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Switzerland

NEW STATUTORY RULES ON REGISTERED PARTNERSHIP AND PROTECTION AGAINST DOMESTIC VIOLENCE

Ingeborg Schwenzer and Anne-Florence Bock***

Résumé

Le droit de famille suisse fut marqué principalement par deux nouvelles lois en 2007: Le 1^{er} janvier 2007 la loi fédérale sur le partenariat enregistré entra en vigueur, et le 1^{er} juillet 2007 des provisions renforçant la protection des victimes de violence domestique furent insérées dans le Code Civil suisse.

L'article donne un bref aperçu de la nouvelle situation légale des partenariats homosexuels en Suisse, traitant entre autres des questions principales de la formation du partenariat, du régime patrimonial, des effets généraux et des droits parentales, ainsi que des questions plus spécifiques comme le droit fiscal et la sécurité sociale, concluant par le droit international privé. Une grande partie des dispositions de la nouvelle loi correspond au droit matrimonial – une décision législative approuvable en principe, mais aussi précipitée dans certains points où la communauté homosexuelle diffère du mariage. La nouvelle loi s'avère critiquable aussi dans la domaine des droits parentales des couples homosexuels.

La seconde partie de l'article présente les nouvelles dispositions concernant la protection renforcée des victimes de violence domestique, des mesures innovateurs pour autant que jusqu'à l'entrée en vigueur des nouvelles dispositions, au niveau fédéral, les autorités tentassent à combattre la violence conjugale surtout avec les moyens du droit criminel – des procédures orientées au passé et à la rétorsion au lieu de la prévention. Les nouvelles provisions, par contre, visent à une intervention plus rapide et efficace, avec le but de surtout permettre aux victimes de rester au domicile commun et de limiter la possibilité d'une offensive répétée, réalisant ainsi un effet préventif. De l'attention spéciale est accordée à la situation des victimes migrantes selon les dispositions de la nouvelle loi sur les étrangers entrée en vigueur le 1^{er} janvier 2008.

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I INTRODUCTION

Swiss family law in 2007 was characterised by two statutory amendments: First, the enactment of a new law permitting same-sex couples to register their partnership, and secondly, the Swiss Civil Code was amended to include new provisions affording stronger protection to victims of domestic violence.

II A NEW REGIME FOR SAME-SEX PARTNERS

Switzerland is no longer the outsider among European countries and has now established a regime for same-sex couples. After Denmark enacted the first law on the recognition of same-sex couples in 1989,¹ and after many surrounding countries have in recent years followed suit,² the Swiss Federal Law on Registered Partnership³ (LRegP) entered into force on 1 January 2007. The new law was accepted by 58% of the voting population in a referendum initiated by Christian and populist parties.⁴ Before the LRegP entered into force, registration for same-sex couples had already been possible in the cantons of Geneva,⁵ Neuchâtel⁶ and Zurich.⁷ Such cantonal registered partnerships had, however, only a limited effect, treating registered partners equally in cantonal matters such as cantonal tax, procedural and public welfare law.⁸ The new status has been a success; in the first 8 months since its enactment, over 1,000 couples chose to register their partnership. Remarkably, over 70% of the newly registered partners were men.⁹

¹ Lov om registreret partnerskab, Nr 372 vom 7 Juni 1989.
² For an overview see M Coester, *Same-Sex Relationships: A Comparative Assessment of Legal Developments Across Europe* (Die Praxis des Familienrechts, 2002) 748 et seq.
³ Bundesgesetz vom 18 Juni 2004 über die eingetragene Partnerschaft gleichgeschlechtlicher Paare (PartG), SR 211.231 (Federal Law on Registered Partnership).
⁴ On the legislative history of the new law see Büchler, Herz and Bertschi 'Allg. Einl. IV Die Entstehung des Partnerschaftsgesetzes' in A Büchler (ed) *Familienrechtskommentar Eingetragene Partnerschaft* (Berne, 2007) n 1 et seq (in the following cited as *Fam.Komm. Eingetragene Partnerschaft*).
⁵ Loi sur le partenariat of 15 February 2001, entry into force on 5 May 2001; see also Neue Zürcher Zeitung of 14 February 2005, 8.
⁶ RSN 212.120.10. The Neuchâtel model was open to heterosexual and homosexual couples, see Neue Zürcher Zeitung of 5 October 2004, 14.
⁷ Gesetz über die Registrierung gleichgeschlechtlicher Partner of 21 January 2002, entry into force on 1 July 2003; see Neue Zürcher Zeitung of 6 June 2003, 45 and Neue Zürcher Zeitung of 18 August 2002, 27. For an overview over all three cantonal regimes see Pulver and Einleitung in T Geiser and P Gremper, *Zürcher Kommentar zum Partnerschaftsgesetz* (Zurich, Basel, Geneva, 2007) n 61 et seq (in the following cited as *ZH-Komm.*).
⁸ Cottier 'Registered Partnerships for Same-Sex Couples in Switzerland: Constructing a New Model of Family Relationships' in M Maclean (ed) *Family Law and Family Value* (Oxford, 2005) 181, 183; see also Neue Zürcher Zeitung of 17 February 2005, 53.
⁹ Data by the Federal Office of Statistics, available at: www.bfs.admin.ch/bfs/portal/de/index/themen/01/06/blank/key/07.html (accessed 24 October 2007); Neue Zürcher Zeitung of 27 July 2007, 15.

Of the five different models evaluated in the legislative process,¹⁰ Switzerland has chosen an opt-in solution which mirrors marriage in many aspects. The new status has been named 'registered partnership'. Rather than inserting the new provisions in the Swiss Civil Code, which would have been the obvious position for such a regime considering its similarities to marriage,¹¹ the new status is governed by a separate law. The provisions are thus clearly separated from the rules governing marriage, showing the intention to substantively separate registered partnerships from other family forms.¹²

(a) Formation of a registered partnership

Registered partnership is only open to two persons of the same sex.¹³ In all other respects, the provisions on the conclusion of a registered partnership largely mirror the provisions on the conclusion of marriage under Swiss law. Both partners must be of age, ie 18 years old, and have the capability to understand the legal and personal significance of entering a registered partnership. Persons under guardianship need the consent of their legal guardian. Similarly to marriage, the new status is based on the principle of monogamy – only persons, who are neither living in another registered partnership nor married, may conclude a registered partnership.¹⁴ A registered partnership is prohibited between persons who are direct descendants of each other as well as siblings.

Differently from matrimonial law, the position of adopted children is not addressed. It seems clear, however, from the explanatory material, that the Parliament intended to prohibit the conclusion of a registered partnership between the adopted child and its adoptive family as well. This follows from the principle that adopted and biological children are legally treated the same, and because the prohibitions of registered partnership are motivated by protecting social family relations.¹⁵ The question remains whether an adopted child may conclude a registered partnership with a member of her biological family, since by adoption kinship of the adopted person with her biological family is legally

¹⁰ The Federal Office of Justice had considered the following five options: (i) selective amendments to existing laws with the aim of putting same-sex couples on equal footing at least in migration, (ii) inheritance and tax law, (iii) a partnership contract with limited effects, (iv) two different forms of registered partnership and (v) the opening of marriage to same-sex couples. See Bundesamt für Justiz *Die rechtliche Situation gleichgeschlechtlicher Paare in schweizerischen Rechts, Probleme und Lösungsvorschläge* (Berne, 1999) 54 et seq.

¹¹ K A Hochl *Gleichheit – Verschiedenheit. Die rechtliche Regelung gleichgeschlechtlicher Partnerschaften in der Schweiz im Verhältnis zur Ehe, Diss* (St Gallen, 2002) 45 et seq.

¹² Schwenzler, *Registrierte Partnerschaft: Der Schweizer Weg. Die Praxis des Familienrechts* (2002) 223, 225. Generally on the advantages and disadvantages of opening marriage to same-sex couples see Büchler, Ehrecht und Geschlechterkonstruktion 'Ein Beitrag zur Abschaffung der institutionalisierten Zweigeschlechtlichkeit' in Z Verein Pro Fri (ed) *Recht Richtung Frauen* (St Gallen, 2001) 59, 75 et seq.; Büchler 'Das Familienrecht der Zukunft' in R Vetterli *Auf den Weg zum Familiengericht* (Berne, 2004) 45, 52 et seq.; Hochl (above n 11), 45 et seq.

¹³ Art 2(1) LRegP.

¹⁴ Arts 3 and 4 LRegP.

¹⁵ A Büchler and R Vetterli *Ehe, Partnerschaft, Kinder* (Basel, 2007) 152.

terminated.¹⁶ Swiss matrimonial law explicitly prohibits marriage between an adopted child, its offspring and its biological ancestors.¹⁷ In spite of this, the biological considerations underlying this prohibition speak against an extension of this prohibition to same-sex couples, where it is biologically impossible to have common children.¹⁸

The procedure of registration has been modelled upon the procedure of marriage.¹⁹ The future registered partners must submit an application for registration at the civil registry office at the place of residence of one of the partners.²⁰ Similarly to marriage, the new law allows the future registered partners to choose the place of registration²¹ since, contrary to what might be expected from its wording, Art 5(1) LRegP only refers to the preparatory procedure. The partners must submit their application in person, if possible, and must personally declare that the preconditions for a registered partnership have been met. The registrar then examines whether the preconditions for the conclusion of a registered partnership are met, and registers the statements made by the partners in the public registration procedure. Unlike marriage, witnesses are not required. Once the registration procedure has been concluded, the new status of the partners – 'in registered partnership' – takes legal effect.

When the new Law on Foreigners²² enters into force on 1 January 2008, the registrar will have to deny the registration of the partnership if it appears obvious that one of the partners only intends to register the partnership to circumvent the provisions of migration law and to obtain a residence permit in Switzerland. To this effect, the registrar may question the partners and even third persons.²³ How this provision will be applied in practice is yet to be seen. So far, it has provoked substantial opposition by the civil registration officials, who consider themselves neither able nor competent to conduct such an examination, and believe that the detection of marriage fraud should be left to the migration authorities.²⁴

¹⁶ Art 267(2) Swiss Civil Code; C Hegnauer *Berner Kommentar* (Bern, 1984) Art 267 ZGB, n 13 et seq.

¹⁷ Art 95(2) Swiss Civil Code.

¹⁸ A Büchler and M Michel *FamKomm Eingetragene Partnerschaft*, Art 4, n 2; Schwenzler (above n 12), 227.; Geiser, *ZH-Komm*, Art 4, n 7 reaches the same conclusion.

