

 sui generis

Introduction to  
**Swiss Law**

MARC THOMMEN



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Marc Thommen

Introduction to Swiss Law





Edited by Daniel Hürlimann und Marc Thommen

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**Marc Thommen**

# **Introduction to Swiss Law**



Editor:

Prof. Dr. iur. Marc Thommen

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# Preface

A man picks an apple from a tree behind a bee house in Gretzenbach, a small village between Olten and Aarau. At first glance, one might perceive this as the most typically Swiss scene imaginable. A closer look, however, reveals some interesting details. On the left is the Wat Srinagarindravararam, Switzerland's biggest Buddhist temple, while at the back right the cooling tower of the nuclear power plant of Gösgen-Däniken is visible. This picture is a part of 'Heimatland' (homeland) by the Basel photographer Julian Salinas. In this series of pictures he tries to avoid the well-known clichés and capture Switzerland in all its layers and complexities.

This introduction, too, tries to capture the Swiss legal landscape in all its layers. My colleagues of the University of Zurich Law Faculty have all contributed chapters from their area of expertise. From the foundations of law (history, philosophy, and sociology) to the classical general subjects of public, private, and criminal law, we have tried to cover the most important substantive and procedural aspects of the Swiss legal order. The legislative and executive institutions as well as the judiciary are explained. The chapters all reflect on the underlying principles and give an account of some landmark cases in the specific fields of law.

First of all, I have to thank my colleagues who agreed to participate in this project. Without their expert contributions it would not have been possible to publish this overview of Swiss Law. Further, I would like to thank Julian Salinas for agreeing to the use of his photography. I also owe thanks to Egbert Clement for designing the cover and to Alexander Grossmann for supporting this project as a publisher. My greatest thanks go to Chrissie Symington and Martina Jaussi for their very thorough proof-reading and diligent editing of the manuscripts. Without their tireless and very competent support, this book would not have been published in time.

Zurich, 18 May 2018  
Marc Thommen



# How to Use This Book

The aim of this book was to create an easy-to-read introduction to Swiss Law. The footnotes have therefore been reduced to an absolute minimum. Wherever possible we have referenced literature in English. At the end of every chapter there is a selection of the available English literature for the respective field of law.

The first reference always mentions the full name of the authors and title of their work; then all the following citations refer to the first footnote. The same referencing scheme is applied to the Federal Acts.



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Martina Becker, M.A. HSG in Law, Assistant Manager Indirect Tax at KPMG AG  
*Tax Law*

Elisabetta Fiocchi Malaspina, Prof. Dr. iur., Assistant Professor at the  
University of Zurich  
*History of International Law*

Christoph Beat Graber, Prof. Dr. iur. (PhD), Professor at the University of  
Zurich  
*Legal Sociology*

Tina Huber-Purtschert, Dr. iur., lic. et mag. rer. pol., Lecturer and Senior  
Research Fellow at the University of Zurich  
*Law of Obligations*

Matthias Mahlmann, Prof. Dr. iur., Professor at the University of Zurich  
*Legal Philosophy and Legal Theory*

Sophie-Katharina Matjaz, Mag. iur., Research Assistant, Lecturer, and PhD  
Candidate at the University of Zurich  
*Civil Procedure*

Matthias Oesch, Prof. Dr. iur., LL.M., Professor at the University of Zurich  
*Constitutional Law*  
*International Relations*

Peter Georg Picht, Prof. Dr. iur., LL.M., Professor at the University of Zurich  
*Civil Law*

Madeleine Simonek, Prof. Dr. iur., Professor at the University of Zurich  
*Tax Law*

Goran Studen, Dr. iur., LL.M., Lecturer at the University of Zurich and Attorney at Law at Pestalozzi Attorneys at Law Ltd

*Civil Law*

Andreas Thier, Prof. Dr. iur., M.A., Professor at the University of Zurich

*Legal History*

Marc Thommen, Prof. Dr. iur., LL.M., Professor at the University of Zurich

*Swiss Legal System*

*Criminal Law*

*Criminal Procedure*

Felix Uhlmann, Prof. Dr. iur., LL.M., Professor at the University of Zurich

*Administrative Law*

*Administrative Procedure*

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# Abbreviations

AS	<i>Amtliche Sammlung des Bundesrechts</i> (official compilation of federal legislation)
BBl	<i>Bundesblatt</i> (Federal Gazette)
BEPS	Base Erosion and Profit Shining (OECD working group)
BGE	<i>Amtliche Sammlung der Bundesgerichtsentscheide</i> (official compilation of the Swiss Federal Supreme Court decisions)
CHF	Swiss Franc(s)
CISG	United Nations Convention on Contracts for the International Sale of Goods
CPR	cardiopulmonary resuscitation
e.g.	<i>exempli gratia</i> (for example)
EC	European Community
ECHR	European Convention on Human Rights; European Court of Human Rights
ECJ	European Court of Justice
ed.	editor
eds.	editors
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
et al.	<i>et alii/aliae</i> (and others)
et seq./et seqq.	<i>et sequens</i> (and the following)
etc.	<i>et cetera</i> (and so forth)
ETH	<i>Eidgenössische Technische Hochschule</i> (Swiss Federal Institute of Technology)
EU	European Union

GDP	gross domestic product
GTC	general terms and conditions
Hrsg.	<i>Herausgeber</i> (editor[s])
i.e.	<i>id est</i> (that is)
ICCPR	International Covenant on Civil and Political rights
ICRC	International Committee of the Red Cross
lit.	<i>litera</i> (letter)
n.	note(s)
NATO	North Atlantic Treaty Organisation
NGO	non governmental organisation
No	number
OECD	Organisation for Economic Co-operation and Development
p.	page
pp.	pages
PfP	Partnership for Peace
S.	<i>Seite(n)</i> (page[s])
SR	<i>Systematische Sammlung des Bundesrechts</i> (classified compilation of federal legislation)
SRG	<i>Schweizerische Radio- und Fernsehgesellschaft</i> (Swiss Radio and Television Corporation)
UN	United Nations
US	United States
USD	United States Dollar(s)
VAT	Federal Value Added Tax
Vol.	Volume
WHO	World Health Organisation
WTO	World Trade Organisation

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## Swiss Legal System

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The purpose of this chapter is to give an “introduction to the introduction” to Swiss Law.<sup>1</sup> After the discussion of some facts and figures (I.) and a very short glimpse at the historical events that led to the founding of the Switzerland we know today (II.), the federal structure of the Swiss confederation (III.), the cantons (IV.), and the communes (V.) are explained in detail. Subsequently, the main features of direct democracy in Switzerland (VI.), the legislation process (VII.), the publication of federal laws (VIII.), and the citation and publication of the case law (IX.) are examined.

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<sup>1</sup> For an excellent (official) introduction see: The Swiss Confederation – A Brief Guide, 2018, (<https://perma.cc/YM59-ZMFK>).

# I. Facts and Figures

In a nutshell, Switzerland may be described as a country at the heart of Europe, yet remaining outside of the European Union. It has roughly 8.5 million inhabitants. In terms of national language, 65.6 % of all Swiss inhabitants speak (Swiss) German, 22.8 % French, 8.4 % Italian, and 0.6 % Romansh. Switzerland is divided up into four language regions:

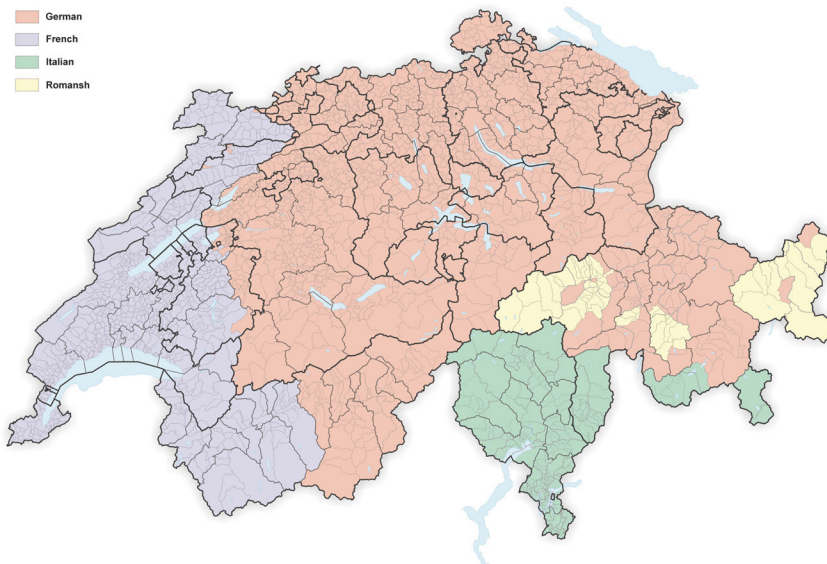


Figure 1: Language Regions<sup>2</sup>

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<sup>2</sup> Source: Wikipedia (<https://perma.cc/4NgZ-6C9B>); originator: Tschubby, translated by Lesqual.



Article 4 of the Constitution of the Swiss Confederation states: “*The National Languages are German, French, Italian, and Romansh.*”<sup>3</sup> According to Article 70 Constitution, only German, French, and Italian are full-fledged “*official languages of the Confederation*”. Federal laws are published in these official languages: the three versions are equally binding.<sup>4</sup> Romansh is only an official language of the confederation “*when communicating with persons who speak Romansh.*” This means that federal laws are only issued in German, French, and Italian. Romansh-speaking individuals can, however, address cantonal or federal authorities in Romansh.

The confederation spreads over 41'000 kilometres squared (km<sup>2</sup>),<sup>5</sup> making it just a little bit bigger than Bhutan (38'000km<sup>2</sup>) and little smaller than the Netherlands (41'500km<sup>2</sup>). In 2016, Switzerland reported a GDP of 659 Billion USD, which, according to an International Monetary Fund ranking, placed Switzerland at the 20<sup>th</sup> position worldwide. Further, in terms of its GDP *per capita* of almost 80'000 USD, Switzerland ranked in second place, closely following Luxembourg.

Switzerland enjoys a positive reputation for its mountains, chocolate, cheese, and watches. Simultaneously, Switzerland and its private banks have long been criticised for offering the wealthy and powerful of this world a safe and secret harbour for their fortunes. In response, efforts have been made to combat money laundering and to weaken the notorious Swiss bank secrecy in recent years.

Switzerland, adhering to its self-imposed policy of neutrality, managed to stay out of two World Wars. The Swiss confederation also hosts international organisations such as the World Trade Organisation (WTO), the World Health Organisation (WHO), or the International Committee of the Red Cross. Furthermore, sports organisations such as the Fédération Internationale de Football Association (FIFA), the Union of European Football Associations (UEFA), or the International Olympic Committee (IOC) have their seats in Switzerland. Near Geneva, on the Swiss and French border, is the European Organization for Nuclear Research (CERN),<sup>6</sup> an institution operating the

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3 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.admin.ch](http://www.admin.ch) (<https://perma.cc/M8UJ-S369>).

4 Article 14 of the Federal Act on the Compilations of Federal Legislation and the Federal Gazette of 18 June 2004 (Publications Act, PubLA), SR 170.512; see for an English version of the Publications Act [www.admin.ch](http://www.admin.ch) (<https://perma.cc/RM53-3EGN>).

5 And over 70 % of it is made up by mountains.

6 This stands for: Conseil Européen pour la Recherche Nucléaire.

largest particle physics laboratory in the world and famously credited with having invented the internet.<sup>7</sup> Switzerland's most renowned university is the ETH, the Swiss Federal Institute of Technology, located in Zurich and counting 21 Nobel laureates amongst its graduates, including its most famous pupil, Albert Einstein.

Switzerland also boasts some famous inventions such as cellophane, absinthe, LSD, and the potato peeler.<sup>8</sup> Tobacco consumption is widespread: according to a WHO report from 2017 almost 25 % of the population are smokers.<sup>9</sup> Switzerland also has one of the highest rates of cannabis use in the world. It is estimated that some 600'000 users get through 100 tonnes of hashish and marijuana each year. The annual consumption of chocolate averages at between 11 and 12 kilos per capita. Switzerland has the third highest level of job security and salary out of all OECD countries. However, it lags behind most western European countries in terms of gender equality: it ranks 24 out of 38 OECD countries for gender inequality in salaries, with a difference of around 17 %. Switzerland is one of only two countries in the world to have a square flag (the other country being the Vatican). Foreigners account for nearly 25 % of the population – one of the highest percentages globally. Military service is still compulsory for male Swiss citizens.<sup>10</sup> The Swiss Air Force – according to a 2014 press release that led to international media coverage – is only on duty during office hours, i.e. from 9h-17h.<sup>11</sup>

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7 Source: [www.theculturetrip.com](https://perma.cc/6Y8X-NE23) (<https://perma.cc/6Y8X-NE23>).

8 Source: [www.expatica.com](https://perma.cc/N37S-G46N) (<https://perma.cc/N37S-G46N>)

9 WHO Report on the Global Tobacco Epidemic, 2017 (<https://perma.cc/MUD5-Q6Q2>).

10 You can find these and more interesting facts about Switzerland on [www.expatica.com](https://perma.cc/N37S-G46N) (<https://perma.cc/N37S-G46N>)

11 See e.g. Huffington Post (<https://perma.cc/JVT9-8NPY>).

## II. History



Figure 2: Federal Charter of 1291<sup>12</sup>

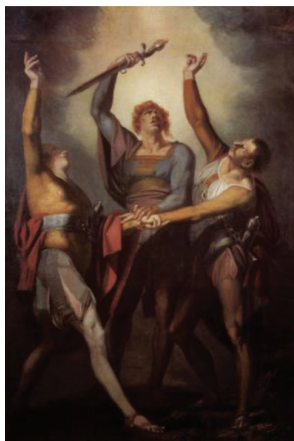


Figure 3: Oath on the „Rütli-Wiese“<sup>13</sup>

12 Source: Wikipedia (<https://perma.cc/DHU4-4NKJ>).

13 Source: Wikipedia (<https://perma.cc/35Y3-Q6RK>).

The 19<sup>th</sup> century historians determined that the founding of the Old Swiss Confederacy occurred on 1<sup>st</sup> August 1291. This is the date of the so called Federal Charter (*Bundesbrief*) which united Uri, Schwyz, and Unterwalden as a “sworn union” against foreign oppressors. According to subsequent mystifications, the oath was taken on the *Rütli-Wiese*, a commons near Seelisberg/Uri. This legend also made its way into FRIEDRICH SCHILLER’s drama of William Tell (1804). The date of Switzerland’s national holiday today is the 1<sup>st</sup> of August.

The modern Swiss federal state only emerged after a short civil war in November 1847. In the lead up to the conflict, Catholic cantons formed a separate alliance (*Sonderbund*) to oppose the gradual centralisation of powers by the predominantly Protestant cantons. In the ensuing *Sonderbund War*, the Protestants prevailed. Still, in the following constitutional convention, the majority of the founding fathers recognised that a centralised political system, as was the French model for example, would not be sustainable. The different cultural and religious identities of the cantons had to be respected. Hence, taking much inspiration from the United States of America, the founding fathers drew up a constitution for a Swiss federal state. Its two main features were (and are) the separation of powers at the federal level (III.) and the sovereignty of the cantons (IV.).

### III. Confederation

As will be explained in great detail by MATTHIAS OESCH in the Chapter on Constitutional Law,<sup>14</sup> the Swiss federal state is defined by its three levels of government: the confederation, the cantons, and the communes.<sup>15</sup> The confederation (*der Bund*) is the top level. It fulfils “*the duties that are assigned to it by Federal Constitution*” (Article 42 Constitution). Only tasks that the cantons are unable to perform or that need uniform regulation are allocated to the confederation (Article 43a Constitution). Article 2 of the Constitution of 1848 stated that the aim of the confederation was „*to maintain the independence of the fatherland against foreign countries, and to maintain quiet and order within the country, the protection of the freedom and rights of the Swiss, and the advancement of their common welfare*”.<sup>16</sup> These aims remain unchanged today.<sup>17</sup> The confederation is inter alia responsible for foreign relations, the military, social welfare, and trade and tariffs.

The Constitution of 1848 established the central institutions of the confederation according to the principle of separation of powers: the parliament as the legislator (Federal Assembly, 1.), the government as the executive (Federal Council, 2.), and the Federal Supreme Court as the judiciary (3.). Bern was designated as the “federal city” in 1848, prevailing over Zurich and Lucerne.

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14 See Chapter Constitutional Law, pp. 145.

15 See Title 3 of the Constitution (“*Confederation, Cantons and Communes*”).

16 Own translation of Article 2 of the Constitution of 1848: “*Der Bund hat zum Zweck: Behauptung der Unabhängigkeit des Vaterlandes gegen außen, Handhabung von Ruhe und Ordnung im Innern, Schutz der Freiheit und der Rechte der Eidgenossen und Beförderung ihrer gemeinsamen Wohlfahrt.*”

17 See Article 2 Constitution: “*1 The Swiss Confederation shall protect the liberty and rights of the people and safeguard the independence and security of the country.*” However, the scope of the aims has been broadened: “*2 It shall promote the common welfare, sustainable development, internal cohesion and cultural diversity of the country. 3 It shall ensure the greatest possible equality of opportunity among its citizens. 4 It is committed to the long term preservation of natural resources and to a just and peaceful international order.*”

The Federal Assembly and the Federal Council both have their seats in Bern.<sup>18</sup> Thus, de facto Bern is the capital of Switzerland, although de iure it has never held that title. The Federal Supreme Court resides in Lausanne.<sup>19</sup>

## 1. FEDERAL ASSEMBLY

As mentioned above, the founding fathers of the Swiss Federal State decided to respect the cultural, economic, and religious differences between the various cantons. Following the example of the Constitution of the United States of America they drew up a bicameral system for the Federal Assembly (*Bundesversammlung*) with the National Council (*Nationalrat*) acting as the “House of Representatives” and the Council of States (*Ständerat*) as the “Senate”. The Federal Assembly is the supreme authority of the confederation (Article 148 I Constitution).

The *National Council* is composed of 200 representatives of the people (Article 149 I Constitution). The cantons are proportionally represented according to their populations. The canton of Zurich, for example, gets to send 35 National Councillors to Bern, while Geneva sends 11 and Glarus sends only one. General elections are held every four years.<sup>20</sup> In the media, the president of the National Council is often referred to as the highest ranking Swiss official. However, in the official order of precedence set by the department of foreign affairs, he or she only ranks at the fourth position, behind the president and vice-president of the Confederation and the other Federal Councillors.<sup>21</sup>

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18 Article 32 I of the Federal Act on the Federal Assembly of 13 December 2002 (Parliament Act, ParlA), SR 171.10 – Seat of the Federal Assembly (“*The Federal Assembly meets in Bern.*”). See for an English version of the Parliament Act [www.admin.ch \(https://perma.cc/3Z8Y-P8QH\)](https://perma.cc/3Z8Y-P8QH); Article 58 of the Government and Administration Organisation Act of 21 March 1997 (GAOA), SR 172.010 – Official seat (“*The official seat of the Federal Council, the departments and the Federal Chancellery is the City of Bern.*”). See for an English version of the Organisation Act [www.admin.ch \(https://perma.cc/9DKM-JWZ4\)](https://perma.cc/9DKM-JWZ4).

19 Article 4 of the Federal Supreme Court Act of 17 June 2005, SR 173.110.

20 Article 149 Constitution – Composition and election of the National Council: “1 *The National Council is composed of 200 representatives of the People.* 2 *The representatives are elected directly by the People according to a system of proportional representation. A general election is held every four years.* 3 *Each Canton constitutes an electoral constituency.* 4 *The seats are allocated to the Cantons according to their relative populations. Each Canton has at least one seat.*”

21 Protocol Regulations of the Swiss Confederation, approved by the Federal Council on 29 September 2017 (<https://perma.cc/55U8-ZHGL>), p. 11.

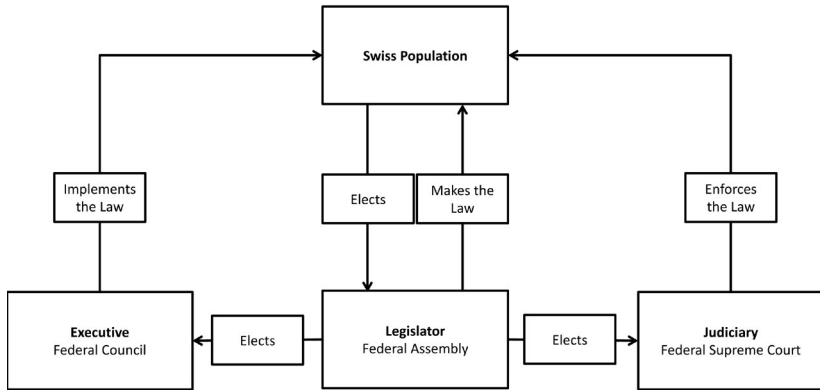


Figure 4: Separation of Powers in Switzerland

In the *Council of States* there are 46 representatives of the cantons (Article 150 I Constitution). 20 cantons get to appoint two delegates, while Obwalden, Nidwalden, Basel-Stadt, Basel-Landschaft, Appenzell Ausserrhoden and Appenzell Innerrhoden are only permitted to appoint one delegate. This is why these six cantons are commonly referred to as “half-cantons” or as cantons with a split vote in the Council of States.<sup>22</sup>

Both chambers are of equal standing (Article 148 II Constitution). The main legislative task of the Federal Assembly is to make federal laws. Its main electoral tasks are to appoint the Federal Councillors and the Supreme Court Justices.

## 2. FEDERAL COUNCIL

The Federal Council is the supreme governing and executive authority of the confederation (Article 174 I Constitution). It is the head of the federal administration. The seven members of the Federal Council act as the government of Switzerland. They are elected by the two chambers of the Federal

<sup>22</sup> According to Article 150 II Constitution “the Cantons of Obwalden, Nidwalden, Basel-Stadt, Basel-Landschaft, Appenzell Ausserrhoden and Appenzell Innerrhoden each elect one representative [they are so called ‘half-cantons’]; the other Cantons each elect two representatives.”

Assembly for a term of four years.<sup>23</sup> They can be re-elected repeatedly for as long as the Federal Assembly regards them as fit to serve. KARL SCHENK (born 1823) served as a Federal Councillor for 31 years. He was first elected in 1864 and died in office in 1895. Federal Councillors cannot be impeached.<sup>24</sup> The only way the Federal Assembly can end their term of office is by not re-electing them. In 2007 this happened to the former right-wing opposition leader, Federal Councillor CHRISTOPH BLOCHER. Parliament can also mount political pressure on a Federal Councillor to resign. ELISABETH KOPP, the first woman to be elected to the Swiss Federal Council, resigned in 1989 after it became public that she had tipped off her husband about alleged criminal activities of a company he was involved in. Every year, the Federal Assembly appoints one of the Federal Councillors as the president of the confederation. The president is, however, not vested with any particular powers, nor is he or she the formal head of state. Instead, the president is merely considered the “*primus inter pares*” (the first among equals). The president of the confederation primarily has a representative task. Immediate re-election as a president is not possible.



Figure 5: The Official 2018 Photograph of the Federal Council<sup>25</sup>

23 See Articles 174 et seqq. Constitution.

24 There is only a very narrow exception: the Federal Assembly can declare a Federal Councillor unable to discharge the duties of office if “*owing to serious health problem or other reasons that prevent him or her from returning to work, the person concerned is manifestly unable carry out his or her duties*” (Article 140a Parliament Act).

25 GUY PARMELIN, SIMONETTA SOMMARUGA, UELI MAURER, ALAIN BERSET (President), DORIS LEUTHARD, JOHANN SCHNEIDER-AMMANN, IGNAZIO CASSIS, WALTER THURNHERR



Each of the seven Federal Councillors is the head of one department of the federal administration: Federal Department of Foreign Affairs (IGNAZIO CASSIS), Federal Department of Home Affairs (ALAIN BERSET), Federal Department of Justice and Police (SIMONETTA SOMMARUGA), Federal Department of Defence, Civil Protection, and Sports (GUY PARMELIN), Federal Department of Finance (UELI MAURER), Federal Department of Economic Affairs, Education and Research (Johann Schneider-Ammann), and Federal Department of the Environment, Transport, Energy, and Communications (DORIS LEUTHARD). Despite his somewhat misleading title, the Federal Chancellor (currently WALTER THURNHERR) does not hold a governmental position. He is the Federal Council's chief of staff.<sup>26</sup>

### 3. FEDERAL SUPREME COURT

The Constitution of 1848 installed the Federal Supreme Court as an *ad hoc* judicial authority of the Swiss confederation. It was only the Constitution of 1874 that founded the Federal Supreme Court as the permanent federal judiciary. The Federal Supreme Court is independent of both the Federal Assembly and the Federal Council. The 38 Supreme Court Justices are elected by the Federal Assembly for a 6 year tenure (Article 145 Constitution). All federal Supreme Court Justices are members of a political party. It is their party who nominates them for election and re-elections. Since 2017, the repartition along party lines has been as follows: Justices of the Swiss People's party (10), Swiss Social Democratic Party (9), Christian Democratic People's Party (7), Liberals (6), Greens (4), Swiss Green Liberal Party (1), and Conservative Democratic Party (1). In turn, the Federal Supreme Court Justices then pay a fixed or proportional part of their yearly salary to their political party. This (election) system has repeatedly and rightly been criticised with view to judicial independence and discrimination of non-party members.<sup>27</sup>

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(Federal Chancellor); Source: Schweizerische Bundeskanzlei, [www.admin.ch](http://www.admin.ch) (<https://perma.cc/CXV7-WKKH>).

<sup>26</sup> The Swiss Confederation – A Brief Guide, 2018, (<https://perma.cc/YM59-ZMFK>), p. 74.

<sup>27</sup> See for example: GRECO – Group of States against Corruption / Council of Europe, Fourth Evaluation Round, Corruption prevention in respect of Members of Parliament, Judges and Prosecutors, Evaluation Report, Switzerland, Adopted by GRECO at its 74th

Re-election of Federal Supreme Court Justices is possible and indeed standard. Historically, there have been only three cases in which Federal Supreme Court Justices who stood for re-election were unsuccessful. Both Justice ROBERT FAZY in 1942 and Justice HANS ULRICH WILLI in 1995 were not re-elected for reasons of age: FAZY was 70 years old, WILLI 68. Justice MARTIN SCHUBARTH was not re-elected on 5 December 1990 because another Justice had lobbied against him with the conservative parliamentarians, following SCHUBARTH's involvement in initiating a fundamental change in judicial practice.<sup>28</sup> However, the media then made this plot public and only one week later, the Federal Assembly reconsidered its own decision and confirmed the re-election. This case shows how problematic the need for re-election is in terms of judicial independence from politics. Another occasion where there was obvious interference with judicial impartiality occurred on 24 September 2014, when several members of the Federal Assembly chose not to give their votes for the re-election of all six Justices of one chamber of the Federal Supreme Court because they disagreed with the jurisprudence of this chamber.<sup>29</sup>

Today, Federal Supreme Court Justices may hold their office until the age of 68. As is the case for Federal Councillors, there is no possibility of impeachment. This situation came under attack when Justice MARTIN

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Plenary Meeting, Strasbourg, 28 November - 2 December 2016 (<https://perma.cc/G5VB-L66E>), p. 29.

28 After three conservative justices had left the Federal Supreme Court, a generation of liberal justices had gained a majority, and the Federal Justice EDWIN WEYERMANN, a member of the Swiss People's Party, found himself in the minority with his conservative views. Hence, he lobbied against Justice MARTIN SCHUBARTH among the conservative parliamentarians, which is why SCHUBARTH was not re-elected at first; see report of National Council 6 October 2003, p. 40 (<https://perma.cc/UX8X-2H92>).

29 In re-elections Justices can receive a maximum of 246 votes, i.e. 200 votes by the National Councillors and 46 votes by the Councillors of State. On 24 September 2014 the Justices of the II. Public Law Chamber were re-elected as follows: FLORENCE AUBRY GIRARDIN (party affiliation: the Greens, votes: 164), YVES DONZALLAZ (Swiss People's Party, 159), LORENZ KNEUBÜHLER (Swiss Social Democratic Party, 190), HANS GEORG SEILER (Swiss People's Party, 198), THOMAS STADELMANN (Christian Democratic Party, 167) and ANDREAS ZÜND (Swiss Social Democratic Party, 166). Allegedly, one of the reasons why these justices were denied so many votes at their re-election was their jurisprudence regarding (criminal) foreigners, e.g. BGE 139 I 16, where the Federal Supreme Court quashed a cantonal court's decision to have a drug dealer deported who originally stemmed from Mazedonia but had lived in Switzerland since the age of 7. This Supreme Court decision enraged a lot of parliamentarians because two years before, on 28 November 2010, a majority of the Swiss electorate had accepted a popular initiative to deport criminal foreigners.

SCHUBARTH's name reappeared in another incident: on 11 February 2003, Justice SCHUBARTH spat on a court reporter in the hallways of the Federal Supreme Court. The Federal Supreme Court itself – on questionable legal grounds – subsequently deprived Justice SCHUBARTH of his judicial duties and asked him to resign. A special commission of the Federal Assembly then – on equally shaky grounds – proposed to impeach him by a singularly applicable tailor-made federal decree. These events led to his resignation on 4 October 2003.

The Federal Supreme Court is composed of seven chambers, two dealing with matters of constitutional and public law, two with private law, one with criminal law, and two with social security. The first five chambers are located at the Supreme Court's main seat in Lausanne, the two social law divisions reside in Lucerne. Considering the fact that the Federal Assembly and the Federal Council are both seated in Bern, for the judiciary there is not only an institutional but also a geographical separation of powers.

The Federal Supreme Court is the supreme judicial authority of the confederation (Article 188 I Constitution). Its two main tasks are to supervise the application of the federal law and to protect individual constitutional rights. In terms of its first key task, the Federal Supreme Court has to make sure that the cantonal and federal courts apply the federal laws in a uniform manner. For example, a woman who had killed her daughter was sentenced to six years of imprisonment, the minimum sentence being 5 years. Article 47 I Criminal Code states that the court determines the sentence *according to the culpability* of the offender. The Federal Supreme Court ruled that the cantonal courts had not properly considered culpability and thus violated federal law.<sup>30</sup> In fulfilling this first task, the criminal law chamber of the Federal Supreme Court *de facto* acts as a Court of Cassation. Before the enactment of the Act on the Federal Supreme Court in 2007, the criminal law chamber was in fact called “Kassationshof”, i.e. Court of Cassation.

In terms of its second key task, the Federal Supreme Court deals with individual complaints regarding constitutional rights. One notable case was initiated after the Geneva school authorities forbade a Muslim teacher from wearing her headscarf during class. At the Federal Supreme Court, the teacher

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<sup>30</sup> BGE 136 IV 55.

claimed a violation of her freedom of religion (Article 15 Constitution). The Court, stressing the religious neutrality of public schools, ruled that the prohibition was not unconstitutional.<sup>31</sup>

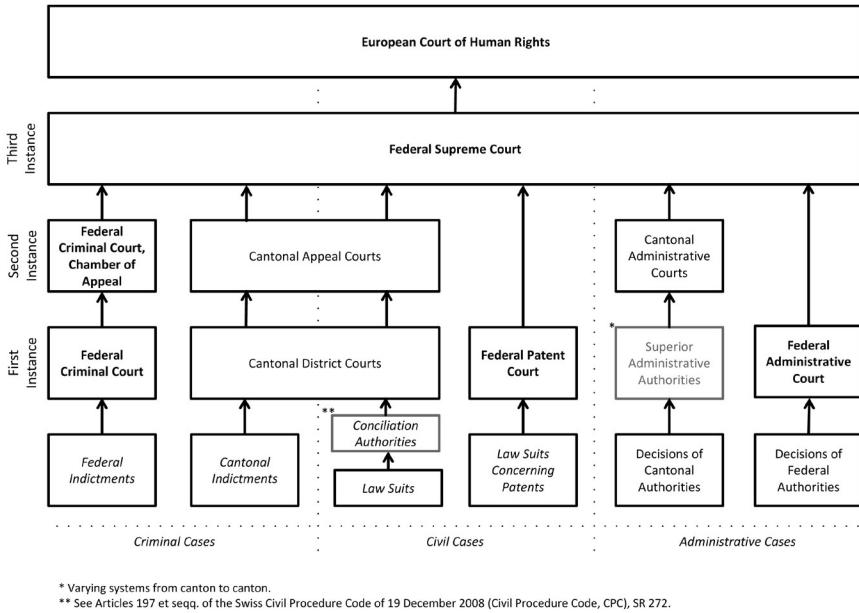


Figure 6: Swiss Court Hierarchy<sup>32</sup>

Its position in the Constitution as the ‘third power’ is the first indicator that the Federal Supreme Court is the least important branch of government. Its relative weakness becomes particularly obvious when considering its powers as a constitutional court in the strict sense of the term. Although the Federal Supreme Court is entitled to rule on the violation of *individual* constitutional claims, its powers to test the constitutionality of *laws* are limited. The Supreme Court can at least declare cantonal laws to be unconstitutional. For example, it declared the surveillance measures of

31 BGE 123 I 296.

32 Source (modified): Wikipedia (<https://perma.cc/DQF2-TS3Q>); originator: Sandstein.

the Police Act of the canton of Zurich to be unconstitutional.<sup>33</sup> However, acts of the Federal Assembly or the Federal Council may not be challenged in the Federal Supreme Court (Article 189 IV Constitution). With view to the separation of powers and the checks and balances operating between the branches of government, this restriction of constitutional review is not convincing. It means that the very same surveillance measures that are enshrined in the Federal Criminal Procedure Code cannot be challenged at the Federal Supreme Court.

In 2017, the Federal Supreme Court decided 7'782 cases. Most of these cases (4'392) were decided by a panel of three Justices. In important cases or upon request of one Justice there was a panel of five Justices (661). Cases which are clearly inadmissible or manifestly ill-founded can be decided by one Justice (2'585). In every case, one Justice is charged with drawing up the judgment (*Referent, juge rapporteur*). Thus, on average each one of the 38 Justices is responsible for drafting 205 judgments per year, or almost one per working day. As well as this drafting responsibility, Justices have to decide more than one additional case per day where they are “merely” part of the panel. To manage this enormous workload, each Justice is supported by 3–4 law clerks. In most cases, Justices have the law clerk draft the judgment that is to be decided upon.

The proceedings at the Supreme Court are conducted almost entirely in writing. The parties hand in their written complaints. Although Article 57 of the Federal Supreme Court Act allows for a hearing to be ordered by the president of the chamber, the parties *de facto* never get to plead orally at the Court. The Court decides most cases by way of circulation. This means that the draft is circulated among the members of the panel. If everyone agrees then the judgment becomes final. However, if the Justices disagree, they must hold a public debate on the case. Thus, the “public hearings” that take place at the Supreme Court are not actual hearings, but public debates. There the Justices discuss the merits of the case in an open courtroom. Even the final vote on the judgment is a process open to the public. The rationale behind this – probably unique – practice is that Justices of the Swiss Federal Supreme Court are not permitted to publish their dissenting or concurring opinions: the public debate presents an alternative

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33 BGE 136 I 87.

opportunity for them to utter such opinions.<sup>34</sup> Such public sessions are in practice very rare. In 2016, a public debate and public pronouncement of the judgement only occurred in 78 of the 7811 cases, i.e. in less than 1 % of cases.

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34 Historically, dissenting opinions were not provided for because the courts used to deliberate their verdicts publicly and had an open vote at the end of the deliberations. As previously mentioned, the Supreme Court continues to deliberate and vote on cases in open court up to this day. On the cantonal level, however, these open deliberations are vanishing for reasons of efficiency. It is this that has sparked a new debate over whether the publication of dissenting opinions ought to be allowed. The main – not very convincing – counter argument purported by opponents is that the publication of dissenting opinions undermines the authority of the courts.

## IV. Cantons

In 1848, there were 25 cantons in the Swiss Confederation: Zurich, Bern, Lucerne, Uri, Schwyz, Obwalden and Nidwalden, Glarus, Zug, Fribourg, Solothurn, Basel Stadt and Basel Landschaft, Schaffhausen, Appenzell Ausserrhoden and Appenzell Innerrhoden, St. Gallen, Graubünden, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchâtel, and Geneva.<sup>35</sup> In 1978, Jura was accepted as the 26<sup>th</sup> canton in a constitutional referendum after it had decided to secede from the canton of Bern in a popular vote.



Figure 8: The 26 Cantons of Switzerland<sup>36</sup>

<sup>35</sup> Article 1 Constitution of 1848.

<sup>36</sup> Source: Wikipedia (<https://perma.cc/5D9M-W82N>); originator: TUBS.

Up to this day, understanding the role of the cantons is key in being able to understand the Swiss federal system. The Constitution of 1848 established Switzerland as a confederation of 25 federal states (cantons) that – much inspired by the United States of America – only conferred some powers (like foreign relations or control over the military) to the central authorities and left all the others (like policing, schooling, taxes, health care, etc.) with the cantons. Thus, from the very beginning of the Swiss federal state's existence, the cantons retained their autonomous standing.

This strong independent position of the cantons can best be understood by examining Article 3 of the Constitution, which has not changed since 1848: *"The Cantons are sovereign ... They exercise all rights that are not vested in the Confederation."* The confederation, on the other hand, only possesses *"the duties that are assigned to it by Federal Constitution"* (Article 42 Constitution). The principles for the allocation of powers and tasks are circumscribed in Article 43a of the Constitution: *"The Confederation only undertakes tasks that the Cantons are unable to perform or which require uniform regulation by the Confederation."* Traditionally, there were only a limited amount of tasks vested in the confederation. In recent years, however, the confederation has assumed greater responsibility. The feeling had begun to develop, particularly in the fields of civil procedural law (Article 122 I Constitution), criminal procedural law (Article 123 I Constitution), vocational and professional education and training (Article 63 Constitution), or road transport (Article 82 Constitution), that nationwide uniform legislation was required. Nevertheless, despite these developments, the cantons remain strong and independent entities within the federal system today.

Each canton must provide for a democratic system of government.<sup>37</sup> Firstly, this means that the people of the canton must have the opportunity to elect their representatives to the cantonal parliament. Secondly, the separation of powers must be respected within the canton. Separation of powers is guaranteed in all 26 cantons. Each canton has a democratically elected cantonal parliament, an executive, and an independent judiciary. The cantonal parliaments issue the cantonal laws, for example on education or on regional planning. These cantonal laws are then implemented by the cantonal executives and controlled by the cantonal courts. So, for example, a cantonal government (executive) issues permits to build houses. If such a permit is refused

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37 Article 51 Constitution: *"Each Canton shall adopt a democratic constitution."*



or restricted, the individual who wants to build a house can take the government to court, and the court will decide upon the application of the law in the circumstances. Thirdly, the cantonal constitutions themselves must be democratically approved and the people of the canton must have the possibility to amend or change the constitution in a popular vote.<sup>38</sup>

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38 Article 51 I Constitution: *“Each Canton shall adopt a democratic constitution. This requires the approval of the People and must be capable of being revised if the majority of those eligible to vote so request.”*

## V. Communes

At the third layer of the Swiss federal landscape are the communes, i.e. cities and villages throughout the country. In 2018, there were 2'222 communes in Switzerland. The city of Zurich is the largest commune (ca. 400'000 inhabitants) and the village of Corippo is the smallest (13 inhabitants).<sup>39</sup> On average, Swiss communes have about 2'800 inhabitants, the median standing at just over 1'000 inhabitants. The number of communes is rapidly declining, as many of them are merging to ease their administrative burdens. The degree of autonomy of communes is determined by the Constitution of the canton they belong to. According to Article 83 of the cantonal Constitution of Zurich, the communes are responsible for all public tasks that are neither assigned to the confederation nor the cantons. Thus, communes provide institutions like social welfare authorities, primary schools, the local police, or the justices of the peace. They are responsible for the maintenance of streets and urban development in general, supply of electrical energy, and the levying of taxes. Some larger communes (cities) have a parliament, but in over 80 % of all communes in Switzerland it is the communal assembly, a gathering of all local citizens, that is the legislative body. They decide on the statute ("constitution") of the commune and elect the local government or mayor.

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39 The Swiss Confederation – A Brief Guide, 2018 (<https://perma.cc/YM59-ZMFK>), p. 13.

# VI. Direct Democracy

In this chapter, an initial glimpse at direct democracy in Switzerland is taken. Participation at the federal (1.), cantonal (2.), and (3.) communal level will be examined separately. A thorough examination of direct democracy will be undertaken in MATTHIAS OESCH'S chapter on constitutional law.<sup>40</sup>

## 1. FEDERAL LEVEL

For the average Swiss person, direct democracy is more than merely a specific form of decision-making. Direct democracy is a core element of the Swiss national identity. As ANDREAS THIER convincingly argues, political participation and self-determination are deeply rooted in Swiss tradition. Their importance can be traced back to the public peaces (*Landfrieden*) of the high and later Middle Ages: “*The conceptual basis of these public peaces was the idea of creating associations based on collective vows. This kind of association was called sworn union (coniuratio).*”<sup>41</sup>

The importance of the *coniuratio* in the narrative of the Swiss nation (“Rütli-Schwur”)<sup>42</sup> might also explain why, up to this day, democratic participation in Switzerland is inextricably tied to citizenship and not to financial contribution. In order to vote in elections, referenda, and initiatives, one must be a Swiss citizen; being a Swiss tax-payer alone is insufficient. It could thus be argued that although the *federal structure* of Switzerland was inspired by the United States, the origins of Swiss *democracy* do not lie in the battle-cry of the American Revolution (“no taxation without representation”) but rather in the small and self-determined communities of peers in the Old Confederacy.

In order to participate in national elections and polls the voters not only need to be Swiss citizens, they also must be of legal age, i.e. 18 years, and must not “*lack legal capacity due to mental illness or mental incapacity*” (Article 136

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<sup>40</sup> See pp. 151.

<sup>41</sup> See Chapter Legal History p. 46.

<sup>42</sup> See Figure 3, p. 6.

I Constitution).<sup>43</sup> Dual citizens are allowed to vote, as are Swiss citizens who live abroad. In contrast, as already mentioned, foreigners who live, work, and pay taxes in Switzerland do not have any right to participate in federal elections or polls. In a limited number of cantons, foreigners have the right to vote. Considering the high threshold for becoming a Swiss citizen,<sup>44</sup> this total exclusion of foreigners (25 % of population)<sup>45</sup> from political participation is questionable. However, the darkest chapter in the history of political rights in Switzerland still remains women's suffrage. On the federal level, women only obtained the right to vote in 1971. On 27 November 1990 the Swiss Federal Supreme Court had to force the canton of Appenzell Innerrhoden to introduce suffrage for women at the cantonal level.<sup>46</sup>

Direct democracy is commonly defined as a political system where decisions are taken by the electorate, i.e. the people themselves. Direct democracy is different from representative democracy: in the latter form, decisions are taken by the elected, i.e. the parliament and/or the government. Decision-making by the people traditionally comes in two forms: top-down or bottom-up.

In the top-down category, a decision that has been taken by the legislator is *taken back* (Latin: re-ferre) to the electorate for approval, hence the term referendum. In Switzerland, any amendment of the constitution through the Federal Assembly must be submitted to a "mandatory referendum" (Article 140 Ia Constitution). Only when the majority of the Swiss cantons and people approve does the amendment take legal force. For example, on 30 September 2016, the Federal Assembly decided that the confederation should enact simplified regulations on the naturalisation of third generation immigrants and stateless children. To fulfil this, the Federal Assembly had to change Article 38 of the Constitution by adding a paragraph 3 and submitting this addition to a mandatory referendum. On 12 February 2017, the proposed change was approved by over 60 % of the Swiss people and by 19 cantons.<sup>47</sup>

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43 This English translation of Article 136 I Constitution is inaccurate for it does not contain any mention of guardianship. A more accurate translated provision on the ineligibility to vote is Article 2 of the Federal Act on Political Rights of 17 December 1976 (PRA), SR 161.1: "*Persons lacking legal capacity who are ineligible to vote in accordance with Article 136 paragraph 1 of the Federal Constitution are persons who are subject to a general deputyship or are represented by a carer as they are permanently incapable of judgement.*"

44 See the article 'Becoming a citizen' on: [www.swissinfo.ch](http://www.swissinfo.ch) (<https://perma.cc/Y6QP-URFS>).

45 See p. 5.

46 For an in-depth discussion of BGE 116 Ia 359 see Chapter on Constitutional Law, pp. 159.

47 Federal Gazette No 17 of 2 May 2017, pp. 3387.

In the bottom-up form of direct democracy, change is initiated by the *people* (Latin: plebs) themselves who want to bring about a *decision* (Latin: scitum), hence the term plebiscite. In Switzerland there are mainly two forms of plebiscites on the federal level. First, the *popular initiative*: this instrument is used to change or amend the Constitution. Any 100'000 Swiss citizens may, within 18 months of the official publication of their initiative, request a revision of the Federal Constitution (Article 138 I and Article 139 I Constitution). On 1 May 2007, politicians of the right-wing Swiss People's Party and the Federal Democratic Union of Switzerland launched an initiative for a nationwide ban on minarets. Within 14 months, they gathered over 113'000 signatures in support of the initiative. The Federal Council and an overwhelming majority of both chambers of the Federal Assembly recommended that the people should reject the initiative. It was argued that the initiative stood at odds with several fundamental values of the Swiss Constitution, such as equality, freedom of religion, or proportionality. However, on 29 November 2009, 57.5 % of the voters as well as 19 cantons and one half-canton approved the initiative. On that day Article 72 III Constitution was enacted: "*The construction of minarets is prohibited.*" Since 1893 a total of 210 popular initiatives have been put to the vote, but only 22 have been accepted by the people and the cantons.

The second form of plebiscite on the federal level is the possibility for the people to challenge federal laws. Within 100 days of official publication, any 50'000 Swiss citizens can request that federal acts of parliament be submitted to a vote of the people (Article 141 Ia Constitution). Confusingly, this form of bottom-up plebiscite is called an "*optional referendum*" although is not a referendum in the previously explained technical sense of the term (top-down). In the case of an optional referendum, it is not the legislator that submits the act to popular approval but the people that demand their say on the matter. On 25 September 2015, the Federal Assembly decreed a new federal act on the Swiss intelligence service. This act inter alia created the possibility for large scale surveillance through the secret service. Several civil liberty groups and left-wing parties opposed the new law and gathered 50'000 signatures to bring about a plebiscite. However, the "referendum" was unsuccessful. In the national poll of 25 September 2016, over 65 % of the voters accepted the new law. It entered into force on 1 September 2017.<sup>48</sup> Since 1875, the Swiss people

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48 Federal Act on the Intelligence Service of 25 September 2015 (Intelligence Service Act, ISA), SR 121.

have had to decide on 185 “optional referenda”. In 105 cases they voted in favour of the “referendum”, thus disavowing the legislator.<sup>49</sup>

## 2. CANTONAL LEVEL

Article 51 I of the Federal Constitution obliges the cantons to provide a democratic Constitution as well as for the possibility of a mandatory referendum and popular initiative: “Each Canton shall adopt a democratic constitution. This requires the approval of the People and must be capable of being revised if the majority of those eligible to vote so request.” The specific requirements under the mandatory referendum and the popular initiative are left up to the cantons. For example, in the canton of Zurich, 6’000 eligible citizens can at any point request the total or partial revision of the cantonal Constitution (Article 23 lit. a and Article 24 lit. a Constitution/ZH).<sup>50</sup>

Apart from these democratic minimal standards guaranteed by the federal Constitution, the cantons are free to create other instruments to enhance the participation of their citizens in the political process. Most cantons do so by providing at least an *optional referendum* and a *legislative initiative* to challenge cantonal laws. In the canton of Zurich, 6’000 eligible people, 12 communes, the city of Zurich, or the city of Winterthur can request that cantonal acts be submitted to a vote of the people (“*optional referendum*”, Article 33 Constitution/ZH); they must do so within 60 days of the official publication. According to Article 23 lit. b and Article 24 lit. a Constitution/ZH, any 6’000 eligible people can request the adoption, amendment, or rescission of cantonal laws (legislative initiative).

A Swiss particularity that currently exists in all 26 cantons is the referendum on financial matters (*Finanzreferendum*): new large, one-time or recurring public investments, which leave considerable room for political

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49 The Swiss Confederation – A Brief Guide, 2018 (<https://perma.cc/YM59-ZMFK>), p. 19.

50 Constitution of the canton of Zurich of 27 February 2005 (Constitution/ZH), SR 131.211. A particularity in the canton of Zurich is the so called individual initiative: A single person can request the revision of the cantonal Constitution as well as the adoption, amendment, or rescission of cantonal laws. If at least 60 members of the Cantonal Council (Legislature) support the initiative, it will be submitted to the Government council (Executive; Article 23 lit. a and b, Article 24 lit. c and Article 31 Constitution/ZH).

choices, are submitted to the public for approval.<sup>51</sup> In the canton of Zurich, the financial referendum can be held on an optional basis against new one-time investments of more than 6 Million Francs as well as new recurring investments of more than 600'000 Francs yearly (Article 33 I lit. d Constitution/ZH), where this is requested by at least 3'000 eligible people, 12 communes, the city of Zurich, or the city of Winterthur (Article 33 II Constitution/ZH).

Furthermore, one of the oldest forms of direct democracy in Switzerland is the so-called *Landsgemeinde* or “Cantonal Assembly,” where all the eligible citizens of a canton form the main decision-making body. They gather once a year on the main square of the canton and decide on specific issues. Voting is conducted through the raising of hands by those in favour of a motion, which conflicts with the constitutional right to submit a secret vote (Article 34 Constitution). The use of the Cantonal Assembly has sharply decreased in the past century. Today, the cantons of Appenzell Innerrhoden and Glarus are the only remaining cantons using this form of direct democracy.<sup>52</sup>

### 3. COMMUNAL LEVEL

The communes can – within the boundaries of the superordinate law – provide their own democratic rules. Usually, the cantons set certain standards and requirements, e.g. the canton of Zurich stipulates in Article 86 Constitution/ZH that there shall be an initiative, a referendum, and a right to make requests on communal level. As explained above in most Swiss villages it is the communal assembly, a personal reunion of all citizens, that is the legislative body. Thus, the citizens of these communes directly decide on the statute of the commune and elect their local government or president.

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51 ANDREAS LADNER, Switzerland: Subsidiarity, Power-Sharing, and Direct Democracy, in Frank Hendriks/Anders Lidström/John Loughlin (eds.), Oxford 2010, pp. 204.

52 Source: Wikipedia (<https://perma.cc/TN3L-WV3L>).

## VII. Legislative Process

How are laws made in Switzerland?<sup>53</sup> On 13 June 1996, the National Council decided that the possibility of legalising same sex marriage should be examined by the Federal Council. In June 1999, the Federal Council published a report on the legal situation of same sex couples in Switzerland in which different solutions were outlined which ranged from private contracts or officially registered partnerships to a fully-fledged marriage for same sex partners. The proposals were submitted to a first national consultation procedure (*Vernehmlassung*). A consultation procedure has the aim of allowing the cantons, political parties, and interested groups to participate in the shaping of opinion and the decision-making process of the confederation.<sup>54</sup> Anyone may participate in a consultation procedure and submit an opinion. Some important entities or organisations, such as the cantonal governments and the political parties, are formally invited to participate.<sup>55</sup> The participants have at least three months to submit their opinion.<sup>56</sup>

The majority of participants that submitted opinions in the 1999 consultation procedure favoured the introduction of some form of registered partnership for same sex couples. Therefore, in November 2001 the Federal Council published a *preliminary draft* and an *explanatory report* on a federal act on registered partnerships for same sex couples. It is important to note that *preliminary draft* (*Vorentwurf*) and *explanatory report* (*erläuternder Bericht*) are technical terms used for the draft legislation at this stage of the legislative procedure.

From 14 November 2001 to 28 February 2002 the preliminary draft and the explanatory report were submitted to a *second* national consultation

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53 For an excellent description of this process see: The Swiss Confederation – A Brief Guide, 2018 (<https://perma.cc/YM59-ZMFK>), pp. 36.

54 Article 2 I of the Federal Act on the Consultation Procedure (Consultation Procedure Act, CPA) of 18 March 2005 (SR 172.061); see for an English version of the Consultation Procedure Act [www.admin.ch](http://www.admin.ch) (<https://perma.cc/HS8B-2PVT>).

55 Article 4 Consultation Procedure Act.

56 Article 7 III Consultation Procedure Act.



procedure – a very rarely occurring practice.<sup>57</sup> All 26 cantons, 10 political parties, and 38 organisations took part in the consultation. The preliminary draft, proposing a specially protected legal status for same sex couples, met wide spread approval. However, some groups continued to advocate for a fully-fledged marriage model, often also demanding that gay and lesbian couples be allowed to adopt children.

Based on the results of the consultation procedure, the Federal Council had the department of justice issue a *draft* for a federal act on registered partnerships. On 29 November 2002, the Federal Council published this draft and handed it to the Federal Assembly. Together with the draft the Federal Council also passed the so called dispatch (*message, Botschaft*) to the Federal Assembly. Dispatch is the technical term used for the explanatory report handed to parliament on a specific proposal. It contains the proposal's legislative history, remarks on its constitutionality, and a commentary on the provisions of the draft. As a standard procedure, both the draft and the dispatch are published in the Federal Gazette, the official journal of the confederation.<sup>58</sup>

Once the draft has reached the Federal Assembly, the presidents of the two chambers jointly decide which chamber – the National Council or the Council of States – first gets to examine the proposed legislation. If they cannot agree, lots are drawn. In our case the draft on registered partnership was first assigned to the National Council for review. Then the dossier was handed down to a special commission of the National Council. This commission first debated on whether or not to approve the introduction of the bill at all. After deciding to approve the introduction, they engaged in an in-depth discussion of the proposed bill. On 2 December 2003, the draft with the amendments proposed by the commission was submitted to the full chamber of the National Council. For two days, the National Council debated and decided on each of the Articles individually and then handed the amended draft over to the Council of States. This chamber also had its commission examine the draft first. On 3 June 2004, the full chamber of the Council of States debated and amended the code. One

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57 Normally – for example when existing acts are to be amended – only this preliminary draft and the explanatory reports are put up for consultation. Two rounds of consultation procedures (as occurred in this example) are only held in exceptional circumstances, e.g. when other applicable legal provisions have changed in the meantime (like the adoption of the Schengen Association Agreement [Schengen/Dublin] after the first round of consultation procedure on the introduction of biometric passports made a second round of consultation procedure necessary).

58 Federal Gazette No 7 of 25 February 2003, p. 1288 (dispatch), p. 1378 (draft).

week later, the last remaining disagreements between the two chambers were eliminated. On 18 June 2004, the final vote was taken, resulting in the passing of the new Federal Act on Registered Partnerships for Same Sex Couples.<sup>59</sup> Two issues were fiercely contested during the course of the parliamentary debate. Firstly, whether to allow same sex couples to adopt children and secondly, whether to grant them access to in-vitro fertilisation. Both questions were answered in the negative (Article 28 Partnership Act).

Following the Federal Assembly's decision, the act had to be published in the Federal Gazette.<sup>60</sup> Within the act's official publication, a 100-day period was set for any 50'000 Swiss citizens to demand an optional popular "referendum" (Article 141 Constitution). Thereafter, the Evangelical People's Party of Switzerland led the opposition against this new act, securing the signature of over 67'000 citizens. The opponents argued that the act weakened the position of the traditional family, would ultimately open the path for same sex couples to adoption, and would create enormous administrative costs for the benefit of only a very minor percentage of citizens. Those supporting the act argued that the existing laws on matters like inheritance and social security benefits discriminated against same sex couples.

On 5 June 2005, the national poll was held. 1'559'848 (58 %) Swiss citizens voted in favour of the new act on registered partnership and 1'127'520 (42 %) against it.<sup>61</sup> The voter turnout was at 56.5 %. As can be seen in the chart below, in the seven mostly catholic or rural cantons of Jura, Wallis, Tessin, Appenzell Innerrhoden, Uri, Schwyz, and Thurgau (marked in red) the act was rejected by the majority of the voters. On the other hand, in the metropolitan areas of Geneva, Lausanne, Basel, and Zurich (marked in dark green) the registered partnership was approved by over 60 % of the electorate.

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59 Federal Act on Registered Partnerships for Same Sex Couples of 18 June 2004 (Partnership Act), SR 211.231.

60 Federal Gazette No 25 of 29 June 2004, p. 3137.

61 Federal Gazette No 34 of 30 August 2005, p. 5183.

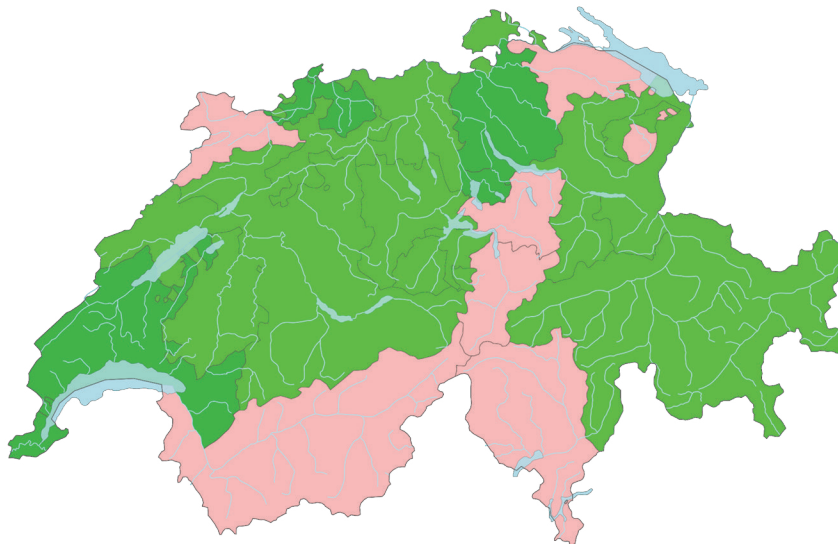


Figure 9: Results of the National Poll on the Federal Act on Registered Partnership for Same Sex Couples<sup>62</sup>

The Federal Council set the act's date of entry into force as 1 January 2007.

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62 Source: Wikipedia (<https://perma.cc/P8UD-388D>); originator: Jedi Friend.

## VIII. Publication of Federal Laws

Preliminary drafts and drafts of federal acts, as well as explanatory reports and the Federal Council's dispatches, are all published in the *Federal Gazette*. The Federal Gazette (*Bundesblatt, BBl; feuille fédérale FF*) is the official journal confederation for standard publications and communications (Article 13 Publications Act). In order for a federal law to be properly enacted, however, it must be published in the *official compilation* of federal legislation (*amtliche Sammlung, AS; recueil officiel, RO*). It is through this publication that federal acts acquire binding legal force (Article 8 Publications Act). The official compilation is a chronological collection of all federal acts of legislation. Upon their entry into force, federal acts also become a part of the *classified compilation* of federal legislation (*Systematische Sammlung, SR; recueil systématique, RS*; Article 11 Publications Act). This compilation lists all federal laws and ordinances under the following categories according to their content:

- 1 State – People – Authorities
- 2 Private law – Civil justice – Enforcement
- 3 Criminal law – Criminal justice – Execution of sanctions
- 4 Education – Science – Culture
- 5 National defence
- 6 Finance
- 7 Public constructions – Energy – Transport
- 8 Health – Employment – Social security
- 9 Economy – Technical cooperation

The Swiss Federal Constitution is classified with the code SR 101. The civil code is classified with the number SR 210. Family Laws are enumerated starting at 211. As the act on registered partnership mainly concerns the family law status of same sex partners, it was allocated the number SR 211.231. This number allows the unequivocal identification of all federal acts.

SR-numbers starting with “o.” refer to international law that is part of the Swiss legislation. The numbering of international law follows the same classification method as the domestic law. The European Convention on Human Rights is classified at SR 0.101, for example. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) of 29 May 1993 is filed under SR 0.211.221.311.

## IX. Case Citation

The most important cases in the Swiss legal system are the decisions of the Swiss Federal Supreme Court in Lausanne/Lucerne and the decisions of the European Court of Human Rights in Strasbourg.<sup>63</sup>

The Federal Supreme Court has a statutory duty to inform the public about its jurisprudence (Article 27 I Federal Supreme Court Act). According to Article 57 of the Federal Supreme Court's own rules of procedure,<sup>64</sup> this information is provided in four different ways: in the official compilation of the Federal Supreme Court decisions (1.), on the internet (2.), by making judgments physically accessible to the public (3.), and through press releases (4.).

### 1. OFFICIAL COMPILATION (BGE)

The Federal Supreme Court publishes landmark cases in its *official compilation* of decisions.<sup>65</sup> This official compilation of the Supreme Court's decisions must not be confused with the official compilation of federal laws of the confederation, discussed above.<sup>66</sup> By virtue of their publication in the official compilation, decisions are regarded as de facto binding precedents. The decisions included in the official compilation are edited, printed, and published in yearly volumes. They are cited as BGE, e.g. "BGE 113 IV 58".<sup>67</sup> "BGE" stands for *Bundesgerichtsentscheid*, i.e. Federal Supreme Court decision. In

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63 For the citation of cases by the European Court of Human Rights see their guidelines (<https://perma.cc/J7KQ-Y7GN>).

64 Regulations for the Federal Supreme Court of 20 November 2006, SR 173.110.131.

65 German: *Amtliche Sammlung der Entscheide des schweizerischen Bundesgerichts* (BGE); French: *recueil officiel des arrêts du Tribunal fédéral suisse* (ATF); Italian: *Raccolta ufficiale delle decisioni del Tribunale federale svizzero* (DTF).

66 See pp. 31.

67 This case was about two men who pushed a 52 kg stone down a hill, killing a fisherman at the foot of the slope. It had to consider the question of whether the two men could be held criminally liable as co-offenders for negligent homicide. For a discussion of the merits of this "rolling stones" case see the Chapter on Criminal Law, p. 390.

French, this decision would be referred to as ATF 113 IV 58. “ATF” stands for *Arrêt du Tribunal fédéral*. In Italian, the case would be cited as “DTF 113 IV 58” *Decisione del Tribunale federale*.

The first three digits of the citation indicate the yearly volume. The first volume was published in 1874 when the Federal Supreme Court was founded as a permanent institution of the confederation.<sup>68</sup> Thus, using the example of BGE 113 IV 58, the first three digits, “113”, indicate that this decision was rendered 113 years after 1874, in 1987. The Roman Numerals in the middle indicate the field of law the case relates to:

- I. Constitutional law
- II. Administrative and public international law
- III. Civil law, bankruptcy law
- IV. Criminal law, enforcement of sanctions, and criminal procedure
- V. Social security law<sup>69</sup>

Thus, for example, BGE 113 IV 58 is a case regarding criminal law (co-offending in negligent homicide). The last group of digits designates the relevant page(s) within the volume, so in this example, pp. 58. Sometimes more specific citations can be found, for example: BGE 113 IV 58, E. 2 (60). Here, the citation only refers to consideration (*Erwägung*) Nr. 2 of the judgment on page 60.

As previously mentioned, it is only the landmark cases that are published in the official compilation. In 2016, the Swiss Federal Supreme Court handled 7’811 cases: only 319 or 4 % of these were published in the official compilation. Whether or not a case ought to be considered a landmark case is decided by the Justices involved in the relevant case. The rationale of this rule is not very convincing as their view on the importance of the case is likely to be tainted by their involvement in it. The decisions in the official compilation are only published in the language that was used for the Federal Supreme Court proceedings, i.e. German, French or Italian.<sup>70</sup> The language used in the pro-

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68 See p. 12.

69 In the volumes BGE 98 to BGE 120, i.e. for decisions between 1972 and 1994, the Federal Supreme Court temporarily used a different numeration for the Roman middle digits in the official compilation: Ia. Constitutional law, Ib. Administrative law and public international law, II. Civil law, III. Debt enforcement and insolvency law, IV. Criminal law and enforcement of sanctions, V. Social security law.

70 Federal Supreme Court decisions in Romansh are extremely rare. See for example: BGE 122 I 93.

ceedings at the Federal Supreme Court is usually determined by the language used in the cantonal proceedings (Article 54 I Federal Supreme Court Act). There are no official translations of the Supreme Court decisions.<sup>71</sup> However, the Court publishes a summary of the main findings of every landmark case, a so-called *Regeste*, in all three official languages. It is important to note that only part of the judgment rendered by the Federal Supreme Court is published in the official compilation. This compilation only contains the excerpts that the deciding Justices deemed most relevant in the particular case. In order to get access to the full judgment, one needs to know the case number which – from volume BGE 128 (2005) onwards – can be found on the header of the officially published decisions (see below 2.).

## 2. PUBLICATION ONLINE

For a long time, the publication practice of the Federal Supreme Court was in violation of the European Convention of Human Rights and the Constitution. According to Article 6 I ECHR “[j]udgment shall be pronounced publicly”. Article 30 III Constitution also requires that the delivery of judgments be public. Before the year 2000, only the judgments in the official compilation and a handful of other judgments that had been published in journals were accessible. Hence, less than 5 % of all judgments were made public. Further, such published decisions were still not in compliance with the constitutional requirements, as only small excerpts were published.

From the year 2000 onwards, the Swiss Federal Supreme Court started to make its judgments available online. This change in its publication practice was the result of mounting pressure on the Court from the media and legal practitioners. Since 2007, all *final decisions*<sup>72</sup> are accessible at the Court’s (still) not very user-friendly homepage.<sup>73</sup> However, up to this day the Court only publishes its final judgements; not its interim ones. Further, there are several

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71 Unofficial German translations of French and Italian Supreme Court decisions can be found in the journal ‘Die Praxis’, Basel. Unofficial French translations of German and Italian decisions are published in: Journal des Tribunaux, Lausanne.

72 Interim decisions of the Court are still not available online.

73 See the official site of the Federal Supreme Court [www.bger.ch](http://www.bger.ch) (<https://perma.cc/Y2PW-BNV9>), or, much more user friendly, this privately run site: [www.bger.li](http://www.bger.li) (<https://perma.cc/5zDF-gKY4>).



thousand decisions from the 1990s that the Court possesses in electronic form but, for no immediately obvious reason, refuses to make publicly available.

It is not only the approximately 4 % of the decisions published in the official compilation<sup>74</sup> that can be found at the Court's homepage; all final decisions of the Court are available here.<sup>75</sup> In the latter category, full decisions can be found which include the header of the judgment with the case number, the date of the judgment, the chamber in charge, the Federal Justices, the clerk of the Court and the parties (anonymised), the facts of the case, the reasoning on the merits of case, and the judgment (non-admissibility, approval or dismissal of complaint):

The screenshot shows the website of the Swiss Federal Supreme Court (Bundessgericht / Tribunal fédéral / Tribunale federale / Tribunal federal). The page is titled "Rechtsprechung" (Case Law) and features a navigation menu with "Elektronischer Verkehr", "Stellen", "Kontakt", "Hilfe", "F | I", and "Suche". The main content area displays a decision from the "Strafrechtliche Abteilung" (Criminal Law Division) dated June 6, 2017, with case number 6B\_300/2017. The decision is by the Chamber of Federal Supreme Court Justices, presided over by Denys, President, and Jacquemoud-Rossari, with Oberholzer as the Law Clerk. The complainant and counsel are represented by Rechtsanwalt Thomas Zogg, and the respondent is the Staatsanwaltschaft des Kantons St. Gallen. A sidebar on the left provides navigation options like "Rechtsprechung (gratis)", "Liste der Neuheiten", and "Suchstrategie".

Figure 10: Modified Screenshot of a Decision of the Federal Supreme Court (with Labels)<sup>76</sup>

<sup>74</sup> See header on the left „BGE und EGMR-Entscheide“; since 2018 the access to the *index* of the decisions of the official compilation is no longer free of charge.

<sup>75</sup> Under the enigmatic header of “further decisions from 2000 onwards” (“*weitere Urteile ab 2000*”; <https://perma.cc/Y2PW-BNVg>).

<sup>76</sup> Source of the unmodified screenshot: [www.bger.ch](http://www.bger.ch) (<https://perma.cc/YC7Z-TVAU>).

As highlighted in the figure above, every case is assigned a specific case number (6B\_300/2017). This case number can be broken down as follows:<sup>77</sup>

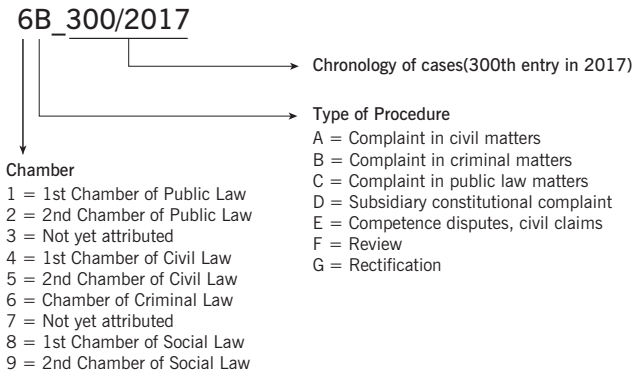


Figure 11: Explanation of the Case Number of a Federal Supreme Court Decision

Hence, the case number 6B\_300/2017 indicates that this case was the 300<sup>th</sup> complaint in criminal matters in 2017 that was addressed to the criminal law chamber of the Federal Supreme Court. The case was decided on 6 June 2017 by the Federal Justices Christian Denys (president of the Criminal Law Chamber), Laura Jacquemoud-Rossari and Niklaus Oberholzer. Walter Briw was the law clerk on this case. X was the defendant: he filed the complaint through his counsel, Thomas Zogg. The responding party was the public prosecutor of the canton of St. Gallen. According to the citation guidelines of the Federal Supreme Court, this “ordinary” case is to be cited as follows:<sup>78</sup> Judgment of the Federal Supreme Court 6B\_300/2017 of 6 June 2017.

As mentioned above (1.), the landmark cases of the Federal Supreme Court are published in the *official compilation* of decisions. By virtue of this official publication, the decisions acquire legal force as binding precedents. The same is not true for the remaining 96 % of judgments: these are merely published online. Still, the courts of first and second instance, legal practitioners and scholars very frequently utilise these judgments when searching for answers to specific legal questions.

77 The numeration explained in the figure only applies to cases that have been decided after the enactment of the Federal Supreme Court Act on 1 January 2007.

78 Source: www.bger.ch (<https://perma.cc/3VP6-8TQG>).

### 3. PUBLIC PRONOUNCEMENT

The Federal Supreme Court also enhances public awareness of its jurisprudence by making its judgements publicly available. According to Article 6 I ECHR, “[j]udgment shall be pronounced publicly.” Article 30 III Constitution similarly requires that the delivery of judgments be public. As mentioned above, from the year 2000 onwards, the Court took steps to better meet its obligation to pronounce judgments publicly, by publishing its written judgments online. However, these online decisions are published anonymously.<sup>79</sup> For data protection reasons, the Court refused to publish judgments with the name of the parties included. It argued that once these names are out, they will forever be traceable online.

However, this strict anonymisation practice did lead to a key problem: it was impossible for the media and the general public to find out whether a judgment had been rendered against a specific person. Only on the very rare occasion of a public debate, i.e. in less than 1 % of all cases, the names of the parties became public. Thus, in recognition of the problem, the court found a compromise. For four weeks after the decision, the judgments of the Federal Supreme Court are put at public disposal in a non-anonymous manner. In practice, this means that the header of the judgment with the full names of the parties and the finding of the court (non-admissibility, approval, or dismissal) are printed out and are physically displayed at the public visitor’s room of the Court. Thus, everyone can enter the Court and browse through these files. They are, however, not published online.

### 4. PRESS RELEASES

The fourth way in which the Court informs the public about its jurisprudence is through press releases. Important cases are summarised and explained in short written statements for the press. Since 26 January 2016, the Federal Supreme Court has also been distributing its press releases via Twitter (@bger\_CH).

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79 Whereas in the early years of the Court’s jurisprudence even the parties in criminal proceedings were named in the official publication (see e.g. BGE 87 IV 13, OERTLY V. PUBLIC PROSECUTOR OF THE CANTON OF ZURICH), in recent years the Court increasingly began anonymising its written judgments.

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# Andreas Thier

## Legal History

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# I. Plurality and the Traditions of Swiss Legal Culture

If we look for defining elements of Swiss legal culture – for the totality of Swiss legal rules, for the political, social, and economic preconditions of their creation and application, and for the references to different collective processes of creating sense for these phenomena – there appears to be at least two defining features. Certainly, one distinguishing feature is the *internationality* of the Swiss legal order, in terms of the strong Swiss commitment to international rules and international organisations, although there of course remains strong opposition against such internationalisation. Another defining characteristic – which shall be the conceptual starting point of this chapter – is the importance of *plurality*. Switzerland has four official languages (Article 4 Federal Constitution)<sup>1</sup>, and places a strong, if not defining importance on cantons and their cultures as making up the Swiss confederation (Article 1 Federal Constitution, see also Article 3 Federal Constitution). Further, considering the importance of the municipal level in daily legal practice, the Swiss legal order can be regarded as structurally pluralistic. This relates to the connection of different cultural areas and traditions as embodied in the sometimes-complex relationship between the great Swiss regions (West, East and South) and their various cultural traditions. As a consequence, Swiss legal culture is also defined by the mechanisms and concepts it utilises to manage, coordinate and mediate these pluralities. For example, the idea of the Swiss “*Willensnation*”, i.e. a nation which rests on their members will,<sup>2</sup> was an important conceptual element in defining the unity of the Swiss people as acting entity in the federal constitution. This corresponds with the strong presence of the idea of popular sovereignty as an integrating element in Switzerland: Direct democracy is a pivotal element of Swiss legal culture,

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1 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.admin.ch](https://www.admin.ch) (<https://perma.cc/M8UJ-S369>).

