ANTI-DISCRIMINATION LAW IN SWITZERLAND

Legal Memorandum

March 2013
EXECUTIVE SUMMARY

The purpose of this memorandum is to provide an overview of the structure and content of anti-discrimination laws in Switzerland.

The Government of Switzerland has taken a sectoral approach to providing anti-discrimination protections. Unlike European states that have passed a comprehensive anti-discrimination law, Switzerland has promulgated a series of laws that address discrimination within certain sectors of society. These laws are based on the anti-discrimination clause of the Swiss Constitution, which outlines the state’s commitment to non-discrimination, equality between men and women, and protections for persons with disabilities. They include both civil and criminal protections against discrimination, and many create federal bureaus with the mandate of overseeing the implementation of the laws.

While this approach has allowed the government to target discrimination in certain sectors, it has also come under criticism from the international community for permitting gaps in protections against discrimination. Several international organizations, including the United Nations and the Council of Europe, have found that Switzerland’s legislative protections fail to protect minority populations from discrimination, and have called upon Swiss authorities to take steps to remedy these deficiencies through, among other things, the passage of a comprehensive anti-discrimination law.
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Statement of Purpose

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Introduction

The Swiss confederation consists of twenty-six cantons, which are further divided into political communes.\(^1\) Based on the principle of subsidiarity, powers are, as much as possible, allocated to the lowest level of government able to properly administer.\(^2\) All competencies not designated to the confederation by the Constitution are left to the cantons.\(^3\) Each canton has the exclusive power to implement federal law (as set forth in Article 46 of the Constitution); draft its own constitution (Article 51); determine the power of communes (Article 50); manage education at all levels (Article 62); govern cultural matters (Article 69); govern matters related to language (Article 70); and manage the church and state relationship (Article 72). Accordingly, Swiss cantons and communes are responsible for many areas relevant to combating discrimination.

The Swiss Constitution establishes the framework for anti-discrimination protections by outlining the state’s commitment to non-discrimination, equality between men and women, and protections for persons with disabilities. Swiss legislation further codifies these protections, establishing civil and criminal rights and remedies for discriminatory actions. Switzerland’s federal anti-discrimination legislation consists of several laws that seek to address discrimination against groups with special needs including women, persons with disabilities, and migrants. This sectoral approach to anti-discrimination law has allowed the Swiss Government to prioritize particular protections and to address emerging social issues. However, this approach also has opened the government up to criticism from international observers, who have pointed out gaps in the laws, and have called upon officials to consider the passage of a comprehensive anti-discrimination law.\(^4\)

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\(^3\) SWITZERLAND CONST. art. 3 (1999).

Constitutional Protections

The Swiss Constitution establishes the framework for its anti-discrimination protections by providing the basic principles for state and cantonal legislation. The Constitution provides that “everyone shall be equal before the law,” and prohibits discrimination on the basis of “origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of physical, mental or psychological disability.” In addition, the Constitution recognizes the need to promote equality and non-discrimination between men and woman and to ensure that persons with disabilities are able to effectively participate in society. The Constitution also provides that “the authorities shall ensure that fundamental rights, where appropriate, apply to relationships among private persons,” thereby establishing equality and non-discrimination as protections owed to individuals by the state in both the public and private sectors.

Legislative Protections

While Switzerland does not have an overarching anti-discrimination law, it has established a criminal and a civil legal framework for addressing discrimination. Protections provided through criminal law seek to eliminate hate speech and discriminatory provision of services to the public. Protections provided through civil law seek to ensure equal access to employment and other opportunities for groups with special needs. Civil protections are enforced through federal bureaus aimed at overseeing the implementation and furthering the purpose of federal legislation.

Criminal Liability

Criminal liability for discrimination protects against hate speech and discriminatory denial of public services, and seeks to ensure equal and uninhibited access of individuals to institutions and services intended for the public. The Swiss Criminal Code prohibits all people from: (1) publicly expressing hate speech; and (2) discriminatorily depriving another person of a service intended for the public. The prohibition on hate speech includes “public incitement to hatred or discrimination, the propagation of a racist ideology, the organization or encouragement of acts of propaganda against a person or group of persons on

5 Switzerland Const. art. 8(1)-8(2) (1999).
6 Switzerland Const. art. 8(3)-8(4) (1999).
7 Switzerland Const. art. 35(3) (1999).
account of their race, ethnic origin or religion, and the fact of publically disparaging or discriminating against these persons [...].”9 Swiss courts have described “public” as referring to acts that do not concern “the family circle, a circle of friends or particular personal relationships or relationships of trust.”10 The Criminal Code also forbids denying people “a service intended for the public” due to their race, ethnicity, or religion. This protection applies to most commercially offered services, such as restaurants and stores.