¹⁹ Arts 5–8 LRegP; Arts 75a–75i Zivilstandsverordnung (ZStV), SR 211.112.2 (Ordinance on the Civil Registry). See also the Explanatory Report of the Federal Council, Botschaft zum Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare, Bundesblatt 2002, 1288, 1312, that explains that the conclusion of the partnership is largely based on matrimonial law, but has been slightly simplified, eg no witnesses are required. Geiser 'Eingetragene Partnerschaft: Fast wie die Ehe', *plädoyer* 3/2005, 26, 27.

²⁰ Art 5(1) LRegP.

²¹ Art 75f ZStV. Geiser, *ZH-Komm*, Art 5–8, n 35.

²² Bundesgesetz über die Ausländerinnen und Ausländer (AusG), Bundesblatt 2005, 7365.

²³ Bundesblatt 2005, 7365, 7422. This new law will add Art 6(2) and (3) and Art 9(1)(c) to the LRegP. Furthermore, if a fictitious partnership is concluded, any interested party will have the possibility to file an application to have the registered partnership declared invalid. See Geiser, *ZH-Komm*, Art 5–8, n 23 et seq.

²⁴ Rigendinger, Lieber Frauen als Misstrauen, NZZ am Sonntag of 2 November 2003, 17; Heikle 'Kontrolle von Ehen', *Neue Zürcher Zeitung* of 26 September 2007, 17; cf also *Neue Zürcher*

If one of the partners was acting under a mistake at the time of entering the registered partnership, or was deceived or threatened into concluding the registered partnership, the partner may file an application to declare the registered partnership invalid within 6 months after the partner gained knowledge of such circumstances, but no later than 5 years after the registration of the partnership.²⁵ If one of the partners lacked the capability of understanding at the time of registration, if the partners are related by a prohibited degree of kinship or if one of the partners is already married or in another registered partnership, any interested party may file an application to declare invalid the registered partnership. In such circumstances, no time-limits restrict the right to contest the validity of the partnership.²⁶

(b) Legal consequences of the registered partnership

(i) Name, nationality and citizenship

Unlike marriage, a registered partnership does not change the name of the partners. While it is a rather modern choice and surely appropriate not to require registered partners to change their name, there is no justifiable reason for denying registered partners the option and symbolism of carrying the same name.²⁷ What remains is the possibility to carry the so-called 'Allianz-name' – ie a name where the family name of the partner is added to the own name by a hyphen. All the same, such a name, although commonly recognised, has no legal relevance.

A registered partnership does not affect nationality or citizenship of the partners. However, a foreign registered partner of a Swiss national profits from facilitated conditions for naturalisation, as only 5 years of residence (instead of 12 years) in Switzerland are required if the partnership has lasted at least 3 years.²⁸

Zeitung of 8 March 2007, 'Heirat nur zum Schein oder grenzenlose Liebe?', 53; critical also Papaux Van Delden, *Mariages fictifs*, Jusletter of 22 October 2007, n 4 et seq.; Dolivo 'Quelques facettes du projet de loi sur les étrangers', *Revue de droit administratif et de droit fiscal* (Revue genevoise de droit public) 2003, 1, 13; Sandoz 'Dann doch lieber falsche Ehen', NZZ am Sonntag of 11 June 2006, 22.

²⁵ Art 10 LRegP.

²⁶ Art 11 LRegP.

²⁷ Schwenzler *Die Praxis des Familienrechts* 2002 (above n 12) 228; Büchler and Michel 'Das Bundesgesetz über die eingetragene Partnerschaft im Überblick' in S Wolf (ed) *Das Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare* (Bern, 2006) 1, 28; Wolf and Genna, *ZH-Komm*, Art 13, n 11 et seq.

²⁸ Art 15(5) and (6) Bundesgesetz über den Erwerb und den Verlust des Schweizerischen Bürgerrechts (BüG), SR 141.0 (Federal law on naturalisation and the loss of Swiss citizenship). See also Roth 'Die öffentlich-rechtlichen Aspekte des Partnerschaftsgesetzes auf den Ebenen des Bundes und der Kantone, mit besonderer Berücksichtigung der Rechtslage im Kanton Bern' in S Wolf (ed) *Das Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare* (Bern, 2006) 103, 112.

(ii) Mutual respect, support and maintenance

Registered partners owe each other mutual respect and support.²⁹ They are supposed to jointly provide for their livelihood,³⁰ the same obligation as that which exists for spouses. If one of the partners is a parent, the other partner has the obligation to support his partner when fulfilling his duties of parental responsibility and maintenance of the child.³¹

Contrary to matrimonial law, the law does not provide for compensation in the situation where one of the partners has contributed significantly more to the common livelihood than could be expected from him. This may be the case if, for example, one partner works in the other partner's business, or contributes more than his share to the common expenses with his income or property. According to the explanatory report, such relations shall be governed by the applicable contract and labour law. This presumption does not sufficiently take into account the emotional relationship of the partners, and may therefore complicate achieving fair monetary compensation especially in cases where the partners have not contractually regulated their relationship in this respect. This provokes the question of why it should be easier for registered partners to reach an agreement than for spouses, where the legislature recognised the need for such a provision back in 1984.³²

Further, the law gives the court the power to order various measures for the protection of one of the partners if necessary, such as ordering one partner to provide information about his financial situation³³ or the power to make an order fixing the respective maintenance contributions due by each partner.³⁴

(iii) Partnership property law

Partnership property law reflects the legislature's concept of two economically independent individuals who pursue their careers separately;³⁵ this is different from the general concept in matrimonial property law of spouses living the 'traditional' role model of homemaker and breadwinner. Partnership property law also takes into account that, generally, no partnership related detriments are to be expected.³⁶

²⁹ Art 12 LRegP, M. Grütter and D. Summermatter *Das Partnerschaftsgesetz, Die Praxis des Familienrechts 2004*, 449, 541.

³⁰ Art 13 LRegP.

³¹ Art 27 LRegP.

³² See also Bächler and Michel in S. Wolf (ed) *Das Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare* (Berne, 2006) (above n 27) 32 et seq.; Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 229.

³³ Art 16 LRegP.

³⁴ Art 13(2) LRegP. The effect of this provision is reinforced by Art 13(3) LRegP, according to which the court may order debtors of the defaulting partner (most importantly, her employer) to directly pay the maintenance sums due to the other partner.

³⁵ Explanatory Report of the Federal Council, Bundesblatt 2002, (above n 19) 1311; see Cottier (above n 8) 189 et seq on different concepts of the 'model' same-sex couple.

³⁶ Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 226, approves of this.

The statutory property regime is separate property,³⁷ ie the registered partnership neither affects the ownership of the partners, nor provides for an equal sharing of partnership related benefits at the dissolution of the partnership. This has been the subject of controversy. On one side, it was emphasised that, in a same-sex relationship, no partnership related detriments were to be expected. Therefore, it was regarded as appropriate not to apply special compensation or sharing mechanisms by default, as long as the partners have the option to contractually agree on another solution where the statutory solution was not appropriate.³⁸ On the other side, it was pointed out that partnership should, as marriage, be regarded as a common endeavour, which justifies sharing benefits and an increase in wealth obtained during the partnership. Further, it was argued that because nuptial agreements are in practice only rarely concluded, one should not have too much faith in the corrective function of partnership agreements.³⁹

Equal sharing is frequently justified by the presumption that both partners contribute equally to the common good, although non-monetary contributions may be difficult to measure,⁴⁰ and the protection of the socially and economically weaker party.⁴¹

Registered partners will very likely not live the 'traditional role model' according to which one partner is the homemaker and the other the breadwinner. Considering that the law should provide a solution adapted to the majority of partnerships, it is at least understandable why the legislator chose a different property regime for registered partners from that for spouses.

Another question is that of the consistency of the individual provisions of the Law on Registered Partnership. Remarkably, the legislature seemed to adopt a different concept when it decided that social security entitlements were to be shared equally by the partners. There is more on the legal consequences of these divergent rules below.

In any case, according to Art 25 LRegP, the partners have the chance to conclude a 'property contract' and thereby tailor the financial consequences of

³⁷ Art 18 LRegP et seq, S. Wolf *Ehe, Konkubinats und registrierte Partnerschaft gemäss dem Vorentwurf zu einem BG, recht 2002*, 157, 162.

³⁸ Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 229.

³⁹ Grenpter *Vermögensrechtliche Wirkungen der eingetragenen Partnerschaft, Die Praxis des Familienrechts 2004*, 475, 484. Cf. also in detail Wolf *recht 2002* (above n 37) 164 et seq.; Hochl (above n 11) 61; Bächler and Michel in S. Wolf (ed) *Das Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare* (Berne, 2006) (above n 27) 50. Pichonnaz, Kapitel 6. Der Partnergüterstand der eingetragenen Partner in A. R. Ziegler et al (eds) *Rechte der Lesben und Schwulen in der Schweiz* (Berne, 2007) 206, even speaks of an unconstitutional discrimination in this respect.

⁴⁰ Hausheer 'Eheliche Gemeinschaft, Partnerschaft und Vermögen im Europäischen Vergleich' in D. Henrich and D. Schwab (eds) *Eheliche Gemeinschaft, Partnerschaft und Vermögen im europäischen Vergleich* (Bielefeld, 1999) 223 et seq, 252; Bächler and Vetterli (above n 15) 52; see also *Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht)* (Bundesblatt, 1979) 1191 et seq, 1320.

⁴¹ Cf. Grenpter *Die Praxis des Familienrechts 2004* (above n 39) 486.

their partnership to their individual situation.⁴² Such a contract must be notarised.⁴³ Yet, the extent of party autonomy afforded to the partners by this provision is not clear.⁴⁴ The wording of Art 25 LRegP allows the partners to 'agree on special provisions to apply at the dissolution of the partnership',⁴⁵ namely to choose the statutory matrimonial property regime of community of acquisitions ('*Ermungenschaftsbeteiligung*'). Further, the explanatory report expressly states that it was not intended to allow registered partners to choose the property regime of community of property.⁴⁶

It is not clear, however, whether the partners may agree to an individual and new property regime. This must be doubted since, under Swiss matrimonial property law, spouses may only choose between one of three property regimes, and may only depart from these rules where this is explicitly provided for by the law.⁴⁷ The Law on Registered Partnership does not contain a parallel restriction. However, there is no indication that the legislature intended to privilege registered partners over spouses in this respect. As long as there is no court practice to the contrary, it must therefore be assumed that registered partners' possibilities to contractually adapt their property relations are as limited as those of married partners.⁴⁸

The provisions governing the property relationships between the partners are further completed by provisions governing the partners' respective rights to information about their partner's financial situation,⁴⁹ the right to request the participation in drawing up an inventory of the assets,⁵⁰ rules on mutual

⁴² For a practical viewpoint and examples see Liatowitsch and Matefi 'Arbeitskreis 6: Eingetragene Partnerschaften: Vermögens- und Partnerschaftsverträge' in J Schwenzler and A Büchler (eds) *Dritte Schweizer Familienrechtstage* (Bern, 2006) 177 et seq.