2 In greater depth on the evolution and cultural function of this concept OLIVER ZIMMER, *A Contested Nation: History, Memory and Nationalism in Switzerland*, 1761–1891, Cambridge 2007, pp. 151, pp. 207.



because it is perceived to be a particular strong device of expressing the will of the people. Another means of coordinating plurality by mediating conflicts of different interests and regions is provided by certain features of Swiss legal tradition. These elements have developed over the course of Swiss legal history, in particular on the confederate and federal level. Their emergence and evolution shall be addressed in this chapter. However, only specific aspects of Swiss legal tradition shall be discussed.

For the purposes of this survey, two larger periods shall be addressed. The first period includes the history of the so-called *Old Confederacy* from the 13<sup>th</sup>/14<sup>th</sup> century to 1798, while the second stage is defined by the emergence of the modern *Swiss constitutional welfare state*. In what follows, it shall be argued that the legal history of the Old Confederacy was particularly defined by strong traditions of autonomous rulemaking by means of covenants and customary law, albeit that decrees have been gaining increasing importance since the 16<sup>th</sup> century (II.). In a second step, the importance of constitutions and codifications as defining elements of lawmaking in the modern Swiss state shall be discussed (III.). The emergence of internationality as part of the tradition of Swiss legal culture is subject of the following chapter.

## II. The Old Confederacy (13<sup>th</sup>/14<sup>th</sup> Century – 1798)

### 1. CONIURATIO, COVENANTS, AND CHARTERS

The Swiss federal constitution uses inter alia the term *Schweizerische Eidgenossenschaft* to describe the Swiss federal state (besides the words *Confédération suisse/Confederazione Svizzera/Confederaziun svizra*). With the elements *Eid* (oath) and *Genossenschaft* (fellowship), this descriptor is a reminder of the long-lasting tradition of the autonomous organisation of the Swiss regions, based on mutual oath. Since at least the 13<sup>th</sup> century, these alliances have formed the basis of the Old Swiss Confederacy. Around 1291 (although maybe not until 1309) “*all people of the valley community of Uri, the entirety of the Schwyz valley and the community of people from the lower Unterwalden valley*” promised to “*assist each other by every means possible with every counsel and favour, with persons or goods within their valleys and without, against any and all who inflict on them or any among them acts of violence or injustice against persons or goods*”.<sup>3</sup> From the 15<sup>th</sup> century onwards, this charter and its formulae would become part of a historiographic narrative of a continuous efforts and struggle of liberation and resistance against foreign enemies. Around the same time a similar motive emerged with the legend of an oath, taken by WILLIAM TELL and others as part of their resistance against foreign powers. This legend, which has become famous by its literary adoption in FRIEDRICH SCHILLER’s play “William Tell”, and the charter, discussed here, merged since around the late 19<sup>th</sup> century to a collective, national narrative about the foundation of the Swiss nation.

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3 The Federal Charter of 1291, Preamble; the English translation follows the proposal by the *Bundesbriefmuseum*, online available at [www.admin.ch](http://www.admin.ch) (<https://perma.cc/WB95-DKAD>).

Both regarding its topic and its basis of validity as an oath, taken by all its associates, this covenant represented a typical legal phenomenon of the High and Later Middle Ages. This phenomenon was that of public peaces (*Landfrieden*): these were a kind of sworn multilateral agreement between arms bearing persons, i.e. nobles or free peasants as opposed to villeins with obligation to render personal services or to pay duties, carrying the obligation to maintain peace and enforce common rules, as they were established by these public peaces.

The conceptual basis of these public peaces was the idea of creating associations based on collective vows. This kind of association was called sworn union (*coniuratio*). In a period lacking an overarching governmental power, as embodied in state and statehood during Roman antiquity and since the early modern period in Europe, the sworn union was in particular present in regions without strong royal or noble dominion,<sup>4</sup> as a basic means of social and moreover political self-organisation, which enjoyed binding force by virtue of autonomously created legal normativity.

Sworn union, public peaces, and covenants were also key instruments in developing further coordination and cooperation in the Switzerland of today.<sup>5</sup> Two lines of development can be distinguished. Firstly, under a network of treaties developed up until 1513, a complex confederate structure between the cantons (then so-called *Orte*) and associated cantons (*zugewandte Orte*) emerged. By way of military expansion and annexation, this group of cantons enlarged its territory by common dominions (so-called *gemeine Herrschaften*) without any kind of membership status. Secondly, several so-called charters (*Briefe*), whose validity was based on the idea of sworn union (*coniuratio*) and public peaces (*Landfriede*), consolidated the organisational structures of the emerging confederacy: the Treaty on Clerics 1370 (*Pfaffenbrief*)<sup>6</sup> between Zurich, Luzern, Uri, Schwyz, Unterwalden, and Zug banned feud and thus violent conflict and excluded ecclesiastical jurisdiction from the territory of the associated partners. In these rules, the concept of jurisdictional

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4 For a very short, but coherent survey see KARL UBL, Corporate Order, in Brill's Encyclopedia of the Middle Ages (<https://perma.cc/K4JU-NDSN>).

5 For an outline of this period in Swiss history see CLIVE H. CHURCH/RANDOLPH C. HEAD, A Concise History of Switzerland, Cambridge 2013 (6<sup>th</sup> printing 2017), pp. 22; ROGER SABLONIER, The Swiss Confederation, in Christopher Allmand (ed.), The New Cambridge Medieval History, vol. 7, Cambridge 1998, pp. 645, online available at [www.cambridge.org](http://www.cambridge.org) (<https://perma.cc/C7WY-UUGA>).

6 CHURCH/HEAD, p. 31.

territorial closure found a typical normative concretisation. The Sempach Treaty of 1393 (*Sempacherbrief*)<sup>7</sup> both confirmed and amplified the combination of public peace and confederacy. As a peace treaty between Uri, Schwyz, Unterwalden, Luzern, Zurich, Glarus, Zug, and Bern as well as Solothurn, this charter banned violence between the signatories, ordered peace between them during joint military operations and also banned solo military actions by individual allies. Eventually, the Compact of Stans 1481 (*Stanser Verkommis*) between Uri, Schwyz, Unterwalden, Luzern, Zurich, Glarus, Zug, and Bern, as well as Freiburg and Solothurn confirmed the former conventions.<sup>8</sup> Moreover, the Compact of Stans established a duty to provide mutual assistance against external enemies as well as to combat revolts. It also committed the allies to common warfare. Parallel to this formation of confederate structures, the Federal Diet (*Tagsatzung*) as central council emerged since 1415 and in a more consolidated structure since 1470. It coordinated the common interests of the confederates: in particular foreign policy matters, questions of common economic politics and policy, and the joint administration of the common dominions.<sup>9</sup>

## 2. CUSTOMARY LAW, RECORDS OF LAW, AND SUMPTUARY MANDATES

The sworn union (*coniuratio*) as a concept for the formation of associations was also dominant on the municipal level.<sup>10</sup> Here, the laws of free municipalities and cities, emerging since the 12<sup>th</sup> century in Switzerland, were based in their validity on an oath made by the citizens. The Zurich Charter of rules for judgement (*Richtebrief*) for example, which was laid out in written form for the first time in 1304, starts by describing itself as “*book of laws of the citizens of Zurich*”, which the citizens of Zurich “*have set up by peace and for the honor*

7 CHURCH/HEAD, p. 33.

8 CHURCH/HEAD, pp. 58, SABLONIER, pp. 662.

9 On the latter aspect see RANDOLPH C. HEAD, Shared Lordship, Authority and Administration: The Exercise of Dominion in the *Gemeine Herrschaften* of the Swiss Confederation, 1417–1600, in *Central European History*, Volume 30, Issue 4, Cambridge 1997, pp. 489, available online at [www.cambridge.org](http://www.cambridge.org) (<https://perma.cc/736U-JHCV>).

10 As a survey see SABLONIER, pp. 656.

of the city by themselves".<sup>11</sup> The rootage of legal validity in the idea of oath became even clearer in another Zurich municipal law of 1336, which declared every action against itself or other articles of municipal law to be "*perjury*".<sup>12</sup>

There were, however, also other legal sources present. In a society with only a limited range of literacy (with the exception, of course, of the ecclesiastical culture, which was basically defined by its deep commitment to literacy and textuality), naturally there was great importance placed on orality and thus unwritten law, as represented by customary law. This phenomenon was also present in medieval Swiss legal culture: particularly in rural areas, customary law, considered as such based on long-term use of rules, governed apparently in the most cases social and economic relations.

There was, however, an increasingly emerging need to establish these rules in written form so as to create a basis for reliable expectations. Consequently, the so-called "*Offnungen*" (literally: "disclosure") emerged. In principle, they claimed to be merely written records of long existing non-written rules, governing in particular the relations between peasants and their lords, between free peasants (with regard to the use of common municipal goods, for example woods, meadows, or lakes), and between lords. A document created around 1300, for example, regarding Pfäfers Abbey claimed to be a list of "*the rights and powers of the Lord's house of Pfaevers, which it has from ancient times on all things, over people and goods*".<sup>13</sup> In reality, however, *Offnungen* usually

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11 Original: Züricher Richtebrief 1304, Introduction, II.21, in: Daniel Bitterli (ed.), Die Rechtsquellen des Kantons Zürich, Neue Folge, Erster Teil, Erste Reihe, Erster Band, Zurich 2011 (online available at [www.ssrq.ch](http://www.ssrq.ch) (<https://perma.cc/68ND-6ATQ>), p. 1: „*Hie vahet an das buoch der gesetzeden der burger von Zurich ... D]ise gesezeden, die an disem buoche geschriben sint, hant die burger von Zurich dur vride und dur besserunge der stat ze eren und in selben uf gesezet.*“

12 First Sworn Compact, *Erster Geschworener Brief* 16<sup>th</sup> July 1336, in: Werner Schnyder (ed.), Quellen zur Zürcher Zunftgeschichte, vol. 1, Zurich 1936, n. 3, pp. 8, section y: Who violates the rules of the compact, „*der sol meineidig sin und sol sin burgrecht verlorn han und sol dar zu Zurich in die stat niemer mere komen.*“

13 Original: Sammlung Schweizerischer Rechtsquellen, XIV. Abteilung: Die Rechtsquellen des Kantons St. Gallen, 3<sup>rd</sup> part: Die Landschaften und Landstädte, vol. 2: Die Rechtsquellen des Sarganserlandes, by Sibylle Malamud/Pascale Sutter, Basel 2013, no. 8, pp. 6, online available at [www.ssrq.ch](http://www.ssrq.ch) (<https://perma.cc/6DJJ-QU5S>), p. 7: „*Dis sint des gotzhuses von Pfaevers rehtungen, die es von alter behebt an allen sachen, uber lút und über güt.*“

represented the result of negotiations about claims, duties, and rights between all participants, and were largely based on consensual action.<sup>14</sup>

Customary law and its transformation into written law could also be observed in cities and larger regions. Here, the term “law of the city”/ “law of the land” was used, which essentially referred to the sum of unwritten or only partially written rules that governed the city or the region. A typical example demonstrating the strong presence of the concept of customary law would be the liberties, rights and customary laws of Vaud (*Libertez, Franchises et Coustumes ... du Pays de Vauld*). These were compiled by decree of the Bern dominion in 1577 and in 1616 were transformed into the so-called laws and statutes (*Loix et statuts*). This change of title also indicated a trend in the history of secular Swiss legal sources in the transition from the late middle ages to the early modern period: the increasing importance of statutory legislation enacted by superiors – usually urban councils and cantonal governments.

“The sumptuary law” (*Sittenmandat*) represented a particularly wide spread type of legislation during the 16<sup>th</sup> and the 17<sup>th</sup> centuries. These sumptuary laws were intended to establish a broad range of economic and in particular social regulation, ranging from price-caps intended to protect those on low income against poverty to topics like alcohol consumption during marriage or the ban of luxury goods. In laws such as the “Statutory mandate and order of our gracious lords, mayor and small and grand council of Zurich” 1650, the rise of legislative and governmental power indicated the emergence of early modern statehood with its wide-ranging claim of power. It was inter alia this kind of development that would find a strengthened continuation in the period following the French Revolution.

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14 On the whole issue see SIMON TEUSCHER, *Lords' rights and peasant Stories: Writing and the Formation of Tradition in the later Middle Ages*, translated by Philip Grace, Philadelphia 2012.

# III. The Rise of Modern Swiss Statehood since 1798

## 1. CONSTITUTIONAL DEVELOPMENTS IN EUROPE

Since the French Revolution of 1789, the idea of constitutionalism – the concept of the constitution as (written) legal order for governmental and political power, which was in principle beyond unilateral disposition by the government or a single ruler – spread throughout Europe. In several stages – particularly in the aftermath of the Vienna congress 1814/1815 with its grant of so-called estate constitutions (*Landständische Verfassungen*) in the member states of the German Confederation, as a reaction to the French revolution 1830, and in the course of the middle European revolutions of 1848/1849 – Constitutions became the longer the more a key part of the identity of statehood in Europe.<sup>15</sup>

Since towards the latter third of the 19<sup>th</sup> century, another feature gained increasing importance for the practice of states and governments.<sup>16</sup> As a consequence of the social and economic turmoil caused by rapidly spreading industrialisation, states began to intervene with increasing intensity into economic as well as social structures and orders. These interventions were embodied in the creation of social security systems and their cost allocating

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15 As a survey on these developments in Europe see for example the contributions in Kelly L Grotke/Markus J Prutsch (eds.), *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences*, Oxford 2014, online available at [www.oxfordscholarship.com](http://www.oxfordscholarship.com) (<https://perma.cc/H4VQ-TREF>). As an exemplary account of these developments with reference to Germany see MICHAEL STOLLEIS, *History of Public Law in Germany, 1800–1945*, New York 2001; MICHAEL STOLLEIS, *A History of Public Law in Germany, 1914–1945*, Oxford 2004.

16 For an overall survey see JÖRN LEONHARD, *The Rise of the Modern Leviathan: State Functions and State Features*, in: Stefan Berger (ed.), *A Companion to Nineteenth-Century Europe*, Oxford 2006, pp. 137, online available at Wiley Online Library (<https://perma.cc/GV78-VFJ7>).

mechanisms.<sup>17</sup> Similar effects were created by a new kind of tax legislation, particularly the income taxation and new types of wealth taxation. These were not only a mechanism intended to provide the state with the required financial resources; they also frequently followed political agendas of redistributing national wealth by means of taxes.<sup>18</sup> At the same time, public services in transportation and energy emerged, which were provided by states and cities and thus obviously enhanced the range of public responsibilities.

This emerging constitutionally-ordered interventionist welfare state mainly used two instruments to implement its power: legislation (including codification) and a newly professionalised administration with wide-ranging enforcement powers.

These developments and phenomena would also occur in Swiss legal and constitutional history after 1798.<sup>19</sup> Given the spatial limitations of this text, it is only possible to offer a short outline of Switzerland's constitutional history (below 2.), and another short outline of the Swiss history of codification (below 3.).

## 2. CONSTITUTIONAL DEVELOPMENTS IN SWITZERLAND SINCE 1798

A Swiss constitutional history expert has differentiated between three stages of statehood and conceptions of government notable since 1798.<sup>20</sup> The first period was characterised by the rule of law with a strong emphasis on individual freedom (bourgeois constitutional state; *bürgerlicher Rechtsstaat*), perceivable until 1848/1874. This was followed by a strong increase in governmental intervention and the rise of the idea of the social state (*Interventions- und Sozialstaat*) between World War I and the latter third of the 20<sup>th</sup> century. Since then, the idea of prevention and maintaining security (prevention state;

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17 As a survey with regard to Germany see MICHAEL STOLLEIS, *History of Social Law in Germany*, Berlin/Heidelberg 2014, online available at Springer Link (<https://link.springer.com/book/10.1007%2F978-3-642-38454-7>), pp. 29.

18 See the contributions in: José Luís Cardoso/Pedro Lains (eds.), *Paying for the Liberal State, The Rise of Public Finance in Nineteenth-Century Europe*, Cambridge 2010, online available [www.cambridge.org](http://www.cambridge.org) <<https://doi.org/10.1017/CBO9780511845109>>.

19 As survey on modern Swiss history in English language see CHURCH/HEAD, p. 104 with further reference.

20 ANDREAS KLEY, *Verfassungsgeschichte der Neuzeit, Grossbritannien, die USA, Frankreich, Deutschland und die Schweiz*, 3<sup>rd</sup> edition, Bern 2013, pp. 259, pp. 426.



*Präventionsstaat*) has gained increasing importance. In fact, the development of constitutional statehood in Switzerland has corresponded with this evolutionary scheme, as shall be argued in what follows, with a particular focus on the federal constitutional order.

### a) Focusing on Individual Rights: The “Bürgerliche Rechtsstaat”

In 1798, the age of the Old Confederacy ended with the invasion of French troops and the foundation of the Helvetic Republic.<sup>21</sup> The new state adopted the constitutional features that were typical for states under French dominance: in a centralised state there was no longer room for autonomous cantons. On the contrary, “*there is no longer any border between the cantons and subjected lands nor between one canton and another.*” Instead the “*unity of the home country and of the general public interest*” would substitute the “*weak bond*” between different “*pieces*”.<sup>22</sup> This experiment, however, failed due to the heavy resistance by a large part of the people. The success of this resistance was proven by the so-called *Mediation* in 1803, which received its name by virtue of the Act of Mediation (*Acte de médiation*), which by and large restored the pre-revolutionary confederate structure, establishing 19 cantons with constitutions of their own. Following NAPOLEON’s defeat in 1814/15, however, the political foundation of this order broke away. Instead, in 1815 the so-called Federal Treaty (*Bundesvertrag/Pacte fédéral*) conceptualized as a treaty of international (and not domestic) law between 22 sovereign cantons, understood as independent states, with the main purpose of securing “*their freedom, independency and safety*” and maintaining public peace “*inside*” this confederation.<sup>23</sup> It was indicative of the restorative intention of this treaty that

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21 MARK LERNER, *A Laboratory of Liberty: The Transformation of Political Culture in Republican Switzerland, 1750–1848*, Leiden 2012, online available at Brill Online (<https://perma.cc/2JLL-9AEW>).

22 Constitution of the Helvetic Republic of 12 April 1798, Article 1, paragraph 2; Original: „*Es giebt keine Grenzen mehr zwischen den Kantonen und den unterworfenen Landen, noch zwischen einem Kanton und dem andern. Die Einheit des Vaterlandes und das allgemeine Interesse vertritt künftig das schwache Band, welches fremdartige, ungleiche, in keinem Verhältnisse stehende, kleinlichen Lokalitäten und einheimischen Vorurtheilen unterworfenen Theile zusammenhielt und auf’s Gerathewohl leitete.*“

23 Original: Bundesvertrag zwischen den XXII Cantonen, 7<sup>th</sup> August 1815, in: *Offizielle Sammlung der das Schweizerische Staatsrecht betreffenden Actenstücke, der in Kraft bestehenden Eidgenössischen Beschlüsse, Verordnungen und Concordate, und der*

federal politics were once again coordinated by the Federal Diet as the main federal institution.

Another correspondence of the Federal Treaty to the pre-revolutionary dynamics of Swiss constitutional history might be noted in the fact that the following decades would be characterised not by constitutional developments on the federal level, but within the cantons. Here, particularly from 1830, in a period called *Regeneration*, constitutions were established in eleven cantons like Bern, Ticino, St. Gallen, Fribourg, or Zurich;<sup>24</sup> these were shaped by liberal concepts such as the expansion of voting rights, the separation of powers and the requirement for legal authorisation of governmental intrusion into individual rights, which, at least in cases like the State Constitution of the Confederate Canton Thurgau (*Staatsverfassung für den eidgenössischen Stand Thurgau*), introduced “full freedom of work, acquisition, and commerce”.<sup>25</sup>

The mainly liberal movement behind these constitutionalising efforts met, however, increasing opposition. The failure of the liberal project to revise the federal treaty in 1833 was telling in this regard. The rising tensions between a group of liberally dominated cantons and a group of more conservatively shaped cantons were in part driven by clashing cultures: an urban, bourgeois, liberal culture on the one side, and a rural, more conservatively-shaped group of cantons on the other. These tensions were only worsened by the previously latent but continuously intensifying conflict between Protestantism and Catholicism. As a consequence, Swiss politics in general and Swiss constitutional politics in particular (in a manner following the same path of development as that in Germany society) became confessionalised: the Protestant side was mainly (albeit not exclusively) linked to the liberal movement, while the Catholic side became increasingly conservative.

These tensions eventually erupted into a short but nevertheless violent conflict in 1847, which ended with the defeat of the conservative-Catholic Special Alliance (*Sonderbund*).<sup>26</sup> A result of these confessional antagonism was to a

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zwischen der Eidgenossenschaft und den benachbarten Staaten abgeschlossenen besonderen Verträge, Zurich 1820, online available (<https://perma.cc/2EMX-T5NY>), pp. 3, p. 3; „Die XXII souveränen Cantone der Schweiz ... vereinigen sich durch den gegenwärtigen Bund zur Behauptung ihrer Freiheit, Unabhängigkeit und Sicherheit gegen alle Angriffe fremder Mächte, und zur Handhabung der Ruhe und Ordnung im Innern.“

24 For Zurich see as a seminal account GORDON A. CRAIG, *The Triumph of Liberalism: Zurich in the Golden Age, 1830–1869*, New York 1988.

25 Article 12 of the State Constitution of the Confederate Canton Thurgau of 14 April 1831: „Alle Bürger des Cantons genießen volle Arbeits-, Erwerbs- und Handelsfreiheit.“

26 JOACHIM REMAK, *A very Civil War: The Swiss Sonderbund War of 1847*, Boulder 1993.

certain extent also represented by the Federal Constitution of 1848,<sup>27</sup> which the cantons of Uri, Schwyz, Nidwalden, Obwalden, Zug, Valais, Ticino, and Appenzell Ausserrhoden rejected in cantonal popular votes during July and August (even though these rejections would not bear any consequence for the overall validity of the new federal constitution). Nevertheless, this contested constitution established a federal state with the Federal Assembly (consisting of two chambers), the Federal Council as federal government and a federal court (although it did not act as permanent institution). The federal legislative powers were quite limited, with the cantons still in charge of the rules on commerce, financial transactions, and education. The largely cantonal responsibility of upholding the rights of the people in Switzerland was also mirrored by a small catalogue of federal individual rights, which primarily guaranteed the equal rights of all Swiss citizens in all cantons. The explanation for the limited federal protection was the perception that the cantonal level ensured strong constitutional protection of individual rights.

However, with the expansion of industrialisation and with the increasing growth of production and economic transaction throughout Switzerland, efforts to strengthen the central state gained traction and resulted in a so-called total revision of the federal constitution in 1874.<sup>28</sup> The new constitution widened federal legislative powers and, as a means to protect individuals against a strong federal legislator state, federal individual rights like economic and religious freedom were introduced, protected by a permanent Swiss Federal Supreme Court with jurisdiction for inter alia cases concerning the violation of constitutional rights of individuals. As a consequence, the constitution of 1874 moved the jurisdictional protection and enforcement of individual freedom *de facto* from the cantonal to the federal level. Nevertheless, the cantonal constitutions remained in force, but they were – as already stipulated by the 1848 constitution – required to respect federal constitutional rules. This included also the federal fundamental rights of the federal constitution, which were thus protected even against the rules of cantonal constitutional law.

A further important step in the evolution of federal statehood was the introduction in 1891 of the popular initiative for revisions of the Federal

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27 The Federal Constitution of the Swiss Confederation, September 12, 1848 with Article XLI and XLVIII as amended January 14, 1866, Bern 1867, online available at Internet Archive (<https://archive.org/details/federalconstitu00switgoog>).

28 Adopted on 29<sup>th</sup> May 1874, English text online available at [www.servat.unibe.ch](http://www.servat.unibe.ch) (<https://perma.cc/ZZD6-ATDW>).

Constitution. With this provision, the concept of direct democracy became a key part of the federal constitutional order. At this point, the idea of a Swiss nation – united not only by tradition, history, common symbols and signs, but also by rules expressing its common constitution-creating will – received legal force.

## b) The (Slow) Rise of the Interventionist State

Federal administrative powers were limited by the end of the 19<sup>th</sup> century, with administrative tasks mainly being executed at cantonal level. Nevertheless, with legislative acts like the Federal law about military insurance 1901 and with the establishment of the Federal Social Insurance Office (starting its activities in 1913),<sup>29</sup> the first elements of interventionist statehood began to emerge on the federal level as well. During World War I and particularly World War II, these interventionist tendencies gained increasing strength, given the efforts of governments and administrations to adapt the Swiss economic order to the demands of the political landscape. An important precondition for such action was a fundamental constitutional change, which had occurred for the first time in August 1914: under the impression of an existential threat, the Federal Assembly granted the Federal Council unlimited authority to take every measure to secure the integrity as well as the borrowing power and the economic interest of Switzerland. This authorisation was valid until 1921, but in 1939, when World War II broke out, the Federal Assembly granted the Federal Council a similar extent of authority again. The Federal Council would use these powers extensively in the years that followed by issuing numerous decrees without having authorisation in existing laws or the constitution. Even though this so-called regime of full powers (*Vollmachtenregime*) experienced fierce criticism after 1945, it lasted until 1952.

However, during and after the renaissance of parliamentary and direct democratic order the tendency towards stronger economic regulation continued: for example, the adoption of the so-called articles on economic order (*Wirtschaftsartikel*) in 1947, which authorised the confederacy to take action to increase the “*welfare of the people*” and for the “*economic protection of the citizens*”. If justified by the “*overall interest*” the confederacy was authorised

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29 For an overall account MATTHIEU LEIMGRUBER, *Solidarity without the State? Business and the Shaping of the Swiss Welfare State, 1890–2000*, Cambridge 2008/2011.

to issue rules “*if necessary in divergence from economic freedom*”.<sup>30</sup> In the following years, however, these provisions remained more promise than an actual starting point for legislative action. In fact, the concept of self-regulation remained as the guiding principle of the Swiss law for the economic system until the 1980s. Only after the worldwide economic crisis in the middle of the 1970s did the ideas of consumer protection, an effective antitrust law and a stronger oversight over financial markets gain influence and become realised in legislation. Moreover, social security became a cornerstone of the Swiss legal order as of 1947. This was due to the adoption of the law for the old-age and survivors’ insurance. This was even more the case after the expansion of mandatory social insurance contributions including mandatory health insurance, introduced in 1996.

### c) Towards the Prevention State

It was nevertheless telling of the reluctance of a still strongly liberal-dominated legislative body that, in particular in the field of financial regulation, stronger mechanisms of oversight were only established in Switzerland after the almost deadly collapse of a major Swiss bank in 2008 during the worldwide financial crisis. However, the new laws on financial regulation were also proof of another, more recent development of rulemaking and constitutional evolution: in particular, the new Swiss law on financial regulation was driven by concerns over potential damage resulting from risky actions taken by finance-market actors. This perspective, particularly influenced by considerations of the future in general and risk in particular, marked a transition that has shaped governmental as well as administrative and legislative action since around the last third of the 20<sup>th</sup> century, with some developments even perceivable in the middle of the century. The “*colonisation of the future*”<sup>31</sup> by *prevention* emerged in the Swiss federal constitution (thus beyond mere

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30 Article 31<sup>bis</sup>: “(1) *Within the limits of its constitutional powers, the Confederation shall take measures to promote the general welfare and the economic security of its citizens. ...* (3) *Where this is justified by general interest, the Confederation is entitled to enact regulations departing, if necessary, from the principle of freedom of trade and industry in order to: a) preserve important economic sectors or professions whose existence is threatened and to improve the skills of persons exercising an independent activity in those sectors or professions*”.

31 See ANTHONY GIDDENS, *Modernity and Self-identity: Self and Society in the Late Modern Age*, Stanford 1991, p. 122; on the context of this term and his importance for legal history research see ANDREAS THIER, *Time, Law, and Legal History – Some Observations and*

insurance law) through measures like planning. It also became visible with the state taking over decisions about certain types of risks like the circulation of new technologies, pharmaceuticals, or, as in the case of the financial markets, types of financial transactions and trading. Federal powers for legislation on nuclear power, for environmental protection, or for the law of city and regional planning were established by constitutional amendments. This development, which has continued under the 1999 revised Federal Constitution,<sup>32</sup> has in part resulted in an expansion of federal administrative law, the establishment of new federal jurisdictional institutions like the Federal Administrative Court and an abundant series of changes of the rules in criminal procedure, for police actions, on preventive custody, or on the intelligence service.

Nevertheless, the cantons, tasked *inter alia* with the application and execution of most of the federal administrative rules, have retained an important position as points of reference for regional collective identities. On the legislative level, these identities particularly find their expression in a vivid cantonal constitutional culture. In this regard, the rise of cantonal constitutionalism since the first third of the 19<sup>th</sup> century is still imprinted on the Swiss legal order of today. Another part of cantonal legal culture, namely the cantonal codifications of private, criminal, and procedural law, has, however, been replaced by federal legislation. But the history of codification is not only an example of the evolutionary patterns of Swiss legal culture in post-modern times. It also demonstrates the strong impact of foreign legal culture on legal evolution within Switzerland, as we shall examine in the following paragraph.

### 3. THE RISE OF CODIFICATIONS IN SWISS LEGAL CULTURE

Codifications of laws have emerged as an increasingly vital part of the Swiss legal order. The idea of establishing a systematic order for a defined area of law, e. g. civil law, through legislation with exclusive validity has been part of the European legal tradition at least since the age of Justinian I (527–565 AD) and his Codex of 529/534. The history of modern codifications begins in the 18<sup>th</sup> century with law books like the General State Laws for the Prussian States

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Considerations, in: *Rechtsgeschichte – Legal History* Rg 25 (2017), pp. 20 (<https://perma.cc/T8Q2-JUHR>), pp. 29, 34 with further reference.

32 See the chapter on Constitutional Law, pp. 138.

1794 (*Allgemeines Landrecht für die Preußischen Staaten*). In Switzerland, two stages of codification efforts can be distinguished: a period of cantonal codifications, beginning in the early 19<sup>th</sup> century (e. g. Criminal code of the republic and canton Ticino 1816 [*Codice penale della republica e cantone del Ticino*], Civil Law Code in Zurich 1853–1855 [*Privatrechtliches Gesetzbuch*], was followed as of 1874 by a series of federal codifications including the Law of Obligations 1881 [*Obligationenrecht*] and the Code of Civil Law 1912 [*Zivilgesetzbuch*], or the Code of Criminal Law of 1937 [*Strafgesetzbuch*], which is in force since 1942).

These codifications and their history reveal another defining element of Swiss legal culture which has recently become even more important. This is that legislators in cantons and on the federal level frequently adopted concepts and structures of rules from other, foreign traditions. In general, three layers of legislation with foreign provenance would influence Swiss codifications in the 19<sup>th</sup> and 20<sup>th</sup> centuries. In the 19<sup>th</sup> century, it was particularly the German Historical School of Roman law, as established by FRIEDRICH CARL OF SAVIGNY (1779–1861) and transferred at first to the German speaking academic discourse by SAVIGNY's Swiss master student FRIEDRICH LUDWIG OF KELLER (1799–1860), whose doctrines influenced not only the codification of law, but also academic education in law. Fundamentally, SAVIGNY, KELLER, and other members of the Historical School of Roman law argued that Roman law texts and doctrines formed a point of reference for legal ideas and reflection about the ideal structure of law. Particularly the law of obligations and large sections of cantonal property law followed the lines of Roman law (like the aforementioned Civil code for the canton of Zurich [*Privatrechtliche Gesetzbuch für den Kanton Zürich*] and the codifications drawing from it [the so-called Zurich group], as well as the Law of Obligations of 1881 [*Obligationenrecht*]). It was also telling that codifications like the *Zivilgesetzbuch* 1912 followed in overall structure the scheme in the *Institutiones* of Gaius (person, things, actions; *personae, res, actiones*) with its sequential arrangement of the law of persons, family, succession, and property. The impact of the Austrian General Civil Code of 1811 (*Allgemeines Bürgerliches Gesetzbuch*) was particularly strong in the so-called Bern group, which was dominated by the Civil Code of city and republic of Bern 1825–1831 (*Civil-Gesetzbuch für die Stadt und Republik Bern*). The French Civil Code of 1804 (*Code civile*) also had a particularly strong impact on the Western Swiss regions as well as in the canton of Ticino, where legislators adopted the Napoleonic law book (albeit usually with changes and adjustments to reflect their own specific needs) as it was done for example

in Fribourg 1834–1850. Similar developments occurred in criminal law; for instance, the adoption of the French Criminal Code 1810 (*Code penal*) in Western cantons as well as in Bern or with the impact of the German Criminal Code 1871 (*Strafgesetzbuch*) on the Eastern cantons like Zurich and Basel.

These phenomena reveal the evolutionary dynamics of Swiss legal culture since the late 18<sup>th</sup> century. Since that time, lawyers, judges, and legislators have in principle always been open to using foreign legal concepts as reference point for their own approach. Consequently, Swiss legal culture as a whole has never been dependent on individual foreign legal orders, but it has always been shaped by a multiplicity of foreign influences. In this regard, the aforementioned Swiss cultural diversity corresponds with the plurality of foreign influence, which has shaped and continues to shape the Swiss legal order of today.



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# Elisabetta Fiocchi Malaspina

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# I. Introduction

The aim of this chapter is to give an overview about the peculiarities of Switzerland in the history of international law, looking into the origin of what nowadays Switzerland represents within the international community.

Switzerland is one of the most prominent states in terms of the hosting of international organisations and NGOs. The international community values Switzerland's role as a mediator, due to its long-standing international policy of neutrality: Within the Peace of Westphalia of 1648 Switzerland's independence was recognized by the European powers. Furthermore, after the Napoleonic wars both at the Congress of Vienna in 1814/1815 and within the Treaty of Paris (20 November 1815), the perpetual neutrality of Switzerland was formally recognized by the international community. Switzerland also enjoys positive international reputation, stemming from its humanitarian engagements which began to take root in the 19<sup>th</sup> century. But what are the historical legal foundations that have shaped Switzerland's role?

The following sections will examine two prominent developments in Switzerland's history of international law between the 18<sup>th</sup> and 20<sup>th</sup> century. The first development to be discussed is the dissemination of the theories of natural law and the law of nations during the 18<sup>th</sup> century in the French-speaking part of Switzerland (II.1.). The ideas of EMER DE VATTEL are key here: he made an essential contribution to the evolution of modern international law (II.2.) The second development examines the emergence of international humanitarian law that took place in Switzerland in the 19<sup>th</sup> century which led to the preeminent role of Switzerland in this field of law. First, the creation of the International Committee of the Red Cross by, among others, HENRY DUNANT will be discussed (III.1.). Furthermore, the efforts of Zurich-born lawyer JOHANN CASPAR BLUNTSCHLI in his attempts to codify international law and his contributions to the founding of the International Law Institut (Institut de droit International) together with GUSTAVE MOYNIER will be addressed (III.2.).

## II. Theories of Natural Law and Law of Nations

### 1. THE SPREAD OF THEORIES OF NATURAL LAW AND THE LAW OF NATIONS

At the beginning of the 18<sup>th</sup> century, the so-called Romandy School of Natural Law (*Ecole romande du droit naturel*) was established in the French-speaking part of Switzerland and achieved great influence mainly in Europe during the 18<sup>th</sup> and 19<sup>th</sup> centuries. It can be perceived as a mediation between the German natural law theories (represented, among others, by SAMUEL PUFENDORF, CHRISTIAN THOMASIVS, and CHRISTIAN WOLFF) and the French ones symbolised, most prominently, by the works of MONTESQUIEU, ROUSSEAU, and VOLTAIRE. Geneva, Lausanne, Neuchâtel, and Yverdon were the main knowledge centres in which natural law and law of nations theories circulated. The most important contributors included jurists and philosophers, such as JEAN BARBEYRAC (1674–1744), JEAN-JACQUES BURLAMAQUI (1694–1748), FORTUNATO BARTOLOMEO DE FELICE (1723–1789), and EMER DE VATTEL (1714–1767).

Although there was not an explicit “school” within the natural law movement, with the term “*école*” historians refer to the common features shared by those authors who, during their careers as professors and editors, played a key role in the spread of natural law theories. These scholars had a strong predisposition for Enlightenment ideas within a specific geographical context, that is, in Switzerland and particularly in the French-speaking part of Switzerland.

The Huguenot<sup>1</sup> and French citizen JEAN BARBEYRAC was already a well-established natural law scholar by the time he arrived in Lausanne in 1711:

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<sup>1</sup> A Huguenot was “A French Protestant of the 16th and 17th centuries. Largely Calvinist, the Huguenots suffered severe persecution at the hands of the Catholic majority, and

he was renowned throughout Europe due to his widely annotated French translations of SAMUEL PUFENDORF's major works on natural law "The Law of Nature and Nations" ("Le droit de la nature et des gens"), 1706, and "On the Duty of Man and Citizen" ("Des devoirs de l'homme et du citoyen"), 1707.<sup>2</sup> Later, after he'd arrived and started working in Lausanne, BARBEYRAC also translated the writings of RICHARD CUMBERLAND and of HUGO GROTIUS' "The Rights of War and Peace", the latter translation being published as "Le droit de la guerre et de la paix" in 1724.<sup>3</sup> JEAN-JACQUES BURLAMAQUI taught natural law in Geneva, using Barbeyrac's French translation of PUFENDORF's "On the Duty of Man and Citizen". He published his manual on natural law under the name "Principles of Natural Law" ("Principes du droit naturel"), 1747. The "Principles of Political Rights" ("Principes du droit politique"), 1751, were posthumously edited by BURLAMAQUI's friends on the basis of his notes. BURLAMAQUI's notebooks (cahiers) provided the basis for some other scholars to publish pieces which expanded on his natural law theory. Among them was FORTUNATO BARTOLOMEO DE FELICE (1723–1789), a former Catholic priest and professor in Rome and Naples who fled to Bern in 1757, converted to Protestantism then became a major cultural mediator and publisher. In 1762, he settled in Yverdon where he founded a publishing house and directed the creation of the so-called Yverdon Encyclopedia (Encyclopédie d'Yverdon), a Protestant adaptation of the Paris Encyclopedia (Paris Encyclopédie).<sup>4</sup> Among many other works, DE FELICE published a new edition of BURLAMAQUI's natural law courses "The Principles of Natural Law and the Law of Nations" ("Les principes du droit de la nature et des gens") in eight volumes between 1766 and 1768. Within this new edition, DE FELICE incorporated some of BURLAMAQUI's

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*many thousands emigrated from France*" (Source: Oxford Dictionary, <https://perma.cc/Z6YD-DDGH>).

- 2 SAMUEL PUFENDORF (1632–1694) was a German jurist, political philosopher, and historian who was renowned for his works on natural law and law of nations. He held the first European chair in natural law and law of nations in Heilderberg in 1661. Barbeyrac translated Pufendorfs most influential works "On the Duty of Man and Citizen" (*De officio hominis et civis*), 1673, and "The Law of Nature and Nations-8<sup>th</sup> book" (*De iure naturae et gentium-libri octo*), 1672.
- 3 MERI PÄIVÄRINNE, Translating Grotius's *De jure belli ac pacis*: Courtin vs Barbeyrac, in *Translation Studies* Volume 5, Issue 1, 2012, pp. 33.
- 4 *Encyclopaedia, or a Systematic Dictionary of the Sciences, Arts, and Crafts* (*Encyclopédie ou Dictionnaire raisonné des sciences, des arts et des métiers, par une Société de Gens de lettres*). It was published in France, between 1751 and 1772, under the direction of DENIS DIDEROT and JEAN LE ROND D'ALEMBERT.

unpublished thoughts, gathered from the latter's notebooks on natural law. DE FELICE also included his own comments in these publications.

## 2. EMER DE VATTEL AND HIS LAW OF NATIONS (1758)

EMER DE VATTEL (1714–1767), a native of Neuchâtel, is most renowned for his treatise on the law of nations, entitled “The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns” (*Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains*), 1758. He had become acquainted with natural law during his period of study in Geneva, having as professor presumably JEAN JACQUES BURLAMAQUI. Instead of harbouring a strong intention from the outset to produce a work on the law of nations, he had initially only intended to provide a French translation of CHRISTIAN WOLFF’s “The Law of Nations treated according to the Scientific Method” (“*Ius gentium methodo scientifica pertractatum*”), 1749.<sup>5</sup> However, he then decided to compose a more independent piece of work on the basis of WOLFF’s theory of the law of nature and nations.

To give some historical context, VATTEL wrote his Law of Nations ten years after the publication of “The Spirit of Laws” (“*L’esprit des lois*”) by MONTESQUIEU and five years before the “The Social Contract” (“*Contract Social*”) by ROUSSEAU. His work made a vital contribution to the development of modern international law.<sup>6</sup> The core of VATTEL’S “Law of Nations” was an emphasis on the tension between the law of nature and the law of nations. He criticised his predecessors for having constructed the law of nations on the basis of theoretical deductions concluded from general principles. VATTEL, in contrast, focused on the practice of states, writing exclusively for sovereigns. He wrote:

*“The law of nations is the law of sovereigns. It is principally for them and for their ministers that it ought to be written. All mankind are indeed interested in it; and, in a*

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5 CHRISTIAN WOLFF (1679–1754) was a German jurist, philosopher, and mathematician. He belonged to the school of Rationalist philosophy of the German Enlightenment and he is considered the most eminent German thinker between LEIBNIZ and KANT.

6 VINCENT CHETAÏL, *Vattel and the American Dream: An Inquiry into the Reception of the Law of Nations in the United States*, in Pierre-Marie Dupuy/Vincent Chetail (eds.), *The Roots of International Law, Liber Amicorum Peter Hagggenmacher*, Leiden/Boston 2014, pp. 251, p. 295.

*free country, the study of its maxims is a proper employment for every citizen: But it would be of little consequence to impart the knowledge of it only to private individuals, who are not called to the councils of nations, and who have no influence in directing the public measures. If the conductors of states, if all those who are employed in public affairs, condescended to apply seriously to the study of a science which ought to be their law, and, as it were, the compass by which to steer their course, what happy effects might we not expect from a good treatise on the law of nations!"*<sup>7</sup>

There are some fundamental aspects of the Law of Nations. VATTEL applied a strictly inter-state perspective: the law of nations is specifically the law governing relations between states. VATTEL relegates the individual to the position of being part of the state's internal sphere.<sup>8</sup> For VATTEL, the law of nations "*is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights*".<sup>9</sup> He dismissed individuals from the scene, thereby perceiving nations to be compact entities confronting each other within a distinct sphere of action. International society thus becomes a true society of sovereign, equal, and independent states – each bound by the fundamental obligation of self-preservation.<sup>10</sup> VATTEL established the principle that sovereign states are the legal subjects of classical international law.

VATTEL unreservedly recognised the existence of a duality of norms governing the conduct of sovereign states: the norms imposed by natural law and those imposed by the positive law of nations. By virtue of their sovereign will, he argued, only states have the capacity to determine the applicability of international legal rights and obligations. In this regard it can be said that VATTEL opened the door to the modern idea of sovereignty. He theorised a law of nations that is both "*liberal and pluralist*" and which is very much in line with the state of European society at the time of the Enlightenment, the

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7 EMER DE VATTEL, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, edited and with an introduction by Bela Kapossy/Richard Whatmore, Indianapolis 2008, p. 18.

8 EMMANUELLE JOUANNET, *Emer de Vattel (1714–1767)*, in Bardo Fassbender/Anne Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford 2012 (cit. JOUANNET, *Emer de Vattel*), pp. 1118. See also EMMANUELLE JOUANNET, *The Liberal-Welfarist Law of Nations, A History of International Law*, translated by Christopher Sutcliffe, Cambridge 2012.

9 VATTEL, p. 67.

10 JOUANNET, *Emer de Vattel*, pp. 1118.



period within which Vattel was writing.<sup>11</sup> The “The Law of Nations” set the benchmark for a new political and legal science, subjected to a remarkable number of translations and commented editions published all through the 19<sup>th</sup> century in Europe and beyond. The following quote describes Vattel’s relevance in the North American context:

*“Vattel’s treaty on the law of nations was quoted by judicial tribunals, in speeches before legislative assemblies, and the decrees and correspondence of executive officials, [...] it was also used as the student’s manual, the reference work of the statesman and the text from which political philosophers drew inspiration”.*<sup>12</sup>

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<sup>11</sup> JOUANNET, Emer de Vattel, pp. 1118.

<sup>12</sup> CHARLES G. FENWICK, The Authority of Vattel, in *American Political Science Review*, Volume 7, Issue 3, Baltimore 1913, pp. 395; see also for the reception CHETAIL, pp. 251.

### III. The Era of International Humanitarian Law

Throughout the 19<sup>th</sup> century, the Swiss and European legal environment was characterised by attempts to codify international law and by the development of international humanitarian law. In fact, the 19<sup>th</sup> century can truly be regarded as the century of international law par excellence. It was during this period that international law began to assume its precise characteristics and a legal science began to appear as a subject separate from those of diplomacy and natural law. The protagonists pushing the development of this separate subject were international lawyers. It was recently written that

*“[i]nternational lawyers called to mediate between universalism and nationalism, humanitarian aspirations and colonial impulses, technical, economic and financial challenges, nations and states, recognized states as subjects of knowledge with regard to that they incorporated a deep supranational dimension into their general principles. International law became the product of a historical reflection by an elite of intellectuals that, through an organic relationship with the conscience of civilized nations, translated value into a scientific system”.*<sup>13</sup>

The international lawyers of this century, in fact, lived through a period of radical change in international affairs. This had begun in the late 18<sup>th</sup> century with the American and French Revolutions, the collapse of the Napoleonic Empire and the events that led to the Congress of Vienna, during which the Holy Alliance had laid the ground for the development of a new international order. The order of 1815 had to be redesigned in the mid-19<sup>th</sup> century due to the Crimean war that ended with the agreement of the Paris Treaty of 1856. Important developments in international law during the 19<sup>th</sup> century, particularly regarding the role played by Swiss jurists and men, are the emergence of the international humanitarian law, the creation of the International Law

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<sup>13</sup> LUIGI NUZZO/MILOŠ VEC, The Birth of International Law as a Legal Discipline, in Luigi Nuzzo/Miloš Vec (eds.), *Constructing International Law, The birth of a discipline*, Frankfurt a.M 2012, p. XII.

Institut (Institut de droit international) in 1873, and different attempts to codify international law.

## **1. HENRY DUNANT AND THE INTERNATIONAL COMMITTEE OF THE RED CROSS**

HENRY DUNANT (1828–1910), a Swiss merchant from Geneva, contributed fundamentally to the development of humanitarian law by formulating the idea of the International Committee of the Red Cross. DUNANT was born into a wealthy and influential family in Geneva. From 1853, he worked in North Africa, overseeing the French colonies' commercial interests. In Algeria, he encountered difficulties with the French authorities: it was due to such circumstances that he travelled to meet NAPOLEON III in Italy where the latter was battling Austrian forces at the time. In 1859, DUNANT arrived in the small town of Solferino during his trip to meet Napoleon, where close to 40'000 soldiers lay dead or wounded on the battlefield. DUNANT was confronted with this sight during his visit. There were no organised medical divisions within the armed forces. Medical provisions were inadequate, doctors scarce, equipment poor, and transport sparse. Many soldiers died from simple wounds as a result of a lack of knowledge or proper care. In response to this state of affairs, HENRY DUNANT brought in food, water, and supplies to try to ensure adequate medical basic medical aid. He rallied the local population into providing assistance, making no distinction between the nationalities of the wounded. The term "tutti fratelli" ("all brothers") was coined as rationale for the principle of impartial medical assistance in armed conflict.

DUNANT recorded his experience in Italy in the book "A Memory of Solferino", which he wrote upon his return to Geneva and published in 1862. Through the medium of the book, he campaigned for the humane treatment of combatants and the protection of the wounded during warfare. The Geneva Public Welfare Society, that had as chairman the jurist GUSTAVE MOYNIER, received DUNANT's plea positively, forming a committee in response to the publication. In February 1863 the five-member committee, constituted by DUNANT, MOYNIER, DR. LOUIS APPIA, DR. THÉODORE MAUNOIR and GENERAL DUFOUR convened to discuss Dunant's proposals. As a result they formed the Permanent International Committee for the Relief of Wounded Soldiers that later became the International Committee of the Red Cross (ICRC).

In October of the same year, an international conference with governmental representatives was organized to formalise the concept of introducing

national relief societies. The conference also agreed upon a standard emblem which would identify medical personnel on the battlefield: a red cross on a white background; a reversed-colour tribute to the Swiss flag and the neutrality it represents.<sup>14</sup>

In 1864, the Swiss government called a second conference that resulted in the adoption of the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field* which entered into force in 1865. The main principles laid down in the Convention are:

- Relief to the wounded without any distinction as to nationality
- Neutrality (inviolability) of medical personnel and medical establishments and units
- The distinctive symbol of the organisation: the red cross on a white ground.<sup>15</sup>



Figure 1: Henri Dunant, 1828–1910<sup>16</sup>

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14 International Committee of the Red Cross, *The History of the Emblems*, 2007, (<https://perma.cc/M4LV-6XGX>).

15 DIETRICH SCHINDLER/JIŘÍ TOMAN, *The Laws of Armed Conflicts*, Dordrecht 1988, pp. 280.

16 Source: Red Cross and Red Crescent (<https://perma.cc/A4LD-RTRC>).

The first Geneva Convention of 1864, regulating the protection of the wounded combatants in the field was amended in 1906, in 1929, and finally in 1949. It was complemented by three other Geneva Conventions regulating maritime warfare, the treatment of prisoners of war and the protection of civilians. The four Geneva Conventions were ultimately amended in 1949 and constitute today the Geneva Convention, that is the *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (I)*, the *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (II)*, the *Convention relative to the Treatment of Prisoners of War (III)*, and the *Convention relative to the Protection of Civilian Persons in Time of War (IV)*. The Convention received three Additional Protocols, the first two in 1977 and the third in 2005. The second Additional Protocol explicitly extends the scope of international humanitarian law to non-international armed conflicts.<sup>17</sup>

The ICRC was at the origin of the International Federation of Red Cross and Red Crescent Societies and the 191 National Red Cross and Red Crescent Societies which form today a humanitarian network, guided by the same seven fundamental principles: universality, humanity, impartiality, neutrality, independence, voluntary service, and unity.<sup>18</sup>

Despite his achievements in the field of humanitarian law, DUNANT himself had a life that could be considered somewhat unfortunate. In 1867, his commercial interests in Algeria took a downturn leading to his eventual bankruptcy. Above all he had to resign from the Red Cross – the very organisation his ideas had inspired. He left Geneva in 1867. From 1887 until his death in 1910 he lived in relative isolation in the Swiss village of Heiden. In 1901 he received the first Nobel Peace Prize, jointly with the French pacifist FRÉDÉRIC PASSY. DUNANT is buried in the Sihlfeld cemetery in Zurich.

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17 ROBERT KOLB, *The Protection of the Individual in Times of War and Peace*, in: Bardo Fassbender/Anne Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford 2012, pp. 324.

18 International Committee of the Red Cross, *Founding and Early Years of the ICRC*, 2010 (<https://perma.cc/64BT-RQWW>).

## **2. FOUNDING OF THE INSTITUTE OF INTERNATIONAL LAW (1873)**

Some of the most important 19<sup>th</sup> century international lawyers joined forces to create the Institute of International Law (*Institut du droit international*). It was founded in Ghent on 8 September 1873. The aim of the Institute of International Law, which presents itself as an authority on the legal conscience of the civilised world, is to promote the development of international law. It vowed to raise awareness for and to lay down the general principles of international law, and finally to contribute to its gradual codification. Its maxim is “*Justitia et pax*”. In 1904 it was awarded the Nobel Peace Prize and it exists until today.<sup>19</sup>

The founders of the Institute who convened for three days in September 1873 in the *Salle de l’Arsenal* of the Ghent Town Hall, were the jurists: PASQUALE STANISLAO MANCINI (Italy), ÉMILE LOUIS VICTOR DE LAVELEYE (Belgium), TOBIE MICHEL CHARLES ASSER (Holland), JAMES LORIMER (Scotland), WLADIMIR BESOBASSOF (Russia), GUSTAVE MOYNIER (Switzerland), JOHANN CASPAR BLUNTSCHLI (Switzerland), AUGUSTO PIERANTONI (Italy), CARLOS CALVO (Argentina), GUSTAVE ROLIN-JAEQUEMYS (Belgium), and DAVID DUDLEY FIELD (United States). The variety of nationalities represented the international character and aim of the Institute. Two of these jurists came from Switzerland: the aforementioned GUSTAVE MOYNIER and JOHANN CASPAR BLUNTSCHLI. These two influential persons will presently be discussed in more detail.

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19 More information on the website of the Institute: <http://www.idi-iil.org/en/> (<https://perma.cc/6g2V-FLTK>).

## a) Gustave Moynier (1826 -1910)



Figure 2: Gustave Moynier (1826–1910)<sup>20</sup>

GUSTAVE MOYNIER (1826–1910) played a significant role in shaping the foundations of international humanitarian law, in two key ways. First, together with HENRY DUNANT, he initiated the founding of the ICRC. Secondly, he was also involved in working towards the establishment of a permanent international criminal court. MOYNIER was born in 1826 into a commercial and industrial family of Geneva. Due to political unrest there, he relocated to Paris at the age of twenty where he subsequently completed his legal studies. His marriage to JEANNE-FRANÇOISE PACCARD afforded him the financial independence necessary to allow him to dedicate his time to questions of public welfare upon his return to Geneva in 1851. MOYNIER's attention had been caught by HENRY DUNANT's witness account and associated analysis regarding the battle at Solferino. He brought the matter before the Geneva Society for Public Welfare which examined DUNANT's vision of institutionalising the care for

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<sup>20</sup> Source: Red Cross and Red Crescent (<https://perma.cc/5V32-X9JZ>).

the wounded during armed conflict. MOYNIER played an active role in the organisation. He took a pragmatic approach to the organisation which eventually clashed with the idealism of HENRY DUNANT, leading to the deterioration of their relationship. Ultimately, HENRY DUNANT was required to leave the organisation, while MOYNIER remained its president until his death.<sup>21</sup>

Remarkably considering the time period, MOYNIER also coined the idea of creating an international criminal tribunal to prosecute breaches of humanitarian law. In 1872, he published his draft “Note on the creation of a specific international judicial institution to prevent and punish violations of the Geneva Convention” (“Note sur la Création d’une Institution Judiciaire Internationale propre à prévenir et à réprimer les Infractions à la Convention de Genève”). Within this draft, he proposed a panel that would decide on cases involving breaches of the Geneva Convention occurring during a war between member states to the treaties. MOYNIER saw the need to enforce the Convention and direct criminal responsibility to the respective perpetrators and to impose monetary penalties against belligerent states.<sup>22</sup>

His draft proposal was widely recognized but also heavily criticised. Some lamented the lack of an enforcing authority with regard to the proposals. Others did not see the need for the creation of a new institution, preferring to stick to the traditional means of bilateral arbitration. Interestingly, MOYNIER himself had followed a fundamental change of heart with his draft proposal. Later on, he had been opposed to the idea of granting jurisdiction over international criminal matters to an international body, believing that the threat of critical public opinion and indignation would suffice to deter potential breaches of humanitarian law.<sup>23</sup>

Aside from the proposal for an international criminal tribunal, MOYNIER also drafted a manual which aimed to codify already existing legal principles of warfare. This Manual on the Laws of War on Land was more favourably received, being unanimously adopted by the Institute of International Law at its conference in Oxford in 1880. It is still known as *The Oxford Manual to this day*.<sup>24</sup>

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21 BENEDICT VON TSCHARNER, *Inter Gentes: Statesmen, Diplomats, Political Thinkers*, Geneva 2012, pp. 163.

22 CHRISTOPHER KEITH HALL, *The First Proposal for a Permanent International Criminal Court*, in *International Review of the Red Cross* Volume 38, Issue 322, 1998, pp. 57.

23 HALL, pp. 57.

24 VON TSCHARNER, pp. 36.



## b) Johann Caspar Bluntschli (1808–1881)



Figure 3: Johann Caspar Bluntschli (1808–1881)<sup>25</sup>

JOHANN CASPAR BLUNTSCHLI (1808–1881) was born in Zurich. He attended school in Zurich and consequently moved to complete his legal studies in Berlin and Bonn, eventually being awarded with a doctoral degree from the University of Bonn. He was a student of FRIEDRICH CARL VON SAVIGNY who introduced him to the so called German Historical School; which influenced BLUNTSCHLI'S own work and teaching substantially. Upon his return to Zurich in 1830, he became extraordinary professor in 1833 and then ordinary professor in 1836. He held seats in the municipal and cantonal parliaments of Zurich and founded the liberal-conservative party. In 1840, BLUNTSCHLI was asked to finalise the drafting efforts for the Zurich civil code, which he successfully did. In 1844, he lost the election for mayor of Zurich, a matter of sore regret for him. In 1847, BLUNTSCHLI decided to withdraw from Swiss politics and once again left his hometown to live in Germany. He became professor in Munich and later Heidelberg and assumed several offices in German political life.

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<sup>25</sup> Source: Wikipedia, with reference to: *Reproduction from Zurich – Geschichte Kultur Wirtschaft. Gebrüder Fretz, Zurich 1932* (<https://perma.cc/5KNN-XFGQ>).

BLUNTSCHLI has completed two major works of international law:

- The Modern Law of War (*Das moderne Kriegsrecht*; 1866)
- The Modern International Law of Civilized States (*Das moderne Völkerrecht der civilisierten Staaten*; 1867)

“The Modern Law of War” was the product of a fruitful relationship between BLUNTSCHLI and FRANCIS LIEBER (1800–1872) of Columbia University in New York. LIEBER was born in Berlin but fled to the United States from Prussia in 1826. He is famous for drafting the “Instructions for the Government of Armies of the United States in the Field”, also known as the Lieber Code – a set of rules of warfare that ABRAHAM LINCOLN made applicable to the Federal Army in the U.S. Civil War in 1863.<sup>26</sup> BLUNTSCHLI and LIEBER maintained intensive written correspondence on a range of topics: from books to read to law, politics, and theology. Their exchange was mutually beneficial, each being influenced by the thinking of the other. The relationship further culminated in the formulation of fundamental principles of international law. The principles that LIEBER had formulated in the Lieber Code were expanded upon by BLUNTSCHLI in his own work “The Modern Law of War”. They had a fundamental influence on the codification of the laws of war, manifested in the Convention respecting the Laws and Customs of War on Land as developed at the Hague Peace Conferences of 1899 and 1907.

With his book “The Modern International Law of Civilized States”, BLUNTSCHLI successfully created a comprehensive codification of international law. He wanted to prove the legal quality of international law by overcoming the perceived conflict at the time between natural law and positive law. Unlike his contemporaries, he did not merely write a commentary on existing treaties and customs. Instead, he presented a comprehensive code that considered the dynamic or ‘organic’ evolution of law and society.<sup>27</sup> The book was written in a clear and informative manner and was thus widely received. Numerous translations led to the publication becoming influential worldwide. His code consists of 862 Articles preceded by an elaborate introduction dealing with the nature, objects, and basis of international law. It deals with the entire law of nations in three general parts:

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26 SILJA VÖNEKY, Francis Lieber (1798–1872), in: Bardo Fassbender/Anne Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford 2012, pp. 1137.

27 MARTTI KOSKENNIEMI, *The Gentle Civilizer of Nations, The Rise and Fall of International Law*, Cambridge 2002, pp. 42.

- The law of peace (1–509)
- The law of war (510–741)
- The law of neutrality (742–862)

BLUNTSCHLI said of his own work:

*“It is substantially the same kind of work as that which I early attempted with success at Zurich upon the narrow field of a little Swiss republic with reference to private law. The principles of that work were now only transferred to the broader field of civilised states in general, and were applied to the moving stream of international relations and legal opinions”.*<sup>28</sup>

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28 HERBERT BAXTER ADAMS, *Bluntschli's Life-Work*, Baltimore 1884, p. 26.

## IV. Conclusion

Switzerland, its jurists, as Vattel, Moynier, and Bluntschli, and social activists, as Dunant, have played a leading role in the development of international law. Studying the emergence of International Humanitarian Law and the theories of International Law in their historical context contributes to an understanding of the development of International Humanitarian Law and International Law as they have evolved over the centuries.

The political and legal culture and environment in Switzerland from the 18<sup>th</sup> century onwards served not only for the natives but also for the intellectuals from all over Europe as a safe haven, where they could freely form their ideas without the fear of political persecution. In this sense Switzerland has not only manifestly promoted the development of International Law by its active role as a state in the international community but also by providing a solid breeding ground for the ideas of individuals.

Until the present day Switzerland maintained this status in the international community having not only the International Committee of the Red Cross based in Geneva but also the United Nations Office in Geneva, the World Trade Organization (WTO), the World Health Organization (WHO), the World Intellectual Property Organization (WIPO) and, among many other important UN programs, the UN Office for the Coordination of Humanitarian Affairs (OCHA) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) to name only a few. Vattel in his “Law of Nations” conveys his own praise for his native Switzerland: *“I was born in a country of which liberty is the soul, the treasure, and the fundamental law; and my birth qualifies me to be the friend of all nations”*.<sup>29</sup>

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29 Vattel, p. 20.

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# Matthias Mahlmann

## Legal Philosophy and Legal Theory

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# I. The Problems of the Philosophy of Law and Legal Theory

A good starting point for reflecting on legal philosophy and legal theory and its purpose, content, and profound significance in any given legal culture is the following observation: law is a mandatory normative order. It is enforced, ultimately, by the threat and application of physical force. Coercive force may be executed by public authorities in a variety of ways – for example by police agents or, in extreme cases, even military operations to defend certain principles of international law. This characteristic of the law raises a crucial issue: how do we know that the law being enforced is, in fact, legitimate? What are the criteria for well-justified law?

These are vitally important questions because the mandatory character of law seems to necessarily imply that the law enforced has a real claim to legitimacy. To enforce and maintain a normative order with physical force without such a claim is an indefensible enterprise.

Thus, it is important that we endeavour to find answers to questions of legitimacy, although this is certainly no easy task. Examples of such questions can be found in various areas of the law. For instance, constitutional states based on fundamental rights are facing new threats posed by international terrorism. Is it legitimate to increasingly curtail fundamental rights because of security concerns? If so – what is the line that should not be crossed? Is there such a line at all?

It has recently been proposed that the international order should be based on the narrow self-interest of nations, pursued with their respective power.<sup>1</sup> Is that the proper guiding principle for the international community or, on the contrary, will this be the highroad to its destruction?

What about the refugee crisis? Are states' national laws well-justified in this area? Does this body of law properly reflect the moral obligations affluent

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1 DONALD TRUMP, Remarks to the 72<sup>nd</sup> Session of the United Nations General Assembly, 19 September 2017.



states and citizens of the Global North have towards the people seeking shelter and a better life? Or are these laws too generous? What about international refugee law: do its principles rest on solid grounds? An example to consider is the principle of non-refoulement, a *ius cogens* norm that prevents a country from returning asylum seekers to a country in which they would face the likely danger of persecution based on race, religion, nationality, membership of a particular social group or political opinion.<sup>2</sup> Is it justified?

Such questions can be supplemented by traditional problems of legal reflection like: what are the foundations of public authority, of states in particular? How do we sketch the contours of a justified order of relations between private parties? What are the bases of guilt, responsibility, and punishment? Are human rights universally justified?

These kinds of questions lead to important problems of justice, freedom, dignity and solidarity and, importantly, such concepts' often contentious concrete meaning. To attempt to answer such questions consistently and coherently with reasons understandable to all is the core task of legal theory and legal philosophy.

The following remarks will outline, first, some central topics of legal theory and legal philosophy to roughly map the contours of the field (II.). They will then explain why spending some time with the questions of legal theory and legal philosophy is not an exotic occupation. On the contrary, serious, committed work with the law is hard to imagine without a substantial reflection about its nature, structure and legitimate content (III.). The attention will turn then to two paradigmatic questions in more detail to illustrate the discourse and some findings of current reflections about justice (IV. and V.) and human rights (VI. and VII.).

A note on terminology: Sometimes legal theory is understood as a predominantly analytic enterprise whereas legal philosophy deals with normative questions. The international discourse on these topics, however, mostly uses these terms interchangeably. These remarks will follow this latter example.

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<sup>2</sup> See Article 33 of the Convention and Protocol relating to the Status of Refugees, 1951 (Geneva Convention).

## II. A Map of Philosophy of Law and Legal Theory

The questions of legitimacy which legal philosophy and legal theory consider are part of, and are embedded in, a wider theoretical enterprise which contains at minimum the following elements:

### 1. DESCRIPTIVE AND ANALYTICAL THEORY

Legal philosophy provides a descriptive and analytical theory of concepts and phenomena of the law. It asks questions like what is a norm? What is the difference between a norm and, say, a habitual pattern of behaviour or the expectation that a certain course of events is going to take place? What is the formal structure of a fundamental right? What is the difference between such a right and an agent's wish or interest, for example? The nature of an obligation – a concept that “*haunts much legal thought*”<sup>3</sup> – is another question that legal philosophy has examined in great detail. This issue is vital because obligations are a core element of any legal system. Another pertinent issue is the meaning of the validity of a norm. What does it mean to assert that a norm is valid? Is it a matter of efficiency, of the (unbound) will of an authority, of the consent of the addressees of norms, or perhaps of some material standards of justice or other ethical principles? Validity is sometimes equated with the existence of a law. Validity is an existence condition of norms. What does this mean? In what sense does a norm exist when it is valid?

These questions are of great importance because they outline the basic architecture of normative systems, including legal systems. We can have no real understanding of legal systems without a clear sense of what concepts such as norm, fundamental rights, obligations, or validity mean.<sup>4</sup>

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3 H.L.A. HART, *The Concept of Law*, Oxford 1961, p. 85.

4 See MATTHIAS MAHLMANN, *Rechtsphilosophie und Rechtstheorie*, 5<sup>th</sup> edition, Baden-Baden 2019, paragraph 26.

These concepts are also important in another respect. Today, one major political challenge is to develop a cross-cultural, perhaps even transcultural concept of normativity and the law. The world has become highly interdependent and, in various ways, its legal orders attempt to respond by establishing a legal framework that accommodates this need for international legal coordination. A very basic framework of this type is created through the Universal Declaration of Human Rights<sup>5</sup> and other human rights documents that define the minimal mandatory standards for the treatment of human beings by public authorities and by other agents (individuals and other legal subjects like companies). It should be noted, however, that whether it is possible to make a human rights claim against companies is particularly contentious in its detail. This system of human rights has gained a very differentiated reality through public international law and regional organisations including the Council of Europe, the European Union, the Organisation of American States, or the African Union and their respective human rights law, all of which more or less satisfactorily complement the constitutional protection of basic rights.

But is this a feasible enterprise? One sometimes encounters the claim that cultures are so different that reaching any form of cross-cultural consensus about particular norms is unimaginable. After all, is it not true that globally, people are deeply divided over questions like the rights of women, the scope of religious freedom or the legitimate claims of people with different sexual orientations? Some even claim that certain cultures do not have certain concepts which are key elements of what is sometimes considered a “Western” conception of the law, e.g. the concept of fundamental rights. These claims are frequently spurious and based on a selective reconstruction of the fundamental features of the legal system under consideration. Nonetheless, if attempting to assess the merits of such claims, it is vital to have a clear sense of what one is talking about when one is referring to a concept like “fundamental rights”. Thus, conceptual clarity – descriptive and analytical precision – is a precondition for successfully meeting the many challenges that the divided modern world poses for ethics and law.

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5 UN General Assembly, Universal Declaration of Human Rights of 10 December 1948, 217 A (III).

## 2. EXPLANATORY THEORIES

Another subject matter of the philosophy of law is that of explanatory theories. Explanatory theories formulate a hypothesis about the causal connection between something requiring explanation and a factor that serves as the explanation for the phenomenon under scrutiny. For example, explanatory theories of law maintain that law in its concrete form is an expression of the economic structure of society, of culture, of the functional necessities of legal social systems or even of the climate. These theories have sometimes become forces of world history: for example, the aforementioned theory developed by MARX connecting law and economics. This theory was an important element of the motivation and content of social revolutions, like the Russian Revolution which transformed important parts of the world last century. The particular stance of pre-Stalinist Marxism with its critique of law, state, and human rights cannot be understood without reference to this highly influential background theory.<sup>6</sup> After all, the critique of the concepts like human or fundamental rights played a key role in the establishment of dictatorships that – a tragic irony – counted among their victims some prominent Marxist theoreticians of law,<sup>7</sup> and led some important Marxist authors to embrace the idea of human rights.<sup>8</sup>

Such theories need to be scrutinised for scientific reasons and because of such sometimes far-reaching practical consequences. There must be scrutiny of whether they are actually defensible and their claims must be backed by evidence. Further, it must be considered whether there are preferable alternatives: for example, with regard to Marxism, perhaps a more differentiated theory of the relationship between the law and the economy, as proposed by

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6 See e.g. KARL MARX/FRIEDRICH ENGELS, *The German Ideology*, in *Marx/Engels Collected Works*, Vol. V, New York 1976, pp. 46, 315 (German source: KARL MARX, *Die deutsche Ideologie*, Marx-Engels-Werke, Band 3, Berlin 1969, S. 63, 311); KARL MARX/FRIEDRICH ENGELS, *The Manifesto of the Communist Party*, in *Marx/Engels Collected Works*, Vol. VI, New York 1976, pp. 477 (German source: KARL MARX/FRIEDRICH ENGELS, *Manifest der Kommunistischen Partei*, Marx-Engels-Werke, Band 4, Berlin 1959, S. 464).

7 E.g. EVGENY PASHUKANIS, author of a classical treatise of Marxism and the law, *General Theory of Law and Marxism*, 1924, in *Selected Writings on Marxism and Law*, Piers Beirne/Robert Sharlet (eds.), translated by Peter B. Maggs, London/New York 1980.

8 The most interesting is ERNST BLOCH, *Natural Law and Human dignity*, translated by Dennis J. Schmidt, Cambridge 1986 (German source: ERNST BLOCH, *Naturrecht und menschliche Würde*, Berlin 1985).

MAX WEBER, including a variety of factors, not just the economy to explain the nature and development of the law.<sup>9</sup>

### 3. NORMATIVE THEORY

A third element of legal philosophy is *normative* theories. KANT famously formulated three questions that philosophy essentially aims to answer in his work the “Critique of Pure Reason”. These questions are: 1. what can we know? 2. what should we do? and 3. what can we hope for?<sup>10</sup> Normative theory answers the second question: what are we supposed to do? This is a very important consideration because it is not only relevant for the agent herself but for others as well. What we decide to do affects others in direct or indirect ways. For example, when we decide that we have reached the limits of solidarity in the framework of the refugee crisis, this is not only a decision about our own life but about the lives of those arriving on Italian shores, boarding a rubber boat in Libya or stranded in a Pacific camp on the way to Australia. Therefore, the kind of answer we formulate to this question is a matter of real consequence.

In order for normative theory to proceed on this course, it must address matters of principle: it considers, for instance, what the content of justice is. Is it related to equality as major authors of the theory of justice, from ARISTOTLE to RAWLS, have argued? If so, in which sense? What does equality actually mean? Who or what is equal and in which respect? What behaviour does the idea of equality mandate?

Normative theory also enquires also into what we owe to each one another. Are there such duties of solidarity? If so, towards whom; to personal relations, to the members of a group one belongs to or to the group itself, to people whom we have formal legal ties with like shared citizenship, or to any human being? What is the content of such duties? Are they differentiated depending on the level of proximity of the agent towards the addressee? What are their limits, what is their minimal content? How are they embodied in the law?

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9 MAX WEBER, *Economy and Society*, edited by Guenther Roth/Claus Wittich, Berkeley/Los Angeles/London 2013 (1972), pp. 311 (German Source: MAX WEBER, *Wirtschaft und Gesellschaft*, 5. Auflage, Tübingen 1972, S. 181 ff.).

10 IMMANUEL KANT, *Critique of Pure Reason*, in *Immanuel Kant, Practical Philosophy, The Cambridge Edition of the Works of Immanuel Kant*, translated and edited by Paul Guyer/Allen W. Wood, Cambridge 1999, pp. 677 (German source: IMMANUEL KANT, *Kritik der reinen Vernunft*, Akademie Ausgabe, Band III, 2. Auflage 1787, Berlin 1911, S. 833).

Legal Philosophy asks questions about concrete institutions of the law. Some questions have already been mentioned above: it enquires into the nature, content, and justification of human rights. What are these rights? In what form do they exist? What are their foundations? Are they relative to different cultures or religions or are they of universal validity? What is the content of true human rights? Are current conceptions of human rights too expansive or too limited; if either, in which area?

