

Session 3 - Barriers to Women's Equal Access to Justice

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Tackling Discrimination in Switzerland

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Overview

- Legal system in Switzerland
- Typology of aspects
- Issues related to substantial law
- Factors regarding access to justice in discrimination cases (employment sector)
- Special issues regarding domestic violence
- Reports and evaluations

Legal System in Switzerland

- Federalism: Federation – Cantons – Communities

- Special features of the Swiss legal system
 - Integrated constitutional jurisdiction
 - Cantonal courts → federal court (civil and penal matters)
 - Restricted constitutional review of federal legislation
 - Justiciability of CESCR and (partially) CEDAW denied

Federal Constitution of the Swiss Confederation, 1999

- Art. 8 (2) «No person may be discriminated against, in particular on grounds of (...) gender (...).»
- Art. 8 (3) «Men and women have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, **and in the workplace. Men and women have the right to equal pay for work of equal value.**»

Federal Act on Gender Equality, 1995

Art. 2 Principles

This Section applies to employment relationships under the Swiss Code of Obligations as well as to all employment relationships under public law in the Confederation, cantons and communes.

Art. 3 Prohibition of discrimination

2 This prohibition applies in particular to hiring, allocation of duties, setting of working conditions, pay, basic and advanced training, promotion and dismissal.

Art. 4 Discrimination through sexual harassment

Any harassing behaviour of a sexual nature or other behaviour related to the person's sex that adversely affects the dignity of women or men in the workplace is discriminatory. (...).