⁴³ Art 23(3) LRegP.

⁴⁴ Wolf *recht* 2002 (above n 37) 164.

⁴⁵ Although the text of this provision merely limits the effect of a property contract to the dissolution of partnership, commentators unanimously hold that a partnership contract affects partnership property also if the property regime is dissolved without a dissolution of the partnership. Wolf and Steiner 'Das Vermögensrecht und die weiteren für das Notariat relevanten Aspekte des Partnerschaftsgesetzes' in S Wolf (ed) *Das Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare* (Bern, 2006) 53, 88 et seq; Gremper, *Die Praxis des Familienrechts* 2004 (above n 39) 500; Büchler and Matefi *FamKomm Eingetragene Partnerschaft* Art 25, n 23 et seq; S Wolf *Die Auswirkungen der eingetragenen Partnerschaft auf Notariat und Grundbuchführung, Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht* (2007) 157, 168.

⁴⁶ Explanatory Report of the Federal Council, *Bundesblatt* 2002 (above n 19) 1318. Critical: Geiser, *Partnerschaftsgesetz und Notariat, Allgemeine Juristische Praxis* 2007, 3, 10.

⁴⁷ Art 182(2) Swiss Civil Code. Generally on the scope of marriage contracts under Swiss law see H Hausheer, R Reusser and T Geiser *Berner Kommentar zum Schweizerischen Privatrecht* (Bern, 1992) Art 182, n 27 et seq.

⁴⁸ Gremper, *Die Praxis des Familienrechts* 2003 (above n 39) 494; cf also Grütter and Summermatter *Die Praxis des Familienrechts* 2004 (above n 29) 462; in detail Wolf and Steiner (above n 45) 82 et seq; Geiser *Allgemeine Juristische Praxis* 2007 (above n 46) 10; cf also Wolf *Die Auswirkungen der eingetragenen Partnerschaft auf Notariat und Grundbuchführung* (above n 45), 164 et seq; in detail see Gremper *ZH-Komm Art 25*, n 23 et seq.

⁴⁹ Art 16 LRegP.

⁵⁰ Art 20 LRegP.

representation in transactions for the day-to-day needs of the partners;⁵¹ and rules on protective measures, such as restricting a partner's right to dispose of certain assets if this is necessary to protect the economic basis of the registered partnership.⁵²

(iv) The common residence

As for spouses, the legislator has enacted special provisions protecting the spatial centre of the partnership, the common residence. Each of the partners may only terminate the lease of the common residence with the consent of the other partner.⁵³ Consent by both partners is also required for the sale of the property or any other legal transaction which affects the rights to the common residence.⁵⁴ The right to stay in the common residence is also protected at the dissolution of the registered partnership. If one of the partners is dependent on the apartment or house for important reasons, the court may transfer the rental contract to him and may even grant the non-owning partner a right of residence against the owning partner if this may be fairly expected from the other partner.⁵⁵ Important reasons requiring the reallocation of the common residence may primarily be children, although the Swiss concept of registered partnership does not promote same-sex parenting. Further important reasons include the situation where one of the partners is disabled or is specifically dependent on the former common residence for business reasons.⁵⁶

(v) Children

Article 28 LRegP prohibits registered partners from adopting children and denies them access to medically assisted reproduction technology. This is explained by 'the natural condition that every child must have a father and a mother who each play their specific role in its development'.⁵⁷ Paradoxically, the law thereby penalises same-sex couples who wish to assume responsibility by entering into a registered partnership, while single persons are eligible for adoption regardless of their sexual orientation.⁵⁸ Sociological research revealing that children growing up in same-sex relationships do not suffer any disadvantages on a psychological or sociological level when compared to their

⁵¹ Art 15 LRegP.

⁵² Art 22 LRegP.

⁵³ In detail see Hülliger 'Mietrechtliche Aspekte des neuen Partnerschaftsgesetzes' *Mietrecht aktuell* 2007, 1 et seq.

⁵⁴ Art 14 LPartG. In detail see Büchler and Vetterli, *FamKomm Eingetragene Partnerschaft* Art 14, n 1; Wolf and Gemma, *ZH-Komm Art 14*, n 1 et seq; Pfäffli, *Partnerschaftsgesetz und Sachenrecht, Die Praxis des Familienrechts* 2007, 600 et seq.

⁵⁵ Art 31 PartG.

⁵⁶ Büchler *FamKomm Eingetragene Partnerschaft* Art 32, n 16 et seq.

⁵⁷ Explanatory Report of the Federal Council, *Bundesblatt* 2002, (above n 19) 1320. Critical in this respect Schweighauser *ZH-Komm Art 28*, n 14 et seq, who points out that the best interests of the child would have been better ensured by examining the eligibility and parental skills of the prospective parents on a case-by-case basis.

⁵⁸ Schwenzler *FamKomm Eingetragene Partnerschaft* Art 28, n 15.

peers, but that two caring parents affect the child's development more positively than one, casts even more doubt on this prohibition.⁵⁹ Further, international developments point in the direction of a gradual recognition of same-sex parentage.⁶⁰

The question of same-sex adoption was much disputed in Parliament.⁶¹ Apart from conservative moral concepts, one reason why adoption by same-sex couples was not permitted may lie in the Swiss direct democracy system. Considering that wide parts of the Swiss population do not yet favour same-sex adoption, a more progressive solution would have endangered the acceptance of the new law in a referendum.⁶²

The fact that children will grow up with same-sex parents is nevertheless recognised.⁶³ If one partner is a parent, the other partner has the obligation to support his partner in the fulfilment of the duty of parental responsibility and maintenance of the child. The social ties that may be established by the non-parent partner are partly protected by the possibility to apply to the guardianship authorities for the right to visit and have contact with the child if the registered partnership is dissolved or if the partners no longer live together.⁶⁴

⁵⁹ Stacey and Biblarz '(How) does the Sexual Orientation of Parents Matter?' (2001) 66 *American Sociological Review* 159, 176; Rauchfleisch *Gleichgeschlechtliche Partnerschaften aus psychologischer Sicht, Die Praxis des Familienrechts* 2004 507, 516; Dittberner *Lebenspartnerschaft und Kindschaftsrecht* (Thesis, Frankfurt aM, 2004) 160 et seq; American Psychological Association *Lesbian and Gay Parenting: A Resource for Psychologists* (Washington DC, 1995) 8, available online at www.apa.org/pi/parent.html (accessed 6 November 2007); cf also Murray 'Same-Sex Families: Outcomes for Children and Parents' (2004) 34 *Family Law* 136, 137 et seq. For an overview of studies analysing the situation of children in same-sex partnerships see U Rauchfleisch *Alternative Familienformen, Einzeltern, gleichgeschlechtliche Paare, Hausmänner* (Göttingen, 1997) 70 et seq; Fthenakis 'Gleichgeschlechtliche Lebensgemeinschaften und kindliche Entwicklung' in: J Basedow, J Hopt, H Kötz and P Dopffel *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (Tübingen, 2000) 251, 382 et seq; B Eggen *Homosexuelle Paare mit Kindern, Die Praxis des Familienrechts* 2007 823 et seq; Stacey, 'Legal Recognition of Same-Sex Couples: The Impact on Children and Families' (2004) 23 *Quinnipiac Law Review* 529, 531 et seq; K Muscheler *Das Recht der eingetragenen Lebenspartnerschaft* (Berlin, 2004) 335.

⁶⁰ For an overview see Schwenzer 'Convergence and Divergence in the Law on Same-Sex Partnerships' in M Antokolskaia (ed) *Convergence and Divergence of Family Law in Europe* (Antwerp, Oxford, Amsterdam, 2007) 145, 150 et seq. Adoption has been extended to same-sex couples in – among others – many US states and Australian territories, England and Wales, Belgium and Spain.

⁶¹ See *Antilches Bulletin* 2003, n 1823 et seq.
⁶² See the vote of Member of the Federal Council Ruth Metzler, AB 2003, N 1825. See more generally Büchler and Vetterli (above n 15) 147; Schweighauser *ZH-Komm* Art 28, n 1.
⁶³ Art 27 LPatG; see also Geiser *plädoyer* 3/2005 (above n 19) 28.

⁶⁴ The prerequisites are that such contact is in the best interests of the child and is required by important reasons, i.e. a close relationship of the partner with the child. For the special situation of children 'planned' together by same-sex partners see Schwenzer *FamKomm Eingetragene Partnerschaft* Art 27, n 30 et seq. Critical with respect to the competence of the guardianship authorities Grütter/Summermatter *Die Praxis des Familienrechts* 2004 (above n 29) 465. The authors point out that in the context of the dissolution of the partnership, it would have been appropriate to decide on the contact with the child in the same procedure.

(vi) Inheritance Law

According to Art 462 Swiss Civil Code, a surviving registered partner is put in the same position as a surviving spouse, i.e. she has a statutory right of inheritance and has a right to a legal portion of her partner's inheritance, which is protected against disposition of her partner by will.⁶⁵

(vii) Social security

Social Security Law also treats registered partners the same as spouses – this is explicitly stated by Art 13a ATSG.⁶⁶ Consequently, registered partners enjoy the same benefits and restrictions as spouses under Old Age, Survivors' and Disability Pension Law (AHV and IV), medical insurance, accident insurance, military insurance, unemployment insurance etc.⁶⁷ In general, this is well justified, since these benefits and restrictions mirror the benefits and disadvantages resulting from their community.⁶⁸ By contrast, the splitting of the Old Age and Survivors' pension entitlement ('AHV-Splitting') is unsuitable for registered partners. The AHV-Splitting was meant to equalise the disparity that resulted for housewives that were not able to build up sufficient social security entitlements. As pointed out above, at least in the majority of registered partnerships, no partnership related detriments will exist. This indicates that splitting social security entitlements will not be substantively justified in the majority of cases.⁶⁹ After all, a registered partnership in itself is not a legitimate ground to equalise a disparity in income which is not related to the partnership itself.

(viii) Tax Law

At the federal level, Art 9(1^{bis}) DBG⁷⁰ requires that registered partners are treated the same as spouses for tax purposes. Also, Art 3(4) StHG⁷¹ obliges the cantons to treat spouses and registered partners the same for the cantonal income and property tax.⁷²

⁶⁵ In detail Wolf and Gemma *ZH-Komm, Erbrecht der eingetragenen Partnerschaft*, n 1 ff.