The legitimacy of public authority – national, super-national, and international – is another pertinent topic of research by legal philosophers. The normative structure of the international order is of great importance. Are there reasons for robust national egoism or is it preferable to pursue a cooperative approach to international relations based on some kind of notion of international solidarity, mutual help, and respect? If the latter, then what are the proper institutions to pursue such aims? A World-State? A federation of nations? Networks operating beyond the state? What are the prospects of such enterprises? Is the hope of “*perpetual peace*”<sup>11</sup> still alive or just the embarrassing dream of a bygone epoch?

An important part of the law is its regulation of relations between private parties. The theory of private law is consequently another leading topic of legal philosophy and legal theory. For example, one can ask questions about the foundations of the law of contract or tort in a legal system or about the content and limits of private autonomy as a guiding principle of liberal private law systems.

A theory of criminal law raises equally significant questions. Are there principled reasons behind the idea that sanctions should be based on concepts of guilt and responsibility? What purposes can criminal sanctions justifiably pursue: dissuading the criminal from reoffending, re-integration, retribution, general prevention or perhaps something else entirely? One may add additional concrete questions like whether the criminal law can justifiably aim for sanctions to have general preventive effects. Further, what are the limits of such sanctions: for example, does the concept of human dignity set any?

Normative theory can also address more concrete questions: e.g. is the ban of burqas in Europe legitimate, or is it a violation of the basic principles of a liberal order? What privacy rights are justified? Is it true that the modern

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11 IMMANUEL KANT, *Toward Perpetual Peace*, in Immanuel Kant, *Practical Philosophy*, The Cambridge Edition of the Works of Immanuel Kant, translated and edited by Mary J. Gregor, Cambridge 2008, pp. 311 (German source: IMMANUEL KANT, *Zum Ewigen Frieden*, 1795, Akademie Ausgabe, Band VIII, Berlin 1923, S. 341 ff.).

digital society has fundamentally reshaped the concept of privacy or, to the contrary, should notions of human autonomy guide our approach to these far-reaching challenges created by digital technologies and their use that have been and still are constitutive of constitutional state?

#### 4. THE RELATIONSHIP OF LAW AND MORALITY

Another classical problem of philosophical reflections about the law concerns the relationship between law and morality. The question is whether there is a necessary connection between the law and morality, as many theorists of law have claimed, even arguing that ultimately the law is a part of political morality: “*lawyers and judges are working political philosophers of a democratic state*”.<sup>12</sup> Or are positivists correct in their persistent claim that the two realms are entirely separate?<sup>13</sup>

As a starting point, one should remember that the separation of law and morality is a basic element of modern law. Law regulates external behaviour and is enforced by sanctions; morality is a normative order that is subjectively experienced as mandatory by individuals themselves, and is effective only because of the power and influence moral obligations have on agents’ motivation.<sup>14</sup> There is no good reason to abandon this basic distinction in current reflection.<sup>15</sup>

However, to underline the distinction between law and morality in this sense does not answer the question of whether material ethical principles are

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12 For a recent example see RONALD DWORKIN, *Justice for Hedgehogs*, Cambridge/London 2011, p. 414.

13 See e.g. HANS Kelsen, *Pure Theory of Law*, translated by Max Knight, Berkeley/Los Angeles 1967 (German Source: HANS Kelsen, *Reine Rechtslehre*, 2. Auflage, Wien 1960); HART; JOSEPH RAZ, *The Authority of Law*, 2<sup>nd</sup> edition, Oxford 2009.

14 The most influential statement of the relation stems from IMMANUEL KANT, *The Metaphysics of Morals*, in in Immanuel Kant, *Practical Philosophy*, The Cambridge Edition of the Works of Immanuel Kant, translated and edited by Mary J. Gregor, Cambridge 2008 (cit. KANT, *Metaphysics of Morals*), pp. 353 (German source: IMMANUEL KANT, *Die Metaphysik der Sitten*, 1797, Akademie Ausgabe, Band VI, Berlin 1914, S. 230 ff.). For a recent restatement of these thoughts see JÜRGEN HABERMAS, *Between Facts and Norms*, translated by William Rehg, Cambridge 1996 (German source: JÜRGEN HABERMAS, *Faktizität und Geltung*, Berlin 1992, S. 143 ff.).

15 See MATTHIAS MAHLMANN, *Elemente einer ethischen Grundrechtstheorie*, Baden-Baden 2008, pp. 27.

somehow relevant in determining the conditions of validity of law and the concrete content of legal norms, in circumstances where the opacity of legal texts necessitates interpretative choices. Even if such principles are relevant in this regard, this does not change the fact that the law thus identified and interpreted regulates external behaviour and does not necessarily demand to make a determination of an individual's conscience. Further, it does not affect the fact that law is backed by external sanctions rather than by the subjective experience of the mandatory character of norms.

There is a very rich discussion about this matter: starting in antiquity, pursued in the natural law tradition and continued today. At least the two major areas just mentioned demand further reflection: the conditions of the validity of norms and the hermeneutics of law.

The problem of defining the conditions for the legitimacy of law raises the following question: is it possible to dissociate legal systems from extra-legal grounds of legitimacy? Can one make an argument for democracy, constitutionalism or human rights without referencing principles of justice or human respect? If this seems difficult to imagine, a first connection between law and morality is established.

Another area where questions about the connection between law and morality become pertinent is in the application of the law. Is it possible to apply the law without the influence of certain background theories, including ethical principles that guide the interpretation of law in concrete cases which require the making of interpretative choices? Can one concretise an abstract fundamental right, for instance freedom of religion in the case of the prohibition of burqas, without the influence of a background theory about the meaning of freedom, the kind of restrictions we can impose on others engaged in *prima facie* not harmful behaviour and the conditions under which this may be allowed? Such background theories cannot be fully determined by the text of the concrete norm to be interpreted, because these theories are the instrument used to concretise the open-textured wording of the norms; the wording that made it necessary to take recourse to them in the first place.

The identification of norms as valid law is another, related issue. Positivists maintain that law can be identified simply by reference to a certain social fact, some kind of rule of recognition, in a famous formulation;<sup>16</sup> but is this really the case? Is it not true that for positivists the identification of positive law also depends on some kind of extra-legal background assumption; namely

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16 HART, pp. 97.



that those norms that have been enacted following a certain procedure for example acts of parliament (according to the rule of recognition) *ought* to be regarded as law? The alternative is to deprive any rule of recognition of its normative dimension and make it simply a description of the practice of judges, officials etc. that changes “*as we go along*”, in WITTGENSTEIN’s words.<sup>17</sup>

However, such an understanding clearly fails to capture the actual practice of law: judges in a democracy, for instance, regard it as a normative rule that one ought to take as law that which has been enacted in the proper way according to prescribed procedures and that which does not violate certain material standards like fundamental rights. The same is true for the constitution of a legal order itself: respecting the constitution is a mandatory rule, not a mere habitual disposition of judges and other officials. These are not banal findings; on the contrary, they are substantial assumptions about the reasons for regarding a norm as valid law. In the case of the constitution, it is clear that the obligation to treat it as law cannot be derived from the constitution itself; it must stem from other sources. In democratic states it is the idea of popular sovereignty that is the ultimate source of legitimacy and thus also of the obligation of judges and officials to treat the constitution as the highest law of the land. The question of the authority of the ultimate law giver is therefore the precise point where any merely positivist reconstruction of the identification of norms as valid law ceases to convince.<sup>18</sup>

Thus, there are very good reasons to think that the realms of law and morality are not entirely separate but instead interwoven in intricate ways. Such a finding does not mean that law is moralised in any objectionable way. The starting point for any interpretation is the positive law: this guides the legal understanding in the first place. Respecting positive law means respecting democracy, where the positive law is the outcome of democratic processes.

As indicated above, making the relationship between law and morality explicit does not turn law into morality, because the social institution of law is not transformed into individuals’ rules of conscience. The problem is rather how we are to determine why the positive law is valid, what the positive law actually says, and how we can decide what it means in difficult (or even sometimes in easy) cases without reference to such background assumptions

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17 LUDWIG WITTGENSTEIN, *Philosophische Untersuchungen*, n. 83, in Ludwig Wittgenstein, *Tractatus logico-philosophicus*, 1984, translation Wittgenstein, *Philosophical Investigations*, 4th edition, P. M. S. Hacker/Joachim Schulte (eds.), Oxford 2009, n. 83.

18 This is not a new observation, see e.g. KANT, *Metaphysics of Morals*, pp. 353.

regarding morality, for example in the case of current conundrums of religious freedom. To insist on the connection between law and morality thus does not lead to a suspect moralisation of law but to an area of crucial, critical transparency where influence that normative theory has on the law and its practice is not hidden but rather exposed.

## **5. EPISTEMOLOGY**

A further important area of legal philosophy concerns the limits of legal insight and knowledge. The questions to be answered in this area are questions about the epistemology of ethics and law. Are we simply exchanging opinions when we argue about matters of justice? Is such argument just mutually shared information about preferences we are entertaining? What is the epistemic status of those propositions we make? Are they in one way or another comparable to insights in other domains of knowledge, for example, the natural sciences or logic? Or are they entirely different, perhaps due to their relativity to the tastes of a particular individual?

These questions are as difficult as they are important because, as indicated above, the law has far-reaching consequences for agents and other human beings who are affected by their actions. Therefore, the degree of certainty we can gain in this area of human thought is of great significance. We sometimes inflict great harm on individuals in the name of normative principles and the law, e.g. when we impose sanctions or, even more dramatically, when we engage in war. Surely such action can only be legitimate if we have firm epistemological reasons to assume that our judgment is not leading us entirely astray.

Whether there are reasons to have some kind of epistemological self-assurance must be examined in the context of some more concrete reflections below.

## **6. ONTOLOGY**

Another important question of legal philosophy is that of what exactly normative propositions refer to. Specifically, are normative propositions, e.g. those of the law, comparable to propositions like “in front of my window stands a tree”? Are normative propositions referring to entities that exist in the world

in the same way that a tree does, or to something else entirely? Are they perhaps referring to nothing at all, instead simply being chimerical empty concepts without any real meaning, as important voices in the history of ideas have argued?<sup>19</sup>

These are very contentious questions concerning the stuff the world is made of. It is far from clear whether normative entities belong to the fabric of the world as many, since PLATO, have argued. The question remains unsettled today due to the arguments of a forceful stream of so-called moral realists who think that, in fact, moral entities are as real as any other entity of human experience.<sup>20</sup> Others, in contrast, object to this kind of theory without necessarily denying the rationality of moral and other forms of normative argument.<sup>21</sup>

## 7. GROTIUS AND METHODOLOGICAL SECULARISM

HUGO GROTIUS, elaborating on a thought formulated in medieval philosophy before his time, famously argued that it is a useful exercise to think about the foundations of law as if God did not exist.<sup>22</sup> This did not imply that GROTIUS did not believe in God. On the contrary, it simply meant that he wanted to explore whether religious premises are necessary in order to establish a convincing system of law. He came to the conclusion that this was not the case. In his opinion, a natural law theory could be developed on the basis of rational insight gained by the exercise of reason that would necessarily lead human beings to certain conclusions about the law. He tried to spell out in some detail what this could mean concretely in his account of the content of natural law, the same account that became a mile stone not only for public international

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19 See e.g. RUDOLF CARNAP, *The Elimination of Metaphysics through the Logical Analysis of Language*, translated by Arthur Pap, in Alfred Jules Ayer (ed.), *Logical Positivism*, Glencoe 1959, pp. 60 (German Source: RUDOLF CARNAP, *Die Überwindung der Metaphysik durch logische Analyse der Sprache*, 1932, S. 219 ff.).

20 See e.g. DAVID ENOCH, *Taking Morality Seriously, A Defense of Robust Realism*, Oxford 2011.

21 See e.g. THOMAS SCANLON, *Being realistic about reasons*, Oxford 2014. On this matter, MATTHIAS MAHLMANN, *Mind and Rights*, in Mortimer Sellers (ed.), *Law, Reason, and Emotion*, Cambridge 2017 (cit. MAHLMANN, *Mind and Rights*), pp. 80, available at [www.ssrn.com](http://www.ssrn.com) (<https://perma.cc/ZZD3-FKYT>).

22 HUGO GROTIUS, *De Iure Belli ac Pacis Libri Tres*, Vol. I, reproduction of the edition of 1646 by James Brown Scott, Washington 1913, paragraph 11.

law of the modern age but for other areas of the law as well – from the concept of rights to criminal law.

The project of an inner-worldly ethics and law as a hallmark of Enlightenment has been famously summarised by IMMANUEL KANT in the course of his philosophy of ethics and law: he stated that human reason needs no higher authority above it to determine the content of justified norms, and no other motivation than that derived from the command of ethical principles.<sup>23</sup> This methodological secularism is very important for two reasons. The first reason is a pragmatic one: the methodological secularism perspective builds bridges across religious and other ideological divides. If it is possible to argue for certain normative principles without taking recourse to such contentious background theories, the prospects of reaching consensus across such divides are better. The second reason is a matter of theory. There are simply very good reasons to believe that in fact a justificatory theory of ethics and law can be outlined satisfactorily without recourse to religious foundations. The examples below will give some indications of how this aim may be reached.

## 8. THE QUESTION OF UNIVERSALISM

One important question is whether some normative propositions are universal.<sup>24</sup> This is not to be misunderstood as a denial of the factual variety of ethical and legal principles. There is no question about it; ethical and legal systems vary in many respects. Rather, the question is whether there are reasons to believe that there are reflective principles that could command universal assent and that are in that sense universally valid, even though they may not be fully accepted everywhere today. Universalism should not be mistaken for the idea of normative convictions being factually uniform.

That there are no such universally justified normative propositions is, however, far from clear. A bedrock principle of modern legal orders is the equal worth of human beings. Certainly, there have been many systems of

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23 IMMANUEL KANT, *Religion within the Bounds of Bare Reason*, in: *Religion and Rational Theology*, edited by Allen Wood/George di Giovanni, Cambridge 1998, p. 57 (German source: IMMANUEL KANT, *Die Religion innerhalb der Grenzen der blossen Vernunft*, 1793, Akademie Ausgabe, Band VI, Berlin 1914, S. 3).

24 On this matter see MATTHIAS MAHLMANN, *Universalism*, in *Max Planck Encyclopaedia of Comparative Constitutional Law*, Oxford 2017, available at [www.oxcon.oup.com](http://www.oxcon.oup.com) (<https://perma.cc/8VT3-8V86>).

law – past and present – that have violated this principle. But are there any good reasons to justify such violations? Is there really an argument for the idea that humans in Cape Town are worth less than in Zurich? Is there an argument that the worth of women is justifiably less in Islamabad than in Paris? What reasons could justify the idea that skin colour is a relevant factor for the enjoyment of rights? It seems pretty difficult to formulate any kind of argument for such views denying human equality (widespread as they may be) that would stand even minimal scrutiny. The same holds true for many other such foundational normative principles - a state of affairs which widely opens the door for the idea of normative universalism.

Normative universalism is an epistemological point of view, not a political doctrine. It defends epistemic egalitarianism by underlining the fact that everyone has the potential for insight, whether this person is graduate of the University of Zurich or struggling to survive in a slum in Mumbai; of whatever skin colour, religious creed or gender. It takes a stance on the justification of basic normative principles and rights, not on the political means for developing a social order where such principles count. There is no individual or group that enjoys any prerogative in determining the content of universally justified norms. On the contrary, the elaboration of a universally justified set of norms is an open-ended process of committed critical thought in which nothing but arguments count, as is the case in any other serious intellectual enterprise of humanity. Consequently, to associate universalism with euro- or ethnocentrism or even cultural imperialism is way off the mark. To defend universalism is not to attempt to impose parochial norms on others: it is to defend the possibility of there being an understanding of basic norms of human civilisation open to all.

### III. The Point of Philosophy of Law and Legal Theory

Legal theory and legal philosophy are important in any given legal culture. Theoretical insight is important in two key regards. Firstly, it is important for successful legal practice. It is impossible to solve difficult (or even simple) problems of law without a deeper understanding of what the particular issue is about. A short look at the challenges formulated above (see I.) – from answers to the problem of international terrorism to the structure of the international legal order – illustrates that.

This is not least the case given the internationalisation of law. An understanding of the general structure of laws is essential in enabling us to rise to the challenges of this new embeddedness of norms in international legal contexts. The discussions about hierarchies of law – municipal, supranational or international – illustrates this very clearly

Secondly, theoretical insight is of intrinsic value. Many people in the legal profession spend their whole life working with the law, and it seems hard to imagine that one devotes one's life to this particular activity without asking some, even passionate, questions about the nature and sense of this kind of occupation. Furthermore, the law is a central and constitutive characteristic of human culture. There can be no understanding of the human condition without sufficiently deep reflection about the law.

Legal philosophy and legal theory provide critical normative yardsticks for the many existential questions we face today. Without such standards, people lack reasons to change, and just as importantly, to support and defend significant, valuable aspects of a given legal order. Consciousness of the sense and meaning of a legal system is a precondition for the survival of some kind of decent civilisation of law.

## IV. Theory of Justice

The theory of justice is one of the core elements of the theory and philosophy of law. The foundations of this theory can be found in the thought of antiquity in the work of authors like SOCRATES, ARISTOTLE, and PLATO; philosophers whose ideas are still relevant today. Some important elements of this theory stand out: justice, in the view of these thinkers, is a matter of insight. It is not a matter of subjective, individual preferences, nor is it related to the fulfilment of particular pleasures. Actions are to be regarded as just or unjust, good or evil, independently of whether agents actually think this is so. Their deontic status is not dependent on the whim of human agents. They are simply just or unjust, good or evil, in themselves.

The content of justice is connected to certain principles, including the principle that everybody must be given his or her due, which later found its expression in Roman law.<sup>25</sup> The principle of proportional equality is key in understanding why inequality of result may be regarded as just. This is because when proportional equality is maintained between the criterion of distribution and the good distributed, e.g. the grade that a student receives for her work and the quality of this work, this distribution is just even though the results are unequal.<sup>26</sup>

A controversial issue in this respect is the criterion of distribution. This criterion of distribution varies according to the spheres of distribution.<sup>27</sup> For instance, if we consider the example of grading, performance is crucial in the distribution of grades. In other areas, different criteria play a role. Article 12 of the Constitution<sup>28</sup> stipulates that need is an important prerequisite for the distribution of at least a basic income that ensures a dignified human life. In other areas, “humanity” is central. This is the case, for example, for the distribution of basic rights in a society; this is usually linked to no other precondition than the humanity of the bearers of such rights.

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<sup>25</sup> Corpus Iuris Civilis, Dig. 1.1.10.

<sup>26</sup> ARISTOTLE, *The Nicomachean Ethics*, translated by David Ross, edited by Lesley Brown, Oxford New York 2009, n. 1129a et seqq.

<sup>27</sup> MICHAEL WALZER, *The Spheres of Justice*, New York 1983.

<sup>28</sup> Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.admin.ch \(https://perma.cc/M8UJ-S369\)](https://perma.cc/M8UJ-S369).

Since antiquity, justice has been a concept used to evaluate the actions of agents. It has also been the foundation for the construction of societies. In antique thought, questions about democracy, oligarchy, aristocracy, and tyranny were wedded to the question of what constitutes a just order. PLATO's particular hierarchical vision of a society is certainly not able to command much assent today, but one key question he posed in its canonical form still persists: what are the consequences for the structure of a decent society if it is based on principles of justice?<sup>29</sup>

Antique thinkers made another important point: they believed that justice and goodness are intrinsically linked to a fulfilled, even happy life. SOCRATES maintained that it is better to suffer injustice than to do injustice, implying that an ethical life is an intrinsic good, more important even than what one may have to endure if one prefers not to inflict injustice.<sup>30</sup> This leads to the idea that there is intrinsic value in a legitimate legal order that mirrors an ethical life on the social and institutional level. It seemed to these thinkers, and with good reason, that this too is a vital element of a decent human life.

These questions have been alive through the centuries, circling around various issues formulated in the past. A recent example for such reflection is the theory of JOHN RAWLS: the single most influential theory of justice of the second half of the 20<sup>th</sup> century. He developed behind the so-called "veil of ignorance" two principles of justice that he thought rational, risk-averse individuals would agree upon, if they were unaware of their particular privileges, talents, and propensities. The first principle is universal freedom. The second principle is that an unequal distribution of material goods can only be justified if: a) the worst-off still profit absolutely, and b) such a system is based on the principle of equal access of everybody to public office. In RAWLS' theory too, equality is the guiding star of reflections about justice, importantly on two levels: on the level of concrete principles and on the level of the construction of the original position where the imagined agents decide upon the principles. The veil of ignorance is nothing other than an expository device for the basic intuition of human equality, an intuition that is at the core of what justice is about.<sup>31</sup>

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29 See PLATO, *Politeia*, in *Plato in Twelve Volumes*, Vol. V and VI, translated by Chris Emlyn-Jones, Cambridge/London 2013.

30 PLATO, *Gorgias*, in *Plato in Twelve Volumes*, Vol. III, translated by W.R.M. Lamb, Cambridge 1967, n. 469b et seq.

31 JOHN RAWLS, *A Theory of Justice*, Cambridge/London 1971. For an alternative, derived from a discussion of RAWLS, see e.g. AMARTYA SEN, *The Idea of Justice*, Cambridge 2009.



## V. A Concept of Justice

From this discussion, at least six principles may be derived that are helpful in understanding the content of justice. The first one is the necessity of having equal standards to be applied to different agents. Second, these standards have to be practically applied in an equal way to different agents in concrete circumstances. Third, equality forms a default principle of distribution. If there is no criterion for an unequal distribution, only an equal distribution is just. Fourth, just treatment presupposes the reasonable determination of the content of criteria of distribution in the respective sphere of distribution. For example, to distribute rights on the basis of skin-colour evidently does not meet these sometimes quite demanding standards. Justice demands to maintain proportional equality between the criterion of distribution and the good distributed. Fifth, restitutive justice serves the purpose of maintaining a just distribution of goods (material and immaterial, like rights) within society. Finally, and importantly, there is a baseline of equality that has to be protected in a just order. This baseline is set by the equal dignity of human beings. Certainly there are cases where inequality of results is just, e.g. in the obvious, aforementioned case of the distribution of grades. But any inequality has to be reconcilable with this basic equality of human beings, a principle from the based on the dignity of autonomous persons.<sup>32</sup>

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32 See on the debate about dignity MATTHIAS MAHLMANN, *Human Dignity and Autonomy in Modern Constitutional Orders*, in Michel Rosenfeld/Andr s S j  (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012 (cit. MAHLMANN, *Human Dignity*), pp. 370; MATTHIAS MAHLMANN, *The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law*, in Christopher McCrudden (ed.), *Understanding Human Dignity*, Oxford 2013, pp. 594; CHRISTOPHER MCCRUDDEN, *In Pursuit of Human Dignity: An Introduction to Current Debates*, in Christopher McCrudden (ed.), *Understanding Human Dignity*, 2013, pp. 1.

## VI. The Birth of the Human Rights Idea

Today, human rights are something like a secular Decalogue of our modern era. They are not, however, a modern invention: rights and the reflection about rights have a very long history, in Natural Law and in social contract theory, for example. An important more recent example is the thought concerning rights in the Enlightenment, based on practical reason and the particular concept of human dignity.

KANT's categorical imperative is a crucial expression of this kind of thinking. The categorical imperative is at the core of KANT's ethics and is wedded to the idea of universalisation. It holds:

*“Act only in accordance with that maxim through which you can at the same time will that it become a universal law.”*<sup>33</sup>

This means that any ethical principle followed by an individual has to be able to survive the test of universalisation. Only if it is thinkable that such a rule could be applied to everybody can it be a legitimate rule.

The second version of KANT's categorical imperative is the so-called principle of humanity:

*“So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”*<sup>34</sup>

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33 IMMANUEL KANT, *Groundwork of the Metaphysics of Morals*, in Immanuel Kant, *Practical Philosophy*, The Cambridge Edition of the Works of Immanuel Kant, translated and edited by Mary J. Gregor, Cambridge 2008 (cit. KANT, *Groundwork*), pp. 37 (German source: IMMANUEL KANT, *Grundlegung zur Metaphysik der Sitten*, 1785, Akademie Ausgabe, Band IV, Berlin 1911, S. 421: *“Handle nur nach der Maxime, durch die du zugleich wollen kannst, dass sie ein allgemeines Gesetz werde.”*).

34 KANT, *Groundwork*, pp. 37 (German source: *“Handle so, dass du die Menschheit, sowohl in deiner Person als in der Person eines jeden anderen, jederzeit zugleich als Zweck, niemals bloß als Mittel brauchst.”*).

This is an exacting statement; it means that every individual is the ultimate limiting condition of actions by individuals and social order. It is thus the principle of radical humanism.<sup>35</sup>

The idea of universalisation is mirrored in the concept of right:

*“Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with the universal law of freedom.”*<sup>36</sup>

There is one natural subjective right under this principle of law that incorporates the categorical imperative in legal thinking. This natural subjective right is

*“freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of any other in accordance with the universal law, is the only original right belonging to every human being by virtue of his humanity.”*<sup>37</sup>

This is not just a right to freedom; it is the subjective right to universally equal freedom, based on the equal dignity of human beings. KANT’s formulation thus weaves together normative elements that continue to be foundational for the human rights project today.

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35 This principle had a major impact on the case law of different legal systems of the world. See for an overview MAHLMANN, Human Dignity, pp. 370.

36 KANT, *Metaphysics of Morals*, pp. 353 (German source: „Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des anderen nach einem allgemeinen Gesetz der Freiheit zusammen vereinigt werden kann.“).

37 KANT, *Metaphysics of Morals* pp. 353. Please note that the German original is gender neutral (Mensch): „Freiheit (Unabhängigkeit von eines anderen nöthigender Willkür), sofern sie mit jedes Anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist dieses einzige, ursprüngliche, jedem Menschen kraft seiner Menschheit zustehende Recht.“ Therefore, the translation has been adapted.

## VII. Contemporary Human Rights Theory

Questions about the foundations of human rights have not stopped to profoundly engage people. The contemporary human rights theory is a place of vivid debate. It draws from the many thoughts in the history of ideas that have been formulated beyond those examples mentioned above. One important consideration is that of why we actually protect human rights. It is often said that human rights are protected by virtue of humanity alone. What does this mean? Is it the agency and personhood of human beings that is foundational in this regard? Are interests and needs central? Is the protection of capabilities, i.e. the factual ability to lead a complete and flourishing life, the source of our rights? Are rights best understood as a political project of the international community? Or, in fact, is human dignity the foundation of human rights? These are important questions and there is currently a lively and demanding discussion around such matters, engaging a huge variety of people across the globe.<sup>38</sup>

A starting point for solving some of these implied problems may be to formulate three elements that need to be incorporated into any convincing theory of human rights. First, a theory of human rights has to contain a theory of the basic universal human goods which are to be justifiably protected. Human rights do not protect everything, only certain qualified goods, e.g. life, respect for the person, bodily integrity, freedom, and the legitimate equality. Any theory of human rights must account for the importance of these particular goods and, in particular, for the *equal* importance of these goods for any human being.

Second, a theory of human rights must include a political theory of the social conditions necessary for the enjoyment of these basic universal human goods. It is not always obvious that rights are the best means through which to obtain even unquestionably crucial human goods. There are certainly such goods that cannot be attained through the protection of rights. For example,

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<sup>38</sup> For an overview see MAHLMANN, *Mind and Rights*, pp. 80.

love is evidently a very important element of human existence, but clearly, a right to love could not ensure that everyone would enjoy this particular element of a fulfilled human life.

Third, normative principles are central. There is no theory of human rights that does not contain such normative principles. Principles of justice are important because they clarify why only a system of equal rights is a legitimate system of rights. In addition, of key relevance are principles of obligatory human solidarity and respect for human beings that, in particular, justify our concern for others; something which is embodied in human rights themselves and in the obligations they entail for our institutions and – ultimately – for all of us.

Justice, solidarity and respect for human persons, equality, and our concern for others are the springs of rights. They are the normative sources at the very foundation of the project of creating a national, regional, and international legal order where human rights in fact matter and are expressed in institutions of democracy, the constitutional state under the rule of law and public international law – one of the more noble aspirations in humanity's often surprisingly tragic history.

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# Christoph Beat Graber

## Legal Sociology

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The purpose of this text is to introduce legal sociology in Switzerland. As a first step, the location of legal sociology as a discipline within legal science is discussed and the methodology of this sub-discipline of the law is explained. Thereafter, a case study is employed to exemplify how legal sociology can be used to analyse the interrelationship between society, technology, and the law in the context of both the proper functioning of the specific form of direct democracy that exists in Switzerland and the constitutional safeguards that are in place to secure its prerequisites. Techno-economic developments have fundamentally changed the media sector. In Switzerland, this has raised the question of whether the personalisation of news reporting conflicts with the constitutional duties of the Swiss Radio and Television Corporation (SRG), the main public service broadcaster. This question arises specifically out of the formation of Admeira, a joint venture between SRG, Ringier (a media company) and Swisscom (the incumbent Swiss telecom company). Admeira allows SRG to benefit from Swisscom's large customer data volumes and broad experience in the use of targeting technologies, but raises some concern regarding their constitutional function in Switzerland.

# I. What is Legal Sociology?

## 1. DISCIPLINE

Legal sociology, together with legal history and legal philosophy, constitutes one of the foundations of the law as a discipline of scientific study. A common feature and particularity of these sub-disciplines of the law is their close relationship with a neighbouring discipline *outside* the legal realm. In the case of legal sociology, this is obviously the relationship with the discipline of sociology. According to EMILE DURKHEIM, one of the discipline's founders, sociology is a science that studies social phenomena as *social facts*, that is manners of acting, thinking, and feeling in society that can be observed from an objective perspective.<sup>1</sup> DURKHEIM understands sociology as a *positivistic science*. In this context, positivism entails two things: firstly, a particular view of social phenomena as objective data and secondly, a value-neutral way of examining these phenomena.<sup>2</sup> Consequently, the key purpose of sociology is to observe social facts as objective data in a value-neutral way. This methodology contrasts with that of the law, which is a normative discipline, operating in accordance with a societal perception of how things should be. Both the law generally and legal doctrine in particular are preoccupied with the *form* of the law, that is to say, they are fundamentally concerned with the systematic relationship between various abstract principles, which can then be used in order to logically produce decisions in concrete cases. The particularity of legal language is its performative quality.<sup>3</sup> For example, words in a statute or a contract do not merely describe a situation or narrate a story; they are supposed to have practical effects in the lives of individuals and within society.

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1 EMILE DURKHEIM, *The Rules of Sociological Method*, translated by W. D. Halls, edited and with a new introduction by Steven Lukes, New York 2013, p. 20.

2 ROGER COTTERRELL, *The Sociology of Law: An Introduction*, 2nd edition, Oxford 1992, p. 11.

3 JOHN L. AUSTIN, *How to Do Things with Words*, 2nd edition, Oxford 1975 (1962).

Legal sociology does not belong to the formally closed realm of legal doctrine nor does it merely describe legal facts in an objective way. Its paradoxical location in-between the disciplines of law and sociology is reflected in the various different names that are used to describe the field at issue; besides legal sociology, the terms sociology of law, sociological jurisprudence, jurisprudential sociology, law and society, sociolegal studies, and legal realism are also frequently encountered within the academic literature. While most of these terms lack precise contours, in this chapter, the term “legal sociology” is used in order to emphasise that the subject we are dealing with is a sub-field of the law as opposed to a sub-field of sociology. Legal sociologists can be defined as jurists who are particularly interested in studying the law from an interdisciplinary perspective. Rather than viewing the law as a formally closed and scientifically self-sufficient system, they observe the law as a realm embedded within broader societal dynamics. To properly adhere to this methodology, legal sociologists must temporarily externalise their observation perspective; they must examine the law from a position that is independent from the discipline itself. On the other hand, legal sociologists do not content themselves with simply observing and describing the law from an external, sociological perspective; instead, they look to re-import what they have learned back into the law, in order to improve the law’s workings.

The origins of the scientific study of law and society date back to the threshold of the 20<sup>th</sup> century when two lawyers, EUGEN EHRlich (in Europe) and ROSCOE POUND (in the United States), together argued that a formalist conception of the law (where law is encapsulated in a closed and self-sufficient realm of jurisprudence) should be rejected. In order to oppose and overcome legal formalism, they invented sociological jurisprudence as a field of research that was, as POUND had famously stated in 1910, more concerned with law in action than law in books.<sup>4</sup> They claimed that any scientific study of legal practice in general is a sub-domain of sociology.<sup>5</sup> However, the problem with conceiving legal science as a sub-domain of sociology is that one overlooks the fundamental difference between “is” and “ought”. Whereas the statement that something “is” the case is a description of observed facts, as sociological studies do, the statement that something “ought” to be the case, as the law does,

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4 ROSCOE POUND, *Law in Books and Law in Action*, in *American Law Review*, 44, 1910, pp. 12.

5 EUGEN EHRlich, *Fundamental Principles of the Sociology of Law*, translated by Walter L. Moll, New Brunswick 2002 (1913), p. 25; ROSCOE POUND, *The Scope and Purpose of Sociological Jurisprudence*, in *Harvard Law Review*, 24(8), 1911, pp. 591, p. 594.

prescribes a normative end. Although it was some time ago that the pioneers were trying to resolve the paradox of engaging in a sociological analysis of the law, the distinction between description (“is”) and prescription (“ought”) continues to present a methodological challenge to legal sociology.

## 2. METHOD

While legal sociology is not a sub-discipline of sociology, it has, ever since its beginnings, been influenced by the writings of classic sociological theorists including AUGUSTE COMTE (1798–1857), KARL MARX (1818–1883), EMILE DURKHEIM (1858–1917), MAX WEBER (1864–1920), TALCOTT PARSONS (1902–1979), NIKLAS LUHMANN (1927–1998) and JÜRGEN HABERMAS (born in 1929), to mention just a few. Adopting a sociological perspective enables the legal sociologist to take into account social facts which offer important information about the law’s causes as well as its effects. Legal sociology is thus an empirical science of the law, analysing its emergence and functioning. The approach is decidedly objectivist; it aims at a value-free observation and description of factual developments, without letting normative preconceptions dictate the outcome. To better understand the operation and effect of the law, legal sociology builds on or develops *theories* offering perceptions of the social structure and the law’s function within a society of ever-growing complexity.

What exactly is a theory? A theory is generally defined as an abstract scientific idea or model that is used to describe a certain aspect of reality. Besides simply describing this reality, a theory normally also attempts to provide explanatory (causal) statements. A *social* theory, more specifically, aims at explaining social phenomena. To meet the ambitions of science, verification or falsification through empiric observation is also required. The purpose of using theory in the social sciences is primarily complexity management: a theory provides for a simplified model of the reality segment that the researcher is attempting to observe, describe and test. Without such simplification, the observed segment would be overly complex and the observation would not be distinct from noise and therefore be unsuitable to draw meaningful conclusions from it.

Thus, a theory enables a social scientist to make certain assumptions about the world and to build analyses, comparisons and predictions from this assumption without being permanently required to take account of the world’s full complexity in his work. Regarding the ways in which theories

materialise, it is roughly possible to distinguish between inductive and deductive approaches. *Inductive* theories come about through the observation of a certain aspect of reality, followed by a subsequent explanation that needs to be generalised and then empirically tested. *Deductive* theories, in contrast, build on hypotheses that are designed by a theorist through abstract thinking. The persuasiveness of a given hypothesis is then measured in relation to the results that its exposure to empiric verification or falsification produces.

As a rule, all types of social theories may find application in legal sociology. It should be noted, however, that if several theories are simultaneously used to analyse a specific reality, special attention must be paid to their compatibility with one another. This is one methodological challenge to legal sociology; an even bigger challenge, however, relates to the aforementioned distinction between “is” and “ought”. The question is how to transfer the knowledge that is gained within the descriptive context of social science to the realm of legal practice, which is where normative conclusions are drawn and performative effects result. The impossibility to meld the law and the social sciences is a paradox. The way out of this paradox is to construct legal sociology as a two-step method of socio-legal analysis. The first step involves an empiric observation and description of real legal problems from the perspective of social science and social theory. While this is necessary to fully understand the social dimension of the legal problems at issue, a second step must follow where an attempt is made to re-import the gained insights back into the legal system. This second step requires a change of perspective from describing social facts to prescribing normative ends and is essential if legal sociology is to contribute to the law’s improvement.

## II. Law, Society and Direct Democracy

The political system in Switzerland is characterised by a specific form of direct democracy that exists within the framework of the Federal Constitution.<sup>6</sup> In the following section, I will first analyse the autonomy of the political system in Switzerland from a sociological perspective. In a second step, the societal preconditions of direct democracy in Switzerland will be identified. Third, I will elaborate on how the Constitution enlists mass media in general and public service broadcasting in particular to contribute to the effective functioning of democracy in Switzerland.

### 1. POLITICAL AUTONOMY

When I refer to political autonomy, something particular is in my mind: the understanding of politics as an autonomous sub-system of society in the sense of NIKLAS LUHMANN's theory of autopoietic social systems. Autonomy of politics in this sense implies that the system is capable of self-reproduction according to its own rules, that is, political rules (not, for example, economic or religious rules). LUHMANN conceptualises society itself as an *autopoietic system*; this term is used to describe something that is reproducing its elements out of its own elements.<sup>7</sup> The elements of a social system are communications, as opposed to humans, or actions of humans, or other agents.<sup>8</sup> LUHMANN defines communication as the synthesis of three selections: the selection of "utterance", the selection of "information", and the selection of

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6 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.admin.ch](https://www.admin.ch) (<https://perma.cc/M8UJ-S369>).

7 NIKLAS LUHMANN, *Social Systems*, translated by John Bednarz with Dirk Baecker, Stanford 1995 (1984).

8 HUGH BAXTER, *Niklas Luhmann's Theory of Autopoietic Legal Systems*, in *Annual Review of Law and Social Science*, Vol. 9, 2013, pp. 167, p. 176; HANS-GEORG MOELLER, *The Radical Luhmann*, New York 2012, pp. 19.



“understanding”.<sup>9</sup> In a communication process, the distinctions of utterance and information of the first communication are understood by the second one. While an utterance is an act of expression, information refers to the distinction between the act and its content. The existence of a system implies a distinction between the system and its environment. Every system constitutes itself according to one specific (binary) difference, and everything that is not part of the system is in the environment. For the political system, for example, the juxtaposition of the (binary) values of “power” and “not power” is constitutive. Systems are operatively closed, which implies that for their reproduction they simply monitor their own operations and exclude every other consideration. Within society, a number of sub-systems have differentiated: they differ from each other in the specific *function* that they fulfil within society. Politics is one of the social systems that LUHMANN distinguishes in his writings. Other sub-systems of society that he covers in his scholarship include the economy, science, art, religion, education, mass media, and family.

The function of the political system is “*providing the capacity that is required for assuring collectively binding decisions*”.<sup>10</sup> Although the political system is distinct from the legal system (whose function it is to generalise normative expectations), both legislation (the acts of making and enacting statutes) and constitutions provide for important mechanisms of structural coupling between the two systems. Statutes are simultaneously important for the law and for politics. In legislation, the law prescribes the form that statutes must have. Politics, on the other hand, requires the creation of statutes in order to be able to implement political power. The legal system is internally structured through the distinction between its centre and periphery.<sup>11</sup> While courts are at the centre of the legal system, legislation (and contracts) is located in its periphery. It is the periphery which is the contact zone between social systems. The periphery is thus the place where a democratic impulse coming from the political system may trigger changes within the legal system. As an example one may think of a newly adopted statute that compels the courts to adapt an established case law. A constitution is a second mechanism of

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9 NIKLAS LUHMANN, *The Autopoiesis of Social Systems*, in R. F. Geyer and Johannes van der Zouwen (eds.), *Sociocybernetic Paradoxes: Observation, Control, and Evolution of Self-Steering Systems*, London 1986, pp. 172, p. 175.

10 NIKLAS LUHMANN, *The Reality of the Mass Media*, translated by Kathleen Cross, Stanford 2000 (1995; cit. LUHMANN, *The Reality of the Mass Media*), p. 84.

11 BAXTER, p. 176.

structural coupling between the law and politics.<sup>12</sup> The constitution of a nation state has a double existence as a supreme text of legal authority and as a political foundation of society. A nation state constitution thus provides “*political solutions for the problem of self-reference of the legal system and legal solutions for the problem of self-reference of the political system*”.<sup>13</sup>

The democratic potential of a political system depends on the extent to which it is able to maintain its autopoiesis.<sup>14</sup> The state itself is defined by LUHMANN as the self-description of the political system. It is possible to observe the state’s operations and its autopoiesis both from the perspective of society and from the perspective of interactions between citizens. From the perspective of society, a state itself is autopoietic as long as it is able to shape its self-reproduction autonomously both internally (i.e. in relation to the sub-systems of politics) and externally (i.e. in relation to the governmental and non-governmental entities in its environment). From the perspective of interactions, a state can enhance its autopoiesis by maximising the conditions for citizen participation in the political process.<sup>15</sup>

Historically, the differentiation of politics as an autonomous social system developed in stages. In the terminology used by JÜRGEN HABERMAS, these stages can be described as “the bourgeois state”, followed by “the bourgeois constitutional state” and finally “the democratic constitutional state”. Reconstructed within a framework of systems theory, these terms articulate self-descriptions of the political system at different junctures in the process of societal differentiation. In this sense, the first stage of the bourgeois state describes an absolutist rule establishing “*a sovereign state power with a monopoly on coercive force as the sole source of legal authority*”.<sup>16</sup> The second stage of the bourgeois constitutional state describes a condition of advanced political differentiation which enables citizens to claim subjective public rights against the sovereign power before an independent authority.<sup>17</sup> The division

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12 NIKLAS LUHMANN, *Law as a Social System*, translated by Klaus Alex Ziegert, Oxford 2004 (1993; cit. LUHMANN, *Law as a Social System*), pp. 405.

13 LUHMANN, *Law as a Social System*, p. 410.

14 SANDRA BRAMAN, *The Autopoietic State: Communication and Democratic Potential in the Net*, in *Journal of the American Society of Information Science*, 1994, 45 (6), pp. 358, p. 365.

15 BRAMAN, p. 365.

16 JÜRGEN HABERMAS, *The Theory of Communicative Action: Lifeworld and System: a Critique of Functionalist Reason*, translated by Thomas MacCarthy, Vol. 2, Cambridge 2007 (1981), p. 358.

17 HABERMAS, pp. 359.

between executive and judicial powers leads to the taming of the administrative apparatus as individuals can now go to court to have their liberties protected. Finally, the stage of the democratic constitutional state describes the condition of a fully differentiated political system with far-reaching inclusion of citizens in the reproduction of political communication. Within a democratically constituted order, citizens possess not only individual liberties which they can enforce against the state (negative freedom) but also the right to equally participate in the political discourse (positive freedom).<sup>18</sup> The separation of power now manifests itself as an institutional differentiation of legislative, executive and judicial state functions.

Political autonomy in the democratic constitutional state presupposes that decisions of governmental authorities are prepared, accompanied and checked as a part of the competition between opinions “in the marketplace of ideas”. The marketplace metaphor, particularly popular in the United States, was coined by OLIVER WENDELL HOLMES, a famous justice of the US Supreme Court (and mastermind of the American tradition of legal realism). In a 1919 dissenting opinion, Justice HOLMES wrote “*that the ultimate good desired is better reached by free trade in ideas – that the best of truth is the power of the thought to get itself accepted in the competition of the market*”.<sup>19</sup>

In many existing constitutional democracies, political participation is limited to the right to participate in the election of the parliament or the president. In Switzerland, however, instruments of direct democracy have been broadened over several constitutional reforms over the passage of time (a mandatory referendum on constitutional amendments has existed since 1848, a voluntary referendum on statutory amendments since 1874 and a popular initiative for the revision of the Constitution since 1891). Notably, the right to vote and to be elected was only extended to women at the federal level after the vote of the people of 7 February 1971, while at the cantonal level this has only been the case across the country since 1990.

## 2. DIRECT DEMOCRACY

The model of direct democracy existing in Switzerland depends on societal preconditions which it cannot guarantee itself, as well as on cultural

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<sup>18</sup> HABERMAS, pp. 360.

<sup>19</sup> *Abrams v United States* 250 U.S. 616 (1919), Mr. Justice Holmes Dissenting, 630 (<https://perma.cc/GK3V-ZT8L>).

resources that need to be renewed permanently. Of these required societal preconditions, the following are the most important: acceptance of dissenting opinions and a spirit of compromise, tolerance towards others, a sense of civic public spirit, a living civil society and plural societal structures. JOHN STUART MILL, an influential thinker of liberalism, considered the confrontation of dissenting opinions as one of the key preconditions of social progress:

*"It is hardly possible to overrate the value, in the present low state of human improvement, of placing human beings in contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar ... Such communication has always been, and is peculiarly in the present age, one of the primary sources of progress."<sup>20</sup>*

Further, IMMANUEL KANT, the eminent philosopher of the enlightenment, coined the term "extended way of thinking" (erweiterte Denkungsart) to describe an individual's capability to also consider a problem from the perspective of an adversary. In KANT's words: *"Through always impartially looking at my judgements from the perspective of others I hope to get a third point which is better than my previous one."<sup>21</sup>*

This capability to include the adversary's perspective in one's own considerations is a key precondition for rational discourse and any form of democratic politics. To ensure the regeneration of cultural resources, education is of primary importance. In Switzerland, the frequent elections as well as the numerous votes on a wide range of political issues require knowledge about the institutions of a democracy and presuppose a minimum understanding of the most important financial, economic, environmental, cultural and social policy implications. Citizens receive the education necessary for making competent decisions about such challenging issues from a minimum set of public offers at various levels of education. In this sense, Article 19 Constitution guarantees the right to an adequate and free primary school education as a fundamental right and Articles 61a to 68 Constitution provide for the concept of a high quality "Swiss Education Area" that is public, generally affordable and accessible, and extends to all levels of education. From

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20 JOHN STUART MILL, *Principles of Political Economy with some of their Applications to Social Philosophy*, edited by W. J. Ashley, 7<sup>th</sup> edition, London 1909 (1848), 3rd book, 18th chapter.

21 IMMANUEL KANT as quoted in JÖRG PAUL MÜLLER, *Die demokratische Verfassung*, 2<sup>nd</sup> edition, Zurich 2009, p. 91 (own translation).

an objective constitutional perspective, the Swiss system of extensive public education is supposed to provide for a type of civil and democratic education that will enable every citizen to form an independent opinion on the many issues that permanently need to be decided at the ballot box.

In this regard, Article 93 Constitution also recognises that radio and television have an important contribution to make to the functioning of democracy in Switzerland. Such a democracy-functional understanding of electronic mass media in Switzerland is in line with the case law of the European Court of Human Rights (ECtHR). Notwithstanding the significant rise of the Internet and social media in the recent past, the ECtHR still emphasises the continuing importance of television as a mass medium with an “immediate and powerful effect” on the decision-making of the public in a democratic society.<sup>22</sup> Accordingly, the duties of the Swiss radio and television system regarding “education”, “cultural development”, “free shaping of opinion” and “entertainment” listed in Article 93 II Constitution must be interpreted from a democracy-functional perspective. When implementing these four goals, radio and television have to pay attention to the “particularities of the country” and the “needs of the Cantons” thus contributing to cohesion in Switzerland. The principles of accurate presentation of facts and diversity of opinion are mentioned as means to reach these goals in Article 93 II Constitution. These principles are justiciable and can be enforced, as a rule, against any radio and television broadcaster established in Switzerland. They are supposed to contribute to securing a generally accessible and diverse offering of the high quality information that people need in order to comply with their democratic duties as citizens.

There are key challenges to the media’s true fulfilment of its constitutional, democratic duties. HANNAH ARENDT is one of the voices having most clearly and eloquently warned of the political dead ends and cultural confusions of modernity. Under the after-effects of National Socialism in Germany in 1961, she asked:

*“[I]f, the modern political lies are so big that they require a complete rearrangement of the whole factual texture – the making of another reality, as it were, into which they will fit without seam, crack, or fissure, exactly as the facts fitted into their own*

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22 See *Animal Defenders International v. The United Kingdom*, App no 48876/08, ECtHR 22 April 2013, paragraph 119 and *J. Bratza concurring*, paragraph 6; *Jersild v. Denmark*, App no 15890/89, ECtHR 23 September 1994, paragraph 31; *Murphy v. Ireland*, App no 44179/98, ECtHR 3 December 2003, paragraphs 69, 74.

*original context – what prevents these new stories, images, and non-facts from becoming an adequate substitute for reality and factuality?*<sup>23</sup>

Her answer: it is, above all, philosophers, scientists and artists in their isolation, independent historians and judges as well as journalists adhering to facts, working according to an “existential mode of truth-telling”.<sup>24</sup> Indeed, combating political lies with diligently researched and checked facts is one of the most important duties of journalism.<sup>25</sup>

For their decision-making, citizens in a direct democracy particularly depend on the mass media distinguishing between factual accounts and the opinions of the newspaper’s or broadcaster’s own collaborators and guest contributors. For ARENDT, facts and opinions are no antagonists as long as it is assured that opinions are formed on the basis of facts. There is a relationship of dependency between the two: effective freedom of expression presupposes the availability of sufficient factual information as a basis for opinion making.<sup>26</sup> The problem for journalism is that facts are expensive to research and check; thus, the mass media may be tempted to respond to the current economic pressure by replacing hard facts with (cheap) opinions.<sup>27</sup> When facts are upstaged by unfounded opinions it is inevitable that the credibility of the mass media suffers – as the transatlantic fuss about “fake news” or “Lügenpresse” demonstrates.<sup>28</sup> Deflated citizens retreat into their echo chambers where any news is trustworthy as long as it is shared between like-minded people.

Although scandals have always played a role in the economy of the mass-media, the factual basis of news has ultimately always been the touchstone of professional journalism. Is this about to change under conditions of online blogs and social media? Selected by personalisation technologies employed by social media sites, outrageous or scandalous posts appear on top of a Facebook user’s newsfeed because they are most likely to match the type

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23 HANNAH ARENDT, *Between Past and Future: Eight Exercises in Political Thought*, New York 1993 (1961), p. 253.

24 ARENDT, p. 259.

25 TIMOTHY GARTON ASH, *Free Speech: Ten Principles for a Connected World*, New Haven/London 2016, p. 202.

26 ARENDT, p. 238.

27 GARTON ASH, p. 195.

28 See, for example, *The Economist*, *America’s alt-right learns to speak Nazi: “Lügenpresse”*, 2016 (<https://perma.cc/3SPQ-59YX>).

of information that had previously attracted her attention, based on previous activities and searches. During the 2016 US election campaign, obvious lies went viral including DONALD TRUMP's claim that BARACK OBAMA was the founder of Islamic State and HILLARY CLINTON the co-founder.<sup>29</sup> For CASS SUNSTEIN, a Harvard law professor, there is no doubt that TRUMP's insulting tweets about his political adversaries "*put him at the centre of what was, for many, an engine for group polarization – and helped vault him to the presidency*".<sup>30</sup> Further, SUNSTEIN fears that personalisation technologies distort the free market of ideas, instead leading to fragmentation of the political discourse.<sup>31</sup> An inclination towards "post-truth politics" and the turn to a "post-factual society" endanger the public sphere, which constitutes a structural principle of democratic politics. The "public sphere" is the social space where different opinions are expressed and various problems and solutions are discussed. It is a key premise of the public sphere that KANT's "extended way of thinking" can unfold and that political actors are always aware of their decisions' contingency. A democratic order presupposes that conflicts are solved by way of public discussion. However, if SUNSTEIN's fear that personalisation technologies distort the free market of ideas and lead to fragmented political discourse should prove true, the normative requirements of the public sphere are questioned. To be sure, a parallelism of fragmented public spheres where issues are only discussed between like-minded people would not be able to establish the shared auditorium necessary for a democratic order. Competition between arguments in the political forum would no longer be possible and the political system's cognitive openness and learning ability would be challenged.

There have been two important sets of objections against SUNSTEIN's theory in the academic literature. A first objection argues that newspapers and electronic mass media have always been biased, appealing to certain audiences only; thus, news personalisation is no novel concern. From media sociology we know that selectivity is generally one of the key functions of mass media.<sup>32</sup> Through the selection of specific information, the mass media reduce overwhelming social complexity and protect systems and individuals

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29 See The Economist, The post-truth world: Yes, I'd lie to you, 2016 (<https://perma.cc/3N3E-MUHA>).

30 CASS R. SUNSTEIN, #Republic: Divided Democracy in the Age of Social Media, Princeton 2017, p. 83.

31 SUNSTEIN, 2017, p. 320.

32 See LUHMANN, The Reality of the Mass Media, p. 34.

from overload. Within a newspaper company, for example, members of the editing staff are in charge of selecting the information that will be covered. The newspaper's journalistic policy and internal standards will often strongly influence the angle from which facts will be examined or the selection of op-eds that readers may encounter. However, the point here is that this selection process does not happen blindly and readers will generally know what type of journalism and editorial bias they can expect from a particular newspaper, TV channel or radio station. Readers in Switzerland, for example, know – not in detail but on the whole – where a newspaper such as *Neue Zürcher Zeitung*, *Tages Anzeiger* or *Weltwoche* stands. This is different in the digital environment because no Facebook subscriber or Google search user will have any idea of the grounds on which the respective algorithms have chosen the news they are recommending individual users to read or watch. The key difference between traditional news outlets and personalisation technologies online, therefore, is transparency of bias.

A second set of objections question the empirical foundation of SUNSTEIN'S thesis that there is not much deliberation beyond echo chambers and that group polarisation is an effect of online content personalisation technologies. In one of the first data-driven studies on personalised recommender systems, HOSANAGAR et al. argued in 2012 that “*the antecedent, that recommenders create fragmentation, is ultimately an assumption*”.<sup>33</sup> This study, however, had a very limited scope and did not extend to the effects of personalisation technologies on news programming.

One year later, YOCHAI BENKLER and his colleagues at the Harvard Berkman Klein Center authored an empirical analysis of the SOPA-PIPA debate that also challenged SUNSTEIN'S thesis to a certain extent.<sup>34</sup> This debate followed proposals by the US Congress to introduce the SOPA (Stop Online Piracy Act) and PIPA (Protect Intellectual Property Act) as new IP enforcement bills in 2011. The bills were stalled as a consequence of massive Internet protests including a 24-hour Wikipedia blackout on 18/19 January 2012, millions of e-mails and thousands of phone calls addressed to members of US Congress

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33 KARTIK HOSANAGAR et al., Will the Global Village Fracture into Tribes: Recommender Systems and their Effects on Consumers, in *Management Science*, 2014, 60 (4) (<https://perma.cc/AXP9-QUZD>), p. 807.

34 YOCHAI BENKLER et al., *Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate*, Harvard University, Berkman Center for Internet & Society, Berkman Center Research Publication No. 2013-16, 2013, available at <http://ssrn.com> (<https://perma.cc/8gW6-AYQM>).



to raise awareness of the harm that the planned laws would mean for Internet freedom. The authors from the Berkman Klein Center argued that their analytical study of this debate provided a perspective “on the dynamics of the networked public sphere that tends to support the more optimistic view of the potential of networked democratic participation”.<sup>35</sup>

However, in defence of SUNSTEIN and against the arguments of the Berkman Klein Center, one might argue that the SOPA-PIPA debate was very technology-centred and thus was particularly capable of mobilising masses of tech-interested people in the US. Therefore, it may not be representative of the general population’s attitudes and values in this area. Indeed, a 2013 book by ETHAN ZUCKERMAN seemed to partially confirm SUNSTEIN’s thesis. According to ZUCKERMAN it is a paradox of technological connection that a greater number of people around the globe sharing information and perspectives may lead to narrower representations of the world than in a less connected world.<sup>36</sup>

Research which both confirmed and questioned SUNSTEIN’s theory was the recent Berkman Klein Center study on online media and the 2016 presidential elections in the United States. The researchers worked with an impressive sample of more than 2 million stories collected from a broad range of sources on the open Internet, including mass media sites, government sites, private sites, blogs etc.<sup>37</sup> They found a pronounced asymmetry between the structure and composition of the media circulated on the right compared to the left. Whereas on the right highly partisan pro-TRUMP reporting and strong polarisation tendencies prevailed, the situation was different on the liberal (in the US understanding of the word) side. On the right the centre of gravity was clearly Breitbart, while on the left long-standing mass media (such as New York Times, Washington Post, CNN etc.) were also commonly in circulation, allowing such sources to play an important role as intermediaries and defenders of high quality journalistic standards and objective reporting. Hence, the public sphere continued to exist. From this important study one can thus deduce that SUNSTEIN’s thesis of group polarisation very much depends on

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35 BENKLER et al., pp. 9.

36 ETHAN ZUCKERMAN, *Rewire: Digital Cosmopolitans in the Age of Connection*, New York 2013.

37 ROBERT FARIS et al., *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election*, Berkman Klein Center Research Publication No. 2017-6, 2017, available at [www.ssrn.com](http://www.ssrn.com) (<https://perma.cc/93B3-ZV99>), p. 21.

the state of quality mass media. Where high quality mass media are able to reach a wide audience, the danger of group polarisation is clearly minimised.

### 3. PUBLIC SERVICE BROADCASTING

As mentioned above, public service broadcasting (PSB) is determined by the Constitution as being one of the main institutions securing the renewal of those resources that are essential for the functioning of the Swiss model of direct democracy. The extent to which the Constitution requires broadcasting regulation for the purpose of safeguarding democracy may be striking to a foreign, particularly non-European, observer.<sup>38</sup> Before elaborating on the legal framework of public service broadcasting under Swiss law and discussing potential future developments under conditions of intelligent algorithms and personalisation technologies, some empiric data concerning media consumption in Switzerland is provided.

#### a) Media Consumption and the Internet

The most recent empiric research confirms both that media consumption in Switzerland primarily takes place on the Internet and that the mass media have already been eclipsed by social media. Today, the Internet is the most frequently used medium for information sourcing, especially in the age group of 15 to 34 year olds. Of the media offered on the Internet, the global search engines and social media (including Google, YouTube, Facebook, WhatsApp and Instagram) on average generate four times more attention than the online offers from the established Swiss mass media. Young people in particular very much focus their Internet media consumption on those global sources. According to the 2016 Media Quality Yearbook of the Research Institute for the Public Sphere and Society at the University of Zurich (“Forschungsbereich Öffentlichkeit und Gesellschaft, fög”),<sup>39</sup> online news sites, web portals and social media are the main sources of information for 62 % of 18 to 24 year olds, and for 22 % of all young adults they are the only source of information. For 43 % of young adults the smartphone is the main technical means to access information online.

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38 For the discussion in the United States see C. EDWIN BAKER, *Media, Markets, and Democracy*, Cambridge 2002, p. 193.

39 See for more information [www.foeg.uzh.ch](http://www.foeg.uzh.ch).

Google (mainly via its ownership of YouTube), Facebook, WhatsApp, Instagram, etc. cooperate with the global media corporations and disseminate their content on their platforms. In collaboration with the Reuters Institute for the Study of Journalism at the University of Oxford, the Research Institute for the Public Sphere and Society conducted a representative survey involving more than 2000 Internet users in Switzerland. According to this survey, 36 % of the interviewed users already consume their news via Facebook. These findings explain why Swiss media companies are now cooperating with the social media giant. Commuter newspapers and tabloids rather than quality newspapers dominate the range of Swiss-origin media currently available on Facebook.

The Research Institute for the Public Sphere and Society survey also emphasised the formidable importance of social networks in the news economy. As advertising revenues increasingly migrate to the Internet in general and the large platform firms in particular, this source is rapidly vanishing as a means for funding the mass media. This development can only lead to increasing difficulties for the mass media in developing alternative business models for the news market. The gravity of the mass media's financial problems is epitomised across the globe by the large number of quality newspapers that disappear every year.

As research by SUNSTEIN and others suggests, the extended use of personalisation technologies by platform firms is reinforcing the already existing trend towards filter bubbles<sup>40</sup> and fragmented public spheres, with the worrying prospect that communication – including about political issues – is increasingly taking place only between like-minded parties; a situation starkly at odds with MILL's pre-conditions for social progress, outlined above. These mostly theoretical assumptions about the effects of personalisation technology are, however, backed up by Research Institute for the Public Sphere and Society empiric findings that people who primarily consume their news via YouTube, Facebook etc. typically have less confidence in the media system. Conversely, those people who frequently use public service broadcasting for their news consumption have a higher degree of confidence in the media system. Confidence in the mass media in turn promotes a general interest in news, as well as improving consumers' willingness to pay for information. However, the data about the Swiss media market clearly shows that raising consumers' general awareness that high quality information is

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40 PARISER, 2011.

expensive will not be able to resolve the grave financial problems of information journalism.

As a preventative measure against further migration of advertising to social media, Swiss media companies are increasingly investing money in technologies of “behavioural targeting”, allowing the personalisation of advertising and news on the basis of collected user data. However, most of the media companies in Switzerland are too small to collect large amounts of data (Big Data). Further, they do not have the financial means or technical know-how that would be required for data analysis and aggregation (Data Mining) or to develop more sophisticated targeting technologies. Thus, as an alternative solution, they are seeking to join forces with partner companies; a strategy that has led to the creation of Admeira, the recently established joint venture between the Swiss Broadcasting Corporation (SRG), Swisscom and Ringier (a media company). The purpose of Admeira is to establish an alliance of the three companies in the field of online advertising. As a telecom company, Swisscom possesses detailed information about its customers, extending – in the case of mobile services – to their online behaviour. In the eyes of SRG, the fact that Swisscom has broad experience of using targeting technologies such as Real Time Advertising or Real Time Bidding establishes the company as a particularly attractive partner for collecting and analysing data. Swisscom, on the other hand, benefits from cooperation with SRG and Ringier because they produce costly news and entertainment programmes that Swisscom can make available on its own TV and entertainment platforms, as opposed to Swisscom having to produce them itself.

## **b) Personalisation Technologies**

The establishment of Admeira raises the key question of whether the use of personalisation technologies by the SRG in order to target individual users would be reconcilable with the broadcaster’s public service remit as defined by Swiss law. Machine Learning (ML), Data Mining, data analysis and other techniques of Artificial Intelligence (AI), have boosted the development of personalisation algorithms that allow companies to produce sophisticated user profiles, which can be employed to predict users’ future behaviour.<sup>41</sup> The more data that is available for training the algorithms, the finer-grained predictions they are able to make. If a media company knows exactly what kind

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41 MIREILLE HILDEBRANDT, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology*, Cheltenham/Northampton 2015, p. 109.

of person a customer is, it may be tempted to use the personalisation technology to take person-related decisions not only regarding advertising messages but also regarding the news and other types of content that a user will see on her screen.

This prospect creates a potential conflict between the SRG's commercial and technological preferences and the legal requirements arising from its public service remit. As mentioned, Article 93 II Constitution provides for a public service mandate, requiring the system of radio and television as a whole to contribute "*to education and cultural development, to the free shaping of opinion and to entertainment*", thus supporting the renewal of the cultural resources necessary for the functioning of democracy and for safeguarding cohesion between the different linguistic regions, cultures and mentalities in the country. Within a setting defined by the economic and cultural particularities of Switzerland, different options for implementing this public mandate are possible. Under the order of a parliamentary committee, the Swiss Government in 2014 published a report which reflected on structural change in the media sector in Switzerland and asked how this was impacting on the fulfilment of the constitutional public service mandate by radio and television in particular and the media sector in general. This reflection was paralleled by political pressure from right-leaning groups requiring an open debate about the institutional implementation of the public service mandate. In a partial response to these pressures, the Swiss government in 2016 produced a further report reviewing the definition of public service broadcasting and analysing the relationship between private electronic media and SRG in the fulfilment of the public service mandate. These reports and debates show a general awareness amongst those involved in policy-making of the potentially far-reaching consequences of the ongoing structural change in the media system. However, there is no consensus so far on how politics should respond to this issue. In a vote of 4 March 2018, a 71.6 % majority of the citizens and all Cantons said no to a popular initiative that wanted to abolish the compulsory levy which serves to finance the SRG and public broadcasting in Switzerland. Although considerable critique was raised against the SRG (including expansionist business practices and too much shallow entertainment) in the run-up to the vote, the result was almost unanimously interpreted as a clear political commitment to the SRG and to robust public service broadcasting.<sup>42</sup>

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42 See the article 'Attack on public broadcasting licence fee clearly fails' on Swissinfo, 4 March 2018 (<https://perma.cc/Lz8R-YXQ3>).

Accordingly, there is a strong likelihood that the currently existing institutional setting will continue to prevail for the next couple of years. This setting provides for the legal obligation of the SRG (as the public broadcaster) and a selected number of private broadcasting companies to contribute to the fulfilment of the public service mandate. The law places the main responsibility for the provision of the public service mandate clearly on the shoulders of the SRG. The small number of private broadcasters, which are authorised with a licence and partly financed through the broadcasting levy, provide their services mainly at local and regional levels.

Article 24 Radio and Television Act<sup>43</sup> provides that the SRG has a comprehensive public service remit. First, the SRG has to live up to high quality standards as regards the news and other content that it is producing. Further, in this regard, the SRG must ensure that its programmes are able to reach the entire Swiss population. Moreover, the public service broadcaster has to advance cohesion between different regions and cultures in Switzerland. For this purpose, the SRG is required to contribute to linguistic exchange between language regions and to financially equalise economic differences between regional media markets. As a consequence, less affluent Italian and French speaking regions are cross-subsidised by the wealthier German speaking area to ensure that a similar offer of quality programmes is available everywhere in Switzerland. This model secures that the same range of public service programmes is supplied in every linguistic region in Switzerland. As compensation for fulfilling its broad mandate, the SRG enjoys *inter alia* financial privileges as it receives a major part of the broadcasting levy which all households in Switzerland are required to pay. The Swiss broadcasting levy currently amounts to CHF 365 per household per year, which is expensive in international comparison. As a result of the debate about the SRG's future in the run-up to the vote of 4 March 2018, a reduction of the levy to CHF 300 seems to be a likely consequence.

If Swiss law justifies the privileged position of the SRG by pointing to the particular mandate that the broadcaster fulfils in favour of democracy and cohesion, then it is of primordial importance that the SRG's content actually reaches the entire population. Personalisation of content could potentially conflict with these stipulations, and especially considering the risks of

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43 Federal Act on Radio and Television of 24 March 2006 (Radio and Television Act, RTVA), SR 784.40; see for an English version of the Radio and Television Act [www.admin.ch](http://www.admin.ch) (<https://perma.cc/9KBY-G4KS>).

fragmentation and polarisation, as described earlier, it is a rather contradictory course for the SRG to pursue. The SRG should ensure a counterbalance to the above-mentioned tendencies of social media and online platforms and should provide that high quality content reaches the entire population in Switzerland.

The fundamental challenge for the SRG will be to convince young people in particular that its programmes are sources of reliable information, which is essential for the future of democracy and cohesion in Switzerland. To achieve this, the SRG will need to explore the extent to which personalisation technologies could work for the good of the public service mandate. The key question is: how can user targeting be combined with “translation services” to both make young audiences aware of perspectives that are qualitatively distinct from those encountered on social networks and online platforms and to enable them to decipher quality in the media?

### III. Summary

Legal sociology is an empiric sub-discipline of the law that is primarily interested in observing the emergence and functioning of the law from an objective perspective. It is only in a second step that a change of perspective occurs, from objective description to normative prescription. Accordingly, the legal sociologist is wearing two hats: the hat of a social scientist who is observing the law from an external sociological perspective and the hat of a jurist who is pondering the gained insights from a system-internal legal perspective and who eventually makes recommendations for improving the law's workings. The law, as an autopoietic sub-system of society, will understand the legal sociologist's recommendations based on its own system-rationality, and then autonomously decide what to do with them.

A legal sociology perspective can be useful in analysing how structural change impacts on the interaction between law and society and the functioning of direct democracy in Switzerland. News selection through personalisation technologies and other forms of artificial intelligence potentially interferes with the concept of direct democracy, which presupposes the existence of citizens who are competent to take informed decisions on a diverse range of matters of political interest. The Swiss model of direct democracy depends on societal preconditions, which it cannot guarantee itself and on cultural resources that need to be renewed continuously. The resources that direct democracy needs for its reproduction are citizens' capabilities to build their own independent opinions on the many political issues they are supposed to take decisions on at the ballot box. According to the Constitution, two institutions are primarily responsible for enabling citizens to meet the requirements of this task: a system of generally accessible public education and a system of public service broadcasting. Under current law, the SRG is in charge of the latter. The *raison d'être* of the SRG is the fulfilment of a public service mandate requiring it to guarantee high quality and diverse information and to contribute to cohesion between the different cultures in the country. The SRG can discharge this duty only if its programmes are able to reach the entire population. Personalisation of content – a potentially tempting business



strategy in the competition (with transnational platform corporations) for user attention – would probably contradict this aim. However, further research on content personalisation and how this technology could be utilised in order to bring high quality information to the attention of younger audiences could be useful.

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# Matthias Oesch

## Constitutional Law

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# I. Constitution

The Swiss Constitution in force today was introduced as recently as the year 2000. However, Switzerland's Constitution has experienced a lengthy history of adaptation and revision. The first section of this chapter examines the history behind the Constitution (1.), before outlining key concepts which are encompassed in its text, like the concept of citizenship (2), the protection of fundamental rights (3.), the allocation of powers between the federation, the cantons and the communes (4.) and the allocation of powers between the three branches of government on the federal level (5.).

## 1. HISTORY AND OVERVIEW

Until 1848, the ancient Swiss cantons together formed a rather loose confederation. The cantons themselves were sovereign states, tied together by treaties. A typical example of such a treaty was the Confederate Treaty of 1815. This was an agreement between the cantons to define a Swiss confederation, agreed by the cantons under pressure from the then predominant European powers during the reorganisation of Europe at the Congress of Vienna. Simultaneously, at this Congress, the other European states recognised the borders of the Swiss confederation and its neutrality. In 1847, a civil war broke out in which the (predominantly liberal) Protestant cantons fought against the (predominantly conservative) Catholic cantons. The conflict erupted after the Catholic cantons founded the *Sonderbund* ("separate alliance"); the Protestant cantons considered this alliance as violating the Confederate Treaty. The Protestant cantons prevailed, and the *Sonderbund* was dissolved.

In the aftermath of this civil war, the Switzerland we know today was founded. In 1848, the new Constitution was put into force, although various cantons – mainly the Catholic ones which had been defeated in the civil war – originally opposed its content as well as the creation of a new federation. The new Constitution created a modern federal state, whereby enumerated policy areas fell under the competence of the federal level, leaving the

regulation of all other policy areas to the then 25 cantons. It strengthened democratic structures and fundamental rights. It also introduced the organisational system of checks and balances on the federal level through the establishment of three separate branches of government: the Federal Assembly (the legislative branch), the Federal Council (the executive branch) and the Federal Supreme Court (the judicial branch). In part, the new Constitution was visibly inspired by the US Constitution and the achievements of the French revolution.<sup>1</sup>

In 1874, the Constitution of 1848 was subjected to a complete revision. A major novelty was the introduction of the optional legislative referendum; citizens could request a binding vote on federal acts which the parliament planned to enact. Further, it was this revision that established the Federal Supreme Court as a permanent court. The army was unified; no longer did each canton have its own army. New fundamental rights such as economic freedom and the right to free primary school education were introduced. Other rights were extended, such as the right of domicile.

Between 1874 and 1999, the Constitution was revised many times. As this occurred, the competences of the federal level were gradually enhanced. Moreover, the elements of direct democracy became more pronounced: in 1891, the right of the citizens to propose a revision of the Constitution was introduced. A further development was the creation of the 26<sup>th</sup> canton: in 1978, the Canton of Jura was founded. And eventually, as late as 1971, women were granted full political rights in federal matters (although some cantons took longer to guarantee the same right).<sup>2</sup>

In 1999, the Constitution was again completely revised. The prime objective of this total overhaul was to update and improve the text, without making any substantial changes. The new text was put into force in 2000, after a majority of the people (59 % of those who voted) and a majority of the cantons (12 cantons, two half-cantons) approved it.<sup>3</sup> It contains all the elements which are typical of a federal state's modern Constitution (short of providing for the constitutional review of federal acts):

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1 THOMAS FLEINER/ALEXANDER MISIC/NICOLE TÖPPERWIEN, *Constitutional Law in Switzerland*, 2<sup>nd</sup> edition, Alphen aan den Rijn 2012, n. 13; WALTER HALLER, *The Swiss Constitution in a Comparative Context*, 2<sup>nd</sup> edition, Zurich/St. Gallen 2016, n. 2, n. 20 et. seq.

2 See below, pp. 159.

3 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Swiss Constitution [www.admin.ch](http://www.admin.ch) (<https://perma.cc/M8UJ-S369>).

