (VSD). Yet in both cases the discussions remain controversial.

² This is particularly important in countries, like Switzerland, that do not have an active policy in this field and lack of systematic reporting or work programmes, see below in the various sections on actions plans and policies. See for a more detailed analysis: Grohsmann Irene/Hausammann Christina/Vinogradova Olga, *Institutionelle Verankerung von LGBTI-Themen in der Schweiz - Umsetzung der Empfehlung CM/Rec(2010)5 des Ministerkomitees des Europarats*, Bern, 19 February 2014.

³ Most of the analysis in this article is based on the detailed reporting in the only comprehensive monograph on LGBTI law in Switzerland that exists in French and German only: Ziegler Andreas R./Montini Michel/Copur Eylem (eds.), *LGBT-Recht - Rechte der Lesben, Schwulen, Bisexuellen und Transgender in der Schweiz: Eingetragene Partnerschaft, faktische Lebensgemeinschaft, Rechtsfragen zur sexuellen Orientierung und Geschlechtsidentität*, 2nd ed., Basel 2015; and: Ziegler Andreas R./Montini Michel/Copur Eylem (eds.), *Droit LGBT- Droits des gays, lesbiennes, bisexuels et transgenres en Suisse: Partenariat enregistré, communauté de vie de fait, questions juridiques concernant l'orientation sexuelle et l'identité de genre*, 2nd ed., Basel 2015.

⁴ I use this term here for convenience and as it appears in the index studied despite the important debate on its appropriateness and instead of possible alternatives like persons having disorders of sex development (DSD).

I. Equality and Non-Discrimination (Overall Weight 25%)

1. Constitution

When it comes to the question whether the Swiss legal order at constitutional (or similar) level contains anti-discrimination provisions, Switzerland obtains a positive mark (weight within category: 5%). Normally, for being awarded these points, such a provision should include an anti-discrimination article (or at least a Constitutional Court decision) which effectively adds sexual orientation to the list of expressly covered grounds. For Switzerland, it is the fact that the Constitution of 1999 includes a prohibition of discrimination based on the lifestyle – a famous political compromise reached at the time to cover sexual orientation without naming it (at a time when the EU was about to include sexual orientation in Article 21 of the Charter of Fundamental Rights).⁵ However, the positive score is not given regarding gender identity, where only very few countries in Europe (so far Malta since 2014, Spain and the UK) score (weight within category: 5%).

2. Employment

This criterion covers employment legislation that expressly prohibits any discrimination based on sexual orientation. Switzerland again obtains a positive mark (weight within category: 5%). The existing prohibition of any discrimination based on the lifestyle in the Constitution is considered sufficient, in particular as it informs the interpretation of the respective provisions of the Civil Code regarding privacy protection in general (Article 27 Swiss Civil Code) and of the employee (Art. 328 Swiss Code of Obligations) are interpreted by writers and courts as including sexual orientation. The same is true for gender identity (weight within category: 5%).⁶

3. Other Areas

In all other areas under this category, Switzerland scores no points. This applies to the absence of any *goods and services anti-discrimination legislation* relating to sexual orientation (weight within category: 5%) or gender (weight within category: 5%), as well as to the absence of such anti-discrimination legislation in *other spheres* relating to sexual orientation (weight within cate-

⁵ See Ziegler Andreas R./Bueno Nicolas, Der verfassungsrechtliche Schutz von Lesben, Schwulen und Transmenschen, in: Ziegler Andreas R./Montini Michel/Copur Eylem (eds), supra, 35ff, par. 48ff.