⁶⁶ Bundesgesetz vom 6 Oktober 2000 über den Allgemeinen Teil des Sozialversicherungsrechts (ATSG), SR 830.1 (Federal law on the general part of social security law).

⁶⁷ In more detail Wolf (above n 28) 116 et seq. The only difference exists after the death of one partner, where the surviving partner is put into the position of a *widower*, this is slightly less favourable than the legal position of a widow. In detail see Rumo-Jungo and Gerber Jenni *ZH-Komm, Sozialversicherungen*, n 8 et seq.

⁶⁸ Schwenzer *Die Praxis des Familienrechts* 2002 (above n 12) 231.

⁶⁹ *Ibid.*

⁷⁰ Bundesgesetz über die direkte Bundessteuer, SR 642.11 (Federal Law on the Direct Federal Tax).

⁷¹ Bundesgesetz vom 14 Dezember 1990 über die Harmonisierung der direkten Steuern der Kantone und Gemeinden (SHG), SR 642 (Federal Law on the Harmonisation of the cantons' direct taxes).

⁷² More in detail Roth (above n 28) 114.

Nonetheless, instead of being an advantage, equal treatment is likely to lead to a higher tax burden in this instance, particularly in dual-income partnerships. On one side, the partners benefit from higher tax deductions and special tax rates; on the other side, the income of the partners is added together to determine the applicable tax rate. In cantons which raise taxes on a progressive scale, this frequently outweighs the benefits of partnership tax rates, and leads to an overall higher tax burden compared to cohabitants. This discrimination of married and registered partners – commonly referred to as the ‘marriage-penalty’ – is regarded as unconstitutional,⁷³ and is currently under revision. A specific reform proposal has, however, not yet been agreed on.⁷⁴

Inheritance and gift taxes are solely within the competence of the cantons. It has been argued, however, that the duty not to impede federal law⁷⁵ and also the constitutional prohibition of discrimination⁷⁶ requires the cantons to provide for equal treatment nevertheless. So far, most cantons are preparing to enact provisions which grant registered partners the same benefits as spouses.⁷⁷

(ix) Migration Law

In Migration Law registered partners are treated the same as spouses.⁷⁸ A foreign national living in a registered partnership either with a person of Swiss nationality or a foreigner with a residence permit in Switzerland is required to share a residence with her partner. An exception to this provision is possible if this is required by important reasons and if they still form a couple.⁷⁹ A special and more favourable regime applies to EU-nationals.⁸⁰

(c) Dissolution of the registered partnership

(i) Conditions for the dissolution of the registered partnership

As is the case with marriage, a registered partnership can only be dissolved by a court, and not merely by an administrative authority.⁸¹ This is meant to underline the importance of dissolution, and to ensure a judicial control of the

⁷³ The Supreme Federal Court has declared this to be unconstitutional in its decision BGE 110 Ia 7. However, until today no law removing this discrimination has been adopted.

⁷⁴ Detailed information is available at: www.efcd.admin.ch/index/index.html?action=id&id=220&lang=de (accessed 28 October 2007).

⁷⁵ Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 232.

⁷⁶ Cf. Hangartner *Verfassungsrechtliche Grundlagen einer registrierten Partnerschaft für gleichgeschlechtliche Paare, Allgemeine Juristische Praxis 2001*, 252, 260.

⁷⁷ Ramsauer *FamKomm Eingetragene Partnerschaft*, Anh 24 DBG/25 StHG, n 12.

⁷⁸ Art 52 AusG (above n 22).

⁷⁹ See Pulver *ZH-Komm*, Art 52 AuG/Art 7 + 17 ANAG, n 28 et seq.

⁸⁰ See the Convention between the Swiss Confederation and the European Community and its member states on the free movement of persons of 21 June 1999, SR 0.142.112.681. Among other things, no common residence is required.

⁸¹ Art 29 LPartG et seq. In detail see Nguyen ‘Le regroupement familial dans la loi sur les étrangers et dans la loi sur l’asile révisée’ in A. Achermann et al. (eds) *Jahrbuch für Migrationsrecht 2005/2006* (Berne, 2006) 31 et seq.

consequences.⁸² It remains questionable, however, whether a merely administrative dissolution might not have been preferable, since the conditions for the dissolution of a partnership are less strict than for divorce, and since no partnership related detriments which ought to be adjusted are to be expected in the majority of cases.⁸³

The law provides for two grounds of dissolution. First, the partners may jointly request the dissolution of their partnership having reached an agreement on the consequences of separation which is suitable for approval by the court; secondly, after one year of separation either of the partners may file a suit for dissolution.⁸⁴ Hardship does not constitute a ground for dissolution. This may be explained by the comparatively short separation period. The shorter separation period compared to marriage and the lack of a period of deliberation after separation by consent may be explained by the expectation that normally no common children will exist in a registered partnership.⁸⁵

The procedure for dissolution is governed by the corresponding rules of divorce law.⁸⁶

(ii) Effects of the dissolution of the partnership

General

As indicated above, the partners may agree on the consequences of their separation. Such an agreement must be approved by the court. The conditions for approval are not strict. The court may only examine whether the agreement is clear, complete and not obviously inadequate and whether the convention was agreed to by free will and with due consideration by the partners.⁸⁷

Maintenance

Article 34 LRegP sets forth the principle that in general, each of the partners is responsible for his own maintenance after separation. This provision reflects

⁸² Büchler and Veiterli (above n 15) 163, point out that this corresponds to the institutional character of registered partnership.

⁸³ Schwenzer *Die Praxis des Familienrechts 2002* (above n 12) 233.

⁸⁴ Art 29 and 30 LRegP. Swiss matrimonial law, by contrast, provides for three grounds for divorce: a joint request of the spouses, separation of 2 years, and if the continuation of marriage (ie the status, not living together) is unbearable for one of the partners.

⁸⁵ A modern solution could thus lie in shortening the separation period for divorce as well, as certain commentators have suggested, but then maybe in differentiating between partnerships in which the interest of third persons requires a prolonged time for consideration. A similar solution has been adopted, eg. in Sweden (Swedish Marriage Code, Ch 5, s 1–2); cf also Schwenzer *Model Family Code* (Antwerp, Oxford, 2007) 24.

⁸⁶ Art 35 LRegP refers to Art 135–149 Swiss Civil Code.

⁸⁷ On the contents and clarity required by the law see (for matrimonial law) Fankhauser *Ausarbeitung und Besonderheiten von Scheidungskonventionen, Die Praxis des Familienrechts 2004*, 287, 289 et seq. On the extent of control with regard to the content see Leutenberger and Schwenzer, Art 140, n 17 et seq. in Schwenzer (ed), *Familienrechtskommentar Scheidung* (Berne, 2005) (in the following cited as *FamKomm Scheidung*).

the standard situation that no partnership related detriments follow from a registered partnership. Article 34(2) nevertheless provides for financial adjustment if one of the partners reduced or did not engage in employment because of the division of roles adopted by the partners. In any case, maintenance payments can be claimed only until the partner in need is able to provide for his living by his own efforts. A second ground justifying maintenance payments exists if the dissolution of the partnership causes need for the other partner, and if the payment of maintenance does not place an inappropriate burden on the providing partner.⁸⁸

Further, Art 34(4) LRegP refers to the provisions on maintenance in divorce law. This includes, *inter alia*, the conditions under which a maintenance claim is regarded as obviously inequitable⁸⁹ and the conditions under which maintenance orders may be modified.⁹⁰

Pension sharing

Registered partners are treated the same as spouses for the occupational benefits plans scheme,⁹¹ not only with regard to pension entitlements, but also with regard to pension sharing at the dissolution of the partnership.⁹² Article 33 LRegP provides for an equal splitting of pension entitlements per reference to divorce law. A first point of criticism is that this rule is not suitable for the standard situation in which both registered partners continue to pursue their individual careers without either partner suffering from a detriment due to the registered partnership. More significantly, the pension splitting provision may lead to arbitrary results in connection with partnership property law. If one partner is self-employed and thus not required to join a pension fund, he will normally provide for his retirement either by saving or investing money, by purchasing a life insurance policy or otherwise. Such private provisions do not have to be shared according to the property regime of separate property. The other partner would by contrast have to share his pension entitlements, without participating in his partner's savings.⁹³ Here, it is problematic that the solution found in matrimonial law was applied to registered partners without considering the factual difference between the two relationships or the internal consistency of the law.

⁸⁸ In more detail Grütter and Summermatter *Die Praxis des Familienrechts* 2004 (above n 29) 471 et seq.

⁸⁹ Art 125(3) Swiss Civil Code, namely if the person entitled to maintenance has grossly breached obligations to contribute to the living of the family; has deliberately caused her own neediness; or has committed a grave crime against the person obliged to pay maintenance or a person close to the maintenance debtor.

⁹⁰ Art 128 et seq Swiss Civil Code.

⁹¹ Bundesgesetz vom 25 Juni 1982 über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge (BVG), SR 831.40.

⁹² For a detailed account of the consequences of a registered partnership on pension entitlements see Moser 'Die Lebenspartnerschaft in der beruflichen Vorsorge nach geltendem und künftigem Recht' *Aktuelle Juristische Praxis* 2004, 1057 et seq.

⁹³ Schwenger *Die Praxis des Familienrechts* 2002 (above n 12) 235. Gremper *Die Praxis des Familienrechts* 2004 (above n 39) 492, also observes this inconsistency. However, he concludes that this indicates that separate property is not the proper property regime.

(d) Private International Law

(i) General principles

Whereas, prior to the enactment of the Law on Registered Partnership, the main point of discussion was whether a union between same-sex partners was contrary to public policy or whether the Private International Law Provisions on marriage could be applied by analogy,⁹⁴ the introduction of registered partnership caused the need to amend the Swiss Private International Law Act.