- Title 1 (Articles 1–6 Constitution) defines the main features of the Swiss confederation. It provides a list of the 26 cantons, which, together with the people, form the confederation itself. It also sets out the aims of the Swiss confederation, in particular the objectives of protecting the rights and liberties of the people and safeguarding the independence and security of the country. This part also sets out the national languages of Switzerland as being German (the first language of 63.5 % of the population), French (22.5 %), Italian (8 %) and Romansh (0.5 %). Finally, this Title highlights the importance of the rule of law.
- Title 2 (Articles 7–41 Constitution) lists the fundamental rights that apply in Switzerland and defines the requirements for Swiss citizenship.
- Title 3 (Articles 42–135 Constitution) distinguishes the competences of the federation from the competences of the cantons and communes, by enumerating the competences which the federal level possesses. It also defines the financial system, including the rules on taxation. This section is by far the most voluminous, encompassing 104 articles.
- Title 4 (Articles 136–142 Constitution) grants political rights in federal matters. In particular, it grants the right to participate in elections to the National Council and in popular votes (initiatives and referenda), as well as the right to launch or sign popular initiatives and requests for referenda.
- Title 5 (Articles 143–191c Constitution) regulates the organisation and competences of the main federal authorities: namely, the Federal Assembly, the Federal Council and the federal administration, the Federal Supreme Court and the other judicial authorities.
- Title 6 (Articles 192–197 Constitution) sets out the procedure for the revision of the Constitution. One key requirement is that the people *and* the cantons must agree on any proposed revision. A revision can be initiated by the federal authorities or the people (popular initiative). Title 6 also contains transitional provisions.

In addition to the relevance of the Constitution itself, constitutional law and practice in Switzerland is influenced by international law, which often encompasses rules of constitutional relevance. A prime example of this is the influence of international human rights guarantees, as well as some of the bilateral agreements that Switzerland has concluded with the EU. Interpreting Swiss law, including the Constitution, in conformity with international law



is a well-established method of interpretation, supplementing the classical canon of methods of interpretation. However, although Switzerland as a country has traditionally taken a friendly, inclusive approach towards international law, the Constitution continues to follow the introverted tradition of constitutionalism and fails to properly reflect Switzerland's participation in global and European organisations and treaty networks.<sup>4</sup>

## 2. PEOPLE

Switzerland has 8'400'000 inhabitants. 6'300'000 of these inhabitants are Swiss citizens. The others – *i.e.* 25 % of the population – are foreign nationals (not including asylum seekers); a very significant proportion. Moreover, more than 300'000 persons commute across the borders to and from Switzerland, often on a daily basis. 770'000 Swiss citizens live abroad.

### a) Citizenship

Citizenship in Switzerland is based on the concept that a citizen has three citizenships: communal, cantonal, and Swiss (Article 37 Constitution). These citizenships are connected: in particular, cantonal and communal citizenships are prerequisites of Swiss citizenship. It is permitted to have dual citizenship under Swiss law, *i.e.* to possess Swiss citizenship in addition to the citizenship of another country.

Citizenship can be acquired by law or by naturalisation. The prerequisites for the acquisition are defined partly by federal law (which mainly just lays out the minimum requirements) and partly by cantonal law (Article 38 Constitution). With respect to federal law, the Federal Act on Swiss Citizenship (Swiss Citizenship Act) is relevant:

- Swiss citizenship is acquired by law, *i.e.* automatically, by children who have one parent with Swiss citizenship (Article 1 Swiss Citizenship Act).<sup>5</sup> These children also attain the Swiss parent's cantonal and communal citizenship (Article 2 Swiss Citizenship Act).

<sup>4</sup> See the chapter on International Relations, pp. 163.

<sup>5</sup> Federal Act on Swiss Citizenship of 20 June 2014 (Swiss Citizenship Act, SCA), SR 141.0; see for an English version of the Swiss Citizenship Act [www.admin.ch \(https://perma.cc/GHN5-HV6Y\)](https://perma.cc/GHN5-HV6Y).

Thereby, Switzerland follows the principle of *ius sanguinis*. A child who is adopted will also acquire Swiss citizenship, from the adopting Swiss parent (Article 4 Swiss Citizenship Act).

- Swiss citizenship is acquired by naturalisation, i.e. by an official decree, when an applicant fulfils the relevant requirements stipulated by federal and cantonal law (Articles 9–19 Swiss Citizenship Act). With respect to federal law, the requirements are that an applicant must demonstrate that he or she has been successfully integrated into the Swiss society (requiring, inter alia, to respect the values of the Swiss Constitution and to be able to communicate in one of the national languages), is accustomed to the Swiss way of life and does not endanger the internal or external security of Switzerland, and that he or she has resided in Switzerland for a certain period of time (ten years for adults). For cantons to approve naturalisation, which is also necessary for Swiss citizenship, it is usually required that an applicant speaks one of the canton's official languages and that he or she has resided in the canton and commune for a certain period of time (which shall not exceed five years according to Article 18 Swiss Citizenship Act). In various cantons, the decision to grant citizenship has traditionally been taken by communal assemblies or, even more problematically in terms of affording sufficient respect to such individuals' fundamental rights, by the electorate in secret ballot votes.<sup>6</sup> A simplified procedure for naturalisation applies to certain foreign nationals, in particular to spouses of Swiss citizens. In 2017, the people and the cantons voted in favour of a new constitutional provision which mandates that the federal authorities shall enact simplified regulations on the naturalisation of third generation immigrants (Article 38 III Constitution).

Swiss citizenship is the prerequisite for various rights and duties. On the federal level, the following are the most relevant:

- Swiss citizens over the age of 18 enjoy numerous political rights. They have the right to participate in elections to the National Council and in popular votes (initiatives and referenda) and to launch or sign initiatives and requests for referenda (Article 136 Constitution). Swiss citizens benefit from the freedom of domicile in Switzerland (Article 24 Constitution),

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6 See pp. 160.

from the protection against expulsion, extradition and deportation (Article 25 Constitution) and from diplomatic protection abroad.

- Swiss men have a duty to render military service. For women, military service is possible but voluntary (Article 59 Constitution).

Swiss citizenship can be lost by law, i.e. automatically, or by official decree. It is lost by law, for instance, when a Swiss citizen was born and has lived abroad, possesses another citizenship and does not declare that he or she wants to maintain the Swiss citizenship by the time he or she reaches the age of 26 (Article 7 Swiss Citizenship Act). It is lost by an official decree, for instance, when a Swiss citizen who also possesses another citizenship seriously violates the interests or reputation of Switzerland (Article 42 Swiss Citizenship Act). These rules are adherent to the international principle that statelessness shall be avoided.

## **b) Foreign Nationals**

As briefly mentioned above, Switzerland has traditionally been a country with a high percentage of people who live and work in the country but do not possess Swiss citizenship. Various factors might explain this. Firstly, the economic prosperity of the country has led to a high demand for manpower from abroad. Moreover, the fact that EU citizens in Switzerland enjoy substantial rights based on the Agreement on the Free Movement of Persons between Switzerland and the EU reduces the incentive for such people to be naturalised. Finally, the restrictive naturalisation policy in Switzerland means that even persons who have lived in the country for decades may not necessarily meet the requirements for naturalisation.

Article 121 Constitution confers the legislative competence for matters of immigration and asylum to the federal authorities. Based upon this conferral, the Federal Act on Foreigners regulates entry to, residence in and departure from the country.

Over the last few decades, various popular initiatives have aimed at forcing the federal authorities to implement a more restrictive policy vis-à-vis foreign nationals.<sup>7</sup> For example, in 2010, the people and the cantons approved the initiative “for the expulsion of criminal foreign nationals” (“Für die Ausschaffung krimineller Ausländer”). This initiative stated that foreign nationals who commit one of the enumerated crimes – such as homicide, rape

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<sup>7</sup> See for popular initiatives in general pp. 151.

and robbery – or even those who have improperly claimed social insurance or social assistance benefits will lose the right of residence automatically and must be deported (Article 121 III-VI Constitution). The Federal Assembly did not implement the initiative literally as such an implementation would have been incompatible with international law guarantees; in particular, it included a hardship clause – a clause which allows for flexibility to be applied when the expulsion would result in a severe personal hardship and the private interests of the foreign national to stay in Switzerland prevail over the public interests to expulse him or her. In response to this legislation, another popular initiative was launched; it was entitled “enforcing the expulsion of criminal foreign nationals” (“Zur Durchsetzung der Ausschaffung krimineller Ausländer”) and demanded a strict implementation of the original initiative. However, the people and the cantons rejected this call for strict implementation in 2016. Another popular initiative dealing with immigration was entitled “against mass immigration” (“Gegen Masseneinwanderung”) and was approved by the people and cantons in 2014. This initiative stipulates that Switzerland shall control the immigration of foreign nationals autonomously, by introducing annual quotas and granting Swiss citizens priority on the job market (Articles 121a and 197 No 11 Constitution). These provisions, read together, are obviously directed against the Agreement on the Free Movement of Persons between the EU and Switzerland, although they do not explicitly refer to this agreement, let alone mandate the government to terminate it. The Federal Assembly decided to implement the initiative in a way that ensured it would not violate the Agreement on the Free Movement of Persons.<sup>8</sup>

Foreign nationals do not enjoy political rights on the federal level. This is problematic, because these people – 25 % of the population, paying taxes as Swiss citizens do – are henceforth excluded from the democratic process. It should be noted, however, that some cantons and communes do grant political rights to foreign nationals. For example, the cantons of Jura and Neuchâtel grant foreign nationals, under certain conditions, the right to vote at cantonal and communal levels.

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8 See the chapter on International Relations, p. 177.

### 3. FUNDAMENTAL RIGHTS

The Constitution contains an impressive catalogue of fundamental rights, starting with human dignity and followed by all the rights which are usually found in modern European constitutions: equality before the law; the prohibition of discrimination on the grounds of, *inter alia*, origin, race, gender and age; the protection against arbitrariness; protection of good faith; civil liberties and freedoms; political rights; basic procedural rights and basic social rights (Articles 7–34 Constitution).

Article 35 Constitution mandates that fundamental rights must be respected throughout the entire legal system. Individuals can invoke them against state authorities. Further, private persons are bound by fundamental rights when they exercise a state function. Finally, fundamental rights must be taken into account by the state, where appropriate, in regulating relationships between individuals. This includes the obligation to draft new laws, and interpret existing laws, in light of fundamental rights (so-called indirect third-party effect). For instance, marriage and family law is to be shaped and interpreted in light of the right to marry and to have a family (Article 14 Constitution). Article 36 Constitution makes it clear that guaranteed rights do not apply in an absolute manner. Restrictions are lawful as long as they fulfil all of the following conditions: they have a legal basis, are justified by a public interest, are proportionate and do not violate the essence of the right in question.

In addition to the federal Constitution, fundamental rights are guaranteed in cantonal constitutions and in international treaties:

- The constitutions of the cantons also contain fundamental rights. In some cases, they go beyond what is guaranteed by the federal Constitution. For instance, the Constitution of the Canton of Zurich guarantees, in Article 15, the right to found, to organise and to attend private educational institutions.
- International treaties are highly relevant for the protection of fundamental rights in Switzerland. First and foremost, the European Convention on Human Rights (ECHR) has been attributed a quasi-constitutional status by the Federal Supreme Court.<sup>9</sup> Other international treaties complement the protection guaranteed by the ECHR, such as the UN Covenant on Economic, Social and Cultural Rights,

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9 BGE 117 Ib 367.

the UN Covenant on Civil and Political Rights, the UN Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination. Moreover, the comparative law method of interpretation has traditionally been instrumental in further developing fundamental rights in Switzerland; in particular, law and practice in Germany, the United States and the EU has markedly influenced developments in the protection of fundamental rights in Switzerland.

The Federal Supreme Court has not hesitated to recognise fundamental rights which were not explicitly provided for in the Constitution of 1848 or 1874, thereby recognising the existence and enforceability of unwritten rights. Examples include freedom of expression (now Article 16 Constitution), freedom of assembly (now Article 22 Constitution) and the right to assistance when in need (now Article 12 Constitution).<sup>10</sup> It is conceivable that in the future the Federal Supreme Court might again recognise guarantees which are not (yet) enshrined in the Constitution, if such a step appears prudent in light of new challenges and threats.

Individuals can directly invoke fundamental rights which are guaranteed by the federal Constitution before administrative authorities and courts. For example, this can be done in cases where cantonal laws and decisions are being reviewed. Similarly, it is possible to challenge decisions based on federal ordinances as to their compatibility with fundamental rights. However, the limit to this review comes in the form of Article 190 Constitution, which mandates that the Federal Supreme Court and the other judicial authorities apply federal acts and international law. This precludes any possibility for the courts to declare federal acts invalid if they are shown to be incompatible with fundamental rights guaranteed by the federal Constitution.<sup>11</sup>

#### **4. FEDERATION, CANTONS, COMMUNES**

Federalism is a basic constitutional principle in Switzerland. The competences and responsibilities are vertically distributed over the three levels of government, namely the federation, the cantons and the communes (municipalities).

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<sup>10</sup> BGE 87 I 114; BGE 96 I 219; BGE 121 I 367.

<sup>11</sup> See pp. 156.

The latter enjoy considerable autonomy in regulating their own affairs, profiting from the principle of subsidiarity (Article 5a Constitution), which dictates that the Confederation only interferes with regulation if the cantons or communes are unable to regulate a particular matter themselves. It is partly thanks to this arrangement that the identity-creating societal, linguistic and cultural diversity throughout the country is preserved. The people are also encouraged to actively participate in political debates and decision-making on the cantonal and communal level. Further, the federal bicameral parliamentary system ensures that the cantons participate in the law-making process on the federal level.<sup>12</sup> They are also involved in the process of revising the federal Constitution; a revision must not only be approved of by a majority of the people but also by a majority of the cantons.

Overall, the above arrangements ensure that the Swiss federal system displays a unique “bottom-up” character.<sup>13</sup> Simultaneously, however, it is acknowledged that the federal level and the cantons shall cooperate and support each other in the fulfilment of their duties (Article 44 Constitution). An essential element in achieving this goal is the use of national equalisation payments, both between the individual cantons and between the federation and the cantons. These payments contribute to the promotion of internal cohesion (Article 2 II Constitution). In 2017, they amounted to almost CHF 5 billion.<sup>14</sup>

The following paragraphs describe characteristic features of the three levels of government:

- The federation is composed of both the people and the cantons (Article 1 Constitution). The federal level enjoys the competences which are assigned to it by the Constitution (Article 42 Constitution). They are enumerated largely in Articles 54–125 Constitution. Federal law takes precedence over cantonal and communal law (Article 49 Constitution). This remains the case even where the Federal Assembly passes acts which, according to the Constitution, are not within its competence.<sup>15</sup>

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<sup>12</sup> See pp. 148.

<sup>13</sup> HALLER, n. 92; s. also FLEINER/MISIC/TÖPPERWIEN, n. 289.

<sup>14</sup> Federal Department of Finance, Factsheet: National Fiscal Equalization (NFA), 2017 (<https://perma.cc/YJE2-SGE5>).

<sup>15</sup> See pp. 156 for the lack of constitutional review of federal acts.

- The second level of government is formed by the 26 Cantons (23 cantons, six half-cantons).<sup>16</sup> As mentioned, it was the Canton of Jura that became the 26<sup>th</sup> canton in 1978; its territory had formerly been part of the Canton of Bern. Attempts to merge the two half-cantons of Basel Stadt and Basel Landschaft into one canton have been unsuccessful; in 2014, the people of Basel Stadt voted strongly in favour of such a merger, but the people of Basel Landschaft strongly rejected it. Zurich is the canton with the biggest population, with 1'460'000 inhabitants, while the Canton of Appenzell Innerrhoden is the smallest, counting just 16'000 inhabitants. Despite differences in size and population, all cantons are equal in respect of their legal status, with the exception that half-cantons have only one seat in the Council of Cantons (Article 150 Constitution) and count only as half a canton when a majority of the cantons is required for a revision of the Constitution (Article 142 Constitution). The cantons possess all competences which have not been assigned to the federal level (Articles 3 and 42 Constitution), including the implementation of federal law (Article 46 Constitution). They enjoy considerable autonomy in organising themselves and regulating their own affairs; the federal level ensures that the cantons have sufficient financial resources to do so (Article 47 Constitution). Cantons are also able to conclude inter-cantonal agreements between themselves (Article 48 Constitution).<sup>17</sup>
- The third level of government is made up of some 2'290 communes. The number is declining due to an ongoing trend where communes merge in order to carry out tasks more efficiently. As with cantons, the population and size of the communes differs greatly. The Commune of Zurich is the biggest, counting almost 400'000 inhabitants; the Commune of Bister (Canton of Valais) is the smallest, counting only 31 inhabitants. The autonomy of the communes is explicitly guaranteed, although the scope of this autonomy is ultimately determined by the cantons (Article 50 Constitution). Within the limits of their autonomy, the communes organise decision-making in communal matters – such as local taxes, local police, primary education and planning of land use – themselves.

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<sup>16</sup> The six half-cantons are Appenzell Ausserrhoden and Appenzell Innerrhoden; Basel Stadt and Basel Landschaft; and Obwalden and Nidwalden. They are known as “half-cantons” because they originated from internal divisions in three cantons; Appenzell, Basel and Unterwalden.

<sup>17</sup> See, for example, the chapter on Criminal Procedure, p. 399.



Over the last few decades, the federal system has increasingly come under pressure in various ways. First, there has been an ongoing shift of competences from the cantons to the federal level, resulting in an increased burden of responsibilities for the federation.<sup>18</sup> Second, the increasing tendency to take recourse to international treaties often results in a tacit neutralisation of cantonal competences. Various bilateral agreements with the EU are examples of this, such as the harmonisation of the mutual recognition of professional qualifications based on the Agreement on the Free Movement of Persons. Accordingly, consultation and cooperation between the different layers of government is even more important today than in the past, in order to ensure that the cantons can have some influence over the conclusion of treaties which may affect their powers. Third, the principle that all cantons have an equal standing in votes on the revision of the Constitution does not quite fit with the principle that all Swiss citizens are equal and have only one vote. A citizen of the Canton of Uri possesses a voting power which is 35 times weightier than the voting power of a citizen of the Canton of Zurich. As problematic as it might be, this inequality is an inevitable consequence of the deliberate choice to create Switzerland as a federation, consisting of both the people and the cantons.

## 5. FEDERAL ASSEMBLY, FEDERAL COUNCIL, FEDERAL COURTS

The federal level is organised in order to guarantee the classic principle of the separation of powers between the different branches of government (checks and balances). The composition and functions of the Federal Assembly, the Federal Council (including the federal administration), and the Federal Supreme Court and other federal judicial authorities are as follows:<sup>19</sup>

- The Federal Assembly is the legislature (Articles 148–173 Constitution). It is a bicameral parliament, consisting of the National Council and the Council of States. The National Council has 200 members, representing the people. The seats are allocated to the cantons in proportion to their

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<sup>18</sup> HALLER, n. 65.

<sup>19</sup> See for two particularities, namely the right of the people to have the last word on federal acts and international treaties and the Federal Council's organisation as a multi-party collegiate body, pp. 151 and pp. 155.

- population. Currently, the Canton of Zurich has 35 seats, while six cantons, including the Canton of Appenzell Innerrhoden, to name but one, have the minimum of one seat. In each canton, the elections operate through the system of proportional representation. The Council of States consists of 46 members, i.e. two delegates from each canton (whereby half-cantons delegate one person), whose role is to represent their cantons. The election of the cantonal delegates is governed by cantonal law; in most cantons, majority voting applies. The term of office for both chambers is four years; re-elections are possible. The two chambers are equal and have similar powers. In particular, both chambers must agree on the enactment of federal acts and the conclusion of international treaties, as well as on the proposed budget. The members of both chambers act together, as the United Federal Assembly, when they elect the members of the Federal Council, the members of the Federal Supreme Court and, in times of war, the Commander-in-Chief of the armed forces.
- The Federal Council is the highest governing and executive authority (Articles 174–187 Constitution). It consists of seven members (councillors) who are elected individually by the Federal Assembly for a term of four years. In 2013, the people and the cantons rejected the initiative “popular election of the Federal Council” (“Volkswahl des Bundesrates”) which tried to demand that councillors be elected directly by the people. Re-elections are possible and usually occur as a matter of routine; there have only been four instances in which councillors have not been re-elected since 1848.<sup>20</sup> The various geographical and linguistic regions of the country should be appropriately represented, which usually is the case. Moreover, all major political parties are represented, based on a tacit agreement between the major parties.<sup>21</sup> One of the councillors acts as “President of the Confederation”, chairing Federal Council meetings and fulfilling representation duties in the country and abroad for a term of one year, acting as *primus* or *prima inter pares* (first among equals). The Federal Council takes its decisions as a collective body, endorsing the principle of collegiality. It directs the federal administration whereby each councillor heads one of the seven Departments (Department of Foreign Affairs; Department of Home Affairs; Department of Justice

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20 HALLER, n. 300.

21 See pp. 155.

and Police; Department of Defence, Civil Protection and Sport; Department of Finance; Department of Economic Affairs, Education and Research; Department of the Environment, Transport, Energy and Communications). The Federal Council decides on the objectives of government policy, thereby deploying political leadership. It submits drafts of federal acts to the Federal Assembly, enacts ordinances and is responsible for foreign relations.

- The Federal Supreme Court is the supreme judicial authority of Switzerland (Articles 188–191c Constitution). Currently, it consists of 38 full-time judges and 19 part-time judges. They are elected by the United Federal Assembly for a term of six years; re-election is possible and, if attempted, is regularly achieved. The court is divided up into seven divisions: two divisions of public law, two divisions of social security law, two divisions of private law, and one division of criminal law. It acts upon appeal, hearing cases which have been decided either by the highest cantonal courts or by other federal courts, i.e. the Federal Criminal Court, the Federal Administrative Court and the Federal Patent Court.<sup>22</sup> The independence of the courts is constitutionally guaranteed.

The members of the Federal Assembly, the Federal Council and the Federal Supreme Court are generally members of political parties. In the Federal Assembly, the most powerful parties are the Swiss People's Party (SVP) with 70 seats, the Social Democratic Party (SPS) with 56 seats, the Liberals (FDP) with 45 seats and the Christian Democratic People's Party (CVP) with 40 seats. These four parties are also represented in the Federal Council.<sup>23</sup> The federal judges are also elected on the basis of party membership. The combination of the judges' party membership with the relatively short term of office of six years for federal judges means that they are under more scrutiny than judges in other jurisdictions, where judges may have longer terms of office but no possibility of facing periodic re-elections.

The city of Bern is the capital of Switzerland. This city is home to numerous official activities: the Federal Assembly meets here, and the official seat of the Federal Council and the departments is also in Bern. The Federal Supreme Court is located in Lausanne, while its two social security law divisions are located in the city of Lucerne.

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<sup>22</sup> See pp. 156 for the limited extent of constitutional review in Switzerland.

<sup>23</sup> See pp. 151.

## II. Principles

The Swiss political system is characterised by various particularities which distinguish it from theoretical models of political systems and from those systems which exist in other states. The following particularities are most noteworthy.

### 1. (SEMI-) DIRECT DEMOCRACY

Swiss citizens are regularly called upon to vote on specific political issues. Their decisions are legally binding and cannot be overturned or ignored by state authorities. On the federal level, popular initiatives and referenda are the relevant instruments. Accordingly, the Swiss system is often termed a semi-direct democracy, mixing elements of a representative system with strong direct democratic elements.<sup>24</sup> In addition, the cantons and communes are free to set up their own systems and methods which operate to facilitate the direct participation of the people.

#### a) Popular Initiative

A popular initiative is an instrument unique to Switzerland: it allows citizens to request a vote on a revision of the Constitution (Articles 138–139*b* Constitution). It requires the approval of a majority of the people who vote and a majority of the cantons in order to be successful.

The right to launch a popular initiative was introduced in 1891. When it was first introduced, 50'000 citizens were required to sign an initiative in order for it to be put to the vote of the people and the cantons. Since then, some limitations have been added: in 1976, the time period within which the required amount of signatures must be collected was circumscribed to 18 months. In 1977, i.e. shortly after women's suffrage had been introduced (as mentioned,

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<sup>24</sup> See for the societal preconditions upon which the Swiss model of direct democracy depends the chapter on Legal Sociology, pp. 118.

this was not until 1971), the number of signatures was raised to 100'000. The Constitution leaves it to the drafters of an initiative to decide whether to propose a revision in general terms or to submit a specific draft of a provision or several provisions. In practice, specific drafts are the norm. The authors of an initiative are free to choose an appropriate title, as long as it is not misleading. Accordingly, authors tend to label initiatives with lurid titles in order to sell them on the political market. An illustrative example was the initiative “against rip-off” (“gegen die Abzockerei”) in 2013 which was approved by the people and the cantons.

The Constitution does not set any hurdles for proposing new provisions, except that peremptory norms of international law must not be violated (*ius cogens*) and, in the case of a proposal for a partial revision, that the principle of unity of form and subject-matter is respected (Article 139 III Constitution). One example of an initiative which did not meet the former requirement was the initiative entitled “enforcing the expulsion of criminal foreign nationals” (“Zur Durchsetzung der Ausschaffung krimineller Ausländer”) of 2016, which demanded a strict implementation of the original initiative of 2010.<sup>25</sup> This initiative was declared partially invalid by the Federal Assembly; although it acknowledged the supremacy of *ius cogens* over the proposed provisions, it defined *ius cogens* exhaustively, rather than leaving it to the international community to further develop this concept and include new elements over time.

Traditionally, popular initiatives have been launched by minorities on issues the established political parties do not want to take up in parliament. In recent years, political parties have increasingly begun to take recourse to initiatives themselves, by-passing the classic parliamentary process. Moreover, initiatives can be launched by interest groups to bring a specific concern to the attention of the public, thereby exerting pressure on the political parties to address the issue. The constitution provides for the possibility that the Federal Assembly submits a counter-proposal to an initiative; when this is the case, the committee responsible for the initiative can withdraw it, and only the counter-proposal – considered to be more likely to meet approval – is submitted to the vote of the people and the cantons. The Federal Assembly might also begin efforts to enact a federal act which encompasses the objectives of the initiative (indirect counter-proposal); again, in this case, the committee who launched the initiative might withdraw it.

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25 Previously discussed in the section on Foreign Nationals, pp. 142.

The people and the cantons have become more willing to approve popular initiatives over the last fifteen years or so. Out of the 22 initiatives which were approved since the creation of this instrument in 1871, ten were approved of after 2002. Amongst these were various initiatives which were incompatible with international law. This is problematic.<sup>26</sup>

## b) Referendum

A referendum allows citizens to vote on a constitutional revision, a federal act or an international treaty (Articles 140–142 Constitution). Two types are provided for:

- A mandatory referendum: this takes place automatically, i.e. without the need for any action from the authorities or the people, in the case of constitutional revisions initiated by the Federal Assembly, accessions to organisations for collective security (e.g. NATO) or to supranational communities (e.g. the EU) and in the case of emergency acts not based on a constitutional provision. Such referenda require the approval of the majority of the people who vote and the majority of the cantons in order to be successful.
- An optional referendum: this can be requested by 50'000 citizens against, in particular, the enactment of a federal act (introduced in 1874) and the conclusion of an international treaty which is of unlimited duration and cannot be terminated, provides for accession to an international organisation, or contains important legislative provisions or requires the enactment of federal legislation for implementation (introduced in 1921, extended in 1977 and 2003). Originally, the necessary number of signatures was 30'000. In 1977, the number was increased to 50'000. The signatures must be collected within 100 days of the official publication of the act or treaty. The people's vote is decisive for the outcome of such a referendum; it is not necessary that a majority of the cantons also approve or reject the act or treaty.

Since 1874, there have been 183 cases where optional referenda have been held, after citizens have successfully collected the necessary number of signatures. In 79 votes, the people agreed to put in force the act or treaty in question; a prominent and to some extent controversial example was the approval

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<sup>26</sup> See the chapter on International Relations, pp. 177.

in 2002 of an act which legalised abortions during the first 12 weeks of pregnancy (Article 119 Swiss Criminal Code). In 104 votes, the outcome was negative, and the act or treaty was not put into force as originally envisaged by the Federal Assembly: a prominent example was the rejection of the Federal Act on the 2020 Pensions Reform in 2017.

The existence of the referendum in Switzerland modifies the representative system. It is the main instrument of control of, and opposition against, the Federal Assembly. To some extent, providing for the possibility to launch an optional referendum compensates for the lack of a fully-fledged parliamentary opposition.<sup>27</sup> The Federal Assembly creates legislation which takes into account the concerns of as many political parties and stakeholders as possible, thus enhancing the chance that the final product will “survive” a possible referendum. Effectively, the citizens of Switzerland themselves become a key opposition to the Federal Assembly. Considering all of this, it becomes clear why the Swiss “referendum democracy” is often referred to as “consensus-oriented democracy”.<sup>28</sup>

### c) “Landsgemeinde” as Cantonal Particularity

The cantons choose their own models for the participation of their citizens in the political process. A particularity is provided for in the cantons of Appenzell Innerrhoden and Glarus, which have appointed the Landsgemeinde as their main decision-making body. Once a year, the cantonal citizens eligible to vote gather on the main town square in the respective capitals, Appenzell and Glarus, and decide on all relevant matters, including any revisions of the cantonal Constitutions, the enactment of cantonal laws and issues surrounding elections. Pending issues are openly debated. Votes and elections are held in public; the method of voting is the raising of hands. Usually, the votes are estimated by the chairman or chairwoman. Votes are only actually counted individually in exceptional cases.

From a legal viewpoint, the Landsgemeinde presents various issues. Open voting conflicts with the right to submit a secret vote (Article 34 Constitution). Citizens who are unable to attend – such as elderly or ill people or people with professional commitments – are excluded from exercising their political rights. This is problematic. Still, the Federal Supreme Court held that these

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<sup>27</sup> HALLER, n. 7.

<sup>28</sup> PATRICIA EGLI, Introduction to Swiss Constitutional Law, Zurich/St. Gallen 2016, p. 64; FLEINER/MISIC/TÖPPERWIEN, n. 26, 98; HALLER, n. 227.

restrictions do not amount to a violation of the federal Constitution, “in spite of deficiencies inherent in the system”.<sup>29</sup>

## 2. MULTI-PARTY GOVERNMENT

Most European countries adhere to a parliamentary system of government, whereby the prime minister and his or her government depend on Parliament’s support.<sup>30</sup> The strongest party selects the prime minister and forms the government, occasionally together with other parties as a coalition, if this is necessary to form a majority.

In Switzerland, a substantially different approach has developed over time. During the first decades of the confederation’s existence, the Federal Council was composed only of members of the Liberals (FDP). Towards the end of the 19<sup>th</sup> century, in the aftermath of the introduction of the referendum and the popular initiative for a partial revision of the Constitution, the pressure to include members of other political parties grew. Therefore, in 1891, the first member of the Christian Democratic People’s Party (CVP) was elected to the Federal Council. In 1929, the first member of the Party of Farmers, Traders and Independents (BGB), which was the predecessor of the Swiss People’s Party (SVP), became councillor. In 1943, the Social Democratic Party (SPS) was represented in the Federal Council for the first time. Since then, it has been a Swiss particularity that all major political parties are represented in the Federal Council. To this effect, in 1959, the so-called “magic formula” was firmly established in Switzerland. According to this formula, the Federal Council should consist of two members of the Liberals (FDP), the Social Democratic Party (SPS) and the Christian Democratic People’s Party (CVP) and of one member of the Swiss People’s Party (SVP). The distribution reflected, approximately, the number of seats which the parties usually won in the general elections. In 2003, the formula was slightly modified to reflect changes in the parties’ popularity. The Swiss People’s Party (SVP) gained one seat; they now have two members in the Federal Council.<sup>31</sup> They gained their extra seat at the detriment of the Christian Democratic People’s Party (CVP) which has only had

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29 BGE 121 I 138.

30 HALLER, n. 238 et seq.

31 This was partly interrupted between 2007 and 2015 when elected members of the SVP chose to leave the party and join a newly founded party, the Conservative Democratic Party (BDP).



one seat since then. Both the Liberals (FDP) and the Social Democratic Party (SPS) still have two seats each.

The magic formula reflects a tacit agreement between the major parties that a collegiate system of a multi-party government best suits the interests of Switzerland. In particular, this practice – where members of all major parties can influence the drafting from the very start – ensures that the Federal Council prepares legislative drafts in a way that they both achieve a majority in the Federal Assembly and also would be likely to “survive” a possible referendum. The collegiate system of a multi-party government is an essential part of the Swiss “concordance democracy”<sup>32</sup>.

However, there is no legal obligation on the part of the Federal Assembly to elect councillors according to the magic formula. As such, with each election of a new councillor, the pros and cons of the Swiss model are discussed, and the public watches the resulting commotion in the Federal Palace with fascination. Nevertheless, despite the recurring debate, it seems likely that the magic formula will continue to form the basis for the composition of the Federal Council, although perhaps this composition will more readily adapt to actual developments than was the case in the previous decades.<sup>33</sup>

### 3. LIMITED CONSTITUTIONAL REVIEW

Constitutional review – i.e. court review of the compatibility of legal acts and decisions with the Constitution and their power to declare such acts invalid if they are incompatible – is a characteristic of most European legal systems. In Switzerland, however, none of the courts are equipped with this function, at least with respect to federal acts. This is due to Article 190 Constitution, which mandates that the Federal Supreme Court and the other judicial authorities apply the federal acts and international law. Therefore, the courts are obliged to apply federal acts even if they are found to violate the Constitution.

In essence, it is the Federal Assembly which authoritatively interprets the Constitution during the process of enacting federal acts. This includes making an assessment as to whether federal acts are compatible with fundamental rights and whether the Federal Assembly is actually empowered by the Constitution to enact legislation in a specific policy field. This particular

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<sup>32</sup> HALLER, n. 227; EGLI, p. 95.

<sup>33</sup> See also FLEINER/MISIC/TÖPPERWIEN, n. 210.

allocation of competence and responsibility is based on a deliberate systemic choice, approved of by the people and the cantons. Attempts to introduce the right of the judiciary to hear cases on the constitutionality of federal acts, for instance by simply deleting Article 190 Constitution, have repeatedly failed to gain enough political support.

Thus, the Federal Assembly becomes the final interpreter of the Constitution. The problematic aspects of this system are clear; the Federal Assembly is not ideally suited, for example, to guarantee fundamental rights, acting as it does through majority voting. However, the Federal Assembly is at least well placed to take its role as final interpreter of the Constitution seriously: it benefits from the advice and assistance of the Federal Council and the legal specialists in the federal administration who prepare drafts and assist in the decision-making process. Notably, it is not easy to point to federal acts which evidently violate the Constitution. Further, the following aspects of the case law of the Federal Supreme Court contribute to minimising the deficiencies of the current system specifically with respect to the protection of fundamental rights:

- The Federal Supreme Court consistently interprets federal acts in light of fundamental rights, thereby adhering to the method of interpreting the law in conformity with the Constitution.<sup>34</sup>
- The Federal Supreme Court does not refrain from pointing to existing incompatibilities if it is not possible to interpret federal acts in conformity with fundamental rights.<sup>35</sup> By doing so, the Federal Supreme Court calls upon the Federal Assembly to remedy the identified deficiencies; it is a method through which the Federal Supreme Court can press the Federal Assembly to at least discuss the issue.
- The Federal Supreme Court accepts cases in which it is called upon to review federal acts in light of the ECHR.<sup>36</sup> The possibility for citizens to directly invoke the rights under this Convention before the Federal Supreme Court somewhat compensates for the lack of constitutional review of federal acts: individuals can request that a federal act which is not compatible with a right guaranteed in the ECHR does not apply.

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34 See e.g. BGE 137 I 351.

35 See e.g. BGE 136 I 65.

36 BGE 125 II 417 (PKK); see the chapter on International Relations, p. 177.

The Federal Supreme Court is competent to review the compatibility of cantonal laws and decisions with the federal Constitution. Various *causes célèbres* of the Federal Supreme Court concerned such constellations and have led to the development of an impressive stream of case law on fundamental rights.<sup>37</sup> Indirectly, this case law again influences the law-making process at the federal level; it becomes clearer to the Federal Assembly what the court will regard as constitutionally unacceptable.<sup>38</sup> Moreover, it is possible to challenge decisions based on federal ordinances as to their alleged incompatibility with the federal Constitution and to request their annulment.

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37 See pp. 159.

38 HALLER, n. 569.

## III. Landmark Cases

The Federal Supreme Court has been discussed throughout this chapter; it is the highest court in Switzerland. Although its powers are limited in scope by Article 190 Constitution, which precludes any possibility of constitutional review of federal acts, it takes an active role in protecting fundamental rights, as the following two cases demonstrate.

### 1. WOMEN'S SUFFRAGE

In 1989, THERESA ROHNER requested that the cantonal authorities allow her to participate at the Landsgemeinde of the Canton of Appenzell Innerrhoden, in order to exercise her political rights. The cantonal authorities rejected her application, on the basis that Article 16 of the Constitution of the Canton of Appenzell Innerrhoden did not grant political rights to women; only men could vote and participate in elections. In 1990, the Landsgemeinde dealt with a proposal to change the cantonal Constitution, according to which the political rights would have been extended to all Swiss citizens residing in the canton – including women. However, the Landsgemeinde, whose voting population at this time consisted of men alone, rejected the proposal. Several applicants, among them URSULA BAUMANN and MARIO SONDEREGGER, challenged the decision of the Landsgemeinde. They requested that the Federal Supreme Court annul the decision and oblige the canton to introduce women's suffrage.

Upon appeal, the Federal Supreme Court agreed with the arguments of the applicants.<sup>39</sup> It determined that the exclusion of women from the cantonal electorate violated Article 4 II of the federal Constitution of 1874, an article introduced in 1981 providing for equal treatment of men and women (now: Article 8 II Constitution). The Federal Supreme Court held that the principle of equal treatment also applied to political rights at the cantonal level. Thus, the cantonal practice which did not allow women to participate at the Landsgemeinde violated Article 4 II Constitution 1874. Although Article 74 IV Constitution of 1874

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39 BGE 116 Ia 359.

(now: Article 39 I Constitution) provided that it was up to the cantons to regulate the exercise of political rights at the cantonal level, this Article had no effect on the Federal Supreme Court's decision because it did not explicitly provide for an exception from the principle of equal treatment. Consequently, the Canton of Appenzell Innerrhoden was required to allow women to participate at the *Landsgemeinde* and to exercise the political rights which were provided for in the cantonal law. The Federal Supreme Court concluded that it was possible to interpret Article 16 of the Constitution of the Canton of Appenzell Innerrhoden to this effect; it was not necessary for the canton to formally change its Constitution.

The decision rendered by the Federal Supreme Court ended the long fight of Swiss women (supported by at least some men) for equal treatment regarding political rights. On the federal level, the women had already been granted full political rights in 1971, based on a constitutional revision approved of by a majority of the people – namely, 65 % of the men who turned up to vote – and a majority of the cantons (Article 74 I Constitution 1874, now: Article 136 Constitution). The Canton of Appenzell Innerrhoden was the last canton to follow suit. Irritatingly and somewhat depressingly, the (male) electorate of the canton was not ready to introduce women's suffrage itself. Rather, the Federal Supreme Court needed to step in.

## 2. NATURALISATION AND FUNDAMENTAL RIGHTS

In 2000, the electorate of the Commune of Emmen (Canton of Lucerne) was called upon to decide on 23 applications for naturalisation (comprising 56 foreign nationals, in some cases applying together as families) in a ballot vote. The people voted in favour of the naturalisation of only eight applicants, who were all Italian citizens. They rejected all other applications, which were mainly submitted by citizens of ex-Yugoslavian countries (some of whom had been born in Switzerland and had always lived here). Four of these applicants challenged the negative vote. The cantonal government council, as the first appellate authority, rejected their complaints.

The Federal Supreme Court annulled the decision of the commune on appeal.<sup>40</sup> It held that the electorate is a state organ and exercises a state function when it decides on the naturalisation of foreign nationals and thus on their legal status. Therefore, the electorate is obliged to respect fundamental rights (Article 35 Constitution). In particular, the prohibition of discrimination

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40 BGE 129 I 217.

applies (Article 8 II Constitution). On the basis of how the electorate decided – naturalisation of all Italian applicants, no naturalisation of all applicants from ex-Yugoslavian countries without evident relevant differences between the applicants – and publications that had been circulated in the run-up to the vote (flyers and letters to newspapers calling out to reject the applications of persons from ex-Yugoslavian countries), the Federal Supreme Court decided that the constitutional prohibition of discrimination on the grounds of origin had been violated. Moreover, it held that the right to be heard applies; negative decisions must be backed up with adequate reasoning (Article 29 II Constitution). This right to be heard is violated *per se* in cases in which the electorate decides on naturalisation applications in a secret ballot vote, as here it is logically impossible to deliver a proper justification for a negative decision. As such, it is no longer permissible to decide on naturalisations through ballot voting.

Most commentators have welcomed the Federal Supreme Court's judgment, and rightly so. In a series of later cases, the Federal Supreme Court has further clarified the guidelines. It acknowledged that decisions on the naturalisation of foreign nationals may still be taken by the communal electorate if this is considered by the commune to be the appropriate forum; however, the decision-making process must respect fundamental rights. The most obvious rights which must be respected in such a process are the prohibition of discrimination (Article 8 II Constitution), the prohibition of arbitrariness (Article 9 Constitution), the right to privacy (Article 13 Constitution), the freedom of religion and conscience (Article 15 Constitution) and the right to be heard (Article 29 II Constitution).<sup>41</sup> Today, a significant number of communal electorates retain the competence to decide on the naturalisation of foreign nationals; the figure has been estimated at approximately 800 communes.

Not everyone was satisfied with the Federal Supreme Court's judgement: in 2008, the Swiss People's Party (SVP) tried to turn back the wheel. It collected the necessary 100'000 signatures for a popular initiative entitled "for democratic naturalisations" ("für demokratische Einbürgerungen") according to which it would have been entirely up to the communes to decide on the decision-making process for naturalisations, thus allowing secret ballot voting to be reinstated. The people and the cantons overwhelmingly rejected the initiative (63 % voting against). Instead, the Federal Assembly codified the basic elements of the Federal Supreme Court's case law in the Federal Act on the Swiss Citizenship (Articles 15–17).

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41 See e.g. BGE 129 I 232; BGE 130 I 140; BEG 135 I 49; BGE 139 I 169.

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# Matthias Oesch

## International Relations

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# I. Treaties

Switzerland traditionally adopts a friendly and respectful attitude towards international law. As a relatively small export-driven country, Switzerland depends on stable international relations, based on the rule of law. It is no surprise, then, that Switzerland participates in numerous international organisations and treaty networks. Nowadays, Switzerland's membership of the United Nations (UN) provides the foundation. Also significant is Switzerland's membership of other organisations and treaty networks, covering almost any policy field conceivable, like trade, investment, monetary issues, taxation, transportation, telecommunication, environment, development, food, health, education, culture, metrology, and weapons control. Switzerland is also a signatory to various human rights treaties; amongst them the European Convention on Human Rights (ECHR), which has been attributed a quasi-constitutional status by the Federal Supreme Court.<sup>1</sup> It is not a member of the North Atlantic Treaty Organisation (NATO); at least, it participates in Partnership for Peace (PfP). The first section of this chapter examines Switzerland's participation in various organisations and treaty networks.

Switzerland – despite its location at the heart of the European continent, surrounded by three of the six founding members of the then-named European Economic Community (EEC) – is not a member of the European Union (EU). Still, it is of prime importance to Switzerland that it maintains close and stable relations with the EU and its member states. Swiss membership of the Council of Europe and the bilateral agreements with the EU are also discussed below.

## 1. UNITED NATIONS AND SPECIALISED AGENCIES

Founded in 1945 in the aftermath of two devastating world wars, the UN's primary aim is to maintain and achieve collective security. As a truly global organisation, it provides a unique forum for all nations and other actors

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<sup>1</sup> See the chapter on Constitutional Law, p. 144.

to co-operate on the international plane. Its outreach, both in terms of its membership and the variety of subject matters it has competence to deal with, is unrivalled by any other international organisation. Currently, its membership encompasses 193 member states. Various programmes, funds and specialised agencies also operate under the UN, all of which have their own memberships and budget. Among the programmes and funds are the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP), the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Environment Programme (UNEP). The specialised agencies are fully-fledged international organisations; they include, among others, the World Health Organization (WHO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Labour Organization (ILO) and the two Bretton Woods institutions, the World Bank and the International Monetary Fund (IMF). The main seat of the UN in Europe is in Geneva; the headquarters are at the Palais des Nations, which was originally built to house the League of Nations, the predecessor of the UN (1920–1946).

Regarding Switzerland's involvement with the UN, it did not actually join the organisation until 2002. The accession process was instigated by a popular initiative; the people and the cantons approved of the accession – albeit quite narrowly, by only 54.6 %. Before joining, Switzerland had already participated in many of the UN's specialised agencies, programmes and funds. It had been a member of the World Bank and the International Monetary Fund since 1992. Since acceding to the UN, Switzerland has played an active role in the organisation. It was involved in the foundation of the new Human Rights Council in 2006 and has actively contributed to the debate on the potential reform of the Security Council.<sup>2</sup> Switzerland has also formally applied to become a member of the Security Council for the period of 2023–24; elections are scheduled for 2022. According to the Federal Council, membership of the Security Council would not compromise Switzerland's policy of neutrality.<sup>3</sup>

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<sup>2</sup> Federal Department of Foreign Affairs (FDFA; <https://perma.cc/A6SY-TXYK>).

<sup>3</sup> For more detail on Switzerland's policy of neutrality, see p. 174.

## 2. TRADE AND INVESTMENT

The World Trade Organization (WTO) sets out the basic legal framework for international trade. It was founded in 1995 as a successor to the General Agreement on Tariffs and Trade of 1947 and largely continued the latter's approach. The WTO currently has 164 members and is situated in the Centre William Rappard, Geneva. The WTO Agreement, which established the organisation, has three main annexes which legally bind all members: the General Agreement on Tariffs and Trade 1994 (embracing various side-agreements, on issues such as technical barriers to trade, agriculture, anti-dumping, and countervailing measures), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). These agreements provide for the basic principles of market access, non-discrimination, and transparency to be respected by all members while simultaneously allowing them to pursue equally legitimate policy objectives, like the protection of public morals, the environment and human and animal health and life. Another key WTO agreement is the plurilateral Agreement on Government Procurement, which sets out rules for public tendering. The Dispute Settlement Understanding (DSU) provides for a fully-fledged state-to-state dispute resolution mechanism. Panels and, upon appeal, the Appellate Body render binding rulings. If a defending party does not comply with such a ruling, the complaining party is permitted to suspend obligations vis-à-vis the defending party, i.e. to impose retaliatory measures.

Switzerland has a long history of involvement with the General Agreement on Tariffs and Trade 1947. It had become a member of the General Agreement on Tariffs and Trade in 1966 (having applied its rules de facto since 1960). Subsequently, when the WTO became the successor of the General Agreement on Tariffs and Trade in 1995, Switzerland was an original member. Since then, the WTO has provided the backbone of Swiss external economic relations. Swiss companies profit from binding market access rights abroad. To date, Switzerland has only once actively participated in WTO dispute settlement proceedings as a complaining or defending party – it participated as a complaining party in the US – Steel case.<sup>4</sup>

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4 See pp. 183.

Further, aside from WTO agreements, Switzerland has concluded a series of free trade agreements with countries all over the globe.<sup>5</sup> In addition to the European Free Trade Association (EFTA) and the free trade agreement with the EU,<sup>6</sup> Switzerland currently has a network of 28 free trade agreements with 38 partners. Switzerland has usually concluded its free trade agreements together with its EFTA partners Norway, Iceland and Liechtenstein; examples are the agreements with Macedonia, Serbia, Ukraine, Turkey, Israel, Egypt, Mexico, Singapore, Chile, the Republic of Korea, the SACU States (including South Africa), Canada, and Hong Kong. Recently, Switzerland has also entered into agreements on its own; this has been the case with respect to the agreements with Japan and China. The main objective of free trade agreements is not only to improve market access for Swiss companies per se, but also to ensure that Swiss companies enjoy market access conditions which are at least as favourable as those enjoyed by its main competitors (in particular those competitors located in the EU). In this context, the conclusion of the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) has led Switzerland to try to renegotiate specific elements of the free trade agreement with Canada. Further, the possible (although currently highly unlikely) conclusion of the Transatlantic Trade and Investment Partnership between the EU and the US (TTIP) would result in even clearer disadvantages for Swiss companies vis-à-vis their competitors in the EU; Switzerland would be forced to make new attempts to level the playing field.

Switzerland is also a party to other international organisations and treaty networks which complement the multilateral trading system under the WTO and free trade agreements. Examples include the World Customs Organization (WCO) and the Organization of Economic Co-operation and Development (OECD). Furthermore, Switzerland has concluded 130 bilateral investment treaties (BITs), mainly with developing and least-developed countries. These treaties allow Swiss firms to request the establishment of arbitration tribunals, in particular based on the rules of the International Centre for Settlement of Investment Disputes (ICSID), in order to review expropriations.

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5 State Secretariat for Economic Affairs (SECO; <https://perma.cc/JBY6-CRC3>).

6 See pp. 169.

### **3. SWITZERLAND AND EUROPE**

#### **a) General Framework**

Switzerland was hesitant about joining European organisations and treaty networks after the end of the Second World War, being concerned that such action may compromise its position of neutrality, independency and autonomy in external trade matters. However, it did join the Organisation for European Economic Co-operation (OEEC), whose key purpose was to administer the European Recovery Program (Marshall Plan), as an original member at its creation in 1948. In 1961, the OEEC was renamed the OECD, and both its mandate and membership were substantially broadened. Regarding European integration, Switzerland did not participate in the efforts to further this through joining the EEC/EC/EU. Instead, in 1960, Switzerland founded the EFTA, together with six other European countries. It is still a member of EFTA to this day, together with Iceland, Liechtenstein and Norway. In 1963, Switzerland became a member of the Council of Europe, whose prime objective is to promote democracy, human rights and the rule of law. Further, in 1974, it also ratified the ECHR. In 1972, Switzerland and the EEC concluded a comprehensive free trade agreement which has been providing the basis for bilateral relations with the EU up to this day. In 1975, Switzerland became an original member of the Conference on Security and Co-operation in Europe (CSCE) – renamed the Organisation for Security and Co-operation in Europe (OSCE) in 1994. In 1992, the people and the cantons rejected accession to the European Economic Area (EEA). Thereafter, Switzerland focused, *faute de mieux*, on concluding sectoral treaties with the EC/EU, combined with the policy of autonomous adaptation of Swiss law to ensure compliance with EU law. This approach, the “Swiss model” of European integration, has proven to be successful, as will be further outlined below.

#### **b) Bilateral Agreements**

Together with the free trade agreement Switzerland concluded with the EEC in 1972, the two sets of bilateral agreements of 1999 and 2004 between Switzerland and the EU (the “Bilaterals I” and the “Bilaterals II”) provide the legal framework for the Swiss-EU relationship. The Bilaterals I consist of seven agreements, mainly dealing with market access (free movement of persons, public procurement, technical barriers to trade, trade in agricultural

products, land transport, air transport, and research). These agreements are tied together by a guillotine clause; the termination of one agreement automatically leads to the termination of the others. The EU insisted on such a clause in order to prevent “cherry picking” on the part of Switzerland; the former feared that the Swiss people would reject the Agreement on the Free Movement of Persons – a particularly sensitive issue in this country but a *conditio sine qua non* for the EU – in a referendum. The Bilaterals II consist of nine agreements and in some respects go beyond market access: they also deal with political issues and co-operation in culture and education (Schengen/Dublin, taxation of savings, fight against fraud, trade in processed agricultural products, MEDIA, environment, statistics, pensions of former EU officials, education and youth programmes). The Bilaterals II do not contain a guillotine clause; only the Schengen/Dublin association agreements share a common fate. The main agreements are supplemented by over 100 other (secondary) agreements. Institutionally, the agreements fail to go beyond the classic tools of diplomatic dispute resolution. Dispute resolution under such agreements proceeds in agreement-specific mixed committees which decide by consensus.

Since 2004, only a few agreements have been concluded, amongst them an agreement on customs facilitation and security, which substantially revised an older version (1990/2009), and an agreement on the cooperation of competition authorities (2013). Moreover, under further bilateral agreements, Switzerland participates in various EU agencies and programmes, including Europol, Eurojust, the European Border and Coast Guard Agency (Frontex) and the European Aviation Safety Agency (EASA). Such participation allows Swiss representatives to be integrated into EU transgovernmental structures. Swiss representatives are informed on ongoing action and can influence the work, mainly by relying on the power of the pen (decision shaping). Naturally, they do not possess voting rights (decision-making).

Currently, Switzerland’s “bilateral way” of cooperating with the EU faces two major challenges. The first major challenge has arrived in the form of a popular initiative approved by the people and the cantons called “against mass immigration” (“Gegen Masseneinwanderung”, 2014). According to the initiative’s newly introduced Articles 121a and 197 No 11 Constitution,<sup>7</sup> Switzerland shall control the immigration of foreign nationals autonomously,

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7 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Swiss Constitution [www.admin.ch](http://www.admin.ch) (<https://perma.cc/M8UJ-S369>).

by introducing annual quotas and granting Swiss citizens priority on the job market. After the approval of the initiative, the EU made it clear in response that it was not willing to renegotiate the Agreement on the Free Movement of Persons of 1999 to the effect that quotas and a discriminatory priority system for Swiss citizens would be permitted. Against this background, the Federal Assembly decided to implement the initiative in a way that ensured it would not violate the Agreement on the Free Movement of Persons. In the context of the Swiss policy of cooperation with the EU, this outcome has been welcomed by most commentators. The danger posed to the continuation of the current bilateral way has been, at least for the time being, dispelled. However, from a constitutional law perspective the outcome is problematic. The wording of the initiative's newly introduced constitutional provisions is clear, and the implementing legislation fails to reflect this properly. An initiative committee successfully collected more than 100'000 signatures for their initiative "out of the dead end" ("Raus aus der Sackgasse", RASA), which provided for the deletion of Articles 121a and 197 No 11 Constitution, the articles which had been created by the "against mass immigration" initiative. However, the initiative committee withdrew the initiative in late 2017, meaning the people and the cantons do not have the possibility to vote on the matter again. This is regrettable.

The second major challenge to the bilateral agreement approach is the fact that as of 2008, the EU has made it clear that it expects Switzerland to conclude an institutional agreement which provides common rules on the dynamic updating of the bilateral agreements, the supervision of their correct interpretation and application, and dispute resolution. An institutional agreement would apply to both new and existing market access agreements which are based on EU law. In Switzerland, the prospect of such an institutional agreement is controversial; some see it as a threat to Switzerland's sovereignty. However, it might actually be advantageous for Switzerland to have the increasingly complex treaty network established on a new and clearer basis: this would enhance legal security, transparency and efficiency. The EU and Switzerland would have a right to bring disputes before a juridical body, presumably an arbitration panel (which must involve the European Court of Justice where a dispute concerns the interpretation of EU law). Switzerland would not depend exclusively on the goodwill of the EU in resolving disputes as is the case today. Moreover, the EU has made the conclusion of new market access agreements (for example an agreement on electricity and on financial services) conditional upon the conclusion of an institutional agreement.



Thus, if Switzerland wants to benefit from such agreements in the future, it must act to establish this institutional agreement. The current state of affairs regarding the institutional agreement is that Switzerland and the EU are still in the negotiation phase.

### c) Autonomous Adaptation of Swiss Law to EU Law

In parallel to the tight network of bilateral agreements Switzerland is party to, it has adopted another approach to mitigate the negative consequences of not being a member of the EU or the EEA: namely, the policy of autonomous adaptation of Swiss law to ensure compliance with EU law. According to the Federal Council, Switzerland's "*goal has to be to secure the greatest compatibility of our legislation with the legislation of our European partners in the areas of cross-border significance.*"<sup>8</sup> Of course, it is entirely possible for Switzerland to deviate from EU regulations and directives; however, this shall only be the chosen approach if there are cogent political and/or economic reasons for doing so.

Overall, the policy of autonomous adaptation has led to the systematic adoption of EU law. Typical examples where autonomous adaptation is employed are laws concerning technical regulations and standards, data protection and financial markets. It has been estimated that 30–50 % of all federal acts and ordinances are influenced by EU law, directly or indirectly: certainly no insignificant proportion.

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8 Bericht über die Stellung der Schweiz im europäischen Integrationsprozess vom 24. August 1988, Federal Gazette No 37 of 20 September 1988, pp. 249, p. 380 (own translation).

## II. Constitution

The Federal Constitution contains many provisions relevant to Switzerland's international engagement. These provisions regulate a variety of matters from the goals to be pursued in international relations to the different competences of various actors in this area, in particular those of the federation, the cantons and the people. Finally, the jurisprudence of the Federal Supreme Court has had a strong influence on the position of international law in Switzerland. These areas will be discussed in the upcoming paragraphs.

### 1. GOALS AND MEANS

The Constitution enlists the goals which Switzerland shall pursue in its international relations. Partly, these goals are of an egoistic nature while partly, they direct the authorities to act altruistically (Preamble, Articles 2 IV, 54 II and 101 I Constitution). They state that the people and the cantons are resolved to act in a spirit of solidarity and openness towards the world; the confederation is committed to a just and peaceful international order; it shall ensure that the independence of the country and its welfare is safeguarded; it shall contribute to the alleviation of need and poverty in the world, to the respect for human rights and democracy, to the peaceful co-existence of peoples, and to the conservation of natural resources; it shall safeguard the interests of the Swiss economy abroad. Regrettably, the Constitution does not reflect the true extent of Swiss participation in international and European organisations and treaty networks. Only Switzerland's UN membership is mentioned; it, at least, has found its way into the transitional provisions (Article 197 No 1 Constitution).

These constitutional goals are framed in rather abstract terms. Thus, in essence, it falls under the discretion of the authorities to concretise them when they decide on specific foreign policy measures. Moreover, the Constitution does not provide for any applicable rules to follow in the event of a conflict between these goals. For instance, there might be controversial debate over whether and, if so, to what extent the protection of fundamental rights should be taken into account in the context of free trade agreements.

The Constitution provides no real guidance in this context. There was some debate over this issue when Switzerland negotiated and concluded its free trade agreement with China in 2014; there were concerns that such an agreement could foster human rights violations if free trade was relied upon too heavily as an end in itself. The eventual result of these negotiations was an agreement that reaffirms both parties' commitment to respecting selected fundamental rights and "fundamental norms of international relations" in the Preamble, supplemented by a side-agreement on labour and employment.

Some argue that the concept of neutrality also amounts to a principle which guides Swiss foreign policy. Back in 1815 at the Congress of Vienna, the then predominant European powers recognised the neutrality of the Swiss confederation. Since then, this status has been reconfirmed several times, and Switzerland has adhered to the notion of (armed) neutrality as acknowledged in public international law. However, the Constitution does not state that neutrality in itself is a goal of Swiss foreign policy.<sup>9</sup> Rather, neutrality is to be used as one of many instruments in order to achieve the goals set out above.

## 2. COMPETENCES

### a) Federation and Cantons

Foreign relations fall under the competences and responsibilities of the federation (Article 54 Constitution). This includes the competence to conclude treaties. This competence for concluding treaties can result in the federation dealing with issues that also encompass policy areas which internally fall into the cantons' domain. Thus, the federal authorities are obliged to protect the interests of the cantons in such a situation and to ensure that they participate in preparing and conducting treaty negotiations in an appropriate manner (Article 55 Constitution).

Despite the existence of Article 55 Constitution, the increasing tendency to take recourse to treaties has resulted in a tacit neutralisation of cantonal competences. The bilateral agreements Switzerland has established with the EU, for instance, deal with matters partly falling into the domain of the cantons,

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9 THOMAS FLEINER/ALEXANDER MISIC/NICOLE TÖPPERWIEN, *Constitutional Law in Switzerland*, 2<sup>nd</sup> edition, Alphen aan den Rijn 2012, n. 24; WALTER HALLER, *The Swiss Constitution in a Comparative Context*, 2<sup>nd</sup> edition, Zurich/St. Gallen 2016, n. 71 et seq.

such as cantonal police, recognition of professional qualifications and public procurement. Accordingly, to ensure that the cantons are not being effectively ignored or undermined, consultation and cooperation between the different layers of government are fundamentally important; more so today than in the past. The cantons have also taken their own steps to ensure their interests are represented: in 1993 they founded the Conference of the Cantonal Governments (KdK) which helps coordinate the efforts of the cantons to pool their interests and speak with one stronger voice.

The cantons are competent to independently conclude international treaties in areas which fall under their remit, as long as the federation has not taken action in that specific policy field itself (Article 56 Constitution). For example, treaties between cantons and neighbouring states or sub-levels of states, such as the German *Bundesländer*, concern cross-border issues like transportation, infrastructure, waste management, and the protection of the environment.

## b) Federal Council, Federal Assembly, Federal Courts

The fundamental principle of the separation of powers between the different branches of government is not just relevant to the Swiss political system in general,<sup>10</sup> but is also a key principle in Swiss foreign policy. The functions of the Federal Council (including the federal administration), the Federal Assembly and the Federal Supreme Court within the context of international relations are as follows:

- The Federal Council is primarily responsible for foreign relations, subject to the right of participation of the Federal Assembly (Article 184 Constitution). It represents Switzerland abroad. The federal administration negotiates treaties, based on a mandate established by the Federal Council. The Federal Council is competent to conclude treaties of limited scope on its own; this is the case, *inter alia*, when a treaty does not create new obligations for Switzerland or when a treaty primarily concerns the authorities and involves technical administrative issues (Article 7a of the Government and Administration Organisation Act).<sup>11</sup>

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<sup>10</sup> See the chapter on Constitutional Law, pp. 151.

<sup>11</sup> Government and Administration Organisation Act of 21 March 1997 (GAOA), SR 172.010. See for an English version of the act [www.admin.ch \(https://perma.cc/7A5T-PQ6B\)](https://perma.cc/7A5T-PQ6B).

- The Federal Assembly participates in shaping foreign policy and supervises the maintenance of foreign relations (Article 166 Constitution). It must agree to the conclusion of treaties (unless the Federal Council can do so on its own). However, the Federal Assembly can only approve or reject a signed treaty in toto. In particular, in the case of “package deals” (such as the accession to the WTO),<sup>12</sup> the Federal Assembly realistically has no other choice than to “wave” a treaty through. From a democratic point of view, this is problematic. It does not allow the treaty at issue to be subjected to proper scrutiny by the Federal Assembly in order to propose amendments. It should be noted, however, that the Foreign Affairs Committees of the National Council and the Council of States must be consulted before the Federal Council adopts a negotiation mandate. Further, these committees are periodically informed about ongoing negotiations, to ensure they are able to offer relevant and up-to-date advice in this regard.
- The Federal Supreme Court acts on appeal, hearing cases decided either by the highest cantonal courts or by other federal courts. Thereby, it also interprets international law and shapes the relationship between international law and Swiss law.<sup>13</sup>

The ongoing shift in law-making from domestic legislation towards international treaties has led to a readjustment of the power balance between the Federal Assembly and the Federal Council (including the federal administration). The power of the latter is increased to the detriment of the former. Consequently, new procedures should be sought in order to enhance the participation of the Federal Assembly as well as that of cantons and civil society groups both in the preparatory phase of and throughout negotiations. Currently, the aforementioned groups’ participation in the treaty-making process is, from a democratic viewpoint, too marginal.

### c) Direct Democracy

Swiss citizens are regularly called upon to vote on issues which either directly or indirectly concern foreign relations and Switzerland’s position on the international plane. The direct democratic tools on offer – popular initiatives and referenda – have decisively shaped the treaty-making process in

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<sup>12</sup> See pp. 167.

<sup>13</sup> See pp. 179.

Switzerland.<sup>14</sup> The instruments are two distinct creations, but have a similarly strong impact on Swiss international relations:

- A popular initiative allows a minimum of 100'000 citizens to demand a vote on a proposed revision of the Constitution (Articles 138–139*b* Constitution). Through popular initiatives, the people can have a significant influence on Switzerland's international relations. A prime example of this was the popular initiative for the accession of Switzerland to the UN, which was approved of by the people and the cantons in 2002. This was a positive step forward in terms of Switzerland's cooperation with the international community. However, over the last decade, an increasing number of initiatives have been incompatible with international law, considering their unambiguous wording. Key examples are the initiative "against the construction of minarets" ("Gegen den Bau von Minaretten", 2009), the initiative "for the expulsion of criminal foreign nationals" ("für die Ausschaffung krimineller Ausländer", 2010) and the initiative "against mass immigration" ("Gegen Masseneinwanderung", 2014). The implementation of initiatives such as these presents huge problems. This is particularly the case when the initiatives violate basic norms of international law. The initiative "against the construction of minarets" is not compatible with the freedom of religion (Article 9 ECHR) and the prohibition of discrimination (Article 14 ECHR). The initiative "for the expulsion of criminal foreign nationals" and the initiative "against mass immigration" are both incompatible with the Agreement on the Free Movement of Persons with the EU. Moreover, the initiative "for the expulsion of criminal foreign nationals" also violates the right to respect for private and family life (Article 8 ECHR). Often, it is simply not possible to fully implement such initiatives. Proposals for reform in this problematic area have been put forward; for example, there have been calls to introduce a provision according to which a popular initiative must comply with basic fundamental rights as guaranteed, for instance, in the ECHR in order to be valid. However, it is crucial to note that any revision to this effect would itself require the approval of the people and the cantons, which may pose a real obstacle.<sup>15</sup>

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14 For more information on these instruments, see the chapter on Constitutional Law, pp. 151.

15 HALLER, n. 597 et seqq.

- A referendum allows citizens to vote, *inter alia*, on the conclusion of an international treaty (Articles 140–142 Constitution). A mandatory referendum takes place in the case of an accession to an organisation for collective security (e.g. NATO) or to a supranational community (e.g. the EU); such an accession needs the approval of a majority of the people and a majority of the cantons. The vote on the envisaged accession to the EEA, eventually rejected by the people and the cantons in 1992, was conducted under this title, due to its potential political and economic significance. In addition, an optional referendum can be requested by 50'000 citizens against the conclusion of an international treaty that: is of unlimited duration and cannot be terminated; provides for accession to an international organisation; contains important legislative provisions or requires the enactment of federal legislation for implementation. Decisive for the outcome is the vote of the people; a majority of the cantons is not required. The bilateral agreements concluded with the EU in 1999, the “Bilaterals I”, and the Schengen/Dublin association agreements of 2004 were all approved of in optional referenda.

It should be noted that regarding referendum votes on treaties, the people often do not possess a real option (a situation somewhat resembling that faced by the Federal Assembly in the case of “package deals”). Practical constraints and opportunity costs can *de facto* force the people to approve a treaty. Typical examples of this sort of situation are votes on amendments to the Schengen/Dublin association agreements in order to keep them in line with dynamic EU law; rejecting such amendments would seriously endanger the fate of these agreements altogether. Therefore, when the people approved the incorporation of the Council Regulation on biometrics in passports and travel documents<sup>16</sup> into the Schengen Agreement with 50.1 % of the votes in 2008, many breathed a sigh of relief – a negative vote could have seriously endangered the continuation of the Schengen Association Agreement and, by virtue of the guillotine clause linking these two treaties, also of the Dublin Association Agreement.

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16 Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents.

### 3. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND SWISS LAW

The federal authorities and the cantons are obliged to respect international law in all their activities (Article 5 IV Constitution). Based thereon and in light of the principle of *pacta sunt servanda*, the Federal Supreme Court has developed a rich stream of case law concerning the validity, rank and effect of international law in Switzerland:

- Swiss law follows the monist tradition. Therefore, treaties which have been duly entered into force automatically become part of domestic law. An act of transformation is not needed.<sup>17</sup>
- International law generally takes precedence over national law. This is unequivocally the case for peremptory norms of international law (*ius cogens*); such norms always overrule any conflicting provisions of national law. Moreover, treaties concluded by Switzerland supersede federal acts in the case of a conflict, unless the Federal Assembly has intentionally enacted legislation which violates the treaty obligation; in such a case, the authorities shall apply the federal act (*Schubert* case law).<sup>18</sup> However, this *Schubert* exception is subject to two key limitations: treaties which guarantee fundamental rights, such as the ECHR, and the Agreement on the Free Movement of Persons with the EU<sup>19</sup> must be respected in all cases; the *Schubert* exception does not apply.<sup>20</sup> The Federal Supreme Court has not yet explicitly decided whether these considerations equally apply in the case of a conflict between a treaty and the Constitution.<sup>21</sup>
- A powerful instrument for averting conflict is the method of interpreting Swiss law in a way that ensures its conformity with international law. The Swiss authorities routinely employ this method.<sup>22</sup>
- Individuals can invoke treaty provisions in proceedings before public authorities directly if they are self-executing, i.e. if they both confer

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17 See already BGE 7 I 774, a judgment of the Federal Supreme Court of 1881.

18 BGE 99 Ib 39.

19 See pp. 181.

20 BGE 125 II 417; BGE 142 II 35.

21 See BGE 139 I 16.

22 BGE 94 I 669.



rights on individuals and are sufficiently clear and unconditional to preclude any need for implementing legislation.<sup>23</sup> Typically, human rights treaties as well as the main bilateral agreements with the EU are directly applicable. However, a key problem with this principle is its vulnerability to interpretation: sometimes the courts refrain from applying treaty provisions directly, even though they seem to obviously meet the conditions of clarity and unconditionality. WTO agreements, for instance, are not considered to be directly applicable.<sup>24</sup> The Federal Supreme Court has also, time and again, refused to directly apply the free trade agreement concluded in 1972 with the EU. This mercantilist approach is the subject of controversial debate. There are competing interests at stake: for example, ensuring the effectiveness of international law versus maintaining both balanced international legal relations (reciprocity) and the domestic balance of powers. Concerns as to the lack of adequate democratic representation in international law-making are a key part of the debate.

In 2016, the Swiss People's Party (SVP) submitted the initiative "Swiss law instead of foreign judges (self-determination initiative)" ("Schweizer Recht statt fremde Richter [Selbstbestimmungsinitiative]"). According to the proposed text, the Swiss Constitution is the highest source of law in Switzerland. In the case of a conflict between the Constitution and a treaty, the former prevails (with the exception of *ius cogens*). In such a circumstance, the treaty must be renegotiated; if necessary, it must be terminated. The proposed text reflects the concern that the scope for domestic policy-making is becoming increasingly limited by international law. However, the way the text addresses this concern is hardly useful. The idea of establishing a rigid hierarchy between the Constitution and international law oversimplifies the complex interplay between these legal dimensions. Moreover, the wording of the initiative is too ambiguous: for example, under what exact circumstances would it become "necessary" to terminate a treaty? Fundamentally, this initiative endangers both legal security and Switzerland's reputation as a reliable partner in international relations. The people will vote on this proposal in due course.

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23 BGE 124 III 90.

24 THOMAS COTTIER/MATTHIAS OESCH, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland. Comments, Cases, and Materials*, Bern/London 2005, pp. 223.

### III. Landmark Cases

In the following section, two key cases which demonstrate Switzerland's involvement and interaction with the international community will be discussed. One case, which came before the Federal Supreme Court, clarified the position of Swiss law with respect to the Agreement on the Free Movement of Persons between the EU and Switzerland (1). The second case demonstrates Switzerland's participation in an international dispute settlement procedure, through its membership of the WTO (2.).

#### 1. SUPREMACY OF THE AGREEMENT ON THE FREE MOVEMENT OF PERSONS

AA, a citizen of the Dominican Republic, had been residing in Switzerland since 2002. In the same year, she gave birth to a boy, BA. The father of BA was C, a German citizen who also lived in Switzerland. Based on these relationships, AA and BA were granted a residence permit in Switzerland, derived from C's right of residence under the Agreement on the Free Movement of Persons. In 2013, however, the competent authority in the Canton of Zurich refused to prolong AA's residence permit, on the grounds that she had been dependent on social security payments for several years. They did, however, grant her son, BA, a residence permit, derived from his father's right of residence. The authority argued that the existence of BA did not require that AA received a residence permit; AA could take her son with her upon leaving the country or alternatively he could remain in Switzerland under his father's care. AA challenged this refusal. She argued that she had a right to reside in Switzerland based on the Agreement on the Free Movement of Persons.

The substantive outcome of the case was that the Federal Supreme Court confirmed the decision of the cantonal authority upon appeal.<sup>25</sup> However, the most interesting points of the judgement were discussed by the Court

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25 BGE 142 II 35.

by way of introduction to the case, where two issues which had been hotly debated in the aftermath of the approval of the popular initiative “against mass immigration” (“Gegen Masseneinwanderung”, 2014) were clarified. First, the Federal Supreme Court confirmed that the Agreement on the Free Movement of Persons is to be interpreted in light of the case law that has been developed by the European Court of Justice in interpreting EU law provisions on the free movement of persons. A parallel interpretation of the Agreement on the Free Movement of Persons – i.e. an interpretation which follows that of the European Court of Justice – is supported by the Preamble of the Agreement on the Free Movement of Persons’ objective, which is “*to bring about the free movement of persons between [Switzerland and the EU] on the basis of the rules applying in the European Community*”. As such, a parallel interpretation is also in line with the teleological method of interpretation, as provided for in Article 31 of the Vienna Convention on the Law of Treaties. There is no explicit obligation on Switzerland to follow European Court of Justice judgements, except in the case of those judgements rendered before June 1999 (Article 16 Agreement on the Free Movement of Persons). However, an autonomous interpretation shall only be followed if there are cogent reasons to do so. In this case, the Federal Supreme Court made it clear that the new Articles 121a and 197 No 11 Constitution do not constitute such cogent reasons. Thus, they interpreted the Agreement on the Free Movement of Persons’ provisions in light of the pertinent case law of the EU and, upon this basis, confirmed the decision of the cantonal authority to refuse to reissue AA with a residence permit.