⁶ See Baur François/Rossinelli Michel, Arbeits- und Dienstrecht, in: Ziegler Andreas R./Montini Michel/Copur Eylem (eds), supra, 533ff., par. 1ff.

gory: 5%) and gender identity (weight within category: 5%). Many countries have special legislation in place that targets such discrimination while the Swiss legislature has always been reluctant to introduce any such general non-discrimination laws which is mostly due to the high esteem for the freedom of contract and a reluctance for the State to interfere in what are considered mostly private relationships.⁷ Switzerland has also no specific laws relating to gender expression (weight within category: 10%) and intersex persons (weight within category: 10%), contrary to few European States like Finland, Netherlands or Malta. Already in 2010 the UN Committee for Economic, Social and Cultural Rights recommended that Switzerland introduce a comprehensive antidiscrimination law⁸ and in February 2012 the Council of Europe's Commissioner for Human Rights made the same recommendation. In 2012 the Swiss Government asked the Swiss Center of Expertise in Human Rights to establish at least a report on the application of the existing laws as the introduction of a more comprehensive legal framework seems not to find the necessary political support at this time.

The absence of a national human rights institution or an equality body that is explicitly mandated to work on sexual orientation in its law/founding documents, or where the national human rights institution/equality body is systematically working on issues covering sexual orientation (8%) or gender identity (weight within category: 8%) weighs in heavily. The existing (academic) institution financed by the Swiss Government to undertake Human Rights work (Swiss Centre of Expertise in Human Rights - SCHR) is not taken into account due to its general character despite the fact that it does work on both areas.⁹

The absence of an Equality Action Plan regarding sexual orientation (weight within category: 12%) and gender identity (weight within category: 12%) that exists in a small number of countries in Europe (like Belgium or France) costs further points.¹⁰

⁷ See the general remarks in: Hausamann Christina, Instrumente gegen Diskriminierung im schweizerischen Recht – ein Überblick, im Auftrag des Eidgenössischen Büros für Gleichstellung von Menschen mit Behinderung [EBGB] und der Fachstelle für Rassismusbekämpfung [FRB], Bern 2008 (online at: <http://www.edi.admin.ch/frb/02047/05154/index.html?lang=de&download=NHZLpZeg7t,1np6I0NTU042I2Z6ln1acy4Zn4Z2qZpnO2Yuu2Z6gpJCDfHt5gmym162epYbg2c_JjKbNoKSn6A-->>).

⁸ Committee for Economic, Social and Cultural Rights, Concluding Observations Switzerland 2010, par. 7 (online at: <http://www.humanrights.ch/upload/pdf/101123_Sozialpakt_Concluding_Obs_Switzerland.pdf>).

⁹ See <<http://www.skmr.ch/de/skmr.html>>.

¹⁰ See for examples of such plans the documents contained in the Council of Europe's SOGI (Sexual Orientation and Gender Identity) Database at: <http://www.coe.int/en/web/sogidatabase/database?_coeosiglbtpublicationsearch_WAR_coeosiglbtportlet_tabs1=search-by-tag-cloud> (last visited 1 March 2016).

II. Family (Overall Weight 27%)

1. Couples (total weight within category: 56 %)

Switzerland has introduced a law providing for a registered partnership a few years ago. It provides for similar rights as marriage (weight within category: 33.75%) but does not yet allow same-sex marriage (weight within category: 45%) and offers no additional registered partnership or civil union with less rights (as e.g. in some countries where marriage is possible like Belgium and France).¹¹ Cohabitation is possible (weight within category: 5.63%) and no constitutional limitation on marriage to opposite-sex couples exists so far (weight within category: 7%) though this was exactly the object of an initiative referendum on that was only narrowly rejected 28 February 2016.¹² In Switzerland, trans people can marry a person of the other gender according to their gender identity after their legal gender recognition thus entering different-sex marriage (weight within category: 4 %) as in most countries.¹³

2. Adoption and Procreation (total weight within category: 44 %)

Joint adoption, i.e. that non-married couples can legally apply for joint adoption does not exist in Switzerland (weight within category: 11%) at all (neither for same-sex partners (even in a registered partnership) nor for unmarried opposite sex couples. Second parent adoption, however, where (same-sex) unmarried couples can legally apply for the adoption of the child of one of the partners by the second partner is currently under consideration (weight within category: 11%). In 2014, the Government has proposed to Parliament to change the Civil Code and introduce the possibility of second parent adoption to unmarried couples (including same-sex couples). Parliament still has to discuss the proposal.¹⁴ Automatic co-parent recognition where children born to same-sex couples are automatically (or at least without major obstacles) recognised legally from birth to their parents is neither available in Switzerland (weight within category: 11%).¹⁵

¹¹ See Chapters 4 to 7 in: Ziegler Andreas R./Montini Michel/Copur Eylem (eds), supra.