The new provisions inserted into the Swiss PILA⁹⁵ mainly refer to the corresponding provisions on marriage. The prevalent connecting factor is therefore the common residence of the partners.⁹⁶ According to the explanatory report, the reason for this – comparatively singular – approach is that an increasing number of states have enacted provisions affording legal protection and a new status to same-sex couples, with yet more legal systems expected to follow suit.⁹⁷ The connecting factor of the common residence is expected to ensure a closer connection to the applicable law than the *lex loci celebrationis*, the importance of which diminishes if the partners move into another legal environment. On the other side, the connecting factor of common residence has the disadvantage of possible shifting, and may further cause problems if the place of residence has not yet enacted a regime for same-sex partners.⁹⁸

The qualification of 'registered partnership' according to the PILA warrants a closer look. Here, one may not simply apply the corresponding concept of national law, since the forms of legally recognised regimes for same-sex partners vary widely; ranging from marriage itself to more contract-like forms, with hardly any resemblance to marriage. The PILA does not itself define what is meant by 'registered partnership'. The explanatory report states that the scope of the new provisions is supposed to extend only to partnerships that affect the legal status of the partners *and* have effects similar to marriage.⁹⁹ Such a narrow interpretation would, however, exclude national concepts which

⁹⁴ See among others Girsberger and Droese, 'Registrierte Partnerschaften – schweizerisches IPR de lege ferenda' *Schweizerische Zeitschrift für internationales und europäisches Recht* 2001, 73 et seq.; Kren Kostkiewicz, 'Registrierte Partnerschaften gleichgeschlechtlicher Personen aus der Sicht des IPR (de lege lata)' *Schweizerische Zeitschrift für internationales und europäisches Recht* 2001, 101 et seq.; Guillaume 'Une proposition de réglementation du partenariat inséparable dans la LDIP' in Guillaume and Arn (eds) *Cohabitation non maritale. Evolution récente en droit suisse et étranger* (Geneva, 2000) 180 et seq. For an overview of the legal situation prior to 1 January 2007 see Widmer *FamKomm Eingetragene Partnerschaft* Teil 4 Internationales Privatrecht, n 5 ff.

⁹⁵ Bundesgesetz vom 18 Dezember 1989 über das Internationale Privatrecht (IPRG), SR 291 (Federal Private International Law Act, in the following cited as PILA).

⁹⁶ Eg Art 48 Swiss PILA.

⁹⁷ Botschaft zum Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare, Bundesblatt 2002, 1288, 1359.

⁹⁸ Widmer *FamKomm Eingetragene Partnerschaft* Teil 4 Internationales Privatrecht, n 3.

⁹⁹ Botschaft zum Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare, Bundesblatt 2002, 1288, 1360.

on the substantive level differ from marriage, but are nevertheless regarded as an institutionalised form of partnership in their country of origin.¹⁰⁰ Excluding partnership models with more contractual characteristics would result in the application of the PIL provisions on contract law, which would not lead to appropriate results.¹⁰¹ For the same reasons, partnership models recognising *de facto* relationships should be subsumed under the PIL-definition of 'registered partnership'. In conclusion, a publicly recognised and mutually exclusive union of two people which entails consequences in private law should be regarded as partnership in the Swiss PILA.¹⁰²

(ii) Registration in Switzerland

The aim of the provisions governing registration was to prevent foreign couples without sufficient ties to Switzerland from registering their partnership there. Consequently, Art 65a and 43(1) PILA require at least one of the partners to be a Swiss citizen or to have his residence in Switzerland. Unlike marriage, registration is not possible for two foreign partners only because the registration would be recognised in their country of origin or residence.

According to Art 44(1) PILA, Swiss law is applicable to partnerships registered in Switzerland.

(iii) Recognition of partnerships registered abroad

The rules on recognition of a registered partnership are governed by the principles of '*favor validitatis*'. Pursuant to Art 45(1) and 65a PILA, a partnership concluded abroad is recognised. A partnership is deemed to be concluded abroad if it is valid either according to the law of the country of origin or of residence of either partner, or in the country where the partnership was concluded.¹⁰³ A special restriction applies to Swiss nationals: if two Swiss nationals conclude a partnership abroad, it is valid as long as the foreign place of registration was not chosen with the intention to circumvent the Swiss law's grounds for invalidity of the partnership.¹⁰⁴

Finally, Art 45(3) PILA specifically deals with the situation that same-sex partners have concluded a marriage abroad. Since in Switzerland, it was explicitly regarded as inappropriate to allow same-sex partners to marry, such a marriage formed abroad will only be recognised as a registered partnership in Switzerland.

¹⁰⁰ Bucher *Le couple en droit international privé* (Basel, Geneva, Munich, 2004) n 521; Widmer *FamKomm Eingetragene Partnerschaft* Teil 4 Internationales Privatrecht, n 43.

¹⁰¹ Bucher 'Le regard du législateur suisse sur les conflits de lois en matière de partenariat enregistré' in Institut suisse de droit comparé *Aspects de droit international privé des partenariats enregistrés en Europe*, 137, 140.

¹⁰² Widmer *FamKomm Eingetragene Partnerschaft* Teil 4 Internationales Privatrecht, n 30 et seq.

¹⁰³ *Ibid* n 73.

¹⁰⁴ The prohibited degrees of kinship and, as of 1 January 2008, also the provisions aiming at the prevention of fictitious partnerships, see above 'Formation of a Registered Partnership'.

(iv) The law governing the legal consequences of a registered partnership

Although Art 48 PILA generally governs the law applicable to the partnership rights and duties, the practical significance of this provision is very limited. Most legal consequences of a registered partnership are dealt with in special provisions applicable to these areas of law. This is true for the name, the capacity to act, inheritance law, child and adoption law, maintenance law as well as for property law. In the following, the focus will therefore lie only on three specific and characteristic consequences of partnership, namely maintenance obligations, property law and the law of adoption.

Maintenance

For maintenance between partners, Art 49 PILA declares the Hague Convention on Maintenance Obligations of 1973 applicable. This means that the law of the common residence is applicable to maintenance obligations during the partnership; and if this law does not provide for maintenance, the law of the common nationality of the partners and subsidiarily the *lex fori*.¹⁰⁵ It is disputed whether the same applies to maintenance obligations after the dissolution of the partnership.¹⁰⁶ Here, Art 8 of the Convention provides for the law applicable to separation to apply. This provision has been much criticised. Consequently, certain authors hold that the law applicable to maintenance obligations after separation should be determined in the same way as for such obligations during the partnership.¹⁰⁷

Property Law

For partnership property law, it is the partners' choice of law which is primarily decisive. Here, the partners may choose between the law of the common place of residence, the law of one of their countries of origin and – unlike married couples – they may choose the law of the place where they registered their partnership.¹⁰⁸ If the partners have not chosen the applicable law, it is first the law of their common residence, subsidiarily the law of their last common residence, and finally the law of their common nationality. If none of the conditions stated above are fulfilled, the PILA provides for separate property to apply. Since the connecting factor of the common residence is variable, the applicable law may change during the term of the partnership. Article 55 PILA declares that the law of the new place of residence applies retrospectively, if the partners have not provided otherwise.

¹⁰⁵ Arts 4–6 Hague Convention on Maintenance Obligations of 1973.

¹⁰⁶ Volken *Zürcher Kommentar zum IPRG* (2nd edn) Art 63, n 27.

¹⁰⁷ Siehr *Das internationale Privatrecht der Schweiz* (Zürich, 2002) 78; Bucher *Le couple en droit international privé* (above n 100) 595.

¹⁰⁸ Art 65c(2) PILA.

Adoption

Finally, the lack of rules governing adoption by same-sex partners warrants a closer look. An increasing number of states have allowed same-sex adoption¹⁰⁹ – this provokes the question whether such family relations would be recognised in Switzerland. Article 78(1) PILA allows for the recognition of foreign adoption if such an adoption took place in the country of residence or of origin of the adopting persons. It was very uncertain whether the recognition of a same-sex adoption would be regarded as contrary to Swiss public policy, since adoption is prohibited by Art 28 LRégP, and because same-sex marriages are only recognised as registered partnerships in Switzerland pursuant to Art 45(3) PILA.¹¹⁰ Relatively recently the Federal Office of Justice has clarified this question and has informed the cantonal civil registry authorities that an adoption by a same-sex couple abroad is not contrary to Swiss public policy, and should be recognised in Switzerland if this is consistent with the best interests of the child.¹¹¹

(v) Dissolution of the partnership

Registered partners may jointly apply for the dissolution of their partnership in Switzerland if either partner lives in Switzerland. If the partners cannot agree on a dissolution by consent, a plaintiff may only sue for dissolution in Switzerland, if he is additionally either of Swiss nationality or if he has lived in Switzerland for at least one year.¹¹² If neither partner lives in Switzerland, Swiss courts have jurisdiction for dissolution only if one of the partners is a Swiss national and if it is not possible or reasonable to dissolve the partnership in either country of residence.¹¹³ Finally, if neither partner is a Swiss national or lives in Switzerland, the partnership may be dissolved at the Swiss national registration, if it is not possible to apply for dissolution at the place of residence of either partner.¹¹⁴

If Swiss courts are competent to dissolve the partnership, they will apply Swiss law, unless the partners are of a common foreign nationality and do not both live in Switzerland, in which case they will generally apply the law of the

¹⁰⁹ For an overview see Schwenger 'Convergence and Divergence in the Law on Same-sex Partnerships' (above n 60) 150 et seq.

¹¹⁰ Widmer *FamKomm Eingetragene Partnerschaft* Teil 4 Internationales Privatrecht, n 188; Schwander *ZH-Komm*, Art 45 Abs 3/Art. 65a-d IPRG, n 156; Copur 'Kapitel 8: Die Elternschaft gleichgeschlechtlicher Paare' in Ziegler et al (eds) *Rechte der Lesben und Schwulen in der Schweiz* (Berne, 2007) 305 et seq. All authors cited above do not regard the recognition of same-sex adoptions as contrary to Swiss public policy, as this would be contrary to the overriding principle of the best interests of the child.

¹¹¹ Letter of the Federal Office of Justice to the cantonal civil registry authorities of 20 December 2006. Available online at: www.bj.admin.ch/bj/fr/home/themen/themen/gesellschaft/zivilstand/weisungen/kreissschreiben.html (accessed 24 October 2007).

¹¹² Art 59 PILA.

¹¹³ Art 60 PILA.

¹¹⁴ Art 65b PILA.

common nationality of the partners.¹¹⁵ If that law does not allow dissolution of the partnership, or unduly impedes dissolution, Swiss law is applicable.¹¹⁶

(e) Concluding remarks

In conclusion, the new law on registered partnership certainly constitutes an improvement since it allows for legal recognition and protection of same-sex relationships. The new provisions mirror matrimonial law to a large extent. This is positive, since same-sex partnerships and marriages are alike in many respects. However, such equal treatment should perhaps have been more carefully reflected in other areas. In particular, the provisions on the splitting of social security entitlements are not only expected to lead to inappropriate results for many registered partners, but are furthermore not adapted to the provisions on partnership property law. Other problematic aspects include the provisions on parental responsibility and the prohibition of adoption. Here, more regard to social reality would have been preferable. Biological ties are losing their importance with the increase of medically assisted reproduction technique, and have thus already created a recognised situation of social parentage.¹¹⁷ Placing registered partners, who have formalised their relationship and publicly taken responsibility for each other, in an inferior position to those who have not, cannot be justified.