Second, the Federal Supreme Court clarified the relationship which exists between the Agreement on the Free Movement of Persons and federal acts. In the case of a conflict, the former takes precedence over the latter. This remains the case even when the Federal Assembly intentionally violates the Agreement on the Free Movement of Persons in full knowledge of the legal and/or political consequences of such an action. Thus, it can be seen that the *Schubert* exception does not apply within the scope of the Agreement on the Free Movement of Persons.<sup>26</sup> The Federal Supreme Court based this finding on the observation that the Agreement on the Free Movement of Persons leads to a harmonisation of the legal order (sectoral participation in the common market) through the realisation of a basic freedom, as well as on the fact that EU law is directly applicable in EU member states and claims supremacy over

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<sup>26</sup> See pp. 179.

national laws. With respect to the case at hand, however, it was not apparent whether these considerations were relevant in order to decide the case (thus forming part of its *ratio decidendi*) or whether they were *obiter dicta*.

The message sent out by the Federal Supreme Court is clear: legislation implementing Articles 121a and 197 No 11 Constitution which violates the Agreement on the Free Movement of Persons would have no practical effect. EU citizens could still directly rely on the Agreement on the Free Movement of Persons; the Federal Supreme Court would continue to uphold these rights. In fact, since this ruling the Federal Assembly has implemented the new provisions in an Agreement on the Free Movement of Persons-consistent way.<sup>27</sup> Unsurprisingly, the judgment of the Federal Supreme Court has been received controversially. Some see it as the Federal Supreme Court ignoring the voice of the people, who voted in favour of Articles 121a and 197 No 11 Constitution but have found that there continues to be no real practical enforcement of these new articles. One key positive aspect of the judgement is that it enhances legal security and contributes to the reliability of Switzerland in the realm of external relations.

## 2. US SAFEGUARD MEASURES ON STEEL PRODUCTS

In 2002, the then President of the United States, GEORGE W. BUSH, imposed definitive safeguard measures on various steel products. The measures consisted of additional tariffs ranging from 8 % to 30 % and were intended “*to facilitate positive adjustment to competition from imports of certain steel products*”.<sup>28</sup> Consequently, some products of foreign steel producers were kept out of the US market; the prices of others were artificially increased. Swiss companies were amongst the affected producers. As a direct response to the US measures, the EU adopted its own safeguard measures on steel products: it imposed a tariff quota system in order to limit trade diversion resulting from US protectionism. The EU measures were even more problematic for the Swiss steel industry than the original US ones.

Eight WTO members – the EU, Japan, Korea, China, Switzerland, Norway, New Zealand and Brazil – challenged the US safeguard measures before the WTO Dispute Settlement Body (DSB), arguing that the measures were

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<sup>27</sup> See pp. 170.

<sup>28</sup> US Presidential Proclamation No. 7529 of 5 March 2002.

inconsistent with Article XIX General Agreement on Tariffs and Trade 1994 and the Agreement on Safeguards. According to long-standing case law, these rules permit WTO members to apply safeguard measures only when, as a result of unforeseen developments, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry producing like or directly competitive products. After unfruitful consultations, a panel was established to examine the matter. The panel determined that the conditions for the imposition of safeguard measures were not met in the case of the United States for any steel product at issue. On appeal, the Appellate Body confirmed the ruling.<sup>29</sup>

After the Appellate Body had issued its report, President BUSH terminated the safeguard measures. A combination of some of the following four reasons might have been decisive in making him do so:

- First, the Appellate Body determined unequivocally that the measures violated WTO law. From a legal perspective, the United States were hence obliged to withdraw the measures; respect for the rule of law demanded this.
- Second, President BUSH was anxious to please constituencies in the States which had traditionally been home to many steel-industry jobs, such as Pennsylvania, Ohio and West Virginia. From a political perspective, he had already accomplished what he had intended through the initial imposition of the measures.
- Third, it had become increasingly apparent that the measures were having a negative effect on the US industry as a whole. The safeguard measures did more harm to the steel-using industries than good to the steel-producing industry. Thus, from an economic viewpoint, the termination of the measures was somewhat logical.
- Fourth, WTO law permits members affected by WTO law-incompatible safeguard measures to apply re-balancing measures.<sup>30</sup> As such, various co-complainants who participated in the WTO dispute settlement

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29 US – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS253/AB, issued 10 November 2003 (complaint of Switzerland).

30 Under the Agreement on Safeguards, an affected member is permitted to apply re-balancing measures, whereas the Dispute Settlement Understanding (DSU) allows a complaining party to suspend obligations vis-à-vis the defending party if the latter does not comply with a panel or Appellate Body ruling.

proceedings were planning to impose re-balancing measures against the United States. The EU, the complainant by far the most affected by the safeguard measures, had already adopted a regulation setting out potentially targeted products, such as fruits and vegetables, textile products and Harley Davidson motorcycles.<sup>31</sup> Japan, China, Norway and Switzerland followed suit and threatened to adopt similar re-balancing measures. By terminating the US safeguard measures, President BUSH could avoid the adoption of potentially very harmful re-balancing measures against the US.

This has been the only WTO case in which Switzerland has actively participated, as a complaining or defending party, to date. In the end, the Swiss delegation was content with the final outcome: it successfully relied on WTO law and prevailed over the United States, resulting in the termination of the harmful safeguard measures. However, at the same time, their satisfaction was not absolute. Although the US measures were declared unlawful eventually, in the meantime, Swiss steel producers suffered real damage due to the trade-restrictive measures imposed by both the US and the EU and the loss of market shares, which they then had to regain tediously. In this context, it is problematic that the WTO dispute settlement mechanism does not provide for compensation for damages suffered due to unlawful actions.

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31 Council Regulation (EC) No 1031/2002 of 13 June 2002 establishing additional customs duties on imports of certain products originating in the United States of America; see also WTO Document G/C/10, G/SG/43 of 15 May 2002.

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# Felix Uhlmann

## Administrative Law

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# I. Codes

In Switzerland – in comparison e.g. with the Netherlands – there is no general code on administrative law. Administrative procedure is both regulated by specific acts on the federal and on the cantonal level. Many of the general principles and ideas of Swiss administrative law are derived from the Constitution and formed by case law of the Swiss courts, mainly the Swiss Federal Supreme Court.

In contrast, administrative law incorporates a myriad of subject matter laws such as laws on citizenship, political rights, education, science, and culture, national defence, financial issues, public works, energy, transportation, health, employment, social security, or the economy and technical cooperation. According to a 2013 survey, there are 4'768 laws (over 65'000 pages) on the federal level alone. In addition, there is an abundance of cantonal laws (although the amount is quite diverse from canton to canton). The cantons exercise all rights that are not vested in the Confederation (Article 3 Constitution);<sup>1</sup> hence there are a great number of cantonal statutes. Cantonal acts typically deal with subjects like police, planning and building, schools, or health care.

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1 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.admin.ch \(https://perma.cc/M8UJ-S369\)](https://perma.cc/M8UJ-S369).

# II. Principles of Administrative Action

## 1. CONSTITUTIONAL PRINCIPLES IN ADMINISTRATIVE LAW

The relationship between constitutional and administrative law may be characterized as one of *mutual influence*. Administrative law and practice give real substance to the meaning of the Constitution. Some constitutional provisions can be best understood through the lens of the relevant administrative statutes, especially in areas where independent constitutional thinking remains underdeveloped, for example the area of state liability. On the other hand, constitutional principles are essential for the proper application of administrative law.

The key principles of legality, public interest, and proportionality are laid down in Art 5 Constitution (Article 36 Constitution in respect to the restriction of fundamental rights).<sup>2</sup> Article 9 Constitution constitutes the protection against arbitrary conduct and principle of good faith and therewith the basis for the doctrine of legitimate expectations.

## 2. PRINCIPLE OF LEGALITY

### a) Legal Basis for Administrative Action

The principle of legality (or the rule of law) is prone to many different understandings and, more problematically, many misunderstandings. Most legal traditions foster distinct traits of this principle, and even when internationally

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<sup>2</sup> See THOMAS FLEINER/ALEXANDER MISIC/NICOLE TÖPPERWIEN, *Constitutional Law in Switzerland*, Alphen aan den Rijn 2012, pp. 209, PATRICIA EGLI, *Introduction to Swiss Constitutional Law*, Zurich/St. Gallen 2016, pp. 107.

understood terms like “the rule of law” are used, the precise meaning often differs from country to country. In essence, the principle of legality refers to the idea of restraining governmental power through law.

It seems that the principle of legality is more comprehensively applied in Switzerland than in other countries, though in a rather flexible manner. The cornerstone of the Swiss concept of legality is that every form of administrative action must be traceable back to a statutory provision: “*All activities of the state are based on and limited by law*” (Article 5 I Constitution). This provision’s emphasis is on finding a basis that justifies state actions *within the law*.<sup>3</sup>

## b) Legality of the Law

It is important to realize that the principle of legality is not only a challenge to administrative action without a sufficient legal basis but is also a powerful tool directed *against the law* itself. The principle requires that the legal basis satisfies *minimal qualitative requirements*.<sup>4</sup> There are two key qualitative requirements in Switzerland: first, the legal basis may not be *unduly vague* and second, *important decisions* must be taken by the *legislator*.

The first prohibition which prevents the creation of *unduly vague* law under the principle of legality is a commonly accepted principle. The Swiss Federal Supreme Court requires that the law must be precise enough to allow citizens to adjust their behaviour according to the legal requirements and to foresee the legal consequences of their behaviour.<sup>5</sup> May the legislator, e.g., just stipulate that billboards on houses must be “aesthetically satisfying” and leave the concretization of this rule to administrative agencies and courts? The Swiss Supreme Court has accepted such legislation, acknowledging that every law necessarily contains some vagueness due to its abstract nature, as well as other factors like the limitations of language, the impossibility of regulating every potential future situation, and the need to allow administrative discretion in the performance of official acts or duties.<sup>6</sup> The standard of review is higher in cases where there have been significant restrictions, typically those

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3 ULRICH HÄFELIN/GEORG MÜLLER/FELIX UHLMANN, Allgemeines Verwaltungsrecht, 7<sup>th</sup> edition, Zurich/St. Gallen 2016, n. 325 et seq.; PIERRE TSCHANNEN/ULRICH ZIMMERLI/MARKUS MÜLLER, Allgemeines Verwaltungsrecht, 4<sup>th</sup> edition, Bern 2014, § 19 n. 1 et seq.; EGLI, pp. 24.

4 HÄFELIN/MÜLLER/UHLMANN, n. 338 et seq.; TSCHANNEN/ZIMMERLI/MÜLLER, § 19 n. 14 et seq.

5 BGE 139 I 280, consideration 5.1.

6 BGE 139 II 243, consideration 10; HÄFELIN/MÜLLER/UHLMANN, n. 344.

which engage fundamental rights.<sup>7</sup> A more deferential standard of judicial review is typical in cases which concern technical areas of the law and where legal areas that are notoriously difficult to regulate are at issue, such as foreign policy.<sup>8</sup>

The second requirement is that important decisions must be taken by the legislator. The legislator must decide on every important aspect of regulation, as opposed to allowing government or administrative bodies to do so: “*All significant provisions that establish binding legal rules must be enacted in the form of a Federal Act*” (Article 164 I Constitution). E.g., court practice has established that fees and levies must be regulated by the law, which must clearly identify who must pay what amount in respect of which service.<sup>9</sup>

Hence, the legal basis of administrative action may be challenged either because of over-vagueness or the lack of legislative basis regarding a certain point of law. If the rule applicable in a certain case covers an important question yet was not enacted by the legislator itself, the principle of legality is violated, even if the rule was precise enough and correctly understood by the administrative authorities.<sup>10</sup> It is obvious that the second requirement is closely connected to the matter of delegated or secondary legislation, which will now be discussed in further depth.

### c) Delegated Legislation

Delegated legislation is legislation that the parliament has conferred to the executive branch. It comes in two forms: 1. purely executive and 2. quasi-legislative.

In the first case legislation merely “fills in the gaps” in the law or simply defines a broad term in the law more precisely; here, no delegation clause is needed. The power to enact secondary legislation stems directly from the constitutional mandate of the government to implement and execute legislation (Article 182 Constitution).<sup>11</sup>

Secondary legislation is considered quasi-legislative if it creates new obligations or deviates from the law; in these cases, a delegation clause is required.<sup>12</sup>

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7 BGE 130 I 360, consideration 14.2.

8 Cf. HÄFELIN/MÜLLER/UHLMANN, n. 389.

9 Cf. BGE 135 I 130, consideration 7.2.

10 Cf. HÄFELIN/MÜLLER/UHLMANN, n. 351 et seq.

11 Cf. BGE 141 II 169, consideration 3.3; HÄFELIN/MÜLLER/UHLMANN, n. 100.

12 HÄFELIN/MÜLLER/UHLMANN, n. 96 et seq.

The delegation clause must fulfil the following prerequisites: 1. The delegation must not be excluded by the Constitution. 2. The delegation clause must be found in the law itself. 3. Delegated legislation can only regulate precisely predefined and limited aspects. For example, the legislator may not leave it up to an autonomous administrative body to regulate the way it employs its workers: such a competence is simply too broad. 4. Finally, the legislator must outline the broad strokes of the regulation. The legislator must decide upon the important issues of the delegated matter. If any of these four prerequisites is not met, then the principle of legality is violated.<sup>13</sup>

#### d) Judicial Review

It is crucial to note that all aspects of the principle of legality may form the basis of an application for full judicial review. For example, a school-boy expelled for bad behaviour may claim that the authorities have no basis for expulsion in his case and thus that they have overstepped their competences. This is a challenge to the application of the law. The school-boy may also contend that his dismissal is unlawful because the statute it is based on is too vague, allowing the authorities unfettered discretion.<sup>14</sup> Alternatively, the school-boy may defy the legal basis claiming the expulsion should have been regulated by the law itself and not by secondary legislation due to the importance of the issue – a challenge that was successfully brought forward in 2013 against a school regulation targeting headscarves.<sup>15</sup>

### 3. PUBLIC INTEREST

The principle requires that “*state activities must be conducted in the public interest*” (Article 5 II Constitution). It is most relevant when taken in consideration together with other principles or rights, particularly regarding *proportionality*. The public interest principle essentially sets the benchmark for the proportionality test, by introducing the requirement to achieve a proper balance between public and private interests.<sup>16</sup>

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13 HÄFELIN/MÜLLER/UHLMANN, n. 368; TSCHANNEN/ZIMMERLI/MÜLLER, § 19 n. 38.

14 BGE 129 I 35, considerations 7.8 et seq.

15 BGE 139 I 280.

16 HÄFELIN/MÜLLER/UHLMANN, n. 461 et seq.; TSCHANNEN/ZIMMERLI/MÜLLER, § 20 n. 1 et seq.

## 4. PROPORTIONALITY

The principle of proportionality is a general requirement that all state action must meet (Article 5 Constitution) and a specific prerequisite in instances where fundamental rights are restricted (Article 36 Constitution).

As is the case with the German understanding of proportionality, in Switzerland the principle encompasses a *threefold test* based on the consideration of both the end pursued (which typically must be in the public interest) and the means employed. The means must be: (1) suitable (*geeignet*) to achieve the end; (2) necessary (*erforderlich*) in the sense that milder means prove inefficient and finally, (3) bearable (*zumutbar*), i.e. the end sought in the public interest must outweigh the compromised private interest of the individual. All three requirements must be satisfied, or the administrative action (or the law itself) will fail the test. For example, restricting helicopter flights from some ports to protect a certain area in the mountains proves “unsuitable” to achieve the aim if that area may easily be accessed through other ports not falling under the restriction;<sup>17</sup> a general prohibition on storing medication abroad on the grounds of better quality assurance is not “necessary” when a quality guarantee can be achieved simply by having the foreign competent authorities conduct inspections (assuming the petitioner’s willingness to bear the additional costs).<sup>18</sup> Finally, although the public interest in the establishment of a natural reserve may outweigh the owner’s interest in building houses in the centre of the reserve, it may be considered “unbearable” for the owners at the border of it.<sup>19</sup>

## 5. LEGITIMATE EXPECTATIONS

### a) Basis

The protection of legitimate expectations is primarily based on Article 9 Constitution. The crucial starting point in determining whether legitimate expectations have been created and thus require protection is to evaluate the *basis* that triggered the expectation. The stronger the basis, the higher the level of protection will be. For example, a (formal) administrative act is a

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<sup>17</sup> BGE 128 II 292, consideration 5.1.

<sup>18</sup> BGE 131 II 44, consideration 4.4.

<sup>19</sup> BGE 94 I 52, consideration 3.

stronger basis than information provided by the authorities about an administrative issue.<sup>20</sup>

One may roughly rank the bases in order of the level of protection they will incur from courts. The most cogent basis for establishing a legitimate expectation is an *administrative contract*, which if permissibly concluded may even protect the private party against a subsequent adaptation of the law. Rights granted under an administrative contract may be “vested rights” (*wohlerworbene Rechte*), like the right to property.<sup>21</sup> This means that they may only be revoked where due compensation is offered.<sup>22</sup>

Substantial protection is also offered if a private party has relied on an administrative act (*Verfügung*). Administrative acts are the cornerstone of administrative action and are analysed in detail below. They have triggered numerous cases on legitimate expectations and a doctrine of *non-revocable administrative acts* has been developed.<sup>23</sup> Administrative acts by their very definition serve to clarify and settle a legal situation. They often govern a legal relationship, which exists over time. In practice it may often become necessary to adapt the administrative act if the legal or factual situation changes. In such a circumstance, however, the legitimate expectation principle can be invoked.<sup>24</sup>

Many cases involving legitimate expectations stem from government provision of *misinformation* or *incorrect advice*.<sup>25</sup> This basis is potent enough to lead to the non-application of the law in a specific case and more generally, even when this has the effect of seriously undermining both the law and the government itself. This may be the reason why the courts require that such advice is provided on an individual basis; general information displayed on the governmental website may not be sufficient to create legitimate expectations.<sup>26</sup> This approach is understandable in practical terms as preventing the chaos that could ensue from multiple claims being made on the basis of publicly available information. However, logically it is difficult to justify why one should have more trust in a single phone call to a civil servant than in information found in an official governmental announcement. Further requirements

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20 HÄFELIN/MÜLLER/UHLMANN, n. 668 et seq.

21 HÄFELIN/MÜLLER/UHLMANN, n. 1237.

22 HÄFELIN/MÜLLER/UHLMANN, n. 1242 and 1244.

23 HÄFELIN/MÜLLER/UHLMANN, n. 628 and 1231.

24 HÄFELIN/MÜLLER/UHLMANN, n. 1228.

25 HÄFELIN/MÜLLER/UHLMANN, n. 667 et seq.

26 Cf. HÄFELIN/MÜLLER/UHLMANN, n. 669.



developed by the courts for the establishment of legitimate expectations in this manner are that the advice was given without reservation, that it was given by the competent authority and that the factual and legal situation has not changed since the advice was given.<sup>27</sup>

Finally, no protection stems from *administrative passivity*.<sup>28</sup> In theory, this doctrine means that an illegal situation may never become legal under the doctrine of legitimate expectations. In such circumstances, the authorities can still intervene at any time, even if they tolerated the illegal situation for decades and the private person remained in good faith for the duration of this time. Simultaneously, it seems obvious that courts may be reluctant to uphold such an intervention by the authorities; it may even be relatively safe to assume that the court might find a solution in favour of the private party (possibly relying on the conceptually similar yet distinct principle of good faith, which will be discussed in the following paragraphs).

## b) Legitimacy of Expectations

Regardless of the different potential bases of legitimate expectations, there is one key prerequisite which remains constant: the expectations must always be *legitimate*. This will not be the case if the private party was aware that the basis was unsound or erroneous. For example, a trained lawyer may not rely on governmental information if a simple review of the law would have proved it incorrect, although this may not be so clear-cut in the case of a layman who relies on such information.<sup>29</sup> Hence, an analysis of legitimate expectations is always conducted on a case-by-case basis and involves a consideration of all the details of the individual situation.<sup>30</sup>

## c) Private Arrangements

Overall, legitimate expectations include situations where, on the basis of some expectation, an individual makes *arrangements* which conflict with the correct application of the law. Such arrangements made by individuals may be understood as the manifestation of legitimate expectations.<sup>31</sup> The protection is usually stronger if, for instance, a house has already been built based

<sup>27</sup> HÄFELIN/MÜLLER/UHLMANN, n. 676 et seq.

<sup>28</sup> Cf. HÄFELIN/MÜLLER/UHLMANN, n. 651.

<sup>29</sup> Cf. for false instructions on the right to appeal BGE 135 III 374, consideration 1.2.2.2.

<sup>30</sup> See e.g. BGE 137 I 69.

<sup>31</sup> HÄFELIN/MÜLLER/UHLMANN, n. 659.

upon building permit, i.e. an *administrative act* (*Verfügung*), in a zone not suitable for buildings and must be demolished. On the other hand, the protection of the individual's interests may be considered less substantial if only insignificant preparatory work for the house has been executed.<sup>32</sup> Clearly, if no arrangements have been made under a legitimate expectation, the principle is typically not applicable.

#### d) Causality

A fourth requirement for the protection of legitimate expectations is a *causal link* between the legitimate basis and the arrangements.<sup>33</sup> If the house in the previous example had been built before the faulty permit was given, obviously there would not be any causal link between the permit and the arrangements; thus, there are no legitimate expectations to be protected.

#### e) Balancing Test

The final step a court will take in determining whether a claim of legitimate expectations should be enforced is the conducting of a *balancing test* between the legality and the expectations. It may be that the basis for the expectations is sound and the (causal) arrangements are substantial but that they do not outweigh the advantages of ensuring the proper application of the law or, perhaps more precisely, the values and interests protected by that law.<sup>34</sup> For example, a person who has legitimately but falsely relied on a building permit will have to demolish his or her house if there is a high risk of avalanches in the area: the public interest clearly trumps the financial interests of the owner.<sup>35</sup> On the contrary, if the building permit falsely allowed the building of six stories in a zone where the maximum height is five stories, one may generally assume that the house would have to be maintained, provided that the expectations were legitimate in all other regards.

The last example illustrates the potential *power* the doctrine of legitimate expectations possesses: it may overrule the proper application of the law, because if allowing an exception to the law is the more suitable solution, courts will rather not apply the law in order to protect the legitimate expectations.

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32 HÄFELIN/MÜLLER/UHLMANN, n. 1252.

33 HÄFELIN/MÜLLER/UHLMANN, n. 663.

34 HÄFELIN/MÜLLER/UHLMANN, n. 664.

35 See Federal Supreme Court decision 1C\_567/2014 of 14 July 2014, consideration 5.2.

The application of the principle is flexible, however. Alternative measures can be employed instead: for example, allowing for an additional deadline in cases where incorrect instructions on the right to appeal have been provided or transition periods in cases of abrupt and unexpected changes to administrative practice.<sup>36</sup> Compensation is and should be considered as a potential remedy, especially in those circumstances where in principle the legitimate expectations are justified but cannot be upheld in practice due to a more compelling public interest (for example, the aforementioned example of the building in a danger zone). However, courts are relatively reluctant to offer compensation. The cases can be understood as a special form of state liability.<sup>37</sup>

## f) Special Doctrines: Administrative Practice and Retroactivity

Legitimate expectations can also stem from *court or administrative practice*, not just from action by the legislative or executive branch. Indeed, there is a comparatively strong burden on courts and administrative authorities to maintain consistent practice. Traditionally, this role has been attributed to the equal protection clause but logically it seems to fit better into the doctrine of the protection of legitimate expectations. The protection from changes in court or administrative practice is two-dimensional, based on a formal and a substantive component. The formal component requires that any change of practice should be duly announced so that private parties can adapt their behaviour accordingly. In this respect, a change of practice generates an obligation on the courts or administration which is comparable to that imposed on government to properly publish a new law that is to be introduced.<sup>38</sup> If this condition is fulfilled, courts and administrative authorities may choose any suitable means through which to introduce the change of practice. Somewhat in contrast, the substantive component of the test presents an opportunity to mount a substantial challenge to the change of practice, since change is only permissible if three conditions are met: namely, there are valid reasons for the change, the change is categorical, and the interest in the correct application of the law outweighs the interest in legal certainty.<sup>39</sup>

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36 HÄFELIN/MÜLLER/UHLMANN, n. 704.

37 See HÄFELIN/MÜLLER/UHLMANN, n. 706; PIERRE TSCHANNEN, *Systeme des Allgemeinen Verwaltungsrechts*, Bern 2008, n. 291.

38 Cf. HÄFELIN/MÜLLER/UHLMANN, n. 595 et seq.

39 HÄFELIN/MÜLLER/UHLMANN, n. 591 et seq.; TSCHANNEN/ZIMMERLI/MÜLLER, § 23 n. 16.

Only limited expectations are created through the *law* itself. The Swiss Federal Supreme Court has laconically expressed the view that one must always expect the law to change.<sup>40</sup> While this is true, surely there is also an expectation that any change in the law will not be sudden and extremely disadvantageous to those individuals affected by it. Therefore, courts sometimes require the legislator to provide for transitional periods when introducing new legislation; this is an effort to mitigate the associated risks and negative effects. Since such an option is available to courts, it is a relatively rare occurrence for cases claiming a legitimate expectation created by the law itself to arise.<sup>41</sup>

More protection from a change in the law is available to individuals under the *doctrine of non-retroactivity*, a principle that has developed independently from the protection of legitimate interests but may, in my opinion, also find its most applicable basis in Article 9 Constitution.<sup>42</sup> Courts have intervened against the “proper retroactivity” (“echte Rückwirkung”) of supervening laws regulating facts that evolved entirely in the past, e.g. compensation for unlawful police action at a certain point in time. They have only ruled in favour of such laws when they have identified a clear legislative intent, a substantial public interest, and the intention for the moderate application of retroactivity.<sup>43</sup> More deference is given where the law attempts to regulate ongoing circumstances, the so-called pseudo-retroactivity (*unechte Rückwirkung*).<sup>44</sup> For example, the legislator may legitimately lower the salary of a civil servant who is employed for a year after the first six months of employment. However, even in such a case, the protection of legitimate expectations may require that the cut is not overly substantial as the employee is likely to have planned his or her engagement on the assumption of a higher salary for the whole period.<sup>45</sup>

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40 Cf. BGE 134 I 23, consideration 7.5.

41 HÄFELIN/MÜLLER/UHLMANN, n. 641.

42 HÄFELIN/MÜLLER/UHLMANN, n. 266.

43 See, inter alia, BGE 138 I 189, consideration 3.4.

44 HÄFELIN/MÜLLER/UHLMANN, n. 284; TSCHANNEN/ZIMMERLI/MÜLLER, § 24 n. 28.

45 Federal Supreme Court decision of 15 December 1976, consideration 4 (printed in Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 78 [1977], pp. 267).

## 6. GOOD FAITH

The principle of good faith has a long tradition in Switzerland. Its original source was Article 2 Swiss Civil Code,<sup>46</sup> which targeted the grossly unfair behaviour of private parties: “*Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations. The manifest abuse of a right is not protected by law.*” Later, the principle of good faith was extended to cover behaviour both from and towards the state.<sup>47</sup> Nowadays, the principle is found in Article 5 III Constitution (which binds both the state and private parties) and in Article 9 Constitution as a fundamental right.

The principle of good faith forbids both contradictory behaviour and the abuse of rights. The *prohibition of contradictory behaviour* highlights the closeness of good faith to the protection of legitimate expectations: for example, an authority which requests the demolition of a property revoking an otherwise falsely issued building permit may violate the individual’s legitimate expectations while also acting in a manifestly contradictory manner.<sup>48</sup>

The allegation of abuse of a right is often the applicant’s last recourse for substantiating a claim. An older case involving a woman who was convicted for the manslaughter of her husband sheds some light on this proposition. Upon being released from prison after serving her sentence, she appeared again before the courts, claiming that she was entitled to a widow’s pension. Apparently, she fulfilled all the necessary qualifications and nothing in the relevant legislation precluded her from getting the pension. However, the Swiss Federal Supreme Court had no difficulty in rejecting her claim for the pension as “*legal protection is only given to rights obtained in good faith*”.<sup>49</sup> The legislator later amended the relevant legislation, bridging an existing gap that up until then had been provisionally filled by court practice relying on the principle of good faith.<sup>50</sup>

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46 Swiss Civil Code of 10 December 1907, SR 210; see for an English version of the Civil Code [www.admin.ch \(https://perma.cc/DV8N-FFT2\)](https://perma.cc/DV8N-FFT2).

47 See BGE 76 I 187; BGE 78 I 294; BGE 79 III 63.

48 See HÄFELIN/MÜLLER/UHLMANN, n. 713.

49 Decision of the former Federal Insurance Court (now integrated in the Federal Supreme Court) EVGE 1951, p. 205, pp. 206. (cited after HÄFELIN/MÜLLER/UHLMANN, n. 725).

50 Cf. HÄFELIN/MÜLLER/UHLMANN, n. 725.

## 7. PROHIBITION OF ARBITRARINESS (REASONABLENESS)

The prohibition of arbitrariness (Article 9 Constitution) is a very special, probably unique, feature of Swiss administrative and constitutional law. In a nutshell, it prohibits grossly erroneous administrative action, irrespective of whether the fault was legal or factual. A claim of arbitrariness may be invoked against the abuse of administrative discretion or against the violation of accepted legal principles, of reasonableness, or of natural justice.<sup>51</sup> In any case, the error by the administration must be *manifest* – although, as a former Swiss Federal Supreme Court judge cunningly put it, there is nothing more arbitrary than the doctrine of arbitrariness itself. The principle is often invoked when there are – typically for procedural reasons – no more specific grounds at hand to challenge state action.

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51 BGE 141 I 70, consideration 2.2.

# III. Forms of Administrative Action

## 1. ADMINISTRATIVE DECISIONS

### a) Omnipresence of Administrative Decisions

Administrative decisions can be jocularly considered the Pythagorean Theorem of Swiss administrative law. Admittedly, they are not part of the subject of advanced mathematics nor can they be considered as being even close in brilliance to the theorem. Despite this, it is certainly true that administrative decisions stand at the centre of many administrative doctrines. If one understands the notion of an administrative decision, one has securely mastered an understanding of the private-public law divide, the shallow waters of administrative contracts, regulations and their occasional crossover into individual acts, and the essence of a right or duty in administrative law.

Administrative decisions are *intrinsically linked to judicial protection and procedural rights*; they guarantee their existence.<sup>52</sup> One should further note that administrative decisions are the *common form of administrative action*. “*The power to administer includes the power to issue administrative decisions*”.<sup>53</sup>

Administrative decisions are attractive because they create *legal certainty*. They are also the bridge to – and a prerequisite for – *enforcement*.<sup>54</sup> Rights granted by administrative decisions cannot be easily revoked and they are protected under the doctrine of legitimate expectations. In practice, courts allow for the modification of administrative decisions if the facts or the law that formed the original basis of the decision have substantially changed.

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<sup>52</sup> See also TSCHANNEN, n. 339 et seq.

<sup>53</sup> BGE 115 V 375, consideration 3b; TSCHANNEN/ZIMMERLI/MÜLLER, § 29 n. 19.

<sup>54</sup> REGINA KIENER/BERNHARD RÜTSCHKE/MATHIAS KUHN, *Öffentliches Verfahrensrecht*, 2<sup>nd</sup> edition, Zurich/St. Gallen 2015, n. 852.

However, they will not modify administrative decisions if, for example, a private person has just missed the time limit to file an appeal.<sup>55</sup> In this respect, administrative decisions have a similar effect to court decisions. If they go unchallenged, they enter into legal force. However, this is certainly not to say that administrative decisions have absolute legal force. Court practice and legal doctrine demonstrate this through their handling of, for example, administrative decisions with an indefinite legal effect. For example, the Swiss driver's license does not have an expiration date but obviously it can be revoked in the case of serious traffic offenses.<sup>56</sup>

## b) Definition of Administrative Decisions

The Federal Act on Administrative Procedure<sup>57</sup> provides for a definition of an administrative decision. In its (unofficial) English translation, Article 5 I reads as follows:

*“Rulings are decisions of the authorities in individual cases that are based on the public law of the Confederation and have as their subject matter the following:*

*a. the establishment, amendment or withdrawal of rights or obligations;*

*b. a finding of the existence, non-existence or extent of rights or obligations;*

*c. the rejection of applications for the establishment, amendment, withdrawal or finding of rights or obligations, or the dismissal of such applications without entering into the substance of the case.”*

It is debatable whether the term “ruling” is the most suitable in this context, as this term is also often used to describe the administration's response to an inquiry on certain issues of an administrative nature (especially in taxation).<sup>58</sup> It seems that in practice the term “administrative decision” as it is used in this book is closer to *Verfügung* in German or *décision* in French. Instead of the term “administrative decision”, one may also talk about an

55 HÄFELIN/MÜLLER/UHLMANN, n. 1090; see also BGE 139 II 243, consideration 11.2.

56 See Article 15c I and Article 16c II Federal Road Traffic Act of 19 December 1958, SR 741.01.

57 Federal Act on Administrative Procedure of 20 December 1968 (Administrative Procedure Act, APA), SR 172.021; see for an English version of the Administrative Procedure Act [www.admin.ch](http://www.admin.ch) (<https://perma.cc/2KU3-NLWU>).

58 HÄFELIN/MÜLLER/UHLMANN, n. 733; BGE 141 I 161, consideration 3.1; THOMAS FLEINER/ALEXANDER MISIC/NICOLE TÖPPERWIEN, p. 284.



“administrative act”, which comes closer to the literal meaning of what is described as *Verwaltungsakt* in Germany or *acte administratif* in France. However, although the French and German terms share many elements with the Swiss concept of an administrative decision (unilateral, individual, rooted in public law) one should not equate them without due caution.

As a final remark, it should be mentioned that Swiss cantons do not necessarily have to adopt the definition of the Federal Administrative Procedure Act. However, they tend to do so in practice.<sup>59</sup> Even when they use other denominations, it is relatively safe to assume that in substance they follow the example set out by Article 5 Administrative Procedure Act.

### c) Administrative Decisions Determining Rights and Obligations

An administrative decision *establishes, amends or withdraws rights or obligations*. Indeed, this is the *raison d'être* of an administrative decision.<sup>60</sup> Other forms of administrative actions may have legal consequences, which are not intended but at most accepted as necessary collateral damage in the fulfilment of the administrative act – for example, a police action, which accidentally leads to the harming of an innocent bystander. In contrast, administrative decisions purposefully determine, confirm, and stabilise a legal situation. One may have a right to build a house but not be legally permitted to do so before a permit has been granted in the form of an administrative decision. If the administration collects taxes, it will often do so in the form of an administrative decision, thereby concretising tax law in an individual case, establishing the citizen's duty to pay the tax and simultaneously establishing the basis for the decision's enforcement *ipso jure*. Administrative decisions can also be negative in substance: if a candidate for the bar exam fails, the commission will confirm the result through a negative decision (while also granting the right to appeal).<sup>61</sup> Finally, an administrative decision may simply confirm an existing legal situation (“*Feststellungsverfügung*”)<sup>62</sup>, thus providing legal certainty for the party requesting the confirmation (e.g. the confirmation that a certain private business practice is in accordance with

59 HÄFELIN/MÜLLER/UHLMANN, n. 852.

60 HÄFELIN/MÜLLER/UHLMANN, n. 867; FLEINER/MISIC/TÖPPERWIEN, p. 285.

61 Cf. HÄFELIN/MÜLLER/UHLMANN, n. 886; TSCHANNEN/ZIMMERLI/MÜLLER, § 28 n. 65.

62 Cf. HÄFELIN/MÜLLER/UHLMANN, n. 889; TSCHANNEN/ZIMMERLI/MÜLLER, § 28 n. 62 et seq.

existing environmental regulation, hence excluding the risk of administrative sanctions in the future).

Usually, the most difficult assessment is to determine which administrative actions affect and change the legal situation of a private individual and thus must be issued formally as an administrative decision, and which do not. The administration would often prefer that it was not necessary to issue an administrative decision as this forecloses the right to appeal and avoids the initiation of a procedure, which would require all constitutional guarantees to be ensured throughout the process, such as the right to be heard.<sup>63</sup> Within this framework, the Swiss Federal Supreme Court has held that there must be an administrative decision before disrupting energy services from a public utility<sup>64</sup> or in cases involving the unsolicited transfer of a civil servant to another post,<sup>65</sup> whereas there is no need for an administrative decision where a post office is closed in a small rural community.<sup>66</sup> The Court ruled also that not only the university degree but also the issuance of single grades may constitute an administrative decision if the award of a distinction depends upon them.<sup>67</sup> In all the above cases, the Swiss Federal Supreme Court had to decide whether the state's actions had legal consequences for the individual. If the question was answered in the affirmative, an administrative decision was formally required.

#### d) Administrative Decisions as Individual Acts

It is quite clear from the legal definition of administrative decisions and from the afore-mentioned examples of such decisions that they concern individual cases. Swiss doctrine would typically label the decision as individual (one person) and concrete (one situation) (*individuell-konkret*), in contrast to rule-making, which is perceived as general and abstract (*generell-abstrakt*).

A critical matter under Swiss law are those cases which concern a concrete situation yet whose settlement has implications for the wider public, thus requiring the issuance of a so-called general decision (*Allgemeinverfügung*). The paramount example is traffic regulation, illustrated by a well-known case

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63 KIENER/RÜTSCHKE/KUHN, n. 315.

64 BGE 137 I 120, consideration 5.5; see also p. 238.

65 BGE 136 I 323, consideration 4.

66 Cf. BGE 109 Ib 253, consideration 1.

67 BGE 136 I 229, consideration 2.6.

which prohibited riding (and driving) on the banks of river Töss.<sup>68</sup> “General decisions” qualify as administrative decisions but with some modification in respect of the right to be heard (and the procedural rights that accompany this right) – in such cases, these rights are only granted to persons specifically affected by the decision. For example, in the aforementioned case, this would most likely be a homeowner living on the riverbank. The decision must be published and can be challenged by everybody potentially affected (typically almost everybody).<sup>69</sup> In contrast to a regular decision which will enter into force if not challenged in due time and which cannot be challenged beyond this point, a person affected by the sign may challenge its validity even after the decision comes into force (e.g. an equestrian from another canton that has been fined after riding on the riverbank).<sup>70</sup>

### e) Administrative Decisions as Unilateral Acts

Swiss administrative law unfolds around the idea of the “sovereignty” (“*Hoheitlichkeit*”) of administrative action. Administrative action entails that the state has the privilege to act unilaterally towards its citizens. In this sense, administrative decisions are *unilateral*. Yet, not all state action must be as such.<sup>71</sup> Indeed, the state may waive its prerogative and act through administrative or private law contracts, thus entering a bilateral agreement with citizens.

In theory, discerning a unilateral state action from an action that originated from an administrative or private law contract seems straightforward. However, this is not the case in practice. One must realise that administrative decisions of a sovereign state do not simply rain down onto unaware private subjects, not least because these subjects are often substantially involved in the decision-making process. One instrument, which ensures proper interplay between the state and private individuals, is the right to be heard, as mentioned above. Admittedly, this right is the channel *par excellence* for allowing an individual to negotiate with the administration. Furthermore, many administrative decisions require an application from an individual for the administration to *ex officio* regulate the case.

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68 BGE 101 Ia 73.

69 HÄFELIN/MÜLLER/UHLMANN, n. 943 et seq.

70 HÄFELIN/MÜLLER/UHLMANN, n. 946.

71 HÄFELIN/MÜLLER/UHLMANN, n. 843; FLEINER/MISIC/TÖPPERWIEN, p. 285.

To determine whether a contract has been concluded one should examine the *level of discretion* on the administration's part. The administration will hardly act as if it is contractually bound if there is no room for negotiations because of detailed regulation; it will, however, act in such a way when it is party to a complex relationship with a private enterprise (for example an organisation that is paid to organise training for unemployed persons).<sup>72</sup> On some occasions the legislator has already prescribed the form of administrative action. A typical example of this is the employment of civil servants where the administration is legally required to act through the form of an administrative decision, if so decided by the legislator.<sup>73</sup> Finally, one should also keep in mind that administrative decisions are the usual form of action, hence placing the burden for justifying contracts onto the administration. In fact, regarding subsidies under federal law, the Act on Public Subsidies<sup>74</sup> explicitly embraces that rule in Article 16.

## f) Administrative Decisions as Acts Under Public Law

Administrative decisions must be based on public law, as Article 5 Administrative Procedure Act explicitly states. This prerequisite seems self-evident. However, quite the opposite holds true when one considers the matter of the public-private law divide that the issuance of administrative decisions brings to the forefront. The Swiss Federal Supreme Court typically approaches critical cases by applying different theories, considering sovereignty (*Subordinationstheorie*), interest and mandate (*Interessentheorie* and *Funktionstheorie*), and – the only recently reactivated – consequences (*Modaltheorie*), eventually choosing the most suitable one for the case at hand.<sup>75</sup> This eclectic approach has been criticised but thinking of a better alternative remains a challenge.<sup>76</sup>

Public law (triggering the need for administrative decisions) is typically applicable if administrative actions are directly fulfilling public interests or a public mandate.<sup>77</sup> On the other hand, administrative actions may qualify as falling under private law if the agency seeks profit or to satisfy its own

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72 E.g. BGE 128 III 250.

73 E.g. § 12 Act of the Canton of Zurich on the Public Personnel of 27 September 1988, 177.10.

74 Act on Public Subsidies of 5 October 1990, SR 616.1.

75 BGE 138 II 134, consideration 4.1.

76 Cf. TSCHANNEN/ZIMMERLI/MÜLLER, § 18 n. 6.

77 HÄFELIN/MÜLLER/UHLMANN, n. 225 and 229.

affairs as a private party would do. If the agency benefits from special powers over private individuals, this can be considered as a clear indication of public law.<sup>78</sup> Finally, note that it may be that the legislator has already legally determined the nature of the administration's actions. In one case where the Swiss Federal Supreme Court had to decide on the question of whether the allocation of domain names is a private or public law action, it held that the legal relationship was one of private law. Although there was substantial public interest or even a public mandate for this activity, the legislator had provided for a private law setting, and the Court did accept this qualification.<sup>79</sup> The Swiss Federal Supreme court took a similar approach in a case involving the issuing of certificates of conformity provided by a private enterprise: this specific procedure was necessary to label a cheese "Gruyère AOC". The Swiss Federal Supreme Court determined the proceeding as an action under public law, reasoning that the possible sanctions imposed for failure to obtain such a certificate were comparable to restrictions on trade.<sup>80</sup>

### g) Form

If one goes through the prerequisites of an administrative decision (an individual, unilateral act under public law determining rights and obligations), one may note that those do not prescribe a certain form that the decision must meet; instead they are substantive requirements. Indeed, the form of an administrative decision is a consequence of these substantive characteristics. An administrative decision must be handed down in writing, be named as such, give reasons for the way in which it has regulated an issue and inform the recipient of any available legal remedies.<sup>81</sup> If the administrative decision was not effectively delivered, it usually is contestable on this ground.

## 2. ADMINISTRATIVE LAW CONTRACTS

It has already been pointed out that the administration may act as a contracting party and that contracts must be distinguished from administrative

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78 HÄFELIN/MÜLLER/UHLMANN, n. 223.

79 BGE 138 I 289, consideration 2.1; BGE 131 II 262, consideration 2.2.

80 BGE 138 II 134, considerations 4.5 and 4.6.

81 See, for administrative decisions based upon federal law, the Federal Administrative Court decision B-198/2014 of 5 November 2014, consideration 2.3.2.

decisions, the latter being imposed by the state unilaterally. Administrative contracts are certainly considerably rarer than administrative decisions. Many of their legal implications are disputed and it is not without reason that one scholar has termed them the “*liaison dangereuse*” of Swiss administrative law.<sup>82</sup>

A favourable aspect of acting under an administrative contract is its *stability*. Administrative contracts may grant “vested rights” (“*wohlerworbene Rechte*”) that enjoy elevated protection under the doctrine of legitimate expectations. In fact, vested rights may not be abolished by future legislation, at least not without due compensation to the affected individual.<sup>83</sup> Vested rights create some noticeable tension between the need for administrative stability and state sovereignty. This is because these rights may restrict the state’s ability to enact future legislation, as they are often guaranteed for an indefinite or at least a substantial period.<sup>84</sup> However, if the legislator was able to undermine or overrule such contractual rights through new legislation, it is equally clear that this would undermine administrative stability and the willingness of private parties to conclude contracts with the government. The Swiss Federal Supreme Court decided numerous cases regarding the extent of respect, which must be paid to vested rights;<sup>85</sup> this tends to vary depending on the substance of the contract. For instance, many employment contracts of civil servants do not create such rights at all or at least do not create unconditional ones.<sup>86</sup> In a case, which involved the incorporation of a private owner’s land into the agricultural zone in exchange for the introduction of legislation that would increase the value of other pieces of land he owned, the question before the Court was whether the municipality could subsequently revoke this favourable legislation without compensating the owner. The Court accepted that the municipality refrained from introducing such legislation.<sup>87</sup>

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82 TSCHANNEN, n. 142.

83 HÄFELIN/MÜLLER/UHLMANN, n. 1315.

84 HÄFELIN/MÜLLER/UHLMANN, n. 1242.

85 See, inter alia, BGE 126 II 171; BGE 127 II 69; BGE 132 II 485.

86 See Federal Supreme Court decision 1C\_230/2007 of 11 March 2008, consideration 4.1.

87 BGE 122 I 328.

### 3. PRIVATE LAW CONTRACTS

It has long been established that the administration may also conclude private law contracts. But as it is the case with administrative law contracts, the administrative authority must justify its decision to enter into a private law contract. Doctrine has largely been sceptical about the permissibility of the state “escaping into private law” (“Flucht ins Privatrecht”).<sup>88</sup> Indeed, it does seem tempting for the authorities to act under private law contracts since it may evade many of the substantial and procedural guarantees of administrative law.

For that reason, court practice and doctrine essentially acknowledge limited areas where the administration may permissibly operate in the field of private law: public procurement, the management of financial assets of the state, and profit-oriented state action. It is also accepted that the legislator may introduce this form of administrative action to other fields.<sup>89</sup>

### 4. INFORMAL ACTS AND STATE LIABILITY

Administrative decisions and contracts share a common denominator: they affect the *legal situation* of citizens. In contrast, informal actions (“real acts”; *Realakte* according to Article 25a Administrative Procedure Act) of administrative bodies do not – at least not deliberately. The “deliberately” aspect is a key point; even if informal actions do actually affect a citizen’s legal situation, they will still be classified as informal actions. Most actions performed within the framework of schools or hospitals do not amount to legal actions even though there is sometimes a fine line.<sup>90</sup> A police car patrolling in a neighbourhood does not trigger any legal effect; nor does the dissemination of governmental information.<sup>91</sup> Swiss cheese producers suffered substantial losses when the federal agency on public health warned about possible contamination of listeriosis in Vacherin Mont d’Or.<sup>92</sup>

To challenge such action, one can resort to a state liability claim in order to challenge informal acts but these cases are not easily won against the

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88 HÄFELIN/MÜLLER/UHLMANN, n. 1379.

89 See BGE 131 II 262, consideration 2.2; TSCHANNEN/ZIMMERLI/MÜLLER, § 42 n. 3.

90 HÄFELIN/MÜLLER/UHLMANN, n. 1409.

91 HÄFELIN/MÜLLER/UHLMANN, n. 1413.

92 BGE 118 Ib 473.

government (burden of proof, the necessity of qualified illegality of the state action etc.). The cheese producers were not successful.<sup>93</sup>

Due to such concerns a new provision was introduced into the Administrative Procedure Act: according to Article 25a Administrative Procedure Act, persons affected may require that an administrative decision is taken on informal acts that concern them specifically (such as the cheese producers). If granted, the administrative decision is subject to a challenge before the courts. The request may target past, current, or future administrative action and is directed to the administrative authority responsible for that action.<sup>94</sup> According to the wording of Article 25a Administrative Procedure Act, to have the legal standing to make such a request, one must prove an interest worthy of protection (a legal term similarly formulated in other administrative proceedings statutes).<sup>95</sup>

## 5. ADMINISTRATIVE RULEMAKING

In contrast to other countries, in Switzerland administrative rulemaking is not subject to specific procedural rules. Only legislation from Parliament is subject to compulsory public consultation.<sup>96</sup> However, if administrative rulemaking comes in the form of delegated legislation, it must respect the principle of legality.<sup>97</sup>

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93 BGE 118 Ib 473, consideration 6.

94 HÄFELIN/MÜLLER/UHLMANN, n. 1429.

95 See § 10c Administrative Procedure Act of the Canton of Zurich of 24 May 1959, 175.2.

96 Article 147 Constitution; Article 3 of the Federal Act on the Consultation Procedure of 18 March 2005 (Consultation Procedure Act, CPA), SR 172.061; see for an English version of the Consultation Procedure Act [www.admin.ch \(https://perma.cc/HS8B-2PVT\)](https://perma.cc/HS8B-2PVT). In particular, there is no right to be heard during the law making process, BGE 131 I 91, consideration 3.1.

97 HÄFELIN/MÜLLER/UHLMANN, n. 368.



## IV. Landmark Cases

### 1. STATE LIABILITY: VACHERIN MONT D'OR<sup>98</sup>

In 1987, an epidemic of the bacteria “*listeria monocytogenes*” emerged in Swiss soft cheese produced in the canton of Vaud (*Vacherin Mont d’Or*). Rather than prohibiting the selling and distribution, the Swiss federal authorities informed the public about possible health risks related to the consumption of Vacherin Mont d’Or. Seven producers of soft cheese brought an administrative claim (*verwaltungsrechtliche Klage*) before the Federal Supreme Court. The plaintiffs claimed that they suffered damages (drop in sales) through legally and factually wrong, inadequate, late, and inappropriate information by the Swiss authorities.

The Court reasoned that according to Article 3 of the Federal Act on State Liability<sup>99</sup> the state can be held liable for damage a civil servant unlawfully causes in carrying out his or her task. The conduct is considered to be unlawful if either certain legally protected interests are violated, focusing on the results of the conduct (*Erfolgsunrecht*), or if it is contrary to provisions of the statutory law, thus focusing on the conduct of the tortfeasor (*Verhaltensunrecht*). However, if official duties require a certain conduct, which is performed in a proper manner, such conduct is lawful.

The plaintiffs could not invoke any legally protected interests since pure assets are, as such, not legally protected and, consequently, pure financial loss does not qualify as *Erfolgsunrecht*. Thus, the Court considered whether the federal authorities, by informing about possible health risks, violated statutory law.

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<sup>98</sup> BGE 118 Ib 473.

<sup>99</sup> Federal Act on State Liability of 14 March 1958, SR 170.32.

In particular, the Court examined Article 3 Epidemics Act<sup>100</sup>, which governs information activities of the federal authorities related to combating infectious diseases. The Court emphasized that the Swiss Federation can only be held liable if the authorities informed in an unjustifiably erroneous manner. The Court found no such errors. Rather, the federal authorities, when informing on the health risks, duly took into account state-of-the-art scientific knowledge and made distinctions between different cheeses where such distinction was appropriate. Thus, the Court found that the authorities informed the public in line of Article 3 Epidemics Act; did not violate statutory law; and, accordingly, acted lawfully. The Court rejected the claim.

## 2. PROTECTION OF LEGITIMATE EXPECTATIONS: PIANO TEACHER<sup>101</sup>

X was a student in the training program at the Conservatory of the canton of Fribourg in order to obtain the necessary diploma to be a piano teacher. On June 26, 2008, he failed his final exam – a piano recital performed in front of an audience – due to a state of discomfort and emotional blockage.

The board of examiners allowed X to repeat the final exam in camera, i.e. without audience. On 13 October 2008 X passed said exam and the board of examiners handed him the signed minutes of the exam. Subsequently, he was informed by letter dated 14 October 2008 that he successfully completed the study program for the teaching diploma.

The director of the Conservatory, however, requested the competent agency – the Direction of Education, Culture, and Sport of the canton of Fribourg – not to issue a diploma since X did not perform publicly. On 2 March 2009 the Direction refused to issue the diploma. X's appeal to the Administrative Court of the canton of Fribourg was not successful. X challenged this decision before the Federal Supreme Court and requested that the Direction be obligated to issue the diploma.

The Federal Supreme Court reasoned that conducting the repeat exam without an audience conflicted with the relevant statutory law. Hence, the administrative act regarding the passing of the repeat exam was legally

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<sup>100</sup> Federal Act on Measures against Human Infectious Diseases of 18 December 1970, SR 818.101.

<sup>101</sup> BGE 137 I 69.

erroneous. The Court, thus, examined whether the Direction could lawfully revoke the administrative act or whether instead X could invoke the protection of his legitimate expectations (Article 9 Constitution).

The Court emphasized that X had legitimate expectations to believe that the resolution of the board of examiners to renounce the public audience was lawful. Further, X made arrangements causally linked to his expectations by obtaining a post as piano teacher. Finally, the Court conducted the balancing test between legality and the expectations. From an overall perspective on the training program and the fact that piano teachers do not have to perform in public, the Court considered the attendance of the public during the final exam to be of minor importance. On the other hand, it emphasized the adverse consequences that X faced if the diploma would not be issued (repetition of a long study program, financial losses, and loss of earnings). The Court held that X's legitimate expectations outweighed the public interest in ensuring the proper application of the law and, as a consequence, the Direction was not allowed to revoke the administrative act.

### 3. PRINCIPLE OF LEGALITY: HEADSCARF<sup>102</sup>

A and C attended public school in a municipality in the canton of Thurgau and wore Islamic headscarves. The school regulations contained the following provision: *"Students attend school neatly dressed. The trustful interaction requires the attendance of school without headgear. Hence, wearing caps, headscarves, and sunglasses during class is forbidden."* The school authorities dismissed the request of the two girls to be exempted from said regulation and barred them from wearing headscarves. The Administrative Court of the canton of Thurgau considered the ban to be based on an insufficient legal basis and disproportionate. Hence, it struck down the ban. The municipality challenged this decision before the Federal Supreme Court.

The Court reasoned that wearing the Islamic headscarf is protected by Article 15 Constitution (Freedom of religion and conscience) and that any restriction on fundamental rights must have a legal basis (Article 36 I Constitution). Such legal basis may not be *unduly vague* and, since banning headscarves constitutes a *severe* restriction on a fundamental right, must be issued by the *legislator*.

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102 BGE 139 I 280.

The school authorities asserted that they were entitled to ban wearing Islamic headscarves based upon the purpose clauses of the cantonal act on elementary schools. The Court considered these provisions to constitute no sufficient legal basis for banning headscarves at schools, namely against the background of the predictability and foreseeability of governmental action.

Further, the school authorities asserted that, based upon a statutory *delegation clause* – i.e. an act made by the legislator –, the organizational planning of the school is in their scope and that they have, accordingly, the right to issue school regulations. The Court reasoned that the school authorities, based upon said delegation clause, may issue certain internal rules. However, it found that the asserted delegation clause does not concern in any way the restriction of fundamental rights such as the freedom of religion and conscience and that, consequently, the elements of delegated legislation were not met. Thus, the Court held that there was no legal basis for banning headscarves at schools.

#### 4. PRINCIPLE OF PROPORTIONALITY: HOOLIGANS<sup>103</sup>

In Switzerland, the cantons established the Concordat on Measures to Combat Violence during Sports Events (so-called “Hooligan-Concordat”) which has been in force in all cantons since 15 November 2007. On 2 February 2012, the Hooligan-Concordat was revised. It implemented further-reaching measures against persons involved in violence. Inter alia, the revised concordat stipulated that

- exclusion orders (*Rayonverbot*) must last at least one year under any given circumstances; and
- the duration of the reporting obligation (*Meldeauflage*) must mandatorily be doubled if such obligation is breached without excusable grounds.

Against the accession of the cantons of Aargau and Lucerne two complaints were filed before the Federal Supreme Court. The Court examined, inter alia, the revised provisions regarding the measures mentioned above by way of abstract judicial review.

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<sup>103</sup> BGE 140 I 2.

The Court reasoned that exclusion orders restrict the right to freedom of movement (Article 10 II Constitution). Such measures must – apart from being based on a legal basis and pursuing a legitimate public interest – be *proportionate*. Further, the Court reasoned that, on one hand, the revised provision completely bars authorities from issuing *any* exclusion order in less severe cases where only orders of less than one year would be proportionate. On the other hand, the minimum time limit of the exclusion order prevents the authorities from adjusting the measures on a case-by-case basis as required by the principle of proportionality. Thus, the Court held that the respective provisions violate the principle of proportionality.

Similarly, the Court questions whether a duplication of the reporting obligation is the least restrictive measure under any circumstances. Rather, the provision constitutes a rigid automatism that does not leave any margin of discretion to the authorities in the individual cases. The Court consequently held that such automatism violates the principle of proportionality. It rescinded the mentioned provisions provision of the Hooligan-Concordat.

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1 This chapter is an updated version of a treatise previously published by the author, see FELIX UHLMANN, The principle of effective legal protection in Swiss administrative law, in: Zoltán Szente/Konrad Lachmayer (Ed.), The Principle of Effective Legal Protection in Administrative Law, A European Comparison, London 2017, pp. 304.





# I. Legal Sources

## 1. HISTORICAL DEVELOPMENTS

The Swiss Constitution of 1874 guaranteed only a limited range of procedural rights (for example, the right to be sued at one's home court). It should be noted that it also guaranteed a narrow range of substantive fundamental rights. However, over the course of the 20<sup>th</sup> century, the Swiss Federal Supreme Court developed many procedural guarantees, such as the right to be heard and other principles of effective legal protection.<sup>2</sup> The legal basis which the court relied on to develop these rights was the equal protection clause.<sup>3</sup>

Shortcomings of legal procedure at that time typically involved a deficit in independent judicial control. Many Swiss cantonal and federal rules only granted limited access to courts in administrative matters. The typical legal recourse involved an appeal to the hierarchically higher administrative body, including the Federal Council or the executive of the cantons.<sup>4</sup> Appeals to the Swiss Federal Supreme Court were possible in some cases and excluded or reduced to a review with very limited scrutiny in others. The Swiss system which did not permit access to independent and full judicial review in administrative matters was incompatible with the European Convention of Human Rights (ECHR) as far as its protection of "civil rights" was concerned. Such civil rights included matters that were considered "administrative" under Swiss law such as disputes concerning bar exams; the withdrawal of a professional licence; disputes on the use of public grounds by private parties for economic aims; or claims for damages and satisfaction based on state liability. Switzerland therefore had to extend judicial control. Such developments,

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2 REGINA KIENER/BERNHARD RÜTSCHÉ/MATHIAS KUHN, *Öffentliches Verfahrensrecht*, 2<sup>nd</sup> edition, Zurich/St. Gallen 2015, n. 35.

3 ULRICH HÄFELIN/GEORG MÜLLER/FELIX UHLMANN, *Allgemeines Verwaltungsrecht*, 7<sup>th</sup> edition, Zurich/St. Gallen 2016, n. 576; BGE 134 I 23, consideration 9.1.

4 RENÉ RHINOW/HEINRICH KOLLER/CHRISTINA KISS/DANIELA THURNHERR/DENISE BRÜHL-MOSER, *Öffentliches Prozessrecht, Grundlagen und Bundesrechtspflege*, 3<sup>rd</sup> edition, Basel 2014, n. 412.

among other factors, led to the framework of the current Swiss Constitution and to a reform of the Swiss judicial process.<sup>5</sup>

## 2. CONSTITUTIONAL FRAMEWORK

The Swiss Constitution<sup>6</sup> dedicates three Articles to the codification of procedural rights: Articles 29, 29a, and 30. Articles 29 and 30 Constitution concern rights *within* a certain procedure and Article 29a Constitution that was introduced later on and has been in force since 1 January 2007 stipulates a right to (judicial) proceedings. Together, these provisions are the cornerstone of legal protection of due process in Switzerland. They are part of the framework of fundamental rights guaranteed by the Swiss Constitution.

Article 29 Constitution sets out the general procedural guarantees which apply in Switzerland:

*“Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.”*

These guarantees apply in any proceedings, whether they are administrative or in court, concerning civil, criminal, constitutional, or administrative matters. Article 29 Constitution also explicitly establishes that these procedural guarantees encompass fundamental rights such as the right be heard (II) or the right to legal aid (III). It also includes the term “fair treatment” that allows the courts to further develop procedural rights.

Article 30 Constitution requires that specific additional guarantees must be met in judicial proceedings. According to this provision, a court must be legally constituted, competent, independent, and impartial. Its hearings must be open to the public and judgements shall be made public<sup>7</sup>.

Article 29a Constitution sets out the conditions for access to court:

5 RHINOW et al., n. 419; see also THOMAS FLEINER/ALEXANDER MISIC/NICOLE TÖPPERWIEN, *Constitutional Law in Switzerland*, Alphen aan den Rijn 2012, p. 107.

6 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.admin.ch](http://www.admin.ch) (<https://perma.cc/M8UJ-S369>).

7 The law may restrict this guarantee and does particularly so in administrative matters. Hence, parties requesting hearings typically rely on Article 6 ECHR.

*“In a legal dispute, every person has the right to have their case determined by a judicial authority. The Confederation and the Cantons may by law preclude the determination by the courts of certain exceptional categories of case.”*

The term “legal dispute” must be defined by relevant procedural law and constitutional practice. Only the law itself may restrict access to court. The Constitution establishes that this may only be done in exceptional circumstances. Article 29a Constitution was clearly inspired by Article 19 IV of the German *Grundgesetz* (*Rechtsweggarantie*).<sup>8</sup>

The Constitution remains silent on the question of the scope of judicial review. Article 29a Constitution is generally understood as guaranteeing only a single, first instance review of the facts and of the law by a court. The right to appeal, especially the right to appeal to the Swiss Federal Supreme Court, cannot be deduced from Article 29a Constitution. However, this right is often guaranteed by more specific provisions of the Constitution such as the right to appeal in penal matters (Article 32 Constitution) or the general (but not universal) right to access the Swiss Federal Supreme Court (Article 191 Constitution). It is also unequivocal that an (administrative) court may not review questions of administrative discretion;<sup>9</sup> this is not a matter that comes under Article 29a Constitution’s guarantee of a review of the facts and the law.

### 3. FEDERAL ACT ON ADMINISTRATIVE PROCEDURE AND CANTONAL LAWS

Specific regulation on administrative procedure is laid down in federal and cantonal legislation. The Administrative Procedure Act<sup>10</sup> is relevant for administrative decisions of the federal authorities. It is also relevant in part for the Swiss Federal Administrative Court. There are also acts on the Swiss Federal Administrative Court<sup>11</sup> and the Swiss Federal Supreme Court.<sup>12</sup>

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8 Article 19 IV Grundgesetz reads, in its English translation, as follows: “Should any person’s rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. [...]”

9 RHINOW et al., n. 1120.

10 Federal Act on Administrative Procedure of 20 December 1968, SR 172.021.

11 Federal Administrative Court Act of 17 June 2005, SR 173.32.

12 Federal Supreme Court Act of 17 June 2005, SR 173.110.

The Swiss cantons have their own codes of administrative procedure. These codes are applicable not only to cantonal acts based on cantonal law but also to cantonal acts which apply federal law (or which apply both cantonal and federal law). Many federal laws are implemented by the cantons (e.g. spatial planning, traffic safety, migration). Although the cantons are not legally required to adhere to definitions in federal law such as the definition of an administrative act (or the consequences for legal protection that follow from the federal approach), there are no noticeable definitional differences of an administrative act in cantonal law. Hence, the definition of administrative acts is virtually the same in both federal and cantonal procedures. In many other aspects, federal and cantonal acts on administrative procedure are quite likewise.

## II. Procedural Rights and Principles

### 1. ADMINISTRATIVE ACTION

In Switzerland, legal protection from administrative action is traditionally linked to the nature of the administrative action. Administrative action carried out in the form of administrative decisions, also called rulings (*Verfügungen, decisions, decisioni*), typically trigger legal protection, either from the administration or the courts, or sometimes from both.<sup>13</sup> Under federal law, an administrative decision must be notified to the parties in writing. It “*must state the grounds on which [it is] based and contain instructions on legal remedies*” (Article 35 I Administrative Procedure Act).

This leads to the question of what kind of administrative action must be clothed in the form of an administrative decision. The answer is that administrative decisions must be issued where the administration’s actions determine the rights and obligations of private individuals. This was explained in the chapter on Administrative Law.<sup>14</sup>

Article 5 Administrative Procedure Act is the relevant provision for the definition of administrative decisions. This Article also specifies that enforcement measures, interim orders, decisions on objections, appeal decisions etc. fall under the scope of this clause. It may be that an administrative decision is simply declaratory, clarifying the extent, existence, or non-existence of public law rights or obligations (e.g. confirming that a certain business practice is within the boundaries of the laws on environmental protection). Such a declaratory ruling must be issued if the applicant has an interest that is worthy of protection.<sup>15</sup>

The link between administrative decisions and legal protection for individuals illustrates why private parties are looking for – or in the words of one

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<sup>13</sup> KIENER/RÜTSCHKE/KUHN, n. 1245; see FLEINER/MISIC/TÖPPERWIEN, p. 284.

<sup>14</sup> See pp. 204.

<sup>15</sup> See Article 25 II Administrative Procedure Act.

scholar, “*hunting for*”<sup>16</sup> – this specific form of administrative action. Other types of state action not clothed in the form administrative decisions are real acts (*Realakte, actes matériels, atti materiali*). They encompass acts such as teaching in schools, treatments in hospitals, police action, public information etc. Legal protection against such acts was traditionally weak. People could rely on state liability claims but this presented disadvantages.<sup>17</sup> Thus, the federal legislator introduced Article 25a Administrative Procedure Act in order to improve legal protection: this provision establishes that everyone with an “interest worthy of protection”<sup>18</sup> may require that an administrative decision is taken on real acts.

The Swiss cantons are not bound by the new Article 25a Administrative Procedure Act within their own domain. In practice, cantons have taken a variety of responses to the introduction of this Article. In some cases, they have copied the provision; in others they have either opted to enact their own independent solutions (such as allowing for a direct appeal against real acts) or made no change at all. It is disputed whether the latter is still permissible under Article 29a Constitution: this provision guarantees judicial protection in any legal dispute and arguably, in those cantons which have still introduced no change, there is currently only limited legal protection available against real acts. The Swiss Federal Supreme Court has not yet made a ruling on this issue.

## 2. RIGHT TO BE HEARD

As explained above, when administrative bodies act through an administrative decision, a number of procedural rights are triggered.<sup>19</sup> The most important guarantee is the right to be heard.<sup>20</sup> It applies in administrative and court proceedings.

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16 SERGIO GIACOMINI, Vom „Jagdmachen auf die Verfügung“ – Ein Diskussionsbeitrag, Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 1993, p. 237, p. 239.

17 UHLMANN, p. 307.

18 See BGE 121 I 87, consideration 1b.

19 For simplicity, the following quotations only contain constitutional federal law. The legal situation in the cantons is very similar, partly because of the compulsory nature of constitutional law, partly because of the example set out by federal law.

20 FLEINER/MISIC/TÖPPERWIEN, p. 255.

The right to be heard encompasses the right to access relevant documents, the possibility to propose witnesses and other means of evidence, and the right to be informed of the possible administrative decision beforehand etc. As mentioned before, the right to be heard is granted by the Swiss Constitution. Procedural law and court practice further concretize the right in specific situations, as well as providing for restrictions on the right in cases which involve relevant third party interests (e.g. business secrets) or state interests (e.g. state security). The imposition of such restrictions often necessitates the striking of a fair balance between differing interests. If a restriction is necessary, courts will try to summarize the content of the document for the relevant party in order to allow a fair discussion on the relevant facts of the case. The court itself usually has access to all documents – cases where documents have not been released to the courts are extremely rare.<sup>21</sup>

Although access to documents is probably the most important aspect of the right to be heard, it should be noted that the scope of this right goes much further. The right may also be violated if relevant evidence is rejected by the court, for example the refusal to hear witnesses (although note that witness hearings are relatively rare in administrative cases) or the refusal to admit expert evidence. The court must also effectively take the private parties' arguments into account. If a decision has already been taken before considering the parties' arguments, the right to be heard is clearly violated. Further, only when the authorities give oral or written reasons for their decisions can the person concerned determine whether his or her argument has been heard or taken into account. In the authority's decision, it must also deal with the private parties' arguments, although this may be done briefly. The reason for the decision must also be sufficiently clear in order to allow an appeal.

The right to be heard also demands that the administrative process is sufficiently transparent. The authority must make it very clear when it is acting through the form of an administrative act. This means that the private parties know when the process has ended; and if no administrative act has been issued they will also know that the process is still ongoing. This obligation goes hand in hand with the duty of the authority to be transparent about the

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21 A notorious example involved constructions plans on nuclear weapons that the Federal Council, i.e. the federal government, ordered to be destroyed during ongoing criminal proceedings; see the investigation of the Swiss Parliament (Fall Tinner, *Rechtmässigkeit der Beschlüsse des Bundesrats und Zweckmässigkeit seiner Führung*, Bericht der Geschäftsprüfungsdelegation der Eidgenössischen Räte vom 19. Januar 2009 [Federal Gazette No 27 of 19 January 2009, p. 5007]).



process and the possible measures it intends to use. The authority is not permitted to be unduly vague about its actions nor may it “surprise” the private parties with the procedure it follows. The latter point is illustrated by a recent decision of the Swiss Federal Supreme Court: The local authorities had invited individuals who had applied to be naturalised to an informal “get-to-know” session. They had not made it clear that they planned to test the applicants on their knowledge of Swiss culture, history, and more at this meeting. The Federal Supreme Court considered that although it is acceptable to expect naturalization applicants to have a basic knowledge of Switzerland, it is not acceptable to test that knowledge without first giving them proper notice.<sup>22</sup> This case also shows that the right to be heard is a flexible instrument that the courts can utilise to intervene against any form of administrative process that does not appear fair.

### 3. RIGHT TO A DECISION WITHIN REASONABLE TIME

A fair process also includes the right to have a decision taken within a reasonable time (Article 29 Constitution). If the authority does not act within a reasonable time, an appeal may be filed at any point. The reasonableness must be determined in light of all circumstances of the case. The authority may consider the complexity of the case, the urgency of the matter, and the behaviour of the parties. However, any internal issues of the relevant authority, i.e. shortage of personell, are certainly not valid grounds for delay.

### 4. RIGHT TO LEGAL AID AND TO COUNSEL

A last important aspect of the overall fairness of the procedure is the right to legal aid.<sup>23</sup> The right to legal aid and to the assistance of a legal counsel if necessary is clearly guaranteed by Article 29 III Constitution:

*“Any person who does not have sufficient means has the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is*

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<sup>22</sup> BGE 140 I 99, considerations 2 and 3.

<sup>23</sup> FLEINER/MISIC/TÖPPERWIEN, p. 256.

*necessary in order to safeguard their rights, they also have the right to free legal representation.”*

The aid can only be granted if a reasonable person would consider the case to have a sufficient chance of success. The need for legal counsel depends on the complexity of the matter and the abilities of the private party: if that person may represent him or herself without great difficulties before the relevant authority, the request for free legal representation will be denied. If the parties are covering the costs of legal representation themselves, it is possible to be represented. However, there is no obligation to employ a lawyer or another specialist. Generally, there are no procedures in Swiss administrative law in which legal representation is compulsory. There are very few exceptions, where the respective authority may order that the parties must appoint one or more representatives (e.g. Article 11a Administrative Procedure Act). In cases involving administrative and constitutional law, parties may (even before the Swiss Federal Supreme Court) be represented by anybody with capacity to act.

## **5. RIGHT TO APPEAL**

As previously discussed,<sup>24</sup> the form of an administrative decision implies that there is a legal remedy available against that decision. The administrative decision must contain instructions on the available legal remedies. Depending on the relevant administrative procedure, the appeal may go directly to a court or instead first to a higher administrative authority and then to a court. Exceptions from legal recourse must be clearly stated in the law and are restricted to exceptional cases. In practice, these exceptions concern highly political matters, for example the issuing of a permit to build a nuclear power station or matters of national security (Article 32 I lit. a and e Administrative Court Act). Some other exceptions concern technical matters or matters that seem little suited for court decisions such as financial bonuses for civil servants (Article 32 I lit. c Administrative Court Act). Overall, the exceptions are narrowly circumscribed by the legislator, as demanded by the Swiss Constitution.

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24 See pp. 225.

Matters are more complicated if third parties intervene. Whether they are granted a right to appeal largely depends on the way the term “party” is defined. Any party to the procedure may launch an appeal (and has the right to participate in the proceedings from the very beginning). The Administrative Procedure Act defines parties, i.e. the holders of the procedural rights, in terms of their material interest in participating: “*Parties are persons whose rights or obligations are intended to be affected by the ruling.*”<sup>25</sup> A similar wording is used for the definition of *locus standi* in an appeal. The right to appeal is granted to anyone that is “*specifically affected by the contested ruling*” and “*has an interest that is worthy of protection in the revocation or amendment of the ruling*” (Article 48 I Administrative Procedure Act). Participation in the first-instance proceedings is generally a requirement for a party to possess the legal standing to lodge an appeal. Typical third parties are neighbours and – more restricted – competitors.