¹² One must say that the definition was hidden in a general proposal to end tax discrimination of certain married couples and thus led to a dilemma for many voters. This wording should have been rejected by Parliament but the latter does not use its constitutional prerogative to do so for political reasons.

¹³ See Recher Alecs, Rechte von Transmenschen, in: Ziegler Andreas R./Montini Michel/Copur Eylem (eds), supra, 105, par. 112ff.

¹⁴ The state of affairs can be followed here:
<<https://www.bj.admin.ch/bj/de/home/gesellschaft/gesetzgebung/adoptionsrecht.html>>
(last visited on 1 March 2016).

¹⁵ See Coppur Eylem, Die Elternschaft gleichgeschlechtlicher Paare, in: Ziegler Andreas R./Montini Michel/Copur Eylem (eds), supra, 455ff.

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Medically assisted insemination for lesbian same-sex couples living in a registered partnership is explicitly excluded by law (though it is not punished or sanctioned if obtained abroad) (weight within category: 7%). Such treatment is never available to single persons, including lesbians, in Switzerland but only to married (and thus for the time being opposite-sex) couples (weight within category: 4%). Obviously, the availability of such assistance abroad makes the existing prohibition more symbolic. Though not addressed by the Rainbow Index one should mention that use of surrogate mothers in Switzerland is generally forbidden at this point in time and the registration of children born from surrogate mothers abroad is difficult. A legal debate is currently taking place as to whether this is reconcilable with the interest of the child following a negative Federal Supreme Court decision.¹⁶ This affects both homosexuals and heterosexuals. It should thus be addressed in a non-discriminatory way with a particular view of the interest of the child and the surrogate mothers.¹⁷

III. Hate Crime and Hate Speech (Overall Weight 20%)¹⁸

In this area Switzerland cannot score as it does neither have specific hate crime laws relating to sexual orientation (weight within category: 18%) and gender identity (weight within category: 18%) nor a hate speech law covering sexual orientation (weight within category: 18%) or gender identity (weight within category: 18%). Any policies or national strategies tackling hate crime and hate speech with regard to sexual orientation (weight within category: 9%) or gender identity (weight within category: 9%) are equally missing. This total absence of measures relates also to intersex persons (weight within category: 10%). As a result, Switzerland has zero points in this area.

However, neither hate crimes nor hate speech are common in Switzerland, several attempts have been made to improve the visibility of the fight against such crimes. Currently there is still one parliamentary initiative pending which tried to amend the existing prohibition of racial discrimination in the Criminal Code¹⁹ in order to include « sexual orientation ».²⁰ It was accepted by both Chambers of Parliament (after initial rejection by one chamber) in 2015 and awaits now action by the Government.

¹⁶ See the case currently pending before the European Court of Human Rights relating to the Judgment of 14 September 2015 in Case 5A_443/2014.

¹⁷ See Boillet Véronique/De Luze Estelle, Mère porteuse, parents d'intention, homoparentalité... Et l'enfant ?, in: Jusletter, 5 October 2015.

¹⁸ See Curchod Alexandre, Strafrecht, in: Ziegler Andreas R./Montini Michel/Copur Eylem (eds), supra, 685ff.

¹⁹ Article 261bis Swiss Criminal Code.

²⁰ Parliamentary Initiative Reynard of 7 March 2013.