In summary, the new law on registered partnership constitutes a step in the right direction and an important innovation, while in certain areas more objectiveness and reflection would have been desirable.

III STRONGER PROTECTION FOR VICTIMS OF DOMESTIC VIOLENCE

The second important development in Swiss family law in 2007 pertains to an altogether different area of law. On 1 July 2007, new provisions in the Swiss Civil Code affording better protection to victims of domestic violence entered into force.¹¹⁸ The main focus of the long-awaited provisions lies on the eviction of the offender from the common home.¹¹⁹ The new provisions constitute an innovation also because they provide for civil law remedies. Up to now, in Swiss law the protection of domestic violence victims' rights was predominantly

¹¹⁵ Arts 61 and 65c PILA.

¹¹⁶ Either according Art 61(3) PILA, if one of the partners is a Swiss citizen or has been resident in Switzerland for 2 years or according to Art 65c(1) PILA, if the law of the country of origin does not recognise registered partnerships at all. The second provision considerably diminishes the importance of the restrictions of the first provision.

¹¹⁷ On the gradual recognition of social parentage see Schwenger 'Tensions Between Legal, Biological and Social Conceptions of Parentage' in Schwenger (ed) *Tensions Between Legal, Biological and Social Conceptions of Parentage* (Antwerp/Oxford, 2007) 1, 11 and 26; Büchler 'Das Familienrecht der Zukunft' in Vetterli (above n 12) (Berne, 2004) 45, 55.

¹¹⁸ AS 2007 137.

¹¹⁹ The new provisions were promoted under the slogan 'Who beats must leave'.

regarded as a matter of criminal law, with the courts of only a few cantons granting relief based on the existing provisions of private law.

In the following, after briefly explaining the factual context of domestic violence in Switzerland and the legal situation prior to 1 July 2007, the new provisions shall be presented and commented upon.

(a) The factual background of domestic violence in Switzerland

Sociological data on domestic violence in Switzerland is sparse.¹²⁰ In 1997, the first comprehensive study on the occurrence of domestic violence found that 20.7% of 1,500 participating women indicated having been subject to physical and/or sexual violence,¹²¹ whereas 40.3% indicated that they had suffered from emotionally abusive behaviour.¹²² A recent study of the Swiss Federal Office of Statistics revealed that the majority of women who are killed are killed by their current or former partners.¹²³ Whereas age, nationality or social status seem to be of limited importance, the most striking factor is that the victims are mainly women.¹²⁴ This data conforms to statistics reported on the European and global level.¹²⁵ Obtaining reliable information on the occurrence of domestic violence is, however, complicated by the fact that a significant number of unreported incidents must be assumed,¹²⁶ which makes information derived from criminal statistics unlikely to be conclusive, and a minimal estimate at the most.

¹²⁰ For an overview see Rufino and von Salis *Aktiv gegen häusliche Gewalt* (Liestal, 2006) Ch 9.

¹²¹ Gillioz, De Puy and Ducret *Domination et violence envers la femme dans le couple* (Lausanne, 1997) 71.

¹²² *Ibid* 69.

¹²³ 246 women out of the 429 cases from 2000–2004, ie 57.3%. Zoder and Maurer *Tötungsdelikte. Fokus häusliche Gewalt. Polizeilich registrierte Fälle 2000–2004* (Bundesamt für Statistik, Neuchâtel, 2006). See also Opfer und Täter in der Statistik, Neue Zürcher Zeitung of 13 October 2007, 13.

¹²⁴ Gloor and Meier 'Interventionen von Polizei und Justiz bei Anzeigen zu Gewalt im sozialen Nahraum. Empirische Untersuchung zu Veränderungen im Kanton Basel-Stadt, 1995–2000' *Die Praxis des Familienrechts* 2001, 651 et seq, 656; Büchler 'Zivilrechtliche Interventionen bei Gewalt in Lebensgemeinschaften. Rechtsstatistik – Rechtsvergleich – Rechtsanalyse' *Die Praxis des Familienrechts* 2000, 583 et seq, 584; for the canton of Baselland see Rufino and von Salis (above n 120), Ch 4, here, 71% of the victims are women; for the canton of Zurich see Schneiter, Eggenberger and Lindauer *Gemeinsam gegen häusliche Gewalt* (Zürich, Basel, Geneva, 2004) 25 (in n 7); Gloor et al *Interventionsprojekte gegen Gewalt in Ehe und Partnerschaft* (Bern, Stuttgart, Wien, 2000) 28. Godenzi *Gewalt im sozialen Nahraum* (Basel, Frankfurt am Main, 3rd edn, 2006) 394, concludes that therefore, a gender-specific response should be considered.

¹²⁵ The WHO multi-country Study on Women's Health and Domestic Violence Against Women, 2005, 27 has shown that 20% to 33% of the women at most investigated sites experienced physical and sexual violence. See Garcia Moreno et al *WHO Multi-country Study on Women's Health and Domestic Violence against Women* (Geneva, 2005).

¹²⁶ Weizels and Pfeiffer, *Sexuelle Gewalt gegen Frauen im öffentlichen und privaten Raum – Ergebnisse der KFN-Opferberatung 1992*, *KFN Forschungsbericht Nr. 37* (Hannover, 1995) 12, estimate the number of unknown cases at 93.3%. Cf Schwander 'Interventionsprojekte gegen häusliche Gewalt: Neue Erkenntnisse – neue Instrumente' *Schweizerische Zeitschrift für Strafrecht* 2003, 195. Cf also Medina-Ariza and Fe-Rodriguez 'Critical Issues Related to the

(b) The legal situation until 1 July 2007

Until 1 July 2007, it was mainly through criminal law that the state intervened against domestic violence. No specifically tailored civil law remedies against domestic violence existed. Nevertheless, a minimal level of protection could be achieved according to matrimonial law and the provisions protecting the rights of personality in general.¹²⁷ All the same, many questions remained unclear, and the existing legal remedies were neither widely known nor frequently ordered. For unmarried couples, achieving a sufficient level of protection was even more difficult.

(i) Protection according to criminal law

In criminal law, domestic violence is punished if criminal offences such as murder, battery, assault, coercion, threatening behaviour or crimes against the sexual integrity of persons are committed. Insofar as these offences are not normally prosecuted *ex officio*,¹²⁸ the position of the victims of domestic violence is facilitated by waiving the requirement to file charges for certain offences.¹²⁹

Unfortunately, the impact of these provisions is diminished by the possibility of the law enforcement authorities¹³⁰ provisionally to close the proceedings.¹³¹ The idea behind this provision is to avoid inappropriate interference with the

Measurement of Intimate Partner Violence: A Clustering Analysis of Psychometric Scores' in Smeenk and Malsch (eds) *Family Violence and Police Response* (Aldershot, Burlington, 2005) 35, 56; Ollus and Nevala 'Challenges of Surveying Violence Against Women: Development of Research Methods' in Smeenk and Malsch (eds) *Family Violence and Police Response* (Aldershot, Burlington, 2005) 9, 11 et seq; cf Godenzi (above n 124) 137 et seq.

¹²⁷ Art 28 Swiss Civil Code et seq. The concept of 'rights of personality' encompasses the protection of the physical and psychological integrity, name, reputation, economic independence, picture, privacy, freedom of movement, the protection of the right of an author to claim authorship etc.

¹²⁸ This is the case for 'simple' battery (Art 123 Swiss Criminal Code), assault (Art 126 Swiss Criminal Code) and the offence of threatening a person (Art 180 Swiss Criminal Code). Before 1 April 2004, rape (Art 190 Swiss Criminal Code) and sexual assault (Art 189 Swiss Criminal Code) were not prosecuted *ex officio* if the victim was married to the offender and living in the same household.

¹²⁹ If the offences of 'simple' battery, assault or threatening of a person are committed against the spouse or registered partner of the offender or against a partner with whom the offender shares a common residence for an undetermined period of time, during the time of such a relationship or the time of shared residence and one year afterwards, criminal proceedings against the offender are initiated without the victim having to file charges. See Colombi 'Gewalt in der Ehe und in der Partnerschaft – zur Auslegung der neuen Art. 123, 126 und 180 StGB' *Schweizerische Zeitschrift für Strafrecht* 2005, 297 et seq.

¹³⁰ The courts, the examining magistrate or the prosecutor.

¹³¹ Art 55a Swiss Criminal Code.

personal life of the victim in situations where the victim's legitimate interests to waive criminal prosecution outweigh the state's interests in prosecuting criminal offences.¹³²

Although the law enforcement authorities have discretion as to whether to comply with such a request of a victim, they frequently neither have the means nor the chance to ascertain that the withdrawal was not unduly influenced by the offender. Additionally, the characteristic dynamics of domestic violence tend to increase the victim's willingness not to press charges. Sociological research has shown that domestic violence tends to occur in three phases.¹³³ The first phase is characterised by emotionally abusive behaviour and minor incidents of physical violence. In this phase, the victim tries to avoid an eruption of violence at any cost and often even feels responsible for causing her partner's behaviour. The second phase, which can be very short, is the point where the violent behaviour erupts. In the third phase, the offender is remorseful, and desperately tries to save the relationship, apologising and promising to improve in the future. The victim, wishing to believe these assertions and wanting to help the offender to change, at this point frequently revokes her testimony and withdraws her complaint. The possibility of provisionally closing the proceedings upon the victim's request therefore exactly corresponds, and even reinforces, the above-mentioned dynamics of domestic violence, and thereby frequently renders the protection of the victim's rights void.¹³⁴

Criminal law's utility as a means to counter domestic violence is also doubtful because it focuses mainly on the past and on retribution rather than on prevention and intervention. Also, criminal proceedings may take a very long time to initiate and then conclude, and can therefore be painful for the victims of domestic violence, without empowering them to improve their situation.¹³⁵

¹³² See Stratenwerth and Wohlers *Schweizerisches Strafrechtbuch, Handkommentar* (Bern, 2007) Art 55a, n 1 et seq.

¹³³ See Dutton *Rethinking Domestic Violence* (Vancouver, 2006) 211 et seq; Godenzi (above n 124) 144; Schwander 'Interventionsprojekte gegen häusliche Gewalt: Neue Erkenntnisse – neue Instrumente' *Schweizerische Zeitschrift für Strafrecht* 2003, 195, 205.