## 6. RIGHT TO CHALLENGE LEGISLATION

Most legislation can be challenged in a concrete case before a court (or before an administrative body). A court will then proceed to conduct a two-tier review. First, it will examine whether the normative basis is legal (*vorfrageweise, inzidente, konkrete Normenkontrolle*). If this test is met, the court further examines whether the law was applied correctly.<sup>26</sup>

Article 190 Constitution noticeably prevents judicial review of legislation, requiring that federal laws be applied even in the case that the court finds the law unconstitutional.

A direct challenge of legislation (*abstrakte, direkte Normenkontrolle*) is possible where cantonal laws and ordinances are at issue. The latter includes internal normative acts (*Verwaltungsverordnungen*) if these affect private parties and their review proves to be impossible or impractical in a concrete case.<sup>27</sup> The cases that challenge cantonal laws are typically decided directly by the Swiss Federal Supreme Court if there is no legal remedy at the cantonal level. The Swiss Federal Supreme Court may quash cantonal laws, thus rendering them fully or partially invalid. Even if the court does not invalidate cantonal

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25 Article 6 Administrative Procedure Act also states that “*other persons, organizations or authorities who have a legal remedy against the ruling*” are parties.

26 RHINOW et al., n. 707 et seq.

27 BGE 128 I 167, consideration 4.3; BGE 122 I 44, consideration 2a.

legislation, it may give important guidelines for the cantonal authorities how to apply the law in order to stay within the constitutional boundaries. This was e.g. the case for police legislation from Zurich. Cantonal constitutions are not subject to judicial control as they must be approved in a procedure by the Swiss Parliament (Article 51 II and 172 II Constitution).<sup>28</sup> There is no direct challenge against federal laws and ordinances.

The legal standing for challenging cantonal legislation exists in a far broader manner than in cases concerning administrative decisions. A person may challenge legislation if she or he can claim that there is a possibility – even if a remote one – that she or he will be affected by the act (*virtuelles Betroffensein*).<sup>29</sup> An appeal against legislation itself does not preclude an individual from later invoking a legal remedy against an individual administrative decision, which applies the law. In this respect, a cantonal law may be challenged twice: first in abstract terms regarding how the act could be applied and later regarding how the act was actually applied in a concrete case.

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28 KIENER/RÜTSCHÉ/KUHN, n. 1780.

29 KIENER/RÜTSCHÉ/KUHN, n. 1740.

# III. Institutional Framework

## 1. ADMINISTRATIVE AUTHORITIES

The administrative authorities themselves play a vital role in providing effective legal protection in administrative law. As was briefly explained above,<sup>30</sup> before the introduction of the current Swiss Constitution often only hierarchically higher administrative bodies were competent to grant legal protection against action taken by bodies lower in rank. This was problematic regarding the fact that these superior bodies were not institutionally independent. However, it is important not to underestimate the level of protection these bodies offered. First, these bodies, often affiliated with the office of Justice of the canton or at the very least staffed with qualified lawyers, developed high standards of judicial protection. Secondly, the superior administrative bodies are usually well aware of the daily work of the lower units, hence strengthening administrative oversight. Finally, administrative control within the public administration has the practical advantage of allowing full scrutiny: whereas courts typically do not review questions of administrative discretion, supervisory administrative bodies show less if any restraint.<sup>31</sup>

The Swiss cantons also execute a substantial amount of federal law: the typical legal recourse against such action first involves going to the hierarchically higher administrative bodies. This can potentially encompass up to three instances, including a review by the cantonal executive.<sup>32</sup> Following this, the applicant may turn to the cantonal administrative courts. These courts must uphold Article 29a Constitution meaning that they must at least conduct a full review of questions of law and facts. After a review by the cantonal administrative courts, most cases can be taken to the Swiss Federal Supreme Court (*Bundesgericht, Tribunal fédéral, Tribunale federale*). The Swiss Federal Supreme Court typically only reviews questions of law.<sup>33</sup>

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30 See pp. 221.

31 KIENER/RÜTSCHÉ/KUHN, n. 13.

32 KIENER/RÜTSCHÉ/KUHN, n. 42.

33 See the grounds for appeal in Articles 95 et seq. Federal Supreme Court Act.

Administrative acts of the federal administration can be taken to the Swiss Federal Administrative Court (*Bundesverwaltungsgericht, Tribunal administratif fédéral, Tribunale amministrativo federale*). Judicial control by a higher administrative body is the exception rather than the rule for action taken in the federal system. However, it does have some practical significance in areas that are excluded from judicial protection such as measures to safeguard internal security; in these cases, control may be partly exercised by the Swiss Federal Council. According to existing legislation, the Federal Administrative Court reviews questions of law, facts, and administrative discretion. However, judicial practice over time has led to the courts typically exercising some restraint in the latter area; part of the rationale here is that cases involving administrative discretion often require specialised technical understanding, or knowledge of the local circumstances or subjective factors (for example, this may be the case for administrative decisions regarding exams).<sup>34</sup> As a general rule, decisions of the Swiss Federal Administrative Court may be challenged before the Swiss Federal Supreme Court. However, some subject matter areas such as cases on immigration and asylum, exams, and subsidies are fully or partially excluded from Federal Supreme Court review (Article 83 lit. c and t Federal Supreme Court Act), hence rendering the Federal Administrative Court the court of last national instance.

## 2. COURTS

As highlighted above, judicial control by the courts is a constitutional guarantee under Article 29a Constitution. Hence, most administrative acts may be challenged before an administrative court directly (like the acts of the federal administration) or indirectly via recourse to higher administrative bodies (e.g. acts of the cantonal administration).<sup>35</sup> The law may only “preclude the determination by the courts of certain exceptional categories of case” (Article 29a Constitution).

The most important restriction on judicial control in Switzerland is not one of the previously outlined exceptions; it is Article 190 Constitution. According to that provision, the “Federal Supreme Court and the other judicial authorities apply the federal acts and international law”. As a consequence of this provision, the constitutional review of federal laws is not permitted, or more

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<sup>34</sup> HÄFELIN/MÜLLER/UHLMANN, n. 444.

<sup>35</sup> See, for an overview, FLEINER/MISIC/TÖPPERWIEN, p. 110.

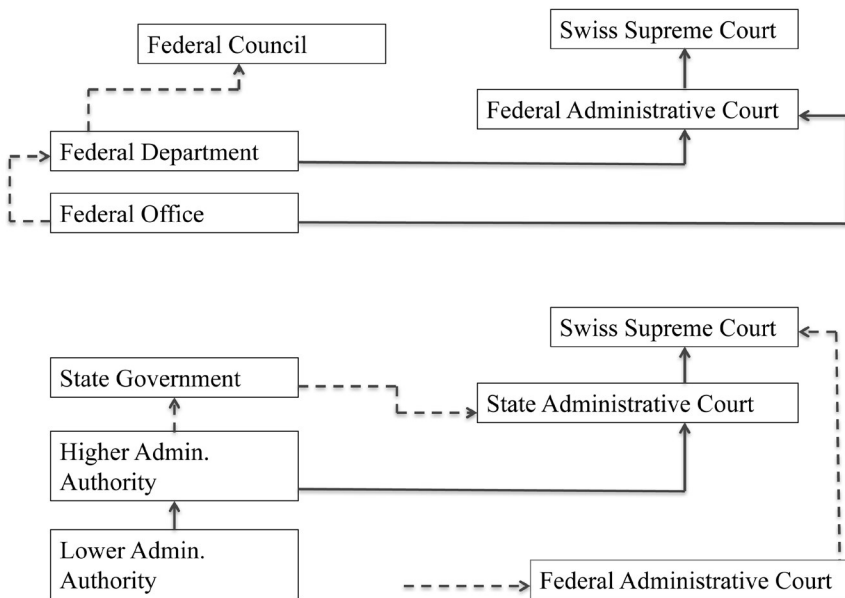


Figure 1: *Appeal System before Cantonal (State) and Federal Authorities*<sup>36</sup>

precisely, Swiss courts must apply federal laws even if they are considered to be unconstitutional.<sup>37</sup> Judicial practice has carved out some exceptions to court abstinence, such as in the case of federal laws, which violate the ECHR. The Swiss Federal Supreme Court will not apply a federal law in conflict with the ECHR. Still, a substantial part of federal legislation is not subject to court nullification in the case of a violation of the Constitution. Swiss cantons, e.g., cannot sue the federal government for overstepping its competences if federal action is based on federal law.

The rationale behind Article 190 Constitution is that the last word on questions of constitutionality should not be given to a court but to the legislator itself, as this is the authority with the highest degree of democratic legitimation. The federal legislator is not above the Constitution but above constitutional control; it is officially bound by the Constitution and must respect it. This means that the federal Parliament itself must decide upon questions of the constitutionality of federal laws – which it regularly does, supported by the

<sup>36</sup> UHLMANN, p. 313.

<sup>37</sup> KIENER/RÜTSCHÉ/KUHN, n. 1763.

expert opinion of the Federal Department of Justice. Several attempts by the Swiss government to abolish Article 190 Constitution have failed; Parliament has thus far refused to allow a shift in power to the courts, which in my view is regrettable.

Notably, Switzerland does not have a special constitutional court. Instead, constitutional questions may be decided by every Swiss court including cantonal courts and courts that decide upon civil or penal matters. In concrete cases, constitutional questions may even be decided by administrative bodies. Hence, Switzerland has opted for a so-called “diffuse” system of constitutional review,<sup>38</sup> closer to the US court system than to the German model of concentrated constitutional review.

According to the Administrative Procedure Act, “[t]he appellate authority shall itself make the decision in the case or in exceptional cases shall refer the case back to the lower instance and issue binding instructions” (Article 61 I Administrative Procedure Act). A referral back to the lower instance administrative authority is typically made if further fact-finding has to be done by the lower instance or if the lower instance may use its discretion to decide the case.<sup>39</sup>

Both appellate administrative authorities and the courts may grant interim relief. Typically, an appeal automatically has suspensive effect.<sup>40</sup> As the Administrative Procedure Act declares, a court may also take “other precautionary measures [...] to preserve the current situation or to temporarily safeguard interests that are at risk” (Article 56 Administrative Procedure Act). Swiss courts typically approach the question of whether to grant suspensive effect or precautionary measures by conducting a balancing test between the interests of the state and those of private parties. If they believe that the eventual result of the case is clear, they also may take the probable outcome into account in considering the granting of such measures.<sup>41</sup> Such decisions are often of great practical importance: cases on public procurement often do not continue once the public authority has legally concluded the contract with its chosen private partner; if the suspensive effect is denied, the claimants may only recover their costs from the procedure but not conclude the contract.

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38 KIENER/RÜTSCHÉ/KUHN, n. 1719.

39 KIENER/RÜTSCHÉ/KUHN, n. 1649 et seq.

40 For details see RHINOW et al., n. 680 et seq.

41 KIENER/RÜTSCHÉ/KUHN, n. 1330.



### 3. OTHER BODIES AND PROCEDURES

In the federal system, special committees which serve as courts have been abolished, with the exception of the Independent Complaints Authority for Radio and Television. The committees have been replaced by the Federal Administrative Court which is competent in all matters decided by the federal administration.<sup>42</sup> In the cantons, special committees still exist, most notably in the areas of construction, taxes and culture.<sup>43</sup>

In some cantons, the institution of the Ombudsman has some practical significance.<sup>44</sup> On the federal level, an initiative to introduce the Ombudsman failed. There are however two independent, personalised functions of control of state-regulated prices (*Eidgenössischer Preisüberwacher*) and of data protection and transparency of the public administration (*Eidgenössischer Datenschutz- und Öffentlichkeitsbeauftragter, EDÖB*). Both may resort to the use of legal remedies but the most efficient tools available to them are negotiation with the administration and informing the public on its rights. The “EDÖB” may also initiate legal proceedings against private parties; he has done so in an important case against Google (google street view)<sup>45</sup>.

Another route through which parties can challenge administrative action is Alternative Dispute Resolution (ADR), recently introduced into the Administrative Procedure Act. Article 33b I Administrative Procedure Act establishes that the court “*may suspend the proceedings with the consent of the parties in order that the parties may agree on the content of the ruling*”. It may encourage the parties to reach an agreement by appointing a neutral mediator. The provision has not been in force long enough to make any useful comment on its practical consequences.

### 4. EUROPEAN PERSPECTIVE

As Switzerland is not a member of the EU, EU law is not directly applicable in Switzerland. However, it may be relevant due to the bilateral treaties or due to an autonomous decision by the Swiss authorities to implement EU law

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42 RHINOW et al., n. 787 et seq. and 1416.

43 KIENER/RÜTSCHKE/KUHN, n. 1402.

44 HÄFELIN/MÜLLER/UHLMANN, n. 1768 et seq.

45 BGE 138 II 346.

(*autonomer Nachvollzug*).<sup>46</sup> EU law is largely irrelevant in terms of the substantive legal protection available in Switzerland; the procedure is predominantly dictated by domestic Swiss law.

Switzerland is currently in the process of negotiating an institutional agreement to ensure the more consistent and efficient application of its present and future agreements with the EU. If Switzerland can conclude such an institutional agreement with the EU, questions of jurisdiction would be a core element. An agreement would clearly influence the administrative process in matters involving EU law. However, negotiations do not appear likely to come to a successful end any time soon.

In contrast, the legal protection now available in administrative matters has certainly been influenced by the jurisprudence of the European Court of Human Rights, namely to grant court review in administrative matters. As explained above, it was deemed insufficient for protection from the administration to only encompass “civil matters”; it is necessary for such protection to also apply to areas technically falling under Swiss administrative law. The European Court of Human Rights is still influencing administrative procedure in Switzerland, recently for example in cases, which concern the right to reply. The Swiss Federal Supreme Court has now shaped a practice that seems to be consistent with European Court of Human Rights requirements: all documents submitted in court procedures must be forwarded to the parties.<sup>47</sup> In administrative procedures this requirement extends to all relevant documents submitted to authorities and courts.

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46 See the chapter on International Relations, pp. 165.

47 See BGE 137 I 195.

## IV. Landmark Cases

### 1. NECESSITY OF ISSUING AN ADMINISTRATIVE

#### DECISION: IWB<sup>48</sup>

X was a tenant in a Basel property. For two years, its owner has not paid the bills for the general electricity supply of the building issued by the canton of Basel-Stadt industrial works (*Industrielle Werke des Kantons Basel-Stadt*, IWB). In a letter of formal notice to the owner, IWB announced that it would stop electricity supply should the outstanding amount not be paid in a certain period of notice. The owner allowed the period to expire without paying. Then, IWB informed the tenants of the property about the upcoming supply stop via ordinary (i.e. non-registered) mail dated 9 April 2008. Energy supply was then stopped between 23 April and 30 May 2008, for the elevator and hot water boiler. After IWB was informed about a pregnant woman living in the property, it resumed electricity supply.

Acting on behalf of X, the Basel tenants' association appealed before the superior administrative body (the Building Department) on 29 May 2008. On 14 July 2008, the Department dismissed – i.e. it did not consider on the merits – the request to resume supply since the stop was already rescinded and rejected the prayer for compensatory relief. X unsuccessfully challenged this decision before the cantonal government (the *Regierungsrat* of the canton of Basel-Stadt) and, subsequently, before the Appellate Court of the canton of Basel-Stadt.

X brought the case before the Swiss Federal Supreme Court, claiming that his constitutional right to be heard was violated because the supply stop was not issued in the form of an administrative act and he was not granted the right to take position on the planned measure beforehand although being tenant of the property.

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48 BGE 137 I 120.

The Court emphasized that IWB is legally obliged to supply electricity. According to the statutory law, supply may only be refused contingent, *inter alia*, if it does not constitute unreasonable hardship for third parties such as the owner's tenants. Hence, the Court reasoned that ordering such refusal interferes with the tenants' rights. The order thus qualifies as administrative act and must be issued as such rather than as real act. Consequently, not only property owners but also tenants and other affected persons must be heard beforehand and be granted the right to express their objections against the admissibility of the planned supply stop (in particular with respect to the unreasonable hardship imposed on them). With respect to the information letter of 9 April 2008, the Court held that it was no sufficient basis for laypersons to exercise their rights. Hence, the Court found that X's right to be heard was violated.

## 2. PROCEDURAL FAIRNESS: NATURALISATION<sup>49</sup>

Spouses A and B as well as their children C and D applied for citizenship in the municipality of *Weiningen* (canton of Zurich). With letter dated 8 October 2012, the municipal Naturalization Commission invited the family for a conversation which, according to the invitation letter, should serve the purpose of getting to know the applicants and their motivation for the naturalization process. In reality, however, the Commission assessed the suitability of the applicants for citizenship. In the following, the municipality rejected their application on the grounds that they are not well integrated into Swiss lifestyle; lacked command of the German language; and could not answer simple geographical and civic questions. A, B, C, and D unsuccessfully challenged this decision before the District Council (*Bezirksrat*), i.e. the hierarchically higher administrative body, and, subsequently, the Administrative Court of the canton of Zurich.

Before the Swiss Federal Supreme Court, A, B, C, and D argued that their right to fair treatment (Article 29 I Constitution) was violated by being invited to a personal interview and, instead, unexpectedly being examined.

The Court found that procedural guarantees of the Constitution apply in the naturalization process, namely the right to be heard (Article 29 I Constitution) as one aspect of procedural fairness, which also entails the right to receive

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49 BGE 140 I 99.

information on the formal and substantive prerequisites of the naturalization process. The Court also stated that according to the principle of good faith (Article 5 III Constitution), parties could expect the state not to deviate from the announced course of proceedings without prior notice.

Further, the Court stated that it is within the municipal discretion to ask questions on general knowledge at *some* point during the naturalization process; however, because of the early stage of the proceedings and the invitation letter, A, B, C, and D could legitimately expect that such examination would take place later on rather than during the (early) personal interview and that they could prepare beforehand. Consequently, the Court held that the municipality violated the right to fair proceedings and to be heard, respectively, as well as the principle of good faith.

Due to the formal nature of the right to be heard, the Court repealed the challenged decision and referred the case back to the municipality for further fact finding and in order to adopt the required procedural steps.

As already stated above, this case also shows that the right to be heard is a flexible instrument that the courts can utilise to intervene against any form of unfair administrative process and that is not restricted to certain case groups. It is important to note that Article 29 Constitution applies to *all* state proceedings in civil, penal, and public law within which a decision on individual rights and duties is rendered, be it before Courts or non-judicial bodies including the government and parliament.<sup>50</sup>

### 3. DIRECT CHALLENGE OF LEGISLATION: POLICE ACT OF ZURICH<sup>51</sup>

On 5 July 2006, the Parliament of the canton of Zurich adopted the Police Act (*Polizeigesetz*), a cantonal law which was subsequently approved by the voters. The adoption of the Police Act should create statutory bases for the performance of the duties and measures of the police force in order to maintain public order and safety. Private persons, a lawyer's association, and political parties challenged the Police Act directly before the Swiss Federal Supreme Court (*abstrakte, direkte Normenkontrolle*), claiming that various

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<sup>50</sup> See also GIOVANNI BIAGGINI, *Kommentar Bundesverfassung der Schweizerischen Eidgenossenschaft*, 2<sup>nd</sup> edition, Zurich 2017, Article 29 n. 3.

<sup>51</sup> BGE 136 I 87.

provisions violate the Federal Constitution, the European Convention on Human Rights (ECHR), and the International Covenant on Civil and Political rights (ICCPR).

In general, the Court reasoned that it is crucial for the constitutionality of cantonal legislation whether it is possible to interpret the cantonal provision in a way that is consistent with the constitutional guarantees invoked.

It is important to note that whereas the Court can only decide on whether to rescind or uphold the challenged legislation, its considerations predetermine the future (constitutional) application of the Police Act: The authorities must act according to the restrictions set out in the considerations of the Court when applying the Police Act in the future, otherwise administrative acts or real acts based on the Police Act will be quashed if challenged.

The Court then examined the procedural aspects of the police custody-regime in relation to the provisions concerning the requirements for taking a person into police custody. As the Police Act did not entail any provisions on the legal protection, the general rules of legal protection in the canton of Zurich applied, i.e. the affected person had to challenge the custody before the superior administrative body. Only after having exhausted these administrative remedies an appeal to the Administrative Court of the canton of Zurich, i.e. a judicial body, was possible. The Court reasoned that Article 5 IV ECHR<sup>52</sup> does not bar the member states from implementing administrative control before granting access to judicial proceedings, contingent a judicial decision is rendered “speedily”. However, Article 31 IV Constitution states that any person who has been deprived of their liberty by a body other than a court has the right to have recourse to a court *at any time* which shall then decide as quickly as possible on the legality of their detention. The Court reasoned that the notion “at any time” means the Court can be invoked *directly* without prior proceedings before administrative bodies. Thus, Article 30 IV Constitution goes beyond the general right to judicial proceedings according to Article 29a Constitution. As a result, the Court held that the Police Act violates Article 31 IV Constitution and requested the cantonal legislator to

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52 Article 5 IV ECHR states that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

enact provisions on the legal protections that suffice under the constitutional guarantees.<sup>53</sup>

#### 4. “LEGAL SAUSAGE SALAD” OR THE IMPORTANCE OF THE ECHR<sup>54</sup>

On 24 February 1998, attorney-at-law R appealed against a civil law decision of a court of first instance to the High Court of the canton of Zurich. His appeal described the proceedings, the challenged decision, the opposing party, and its counsel by various improper expressions. Inter alia, he called the proceedings a “*charade*” (literally “*monkey theatre*”, *Affentheater*) and a “*legal sausage salad*”; described the statement of claim as “*ludicrous*” and “*mad-brained*”; designated the decision as “*sheer nonsense*”; called the court of first instance a “*body of a rogue state*”; and stated that the opposing counsel was “*blathering of the law*”. The High Court filed a complaint to the Supervisory Commission for Attorneys-at-Law (*Aufsichtskommission über die Anwältinnen und Anwälte*) which initiated a proceeding against R. Later, the (then existing) Court of Cassation of the canton of Zurich held that the High Court’s decision violated the right to be heard of the party represented by R.

On 4 November 1999, the Commission imposed a fine on R and barred him from exercising his profession for three months because the expressions used in his first file were inadmissible under professional ethics and practice rules. R’s appeal to the High Court was not successful. He brought the case before the Swiss Federal Supreme Court, claiming that the High Court violated Article 6 I ECHR by not carrying out a public hearing despite a corresponding request made by him. He argued that the Commission (which carried out such public hearing) did not constitute an independent court as required by Article 6 I ECHR.

Article 6 I ECHR entitles everyone in the determination of his civil rights and obligations or of any criminal charge against him to a fair and public hearing within a reasonable time by an independent and impartial tribunal

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53 The Police Act was then amended by the Parliament of the canton of Zurich. Nowadays, an appeal to the Compulsory Measures Court is available.

54 BGE 126 I 228.

established by law. The Court held that disciplinary proceedings leading to professional bans concern “civil rights” within the meaning of Article 6 I ECHR.

The Court considered the Commission to be closer to an administrative body than to a court. Such finding is also supported by the case law of the ECHR that focuses on the *appearance* of the body. Consequently, the Court reasoned that the Commission acted as non-judicial body here and that a public hearing held only by such body does not meet the requirements imposed by Article 6 I ECHR and Article 30 Constitution, respectively. It referred the case back to the High Court to hold a public hearing in accordance with Article 6 I ECHR and decide again.



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# Madeleine Simonek Martina Becker

## Tax Law

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# I. Fiscal Sovereignty and Constitutional Principles

## 1. FEDERALISM AND FISCAL SOVEREIGNTY

### a) Distribution of Fiscal Sovereignty

As a consequence of Swiss federalism,<sup>1</sup> Switzerland's tax system incorporates three levels of taxation: taxes are imposed by the federation, the cantons and the municipalities.<sup>2</sup>

According to Article 3 of the Federal Constitution of the Swiss Confederation (Constitution),<sup>3</sup> the cantons retain law-making power except in areas where the Constitution expressly delegates this power to the federation. Therefore, the federation is only allowed to levy those taxes which the Constitution exclusively grants its competence over. These are the following:

- Federal direct tax (Article 128 Constitution)
- Value added tax (Article 130 Constitution)
- Stamp duty on securities, receipts for insurance premiums and certain other commercial deeds (Article 132 I Constitution)
- Withholding tax on income from moveable capital assets, lottery winnings and insurance benefits (Article 132 II Constitution)

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1 See for more explanations on Swiss federalism the Chapter on Constitutional Law, pp. 135.

2 See for the following and for more details on the whole chapter: MADELEINE SIMONEK, Tax Coordination between Cantons in Switzerland - Role of the Courts, in Michael Lang/Pasquale Pistone/Josef Schuch/Claus Staringer (eds.), *Horizontal tax coordination*, Amsterdam 2012 (cit. SIMONEK, Tax Coordination), pp. 221.

3 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.admin.ch \(https://perma.cc/M8UJ-S369\)](https://perma.cc/M8UJ-S369).

- Taxes on commodities such as beer, tobacco and mineral oil etc. (Article 131 Constitution), customs duties (Article 133 Constitution), and traffic taxes (Articles 85 and 86 II Constitution)
- Taxes on gambling houses (Article 106 III Constitution)

Conversely, the cantons are essentially free to levy any taxes, except those which are exclusively reserved to the federation.<sup>4</sup> The cantonal constitutions further delegate and organise the division of tasks and powers between each canton and its communes. Although the cantons have original taxing powers and are even permitted to create new taxes, they do not have unfettered discretion over the design of their tax system. They are limited by the Tax Harmonisation Act<sup>5</sup> which obliges them to levy certain types of taxes. Further, they are generally restricted by the fact that the Constitution and all federal laws take precedence over any conflicting cantonal and municipal law.

## b) Federal Tax Harmonisation Act

For a long time, fiscal federalism resulted in the existence of 26 (often very) different cantonal tax laws. This situation hindered personal and economic mobility within Switzerland.<sup>6</sup> Taxpayers who were liable to be taxed in two or more cantons were subjected to different assessment principles and procedures in each canton, for example, in the case that a taxpayer lived in one canton and owned real estate property in another canton. Furthermore, an exit tax could be imposed if an individual or a legal entity relocated from one canton to another canton.

In order to remove these obstacles, on 12 June 1977, the Swiss people accepted a new federal competence in a referendum to harmonise cantonal and federal direct tax law. Subsequently, the Tax Harmonisation Act entered into force on 1 January 1993, and after a transition period of 8 years has actually applied from 1 January 2001.

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4 According to Article 134 Constitution, value added tax, stamp duty, withholding tax as well as special consumption taxes are exclusively reserved to the federation. In contrast, income taxes are levied on the federal and cantonal levels and depending on the cantonal order on the communal level as well.

5 Federal Act on the Harmonisation of Direct Taxes at Cantonal and Communal Levels of 14 December 1990, SR 642.14.

6 See for the following and for more details on the whole chapter: SIMONEK, Tax Coordinations, pp. 236.

The Tax Harmonisation Act significantly improved tax coordination in Switzerland, introducing tax harmonisation with regard to direct taxes between the federation and the cantons (vertical tax harmonisation) as well as between the cantons themselves (horizontal tax harmonisation). It is a legal framework that contains rules on the tax subject, the tax object, the tax base, the tax period and the tax procedure. Some of these rules go into minute details, whilst others leave a certain scope of action and some room for interpretation to the cantons. The Tax Harmonisation Act, however, does not harmonise tax rates and tax allowances. In this regard the cantons remain fully sovereign. Hence, tax competition between the cantons and also between the communes is not hindered by the Tax Harmonisation Act.<sup>7</sup>

## 2. MAIN (CONSTITUTIONAL) PRINCIPLES

### a) Principle of Legality

The principle of legality (Article 5 Constitution) is of fundamental importance in Swiss tax law. Article 127 I Constitution ensures its application to tax matters and states that *“the main structural features of any tax, in particular those liable to pay tax, the object of the tax and its assessment, are regulated by the law”*.

Swiss courts as well as academic literature demand strict adherence to the principle of legality. The principle requires that tax laws are be put to an optional referendum. Furthermore, the law must be appropriately detailed in order to comply with the constitutional requirement of legality.

### b) Principle of Universality

The principle of universality is enshrined in Article 127 II Constitution. It demands that each member of a community should contribute to the community's financial burdens and denotes that all taxpayers or groups of taxpayers should be subject to the same taxes and taxation rules. However, although the principle of universality aims to prevent the application of any privileges or discrimination, Swiss tax law does contain certain privileges which are considered justified due to their fulfilment of other constitutional principles and

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<sup>7</sup> See p. 260.

goals. In particular, certain tax incentives granted to foreign wealthy taxpayers, such as the lump-sum taxation,<sup>8</sup> or to foreign companies are considered justified by the goal to foster the Swiss economy.

### **c) Principle of Uniformity and Ability-To-Pay Principle**

The principle of uniformity and the ability-to-pay principle share similar content, requiring that each taxpayer must contribute to the fiscal burdens of the state according to his or her economic, financial and personal resources (Article 127 II Constitution).

The Constitution demands both horizontal and vertical equality of treatment of individuals. Horizontal equality requires that taxpayers living in the same economic and personal circumstances and deriving the same amount of taxable income should be subjected to equal taxation. Vertical equality, on the other hand, requires that taxpayers living in different economic and personal situations and/or deriving a different amount of taxable income should be subjected to different levels of taxation. Vertical equality particularly refers to the design of the tax scale and to the question on whether progressive, proportional or degressive tax rates should be chosen.<sup>9</sup>

### **d) Prohibition of Inter-Cantonal Double Taxation**

Since 1874, the Constitution explicitly prohibits inter-cantonal double taxation. Today, the prohibition is enshrined in Article 127 III Constitution. Inter-cantonal double taxation arises if a taxpayer is simultaneously subjected to the same or similar taxes on the same tax object by two cantons, for example, if the taxpayer is considered to be a tax resident of two cantons. No law on the prevention of inter-cantonal double taxation has ever been enacted. Instead, the Federal Supreme Court developed a dense network of rules covering the allocation of taxing rights between the cantons. Some of these rules have in the meantime been enacted by the Tax Harmonisation Act, but still most of the inter-cantonal allocation rules is based on case law.

The basic rules are the following: any income from real estate, permanent establishments and fixed places of businesses may only be taxed by the canton wherein the property is situated. The same rules apply for the taxation of

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8 See pp. 254.

9 See p. 266 for a leading court decision with regard to degressive income tax rates.

net wealth. All other income or net wealth, including income from employment or income from moveable property, may only be taxed by the canton where the taxpayer has his or her main tax residence (usually the taxpayer's centre of living).

The constitutional prohibition on inter-cantonal double taxation also embodies a kind of non-discrimination rule: A taxable person who is only liable to have part of his or her income taxed in a certain canton may not be treated less favourably than a taxpayer whose whole income is taxable in that canton.

### e) Principle of Good Faith

The Constitution expressly requires that “*state institutions and private persons shall act in good faith*” (Article 5 III Constitution). Additionally, Article 9 Constitution states that “*every person has the right to be treated by state authorities in good faith and in a non-arbitrary manner*”. Whereas Article 5 III Constitution demands honest and trustworthy behaviour from every person, Article 9 Constitution explicitly focuses on the relationship between the individual and the state. Every person has a legally enforceable right to be treated in accordance with the principle of good faith by legislative bodies as well as by those who apply the law.<sup>10</sup>

In tax law, the principle of good faith is of high relevance. In particular, it is considered to be the legal basis for the prohibition of an abuse of rights and the Swiss doctrine of preventing tax avoidance. According to the constant jurisprudence of the Federal Supreme Court, the criteria for defining tax avoidance are the following:

- the transaction structure or legal set-up chosen by the taxpayer is inappropriate or unusual, and completely inappropriate to the economic facts; and
- the taxpayer's primary goal for utilising the chosen legal form was to achieve substantial tax savings; and
- the taxpayer will in fact achieve substantial tax savings if the legal form chosen is accepted by the tax administration.

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<sup>10</sup> See for the following and for more details MADELEINE SIMONEK, The principle of good faith in Swiss domestic and international tax law, in Cécile Brokelind (ed.), Principles of Law: Function, status and impact in EU tax law, Amsterdam 2014, pp. 319.



If the criteria for tax avoidance are met, the real facts are disregarded and replaced by those facts that would have been considered as the usual and appropriate approach. For example, if the taxpayer tries to convert taxable dividend income into tax-free capital gain by using a completely inappropriate transaction structure, no tax free capital gain, but taxable dividend income will be recognised.

In practice, moreover, the principle of protecting a legitimate expectation that is also based on the principle of good faith is important in the context of the Swiss tax ruling practice.<sup>11</sup>

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<sup>11</sup> See for more details on the Swiss tax ruling practice pp. 267.

## II. Most Important Taxes and Tax Codes

### 1. FEDERAL TAXES

#### a) Federal Direct Taxes

##### aa) Introduction

The first federal direct tax was introduced during World War I to meet the increasing financial needs of the federation. In the following, the federation's right to levy a direct federal tax was prolonged ever since, today the competence is enacted in Article 128 Constitution.<sup>12</sup> The authorisation is still limited in time, relying on repeated extensions by popular vote (currently the federation has been granted the competence until 2035; Article 196 No. 13 Constitution).<sup>13</sup> As a consequence, the federation is forced to reconsider its financial regime on a regular basis, particularly since the federal direct tax makes up approximately one third of the federal revenue.

Based on Article 128 Constitution, the federation enacted the Federal Direct Tax Act<sup>14</sup> which regulates the federal individual and corporate income tax and provides for the imposition of a source tax on the income of certain individuals and legal entities.

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12 MADELEINE SIMONEK, Kommentierung zu Artikel 128 BV in Bernhard Waldmann/Eva Maria Belser/Astrid Epiney (eds.), *Basler Kommentar Bundesverfassung*, Basel 2015, N 1 et seq., also for additional information on the history of the federal income tax.

13 In a popular vote of 4 March 2018, the federation's competence was prolonged for another term of 16 years.

14 Federal Act on the Federal Direct Tax of 14 December 1990, SR 642.11.

## **bb) Federal Individual Income Tax**

The federal individual income tax is levied from Swiss tax residents as well as from non-residents who have economic attachment to Switzerland. Income taxes are generally considered as the most appropriate indicator for the ability to pay taxes.

Tax residency is deemed to exist if an individual intends to live permanently in Switzerland, stays in Switzerland for at least 30 days during which he is engaged in a gainful activity, or stays in Switzerland for at least 90 days without partaking in any gainful activity (Article 3 Federal Direct Tax Act). Swiss tax residents are subject to unlimited tax liability on their world-wide income, with exceptions for enterprises, permanent establishments and immovable properties which are situated abroad. Income derived from one of these sources is unilaterally exempt from taxation in Switzerland (Article 6 I Federal Direct Tax Act).

Non-residents with an economic relationship with Switzerland are subject to a limited tax liability. Limited tax liability means that taxation is restricted to income that is derived from Swiss sources such as income from real estate, permanent establishments situated in Switzerland, or from gainful activity carried on in Switzerland (Article 6 II Federal Direct Tax Act).

The individual income tax is levied on the taxpayer's overall income. This includes income derived from employment and businesses as well as income from immovable (e.g. rental income) and moveable property (e.g. interest, dividends, royalties, lottery winnings etc.), pension schemes and any other income that is realised on a single or regular occasion. Exempt from individual income tax are capital gains realised on privately held moveable and immovable assets such as securities, works of art, or real estate (Article 16 III Federal Direct Tax Act). In contrast, capital gains realised on business assets, for example on assets belonging to an individual business, are fully taxable. The distinction between private assets and business assets is hence a rather weighty one, and in practice often a cause for dispute between the taxpayer and the tax authorities, particularly in cases in which a taxpayer incidentally acts as a professional trader, for example of securities or real estate, without having registered a business.

Families are considered to form an economic unit for income tax purposes. The income of spouses living in an intact marriage, meaning not legally or effectively separated, or of registered partnership are jointly assessed (Article 9 Federal Direct Tax Act).

There are various deductions which may be made from the taxable income (Articles 33, 33a and 35 Federal Direct Tax Act). For example, professional expenses are deductible from the gross income if they were closely enough linked to or caused by the earning of the income, e.g. expenses for (public) transportation, even though capped at a certain amount<sup>15</sup>, expenses for any special clothing required for work, meals taken outside of the home, costs for professional development, etc. General deductions are also available for private debt interest, alimony or child support payments, donations to tax-exempt charities, contributions to social security institutions and pension plans, self-owned real estate maintenance costs, and medical expenses if not reimbursed. This list is non-exhaustive. Further, lump-sum allowances are granted for each dependent child, for married couple and for individuals who are providing financial support to a person in need.

The overall taxable income is taxed as a whole at the applicable tax rate. There are no baskets or schedules with different tax rates for certain kinds of income. Two different tariffs apply: on the one hand for single persons and on the other hand for married couples and/or families and single persons living together with minor children or with persons requiring support (Article 36 Federal Direct Tax Act). The tax rate for the federal income tax currently starts at a taxable income of CHF 17'800 per tax year for those who are single and CHF 30'800 per tax year for married couples. Income which falls below this level is not taxed. The tax scale is progressive. For example: the tax rate for a single person with a taxable income of CHF 100'000 amounts to 2.87 % and with a taxable income of CHF 200'000 to 6.78 %. A married couple with the same taxable income would pay federal income tax at a rate of 1.97 % or 6.28 % respectively. The maximum tax rate is 11.5 %: it applies to a taxable income of over CHF 755'200 (for singles) and CHF 895'000 (for married couples).<sup>16</sup>

Swiss residents with foreign citizenship who are not engaged in any gainful activity in Switzerland may request that they are not taxed according to the ordinary assessment principles, but instead on a lump-sum basis (Article 14 Federal Direct Tax Act). The income tax in these circumstances is not based on the effective world-wide income, but – with some exceptions – on the annual living costs of the taxpayer and his or her family (Article 14 III Federal

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15 Costs for private transportation are only deductible if no public transportation is available.

16 Tax rates for the tax year 2017.

Direct Tax Act). The justification of the very favourable lump-sum taxation is disputed, but is mainly seen in the goal to attract very wealthy people to Switzerland. On the cantonal level, in recent years, some cantons have removed lump-sum taxation in order to better ensure equality (e.g. Zurich and Basel Stadt).

Tax assessment is generally based on a personal tax return filed by each individual taxpayer. Switzerland's system does not provide for a general salary tax (commonly referred to as a "pay as you earn" system). However, a source tax is levied in some circumstances (see below). The due date for filing the tax return is usually 31 March of the calendar year following the tax year. The assessment procedure for assessing the federal income tax is delegated to the cantons: they assess the federal income tax together with the cantonal income and net wealth taxes.

### **cc) Federal Corporate Income Tax**

Legal entities that have their statutory seat or their place of effective management in Switzerland are subject to the federal corporate income tax, so called net-profit tax (Article 50 Federal Direct Tax Act). A corporation is considered to have its statutory seat in Switzerland if it is registered with the Swiss Register of Commerce. For determining the effective place of management, the decisive criterion is where the activities which serve to achieve the company's business purpose are taken in their entirety. Thereby, the day-to-day business decisions taken by the company as opposed to strategic or pure administrative decisions are the most important consideration in this regard.

Swiss income tax law generally follows the so-called separation principle: legal entities and their shareholders are taxed separately. For that reason, Swiss income tax law does not provide for group taxation. However, a so-called participation exemption is available to avoid triple or multiple taxations within a group (Article 69 Federal Direct Tax Act). Partnerships are principally treated as transparent and the net profit of the partnership is attributed to each partner according to the partnership agreement (Article 10 Federal Direct Tax Act).

Similar to the situation with the federal individual income tax, taxpayers with a personal attachment to Switzerland (i.e. statutory seat or effective place of management) are unlimitedly liable to pay tax on their world-wide income, except for income arising from permanent establishments, enterprises or real estate located abroad (Article 52 I Federal Direct Tax Act). Non-resident legal entities with an economic attachment to Switzerland are subject to a limited tax liability. This mainly includes income derived from permanent

establishments, business enterprises or real estate located in Switzerland (Article 52 II Federal Direct Tax Act).

The federal corporate income tax is levied at a flat rate of 8.5 %. However, because paid taxes are deductible, the effective tax rate is actually lower and may range from approximately 7 to 7.8 %, depending on the deductible amount of federal, cantonal and communal taxes. A reduced tax rate of 4.25 % applies for associations, foundations and other legal entities.

The required filing date for the tax return depends on the balance sheet and reporting date of the legal entity. The tax return generally has to be filed 6 to 8 months after the reporting date.

### **dd) Source Tax Levied on Income of Certain Individuals and Legal Entities**

Because the ordinary tax assessment procedure is considered too complicated for taxpayers who are only living in Switzerland for a short period of time, Swiss tax residents with foreign citizenship and who do not have a Swiss residence permit are taxed at source for their employment income provided that their taxable salary does not exceed an amount of CHF 120'000 per year (Articles 83–90 Federal Direct Tax Act). This means that the employer of such an individual is obliged to deduct the source tax directly from the salary and to forward it on to the tax administration. The source tax is principally a final tax replacing the ordinary income tax.

Source taxation also applies to certain non-residents who have an economic attachment to Switzerland and derive income from Swiss sources, such as cross-border commuters, artists and sportspersons, or board members and company directors (Articles 91–101 Federal Direct Tax Act).

### **b) Withholding (Anticipatory) Tax**

The law covering the federal withholding tax is the Federal Act and Ordinance on Withholding Tax.<sup>17</sup> Withholding tax is levied on the revenue from certain moveable capital assets (particularly dividends and interest on bonds and bank accounts), on Swiss lottery winnings (including commercial bets) and on certain insurance benefits (Article 1 Federal Withholding Tax Act).

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<sup>17</sup> Federal Act on Withholding Tax of 13 October 1965, SR 642.21; Ordinance on Withholding Tax of 19 December 1966, SR 642.211.

The tax is withheld at source by the Swiss debtor of the revenue (e.g. a Swiss bank paying out interest on bank accounts or a Swiss company distributing dividends) and then forwarded on to the Federal Tax Administration.

The tax rate for the withholding tax varies depending on the category of item at hand. It amounts to 35 % for moveable capital revenue and lottery winnings, 15 % for life rents and 8 % for other insurance benefits.

The purpose of the withholding (anticipatory) tax is to secure correct income tax declaration and to avoid tax evasion and tax fraud. For that reason, Swiss resident beneficiaries can request a full reimbursement of the tax provided that they fully comply with their income tax reporting obligations in due time.

In contrast, for non-resident beneficiaries the withholding tax is principally a final tax. Non-resident beneficiaries may only ask for a full or partial refund of the withholding tax if they are entitled to the benefits of the respective double taxation treaty concluded between Switzerland and their country of tax residence.

### c) Federal Value Added Tax

The Federal Value Added Tax (VAT) was introduced in Switzerland on 1 January 1995. The current Value Added Tax Act entered into force on 1 January 2010.<sup>18</sup>

The Swiss VAT is a general consumption tax aiming at the taxation of non-business related domestic consumption of goods and services. Therefore, VAT is levied on supplies of goods and services by a taxable person within Switzerland as well as on the import of goods and the acquisition of certain services from abroad. Because only consumption within Switzerland should be taxed, an exemption applies for the export of goods as well as the providing of certain services to recipients abroad.

VAT is typically levied at all stages of the value chain. Since only final consumption should be taxed, registered businesses are allowed to deduct paid VAT as input VAT (net all-phase principle). This system avoids an accumulation of tax within the value chain. Because the tax must be shifted to the consumer, the business itself should – systematically – not bear any final tax costs.

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<sup>18</sup> Federal Act on Value Added Tax of 12 June 2009 (Value Added Tax Act, VAT Act), SR 641.20; see for an English version of the Value Added Tax Act [www.admin.ch](http://www.admin.ch) (<https://perma.cc/6P3Q-AXMW>).

With regard to VAT, a taxable person is anyone who carries on a business activity in Switzerland. Exemptions exist for businesses that generate a turnover of less than CHF 100'000 per year or resp. CHF 150'000 per year in case of non-profit and charitable institutions (Article 10 Value Added Tax Act). Upon registration with the Federal Tax Administration, the taxable person must self-declare and self-assess the VAT amount due generally on a quarterly or semi-annual basis.

From 1 January 2018, the VAT rates amount to 7.7 % for all supplies not subject to a special VAT rate, 3.7 % for accommodation services and 2.5 % for certain goods and services typically used in daily life, for example, items like food, water, drugs and newspapers (Article 25 Value Added Tax Act). The maximum VAT rates are set out by the Constitution (Article 130 I Constitution). Any increase or decrease of the VAT rates thus requires the approval of the majority of the Swiss people and the cantons in a referendum. Past experience of referenda in this area demonstrates that the Swiss people tend to agree to a VAT increase if this is linked to special expenditures, for example the development of railway infrastructure (Article 130 III<sup>bis</sup> Constitution) or the devoting of increased finance to the social security system.

## d) Other Taxes

According to the Federal Act on Stamp Duties,<sup>19</sup> the federation levies three types of stamp duties purposing to tax the constitution or transfer of rights: an issuance stamp duty on the issuance of shares as well as participation and dividend certificates in companies and cooperatives, a transfer stamp duty on the transfer of securities and a stamp duty on insurance premiums.

Pursuant to Article 131 Constitution, the federation is also permitted to levy further consumption taxes, for example a tobacco tax, a beer and a spirits tax, a mineral oil tax on crude oil, other mineral oils, natural gas, the products obtained from the processing thereof and motor fuel, a mineral oil surtax on motor fuel, and an automobile tax on the value of imported or domestically manufactured automobiles. Moreover, the federation levies a CO<sup>2</sup> tax and a federal casino tax.

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<sup>19</sup> Federal Act on Stamp Duties of 27 June 1973, SR 641.10.



## 2. CANTONAL AND COMMUNAL TAXES

### a) Taxes on Income and Net Wealth

#### aa) Individual Income Tax

The cantons are obliged to levy an individual income tax based on the principles and framework outlined by the Tax Harmonisation Act (Articles 3 et seq. Tax Harmonisation Act). Because the Tax Harmonisation Act harmonises not only the tax laws of the 26 cantons (horizontal harmonisation), but also the federal direct tax law and the cantonal tax laws (vertical harmonisation), the cantonal tax laws largely follow the system of the federal direct tax law and contain very similar, sometimes even identical provisions.

There has been however no harmonisation in the area of tax allowances and tax rates. As such, the income tax rates vary considerably between the cantons and also between the communes of a canton. Traditionally, the municipalities with the lowest income tax rates are located in the Canton of Schwyz and Zug. The more expensive regions are traditionally found in the French part of Switzerland. For example, a single person with a taxable income of CHF 100'000 per year pays cantonal and communal income taxes at a total rate of 8.1 %<sup>20</sup> if he or she lives in Wollerau (Canton Schwyz) and at a total rate of 23.5 %<sup>21</sup> if he or she lives in Les Verrieres (Canton Neuchâtel). If such a person lived in the City of Zurich the income tax burden (cantonal and communal levels) would amount to 13.8 %.<sup>22</sup>

Up to this day, political efforts to restrict the cantons' sovereignty to autonomously determine their income tax rates have been consistently unsuccessful. The positive effects of tax competition have so far been weighted higher than equality concerns, in particular since tax competition is considered to foster the spending discipline of the cantons (and communes) and to uphold their right of fiscal self-determination. A fiscal equalisation system on both the cantonal and the federal level aims to balance out to a certain extent the different burdens, financial strengths and financial needs of the 26 cantons (and communes), but has not the purpose to prevent tax competition.

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20 Including the federal income tax the total rate amounts to 11.0 %.

21 Including the federal income tax the total rate amounts to 26.4 %.

22 These calculations include the usual deductions and tax allowances that may however vary from canton to canton, and represent the average tax rates for the tax year 2017.

## bb) Net Wealth Tax for Individuals

Based on Article 2 Tax Harmonisation Act, the cantons are obliged to levy a tax on the net wealth of individuals. In general, individuals' worldwide net wealth is subject to the tax, including for example bank deposits, securities, cars and real estate, but not household goods and personal effects (Article 13 Tax Harmonisation Act).

Assets are usually assessed at fair market value at the end of the tax year (Article 14 and Article 17 Tax Harmonisation Act). All debts are deductible. Further, different personal deductions are available. Some cantons further provide for tax-free minimums in terms of net wealth (e.g. Canton of Obwalden CHF 25'000, Canton of Zug CHF 100'000).<sup>23</sup>

Most of the cantons provide for a system of progressive tax rates. The maximum cantonal and communal net wealth tax rates range from between approximately 0.1 % in the Canton of Nidwalden to 1 % in the Canton of Geneva.<sup>24</sup>

## b) Taxes on Net Profit and Capital of Legal Entities

### aa) Net-Profit Tax of Legal Entities

The cantons are also obliged to levy a tax on the net-profit of legal entities. Due to horizontal harmonisation, the relevant provisions with regard to the tax subject, the tax object, the tax period, the tax procedure, and the tax penal law are again very similar or even identical to the federal net-profit tax.

As already mentioned, the tax rates are however not harmonised and for that reason the cantonal and communal corporate income tax rates differ quite significantly. Today, for corporations, the effective cantonal and communal tax rates including the federal direct tax rate range from approximately 12 % in the Canton of Lucerne to 24 % in the Canton of Geneva (for the tax year 2017).<sup>25</sup>

As a consequence of the ongoing so-called tax proposal 17 that aims at abolishing several cantonal preferential tax regimes which the international community considers harmful, many cantons intend to considerably reduce their corporate income tax rate. In future, in order to remain internationally attractive, most of the cantons aim at reaching an income tax rate for

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<sup>23</sup> For a single person without children for the year 2017.

<sup>24</sup> Maximum tax rate for a single person without children for the tax year 2017.

<sup>25</sup> "Effective tax rate" means the applicable tax rate before deduction of the taxes.

corporations of 13 to 15 % (total of effective federal, cantonal and communal tax rates).

## **bb) Capital Tax**

The cantons are also obliged to levy a capital tax on a legal entities' equity. For corporations, the taxable equity includes the paid-in share capital, any capital contributions made by the shareholders, and both disclosed and taxed hidden reserves. In almost all cantons the tax rate is proportional and ranges from approximately 0.001 % in the Canton of Uri to 0.5 % in the Canton of Basel Stadt.

## **c) Further Cantonal Taxes**

### **aa) Inheritance and Gift Taxes**

Inheritance and gifts are not subject to the income tax, neither on the federal nor the cantonal level. However, almost all cantons levy a special inheritance and/or gift tax.<sup>26</sup> Inheritance and gift taxes are not subject to the Tax Harmonisation Act and are therefore not harmonised.

The inheritance tax is levied on the transfer of assets to heirs and legatees (statutory and designated), and the gift tax comprises gifts inter vivos. The surviving spouse is exempted from inheritance and gift taxes in all cantons, and most cantons also fully exempt all children and grand-children. The tax is generally calculated on the market value of the assets at the time of the decedent's death or the gift minus any transferred debts. Other relevant factors in calculating the tax rate are the total amount of the assets transferred and the relationship between the heir and the deceased (degree of relationship) or the donor and the donee respectively.

### **bb) Real Estate Capital Gains Tax**

As outlined above, capital gains realised on moveable and immovable private assets are tax-free on the federal level. Capital gains realised on moveable assets are also tax-free on the cantonal level.

The cantons are however obliged to levy a real estate capital gains tax on privately held immovable property. This tax qualifies as a special kind

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<sup>26</sup> The Canton of Schwyz and the Canton of Obwalden levy neither an inheritance nor a gift tax; the Canton of Luzern does not levy a gift tax.

of income tax. Even though the real estate capital gains tax belongs to the harmonised taxes (Article 2 Tax Harmonisation Act), there is much less harmonisation here as compared to the individual and corporate income taxes. However, the Tax Harmonisation Act demands that short-term real estate capital gains are subject to a higher tax burden in order to combat property speculation (Article 12 V Tax Harmonisation Act).

### **cc) Other Property and Expenditure Taxes**

Due to the fiscal sovereignty of the cantons, the cantons or their communes provide for various further taxes. Most cantons levy a real estate transfer tax on the transfer of ownership of immovable property (house and land) including any associated rights located in Switzerland. Some cantons levy a special real estate property tax that is assessed on an annual basis and calculated on the tax value of the property at the end of the tax period.

All cantons levy a motor vehicle tax on all motor vehicles and trailers located in Switzerland. Such motor vehicles must be duly registered in the respective canton in order to receive the registration papers and a number plate.

Further cantonal or communal taxes include dog taxes, entertainment taxes levied on the ticket price of public events, lottery taxes, stamp duties and register duties as far as not covered by the federal stamp duties, city taxes or visitor's taxes for overnight stays, tourism promotion taxes, fire brigade exemption taxes, water taxes, etc.

## **3. INTERNATIONAL TAX AGREEMENTS**

### **a) Multilateral Conventions**

One key multilateral convention recently ratified by Switzerland is the Convention on Mutual Administrative Assistance in Tax Matters entered into force on 1 January 2017. Drafted by the OECD and the Council of Europe, the convention is today the most comprehensive multilateral instrument applicable to all forms of tax co-operation in order to tackle tax evasion and avoidance.

Subsequently, Switzerland also ratified the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information. This agreement provides a standardised mechanism to facilitate the automatic exchange of financial account information between tax

authorities. It has been in force in Switzerland since 1 January 2017 with the consequence that the Swiss banking secrecy does no longer apply to holders of Swiss bank accounts living abroad.

Switzerland also actively participated in the OECD's working groups of the Base Erosion and Profit Shifting ("BEPS") project. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS was signed by Switzerland on 7 June 2017 and shall be ratified in the course of 2018. This instrument should allow countries to easily implement the minimum standard outlined in the BEPS final reports.

## **b) Double Taxation Treaties**

Switzerland has signed a total of approximately 95 double taxation treaties covering individual and corporate income taxes as well as withholding taxes. Some of them also include net wealth and capital taxes. Swiss double taxation treaties principally follow the OECD model convention with just a few Swiss-specific deviations. Unlike the situation regarding income taxes, currently, Switzerland has only concluded 8 double taxation agreements covering inheritance taxes.

## **c) Bilateral Agreements with the European Union**

Switzerland is not a member state of the European Union. Nevertheless, a close relationship exists between the two parties on political, economic and cultural levels. Over the years, countless bilateral agreements have been concluded to govern these relations. From a tax perspective the most important agreements are the Agreement on Free Movement of Persons that prohibits amongst others discrimination of EU nationals in Switzerland and vice versa,<sup>27</sup> and the Agreement on Automatic Exchange of Information in Tax Matters that replaced the former Agreement on the Taxation of Savings Income as of 1 January 2017.

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<sup>27</sup> See for a landmark case on the application of the Agreement on Free Movement of Persons p. 268.

# III. Landmark Cases

## 1. PRINCIPLE OF EQUALITY: TAXATION OF MARRIED AND NON-MARRIED COUPLES

In 1982, Mr. and Mrs. Hegetschweiler filed a complaint to the Swiss Federal Supreme Court, alleging that their canton of residence (Zurich) applied an income tax rate scheme that resulted in a non-justified higher or at least different tax burden for married couples as compared to unmarried taxpayers.

The Federal Supreme Court upheld the complaint, deciding that there had been an infringement of the Constitution.<sup>28</sup> According to the court, the principle of equality requires that a married couple must not be taxed at a higher rate than an unmarried couple living in the same circumstances and deriving the same taxable income.

As already mentioned, Swiss income tax law applies family taxation. The joint assessment in connection with the progressive income tax rates may often lead to a so-called “progression effect”, meaning that the spouses pay higher taxes just because of their joint taxation.

As a consequence of the decision in the Hegetschweiler case, all the cantons had to amend their laws. The cantons introduced different measures to ensure equal treatment such as splitting spouses’ income to define the applicable tax rate, making special deductions for dual-income households, having various applicable tax rate schemes etc. Today, unequal treatment of married and unmarried couples is largely abolished on the cantonal and communal level. On the federal level, however, unequal taxation is not fully abolished. In particular, married couples with a high taxable income are still affected by the progression effect.

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28 BGE 110 Ia 7.

## 2. ABILITY-TO-PAY PRINCIPLE: DEGRESSIVE INCOME TAX RATES

In 2007, the Federal Supreme Court had to decide on the constitutionality of degressive income tax rates.<sup>29</sup>

The people of the Canton of Obwalden approved, in a popular vote, a new income tax scale that included degressive tax rates. The tax scale combined progressive tax rates applicable to a taxable income of up to CHF 299'999 with degressive tax rates starting at a taxable income of CHF 300'000. The income tax scale was hence as follows:

Taxable Income	Tax (in CHF)	Tax Rate
50'000	5'784	11.57 %
100'000	3'834	13.83 %
300'000	46'311	15.43 %
500'000	65'824	13.16 %
1'000'000	117'650	11.77 %

Figure 1: Tax Income Scale

A majority of 86 % of the people of the Canton of Obwalden voted in favour of this new income tax scale, most likely being convinced by the government's argument that low income tax rates for higher taxable income could attract very wealthy new taxpayers to the canton.

However, some taxpayers in the Canton of Obwalden argued before the Federal Supreme Court that such a partially degressive tax scale infringes the ability-to-pay principle as well as the principle of uniformity. The Federal Supreme Court upheld this complaint. They particularly considered that the conversion from a progressive to a degressive tax scale at a taxable income of CHF 300'000 is arbitrary and cannot be reasonably justified. As a consequence, the new law did not enter into force. This judgement clarified that, in Switzerland, income tax rates must be progressive or at least proportional.

<sup>29</sup> BGE 133 I 206.

### 3. PRINCIPLE OF GOOD FAITH: SWISS RULING PRACTICE

A Swiss company belonging to a Swiss group set up a permanent establishment in the Cayman Island. The permanent establishment's purpose was carrying on financing functions for the whole group. In 1999, the cantonal tax administration approved the chosen structure in an advance tax ruling and confirmed that the income allocated to the Cayman permanent establishment will be exempted from Swiss income tax. A few years later, the Federal Tax Administration took the view that the Cayman permanent establishment did not have enough substance and that therefore the income previously attributed to the Cayman permanent establishment will be attributed to the Swiss company. The cantonal tax administration informed the Swiss company about this position in February 2005. The dispute was brought before the Federal Supreme Court.

Advance tax rulings are of high practical importance in Swiss tax practice. Taxpayers have the possibility of asking the competent tax authority to assess the tax implications of a proposed structure or transaction before implementing the structure or carrying on the transaction. Such assessments have a binding nature, based on Article 9 Constitution and the principles of good faith and the prohibition of the abuse of rights.

The Federal Supreme Court confirmed in the mentioned decision the basic requirements for a tax ruling to have binding effect:

- the planned transaction and the accompanying facts must be described in detail and must be correct (including the name of the taxpayer);
- the ruling must be approved by the competent authority;
- the information provided by the tax administration must not be obviously incorrect;
- the taxpayer, based on the information provided in the ruling, has taken steps that cannot be easily undone;
- the law has not changed; and
- the public interest does not require a strict application of the law where this is contrary to the content of the tax ruling.

In the case at hand, the Federal Supreme Court established that the Swiss company's trust in the tax ruling should be protected for as long as its trust



in the tax ruling was not destroyed.<sup>30</sup> However, from the moment the Swiss company received the letter from the cantonal authorities informing them of the opinion of the Federal Tax Administration, the Swiss company could no longer rely on the ruling and the protection of his good faith.

#### **4. PRINCIPLE OF NON-DISCRIMINATION: SALARY WITHHOLDING TAX**

X, a Swiss national living in France, commuted every day to Geneva for work. According to the double taxation treaty concluded between Switzerland and France, Switzerland was allowed to tax X's income from employment.

Since X was a Swiss non-resident, his employment income was taxed at source. Under the Swiss source tax system, the source tax that was deducted from X's salary by his employer did not allow for the deduction of individual expenses, such as commuting costs, contributions to pension funds, and personal tax allowances. Instead, only flat-rate deductions were included in the source tax scale. X complained that such taxation infringes the principle of equality and the Agreement on the Free Movement of Persons concluded between Switzerland and the European Union.<sup>31</sup>

The Federal Supreme Court upheld X's complaint. The court referred to the Schumacker doctrine of the European Court of Justice (C-279/93), deciding that the principles developed by the European Court of Justice in that decision are also applicable to the Swiss source tax. In the case at hand, X earned more than 95 % of his taxable income in Switzerland. According to the Schumacker doctrine, Switzerland thus had to take into account his personal situation and was not allowed to tax X less favourably than a Swiss tax resident.

Due to this decision, the law on the source taxation of employment income was amended. The new law does not fundamentally change source taxation as such, but gives taxpayers who are taxed at source the possibility to request, under certain conditions, an ordinary tax assessment. The new law will most likely enter into force on 1 January 2021.

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30 BGE 141 I 161.

31 BGE 136 II 241.

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# Peter Georg Picht Goran Studen Civil Law

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# I. Swiss Civil Code

## 1. HISTORY

The first attempt to codify civil law in Switzerland was undertaken during the Helvetic Republic. However, with the decline of the Helvetic Republic in 1803, the work on a comprehensive Private Law Code ceased.

In the 19<sup>th</sup> century, most cantons adopted civil law legislation with the aim of ending legal fragmentation and to achieving legal certainty on a cantonal level. Whereas the French Code Civil of 1804 was used as a model for the (French and Italian speaking) cantons in western and southern Switzerland (Fribourg, Ticino, Vaud, Valais, Neuchâtel, and Geneva), other cantons (amongst others, Bern, Lucerne, Solothurn, and Aargau) based their legislation on the Austrian Civil Law Code. A third group of German-speaking cantons in central and eastern Switzerland managed to, by and large, remain uninfluenced by foreign legislators in their enactment of comprehensive civil law legislation (for instance Zurich). Finally, a last group of central cantons (inter alia, Uri, Schwyz, Glarus, and Appenzell) completely abstained from enacting any comprehensive civil law legislation.<sup>1</sup>

One influential cantonal codification during this period was that made on behalf of the canton of Zurich by JOHANN CASPAR BLUNTSCHLI, a legal scholar and professor of law in Zurich, Munich, and Heidelberg. He drafted Switzerland's first independently codified cantonal civil code which entered into force in 1856. BLUNTSCHLI's work was well-recognised both nationally and internationally and it served as a model for the later codification and harmonisation of Swiss civil law on the federal level.

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1 PETER TUOR/BERNHARD SCHNYDER/JÖRG SCHMID/ALEXANDRA JUNGO, *Das Schweizerische Zivilgesetzbuch*, 14<sup>th</sup> edition, Zurich 2015, § 1 n. 2 et seqq.



Figure 1: Johann Caspar Bluntschli (1808–1881)<sup>2</sup>

However, the Swiss civil law landscape was to remain heterogeneous throughout the second half of the 19<sup>th</sup> century. Due to their extensive autonomy, the 25 cantons<sup>3</sup> (i.e. federal states) retained their legislative independence leading to a variety of civil codes, while there was a total lack of legislation in some cantons. As such, significantly different legal principles in the field of civil law could be applied to different cases depending on the canton at issue. In the 1860s, in the context of this complex landscape, the Swiss Lawyers' Association called for a unified civil code at the federal level. However, the first attempt to provide the federal legislator with the competence to enact such a code was rejected by both the people and the cantons in 1872, although shortly thereafter, a limited federal competence to pass the federal Code of Obligations of 14 June 1881 was accepted by the people and the cantons.<sup>4</sup> Finally, in 1898 the people and the cantons transferred the (non-exclusive) competence regarding civil law matters to the federal legislator.

<sup>2</sup> Source: Wikipedia, with reference to: *Reproduction from Zurich – Geschichte Kultur Wirtschaft. Gebrüder Fretz, Zurich 1932* (<https://perma.cc/5KNN-XFGQ>).

<sup>3</sup> Today, there are 26 cantons within the Swiss confederation. This has been the case since 1979 when the canton of Jura seceded from the canton of Bern by popular vote.

<sup>4</sup> As a matter of substantive law, the Code of Obligations – although adopted earlier – is the fifth part of the Civil Code. However, the Code of Obligations formally and in terms of general use is considered a distinct codification with a separate Article numbering.

## 2. LEGISLATION

The Federal Council mandated EUGEN HUBER, a professor of state law, private law and legal history at the Universities of Basel, Halle, and Bern, to draw up a comparative compendium of all existing cantonal civil codes. From 1886 until 1893,<sup>5</sup> HUBER published his comparative analysis in four separate volumes.



Figure 2: Eugen Huber (1849–1923)<sup>6</sup>

Following the comparative analysis, HUBER published the first draft of the Civil Code in 1900. Until 1904, a commission of experts deliberated on the draft. Finally, on 10 December 1907, the Code was adopted by the Federal Assembly: It officially came into force on 1 January 1912.

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Therefore, this chapter does not address the Code of Obligations and its underlying principles (for details on the Code of Obligations see the Chapter Law of Obligations, pp. 305).

5 Notably, HUBER's assistance was mandated several years before the referendum in 1898 took place which granted the federal legislator the competence to codify civil law. This was also the situation with the Criminal Code: although the assistance of CARL STOOS was mandated in 1892, the legislative competence was not granted to the federation until 1898. The most probable explanation behind this is that the Federal Council was fairly confident that the referendum would pass and was merely a formality; thus they wanted to push the project immediately; see for details on the Criminal Code the Chapter on Criminal Law, pp. 369.

6 Source: Wikipedia (<https://perma.cc/EQ7T-E2UV>).



### 3. CONTENT<sup>7</sup>

The Civil Code is comprised of 977 Articles. It also contains, in a “*final title*”, 251 commencement and implementing provisions which, inter alia, regulate the transitional relationship between this federal Code and its cantonal predecessors.

After the ten introductory Articles which contain general principles of Swiss law (application of the law, good faith, relationship between federal and cantonal law, and rules of evidence), the Civil Code is divided into four parts.

Part 1 (Articles 11–89c) covers the *Law of Persons* and mainly regulates the legal personality of natural and legal persons, legal capacity as well as the protection of legal personality in case of infringements. It also addresses the issue of the registration of civil status. Another focus of Part 1 is legal persons. The general provisions of Articles 52–59 contain fundamental principles that are universally applicable to all legal persons under Swiss law (such as the separate legal personality of legal persons, their capacity to act and to acquire rights and obligations, their seat, and rules pertaining to their dissolution), while Articles 60–79 specifically address associations and Articles 80–89a deal with foundations. The last two Articles (Articles 89b and 89c) are dedicated to so-called collective assets – i.e. funds raised by way of a public collection for charitable purposes – where no arrangements have been made with regards to the management or use of such funds.

Part 2 is dedicated to *Family Law* (Articles 90–456). It addresses the marital law and the marital property law. Although Swiss law does not (yet) allow for same-sex marriages, since 2007 the registered partnership between persons of the same sex is regulated in a separate federal law. The family law also contains provisions on kinship and, inter alia, regulates the parent-child relationship. An entire section (Articles 360–456) sets out measures for the protection of adults (including measures for legally incompetent persons and the deputyship) and introduces the instruments of the health care proxy and the living will into Swiss civil law.<sup>8</sup>

Part 3 of the Civil Code (Articles 457–640) deals with the *Law of Succession* and is subdivided into provisions relating to heirs, testamentary freedom and

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7 In the following text, where Articles are mentioned without referencing their source of law, they are located in the Swiss Civil Code of 10 December 1907, SR 210; see for an English version of the Civil Code [www.admin.ch](http://www.admin.ch) (<https://perma.cc/DV8N-FFT2>).

8 The rules pertaining to the protection of minors and adults, which completely overhauled the former custodianship law, entered into force on 1 January 2013.

testamentary dispositions, executors, the commencement and legal effects of succession as well as the division of the estate.

Part 4 (Articles 641–977) focuses on *Property Law*. It contains rules regarding ownership in general, land ownership, and ownership of chattel. Part 4 also regulates limited rights *in rem* (e.g. *usufruct* and other personal servitudes, right of residence and building rights), charges on immovable property (mortgages and mortgage certificates as personal obligations), and charges on chattel (such as pledges and liens). Swiss property law also contains rules on possession, including the legal definition of possession, rules pertaining to the transfer of possession, and legal remedies in case of interference. The final provisions of Part 4 cover formal and material aspects of the land register.

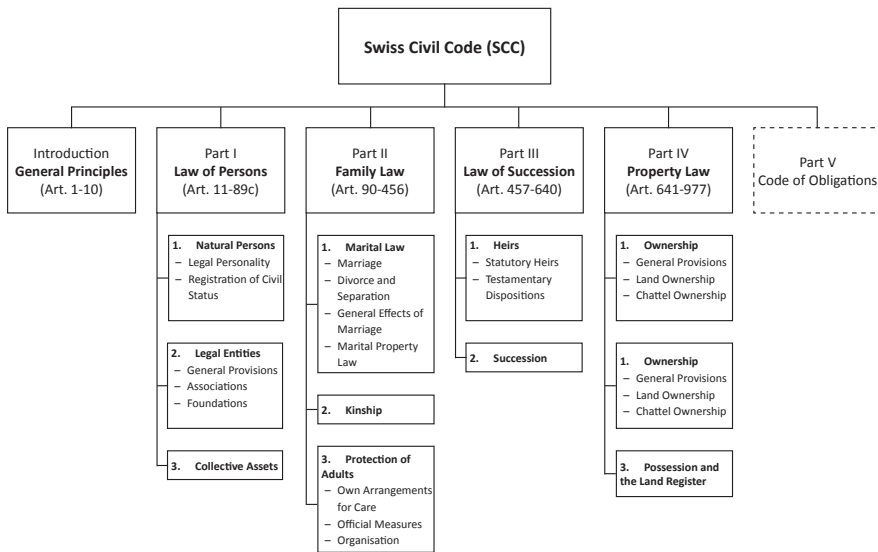


Figure 3: Structure of the Civil Code

## 4. MARITAL PROPERTY LAW

Swiss family law establishes three marital property regimes to govern the ownership of the property: (i) the marital property regime of participation in acquired property (*Errungenschaftsbeteiligung*), (ii) the community of property (*Gütergemeinschaft*), and (iii) the separation of property (*Gütertrennung*). As participation in acquired property constitutes the default,

it applies if the spouses do not choose a different regime by marital agreement (either by way of a prenuptial agreement prior to marriage/civil union or by a contract amending an existing matrimonial property regime following marriage/civil union).

The marital property regime of participation in acquired property (Articles 196–220) distinguishes property acquired during the marriage from the individual property belonging to each individual spouse. Consequently, two different types of property can be distinguished, namely the individual assets of the spouses/registered partners and the assets they acquired during the marriage or registered partnership.<sup>9</sup>

The *acquired property* under this regime comprises the assets which a spouse acquired for valuable consideration during the marital property regime, in particular:

- proceeds from employment (e.g. salaries);
- benefits received from staff welfare schemes, social security, and social welfare institutions;
- compensation for inability to work;
- income derived from individual property; and
- property acquired to replace or substitute acquired assets.

By operation of law (Article 197), a spouse's *individual property* comprises:

- personal belongings used exclusively by that spouse (e.g. jewellery, musical instruments, etc.);
- assets belonging to one spouse as well as donated and inherited property;
- claims for satisfaction; and
- acquisitions substituting or replacing individual assets.

The marital property regime is dissolved (i) through divorce, (ii) on the death of a spouse, or (iii) on the implementation of a different regime. In the case of dissolution of the marital property regime of participation in acquired

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9 By default, registered partners live under the property regime of separation of property, see Article 18 of the Federal Act on Registered Partnership for Same Sex Couples of 18 June 2004, SR. 211.231. However, registered partners can opt-in and declare applicable the principles of the regime of participation in acquired property, by way of a property agreement.

property, each spouse (or, in case of dissolution upon death, his/her heirs) keeps his or her *individual* property and the spouses (or the surviving spouse with the deceased spouse's heirs) settle their debts to one another. The distribution of the property which was acquired during the marriage depends on the surplus or deficit of each spouse's *acquired* property, whereby each spouse is entitled to one-half of the surplus of the other spouse.

The marital property regime of *community of property* comprises two types of property: the individual assets of each spouse and the common assets of the couple. If the community of property regime is dissolved by the death of a spouse or the implementation of a different marital property regime, each party is entitled to one-half of the common assets and may keep his or her own individual assets.

Finally, in the *separation of property* regime only one type of property exists, namely the individual property of each spouse. Each spouse, within the limits of the law, administers and enjoys the benefits of his or her individual property. If the regime of separation of property is dissolved, each spouse is entitled to his or her individual property.

## 5. PROHIBITION OF MAINTENANCE FOUNDATIONS AND FEE TAILS

Article 335 I establishes that assets may be tied to a family by means of a family foundation created under the Law of Persons or Inheritance Law (see Article 80 I) to meet the costs of raising, endowing or supporting family members, or for other "*similar purposes*". However, the establishment of (new) fee tails (*Fideikommiss*) is explicitly prohibited (Article 335 II, Article 488 II).<sup>10</sup> This prohibition of fee tails aims at preventing the preservation and accumulation of wealth in dynastic family structures.

The Federal Supreme Court follows a strict interpretation of the phrase "*similar purposes*" contained in Article 335. In a key ruling it held that the establishment of family foundations for maintenance purposes

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<sup>10</sup> Fee tails in civil law jurisdictions were a way of connecting assets to a certain family over generations by bequeathing them from father to, traditionally, eldest son thereby, preventing desegregation of the family assets (e.g. lands, castles, etc.). Nowadays common-law trusts and, in some jurisdictions, family foundations can serve similar purposes.