Federal Act on Gender Equality, 1995

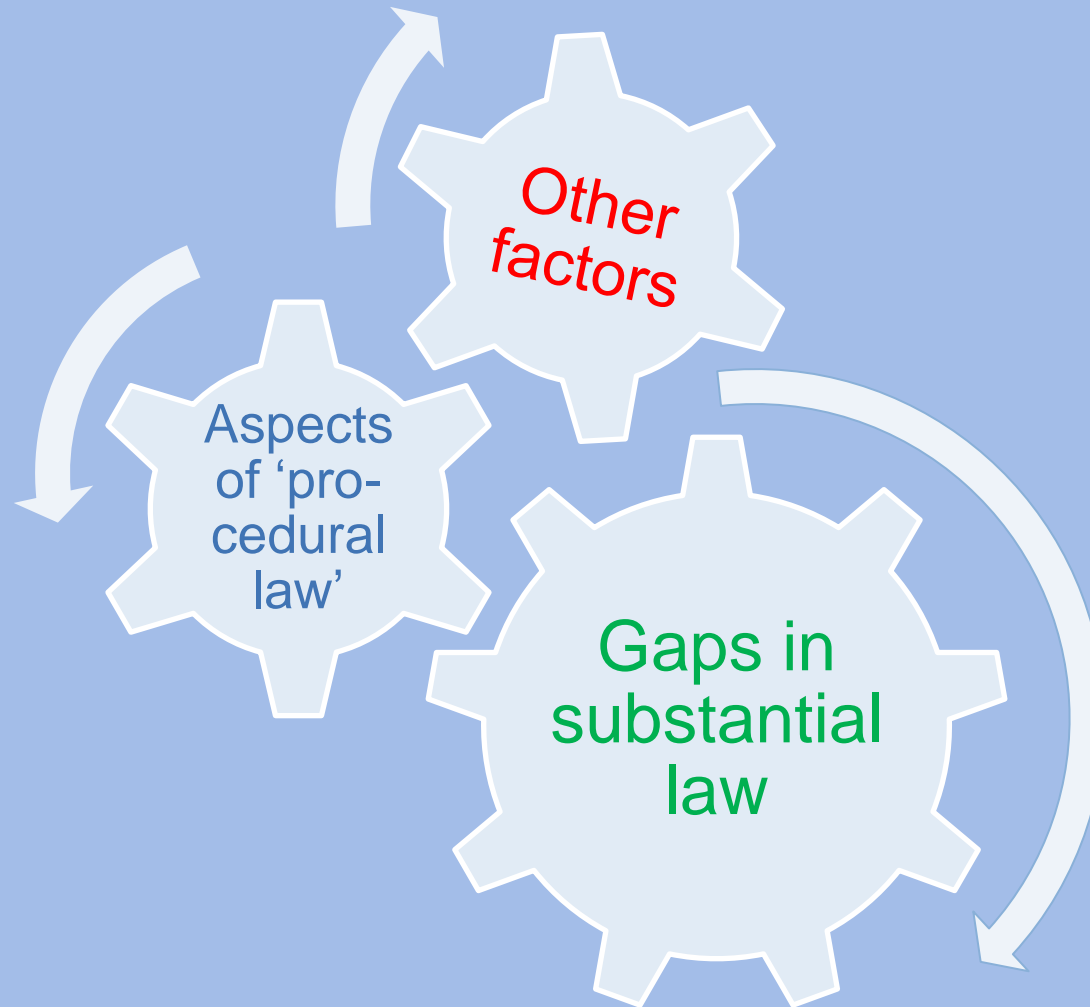
Art. 5 Employees' rights

1 Anyone who is the victim of discrimination (...) may apply to the court or to the administrative authority for an order:

- a. prohibiting or stopping threatened discrimination;
- b. requiring existing discrimination to cease;
- c. confirming that discrimination is taking place if it is continuing to have a disruptive effect;
- d. for the payment of any salary due.

2 If the discrimination relates to the refusal of employment or to dismissal under the Code of Obligations, the person concerned is entitled only to a compensatory payment. (...)

Typology of aspects



Issues related to substantial law

- Importance of specific anti-discrimination laws in addition to constitutional protection
 - Clear entitlements
 - Narrowing judicial interpretation
 - Awareness rising

- Discrimination beyond employment
 - no specific prohibitions or anti-discrimination regulations in Swiss private law (access to services; tenancy law; ...)
 - blanket clauses (“misuse”; “arbitrary”; ...)
 - civil and penal protection of personality
 - Lack of data regarding discrimination beyond employment

Factors regarding access to justice in discrimination cases (employment sector) I

- **Importance of arbitration/conciliation bodies** → effective, voluntary for plaintiffs; differences between cantons
- **Protection of plaintiffs/complainants during process** → system of dismissal protection
- **Burden of proof** → partial facilitations
- **Inquisitorial system** vs. adversarial system
- **Amount of compensation** → limited
- **Costs** → no court fees but risk of legal expenses
- **Collective/associational claims** → action for declaratory judgment only - limited effects

Factors regarding access to justice in discrimination cases (employment sector) II

- **Knowledge** of direct and indirect discrimination
 - Victims of discrimination
 - Information centers/advisory offices
 - Judges
- **Knowledge** of legal remedies
- **Relation between ‘efforts/risks’ and ‘results’**
Factors, e.g.:
 - Fear of negative effects at workplace and (in-)direct reprisals
 - Maximum outcome of process
 - Costs and duration of process

Special issues regarding domestic violence

- Victim assistance
- Procedural rights of victims
- Prosecution ex officio
- **Recent discussions: Narrowing the preconditions for termination/suspension of proceeding**

Reports and evaluations

- SWISS CENTER FOR EXPERTISE IN HUMAN RIGHTS (SCHR), Access to Justice in Discrimination Cases in Switzerland, Synthesis and Sub-report on Gender Issues, 2015 (*draft version – not yet published*)
- SCHWEIZERISCHER BUNDESRAT [FEDERAL COUNCIL], Bericht zur Motion 09.3059 Heim, Eindämmung der häuslichen Gewalt, 2015 [report on domestic violence]
- SCHWEIZERISCHER BUNDESRAT [FEDERAL COUNCIL], Bericht über die Evaluation der Wirksamkeit des Gleichstellungsgesetzes, 2006 [report of the federal council on the evaluation of effectiveness of the federal act on gender equality]
- STUTZ HEIDI/SCHÄR MOSER HEIDI/FREIVOGEL ELISABETH, Evaluation der Wirksamkeit des Gleichstellungsgesetzes. Synthesebericht. Im Auftrag des Bundesamts für Justiz, 2005 [evaluation of effectiveness of the federal act on gender equality]