Civil Liability

A number of civil laws provide protections against discrimination on the basis of protected characteristics. To implement these protections, federal laws provide for the establishment of federal offices empowered to oversee implementation and to publicly comment on ways in which protections can be improved. For instance, the Federal Act on Gender Equality seeks to establish equality between men and women by prohibiting discrimination against women in employment.11 The Act establishes the Federal Office for Gender Equality, which oversees the implementation of the Act.12 Similarly, the Federal Act on the Elimination of Discrimination against Persons with Disabilities establishes “framework conditions for better integration of disabled persons in society.”13 The Act also creates the Federal Bureau for the Equality of People with Disabilities to oversee its implementation and to provide further guidance in expanding protections for persons with disabilities.14 The Foreign Nationals Act, the Languages Act, and the Partnership Act provide protections for foreigners and migrants, language communities, and LGBTI persons, respectively.15

In addition, Swiss law provides a number of civil protections against racial discrimination. Several provisions of Switzerland’s Civil Code and Code of

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10 Under this definition, the court determined that a closed meeting in the forest of 40-50 skinheads who belonged to different groups was “public.” European Commission against Racism and Intolerance, ECRI Report on Switzerland (Fourth Monitoring Cycle), 14 (Sept. 15, 2009), available at http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/switzerland/che-cbc-iv-2009-032-eng.pdf (citing ATF 130 IV 111 (May 27, 2004)).
Obligations prohibit discrimination in employment and contractual relationships.\footnote{Third Report Submitted by Switzerland Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2012)001, para. 23 (Jan. 26, 2012), \textit{available at} http://www.coe.int/t/dghl/monitoring/minorities/3_fcnmdocs/PDF_3rd_SR_Switzerland_en.pdf.} For instance, the Code of Obligations invalidates contractual clauses that “contravene public policy, morality or rights of personal privacy,” or are immoral.\footnote{Code of Obligations art. 19-20 (Switzerland 1911), \textit{available at} http://www.admin.ch/ch/e/rs/2/220.en.pdf.} The Code of Obligations also forbids the termination of a contract based on “an attribute pertaining to the person of the other party, unless such attribute relates to the employment relationship or substantially impairs cooperation within the business.”\footnote{Code of Obligations art. 336 (Switzerland, 1911), \textit{available at} http://www.admin.ch/ch/e/rs/2/220.en.pdf.} The Civil Code requires every individual to “act in good faith in the exercise of his or her rights and in the performance of his or her obligations.”\footnote{Swiss Civil Code of 1907 art. 1 (Switzerland 1907), \textit{available at} http://www.admin.ch/ch/e/rs/2/210.en.pdf.} This good faith requirement precludes people from treating individuals or groups differently without a reasonable and objective justification.\footnote{Third Report Submitted by Switzerland Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities ACFC/SR/III(2012)001, para. 23 (Jan. 26, 2012), \textit{available at} http://www.coe.int/t/dghl/monitoring/minorities/3_fcnmdocs/PDF_3rd_SR_Switzerland_en.pdf.}

Similarly, the provisions of the Swiss Civil Code dealing with personality rights, which protect an individual’s dignity and reputation, have also been interpreted to protect people from discrimination.\footnote{European Commission against Racism and Intolerance, \textit{ECRI Report on Switzerland (Fourth Monitoring Cycle)}, 16 (Sept. 15, 2009), \textit{available at} http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/switzerland/che-cbc-iv-2009-032-eng.pdf.} In a recent case, a black woman was not hired as a caregiver because the employer claimed that her skin tone might “frighten the patients.”\footnote{European Commission against Racism and Intolerance, \textit{ECRI Report on Switzerland (Fourth Monitoring Cycle)}, 16 (Sept. 15, 2009), \textit{available at} http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/switzerland/che-cbc-iv-2009-032-eng.pdf.} The Lausanne Labor Court found that this discriminatory treatment amounted to a violation of the woman’s right to personality.\footnote{European Commission against Racism and Intolerance, \textit{ECRI Report on Switzerland (Fourth Monitoring Cycle)}, 16 (Sept. 15, 2009), \textit{available at} http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/switzerland/che-cbc-iv-2009-032-eng.pdf.}

**Protective Agencies**

Two Swiss institutions have been created to oversee the implementation of protections against racial discrimination – the Federal Commission Against Racism and the Federal Service to Combat Racism.
Federal Commission Against Racism

The Federal Commission Against Racism, an extra-parliamentary commission created following Switzerland’s ratification of the Convention on the Elimination of Racial Discrimination, monitors legislation, advises the executive and legislative branches of government, raises public awareness of racism, and promotes policies to advance equality. The Commission can also receive complaints and provide information, support, and referrals to victims of discrimination. In 2010, the Commission published a report that proposed measures to strengthen Swiss anti-discrimination legislation in the area of racial discrimination. The Commission also co-runs the Consultation Network for Victims of Racism, which monitors the frequency of racist incidents and makes advice available to those affected by racial discrimination.