IV. Legal Gender Recognition and Bodily Integrity (Overall Weight 15%)

The Swiss legal order allows for legal gender recognition (weight within category: 10%) following a court decision and does so far not provide for any other (simpler) administrative procedures for legal gender recognition (weight within category: 8%) as this is considered unnecessary. Legislation that makes name change possible (without any major obstacles) is in place (weight within category: 8%). The current practice is to require a « Gender Identity Disorder » diagnosis/psychological opinion for legal gender recognition (weight within category: 14%).²¹

However, the fact that compulsory medical intervention is normally required leads to a loss of points (weight within category: 11%). As this medical intervention normally amounts to surgery, more points are lost (weight within category: 11%). Sterilisation or proof of infertility is a requirement for legal gender recognition and thus makes Switzerland lose these points too (weight within category: 14%). In the absence of clear legal provisions in this respect, however, the practice of the (local) courts is of paramount importance. This situation was not totally clarified in the leading case decided by the Federal Supreme Court in 1993 (BGE 119 II 264 E. 6c) as the Court only referred to the need for an irreversible change of gender without saying clearly how this could be achieved. Consequently, several more recent (lower) court decisions have not required a surgical intervention as such.²²

Divorce or single status is currently not a requirement for legal gender recognition (weight within category: 10%) according to the Rainbow Index as there are recent court decisions that have not required the dissolution/divorce of an existing marriage while the law is silent.²³

The existing Swiss law does not provide for a prohibition of medical intervention before an intersex child is able to give informed consent (weight within category: 14%). No points for Switzerland in this respect.²⁴ Here a

²¹ See Recher Alecs, Rechte von Transmenschen, in: Ziegler Andreas R./Montini Michel/Copur Eylem (eds), supra, at par. 42ff and Recher Alecs, Änderung von Name und amtlichem Geschlecht: einfach zum rechtskonformen Entscheid, FamPra.ch, No. 3, 2015, 623-641, online at: <<http://www.fampra.recht.ch/fampra/lpext.dll/fampra/avfampra15/fampra0315/inhfampra0315/inhfampra0315auf/04fampra0315auf?f=templates&fn=index.html&2.0&vid=10.1049/Deu>> (last visited 1 March 2016).

²² See Recher Alecs, Rechte von Transmenschen, in: Ziegler Andreas R./Montini Michel/Copur Eylem (eds)supra, par. 52.

²³ See idem, par. 53.

²⁴ See for a detailed study Werlen Mirjam, Persönlichkeitsschutz und höchstpersönliche Rechte bei Kindern mit einer Geschlechtsvariante (DSD), in: Jusletter 24 August 2015, online at: <http://jusletter.weblaw.ch/jusliissues/2015/812/personlichkeitsschutz_431d94276e.html> (last visited 1 March 2016).

debate should take place on how the best interest of the child can be safeguarded.

V. Freedom of Assembly, Association and Expression (Overall Weight 8%)

When it comes to existing restriction of the freedom of assembly or association and expression, Switzerland obtains all possible points. It is generally accepted that these rights are generally well protected in the country, and thus equally regarding the rights of LGBTI persons. Public events can normally be held without any state obstruction they are sufficiently protected by public authorities (e.g. police) (weight within category: 35%), in particular as the level of potential violence in this area is extremely low. A huge number of associations operate without any state obstruction and LGBTI human rights defenders can work without intimidation (weight within category: 30%). No laws limits the freedom of expression on LGBTI issues (e.g. anti-propaganda laws, censorship laws etc.) either at national or local level (weight within category: 35%) though incidentally there are questions regarding the decency of certain types of advertising without, however, amounting to any systematic obstruction.²⁵ It is obviously linked to the question of a general prohibition of discrimination, in particular when it comes to private behaviour but also to the perception of what constitutes decent behaviour.