(*Unterhaltstiftungen*) is not permissible.<sup>11</sup> However, considering the historic will of the legislator at the time of the Civil Code's enactment, this ruling was neither imperative nor convincing in the light of modern foundation law developments and the generally liberal approach of the Swiss civil law. Perhaps indicating a shift towards a less strict approach, the Federal Supreme Court held in 2009 that Article 335 is not to be considered a so-called *loi d'application immédiate* preventing the legal recognition of maintenance foundations established under foreign law.<sup>12</sup>

## 6. INHERITANCE LAW

As a consequence of the freedom to dispose of one's property as one sees fit *inter vivos* (Article 641), Swiss inheritance law stipulates the freedom to pass on wealth at death through the means of a will (Article 470 I). Within the *numerus clausus* of types of testamentary dispositions, the testator may, in principle, freely allocate his property after his death (Article 481 I). The Civil Code stipulates testaments and contracts of succession as the two main types of wills. If the testator decides not to make a will, the Civil Code designates his offspring, spouse, and other family members as statutory heirs who are eligible for a certain quota of the estate (Articles 457–466).

Pursuant to Article 542, an heir must be alive and capable of inheriting at the time of succession. While natural persons can inherit both as statutory and testamentary heirs, legal persons can only be appointed as heirs by way of a testamentary disposition. In certain constellations (for example if a person wilfully and unlawfully caused or attempted to cause the death of the decedent) a person will be regarded as unworthy (i.e. incapable) of inheriting thus excluding such person as statutory and/or testamentary heir (Articles 540 et seq.). By operation of law the excluded person's issue inherit from the deceased as if the person unworthy to inherit had predeceased the deceased.

Unless the testator has – legitimately – deprived an heir of his or her statutory heirship by way of disinheritance (Articles 477 et seqq., for example where the heir has committed a serious crime against the testator or a person close to the testator), the freedom to make a will is significantly limited by

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11 BGE 71 I 265.

12 BGE 135 III 614.

Switzerland's restrictive regime of *forced shares*. Under this regime, only the "disposable part" of a testator's assets can be passed-on at his or her discretion (Article 470 I), while a substantial quota of the testator's assets is available to the testator's offspring, spouse, and parents (again, unless the testator can disinherit one or more of the aforementioned persons).<sup>13</sup> This is a statutory entitlement. Moreover, the statutory heirs do not simply receive the right to make a claim for payment against the testator's estate; they become heirs *ex lege*. Finally, to protect against the possibility of the testator abusively evading the heir's statutory rights *inter vivos*, the testator's freedom to dispose of his or her assets *inter vivos* is limited by the possibility of an abatement of such transactions after his or her death (Article 527).

Example: At the time of his death the testator, whose spouse had died a couple of years earlier, leaves a daughter and assets of around CHF 1 million. The testator who had always lived with an attitude "to leave the world a better place" had, over a period of three years prior to his death, made various donations of CHF 9 million in total to a charitable institution. In his testament the testator has appointed his daughter as sole heiress. Although the daughter had, from a formal point of view, been appointed as sole heiress, the *inter-vivos*-donations substantially undermine her compulsory share. Without the deceased's donations the estate would have amounted to CHF 10 million and the daughter would, from a legal point of view, have been entitled to a compulsory portion of  $\frac{3}{4}$  of the estate (Article 471 I), i.e. CHF 7.5 million. However, in economic terms she only gets CHF 1 million under the testament. According to Article 527 III gifts made in the last five years before the deceased's death are subject to abatement. As a result, the daughter can demand CHF 6.5 million from the donee (i.e. the charitable institution) to fully restore her compulsory portion of the heritage.

Another key characteristic of Swiss inheritance law is the principle of *eo ipso* acquisition of an estate through universal succession (Article 560). Upon the death of the deceased, the estate in its entirety vests *ex lege* in the heirs. According to the *eo ipso* acquisition, the heirs acquire all of the deceased's assets and debts automatically and without a requirement for any formal act from the heirs and/or any administrative or judicial body. As a result of the *principle of universal succession* the deceased's claims, rights of ownership, limited rights *in rem*, and rights of possession automatically pass to the heirs

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13 Currently, a draft legislation proposes abolishing the compulsory portion of the parents and reducing the offspring's compulsory portion from  $\frac{3}{4}$  to  $\frac{1}{2}$  of their statutory share.

while the debts of the deceased become the personal debts of the heirs. The principle applies to both statutory and testamentary heirs. In order to protect heirs from receiving unwanted or over-indebted/insolvent estates, every heir has the right to renounce the inheritance within three months after he/she learned of the death of the deceased (Article 567). In addition, there is a legal presumption in favour of renunciation in case of insolvent estates (Article 566).

## II. Principles

### 1. APPLICATION AND INTERPRETATION OF THE LAW

According to Article 1, which addresses the relationship between statutory law and judicial power, the law must be applied by the courts to all legal questions it provides an answer to, by directly applying its wording or by interpreting its terms. However, in the absence of an applicable provision, a court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would establish itself if it were the legislator. When applying and interpreting the law, the court shall follow established doctrine and tradition.

Article 1 can be regarded as the civil law's expression of the constitutionally protected and fundamental principle of the *rule of law* (*Rechtsstaatlichkeitsgrundsatz*) in the following ways. Firstly, it provides for the *separation of powers* by requiring a court to apply the law in cases where it is applicable. The legislator passes laws as abstract and general rules; thus it is for the courts to concretely apply the law in each individual case. Secondly, Article 1 dictates that, when interpreting the law, the courts must follow established *methodology*. Although the reference to doctrine and tradition in Article 1 is not exhaustive, this reference does explicitly identify established doctrine and case law as two relevant considerations of methodological interpretation in the process of finding justice.<sup>14</sup> Thirdly, Article 1 contains the *prohibition of arbitrary decisions*. In cases where the legislator has not passed any legislation, the courts cannot simply decide the case as they see fit. Instead, this provision stipulates a process according to which a court must resort to customary (e.g. local or professional) laws, if available. If neither explicit nor customary laws exist, the court must put itself in the shoes of the legislature and establish a rule that could serve as a general statutory law-provision. Even

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<sup>14</sup> “Tradition” within the meaning of Article 1 includes established case law as well as established administrative practice, see TUOR/SCHNYDER/SCHMID, § 5 n. 37 et seqq.



in this scenario, the court is not permitted unfettered discretion. By dictating that the court must “*act as legislator*”, Article 1 demands a structured approach, and thereby subtly yet effectively reminds courts of the fundamental principles of the rule of law – such as proportionality and legal equality.

Whilst interpreting the law, the Federal Supreme Court utilises the following *common legal interpretation methods*:

- *grammatical interpretation* relying on the wording, syntax, and linguistic usage of the relevant text thereby giving words their literal, usual, and grammatical meaning;
- *systematic interpretation* by contextualising a provision within the overall legal and statutory framework;
- *teleological interpretation* which involves a consideration of the purpose and rationale (*telos*) of a certain provision;
- *realistic interpretation* which demands that the result of an interpretation must also consider questions of practicability;
- *historic interpretation* considering either the legislator’s original will or relying on a more flexible historic intention, which may take into account later developments; and
- *constitutional interpretation* requiring courts to choose an interpretation that is best in line with the fundamental values enshrined in the Swiss Constitution.<sup>15</sup>

It should be noted that there is no hierarchy between these methods of interpretation; no method has greater importance or is accorded greater weight than the others. Instead, the Federal Supreme Court employs a “pragmatic” *pluralism of methods*. According to this approach, the law must primarily be interpreted integrally: its wording, meaning, and purpose as well as its underlying values and inherent rationale all must be part of the consideration. The interpretation must not be solely based on the wording of the provision. Instead, the relevant rule must be considered within the context of the law in a broader sense, and as something which can only be properly understood and concretised when confronted with the facts of an individual case. In this way, the rule ultimately comes to life through interpretation.<sup>16</sup>

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<sup>15</sup> BGE 106 Ia 33.

<sup>16</sup> BGE 136 III 23, consideration 6.6.2.1.

This pragmatic approach is being criticised in the legal doctrine. On closer examination, it can very well be argued that the Federal Supreme Court simply wants to keep the door open for any future interpretation of a certain law. Whether such blurring of boundaries between the different interpretation methods is strengthening legal certainty, is, however, highly doubtful. In addition, it becomes more difficult to draw the line between admissible further development of the law through judicial decisions (e.g. to close a legal loophole) and inadmissible judicial legislation.

## 2. GOOD FAITH

Another fundamental principle of Swiss civil law is enshrined in Article 2: every person must act in good faith when exercising his or her rights or fulfilling his or her obligations. Further, this provision clarifies that the manifest abuse of a right is not protected by law. The general *principle of good faith* is not limited to civil law, but is universally applicable and has validity in all aspects of Swiss law.<sup>17</sup>

This general rule of good faith (*bona fide*) can be divided into two sub-principles:

- (i) the principle of *mutual respect and consideration* when exercising rights and fulfilling legal obligations; and
- (ii) the prohibition of *abuse of rights*.

The principle of good faith requires that the parties to a legal relationship (regardless of whether the basis of the relationship is the law or a contract) act in an appropriate and honest manner, remaining loyal to their legal obligations. In this regard, Article 2 codifies and channels universal moral and philosophical ideas of integrity into the civil law.<sup>18</sup>

<sup>17</sup> BGE 83 II 345: “Article 2 of the Civil Code contains a general rule which applies in addition to individual legal norms, and which claims validity also outside the scope of federal civil law, e.g. in cantonal procedural law [...]”; see also the Chapter on Administrative Law, p. 200.

<sup>18</sup> Hence, it is not surprising that the sub-principle of mutual respect has, in fact, a lot in common with IMMANUEL KANT’s categorical imperative: “Act only according to that maxim whereby you can, at the same time, will that it should become a universal law”, IMMANUEL KANT, Groundwork of the Metaphysics of Morals, in Immanuel Kant, Practical Philosophy, The Cambridge Edition of the Works of Immanuel Kant, translated and edited by Mary J. Gregor, Cambridge 2008, pp. 37.

The principle of good faith reveals an important facet of Swiss civil law: Article 2 is the gateway and focal point for legal interpretation of, among others, contracts, actions, etc., and, where necessary, the creation of amendments or supplements to legal declarations of intention. Declarations of intention (such as declarations aiming at the conclusion of a contract), which are unclear, vague, or ambiguous and thus open to various interpretations, will be interpreted in accordance with the so-called *principle of trust* (*Vertrauensprinzip*).<sup>19</sup> This principle mandates that in cases where the true intention of the declaring party cannot be unequivocally established, the declaration will be interpreted as the receiving party, in good faith, could and should have understood it.

Other facets of the principle of good faith are the rule against unusual clauses (*Ungewöhnlichkeitsregel*) and the ambiguity rule (*Unklarheitenregel*). In particular, in the context of general terms and conditions (GTCs), where an unusual or surprising wording was implemented without this being explicitly notified, it will not be considered binding on the weaker or less experienced party. Furthermore, ambiguous wording will be interpreted by the court to the detriment of the author of such a clause.

The *prohibition of the abuse of rights* allows Swiss courts to rectify or prevent a result which, although correct from a purely formalistic legal point of view, would be ethically and morally questionable. It leaves room for correcting or preventing unbearable consequences which might otherwise undermine the trust of the people in the legal system's ability to provide fair and reasonable (and morally understandable) results.<sup>20</sup> According to established case law of the Federal Supreme Court of Switzerland a blatant abuse of the law will not be granted legal protection (Article 2 II).<sup>21</sup> Whether an exercise of rights is abusive must be determined in light of all the facts and circumstances of the individual case. Case-law has established certain types of conduct which will be considered abusive such as, amongst others, the exercise of a right which

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19 This applies to declarations of intention to be received by the other party (*empfangsbedürftige Willenserklärungen*). In case of a *unilateral* declaration of intention, which does not need to be received by another party to become legally binding (e.g. testament), the Federal Supreme Court applies the so-called *principle of intent* (*Willentheorie*) according to which only the true and real intention of the declaring party is relevant (and not the interpretation of a hypothetical and [quasi-] objective receiving third party) – as long as the interpretation result can be reconciled with the wording of the declaration.

20 BGE 125 III 257, consideration 2 a.

21 Amongst others, Judgement of the Federal Supreme Court 4A\_141/2008 of 8 December 2009.

is not justified by any legitimate interest, the misuse of a legal institution for inappropriate interests or the contradictory use of rights in a manner that violates valid expectations based on prior conduct. However, Article 2 II is to be applied restrictively and only where the results of strictly applying the law would be severely unjust.

Example: With the aim of reducing taxes and duties, the seller and buyer of a building plot decide to formally reduce the official purchase price in the notarial deed of sale from CHF 6 million to CHF 5 million. However, they agree that the buyer shall pay the seller the difference in cash. If the buyer, upon signing of the notarial deed of sale, refuses to pay the additional CHF 1 million, the seller cannot claim invalidity of the notarised purchase agreement in order to get back ownership of the building plot in return for refund of the purchase price. Although, from a formal point of view, the notarised purchase agreement would be deemed invalid because it did not contain the correct purchase price and, therefore, does not fulfil the requirement that the *entire* agreement regarding the sale of land requires the notarial form, such approach could promote illicit behaviour of colluding parties and undermine the trust of the general public. Therefore, Article 2 II prohibits the seller from invoking the invalidity argument.<sup>22</sup>

One important group of cases revolves around the argument of *venire contra factum proprium* whereby the contradictory conduct of one party is sanctioned if the other party, based on the previous conduct (either by action or omission) of the former, could reasonably expect a different behaviour and has made (financial) arrangements (e.g. investments) as a result of his or her expectations.

Example: Company X (a limited liability company, *GmbH*) has rented business premises from company Y (a company limited by shares, *AG*) for a fixed period of ten years. According to the rental agreement, the parties agreed to start negotiating the terms and conditions of a contract renewal three months prior to the end of the ten-year period. During the negotiations the CEO of company Y repeatedly stated both verbally and in various e-mails that the

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22 Interestingly, in similar cases (BGE 92 II 323 and BGE 104 II 99) the Federal Court declined to set Article 2 II aside on the basis that the other party had willfully colluded in such illicit conduct. Instead, the court emphasised that the legal situation created by the parties as a result of the notarised deed of sale (i.e. the transfer of ownership and the changes registered in the land register) justified rejecting the formally correct argument of invalidity in order to uphold the public reliance and faith with regards to entries in the land register.

lessor wanted to sign a new rental agreement (substantially in line with the previous one which allowed the tenant to modify the premises according to the tenant's needs) with company X "because of the great personal and business relationship" between the two parties.

Against this background and expecting to stay in the business premises for another five to ten years, company X started to make substantial renovations and modifications in the rented space. During this time the parties negotiated the terms of a new contract. Company Y CEO has frequently visited the rented premises where he complimented Company X on the construction works.

However, on the day of the official expiry of the old rental agreement and with only minor issues left to negotiate, the CEO of company Y suddenly sent an e-mail to company X stating that "as you are aware, the rental agreement is expiring today" and demanded from company X to "remove any installations and to make sure to hand over the premises in the original condition by 5.00 pm today at the latest".

In this case company X could, based on the CEO's behaviour, reasonably expect to sign a new rental agreement which would also allow the tenant to make renovations and modifications to the rented premises. By repeatedly signalling to company X during the negotiations, on the one hand, that a contract renewal could be expected and, on the other hand, by abruptly abandoning the negotiations, CEO of company Y has acted in a contradictory manner.

As a result and based on Article 2 II, Y can neither claim that the original rental agreement expired nor demand that company X hand over the business premises in the original condition.

### 3. PUBLICITY, POSSESSION, AND LAND REGISTER

Property law allocates property by conferring rights *in rem* (or real rights) (*dingliche Rechte*)<sup>23</sup>, which have legal effect not only between the parties of a contract or other bilateral legal relationship (*inter partes*), but which can be enforced against everyone (*erga omnes*).<sup>24</sup> To make it easy for any interested (third) party to ascertain the existence or non-existence of such real rights, Swiss property law upholds the *principle of publicity* (*Publizitätsprinzip*),

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23 A real right (or right in rem) is a right attached to a movable or immovable property instead of a person.

24 E.g. such as ownership as a real right, conferring absolute freedom within the limits of the law (Article 641 I) and the right to make a claim of ownership against everyone (Article 641 II).

according to which rights *in rem* must be made public through suitable means.<sup>25</sup>

With regard to movable property, it is possession (*Besitz*), i.e. effective control (Article 919 I), that grants publicity. Accordingly, to validly transfer ownership the new owner must legitimately gain possession (*traditio*) of the chattel (*Traditionsprinzip*, Article 714 I).<sup>26</sup>

There are, however, different forms of possession under Swiss law which may result in different legal remedies being available for the different categories of possessors. First, more than one person is able to possess the same chattel at the same time (*multiple possession*). Thus, effective control can be exercised directly (*immediate possession*) or indirectly via another person (*indirect possession*). Secondly, whoever exercises effective control as if he were the owner of the property has *direct possession*, while someone who exercises effective control based on an obligatory right or a limited right *in rem* has *derivative possession* (Article 920). Thirdly, possession (and also ownership) can be transferred without the need to physically exchange the object of possession (Article 924).

Example: A has borrowed a book from his friend B until the end of the semester (loan for use pursuant to Article 305 of the Swiss Code of Obligations).<sup>27</sup> Under Swiss law, B can sell his book to C while A may continue keeping and using the book. In this case B would need to inform A about the sale of the book and instruct him to hand it over to C at the end of the semester. Following the sale, B has transferred his indirect possession (and, since there is no direct/indirect ownership, full ownership) to C by way of an instruction pursuant to Article 924 (*Besitzanweisung*). A remains the immediate or direct possessor of the book and is entitled to refuse delivery of the book to C based on the same arguments he/she could have invoked against B under the loan for use (C may, therefore, not demand that A deliver the book to C during the semester).

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25 TUOR/SCHNYDER/SCHMID, § 88 n. 9. For a discussion of the principle of publicity under English law, see Wolfgang Faber/Brigitta Lurger (eds.), National Reports on the Transfer of Movables in Europe, Vol. 6, The Netherlands, Switzerland, Czech Republic, Slovakia, Malta, Latvia, in *European Legal Studies*, Vol. 15, Munich 2011, p. 167.

26 Therefore, possession is a fact and not a right.

27 Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: The Code of Obligations), SR 220; see for the English version of the Code of Obligations [www.admin.ch](http://www.admin.ch) (<https://perma.cc/AJ2U-V3MB>).

Since possession usually reveals the existence of real rights on the chattel,<sup>28</sup> the possessor has an interest in excluding third parties from illegitimately exercising control over the chattel. Therefore, the Civil Code stipulates the *action for restitution based on possession* (Article 927) in the event of a wrongful dispossession by any third party.<sup>29</sup> Additionally, anyone who has a better *right* to possess the chattel (as opposed to possession as such) can utilise the *action for restitution based on a right to possession* (Articles 934 and 936).

Example: After B had sold the book to C, fellow student D stole the book from A who was learning in the library. A (and, for that matter, also C as indirect possessor) could demand restitution of possession based on Article 936 since D was acting in bad faith when obtaining direct possession.

However, if the current possessor took possession in good faith<sup>30</sup> in the case of a chattel which was lost by the previous possessor, the latter must reclaim possession within a five year period from the moment the chattel was lost (Article 934). In order to protect the public faith in certain transactions and business practices, Article 934 II stipulates that whenever a chattel has been sold at a public auction, or on the market, or by a merchant dealing in goods of the same kind, it may be reclaimed from the first and any subsequent bona fide purchaser only against reimbursement of the price paid.

If D immediately after he had stolen the book sells it to E, who acted in good faith when purchasing the book, A and C have five years to reclaim their possession from E. Assuming that D is neither a merchant nor sold the book to E on the market, E cannot demand any reimbursement from A or C. Should A and/or C fail to reclaim possession (and, in case of C, also ownership) within the five year-period, E acquires not only possession, but also ownership (!) based on Article 714 II in conjunction with Article 934 even though D as thief was neither authorised to transfer possession nor ownership. Consequently, after five years E becomes the sole possessor and sole owner of the book if he or she acted in good faith.

Further, the previous possessor is not permitted to reclaim possession at all if he or she had knowingly and willingly entrusted the chattel to another person, who then transferred the property to a third party (Article 933).

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28 As a consequence, Article 930 I stipulates a presumption of ownership for the (direct) possessor of the chattel.

29 Immediately after becoming aware of the dispossession and the identity of the offender, but no later than one year after the dispossession occurred (Article 929).

30 See pp. 285.

Thus, in our example neither A nor C could reclaim (direct or indirect) possession based on Article 936 if the book had not been stolen, but if A had instead given it to D as a gift. In this case D, if acting in good faith, is protected both with regards to possession and ownership since the chain of possession had not been broken by way of an unwanted loss or theft.

While a possessor may only invoke an action for restitution of possession based on Article 934 (against a possessor acting in good faith) or Article 936 (against any possessor acting in bad faith), the owner can, additionally, reclaim his or her possession through an *action for restitution based on ownership* (Article 641 II). Unlike the provision in Article 934, there is no specific time limitation period for an action based on Article 641 II, but property ownership needs to be proven.

In the case of immovable property, any disposition, change of ownership, or the creation or cancellation of as well as any amendments to real rights and obligations must be recorded in the land register to have legal effect. The expectation that the land register and its entries are accurate is guaranteed by law under the principle of good faith (Articles 971–974).

Swiss contract law is characterised by the far-reaching autonomy of the contracting parties. In this area, the law only defines certain boundaries (e.g. protection of the typically weak); otherwise it allows the parties to autonomously create and define the scope of rights and obligations which their legal arrangement will encompass. In property law, on the other hand, contracting parties' autonomy is much more limited. Since rights *in rem* take effect *erga omnes*, it must be easy for any third party to ascertain their scope. Therefore, Swiss property law follows a strict *principle of numerus clausus* of rights *in rem*.<sup>31</sup>

The principle of *numerus clausus* regarding rights *in rem* means that parties can select only from a given set of rights when they want to establish or modify a right *in rem* (in particular by way of contract). In this regard it is important to point out that possession in Swiss civil law does not constitute a right *in rem*. However, possession does indicate who has actual control over an asset and thereby ensures adherence to the principle of publicity and protects good faith.

In addition to ownership (*Eigentum*), Swiss property law only encompasses the following rights *in rem*:

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<sup>31</sup> The numerus clausus principle means that there is only a limited number of property rights available to the parties. As a consequence, parties are not entitled to create “new” property rights by deviating from the catalogue of real rights provided by Swiss property law.



- easement (both on property and limited personal easement);
- *usufruct*; and
- lien (including charges on chattels, charges on immovable property such as mortgages, special liens, and liens on debts).

#### 4. RULES OF EVIDENCE

When the Civil Code came into effect in 1912, the federal legislator lacked the competence to legislate on matters of civil procedural law.<sup>32</sup> However, it was deemed necessary that the Civil Code should address certain procedural issues relating to evidence which could not be separated from the substantive civil law. Thus, certain civil procedural matters are covered in this legislation.

One such rule is contained in Article 8: unless the law provides otherwise, the *burden of proof* for establishing an alleged fact shall rest on the person who would derive rights from that fact. Consequently, the party asserting a claim is obligated to prove the legally relevant facts giving rise to and substantiating the claim.<sup>33</sup> Conversely, the party arguing that a claim is unsubstantiated or unenforceable bears the burden to prove the legally relevant facts that make the claim unenforceable (e.g. the argument that the applicable limitation period has lapsed or that the claimant had granted the defendant a deferral).

Further, the legislator of the Civil Code foresaw potential evidence-related problems with regard to good faith if the party invoking or relying on *bona fide* would have to prove its very existence. Therefore, Article 3 makes it clear that where the law makes legal effect conditional on a person's good faith, there shall be a *presumption of good faith*. However, according to Article 3 II, a person cannot invoke the presumption of good faith if he or she has failed to exercise the diligence required by the circumstances of the relevant case.

To illustrate this point: A, who is a car dealer, is offered a brand new "Race Car Deluxe Limited Edition" by B. B, who had stolen the car a couple of days earlier, is asking for a purchase price of CHF 30'000. The car in its current condition is being sold to customers at a market value of CHF 50'000, while

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32 As a matter of fact, only since a referendum in 2000 does the competence for procedural law lie with the federal legislator resulting in the Swiss Code of Civil Procedure of 19 December 2008, SR 272. For details on Swiss Procedural Law, see the Chapter on Civil Procedure, pp. 333; see for an English version of the Civil Procedure Code [www.admin.ch \(https://perma.cc/7MVG-YPQF\)](https://perma.cc/7MVG-YPQF).

33 TUOR/SCHNYDER/SCHMID, § 7 n. 7.

the dealer price paid by professional car dealers is approximately CHF 40'000. In such a case the low price asked by B should alarm A. Since the car is being offered to him 40 % below fair market value and still 25 % off the regular dealer price, A could not claim he acted in good faith. Instead, a court would argue that he failed to exercise proper diligence when acquiring the car and, as a consequence, A would be treated as *mala fide* (bad faith) possessor.<sup>34</sup>

## 5. PRESUMED CAPACITY OF JUDGEMENT

Under Swiss law, in order for one's actions to create legal effect, one must have capacity of judgement. According to Article 16, a person is capable of exercising judgement within the meaning of the law if he or she does not lack the capacity to act rationally by virtue of being below a certain age or because of mental disability, mental disorder, intoxication, or due to other similar circumstances. The capacity of judgment is not determined abstractly, but in light of each legal transaction or event taking place. For instance, Article 94 requires prospective spouses to be at least 18 years old and to have capacity of judgement. In this case it is (only) relevant to ascertain that the prospective spouses are mentally capable to understand the general concept of marriage and to make such decision based on their own free will. In other words, for the question of capacity of judgement *in relation to a prospective marriage* it is irrelevant whether or not one of the prospective spouses would also be capable of concluding a complex legal contract.

According to the general rule of evidence (Article 8), the party invoking incapacity of judgement as an argument for or against a claim would, in principle, have to prove this circumstance. However, *capacity of judgement* is presumed under Swiss civil law. Consequently, a party does not have to prove that he or she was capable of judgement. As a result, when entering into a contract, parties can assume that the other party is legally capable. This presumption cannot be rebutted easily or prematurely. Even in cases involving a person who constantly brings suits, the presumption cannot be easily rebutted. As the Federal Supreme Court held, not everyone who tries to enforce his/her alleged rights in a stubborn manner with all possible means, and occasionally even disregards norms of common decency, can be automatically regarded

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34 For a similar case see BGE 107 II 41; see also BGE 113 II 397 where the court held that car dealers are subject to a higher standard of due care and diligence in the context of purchases and sales of cars compared to other persons.

as a psychopathic grumbler (*psychopathischer Querulant*) who is incapable of judgement – even if he or she overstretches the patience of courts and authorities.<sup>35</sup>

It should be pointed out that doctrine and case law seem to be moving towards a less extreme approach to the presumption of capacity of judgement. In a case from 2004, the Federal Supreme Court was confronted with the following facts: In 1985 and thus at the age of 85, E, who had no close relatives at that time, had drawn up a notarised testament in favour of C and a local Swiss community (B). From 1988 onwards E needed intensive care and nursing in her home. At the instigation of the competent guardianship authority, A started taking care of E in July 1988 and both women developed a close personal relationship. In September 1988, E, accompanied by A, drew up a new notarised testament revoking all prior testamentary dispositions and appointing A as E's sole heiress. Shortly afterwards E died. Upon E's demise, B and C brought forward an action for annulment arguing that E had not acted with capacity of judgment when drawing up the second testament. The Federal Supreme Court upheld the lower courts' decisions and, effectively, declared void the second testament. The Court held that the presumption of capacity of judgement cannot be invoked (i.e. the person concerned is regarded as lacking capacity of judgement) if the person concerned, according to his or her general constitution, must normally and in all probability be regarded as incapable of exercising judgment. Based on the facts of the case the court found that a reduction of the standard of evidence applies and that, as a consequence, the burden of proof shifts to the person arguing in favour of capacity of judgement. Following such a shift of the burden of proof, the party confronted with a claim of incapability of judgement may, according to the court, bring forward all facts and arguments in support of his/her position by providing *full proof* of capability of judgement.<sup>36</sup>

However, this decision raises two questions: Firstly, how can someone provide full proof of capability of judgement, in particular in cases where the person concerned has already died? Secondly, in an ageing society one must be careful not to jump to the conclusion that older people from a certain age onwards or with a certain health condition (What age/health conditions exactly?) are, in essence, generally presumed to lack capacity of

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35 BGE 98 Ia 324, consideration 3.

36 Judgment of the Federal Supreme Court 5C.33/2004 of 6 October 2004 (in particular, considerations 3.1. and 3.2).

judgement – thereby shifting the burden of proof to the older and more vulnerable members of society. Hence, it will be interesting to see how Swiss courts will decide in the future in potentially less obvious cases than the one described above.

## 6. SEPARATION PRINCIPLE

Part 1 of the Civil Code regulates the legal personality of legal persons in Switzerland. In Swiss law, so-called legal persons (*juristische Personen*) possess all the same rights and duties as natural persons, except for those which presuppose intrinsically human attributes, such as gender, age, or kinship (Article 53).

The decision to grant legal persons legal capacity and hence the ability to possess rights and be subjected to obligations, raises questions regarding (i) the internal relationship between the legal person and its owners, founders, or members and (ii) the external relationship of the legal person vis-à-vis third parties. In this regard, Swiss civil law follows the so-called *separation principle* (*Trennungsprinzip*), a fundamental rule of Swiss civil law in general and the Law of Persons in particular.

Under the separation principle, a legal person is separated both in legal and economic terms from its members, owners, or founders. In other words, the legal person itself is not just the sum of its members, owners, or founders; instead, it carries out its own activities and participates independently in economic and legal transactions. Hence, the legal person, and not the natural persons behind it, is the sole owner of its assets and the sole debtor of its obligations. Consequently, the members, owners (i.e. shareholders), or founders are neither entitled to the legal person's assets nor liable to third parties for its debts.<sup>37</sup>

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37 Of course, shareholders are entitled to a company's profits by way of dividends. However, shareholders cannot simply demand that a certain asset (e.g. real estate), belonging to the company be gifted to them (this would also be considered a breach of the fiduciary duties of the company's board of directors).

### III. Landmark Cases

The Federal Supreme Court (*Bundesgericht*) in Lausanne is the highest court in Switzerland and also the highest instance court for civil cases. Parties may only appeal to the Federal Supreme Court if they have exhausted all other procedures before hierarchically lower courts. When considering civil law matters, the main task of the Federal Supreme Court is to secure the consistent application of Swiss civil law throughout Switzerland. However, the Federal Supreme Court does not engage in reassessing the substance of a case or hearing new facts. Instead, it focuses only on whether the law has been correctly applied and interpreted.

#### 1. LEGACY HUNTER<sup>38</sup>

In 2006 the Federal Supreme Court was given the (rare) opportunity (i) to shed light on the question whether a duty to inform can be derived from the general principle of good faith according to Article 2 I and (ii) to elaborate on grounds for unworthiness to inherit pursuant to Article 540.

E was born on 7 February 1907. She married an industrialist from Dresden. The marriage remained childless. A few years after the death of her husband, E relocated to and settled in Basel. She lived in her own flat, independently and without need for nursing care. On the 8 or 9 December 1993, E fell heavily in her apartment where she laid on the ground for a while without care or help. Following her accident, E (hereinafter: testator) was admitted to a nursing home 1993 where she died on 9 July 1995.

K (hereinafter: plaintiff) comes from a family that belonged to the circle of friends or acquaintances of the testator. According to a will dated 31 August 1987, the testator appointed K as sole heir. In a supplement to that will, the testator confirmed K's position as sole heir on the 10 March 1991.

B (hereinafter: defendant) acted as the testator's lawyer from 1991 until, presumably, her death. According to the facts the Federal Supreme Court was

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38 BGE 132 III 305.

bound by, the defendant has been the lawyer of the testator since 1991 and has also discussed hereditary issues with her. When asked about her wishes regarding her estate, the testator replied to the defendant with the words: “*That’s you.*” During a visit at the nursing home, the defendant was informed by the testator in April 1994 about her will and that she had appointed the defendant as her sole heir. The defendant took this testament dated 2 December 1993 with him when he left the testator.

In addition to the relationship of trust as the testator’s nominated lawyer, the defendant exercised great personal influence over the testator. The testator has not only been in a relationship of trust with the defendant, but continued to be in an actual relationship of dependency. With constant gifts the testator wanted to gain and maintain the friendship and affection of the defendant. The defendant was almost the sole reference person of the testator. The testator assumed that the defendant’s consideration towards her was the result of genuine friendship and affection, and in this light she appointed the defendant as her sole heir. The defendant, on the other hand, did not act on the basis of friendship, but wanted to enrich himself. As the courts held, the defendant’s true intentions have remained hidden from the testator.

In a handwritten will dated 16 November 1992 or 1993 (the exact year could not be determined), the testator appointed the defendant as her sole heir and executor and instructed him to pay out a certain sum as a legacy (*Vermächtnis*) to the plaintiff. In a testament dated 2 December 1993, the testator confirmed the defendant as sole heir and executor, but this time she did not include in the new will the legacy in favour of the plaintiff. Finally, in a letter to the defendant dated 25 February 1995, the testator revoked all previous testamentary dispositions and instructions, with the exception of those in favour of the defendant.

The plaintiff challenged the defendant’s appointment as the sole heir and executor of the testator and, *inter alia*, brought an action seeking annulment of the testament dated 2 December 1993, stating that the defendant was unworthy to inherit and thus incapable to act as executor. The civil court of Basel-Stadt declared the last will of 2 December 1993 invalid. The appellate court of the canton of Basel-Stadt came to the contrary conclusion that the last will of 2 December 1993 was valid. However, the appellate court ultimately allowed the claim and found that the defendant was unworthy to inherit and incapable of exercising the office of executor.

With his appeal, the defendant requested to be, essentially, reinstated as executor and declared sole heir of the testator. The appeal was dismissed by the Federal Supreme Court.

With regards to the unworthiness of the defendant to inherit, the Federal Supreme Court had to answer the question whether the defendant, as the lawyer of the testator, had been under the duty to inform her about his conflict of interest (as lawyer and presumed sole heir) and, as a result, had maliciously prevented the testator from making a new and/or revoking the existing (last) will.

Firstly, the court held that the malicious act or omission pursuant to Article 540 I No 3 does not require that a criminal act had been committed. Secondly, the court confirmed the view that there must be a causal relationship between the malicious act or omission and the fact that the decedent did not make or revoke a will. In cases of a potential failure to provide advice and information, the hypothetical causality must be analysed. In other words, one must ask whether – based on an ordinary course of events and the general experience of life – a testator would have made, amended, or revoked a testament had he or she been informed in a proper manner.

The court then turned to the question whether the defendant was under a legal obligation to inform the testator about his true intentions which were not based on genuine friendship and about the conflict of interest arising from his simultaneous position as the testator's appointed sole heir and lawyer. The court repeated that from 1991 until her death the defendant was the only reference person for the testator. From the testator's perspective, this was much more than a working or purely professional relationship. Against this background, the court relied on the principle of good faith (Article 2) requiring parties to a legal relationship to act in an appropriate and honest manner. By not informing the testator about his true – i.e. purely economic – intentions and the conflict of interest as the testator's appointed heir and lawyer, the defendant had caused the testator to believe that they had a genuine friendship. Against this background the testator kept the defendant as the sole heir and executor until her death. Interestingly, the court did see that the testator, from a legal point of view, could have amended or revoked her last will and/or made a new testament at any time. However, it emphasised that the testator had relied on the (wrong) assumption that she and the defendant shared a friendship which made her believe there was no need to revoke her will or to make a new one.

In the eyes of the court, the defendant's failure to inform the testator about his true intentions as well as of his conflict of interest qualified as a grave misconduct on his part resulting in his unworthiness to inherit and to act as executor.

## 2. CAPACITY TO MARRY<sup>39</sup>

In this case the Federal Supreme Court was given the opportunity to examine the significance, meaning, and implications of the capacity of judgment (Article 16) in the context of a (prospective) marriage.

P, born in 1951 and E, born in 1934, had lived together since 1979 and in that year the couple initiated the formal preparatory procedure with the aim to marry (Article 97 I).<sup>40</sup>

During the preparatory procedure, P's mother, siblings, and in-laws spoke out against the marriage and, ultimately, brought forward an application to prohibit the prospective marriage. They claimed that P was mentally disabled and thus lacked capacity of judgement with regards to the prospective marriage.

Based on three court appointed experts' opinions, the court of first instance came to the conclusion that P's mental deficiency was in the border area between debility and imbecility. However, the court of first instance held that neither the couple's own interests nor those of other persons exclude the prospective marriage. It stated that marrying E was evidently in P's interest since she could remain in her familiar environment. P, who was pregnant at that time, was from a medical point of view also not in danger of passing on her mental condition onto her offspring, thereby rendering moot this (ethically very weak, to say the least) line of argument. As the court, dismissing the claim brought forward by P's family, said: *"Since P [...] could expect some help from E [...] in fulfilling her duties as a housewife and mother and since the simple, nature-loving life on the farm as well as the harmony between [the couple] could compensate for some educational shortcomings, it cannot be said that the child's interests [...] necessarily preclude the marriage."* P's family appealed this decision to the Higher Court, but to no avail. With their appeal to the Federal Supreme Court the claimants essentially repeated their arguments presented to the lower courts.

With regard to the capacity to marry (Article 97 I), the Federal Supreme Court had to decide whether P should be regarded as having capacity of

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39 BGE 109 II 273.

40 In a nutshell, the aim of the preparatory procedure is to give the civil register the opportunity to assure itself that the marriage requirements are met (inter alia, that no fake marriage takes place, that the prospective spouses are not already married to other persons, and that the spouses are capable of marrying).



judgement pursuant to Article 16. Agreeing with the lower courts, it held that the (in-)capacity of judgement cannot be determined, once and for all, in an abstract manner without regard to the specific circumstances of each individual case.

The Federal Supreme Court held that, as far as the capacity to marry is concerned, one must (only) determine whether the fiancées have the mental maturity to enter into marriage with the concrete partner and whether they are capable of understanding the concept and meaning of a marriage and the mutual obligations resulting from it. Interestingly, the court continues by stating that the requirements regarding the capacity of judgement in the context of marrying are higher compared to the capacity of judgement in business or commercial dealings. At the same time, however, the requirements must not be so high to effectively render meaningless marriage as a constitutionally guaranteed right for too large a part of the population.

In its decision the Federal Supreme Court recalled that the reason for the requirement of Article 97 I was to prevent from the very beginning (dysfunctional) marriages which can never result in a true communion between two people. In addition, this provision wishes to protect the mentally incapable weak(er) person from being at the mercy of his or her spouse.

However, in a case like the present, capacity of judgement can be affirmed if the marriage is only beneficial for the mentally disabled person. By repeating the facts determined by the lower courts, the Federal Supreme Court found that a marriage with E was in the best interest of P and that she was to be considered as having capacity of judgement to enter into the marriage according to Article 97 I.

### 3. FOOTMAN WITH SAMOVAR<sup>41</sup>

In a landmark case involving a famous artwork, the Federal Supreme Court clarified its view with regard to claims for restitution based on possession (Articles 934 and 936) and the relevant question of good or bad faith of the current possessor in light of Article 3.

In 1989, Mr. Werner Merzbacher, an important private collector of contemporary art, acquired for just over \$ 1 million the painting “Footman

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41 BGE 139 III 305; the details, including the names of the parties involved, are publicly known.

with Samovar” which was painted in 1914 by the Russian artist Kasimir Sewerinowitsch Malewitsch, one of the most prominent representatives of the so-called Cubo-Futurism school. The sale had been executed on a commission basis by a gallery in Geneva, with the seller remaining anonymous.<sup>42</sup>

Prior to the acquisition, Mr. Merzbacher had consulted with an expert who had confirmed the authenticity of the artwork. However, the expert had also, at this point, informed Mr. Merzbacher about rumours which were circulating in the art world claiming that a stolen artwork from Malewitsch was apparently on the market. Consequently, Mr. Merzbacher initiated extensive investigations regarding the “Footman with Samovar” and contacted organisations including Interpol about the matter. These investigations yielded no results.

In 2004, a Russian art collector filed a lawsuit against Mr. Merzbacher for restitution of possession based on Articles 934 and 936 (basically arguing that Mr. Merzbacher was not a bona fide possessor, but had acted in bad faith when acquiring the artwork). He claimed that the “Footman with Samovar” had been stolen from the private collection of his parents in 1978, and argued that this was a fact that Mr. Merzbacher both could have and ought to have known.

Both the District Court of Meilen as the court of first instance and the High Court of the Canton of Zurich as the second instance dismissed the case. They took the view that Mr. Merzbacher neither had nor ought to have had knowledge of the theft of the painting and, therefore, bona fide could be assumed based on Article 3 I. The lower courts held that Mr. Merzbacher had exercised proper and due diligence because he had initiated investigations prior to making the purchase.

The Federal Supreme Court, however, set aside the decision and remitted the case to the High Court of the Canton of Zurich. In particular, the Federal Supreme Court held that Mr. Merzbacher should have conducted more detailed investigations and that, therefore, the presumption of bona fide does not apply in the current case. The court, having regard to Article 3 II, pointed out that the art expert had informed Mr. Merzbacher about a concrete rumour indicating that “Footman with Samovar” might have been stolen. This was a clear warning sign considering that paintings from Malewitsch have only very rarely been put on the market for sale in the relevant period. In

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42 The details and facts of this complex case are contained in the decision CG040012 of the District Court of Meilen of 21 December 2010.

the court's own words, "[i]t is sufficient that at the time, from an objective point of view, the consultation of one or more experts would have been a suitable (if not the most appropriate) and reasonable measure to find out more about this rumour and any defects or limitations of the right of disposal on the part of the seller."

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# Tina Huber-Purtschert

## Law of Obligations

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The Swiss Law of Obligations is mainly contained within the Code of Obligations, which is Part Five of the Swiss Civil Code and is officially known as the Federal Act on the Amendment of the Swiss Civil Code.<sup>1</sup> The Federal Assembly of the Swiss confederation decreed the creation of the Code of Obligations on March 30, 1911; together with the other parts of the Civil Code, it entered into force on January 1st, 1912. The Code of Obligations is filed in the classified compilation of federal legislation under the number 220 (the Civil Code is filed under the number 210).<sup>2</sup> The Code of Obligations exists in three official language versions, namely in French, German, and Italian.<sup>3</sup> For several years now, the confederation has also provided an English translation and since very recently a Romansh translation too. However, since English is not official language and Romansh only partial official language of the Swiss confederation, these translations are provided for information purposes only; they have no legal force.<sup>4</sup>

The Code is regularly subjected to both minor and major retouches, but its basis is now over one hundred years old and remains to this day a model of simplicity. The legislator followed one basic rule: no more than three paragraphs per Article and no more than one sentence per paragraph. This rule is largely still followed today. Thus, the basic aim of the Code is to codify the general rule rather than to enumerate each possible relevant scenario which may arise. The Code of Obligations draws key influence from the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), but due to the Swiss legislator's aforementioned ambitions of simplicity, it is much easier to read. Exemplifying this, the Swiss Code of Obligations is often chosen by the parties as the law applicable to their contracts, particularly in commercial arbitration.

The Code of Obligations consists of five divisions with the following titles:

- Division One: General Provisions (Articles 1–183)
- Division Two: Types of Contractual Relationship (Articles 184–551)

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1 In the following text, where Articles are mentioned without referencing their source of law, they are located in the Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: The Code of Obligations), SR 220.

2 For an explanation of the classified compilation of federal legislation see Chapter Swiss Legal System, pp. 31.

3 Article 70 I of the Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101 (Constitution); see for an English version of the Constitution [www.admin.ch](https://www.admin.ch) (<https://perma.cc/M8UJ-S369>).

4 See for the English version of the Code of Obligations [www.admin.ch](https://www.admin.ch) (<https://perma.cc/AJ2U-V3MB>).

- Division Three: Commercial Enterprises and the Cooperative (Articles 552–926)
- Division Four: The Commercial Register, Business Names, and Commercial Accounting (Articles 927–964)
- Division Five: Negotiable Securities (Articles 965–1186)

The code essentially covers two major subjects: contract and tort law in the first two divisions and company law (including the law on securities) in the subsequent three divisions. Since the two subjects cover different areas of the law, they will be discussed individually and chronologically in this chapter.





# I. Contract and Tort Law

## 1. CODES

As mentioned above, the Articles about contract and tort law can be found in the first two divisions of the Code of Obligations. The first division with the general provisions contains the following subjects subdivided into five titles:

- Creation of Obligations (obligations arising by contract, obligations in tort, obligations deriving from unjust enrichment; Articles 1–67)
- Effect of Obligations (performance of obligations, consequences of non-performance of obligations, obligations involving third parties; Articles 68–113)
- Extinction of Obligations (Articles 114–142)
- Special Relationships relating to Obligations (joint and several obligations, conditional obligations, earnest money,<sup>5</sup> forfeit money,<sup>6</sup> salary deductions, and contractual penalties; Articles 143–163)
- Assignment of Claims and Assumption of Debt (Articles 164–183)

It is important to mention that several of the general provisions of the Code of Obligations have a broader application than just within the context of the Code of Obligations. Article 7 Civil Code<sup>7</sup> expressly states:

*“The general provisions of the Code of Obligations concerning the formation, performance and termination of contracts also apply to other civil law matters.”<sup>8</sup>*

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5 Earnest money is a payment already made upon conclusion of a contract with the meaning that the contractual partner may retain the amount in the event of non-performance.

6 Forfeit money is a payment already made upon conclusion of a contract and which is a compensation for the right to withdraw from the contract.

7 Swiss Civil code of 10 December 1907, SR 210.

8 E.g. Article 18 about the interpretation of contracts and simulation is applicable to the interpretation of testamentary dispositions. The law of succession is contained in the Civil Code, starting at Article 457 Civil Code.

The general provisions have probably undergone the least change as compared to the rest of the Code of Obligations since its creation. Major reform projects traditionally face much resistance. For example, due to lacking consensus in the relevant consultation procedure, the Federal Council decided in 2009 to renounce plans to undertake a comprehensive revision and unification of the Articles concerning tort law, opting instead for minor retouches<sup>9</sup> only. Since then, an initiative from the law faculties of all Swiss universities with a law department has been launched, demanding that the general part of the Code of Obligations be rewritten. The focus of the “CO 2020” initiative is threefold: Apply modern, unified language where needed, codify generally accepted principles, and modernise certain subjects, e.g. the consequences of defect performance of a contract; all this with the aim of continuing the tradition of a simple, citizen-oriented code. The CO 2020 is available in French, German, Italian, and English.<sup>10</sup> In 2013, the Swiss parliament made a request (formally known as a postulate) to the Federal Council with reference to CO 2020 asking whether the Council would be willing to present entirely revised, more up-to-date general provisions of the Code of Obligations for Parliament to consider. In January 2018 the Federal Council answered Parliament that the consultation process has shown that there is not a societal consensus about the need of such a general revision.

Articles 184–551 cover different types of contractual relationship (so called nominate contracts), namely the following:

- Sale and exchange (Articles 184–238), including amongst others special provisions about the *sale of chattel* (Articles 187 et seqq.) and the sale of *immovable property* (Articles 216 et seqq.)
- Gift (Articles 239–252)
- *Lease* (Articles 253–274g) and usufructuary lease<sup>11</sup> (Articles 275–304)
- Loan for use (Articles 305–311) and fixed-term loan (Articles 312–318)
- Employment contracts (Articles 319–362), including the *individual employment contract* and special employment contracts such as the

9 The retouches implemented to date concern mainly the introduction of a liability in respect of cryptographic keys used to generate electronic signatures or seals (Article 59a).

10 See [www.or2020.ch](http://www.or2020.ch) (<https://perma.cc/5N9L-FG6T>).

11 The usufructuary lease is a contract whereby the lessor undertakes to grant the lessee the use of a productive object or right and the benefit of its fruits or proceeds in exchange for rent (Article 275).

apprenticeship contract, the commercial traveller contract,<sup>12</sup> and the homemaker contract

- *Contract for work and services* (Articles 363–379)
- Publishing contract (Articles 380–393)
- Agency contracts (Articles 394–418), including the *simple agency contract* and special agency contracts such as the brokerage contract and the commercial agency contract
- Agency without authority (Articles 419–424)
- Commission contract (Articles 425–439)
- Contract of carriage (Articles 440–457)
- Payment instruction (Articles 466–471)
- Contract of bailment (Articles 472–491)
- Contract of surety (Articles 492–512)
- Gambling and betting (Articles 513–515)
- Life annuity contract and lifetime maintenance agreement (Articles 516–529)
- Simple partnership (Articles 530–551), although thematically these provisions belong to company law rather than contract law.<sup>13</sup>

Not all the regulated contracts have reached the same level of practical significance. Chattel sale, sale of immovable property, lease, individual employment contract, the contract for work and services, and the simple agency contract are probably the most widely used. The rest are, generally speaking, utilised on a significantly rarer basis.

Although contractual rules are generally located in the Code of Obligations, other federal acts (and not to forget treaties, on a higher level, and ordinances, on a lower level) aside from the Code of Obligations also contain contractual rules. Generally these other acts regulate a very specific contractual problem or relationship. Some notable examples include the Consumer Credit Act<sup>14</sup> (not [yet] available in English), the Product Liability Act<sup>15</sup> (not [yet] available

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12 Under a commercial traveller's contract, the commercial traveller undertakes to broker or conclude all manner of transactions on behalf of the owner of a trading, manufacturing, or other type of commercial company off the employer's business premises in exchange for payment of a salary (Article 347).

13 See p. 325.

14 Federal Act on Consumer Credit of 23 March 2001, SR 221.214.1.

15 Federal Act on Product Liability of 18 June 2010, SR 221.112.944.

in English), or the Package Travel Act<sup>16</sup> (available in English). Also of importance is the United Nations Convention on Contracts for the International Sale of Goods (CISG),<sup>17</sup> which is also considered to be Swiss law due to Switzerland's ratification of it.

How do the general and the specific provisions of the two first divisions of the Code of Obligations interact? Essentially, while the general provisions of the Code of Obligations regulate basic questions and contain rules relating to all types of contracts, the provisions on the types of contractual relationship only stipulate rules for specific certain types of contracts. Thus, in any given case, one must first determine whether that case relates to a specific regulated contract. If so, the specific rules apply first and foremost, following the principle that the more specific law has priority over the more general one (“*lex specialis derogat legi generali*”). In all cases where the specific rules are not helpful, the general provisions apply. For example the provisions about the sale of chattle regulate the rights of the customer in the event of defects on the contractual object (Articles 197 et seqq.) and also the time limits applicable on these claims (two years after delivery of the object to the buyer, Article 210 I). But these provisions do not regulate the time limit for the payment of the purchase price. So we have to apply the general provisions which state that the time limit is ten years (Article 127).

## 2. PRINCIPLES

Swiss contract law follows – within the limits of the law – the principle of *freedom of contract*. This means that no one is *obligated* to conclude a contract (unless there is a legal provision requiring this, e.g. the obligation of every car owner to secure insurance). It also means that everyone has the right to *choose* his or her contractual partner (as long as this partner has capacity to act<sup>18</sup>; a

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16 Federal Act on Package Travel of 18 June 1993, SR 944.3; see for an English version of the Package Travel Act [www.admin.ch](http://www.admin.ch) (<https://perma.cc/BB2D-84LN>).

17 United Nations Convention for the International Sale of Goods of 11 April 1980 (CISG), SR 0.221.211.1.

18 A person who is *of age* and is *capable of judgement* has the capacity to act (Article 13 Civil Code). A person is *of age* if he or she has reached the age of 18 (Article 14 Civil Code). A person is *capable of judgement* within the meaning of the law if he or she does not lack the capacity to act rationally by virtue of being under age or because of a mental disability, mental disorder, intoxication, or similar circumstances (Article 16 Civil Code).

toddler, for example, would not have the required capacity). Further, the *content* of the contract may be freely chosen by the parties (as far as its content is legal: for example, a contract regulating the sale of illegal drugs is not an available possibility). The scope of the word “content” here is wide. The parties not only have the freedom to define their mutual obligations but also to define the consequences for a breach of contract. Regarding the *form* of a contract, the Swiss Code of Obligations generally does not impose requirements: a contract may therefore be concluded orally or even through implicitly consenting behaviour (Article 1). Such an implicitly consenting behaviour can e.g. be seen in putting a good on the cashiers desk in a self-service shop. There are, however, a few exceptions where a special form is legally required, e.g. a sales contract about real estate must be concluded not only in written form but also as a public deed (Article 216 I). Finally, the freedom of contract also encompasses the right to alter or terminate a contract.

Hereinafter, the functioning of the contract law part of the Code of Obligations will be discussed grouped by topics chronologically following the lifespan of a contract.

## a) Conclusion of a Contract

The conclusion of a contract requires a mutual expression of intent by the parties, which can be expressed or implied (Article 1). That means that the parties must consent on every basic point (*essentialia negotii*); only secondary terms may be left open (Article 2). The basic points of a contract are determined by the characteristics of the contract under discussion.<sup>19</sup> The usual process for concluding a contract is an offer and then the unqualified acceptance of this offer by the other contractual party, e.g. a shop offers a blouse for CHF 150 and the customer agrees by bringing the item to the cash desk.<sup>20</sup> But there can also be “loops” in the process, where an offer leads to a counter-offer (e.g. the customer asks the shop owner if she can have a discount of CHF 20 when she buys 2 blouses for CHF 280 altogether) which must then be accepted. Or Party A makes a request for an offer to Party B, which Party A can accept upon receipt (e.g. the customer asks for the total price of two blouses). It can be said

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19 Nominate vs. innominate contracts, see pp. 321.

20 Note that the *essentialia negotii* of a chattle sale are that the seller undertakes to deliver the item sold and to transfer ownership of it to the buyer in return for the sale price, which the buyer undertakes to pay to the seller. So the seller and buyer have to agree on the item sold and the sale price.

that a valid offer and a valid acceptance are always needed at some point to conclude a contract.

It goes without saying that contractual parties must have capacity to act in order to create rights and obligations through their actions (Article 12 Civil Code). According to Article 13 Civil Code a person who is of age (Article 14 Civil Code: 18 years) and is capable of judgement (Article 16 Civil Code) has the capacity to act. A contract can be concluded not only by a party themselves but also by their representatives. Non-commercial representation is regulated in Articles 32–40, while commercial representation is covered by Articles 458–465.<sup>21</sup> Commercial representatives act on behalf of a trading, manufacturing, or other commercial business whereas the rules for non-commercial representation are applicable in all other cases of representation.

## b) Interpretation of a Contract

The interpretation of a contract orients itself in the first place on the *principle of will* (subjective interpretation), or as stated in Article 18 I

*“[...] the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement.”*

If e.g. two parties call the subject of their sales contract congruently “cat” although it is biologically a dog, that does not matter. They willingly agreed on that specific pet, the cat is covered by their so called *natural consensus*.

Only where there is doubt about the common intention of the parties does the *principle of confidence* (objective interpretation) become relevant. As such, the principle of confidence is not codified in Swiss law; the basis of the principle is thus largely seen as stemming from the duty to act in good faith, established by Article 2 Civil Code:

*“Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.”*

According to the principle of objective interpretation, a declaration of intention is to be understood the way the other party of the contract could

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<sup>21</sup> It should also be noted that representation rules are also contained in company law, e.g. Article 718 et seqq. for companies limited by shares.

and did in good faith understand it. If e.g. a customer orders “chips” in a Swiss restaurant, he has to expect potato crisps and not French fries (the latter are called “Pommes frites”). Therefore an English customer that orders chips concludes a contract on potato crisps and not French fries according to the so called *normative consensus* of the parties. Although the English customer has concluded a valid contract, he may invoke a defect in consent in order to invalidate the contract.<sup>22</sup>

If the diverging interpretations of both parties are equally admissible, there is no consent but rather *dissent* and therefore no contract has ever come into legal existence.

### c) Defects in the Conclusion of a Contract

The Code of Obligations establishes three cases where there will be a defect in the conclusion of a contract. These defects in the conclusion of a contract result in the contract being null/void *ab initio*. First, a contract is void if its terms are (from the outset) impossible (Article 20 I, e.g. a sales contract about a specific item that was incinerated before the conclusion of the contract). Second, a contract is also void, when its terms are unlawful or immoral (Article 20 I, the classic case would be a contract for the sale of prohibited drugs). Finally a contract is void if a prescribed formal requirement has not been fulfilled (Article 11, e.g. according to Article 216 I a contract for the sale of immovable property must be concluded as a public deed).

### d) Defects in Consent

Falling under defects in consent are error, fraud, and duress.

The error must be fundamental (Article 23). Article 24 enumerates the four cases where an error is fundamental. The cases in paragraph I No 1–3 describe situations where a contract has been concluded due to the principle of confidence (*normative consensus*) but where one party has a different intention (e.g. „when an English customer orders chips in a restaurant and realizes only upon delivery that the food he wanted consists in french fries and not chips or) when a customer orders a bunch of roses from a florist and realizes only upon delivery that the flowers he wanted are not roses but tulips). The case of fundamental error with the greatest impact (because often discovered only years after the conclusion of a contract) is paragraph

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22 See below, d) Defects in Consent.



I No 4, where the error relates to specific facts which the party acting in error considered in good faith to be a necessary basis for the contract (e.g. the buyer thought it was a real Picasso he or she was purchasing for CHF 4 million rather than a copy).

In cases where a party is induced to enter into a contract by the fraud of the other party, the error does not have to be fundamental in order for the contract to be voidable (Article 28 I). An example of a fraud is when a jeweller intentionally sells a gold-plated bracelet as a pure gold bracelet.

Further, if a party enters into a contract under duress, he or she is not bound by that contract. A party is considered as being under duress from the other party if, in the circumstances, he or she has good cause to believe that there is imminent and substantial risk to his own life, limb, reputation, property, or to those of a person close to him (Article 30 I). A person enters a sales contract for e.g. restaurant equipment under duress, when the seller threatens the buyer that he will harm his restaurant business by telling everybody about the hygiene issues the buyer had.

Defects in consent have a different effect on a contract than defects in the conclusion of a contract. While in the latter case, a contract is null/void from the outset for both parties, in the former cases the contract is “just” voidable. This means that the party whose consent was defective must notify the other party of his or her defect in order to invalidate the contract. Where this party does not notify the other party of the defect in consent within one year (forfeiture limit), the contract is deemed to have been ratified (Article 31 I). The one-year limit starts at the time that the error or the fraud was discovered or from the time that the duress ended (Article 31 II).

### e) Unfair Advantage

Somewhat of a “mixture” between defect in consent and defect in content is the case of unfair advantage. This is applicable when there is a clear discrepancy between performance and consideration under a contract concluded, as a result of one party’s exploitation of the other’s indigence, inexperience, or thoughtlessness. In such circumstances, the injured party is permitted to declare within one year that he or she will not honour the contract and demand restitution of any performance already made (Article 21 I). The one-year period commences from the point when the contract is concluded (Article 21 II). An example of an unfair advantage would be the sale of a wedding gown for ten times the price the night before the wedding to a bride who

is already at the wedding location and who had realized that her wedding dress has been stolen.

## f) Claims According to the General Provisions of the Code of Obligations

According to the general part of the Code of Obligations, contractual claims can stem from different bases. The most powerful contractual claims are those deriving from defect-free contracts. Other claims have their basis in unjust enrichment or tort obligations.

- *Contractual claims and breach of contract:* As a general rule and unless the terms or nature of the contract mandate otherwise, a contractual party can demand performance immediately after discharging or offering to discharge his own obligation (Article 82). Breach of contract can not only result from *non-performance* but also from *defective or delayed performance*.
- According to the general rule, a party who does not correctly perform must compensate the other party for the damage sustained (Article 97 I). The prerequisites (aside from the breach of the contract) are damage, causality between the damage and the breach, and misconduct attributable to the obligor. All prerequisites must be satisfied in order for a claim to be valid. The last prerequisite is assumed in a contractual relationship, so that the burden of proof is shifted from the obligee (creditor) to the obligor (debtor). Due to this shift, it is rare that the non-performing debtor finds him or herself exonerated due to an evidentiary absence of fault. For example a lawyer who misses a deadline for a claim has to compensate his client for the lost claim (damage), since missing a deadline is a fundamental breach of a lawyer's duty of care (misconduct attributable to the obligor), missing the deadline was the cause for the lost claim (casualty between damage and the breach) and the lawyer cannot present any reason to exculpate himself (misconduct is attributable to the obligor).
- Where an obligation is due, the obligor is in default as soon as he receives a formal reminder from the obligee. Where a deadline for performance of the obligation has been set by agreement, the obligor is automatically in default upon the expiry of the deadline (Article 102). These requirements are the basis for damages for delay in performance and, once in

default, the obligor is generally liable for further damages even if they are not attributable to him or her (Article 103 I). The creditor not receiving performance in due course is entitled to set a new, appropriate time limit for subsequent performance (Article 107 I). If performance has not been rendered by the end of that time limit, the obligee may either compel performance in addition to suing for damages in connection with the delay or instead forego subsequent performance (first right to choose) and either claim damages for non-performance or withdraw from the contract altogether (second right to choose) (Article 107 II).

- When claiming damages for non-performance, the obligee is entitled to receive the so called *positive interest*: this reflects the position the obligee would have been in had the defaulting party performed correctly. When withdrawing from the contract altogether, the obligee is entitled to receive the so called *negative interest*: this reflects the position the obligee would have been in had he never concluded the contract. Thus, in situations of delayed performance, an obligee must carefully assess which of the three options would best meet his needs.
- As a general rule compelled performance is sought if the specific contractual performance is essential, e.g. because no one else can provide it. If the performance can be provided by another supplier but is more expensive, damages for non-performance may be claimed in order to obtain the price difference. If one has lost the interest in the contractual object, it is best to withdraw from the contract. The same applies if the performance can be obtained cheaper from another supplier.
- *Unjust enrichment*: A person who has enriched oneself without just cause at the expense of another is obliged to make restitution (Article 62 I). The concept of this *condictio* dates back to Roman law. The most commonly occurring case of unjust enrichment is the restitution of assets due to unjust enrichment (money is the most common asset demanded in such claims), where the obligee made a transfer of assets having mistakenly assumed the existence of an obligation, only later learning that this duty does not exist. Typically such a case occurs when a party to a contract that suffers from a defect in consent performs his contractual duty (e.g. pays the sales price), subsequently discovers the defect in consent and successfully invokes it, thus invalidating the contract.

- *Obligations in tort*: The general provisions on civil liability (not to be confused with criminal responsibility which is dealt with by the Swiss Criminal Code) are stated in Articles 41 et seqq. While the general principles can be found in the Articles 41–53, the subsequent provisions set general principles for special cases, e.g. the liability of employers (Article 55) or the liability of property owners (Article 58 et seq.). The prerequisites for a valid claim according to Article 41 are, aside from damage and illegality, causality between the damage and the illegality, and misconduct attributable to the defendant. All these prerequisites must be met in order for the claim to be valid. It should also be noted that the last prerequisite is not assumed to exist as it would be in a contractual claim, meaning that the damaged party must prove all four prerequisites. For example a man who by accident drives into the garage door of his neighbour has to compensate the latter for that door (damage). Damaging the neighbour's property is prohibited (illegality). Driving into the garage door was the cause of the damage (causality) and the man's driving must at least have been negligent (misconduct).

In contrast, some of the claims for special cases are designed as strict liability cases (meaning that the defendant is also liable where there is an absence of misconduct attributable to him or her), e.g. the liability of property owners. Finally, such provisions can often be found in special codes (the code concerning road traffic<sup>23</sup> is probably the most relevant of these).

## g) Quasi-Contractual Claims

Quasi-contractual claims arise when parties interact in a contractual context but act without a (valid) contract and when the (at least partial) application of contractual provisions leads to a more appropriate result than the application of non-contractual ones. The Code of Obligations provides only a few quasi-contractual claims. For example, in the case of a negligent error, where according to Article 26 I a party acting in error and invoking that error to repudiate a contract is liable for any loss or damage arising from the nullity of the agreement where the error is attributable to his or her own negligence, unless the other party knew or should have known of the error. So if a customer orders

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<sup>23</sup> Federal Act on Road Transport of 19 December 1958, SR 741.01.

roses but means tulips<sup>24</sup> she has to pay for the roses, if the florist cannot sell them to anyone else. The customer is not liable if she always orders tulips and the florist should have known this. Doctrine and court-practice, however, have widened the category of quasi-contractual claims. Prominent examples are the liability after inspired confidence based on trust<sup>25</sup> or the liability for the fault in concluding a contract (culpa in contrahendo or short c.i.c.).

## h) Time Limits

Under Swiss law, all claims (with some exceptions, particularly in the field of real estate, e.g. Article 807 Civil Code, which states that claims regarding a mortgage that has been recorded in the land register are not subject to time limits) become time-barred after a certain amount of time, meaning that the claims cannot be enforced, regardless of their validity. The concept of time limits must be strictly distinguished from the concept of forfeiture limits. Whereas time-barred claims may still be enforced if the counter-party does not object (Article 142), the passing of a forfeiture limit leads to the extinguishment of the right in question. A time-barred claim e.g. may be set off provided that it was not time-barred at the time it became eligible for set-off (Article 120 III).

In general, claims become *time-barred after ten years* (Article 127), unless federal civil law provides otherwise. A limit of five years applies to claims resulting from rent and other periodic payments, payments for food, board, lodging and hotel expenses and claims in connection with professional services carried out by craftsmen, doctors, advocates, and notaries, and work performed by employees etc. (Article 128). The limitation period is counted from the moment the debt becomes due (Article 131 I).

Obligations in tort and obligations stemming from unjust enrichment do not only have to meet an absolute time limit; a relative time limit also must be respected. In tort cases claims become *time-barred one year* after the injured party became aware of the loss/damage and of the identity of the person liable. In unjust enrichment cases the period is one year after the date on which the injured party learned of their claim. Claims are barred in any event ten years after the date on which the loss/damage was caused (tort) or the claim first arose (unjust enrichment).<sup>26</sup>

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<sup>24</sup> See pp. 315.

<sup>25</sup> See the Swissair-Case, p. 323.

<sup>26</sup> Articles 60 I and 67 I.

## i) Types of Contractual Relationship

The contracts codified in the Code of Obligations are characterised by standard principal obligations that apply to the contractual parties (“standard” *essentialia negotii*). These standard obligations are in general stated in the first Code of Obligation-Article(s) of the respective contract. Every type of contract has its own particularities. The most relevant types of contract are the following:

- *Sale* (Articles 184–236): According to Article 184 I, the seller undertakes to deliver the item sold and to transfer ownership of it to the buyer in return for the sale price, which the buyer undertakes to pay to the seller. The validity of a chattel sale contract is not subject to compliance with any particular form (Article 11 I), however a contract for the sale of immovable property is only valid if concluded as a public deed (Article 216 I).
- *Lease* (Articles 253–273c): Leases are contracts in which a landlord or lessor grants a tenant or lessee the use of an object in exchange for rent (Article 253). The compensation (rent) is compulsory in order for the contract to be characterised as a lease (while it is compulsory for a contract to make an object available free of charge in order for it to be characterised as a loan for use).
- *Individual employment contract* (Articles 319–355): Through an individual employment contract, the employee undertakes to work for the employer for a limited or unlimited period and the employer undertakes to pay him a salary based on the amount of time he works (time wage) or the number of tasks he completes (piece work) (Article 319 I).
- *Contract for work and services* (Articles 363–379): A contract for work and services is a contract whereby the contractor undertakes to carry out work and the customer undertakes to pay him for that work (Article 363). The essential characteristic of this type of contract is the contractor’s duty to provide a certain result in the form of the agreed outcome. Usually, the agreed outcome will be something physical (e.g. a built-in wardrobe made by a carpenter), but it can also be something immaterial (e.g. static calculations by an engineer). The crucial criteria a contract must possess to qualify as a contract for work and services is agreement on a measurable result that can be guaranteed.<sup>27</sup>

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27 See the Market Value Estimate-Case, p. 323.

- *Simple agency contract* (Articles 394–406): A simple agency contract is a contract whereby the agent undertakes to conduct a certain business or provide services in accordance with the terms of the contract (Article 394 I). A simple agency contract can be gratuitous or provide for remuneration (Article 394 III). The main duty of agents is to perform the business entrusted to them diligently and faithfully. They are not liable for the contract to have a successful result.<sup>28</sup> A simple agency contract is therefore the traditional type of contract governing activities of professionals like doctors and lawyers (who, for example, cannot guarantee the outcome of an operation or lawsuit but must act according to best practice in their respective fields). A simple agency contract may be mandatorily revoked or terminated at any time by either party (Article 404 I).<sup>29</sup> Since a key feature of the simple agency contract is the existence of mutual trust between the contractual parties, this option is considered to be in most cases acceptable. However, a party who revokes or terminates the contract at an inopportune point in time must compensate the other party for any resulting damage (Article 404 II).

## j) Innominate Contracts

Articles 184–551 cover so called “nominated” contracts (in the sense of “regulated” types of contracts). Since the Code of Obligations follows the principle of freedom of contract, parties can also conclude contracts that do not follow the characteristics of a nominate contract. These contracts are called innominate contracts. Examples for common innominate contracts are leasing contracts, exclusive distribution contracts or licence contracts. As a basic rule, the general provisions of the Code of Obligations apply to such contracts, although legal practice and doctrine regulates where provisions of the nominate contracts are to be applied directly or analogously to innominate contracts.

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<sup>28</sup> In contrast to the contract for work and services, see the Market Value Estimate-Case, p. 323.

<sup>29</sup> See the Revocability of Simple Agency Contracts-Case, p. 324.

### 3. LANDMARK CASES

#### a) Swissair-Case<sup>30</sup>

##### *Liability after inspired confidence based on trust*

The claimant concluded a contract with a subsidiary company of the Swissair Group concerning membership rights to use luxurious residences near golf courses at home and in foreign countries. The claimant paid an initial fee of CHF 90'000. Subsequently, the project came to nothing, the subsidiary company went bankrupt. The claimant then asked for its money back from the Swissair Group. However, the group denied the existence of a claim as it had not entered into the contract with the claimant. The Federal Supreme Court agreed that the claimant had no contractual claim or obligation in tort against the defendant. Nonetheless, it recognised that there was liability after inspired confidence based on trust of the defendant, since the subsidiary company emphasized in its publicity for the membership heavily its affiliation to the Swissair group and the latter's approval of the project. The Federal Supreme Court held that there was a violation of confidence based on trust that merited protection, since the Swissair group had tolerated the behaviour of the subsidiary company. With this ruling, the Swiss Federal Supreme Court introduced the concept of liability after inspired confidence based on trust into Swiss Law, although there is no direct basis for such a claim in the Code of Obligations itself.

#### b) Market Value Estimate-Case<sup>31</sup>

##### *Delineation between a contract for work and services and a simple agency contract*

The matter in dispute in this case was a market value estimate of the defendant of a piece of real estate. This estimate was the basis for the calculation of the claimant's share in an inheritance case. Five years after the estimate was given, the claimant sold the real estate for a price almost 25 % below the estimate. The claimant sued the estimator for the damage, since his inheritance share had been calculated on an inaccurately high estimate of the real estate's value. To define the rules of liability which the defendant's conduct

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30 BGE 120 II 331.

31 BGE 127 III 328.



was to be measured against, the Swiss Federal Supreme Court started by considering what type of contract had been concluded regarding the market value estimation. It came to the conclusion that the estimate of a real estate is based on discretion and that the result of such an expert opinion cannot be measured objectively. Therefore, the Supreme Court qualified the contract as a simple agency contract and not as a contract for work and services: consequently, they denied a damage claim. This case is a key example of the practical importance of delineating between a contract for work and services and a simple agency contract.

### c) Revocability of Simple Agency Contracts-Case<sup>32</sup>

*Revocability at any time of simple agency contract is compulsory*

The claimant and the defendant agreed on an advisory contract concerning accounting services. It was undisputed between the parties that the consultancy agreement qualifies as a simple agency contract. After a few months, the defendant terminated the contract based on Article 404 I without giving notice. The claimant sued the defendant for damages, arguing that the contract conferred a right to resign only at the end of a quarter and after a three month notice period had been given. According to the Swiss Federal Supreme Court, Article 404 I is compulsory and cannot be altered by contractual provisions. The court also negated the argument that the revocability at any time of simple agency contracts should be restricted to contracts governed by personal trust. According to the court the clear wording of the law text does not allow for such a differentiation.

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32 BGE 115 II 464.

## II. Company Law

### 1. CODES

As mentioned at the beginning of this chapter, the Articles about company law (including the law on securities) can be found in divisions three to five of the Code of Obligations (further, the last part of division two regarding the simple partnership belongs to company law rather than to contract law). Division three covers commercial enterprises and the cooperative (Articles 552–926) and is followed by division four which concerns the commercial register (Articles 927–943), business names (Articles 944–956), and commercial accounting (Articles 957–964). Division five is entirely dedicated to negotiable securities, covering registered securities, bearer securities, and instruments to order (Articles 965–1155) as well as bonds (Articles 1156–1186).