Federal Service to Combat Racism

The Federal Service to Combat Racism coordinates with federal, cantonal, and communal partners to educate the public about racism and prevent racial discrimination. In 2009, the Service published a legal guide to racial discrimination, and between 2010 and 2012 offered approximately 40 trainings on legal remedies available in cases of racial discrimination. The Service has also supported a number of projects aimed at reducing discrimination against foreigners, Travellers, and members of the Jewish community.

International Evaluation of Switzerland’s Anti-Discrimination Protections

The international community has recognized the strides taken by the Swiss Government to provide protections against discrimination. The international community has also increasingly pinpointed gaps in these protections, however,

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which have led to a series of recommendations that Switzerland consider passing a comprehensive anti-discrimination law.

In a 2012 review of human rights protections, the Council of Europe Commissioner for Human Rights noted that despite the “commendable results” of Switzerland’s sectoral anti-discrimination efforts, “such an approach leaves gaps in the system, which can best be overcome through the adoption of a comprehensive anti-discrimination law.” The Commissioner pinpointed specific areas in which the sectoral approach was unable to provide adequate protections, noting that, for example, “the existing law and practice appear to fail to protect persons with disabilities from discrimination in the workplace and to obligate private services providers to adapt their services to the needs of persons with disabilities.”

Similarly, the Committee on the Elimination of All Forms of Racial Discrimination (CERD) noted that while “the Convention [on the Elimination of All Forms of Racial Discrimination] forms an integral part of the Swiss legal system . . . the Committee remains concerned at the lack of comprehensive civil and administrative legislation and policies to prevent and combat racial discrimination in all areas, and at the fact that only 10 cantons, out of twenty-six, have enacted anti-discrimination laws.” The Committee noted limited progress in halting attacks on minority populations due to a widespread negative perception of foreigners and minorities. In particular, the Committee noted significant discrimination against the Roma, Sinti, and Yenish communities in Switzerland, particularly with regard to housing and education. The Committee called upon the state to “adopt a national plan and legislation at all levels of Government against racial discrimination, xenophobia, and other forms of intolerance.”

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The Migrant Integration Policy Index, which measures the strength of anti-discrimination frameworks, ranks Switzerland second to last among thirty-one states in Europe and North America with regard to protections against discrimination. 35 It also found that, due to weak legal protections, residents encounter discrimination on many grounds in their daily life without consequences. 36 One particular problem is the narrowness of the criminal code, which prohibits only discrimination based on race, ethnicity and religion. 37 In one case, a prosecutor declined to pursue a case in which “nationals of the Balkans” had been refused entrance to a nightclub, because “nationals of the Balkans cannot be classified in a religious group or race and do not meet the definition of an ethnic group.” 38 In another case, a restaurant refused service to “Albanians” and “former Yugoslavs.” The judge accepted the classification of Albanian as an ethnicity, but rejected the claim regarding former Yugoslavs. 39

Switzerland’s 2008 Universal Periodic Review process, conducted before the UN Human Rights Council, addressed a number of issues pertaining to the improvement of anti-discrimination legislation. The Working Group and participant states all noted that Switzerland had made great strides in protecting its population against discrimination, but that these steps had not yet eliminated problems of racism, xenophobia, and gender discrimination. 40 In its recommendations, the Netherlands called upon Switzerland to promulgate federal legislation “to provide protection against all forms of discrimination, including on the grounds of sexual orientation and gender identity.” 41

To date, Switzerland’s legal protections against discrimination remain fragmented. In Switzerland’s 2012 Universal Period Review, stakeholders

observed that “some individuals and specific groups were exposed to discrimination because they were not specifically protected and did not have the specific legal instruments to claim their rights.”  

In particular, employment discrimination due to HIV/AIDS is on the rise and LGBTI persons still face discrimination. Again, Switzerland was called upon to adopt federal legislation “to provide protection against all forms of discrimination, including on grounds of sexual orientation and gender identity.”

Conclusion

Switzerland’s sectoral approach to anti-discrimination law has permitted the state flexibility in addressing issues and adapting to the needs of the population. The Constitution’s anti-discrimination clauses establish the framework for this approach, providing the underlying principles on which anti-discrimination laws are based. These principles are codified in criminal and civil laws, which provide rights and remedies for discriminatory action and establish federal bureaus to oversee their implementation. While these laws have allowed Switzerland to protect the rights of certain segments of the population, the international community has noted gaps in this legislation that have allowed discriminatory practices to continue, and has called upon the government to pass a comprehensive anti-discrimination law.