VI. Asylum (Overall Weight: 5%)

As the existing legal framework in the area of asylum does not expressly mention (sexual orientation) (weight within category: 25%) or gender identity (weight within category: 25%) as a qualification criterion, Switzerland obtains no points in this respect. This assessment may be too harsh. Actually, both the authorities and the judiciary as well as legal writers have always considered that the right to asylum due to persecution as « member of a specific social group » currently contained in the Law on Asylum clearly includes LGBTI persons.²⁶

²⁵ See, for example, a recent debate on the decency of certain types of advertising and the role of public transport enterprises prohibiting them on their premises and in their transport vehicles, such as reported in the press in early 2015 regarding an advertising campaign by the Basler Jugendtreff (Basel Youth Meeting Point).
<<http://www.20min.ch/schweiz/basel/story/30731>> (last visited 1 March 2016).

²⁶ Article 3 par. 1 of the Law on Asylum (SR 142.31 Asylum Act of 26 June 1998); see Bertschi Martin, Migrationsrecht, in: Ziegler Andreas R./Montini Michel/Copur Eylem (eds), supra, par. 47 and Recher Alecs, Rechte von Transmenschen, in: Ziegler Andreas R./Montini Michel/Copur Eylem (eds), supra, par. 165.

The absence of an explicit policy or other positive measures regarding (sexual orientation) (weight within category: 25%) or gender identity (weight within category: 25%) costs additional points. State actors must take these measures as part of a recurrent and continuing framework, as mere *ad hoc* measures do not count. The absence of general reports as mentioned under the Chapter on Equality and Discrimination leads to a double counting, as most States would simply include a chapter on asylum in these general reports.

Conclusions

The situation of LGBTI persons in Switzerland is generally not considered as alarming. There is certainly room for improvement but the score obtained in the ILA Rainbow Index is probably not a very good indicator of the reality. When it comes to sexuality and lifestyle the country is still dominated by conservative voices and the political system lends itself to compromises and practical arrangements that lack the visibility of specific legislation and action plans. As a result, many points are lost because the country has not adopted specific actions plans or political frameworks addressing the rights of LGBTI persons. The particular problems of trans persons have only recently been given more coverage and slowly enter into the political debate.

In the area of equality and discrimination, the adoption of a specific law on discrimination (including on sexual orientation and gender identity) would certainly give more profile to the remaining fear to be discriminated by private parties. Here the traditional refusal of accepting a broad anti-discrimination approach seems deeply rooted in the Swiss political landscape. In international fora, the Government regularly defends the sectoral approach and the autonomy of the regions (cantons) to take the appropriate measures. The most important problem, however, seems to be that discrimination between private persons is insufficiently tackled and here the general perception by the public may change (or may already have changed). The study in this respect mandated by the Government may be a good beginning in this respect.²⁷

When it comes to family issues, Switzerland is probably in the midfield of European nations. The existing law on registered partnership is acceptable though the existing discriminations regarding naturalisation and access to medically assisted parenthood should be eliminated as soon as possible. The latter is useless as such assistance can easily be obtained abroad anyhow. The questions of surrogacy should be approached in a non-discriminatory way.

²⁷ A good summary of the arguments can be found at: www.skmr.ch/de/themenbereiche/institutionelle-fragen/artikel/diskriminierungsschutz.html.

Questions relating to adoption and access to medically assisted parenthood are currently discussed and, more concretely, the proposal to allow same-sex couples to adopt the child of their partners is currently before Parliament.

In the two areas of asylum and hate crimes/speech Switzerland scores absolutely no points although the situation is comparable to that of many countries with high scores. With regard to hate crimes, the adoption of a specific law as mandated by Parliaments would lead to visible improvements that are symbolically certainly important. It seems important that this opportunity be used – hopefully also covering gender identity at the same time.

When it comes to legal gender recognition the current situation in Switzerland seems also to be more complex than shown in the Rainbow Index. The existing case law of various courts in Switzerland (despite a rather severe Federal Supreme Court Judgment of 1993) seems to indicate that an official change of gender identity can be obtained without surgical interventions or compulsory divorce. The treatment of children with VSD should always safeguard the best interest of the child.

In the area of asylum, an action plan or an explicit policy program cannot be expected any time soon. The current situation regarding asylum for LGBTI persons who are prosecuted abroad due to their sexual orientation and/or gender identity seems better than reflected by the Rainbow Index.