¹³⁴ Kottmann 'Opferschutz am Beispiel der häuslichen Gewalt' *Justiz* of 11 September 2006. By contrast, in Canada a 'pro charge policy' was implemented in the 1980s, meaning that charges against an offender were pressed without regard to the victim's will. Seth *Öffentliche Interventionen gegen häusliche Gewalt* (Bern, 2003) 35. Gloor et al, (above n 124) 67, note very high numbers of withdrawal of cases by victims. These numbers seem even more alarming if taking into consideration that these were victims who had actively pressed charges. Cf Büchler 'Gewalt in Ehe und Partnerschaft' *plädoyer* 2/1999, 28, 30, who summarises that the biggest obstacle for criminal law intervention against the offender is the victim herself. For an in-depth analysis on the reasons why victims do not press charges see Leuze-Mohr *Häusliche Gewalt gegen Frauen – eine straffreie Zone* (Baden-Baden, 2001) 276 et seq.

¹³⁵ Büchler *Gewalt in Ehe und Partnerschaft, Polizei-, straf- und zivilrechtliche Interventionen am Beispiel des Kantons Basel-Stadt* (Basel, Geneva, Munich, 1998) 248; cf also Seith (above n 134) 241, who points out that only a comprehensive system of civil law, criminal law and migration law remedies will make an effective protection of victims of domestic violence possible. Further, the low proportion of criminal complaints indicates that from a victim's perspective, criminal law does not promise the anticipated effect, Leuze-Mohr (above n 134) 322 and 330.

(ii) Protection according to civil law

A core point here is the question of who has to leave the family home. The family home's importance as a social centre does not have to be emphasised. In the context of domestic violence, it is also the close proximity of victim and offender that increases the victim's exposure to repeated offences and diminishes her capability to defend herself.¹³⁶ It has therefore long been demanded that the offender must leave – not only to make the point that he is the one who has done something wrong, but also to relieve the victim of bearing the risk of relocation, of being homeless and also of practical problems such as the distance to the children's school.¹³⁷

Prior to 1 July 2007, only limited protection was afforded by certain provisions pertaining to matrimonial law and by the provisions protecting the right of personality in general.¹³⁸ In spite of these provisions, however, many questions were unresolved.¹³⁹

In more detail, the legal situation was characterised by the following shortcomings. Married victims' right to stay in the common residence was protected. It was, however, uncertain whether other measures could be ordered before divorce proceedings had been initiated.¹⁴⁰ Unmarried partners were in a difficult situation with regard to the protection of the common home. Additionally, the possibility of obtaining other protective orders such as non-molestation orders or orders prohibiting the offender from approaching

¹³⁶ Keel "Wer schloht, dä goht", Massnahmen gegen häusliche Gewalt: das St. Galler Modell' *Schweizerische Zeitschrift für Strafrecht* 2006, 321, 322.

¹³⁷ Büchler *Gewalt in Ehe und Partnerschaft, Polizei-, straf- und zivilrechtliche Interventionen am Beispiel des Kantons Basel-Stadt* (above n 135), 242 et seq.

¹³⁸ See above 'The Legal Situation until 1 July 2007'.

¹³⁹ In detail see Büchler *Gewalt in Ehe und Partnerschaft, Polizei-, straf-, und zivilrechtliche Interventionen am Beispiel des Kantons Basel-Stadt* (above n 135), 251 et seq; Büchler, *Die Praxis des Familienrechts* 2000 (above n 124) 583, 595 et seq.

¹⁴⁰ Already before the new Art 28b Swiss Civil Code entered into force, the judge could decide which of the partners was entitled to remain in the family home according to Arts 175 and 176(1)(2) Swiss Civil Code; ie it was possible to order the offender to leave the common apartment or house. The legal situation with regard to further protective measures such as orders prohibiting the offender from molesting or approaching the victim was more difficult. It was disputed whether such measures could be ordered according to Art 28a Swiss Civil Code at all, and whether these general provisions belonging to the law protecting the right of personality were also applicable in matrimonial law, since Art 172(3) Swiss Civil Code limited the judge's power to order only the measures explicitly named in the law. This resulted in the absurd situation that spouses, for whom a special protection regime existed, were, according to the practice of some cantons, in this respect in an inferior position to cohabitants. The situation improved if divorce proceedings had been initiated, as then the available measures were no longer limited. However, this was of limited use to the victim who at least needed some time to deal with the situation, and could not be expected to take such a decision prematurely only to get access to the necessary protective measures. In some cantons, however, the courts nevertheless ordered such measures, see Schneider, Eggenberger and Lindauer (above n 124) 60. See also Jaquery and Vaerini Jensen 'La violence domestique à l'égard des femmes en droit international, européen et Suisse' in Besson, Hottelier and Werro (eds) *Human Rights at the Center* (Geneva, Zurich, Basel, 2006) 415, 443.

domestic violence. The focus here lies on treating domestic violence as a criminal offence, rather than just a 'family dispute', and in instructing the police officers to behave accordingly, ie to merely record the facts.¹⁴⁸ Attempts to reconcile the partners have proven rather to reinforce the offender's position and dominance.¹⁴⁹

An evaluation of the measures adopted in St Gallen and Appenzell Ausserrhoden shows that the offender was evicted from the home in 28.6% (St Gallen) and 53.5% (Appenzell Ausserrhoden) of the interventions. The measure was overall well accepted (only one person filed an appeal) and approved of by all experts and institutions involved.¹⁵⁰

Despite the new provisions that have been inserted in the Swiss Civil Code, the cantonal measures are still expected to play an important role in the future, primarily because the police are accessible at any time and because such measures take effect immediately, in contrast to measures which have to be ordered by a court in a civil procedure.¹⁵¹

(c) The new provisions: focus on the rights of the victim to stay in her familiar surroundings

While civil law provided only insufficient means, and while in criminal law the possibility of closing the proceedings often prevented criminal proceedings, the cantonal projects were evaluated very positively, and thus emphasised the need for similar provisions on the federal level in order to ensure a uniform regime of protection.

The new provisions against domestic violence consist of two new articles that were inserted in the Swiss Civil Code after the general provisions protecting the

2005, Rufino and von Salis (above n 120) Ch 6, 2. Unfortunately, only one-third (Baselland/one-fourth (Basel-Stadt) of the participants actually completed the programme.

¹⁴⁸ This was the main point of criticism against police intervention in Switzerland, see Seith (above n 134) 33. On the corresponding project in the canton of Zurich see Schneider, Eggenberger and Lindauer (above n 124) 32 and 107 et seq. Sociological research has revealed that such behaviour reduces the recidivation rate, see Godenzi (above n 124) 371 et seq.

¹⁴⁹ Cf Leuze-Mohr (above n 134) 132 et seq.
¹⁵⁰ See *Wyss Gegen häusliche Gewalt, Interventionsprojekte in den Kantonen St. Gallen und Appenzell Ausserrhoden: Erste Erfahrungen mit der Umsetzung der polizeilichen Wegweisung* (Berne, 2005) 30. For Appenzell: Schlussbericht zum Projekt Massnahmen gegen häusliche Gewalt vom Frühjahr 2004, available online at: www.ar.ch/KAPO/SchlussberichtAR.pdf (accessed 27 September 2004). For St Gallen: *Gewalt.Los - Interventionsprojekt gegen Häusliche Gewalt des Kantons St. Gallen. Bericht zum Abschluss der Phase I und II*, available online at: www.opferhilfe-sg.ch/files/_29_/schlussbericht_st_gallen.pdf (accessed 27 September 2004).

¹⁵¹ This is implicitly recognised by the provision in Art 28b(4) Swiss Civil Code, according to which the cantons must designate a competent authority to immediately evict the offender from the common home in case of a crisis. According to the explanatory report by the legal commission of the national council, it may be expected that this will primarily be the police. Report of the law commission of the national council of 18 August 2005, Bundesblatt 2005, 6871, 6889.

the victim or certain areas was uncertain.¹⁴¹ Overall, the protection afforded by the general provisions protecting the person was widely unknown and not frequently ordered, making the lack of a specifically tailored regime evident.¹⁴²

(iii) Select innovations on the cantonal level

Because protection against domestic violence was not sufficiently ensured on the federal level, some of the Swiss cantons enacted special provisions in their police laws.¹⁴³ The lead was taken by the cantons of St Gallen¹⁴⁴ and Appenzell Ausserrhoden, which as of 1 January 2003 adopted provisions allowing the police to evict the offender from the common home and to prohibit him from returning to ensure that the violence stopped.¹⁴⁵ Subsequently, the other cantons followed suit, so that now up to 15 cantons have enacted similar rules, and most of the others are in the process of adopting such provisions.¹⁴⁶ At the cantonal level, the intervention against domestic violence is in most cases accompanied by expanding information and consultation services for victims and offenders,¹⁴⁷ by providing that the cost of the public intervention is borne by the public, and by training police officers how to best cope with situations of

¹⁴¹ If the victim of domestic violence formed a cohabiting couple with the offender, she only had the right to make her partner leave the apartment immediately if she was the sole tenant. Although an order to leave the home could at least in theory be based on Art 28a Swiss Civil Code, the practical importance of this provision was limited, as the court was not able to interfere with property rights or landlord and tenant law, and since the special provisions protecting the matrimonial home were not applicable to cohabitants, and the offender could not be hindered from terminating the lease or selling the apartment. Further orders such as prohibiting the offender to approach the victim were only possible if a balancing of the interests resulted in favour of the victim. Cf also Cabernard and Vetterli *Die Arretierung des Zivilgerichts bei häuslicher Gewalt, Die Praxis des Familienrechts* 2003, 589, 595 et seq.

¹⁴² Cf *Büchler Gewalt in Ehe und Partnerschaft, Poltzer, straf-, zivilrechtliche Interventionen an Beispiel des Kantons Basel-Stadt* (above n 135) 341.

¹⁴³ Other cantonal projects focused on a comprehensive approach to domestic violence, including increasing communication between the institutions involved with domestic violence, specialised training of the persons involved, an improvement of the services rendered, public campaigns and training programmes for offenders, eg the project 'Halt-Gewalt' (Stop the Violence) in Basel-Stadt, which was evaluated by Gloor et al (above n 124) 89 et seq. On the intervention project in the canton of Berne see Schwander *Schweizerische Zeitschrift für Strafrecht* 2003, 211. For Zurich see Eggenberger and Weingartner 'Das Zürcher Interventionsprojekt gegen Männergewalt ZIP von 1996 bis 2000' in *Frauenfragen* 2000/2, *Violence Domestique: Comment intervenir?*, 62 et seq.

¹⁴⁴ Polizeigesetz vom 10 April 1980, sGS 451.1, Art 43 et seq. See in detail Keel *Schweizerische Zeitschrift für Strafrecht* 2006 (above n 136) 323 et seq. Frei 'Wegweisung und Rückkehrverbot nach st. gallischem Polizeigesetz' *Aktuelle Juristische Praxis* 2004, 547 et seq.

¹⁴⁵ This is in line with the finding that women often mainly seek short-term goals from an intervention, such as an immediate cessation of violence. See Kelly 'Moving in the Same or Different Directions? Reflections on Recent Developments in Domestic Violence Legislation in Europe' in Smeenk and Malsch *Family Violence and Police Response* (Aldershot, Burlington, 2005) 81, 87.

¹⁴⁶ For an overview of the legal situation in the 26 Swiss cantons, see Schwander *Violence domestique, Analyse juridique des mesures cantonales* (Bureau fédéral de l'égalité entre femmes et hommes, Berne, 2006) (above n 136) 113 et seq.

¹⁴⁷ Increasingly, the need for offender oriented programmes is recognised, see, eg, for the cantons of Baselland and Basel-Stadt where the number of participants has nearly tripled from 2001 to

right of personality (Art 28b and 28c), and by two amendments to existing provisions which improve the victim's position if she applies for interim measures of protection (Art 28d(2) and (3)) and ensure that the new provisions apply in matrimonial law as well (Art 172(3)).

(i) Definition of domestic violence

Article 28b Swiss Civil Code contains a very broad definition of domestic violence. Violence, threats and stalking are explicitly named, which is meant to ensure that physical violence as well as psychological violence is covered. Violence means behaviour that directly harms the physical, psychological, sexual or social integrity of a person.¹⁵² The violence must reach the level of a violation of the right of personality¹⁵³ – meaning that not every kind of socially improper behaviour is legally relevant. A threat is behaviour causing fear of inflicting unlawful harm to the victim or a person to whom she is close – be it physical, psychological, sexual or social harm.¹⁵⁴ Stalking denotes obsessively and continuously following and molesting a person, eg by spying on the victim. Such behaviour must cause substantial fear in the victim, and occur repeatedly.¹⁵⁵

(ii) Personal scope of application

The new provisions protect any victim of the above-mentioned behaviour. In particular, no restrictions with respect to sex, age or marital status exist, nor is it required that the offender is – or was – in any kind of relationship with the victim. Article 28b Swiss Civil Code thus has a wider scope of application than the traditional situation of domestic violence. In order to protect the victim's right not to initiate proceedings, only the victim herself can apply for protective measures, and not other persons who are close to the victim.¹⁵⁶ Orders can be made against the offender and anybody who participated in the violent behaviour.¹⁵⁷

(iii) Orders that can be made

Article 28b(1)(1–3) Swiss Civil Code contains a non-exhaustive list of orders that may be made by the court. More specifically, the court may prohibit the offender from approaching the victim, may order the offender to stay beyond a certain distance from her apartment or other places, and not to contact or

¹⁵² Report of the law commission of the national council of 18 August 2005, Bundesblatt 2005, 6871, 6884.

¹⁵³ Art 28 Swiss Civil Code.

¹⁵⁴ Report of the law commission of the national council of 18 August 2005, Bundesblatt 2005, 6871, 6884.

¹⁵⁵ Ibid.

¹⁵⁶ Contrary to certain proposals during the consultation period.

¹⁵⁷ Report of the law commission of the national council of 18 August 2005, Bundesblatt 2005, 6871, 6885.

molest the victim in any way. The court should have particular regard to all interests at issue, and only make an order if it concludes that this is proportional and the most suitable solution for the individual case. The measure does not necessarily have to be limited to a certain period of time, although this may be appropriate if the measure substantially interferes with the offender's rights. Compliance with the court's order may be assisted by including the threat of criminal proceedings in case of infringement.¹⁵⁸

Article 28b(2) and (3) Swiss Civil Code contain special remedies if the offender and the victim share a common residence. According to Art 28b(2) Swiss Civil Code, the victim can file an application to evict the offender from the common home for a certain time. This period can be extended once. The victim can still apply for this measure if she left the common home directly after the violent act occurred. A balance between the victim's rights and the offender's interests is achieved by the option to order the victim to compensate the offender appropriately for her sole use of the home.¹⁵⁹

Further, the court may transfer the rental contract to the victim if the landlord agrees. This measure is aimed at resolving the situation in which an offender who is the sole tenant is evicted from the common home longer than the ordinary notice period of 3 months, and could therefore seek to terminate the lease. Already prior to the enactment of the new provisions, if the common home qualified as the family home of a married couple or of registered partners,¹⁶⁰ a termination of the lease was only possible if both partners explicitly agreed.¹⁶¹ Article 28b(3) Swiss Civil Code now ensures that also cohabiting partners and other persons sharing an apartment are suitably protected, and may help in finding a permanent solution to the housing needs of the victim if the landlord agrees.

Finally, the cantons must designate a competent authority who can immediately intervene and evict the offender from the common home in case of a crisis,¹⁶² and provide consultation services for victims as well as offenders.¹⁶³

(iv) The procedure

The establishment of the procedure in which victims of domestic violence may apply for the measures described above is left to the Swiss Cantons. Articles 28c and 28d Swiss Civil Code, however, explicitly recognise that such measures may also be ordered as interim measures,¹⁶⁴ and even via a procedure which does

¹⁵⁸ Under Swiss law, this may be done by any competent authority by explicitly mentioning Art 292 Swiss Criminal Code and its sanction of a fine. If any person disobeys an order containing such a provision, he has concluded a criminal offence and is sanctioned with a fine.

¹⁵⁹ Art 28b(3) Swiss Civil Code.

¹⁶⁰ Is the spatial centre of matrimonial and family life.

¹⁶¹ Art 266m Swiss Code of Obligations.

¹⁶² See above n 151.

¹⁶³ Art 28b(4) and (5).

¹⁶⁴ Art 28c Swiss Civil Code.

not grant the offender the right to be heard.¹⁶⁵ The victim's procedural position is further strengthened by granting her access to such interim measures even if she has unduly delayed her application and by exempting her from the duty to provide security for the offender's possible damages.

(v) Special issues in connection with Swiss migration law

Family law has – apart from immediate effects on the personal level – an impact on other areas of the law such as migration law. In the context of domestic violence, the so-called 'derivative permits of residence' raise a problem.

On 1 January 2008, the new Swiss Law on Foreigners will enter into force.¹⁶⁶ According to this law, the foreign spouse or registered partner of a Swiss national or of a foreigner with a permanent residence permit in Switzerland is only entitled to a residence permit as long as she lives together with her partner.¹⁶⁷ For victims of domestic violence, this constitutes an obstacle to effectively making use of the new remedies. If they cease to share a residence with their spouse or partner, they run the risk of losing their permit of residence in Switzerland, especially if their marriage has been short and they do not have children. Frequently, in such a situation, returning to their country of origin would not be socially acceptable, making it preferable to suffer, but maintain a common residence. As a result, foreign partners are significantly exposed to violent behaviour of their partners.

In the consultation process of the new law against domestic violence, the insertion of a provision protecting the rights of foreign victims of domestic violence by automatically granting them a residence permit was a controversial issue. Such a provision was, among other reasons, not enacted because the Civil Code was not regarded as the proper place for provisions of public law.¹⁶⁸

The new Law on Foreigners recognises this concern. Although foreign victims of domestic violence are not automatically entitled to a permit of residence, the law provides that foreigners have the right to a prolongation of their residence permit if 'important personal reasons require a further stay in Switzerland', and explicitly states that important personal reasons exist namely if the spouse

was the victim of domestic¹⁶⁹ violence, and if the social integration in the country of origin appears to be at risk.¹⁷⁰ This is already a significant improvement if compared to the legal situation before the entry into force of the new Law on Foreigners. In those circumstances the authorities had wide discretion when deciding whether to grant a permit of residence, which had led to a widely divergent practice by the cantonal authorities.¹⁷¹ It is hoped that this provision in practice proves itself as an effective means to aid foreign victims of domestic violence.¹⁷²

(d) Conclusion

Considering the presumed extent of domestic violence in Switzerland, and the international developments in this field, the fact that Switzerland has finally decided to implement the necessary innovations in the Swiss Civil Code is to be commended. The new provisions help to intervene against the specific exposure of the victims of domestic violence to the threat of repeated offences; a threat which is increased by the close vicinity to the offender. They are therefore to be appreciated as a new and efficient means in the struggle against domestic violence, through which Switzerland has finally achieved similar standards of protection to its surrounding countries.

¹⁶⁵ Art 28d Swiss Civil Code, so-called 'super-provisional' measures.

¹⁶⁶ The new law (above n 22) was accepted by the Swiss People in a referendum on 24 September 2006.

¹⁶⁷ In the old law on Foreigner's Residence in Switzerland, only the spouses of non-Swiss nationals had to share a common residence with their partner. The requirement of living together is meant to be an obstacle against marriage fraud. Cf Gafner 'Les femmes migrantes face à la loi sur le séjour et l'établissement des étrangers (LSEE), à la loi sur les étrangers et à la loi sur l'asile (LAsi)' *Revue de droit administratif et de droit fiscal* (Revue genevoise de droit public) 2003, 16, 20; Kantonale Fachkommission für Gleichstellungsfragen Bern (ed) *Migrantinnen: Aufenthaltsrecht und häusliche Gewalt. Erteilung und Verlängerung von Aufenthaltserlaubigungen* (Berne, 2004) 14 et seq; Reetz 'Wer schlägt bleibt. Zur rechtlichen Situation gewaltbetroffener Migrantinnen' in *Frauenfragen* 2005/1, *Häusliche Gewalt und Migration*, 29 et seq.

¹⁶⁸ Cf Opinion of the Federal Council, Bundesblatt 2005, 6897, 6898.

¹⁶⁹ The wording of Art 50(2) AuG only mentions 'matrimonial' violence. However, Art 52 AuG states that the provisions of the preceding chapter regarding foreign spouses are to be applied by analogy to foreign registered partners.

¹⁷⁰ Art 50(2) AuG (above n 22).

¹⁷¹ On the legal situation then see Schmeiter, Eggenberger and Lindauer (above n 124) 68 et seq.; DuBois and Vetterli *Häusliche Gewalt, erste Erfahrungen mit neuen Gesetzen, Die Praxis des Familienrechts* 2004, 851, 855 et seq.

¹⁷² In more detail Gafner *Revue de droit administratif et de droit fiscal* (Revue genevoise de droit public) 2003 (above n 167) 21 et seq.