### 2. PRINCIPLES

#### a) Company Forms

Unlike Swiss contract law, the provisions of Swiss company law do not provide for the freedom to create any kind of company. On the contrary, one's choice is limited to the types of company the law provides for. Most types of business associations are regulated in the Code of Obligations, while more variations can be found in the Civil Code and in the Federal Act on Collective Investment Schemes.<sup>33</sup> Which type is chosen in the circumstances depends on the intentions and interests of the people creating the company. The company forms can be grouped as follows:

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<sup>33</sup> Federal Act on Collective Investment Schemes of 23 June 2006 (Collective Investment Schemes Act, CISA), SR 951.31.

Type	Sole proprietorships	Partnerships	Corporations	Legal entities outside of the Code of Obligations
Characteristic	“One-man-business” without separate legal personality	Association of persons without separate legal personality	Legal entity with separate legal personality	Legal entity with separate legal personality
Forms	<ul style="list-style-type: none"> <li>– Non-registered</li> <li>– Registered (Article 934, Article 36 ordinance on the commercial register)</li> </ul>	<ul style="list-style-type: none"> <li>– Simple partnership (Articles 530–551)</li> <li>– General partnership (Articles 552–593)</li> <li>– Limited partnership (Articles 594–619)</li> </ul>	<ul style="list-style-type: none"> <li>– Company limited by shares (Articles 620–763)</li> <li>– Partnership limited by shares (Articles 764–771)</li> <li>– Limited liability company (Articles 772–827)</li> <li>– Cooperative (Articles 828–926)</li> </ul>	<ul style="list-style-type: none"> <li>– Association (Articles 60–79 Civil Code)</li> <li>– Foundation (Articles 80–89a Civil Code)</li> <li>– Collective Investment Schemes Act (CISA) with inter alia the investment company with variable capital</li> </ul>

Figure 1: Types of Business Associations

By far the far most common business form in Switzerland is the sole proprietorship (b.), followed by the company limited by shares (c.), and the limited liability company (d.), respectively. Thus, these three forms will now be studied in greater detail.

## b) Sole Proprietorship

The easiest to create is the sole proprietorship. It has no separate legal personality from the person running the business.

Creation	<ul style="list-style-type: none"> <li>– automatically created when a natural person starts his or her own commercial activity under his or her own name and own responsibility</li> <li>– If the turnover p.a. amounts up to at least CHF 100'000, a sole proprietorship must be registered in the commercial register; below that level, it is optional (Article 934, Article 36 ordinance on the commercial register). The entry is in any case not constitutive but only declaratory.</li> </ul>
Liability	<ul style="list-style-type: none"> <li>– As a sole proprietor, the founder is fully, personally liable for the liabilities of the business.</li> </ul>
Company name	<ul style="list-style-type: none"> <li>– Must contain the family name of the sole proprietor (Article 945)</li> </ul>

Employment	<ul style="list-style-type: none"> <li>- Founder is self-employed by working under his or her own name and at his or her own expense, autonomously, at own risk</li> </ul>
Legal basis	<ul style="list-style-type: none"> <li>- Article 934 (provision concerning registration in the commercial register)</li> <li>- Article 936a (business identification number)</li> <li>- Articles 945 et seq. (business name)</li> <li>- Articles 36–39 ordinance on the commercial register</li> <li>- tax law</li> <li>→ Regulation is very basic</li> </ul>
Applicability	<ul style="list-style-type: none"> <li>- To embark upon first commercial activities</li> <li>- Where commercial activities are small</li> <li>- Generally for “one-man-show” with max. a few employees</li> <li>- Where budget is insufficient to set up a corporation</li> </ul>

Figure 2: Sole Proprietorship

## c) Company Limited by Shares

The flagship of commercial enterprises is the company limited by shares.

Creation	<ul style="list-style-type: none"> <li>- Is established when the founding members declare by public deed that they are forming a company limited by shares, lay down the Articles of association therein, and appoint the governing bodies (Article 629 I)</li> <li>- Acquires legal personality upon being entered into the commercial register (Article 643 I)</li> <li>- Share capital must amount to at least CHF 100'000 (Article 621)</li> </ul>
Liability	<ul style="list-style-type: none"> <li>- Shareholders are not personally liable for the debts of the company (Article 620 II)</li> <li>- The company's liability is limited to its assets</li> </ul>
Company name	<ul style="list-style-type: none"> <li>- Can be freely chosen by respecting the general principles on the composition of business names, which means that the content of a company name has to be truthful, cannot be misleading, and does not run counter to any public interest (Article 944 I)</li> <li>- Must indicate the legal form (Ltd) in a national language (French, German, Italian, or Romansh) (Article 950)</li> </ul>
Governing bodies	<ul style="list-style-type: none"> <li>- General meeting (Articles 698–706b) as the supreme governing body</li> <li>- Board of directors (Articles 707–726) which leads the company. This role can be delegated to individual members of the board or third parties (directors) if provided for in the Articles of association.</li> <li>- External auditors (Articles 727–731b), by law, required intensity of the audit depends on the size of the company</li> </ul>

Duties of a shareholder	<ul style="list-style-type: none"> <li>– Shareholders may not be required to contribute more than the amount fixed for subscription of a share on issue (Article 680)</li> <li>→ If more duties are intended, shareholders must regulate them among themselves by a separate contract (shareholders' agreement)</li> </ul>
Where regulated	<ul style="list-style-type: none"> <li>– Articles 620–763</li> <li>– Article 936a (business identification number)</li> <li>– Articles 950 et seq. (business name)</li> <li>– Articles 43–70 ordinance on the commercial register</li> <li>– Tax law</li> <li>→ Most intensively regulated business association</li> </ul>
Applicability	<ul style="list-style-type: none"> <li>– For commercial activities with a broader impact</li> <li>– Where is intention to employ people</li> <li>– Where existence and operation of the company should not depend on the people owning it</li> <li>– Where looking for limitation of the liability for the owners of the company</li> <li>– Where budget is sufficient to set up a company limited by shares</li> </ul>

Figure 3: Company Limited by Shares (Ltd.)

## d) Limited Liability Company

Also very popular is the limited liability company. After an initial niche existence it somehow experienced a boom in popularity. This change was due to the increase of the default minimum share capital needed for establishing a company limited by shares from CHF 50'000 up to CHF 100'000 in 1992 and a law reform of the limited liability company in 2008, consequently shaping the limited liability company as a personalized corporation.

Creation	<ul style="list-style-type: none"> <li>– Is established when the founding members declare by public deed that they are founding a limited liability company, lay down the Articles of association therein, and appoint the management bodies (Article 777 I)</li> <li>– Acquires legal personality upon being entered into the commercial register (Article 779 I)</li> <li>– Nominal capital must amount to at least CHF 20'000 (Article 773)</li> </ul>
Liability	<ul style="list-style-type: none"> <li>– Members are not personally liable for the liabilities of the company (Article 794)</li> <li>– The company's liability is limited to its assets</li> </ul>
Company name	<ul style="list-style-type: none"> <li>– Can be freely chosen by respecting the general principles on the composition of business names, which means that the content of a company name has to be truthful, cannot be misleading, and does not run counter to any public interest (Article 944 I)</li> <li>– Must indicate the legal form (Ltd liab. Co) in a national language (French, German, Italian, or Romansch) (Article 950)</li> </ul>

Governing bodies	<ul style="list-style-type: none"> <li>– Members' general meeting (Articles 804–808c) as the supreme governing body of the company</li> <li>– Management (Articles 809–817) leads the company; company members are jointly responsible for the management unless Articles of association adopt alternative provisions</li> <li>– Auditor (Article 818 with reference to Articles 727 et seqq.), by law, required intensity of the audit depends on the size of the company</li> </ul>
Duties of a member	<ul style="list-style-type: none"> <li>– Company members are obliged to pay the issue price of their capital contributions and, if required by the Articles of association, must make additional material contributions (Articles 793, 795, 796)</li> <li>– Company members have a duty of loyalty and are subject to prohibition of competition (Article 803)</li> </ul>
Where regulated	<ul style="list-style-type: none"> <li>– Articles 772–827</li> <li>– Article 936a (business identification number)</li> <li>– Articles 950 et seq. (business name)</li> <li>– Articles 71–83 ordinance on the commercial register</li> <li>– Tax law</li> <li>→ Well-regulated business association</li> </ul>
Applicability	<ul style="list-style-type: none"> <li>– For commercial activities with a more local/regional impact</li> <li>– Where there is an intention to employ people</li> <li>– Where existence and operation of the company should depend on the people owning it</li> <li>– Where looking for limitation of the liability for the owners of the company</li> <li>– Where budget is insufficient to set up a company limited by shares</li> </ul>

Figure 4: Limited Liability Company (Ltd liab. Co)

### 3. LANDMARK CASES

Generally, shareholders and corporations (as separate legal entities, e.g. a company limited by shares) are each liable “for their own business”, and neither one is liable for the obligations of the other. But the Swiss Federal Supreme Court has recognised exceptions to that principle. This can be seen in its established practice of breakthrough (also known as “piercing the corporate veil”) where the company is totally dominated by one shareholder and this shareholder has somehow used the company for his or her own purposes.

It can therefore be assumed that in accordance with the economic reality, there is an identity of the natural and the legal person and that the legal relations which bind one also bind the other; this is always the case where the

assertion of difference constitutes an abuse of rights or results in an obvious violation of legitimate interests of third parties.<sup>34</sup>

### a) Breakthrough-Case I<sup>35</sup>

#### *Liability of dominating shareholder for company limited by shares*

The claimant, an engineer, sold a patent to a natural person. Under this licence contract, the buyer incurred some obligations, e.g. the obligation to refrain from exporting goods produced with the patent and to share experiences with the seller. The buyer then did not perform these obligations. The user of the patent was a company limited by shares that was dominated by the buyer as principal shareholder. The Federal Supreme Court stated that in the present case the natural person (buyer) and the legal person (the company limited by shares) were identical, although the buyer was formally not the sole shareholder. The court declared the other shareholders only as dummies and stated that it would be a violation of good faith if the company limited by shares did not have to execute the duties its dominating shareholder had incurred.

### b) Breakthrough-Case II<sup>36</sup>

#### *Liability of company limited by shares for dominating shareholder*

To enforce a claim against an obligor, the claimant sequestered a property. Formally the property had not belonged to the obligor but to a company limited by shares that he dominated. The Federal Supreme Court stated that in the present case the natural and legal person were identical and thus that it would be a violation of good faith if the obligor could escape his obligations by determining that the assets belonged to a separate legal entity.

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34 BGE 121 III 319 Consideration 5.a)aa), confirmed e.g. in BGE 132 III 489 Consideration 3.2 or Judgment of the Federal Supreme Court 5A\_330/2012 of 17 July 2012, Consideration 3.1.

35 BGE 71 II 272.

36 BGE 102 III 165.

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# Sophie-Katharina Matjaz

## Civil Procedure

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# I. Swiss Civil Procedure Code

The first section of this chapter examines the long path that ultimately led to a unified civil procedure in Switzerland. First, the constitutional framework within which Swiss civil procedure laws<sup>1</sup> operate (1.) and the legislative process that resulted in the Civil Procedure Code of 2008 (2.) are described. Finally, the third part of this section discusses the main content of the Code (3.).

## 1. CONSTITUTIONAL FRAMEWORK

When the Swiss confederation was founded in 1848, one of its key features was (and still is) the autonomy of its 25 cantons.<sup>2</sup> Legislative power was at their full disposal,<sup>3</sup> including matters of civil and civil procedure law. Members of

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<sup>1</sup> The most important enactment on civil procedure in Switzerland is the *Swiss Civil Procedure Code* of 19 December 2008 (Civil Procedure Code, CPC), SR 727, which contains the procedural framework for conducting and deciding civil law disputes; see for an English version of the Civil Procedure Code [www.admin.ch](http://www.admin.ch) (<https://perma.cc/PE8T-RMBT>). Besides, there are other laws of significance for civil procedure: The *Debt Enforcement and Insolvency Act* of 11 April 1889, SR 281.1, contains provisions on the enforcement of monetary claims and on insolvency proceedings. The *Federal Act on the Federal Patent Court* of 20 March 2009 (Patent Court Act, PatCA), SR 173.41, governs proceedings before the Federal Patent Court; see for an English version of the Patent Court Act [www.admin.ch](http://www.admin.ch) (<https://perma.cc/NXD3-NSXP>). The *Federal Act on Federal Civil Procedure* of 4 December 1947 (Federal Civil Procedure Act), SR 273, determines rules for disputes that are tried before the Federal Supreme Court as the first instance. The *Federal Act on the Federal Supreme Court* of 17 June 2005 (Federal Supreme Court Act), SR 173.110, governs the position and organisation of the Federal Supreme Court and proceedings before the Federal Supreme Court as an appellate court. The *Federal Act on International Private Law* of 18 December 1987, SR 291, determines the jurisdiction of Swiss civil courts and the applicable law in international matters. Finally, there is a variety of *cantonal legislation* on court organisation and subject-matter jurisdiction.

<sup>2</sup> There were 25 cantons at this point in history. As the canton of Jura acceded to the federation in 1979, there are 26 cantons in Switzerland today.

<sup>3</sup> Article 3 of the Federal Constitution of the Swiss Confederation of 12 September 1848 stated that the cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution and that they exercise all rights that are not vested in

the Swiss Lawyers Association had begun to consider the benefits of unifying Switzerland's civil and civil procedure law as early as in 1860. The first attempt to do so was narrowly rejected by both the people and the cantons in 1872.<sup>4</sup> Although the enforcement of monetary claims and the insolvency law were unified by the Debt Enforcement and Insolvency Act in 1889 and the competence regarding substantive civil law was transferred to the federal legislator in 1898,<sup>5</sup> the cantons largely retained their power to enact legislation on civil procedure during this period. But competence in civil procedure matters was granted to the federation where it was considered indispensable in ensuring the uniform application of the civil law. This meant that the original Civil Code contained some procedural provisions, such as rules on evidence. Even after the codification of Swiss civil procedure law on a federal level, these provisions were left to remain in the Civil Code and can therefore still be found in this legislation. An example for such a rule is contained in Article 8 Civil Code: unless the law provides otherwise, the burden of proof for establishing an alleged fact shall rest on the person who would derive rights from that fact.

While neighbouring countries had successfully codified their civil procedure law by the end of the 19<sup>th</sup> century, discussions about expediency and potential versions of a unified procedure law would continue for nearly another century in Switzerland. The 1999 version of the Constitution still did not provide for centralised legislative powers, although the federal legislator was enabled to regulate the territorial jurisdiction of courts for the whole of Switzerland.<sup>6</sup> Subsequently, the Swiss Jurisdiction Act was issued.<sup>7</sup> It contained unified rules on the territorial jurisdiction of Swiss courts in civil

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the confederation. The provision still exists in its original form today (Article 3 of the Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.admin.ch](http://www.admin.ch) [<https://perma.cc/M8UJ-S369>]).

4 253'606 people declared themselves in favour of adopting the draft that would have transferred substantial legislative competences towards the federal legislator, while 260'859 people rejected it.

5 For details on the enactment of the Swiss Civil Code of 10 December 1907 (Civil Code), SR 210, see the Chapter on Civil Law, pp. 271, and for details on the enactment of the Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911 (Code of Obligations), SR 220, see the Chapter on the Law of Obligations, pp. 305. See for an English version of the Civil Code [www.admin.ch](http://www.admin.ch) (<https://perma.cc/DV8N-FFT2>) and for an English version of the Code of Obligations [www.admin.ch](http://www.admin.ch) (<https://perma.cc/AJ2U-V3MB>).

6 Articles 30 and 122 of the Constitution in the version dated 18 April 1999.

7 Federal Act on the Jurisdiction in Civil Matters of 24 March 2000 (Jurisdiction Act), SR 272.

domestic matters and entered into force on 1 January 2001.<sup>8</sup> Despite being limited in its scope, it can be regarded as the first codification of Swiss civil procedure law on the federal level.

Since the 19<sup>th</sup> century, a total of almost 100 civil procedure codes have been issued by the cantons. These codes took influence from one another as well as from foreign civil procedure legislation. For example, the legislation in the French-speaking part of Switzerland was strongly shaped by the French Code de Procédure Civile. Varying developments in each canton meant there were substantial differences in the content and layout of the codes. For example some cantonal legislators decided to concentrate the proceeding in a main hearing where also evidence was taken (Bern, Lucerne, Vaud). In other cantons the taking of evidence preceded (Valais) or followed up on the main hearing (Zurich). In some cantons conciliation proceedings were mandatory before a claim could be filed (Lucerne, Valais, Zurich), in other cantons the conduct of such proceedings remained at the parties' disposal (Bern, Vaud). Significant differences appeared also in the weighting of procedural principles. For example, the cantonal code of Bern allowed the modification or correction of facts up until the party submissions during the main hearing while the canton of Vaud committed the parties to present all relevant facts during the initiation phase of proceedings. The age of the cantonal codes at the time that the Civil Procedure Code entered into force in 2011 was also extremely varied: for example, the code from the canton of Basel Stadt dated from 1875, while the canton of Glarus' code had been more recently issued in 2001.

Nevertheless, it can be argued that a tradition of Swiss civil procedure did exist on the federal level to some extent prior to the federal Code's entry into force, in two respects. First, certain federal laws which had substantial influence on civil procedure were already in existence (such as the Debt Enforcement and Insolvency Act, the Jurisdiction Act, and the Civil Code mentioned above). Second, a number of questions of civil procedure were addressed at the federal level by the Swiss Federal Supreme Court in various landmark cases. For example, the Federal Supreme Court decided in 1988 that once an action is filed, the subject matter of the dispute may not be made pending elsewhere between the same parties.<sup>9</sup> Later this principle was codified in the Jurisdiction Act (Article 35) and can now be found Article 64 Civil Procedure Code.

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8 The Jurisdiction Act was replaced by the Civil Procedure Code on 1 January 2011.

9 BGE 114 II 186.

Still the variety of procedural codes proved to be a source of complication and legal insecurity, as the Federal Council indicated in its Message<sup>10</sup> supporting the unification of Swiss civil procedure.<sup>11</sup> At the turn of the millennium, the necessity of unifying civil procedure law on a national level was clear. The reform of the Swiss justice system was put to popular vote and approved in a landslide victory on 12 March 2000.<sup>12</sup> This cleared the way for the drafting of the Civil Procedure Code.

To this day, there are some domains in the area of civil procedure where the cantons retain responsibility. These areas are the organisation of the courts and conciliation authorities (Article 122 II Constitution and Article 3 Civil Procedure Code), the administration of justice in civil cases, and the tariff authority.

First, the cantons are responsible for creating their own court systems. Cantonal legislation on court organisation regulates the composition of the courts and establishes the matters that fall under these courts' competence, i.e. their subject-matter jurisdiction. Federal law does impose some limits on cantonal autonomy and discretion in this area, however: namely, it obliges the cantons to provide two cantonal instances of civil jurisdiction. This is referred to as the double-instance principle, meaning that the cantons must provide the possibility to appeal a first instance judgement to a cantonal appellate court.

Neither the denominations for the institutions nor the substantive requirements for the jurisdiction of the courts are uniform amongst the cantons. For example, individual cantons can decide whether they want district courts to be responsible for settling criminal and civil cases for a specific territorial area (as in the canton of Zurich) or a cantonal civil court with an exclusive jurisdiction in civil matters (as is the case in Basel Stadt). In some cantons, single judges are only used in proceedings with a value in dispute<sup>13</sup> below a certain amount. For example Basel Stadt, Lucerne, and Zurich in

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10 In Swiss legislation proceedings a message is a report by a federal authority that accompanies a draft for a legislative act submitted to parliament by that authority. Its purpose is to inform parliament about the suggested draft, its goals, and underlying problems. Messages are published and often used for interpretation of the law.

11 Message on the Swiss Civil Procedure Code (CPC), Federal Gazette No 37 of 19 September 2006, pp. 7221, p. 7228.

12 86.4 % of the voters and all cantons approved the reform. The turnout was at 42 %.

13 The value in dispute is the (estimated) economic interest that the plaintiff has in pursuing the case.

principle use single judge proceedings for cases with a value of up to CHF 30'000. For proceedings with a value in dispute higher than CHF 30'000, multi-judge courts are provided in these cantons. Other cantons use single judges for cases of higher value or use single judges regardless of the value in dispute (as in Bern where a judgement is delivered by a single judge in first instance proceedings, no matter how high the value in dispute is). Cantons can also use particular courts for specific types of disputes. For example, the canton of Zurich provides special courts for commercial (at second instance), employment, and tenancy matters. The cantons can also set up rules on the eligibility of judges. For example, cantons may allow laymen on the bench. This remains particularly common in rural areas, where judges often hold other jobs alongside their judgeship. They are usually supported by a legally trained clerk.

Secondly, the administration of civil justice lies in the hands of the cantons: although the Civil Code and the Code of Obligations are acts of the federal parliament, they are administered by cantonal courts. Only civil disputes between the confederation and a canton or disputes between cantons are tried directly by the Federal Supreme Court in Lausanne (known as direct proceedings, Article 120 Federal Supreme Court Act). However, such cases only occur rarely.

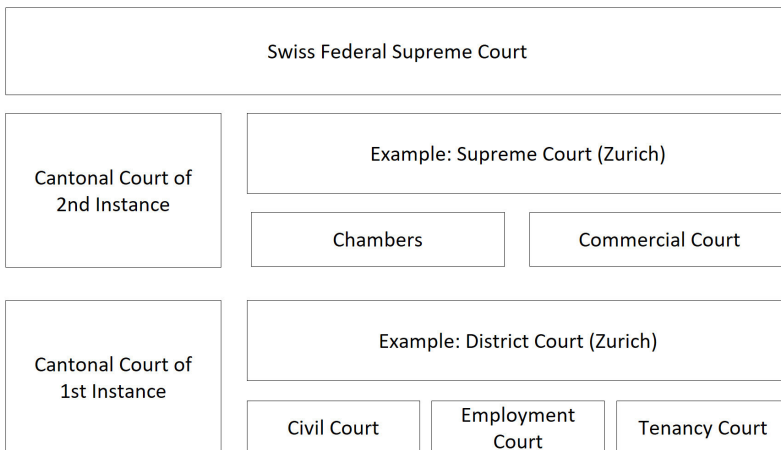


Figure 1: Court Organisation



Finally, the cantons retain the exclusive competence to set tariffs for procedural costs (Article 96 Civil Procedure Code).

## 2. LEGISLATION

As mentioned, by the end of the 20<sup>th</sup> century it was becoming increasingly clear that there was a need to unify civil procedure in Switzerland. Thus, in 1999, the then acting head of the Federal Department of Justice and Police ARNOLD KOLLER established a commission of experts with the set purpose of considering the unification of civil procedure in Switzerland and producing a preliminary draft for a federal code. In 2002, the commission delivered the preliminary draft to the Federal Department of Justice and Police together with an accompanying report. They proposed to unify the procedure before cantonal courts by uniting established institutions from different cantonal codes, without using any specific code as an archetype. Proceedings before the Federal Supreme Court and court organisation would not be affected.

From June to December 2003, the preliminary draft was submitted to a national consultation procedure.<sup>14</sup> Almost everyone welcomed the idea of unification. The participants in the consultation procedure supported the concept of continuing the tradition of the cantonal civil procedure laws as far as possible and introducing innovations where this was considered useful. In particular, the fact that the proposals avoided the introduction of a US-style class action (meaning proceedings where one of the parties is a group of people who are represented collectively by a member of that group) was widely approved of. The inclusion of the Jurisdiction Act into the new federal Code without changing its content also met approval. However, there was some minor criticism on the details of the Code: the strong emphasis on written form for civil proceedings was criticised for being likely to lead to unnecessarily long proceedings. Further, the provisions on the admissibility of new facts and evidence were considered too strict. Finally, it was demanded that mediation as an alternative to conciliation proceedings be introduced.

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14 Article 3 of the Federal Act on the Consultation Procedure of 18 March 2005 (Consultation Procedure Act, CPA), SR 172.061; see for an English version of the Consultation Procedure Act [www.admin.ch](http://www.admin.ch) (<https://perma.cc/HS8B-2PVT>).

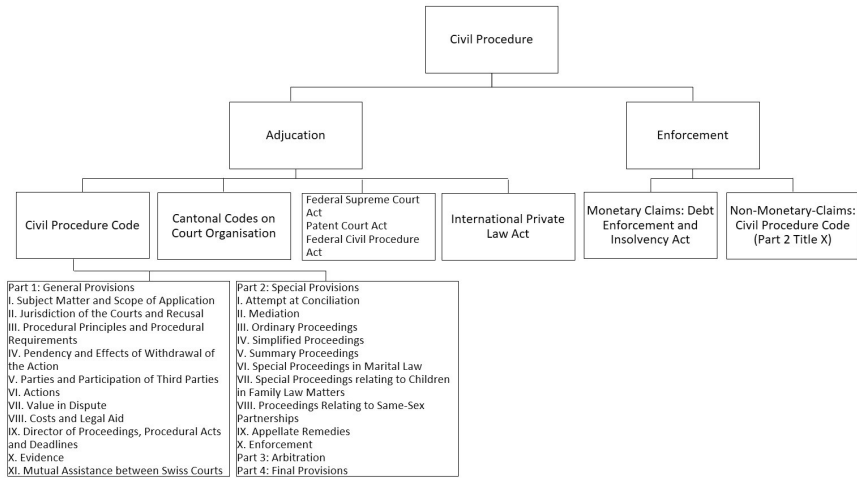


Figure 2: Civil Procedure Laws

Following the national consultation procedure, the Federal Council assigned the task of drawing up a Draft of the Swiss Civil Procedure Code<sup>15</sup> and an explanatory message<sup>16</sup> on to the Federal Department of Justice and Police. During the creation of this Draft, the criticisms from the national consultation procedure were taken into account. The Draft was adopted in June 2006 and submitted to the members of parliament together with the Message. Subsequently, after just over a year of debates, parliament passed the federal Civil Procedure Code on 19 December 2008. It entered into force on 1 January 2011, replacing the 26 cantonal civil procedure codes and the Jurisdiction Act.

The nationwide standardisation of civil procedure by the Civil Procedure Code was not exclusively met with approval. It was sometimes criticised by academics for being poorly drafted and for the fact that it was not motivated by any legal policy issues apart from that of unification itself. Nonetheless, there was a broad consensus that the introduction of the Civil Procedure Code was an important step in the right direction in many ways. For instance, it became a lot easier for lawyers to represent clients in other cantons. The unification also enhanced the academic debate about civil procedure in

15 Draft of the Swiss Civil Procedure Code, Federal Gazette No 37 of 19 September 2006, pp. 7413.

16 See footnote 11. See also footnote 10 for an explanation of the message in the Swiss legislation process.

Switzerland: before the introduction of the Civil Procedure Code, there was only limited publishing on cantonal codes, meaning that there was often a lack of literature for legal professionals to rely on. Also, since the introduction of the Code, there has been an increase in federal judicial activity concerning civil procedure in Switzerland which has led to enhanced predictability of court decisions, thus improving legal certainty.

Of course, there remains room for progress. There are still 26 different cantonal acts on the organisation of civil courts: this results in a lack of clarity for legal subjects as well as for practitioners and means that there is still difficulty for lawyers who want to practice in different cantons. Also, some authors point out that cantonal customs have not been eliminated by the introduction of a federal code; instead, there seems to be a tendency to implement the new Code in a manner that respects old cantonal traditions. This is connected to the fact that the Civil Procedure Code is – by international comparison – very compact in terms of the number of articles it contains (408) as well as regarding the length of those articles. In the Message on the Draft of the Civil Procedure Code, the legislator even expressed its pride in having the “*courage to leave gaps*”<sup>17</sup> in the spirit of simplicity and comprehensibility. Some argue that this is beneficial in that it helps lay judges to better understand the law and provides the courts with a certain flexibility to tailor proceedings to the circumstances of a certain case. But this terseness also opens the door for cantonal idiosyncrasies and thus legal uncertainty.

Another aspect of the Code which has proven controversial is its lack of proper collective redress mechanisms. The legislator decided not to introduce the Anglo-American concept of class action lawsuits when it passed the new Code in 2011. This was because it was considered that this procedural tool would not fit with the Swiss legal system, which rests on the fundamental principle that only the holder of a legal right can assert that right. Thus, instead, courts in Switzerland deal with proceedings involving multiple parties by relying on existing procedural instruments: in particular, the group action for clubs and organisations (Article 89 Civil Procedure Code)<sup>18</sup> and the general joinder of claims which were filed separately but which are closely related in substance (Article 90 Civil Procedure Code). However, it is now widely recognised that

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<sup>17</sup> Message Civil Procedure Code, p. 7236.

<sup>18</sup> Article 89 Civil Procedure Code allows associations and other organisations of national or regional importance that are authorised by their articles of association to protect the interests of a certain group of individuals to bring an action in their own name for a violation of the personality of the members of the group.

the existing instruments for aggregating claims are no substitute for proper collective redress mechanisms. For example, just recently in late December 2017, a Swiss consumer protection organisation filed for damages against Volkswagen on behalf of 6'000 people in light of the emissions scandal. In order to do so, they had to develop a complicated concept of combining different legal remedies, thereby breaking completely new ground. Consumer protection organisations are among the sharpest critics of the lacking possibilities for collective redress in Swiss civil procedure.

The demand for collective redress mechanisms is to be seen in connection with the more fundamental problem of ensuring access to justice.<sup>19</sup> Court fees and reimbursement of lawyers' fees differ greatly within Switzerland as these are still areas where the cantons retain exclusive competence. Additionally, in Switzerland the plaintiff is usually obliged to pay court fees and the costs of his or her lawyer in advance (Article 98 Civil Procedure Code). So proceedings might not only be economically pointless in cases with a low value in dispute; also, claimants may be prevented from filing an action due to a lack of readily available finances.

On 2 March 2018 a preliminary draft for a partial revision of the Civil Procedure Code was submitted to a national consultation procedure. It aims in particular to improve collective redress in Switzerland. To this end the preliminary draft stipulates a readjustment of the group action. Under current legislation associations and other organisations can file non-monetary claims (prohibiting an imminent violation, putting an end to an ongoing violation or establishing the unlawful character of a violation) to safeguard collective interests (group action, Art. 89 Civil Procedure Code). In the future, collective enforcement of monetary claims, especially mass damages, shall be possible. Examples could be the selling of faulty products, but also unfair business practices that concern a large number of people. Also, the preliminary draft provides for the establishment of a new group comparison proceeding oriented towards a similar instrument that exists in the Netherlands since 2005. Essentially it shall be possible for a person accused of a rights violation to reach a settlement on the consequences of that rights violation with an organisation legitimated to file a group action. A court could then declare this settlement binding for all affected persons if they do not claim their refusal within three months ("opt out").

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19 TANJA DOMEJ, *The Swiss Federal Code of Civil Procedure: Achievements and missed opportunities*, Tijdschrift voor Civiele Rechtspleging, 24 (2), pp. 36, pp. 40.

Other proposed adjustments concern costs of civil proceedings: advance payments that the court can demand from the plaintiff shall be limited to half of the amount of the expected court costs (as opposed to the whole of the expected costs under current law, Article 98 Civil Procedure Code). Also, court costs shall be set off against the advances paid by the parties only to the extent that the parties are charged. So the collection risk shall lie with the state instead of the parties in the future. These adjustments stem from the criticism mentioned above, deeming current cost law as an access barrier and so-called paywall for those seeking legal protection. The deadline for the national consultation procedure is 11 June 2018.

### 3. CONTENT<sup>20</sup>

The Swiss Code of Civil Procedure contains 408 Articles. They are divided up into four parts which are themselves subdivided into several titles.

Part 1 contains general provisions and consists of eleven titles. Title 1 (Articles 1–3) regulates the subject matter and scope of application of the Civil Procedure Code. It is applicable to contentious civil matters (Article 1 lit. a), i.e. disputes between two adverse parties (known as contradictory procedure) that do not concern public law. To a limited extent, the Code is also applicable to court orders made in non-contentious matters (Article 1 lit. b). These are procedures with only one party: for example, a woman who applies for a declaration that her husband is presumed deceased because he has been missing for a long period of time without any indication that he is still alive.

The procedure for the enforcement of monetary claims as well as bankruptcy matters are regulated by the Debt Enforcement and Insolvency Act. The collection of debts is called *Betreibung* in Switzerland and is special in that it is possible to enforce money claims by legal compulsion without preceding substantive judicial assessment.<sup>21</sup> Therefore, competent authorities in

<sup>20</sup> In the following text, where articles are mentioned without referencing their source of law, they are located in the Swiss Civil Procedure Code of 19 December 2008 (Civil Procedure Code), SR 727.

<sup>21</sup> The creditor can address a demand for enforcement to the competent enforcement authority, specifying legal ground and amount of his claim (Article 67 Debt Enforcement and Insolvency Act). Upon receipt of the demand for enforcement, the enforcement authority issues an order for payment (Article 69 Debt Enforcement and Insolvency Act) and serves it to the creditor and debtor. The order contains the request to the debtor

these matters are to a large extent so-called debt enforcement offices and bankruptcy offices and not courts. For example, a debt collection procedure is initiated by the creditor addressing his demand for enforcement to the debt enforcing office. Still, the Debt Enforcement and Insolvency Act stipulates some procedural steps in debt collection and bankruptcy proceedings to be carried out by court orders. An example would be the opening of bankruptcy. For such court orders in cases involving debt enforcement and bankruptcy law, the Civil Procedure Code is also applicable (Article 1 lit. c).

Furthermore, the Code is also applicable to arbitration in domestic cases (Article 1 lit. d), i.e. if both parties have their domicile and habitual residence in Switzerland at the time of signing the arbitration agreement.

The Code governs the procedure to be followed before cantonal courts. Provisions for complaint proceedings before the Federal Supreme Court are contained in the Federal Supreme Court Act. So-called direct civil proceedings that are tried before the Federal Supreme Court at first instance are subject to the Federal Civil Procedure Act. These cases are very rare and concern for example conflicts between the federation and the cantons or between the cantons among each other.

The second Title of Part 1 (Articles 4–51) regulates the jurisdiction of the courts. As explained above, subject-matter jurisdiction is mostly governed by cantonal legislation. In contrast, territorial jurisdiction, determining the geographical area in which a court will have competence (place of jurisdiction), is regulated by federal law. The Civil Procedure Code establishes general places of jurisdiction. For natural persons, this will be the court at the location of the defendant's domicile (Article 10 I lit. a). For defendant legal entities, this will be the court at the location of the company's registered office (Article 10 I lit. b). The general place of jurisdiction applies if no other (specific) place of jurisdiction is provided for. Specific places of jurisdiction are for instance provided for disputes which concern immovable property (Article 29: the court at the place where a property is or should be recorded in the land register), employment law (Article 34: the court at the domicile or registered office of the defendant or where the employee normally carries out his or her work), or consumer contracts (Article 32: for actions brought by the consumer: the

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to pay his debts plus the costs of the enforcement within 20 days to the creditor. If the debtor wants to contest the claim, he can do so by raising an objection within ten days from being served the order for payment (Article 74 Debt Enforcement and Insolvency Act). If an objection is raised, the progress of the enforcement procedure is interrupted until a court makes a decision on the claim.

court at the domicile or registered office of one of the parties and for actions brought by the supplier: the court at the domicile of the defendant). Most places of jurisdiction are of an optional nature, meaning that the parties may choose the court they want to have jurisdiction over an existing or future dispute arising from a particular legal relationship (Article 17). For optional places of jurisdiction it is also possible for the defendant to consent tacitly to the jurisdiction of an incompetent court by entering an appearance on the merits without objecting to the court's jurisdiction (acceptance by appearance, Article 18). Few places of jurisdiction are of mandatory nature, in these cases it is not possible for the parties to agree on the jurisdiction of a court at another place and acceptance by appearance is excluded. For example, an action based on marital law can exclusively be brought before the court at the domicile of either of the parties (Article 21). Finally, some places of jurisdiction are designed as partly mandatory, meaning the parties may agree on a different place of jurisdiction only after a dispute has arisen. This is for instance the case for consumer or tenancy contracts (Article 35).

The third Title of Part 1 (Articles 52–61) regulates the basic principles of civil procedure such as acting in good faith (Article 52), the right to be heard (Article 53), the court's duty to enquire (Article 56), ex-officio application of the law (Article 57), and the principles of the production of evidence (Article 55). Title 3 also lists procedural requirements (Article 59). Those are the formal requirements for proceedings, like for example the proper filing of the statement of claim, a legitimate interest of the plaintiff, the case not being the subject of pending proceedings elsewhere, and the subject-matter and territorial jurisdiction of the court seized. Title 4 (Articles 62–65) governs pendency and withdrawal of the action. As soon as an action is filed, a case becomes pending (Article 62 I). If the claimant withdraws the action, he cannot bring proceedings against the same party on the same subject matter again (Article 65).

Title 5 (Articles 66–83) contains rules on the parties. Anyone who is legally capable has the capacity to be a party (Article 66). Natural persons are always legally capable,<sup>22</sup> while legal entities have to be pronounced legally capable by the law. Any person with capacity to act<sup>23</sup> has the capacity to take legal action (Article 67 I). A person without capacity to act (for example, a child) may act through a legal representative (Article 67 I). A party may choose whether or

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<sup>22</sup> Article 11 Civil Code: "Every person has legal capacity".

<sup>23</sup> Article 13 Civil Code: "A person who is of age and is capable of judgement has the capacity to act".

not to be represented in proceedings (Article 68 I). Professional representation is essentially reserved to lawyers (lawyers' monopoly), although the cantons may provide exceptions in some areas such as for representation before conciliation authorities or before the special courts for tenancy and employment matters (Article 68 II). For example, the canton of Zurich allows employees of a tenants or employee organisation to represent clients that belong to these organisations before tenancy and employment courts in cases with a value in dispute of CHF 20'000 or less. Title 5 also regulates the joinder of parties (Articles 70–72), third party intervention (Articles 73–77), and the substitution of a party (Article 83).

Title 6 of Part 1 (Articles 84–90) regulates different types of actions. There are three main types of actions in Switzerland. One is the action for performance, which is where the claimant demands that the court order the defendant to do something, refrain from doing something, or tolerate something (Article 84). For instance, the court may demand that the defendant hand over a certain item. Second, there is the action to modify a legal relationship, by which the claimant demands the creation, modification, or dissolution of such a relationship or a specific right (Article 87). Typical examples are filing for divorce or challenging a resolution of an association's general assembly. Third, an action for a declaratory judgement is used to demand that the court establish whether or not a right or legal relationship exists (Article 88). It is subsidiary to the action for performance and the action to modify a legal relationship.

The other titles of Part 1 contain rules on the calculation of the value in dispute (Title 7) and on costs and legal aid (Title 8). At this point it should be noted that the federal Code regulates the determination and allocation of procedural costs while the competence to set the tariffs for procedural costs (deciding how high costs are) lies with the cantons (Article 96). Further rules in this Part include provisions on procedural acts and deadlines as well as on the direction of proceedings by the court (Title 9) and mutual assistance between Swiss courts (Title 11).

Part 1 Title 10 (Articles 150–193) contains the rules on evidence. Evidence is required to prove facts that are both legally relevant and disputed (Article 150). The court forms its opinion on the case based on its free assessment of the evidence taken (Article 157). Evidence that relates to publicly known facts, facts known to the court, and commonly accepted rules of experience shall not be taken into account (Article 151). Article 29 II Constitution defines the right to be heard, which is mirrored in the Code's so-called right to evidence (Article 152 I). A party is entitled to have the court accept the



evidence that he or she offers in the required form and time. However, there is a key exception to the right to evidence: the court's so-called anticipated evaluation of evidence. This allows a judge to refuse to accept evidence if he or she is already convinced that a certain fact is true or false before taking the evidence, or if already convinced that the evidence offered is unsuitable. Some authors see this practice as inherent to the free assessment of evidence and necessary with a view to the constitutionally granted<sup>24</sup> need for speed (the Civil Procedure Code obliges the courts to issue the required procedural rulings to enable the proceedings to be prepared and conducted efficiently, Article 124 I). Indeed, the principle of the free assessment of evidence means that the court forms its opinion on whether a controversial fact is true or false through free assessment of the available evidence. It is certainly true that in some constellations there will be a point when a judge is convinced that his opinion is established and cannot be affected by taking (more) counterevidence. As an example one could assume a case in which the fact to be proven is that A bought a car from B and the available evidence includes a notarized signed purchase agreement, written communication between A and B about the purchase, an expert opinion that confirms the authenticity of A's signature, and the statement of the notary who was present during the conclusion of contract. If A now offers the testimony of his wife claiming that she was abroad with A on the day of the contract conclusion and he therefore could not have signed the contract, it would be comprehensible that such a statement would not change the court's opinion about A having bought the car from B. As a matter of fact, it would be unfavourable if the judge was obliged to take any evidence being offered despite of his opinion making being concluded, as this could open doors to parties considerably prolonging cases. Of course, for the anticipated evaluation of evidence to be acceptable, the court may only refuse to accept evidence if it is sure that it will not change its opinion, not in cases of doubt. This is especially given when evidence is generally unfit to prove a certain fact, for instance an expert opinion can generally not prove the agreement of will between two parties. Some authors regard the rejection of generally suitable evidence that is seen as unfit in a particular case by subjective assessment of the court as permissible, for instance when only the testimony of a strongly biased witness is offered as sole evidence. Still, it must be noted that

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24 Article 29 I Constitution: *"Every person has the right to [...] have their case decided within a reasonable time"*.

the questioning of witnesses and parties and also their confrontation can provide valuable indications for their credibility and therefore, anticipated evaluation of evidence can be problematic.

Article 168 I lists the admissible types of evidence (*numerus clausus* of evidence): testimony, physical records, inspection, expert opinion, written statements and questioning, and statements of the parties. A witness must disclose if parts of his statement are based on information that was not obtained by his or her direct sensory perception but given to him or her by another person (hearsay evidence). Such statements do not possess direct evidential value, but can be included as circumstantial evidence when assessing the probative force of other evidence. Expert opinions commissioned by the parties have no evidentiary force and are essentially treated in the same way as a party statement. However the preliminary draft for a partial revision of the Civil Procedure Code from 2018 proposes to consider them as physical records.

The distribution of the burden of proof is determined by Article 8 Civil Code, rather than the Civil Procedure Code: this provision states that unless the law provides otherwise, the burden of proof for establishing an alleged fact shall rest on the person who would derive rights from that fact. Consequently, the party asserting a claim is obligated to prove the legally relevant facts giving rise to and substantiating the claim. For example, if the claimant demands that the defendant hand over an object in fulfilment of a purchase contract, the claimant has to prove the existence of said contract as he is deriving his claim from it. Contrarily, the defendant has to prove possible objections, like the contract being invalid or the object having been handed over and the contract therefore already being fulfilled. There are also legal provisions which establish a presumption of certain facts as long as there is no proof to the contrary (presumption of facts). An example of such a provision is Article 3 I Civil Code, which states that where the law makes legal effect conditional on a person's good faith, there shall be a presumption of good faith. This means that in such cases, the party invoking good faith is released from the obligation to prove it; it is presumed to exist by law. The reason rules about the burden of proof can be found in the Civil Code is a historical one: at the time of the enactment of the Civil Code it was considered vital to regulate such matters on the federal level to ensure the uniform application of civil law, even though at this point civil procedure was still the cantons' domain. Even after the codification of Swiss civil procedure law on a federal level, these provisions were not transferred but left to remain in the Civil Code which is why they can still be found there.

Parties to the proceedings as well as third parties have a duty to cooperate in the taking of evidence (Article 160 I). They must give truthful testimony, produce the required physical records, and allow an examination of their person and/or property. In the case of a party's unjustified refusal to cooperate in this area, the law does not allow for the imposing of any fines or sanctions whatsoever. Instead, the refusal is taken into account during the appraisal of evidence; this can in fact have all the more serious consequences. For example, if a party refuses to produce a certain document although it is known to be in possession of it, the court might use the refusal as an indication for the assumption that the document features the content claimed by the opposing party. For situations where third parties refuse to cooperate without a valid reason, the courts have a number of measures at their disposal, including imposing a disciplinary fine or ordering compulsory measures (Article 167 I), like the enforcement of witness appearances or the seizure of documents.

Part 1 Title 10 also sets out the rules for dealing with illegally obtained evidence. The taking of evidence can be formally unlawful, for example when a witness gives testimony without being advised of their right to refuse to cooperate (although third parties have a general duty to cooperate, they are under certain circumstances given the right to refuse, for instance if they are or were married to, cohabit with or have a child with a party [Article 165 I]). Such a testimony is usually not admissible as evidence. Evidence can also be obtained in infringement of the substantive law, for example when a letter is opened in breach of the privacy of a sealed document (Article 179 Criminal Code)<sup>25</sup> or a conversation is recorded in breach of Article 179<sup>bis</sup> Criminal Code. Such illegally obtained evidence is generally not admissible, unless there is an overriding interest in finding the truth (Article 152 II). The public interest in finding the truth is assumed to be higher the more prevalent the principle of *ex-officio* investigation (meaning the courts must inquire into the "material" truth *ex officio* instead of relying on the facts presented by the parties) is in a proceeding. This principle is strongest pronounced in cases concerning children in family matters, which is why in these cases also the public interest in finding the truth appears highest. Least weight is attached to the public interest in finding the truth in proceedings without any *ex-officio* investigation and in matters of voluntary jurisdiction. The private interest in finding the truth

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25 Swiss Criminal Code of 21 December 1937 (Criminal Code), SR 311.0; see for an English version of the Swiss Criminal Code [www.admin.ch](http://www.admin.ch) (<https://perma.cc/4QS4-CWQ5>).

rises and falls with the sum of the value in dispute. The interest in finding the truth must be weighed against the interest in protecting the legal right that was violated by the unlawful taking of evidence. Generally, physical and psychological integrity stands above material goods, which means that evidence obtained by violence or threat is not admissible in claims proceedings.

Part 2 of the Civil Procedure Code contains special provisions. In its first Title (Articles 197–212) the rules for conciliation attempts are set out, while its second Title (Articles 213–218) regulates mediation. A conciliation attempt is an informal proceeding in which a conciliation authority tries to reconcile the parties in an informal manner and that serves to avoid a court proceedings. The conciliation authority assesses the conflict and can propose a solution. Mediation is an even less formal voluntary and confidential dispute resolution procedure guided by an independent third party that is only responsible for the procedure while the subject of the negotiations and the development of solutions largely lie in the hands of the parties. In line with Swiss tradition the law values consensus-based solutions between the parties and therefore mandates an attempt at conciliation before a case can be brought before a court (Article 197). There are a number of exceptions, for example for summary proceedings and family matters (Article 198). Also, the parties can agree to waive any attempt at conciliation in financial disputes which have a value of at least CHF 100'000 (Article 199). The organisation of conciliation authorities is regulated by the cantons and therefore can take several forms. Many cantons use so-called justices of the peace, who are often non-lawyers, being elected by the public into the role. Some cantons provide specific conciliation centres and a few cantons hold conciliation proceedings in courts. About half of such conciliation attempts are successfully settled, although the numbers differ substantially between the cantons. Parties can agree to use mediation rather than the conciliation proceedings (Article 213) but this option is only rarely used.

The remaining Titles of Part 2 of the Civil Procedure Code contain rules on the different types of proceedings. Title 3 (Articles 219–242) regulates the ordinary proceedings at first instance that apply in general civil cases where the value of dispute exceeds CHF 30'000. The established rules concern the exchange of written submissions, hearings, the taking of evidence, and decisions. Title 4 (Articles 243–247) regulates simplified proceedings. These proceedings apply in financial disputes with a value in dispute not exceeding CHF 30'000. Title 5 (Articles 248–270) concerns summary proceedings: these are applied in cases where the facts or the law are clear, where matters are non-contentious, and in various other specific circumstances as provided by

law (for example in proceedings fixing a time limit for legal transactions by minors or persons subject to a general deputyship; proceedings of acceptance of an oral will or proceedings appointing, dismissing, and replacing a company's liquidator). Titles 6, 7, and 8 set out special provisions which apply in cases of marital disputes, proceedings concerning children in family matters, and proceedings concerning same-sex partnerships. Title 9 (Article 308–334) establishes the legal remedies available to the parties (appeal, objection, review) and Title 10 regulates the enforcement of decisions concerning non-money-claims (for instance the delivery of a moveable property or the restoration of earlier conditions on a property), while the enforcement of money claims is regulated by the Debt Enforcement and Insolvency Act.

Part 3 (Articles 353–399) of the Code regulates arbitration in domestic cases, i.e. where both parties have their domicile and habitual residence in Switzerland at the time of signing the arbitration agreement. Arbitration in cross-border cases is subject to the Private International Law Act. Finally, Part 4 (Articles 400–408) regulates the implementation of the Code.

## II. Principles

Civil procedure in Switzerland is constrained by a set of principles outlined by the Civil Procedure Code. For example, all those who participate in proceedings must act in good faith (Article 52). Further, the parties' right to be heard must be respected (Article 53). Court hearings are public and judgments must both be pronounced publicly and made accessible to the public (Article 54 I). The court applies the law *ex-officio* (Article 57). In the following paragraphs, four other fundamental principles will be examined.

### 1. THE PRINCIPLE OF PARTY DISPOSITION AS A RULE

In Swiss civil procedure, the parties largely have the power to decide the time, subject matter, and duration of proceedings: this is what is known as the principle of party disposition. In this regard, the only principle that the Civil Procedure Code explicitly mentions is that of *non ultra petita*. It states that the court may not award a party anything more than or different from that requested (Article 58 I). Nonetheless, the principle of party disposition is recognised as being generally applicable to Swiss civil procedure, including matters like the initiation and closing of proceedings. The courts do not open proceedings on their own initiative; instead, the claimant decides whether or not to file an action. The claimant also determines the subject of the proceedings through his or her claim, i.e. what he or she is demanding from whom. If a claim is divisible, an action for only part of the claim can be filed (Article 86). Because of the principle of *non ultra petita*, the court is restricted to the claimant's request. The principle of party disposition also means that the proceedings can be brought to an end by the parties at any point. Procedural institutions to end a proceeding are settlement or acceptance of the claim and withdrawal (Article 241). They have the same effect as a binding decision.

The principle of party disposition is complemented by the court's duty to enquire (Article 56). If a party's submissions are unclear, contradictory, ambiguous, or manifestly incomplete, the court provides an opportunity for either party to clarify or complete the submission by asking appropriate questions.

Shortly after the entry into force of the Civil Procedure Code, it was heavily disputed whether the court merely had a right to enquire or an actual obligation to do so. It is now recognised that the court is indeed obligated to ask questions.

## **2. THE PRINCIPLE OF EX-OFFICIO ASSESSMENT AS AN EXCEPTION**

Another exception to the principle of party disposition in Swiss civil procedure is the principle of ex-officio assessment (Article 58 II). It means that the court has a duty to independently assess the case before it; it deprives the parties of their free disposal over the matter in dispute and means that the court is not bound by the parties' requests. In Swiss civil procedure, the principle of ex-officio assessment is applied where the public interest requires that the parties are deprived of their free disposal. Such a reason may be, for instance, the protection of weaker parties (like minors). For example, the court can award more child maintenance than the amount requested by the claimant or than the amount the parties had agreed on in a divorce settlement.

The claimant still has to file an action if ex-officio assessment is applicable. State authorities may only initiate civil proceedings if this is explicitly stated by federal law: for example, this is the case for the action for annulment of marriage (Article 106 Civil Code).<sup>26</sup> Appellate proceedings can never be initiated ex-officio.

## **3. THE PRINCIPLE OF PARTY REPRESENTATION AS A RULE**

While the principle of party disposition stipulates how the subject matter of proceedings is defined, the principle of party representation concerns the question of how the court comes to know the facts and evidence it needs for

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<sup>26</sup> Grounds for marriage annulment are for instance that one of the spouses was already married at the time of the wedding; that one of the spouses lacked capacity of judgement at the time of the wedding and has not regained such capacity since; that the marriage was prohibited due to kinship; that a spouse has not married of his or her own free will or that one of the spouses is a minor.

deciding the case. In Swiss civil procedure, this principle is the rule, meaning that only the facts and evidence produced by the parties form the subject matter of the proceedings. This means that the parties must present the court with the facts in support of their case and submit the related evidence (Article 55 I). This can contradict the search for the material truth. For example, if a party does not dispute or concedes allegations of its opponent, the judge has to base his or her decision on these facts, regardless of his conviction of the truth. However, this is justified by the principle of individual autonomy in civil procedure. Like according to the principle of party disposition explained above, the parties can decide whether they want to bring proceedings before a court; they also can decide which facts they present in their statements.

The principle of party representation is limited in several ways: evidence is not required to be provided in support of publicly known facts, facts known to the court, and commonly accepted rules of experience. The latter can be based on general life experience (common sense) or on experiences from specific areas of life (trade and commerce, technology, art, etc.). An example would be the determination of the time spent on housekeeping based on statistical data. Facts can also be undisputed and therefore be considered proven. As with the principle of party disposition, the principle of party representation is also complemented by the court's duty to enquire. Again, this means that the court asks questions for either party to clarify or complete their submissions if they are unclear or incomplete. If this duty to enquire is exercised extensively, the proceedings acquire a more inquisitorial touch, something which runs counter to the idea of the principle of party representation upon which it is the parties' responsibility to present the relevant facts to the court which does not establish facts of its own. Therefore, it is widely recognised that the duty to enquire shall be exercised with great restraint towards parties who are legally represented, at least in ordinary proceedings. For simplified proceedings, a comparably stronger duty to enquire is imposed by the Civil Procedure Code (Article 247).

#### **4. THE PRINCIPLE OF EX-OFFICIO INVESTIGATION AS AN EXCEPTION**

While the principle of ex-officio assessment means that courts are bound by the parties' requests, the principle of ex-officio investigation concerns the establishment of the facts in a case. Within the scope of the principle of



ex-officio investigation the courts cannot rely on the facts presented to them by the parties: they must inquire into the “material” truth ex officio, thus providing an exception to the principle of party representation. The principle of ex-officio investigation is highly relevant in criminal proceedings. It does not have the same significance in civil proceedings because civil courts cannot rely on the relevant investigation authorities. Distinction is to be made between the principle of limited ex-officio investigation (establish the facts) and the principle of unlimited ex-officio investigation (investigate the facts). Unlimited ex-officio investigation applies in proceedings concerning children in family matters. Limited ex-officio investigation applies in disputes concerning matters of discrimination under employment law and certain tenancy matters, as well as in tenancy, lease, and employment law disputes where the value in dispute does not exceed CHF 30'000. As with ex-officio assessment, the main reason behind ex-officio investigation is to protect the weaker party.

Where ex-officio investigation is required, the court questions the parties extensively and demands that they produce relevant materials, for example by calling witnesses. Still, due to the court’s limited possibilities of investigation, it is up to the parties to describe the main facts, being prompted by the judge’s questions where necessary. Only where unlimited ex-officio investigation applies does the court have the responsibility for establishing the relevant facts.

This means the involvement of the court in the establishment of the facts of a case can have the following manifestations in different proceedings:

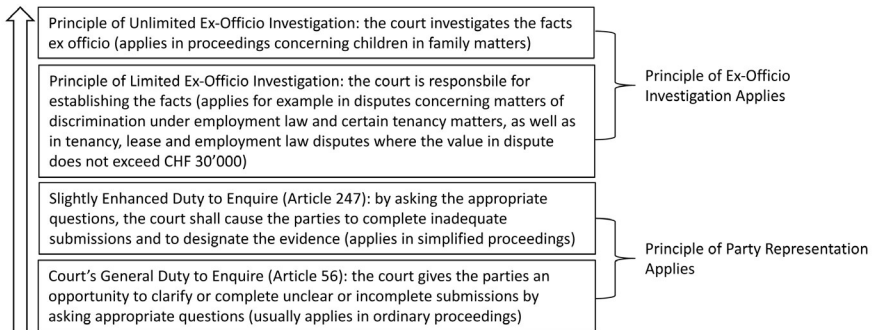


Figure 3: Levels of Court Involvement in Establishing the Facts

# III. Institutions and Procedure

The institutions and procedure of Swiss civil justice can be best understood by chronologically following the course of a standard case. First, the attempt at conciliation, which is essentially mandatory before a case can be brought before a court, will be explained (1.). Subsequently, the rules for ordinary proceedings will be examined in detail (2.) following which a short overview of simplified and summary proceedings will be given (3.). Finally, the appellate remedies in Swiss civil procedure will be outlined (4.).

## 1. ATTEMPT AT CONCILIATION

As explained above, an attempt at conciliation is basically mandatory in Switzerland before a case can be brought to court (Article 197), although the law does provide for some exceptions (such as in summary proceedings). For financial disputes with a value in dispute of more than CHF 100'000, parties can agree to waive the conciliation attempt (Article 199 I). Like with cantonal courts, the federal law regulates the procedure before conciliation authorities but leaves their organisation to the cantons. The conciliation proceedings are initiated by the claimant filing an application for conciliation in the form of paper documents, either electronically (Article 130 I) or orally before the conciliation authority (Article 202 I). In their application, they must identify the opposing party, describe the prayers for relief and the matter in dispute. This is the minimum content required for a conciliation application (Article 202 II). With the filing of the application, a case becomes pending (Article 62): from this point, the same subject matter can no longer be filed elsewhere between the same parties (Article 64).

Conciliation authorities try to help the parties reach an agreement. The procedure is thus less formal than that followed in court proceedings. Conciliation hearings are also generally<sup>27</sup> not open to the public. After the application is

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<sup>27</sup> In disputes relating to the tenancy and lease of residential and business property the conciliation authority may allow full or partial public access to the hearings if there is a

filed, the conciliation authority serves the defendant and summons the parties to a hearing. The parties must appear in person. The statements made during the hearing are confidential and cannot be used subsequently in any court proceedings (Article 205). In financial disputes where the value in dispute is below CHF 2'000, the conciliation authority can decide on the merits on the plaintiffs' request (Article 212). If the value in dispute is below CHF 5'000, the conciliation authority can submit a proposed judgement to the parties, which has binding effect as long as it is not rejected by any of the parties within 20 days (Article 211). If the parties do not reach an agreement during the hearing and the conciliation authority can neither decide the case nor render a proposed judgement, it grants authorisation to proceed (Article 209 I). From this point, the claimant has three months to file the action in court if he or she wishes.

## 2. ORDINARY PROCEEDINGS

Court proceedings are initiated by the claimant filing a detailed statement of claim (Article 221). If the value in dispute exceeds CHF 30'000, the ordinary proceeding applies. Provisions regulating ordinary proceedings apply to other proceedings unless there are specialised rules stipulated by law. After the statement of claim is received by the court, the preparation of the main hearing begins. The court examines whether the procedural requirements (such as the proper filing of the statement of claim, a legitimate interest of the plaintiff, the case not being the subject of pending proceedings elsewhere, and the subject-matter and territorial jurisdiction of the court seized) are met (Article 60), serves the statement of claim on the defendant, and sets a deadline for the submission of a written statement of defence (Article 222). If the defendant does not submit within the deadline (including a short period of grace)<sup>28</sup>, the court can if feasible make a decision solely from the statement of claim (Article 223 II).

After the statement of defence is received, the court has several choices regarding the next procedural steps to be taken. It can proceed directly to the main hearing, order that an instruction hearing be held before proceeding to the main hearing, or order that a second written exchange be conducted before

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public interest.

28 If the statement of defence is not filed within the deadline, the law orders the court to allow the defendant a short period of grace.

the main hearing. An instruction hearing can be held at any time during the proceedings to discuss the dispute informally, complete the facts,<sup>29</sup> reach an agreement, or simply prepare for the main hearing (Article 226). Courts can also take evidence during such hearings. Prior to the main hearing, the court delivers the so-called ruling on evidence (Article 154): here the court rules on the admissibility of each piece of evidence and determines which party has the burden of proof for each fact.

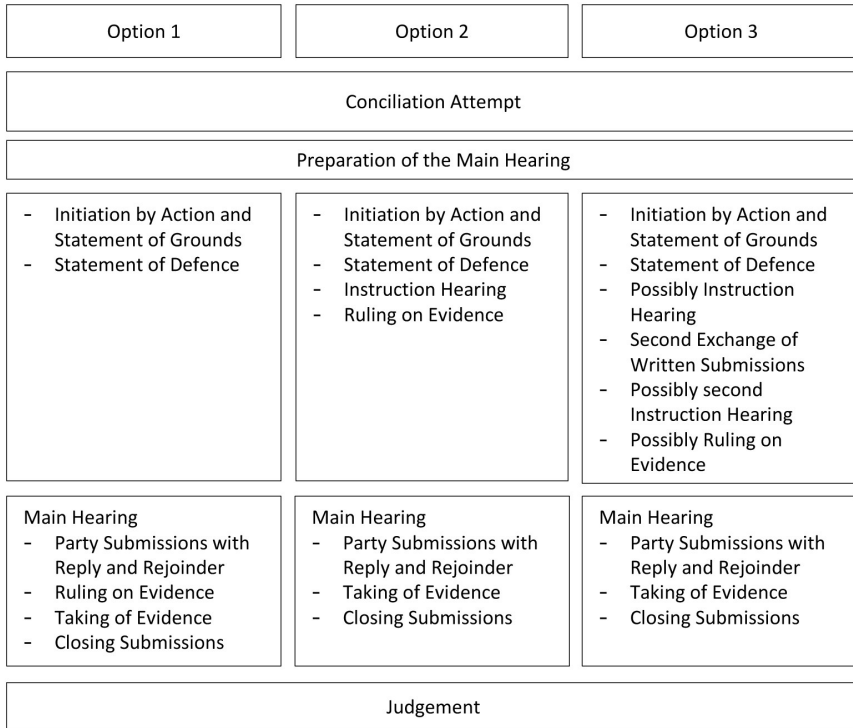


Figure 4: Possible Options for the Conduct of Ordinary Proceedings

<sup>29</sup> In ordinary proceedings, the courts usually exercise their duty to enquire during the instruction hearing, giving the parties the opportunity to clarify, or complete their submissions by asking appropriate questions.

In Swiss civil procedure, the main hearing is structured in a fairly formal way. First, there are two rounds of oral statements taken from each party (Article 228). After the second round of written or oral statements, new facts and evidence are admissible only if they are introduced immediately and came into existence after the statements or, where they existed prior to this point, if the party was unable to introduce them earlier despite exercising reasonable diligence (Article 229). If the court decides to proceed directly to the main hearing after the statements of action and defence, parties can introduce new facts and evidence in their first oral statement. If the court decided to hold an instruction hearing for reasons other than simply reaching agreement, parties are generally not permitted to introduce any new facts or evidence in the main hearing (except if they arose after the instruction hearing or if they existed before but the party was unable to introduce them earlier despite exercising reasonable diligence). Instead, the parties can only comment on the statements that the other party made during the instruction hearing. The same goes for cases in which the court ordered a second round of written exchanges between the parties: here, the parties can only comment on the statements made by the other party in the last written exchange. So in conclusion, in Swiss civil procedure parties have two opportunities to bring new facts or evidence into the proceedings without limitation: First the statements of action and defence and second depending on the further course of the procedure either the second round of written exchanges, the statements during the instruction hearing, or the first oral statements during the main hearing.

The second oral statement in the main hearing provides the parties with an opportunity to comment on the other party's first statement. This is especially important in cases where new facts or evidence have been introduced. Thereupon, the court examines the evidence produced by the parties and indicated in the ruling on evidence (questioning witnesses, performing an inspection, etc.). Afterwards, the parties may comment on the result of the evidence and on the merits of the case (Article 232). Each party has the right to make a second round of submissions. Parties can jointly agree to dispense with the main hearing (Article 233). In such cases, no evidence is taken as this is exclusively done as part of the main hearing.

If the court is able to make a decision, it closes the proceedings either by deciding not to consider the merits or by making a decision on the merits (Article 236). If the proceedings are not presided over by a single judge, the court decides by majority. The court may give notice of the decision to the

parties without providing a written statement of the grounds, although the parties can request that such a statement be produced within ten days (Article 239).

### 3. OTHER TYPES OF PROCEEDINGS

Simplified proceedings are governed by Articles 243–247. They apply in cases where the value in dispute is below CHF 30'000, as well as to disputes in social matters, such as tenancy disputes, employment disputes, and consumer disputes. Simplified proceedings are less formal, largely allow oral submissions, and attribute a more active role to the court. Contrary to ordinary proceedings, in simplified proceedings a claimant may submit his claim orally before the court.

The Civil Procedure Code provides for summary proceedings in Articles 248–270. These procedures are even simpler and more expedient than simplified proceedings. They apply, in particular, to urgent requests and requests for provisional measures. They also apply to non-contentious matters, matters where the facts can be immediately proven, or matters where the legal situation is straightforward and indisputable. Summary proceedings also apply to specific proceedings under the Debt Enforcement and Insolvency Act, such as a declaration of bankruptcy. As in simplified proceedings, a claimant may present his or her claim orally. In the context of summary proceedings, the only permitted form of evidence is documents. Other types of evidence are only admissible if the taking of such evidence does not delay the proceedings or if the court has to establish facts *ex officio*.

### 4. APPELLATE PROCEEDINGS

As mentioned above each canton has a second-instance, appellate court. The Civil Procedure Code knows three appellate remedies: appeal, complaint, and revision. Subsequent complaints against final cantonal decisions can, in limited circumstances, be filed with the Swiss Federal Supreme Court. Such complaints are governed by the Federal Supreme Court Act (Articles 72 et seqq. Federal Supreme Court Act).

An appeal (Articles 308–318) is the ordinary remedy against final and interim decisions of first instance if the value in dispute amounts to at least CHF 10'000. Decisions in non-financial matters can practically always be

challenged by appeal (for example, divorce cases). An appeal must be filed in writing within 30 days of service of a decision (Article 311 I). If the decision was rendered in summary proceedings, the deadline for filing the appeal is 10 days (Article 314 I). An appeal may be filed on grounds of the incorrect application of law (such as incorrect application of the Civil Procedure Code itself or incorrect application of substantial civil law) or the incorrect establishment of facts (such as incorrect assessment of evidence, incorrect assumption about whether facts have been claimed or not claimed).

Where an appeal is excluded, i.e. in financial cases with a value in dispute below CHF 10'000, a party may file an objection (Articles 319–327a). Objections are admissible on the grounds of the incorrect application of the law, but incorrect establishment of facts may be raised as a ground only if the establishment of facts has been obviously incorrect (Article 320). This is for instance presumed if the court determines facts based on an arbitrary assessment of evidence or if it assumes a fact that needs to be proven as proved without any records giving information on this fact. The deadline for filing an objection is 30 days from service of a court's decision (Article 321 I). In the case of summary proceedings, it is 10 days (Article 321 II). Contrary to an appeal, the filing of an objection does not, as a rule, suspend the legal effect and enforceability of the contested decision (Article 325 I). However, exceptionally, the appellate court may grant a suspension of the enforceability (Article 325 II). As opposed to appeals, new evidence, or new allegations of facts are, in principle, inadmissible (Article 326).

Finally, a party can apply to the court that has decided as final instance in its case to reopen proceedings through a review (Articles 328–333) leading to a final judgment if significant facts or decisive evidence are discovered which were not available in the earlier proceedings (Article 328 I lit. a). Review of a decision may also be requested when the decision was unlawfully influenced to the detriment of a party (Article 328 I lit. b). Offences in this context are for instance perjury by a party to civil proceedings (Article 308 Criminal Code), perjury by an expert witness or false translation (Article 307 Criminal Code), issuing a false medical certificate (Article 318 Criminal Code), or bribery of Swiss public officials (Article 322ter Criminal Code). A review must be filed within 90 days of the discovery of the grounds for review (Article 329 I) and within 10 years of the date the decision came into force (Article 329 II). Like with objections, the filing of a review does not suspend the legal effect and enforceability of the decision (Article 332).

## IV. Landmark Cases

### 1. INTERNATIONAL CASE<sup>30</sup>

In this case, a firm that owned a Swiss patent and had its registered office in Denmark accused a firm with its registered office in Switzerland of infringing the aforementioned patent. The question was whether this qualified as an international matter in which case territorial jurisdiction would be determined by international treaties or if it should instead be subject to Swiss jurisdiction regulations. The Federal Supreme Court stated that the question of whether a matter was of international nature or not must be examined in each case individually and under the given circumstances. Therefore, it cannot be assumed that every case in which one party is of foreign nationality will automatically qualify as international. However, the Federal Supreme Court decided that a case will always qualify as international if one of the parties has its domicile or registered office in a foreign country. This applies regardless of the party's role in the proceedings (claimant or defendant).

The Federal Supreme Court rendered this decision with regards to the Swiss Jurisdiction Act, a piece of legislation that has since been replaced by the Federal Code of Procedure. However, the rules of the Jurisdiction Act were simply transferred in their full content to the Federal Code: thus, this landmark case on the international nature of a dispute is still relevant today.

### 2. DÜRRENMATT'S HEIRS<sup>31</sup>

The famous Swiss author FRIEDRICH DÜRRENMATT (one of his most well-known works being the highly recommended play "The Physicists") died on 14 December 1990, leaving his wife CHARLOTTE DÜRRENMATT and his three children as sole heirs. However, the publishing house he had worked with erroneously transferred the rights of theatrical performances of DÜRRENMATT'S

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<sup>30</sup> BGE 131 III 76.

<sup>31</sup> BGE 121 III 118.



work “Midas” to a Bavarian theatre. Thereupon, CHARLOTTE DÜRRENMATT filed an action for a declaratory judgement, demanding that the court declare the transfer of rights invalid. The Federal Supreme Court ruled that the rights on DÜRRENMATT’s work were common property of his heirs; hence, they could only jointly appear as plaintiffs. This is largely to ensure that none of the heirs suffer any damage due to the sole efforts of another heir. Consequently, CHARLOTTE DÜRRENMATT—who had been listed alone in the statement of claim – was not a legitimate plaintiff: all of DÜRRENMATT’s heirs would have to have been listed in order for the claim to proceed.

This decision occurred before the Federal Code of Civil Procedure was enacted. Today, the mandatory joinder of parties is regulated by Article 70. Nevertheless, the decision is still important today, as the substantive civil law that determines which cases two or more persons must appear jointly in has not changed since the entry into force of the Code of Civil Procedure.

### 3. AGREEMENT ON JURISDICTION<sup>32</sup>

In this case, the claimant – a lawyer – filed an action for performance to claim the fees for his legal services against the defendant in Winterthur, though the defendant’s domicile was in Schaffhausen. The claimant justified his petitioning of the court in Winterthur on an agreement on jurisdiction in his Terms and Conditions (T&Gs) that the defendant had signed. The Federal Supreme Court stated that parties can only waive jurisdiction at the defendant’s domicile if there is a consensus between them regarding this matter. If an actual consensus in the sense of an agreement cannot be proven, it is the normative consensus<sup>33</sup> that counts. Such a consensus is only found if the contracting party can assume in good faith that the other party accepted the agreement on jurisdiction by signing the contract. Relevant factors in this context are, for example, the business experience of the waiving party, the arrangement of and emphasis on the jurisdiction clause within the T&Gs, etc. The Federal Supreme Court established that a jurisdiction clause must be on prominent display and be clearly marked out in the T&Gs if the contracting party does not have a lot of business experience. This is because otherwise it cannot be

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<sup>32</sup> BGE 124 III 72.

<sup>33</sup> According to the principle of objective interpretation, a declaration of intention is to be understood the way the other party of the contract could and did in good faith understand it.

assumed that the party wanted to waive jurisdiction at his or her domicile (this requirement is known as the typographic practice).

As the typographic practice was developed before the Federal Code of Civil Procedure entered into force, doctrine largely assumes that it was abolished by the new Code and that nowadays, it is sufficient for an agreement on jurisdiction to be written, as opposed to clearly demarcated. Nonetheless, the Swiss Federal Supreme Court has confirmed its previous practice in several more recent decisions.<sup>34</sup>

#### 4. FILING AN APPEAL WITH AN INCOMPETENT COURT<sup>35</sup>

A woman filed an action against her employer before the employment court in Zurich which dismissed her case. She filed an appeal against this judgement on the last day of the time limit via the Swiss Postal Services, addressing it to the employment court that had dismissed her claim. In reality, it was the High Court of Zurich that had jurisdiction over the appeal. Thus, the High Court rejected the appeal on the basis that it had not been appropriately filed within the time limit. Upon a further appeal to the Federal Supreme Court, it was held that the lack of a legal provision covering situations where the deadline to appeal was missed due to the application being filed with an incompetent court was not intended by the legislator; thus there was a gap in the law.

Before the Federal Code entered into force in 2011, the Federal Supreme Court had already defined it as a “principle of civil procedure” that filing an appeal with an incompetent court and therefore missing the deadline to appeal does not preclude compliance with said deadline. This principle was also applied to situations where there was a gap in the regulation of this issue in the former cantonal codes. According to the Federal Supreme Court, this principle has continued to apply since the entry into force of the Federal Code, albeit in a slightly modified form. Specifically, because court organisation is still within the cantons’ domain; it might not be possible for a federal authority or one from another canton that mistakenly receives an appeal to accurately determine the authority that actually has jurisdiction in order to forward the appeal on towards it. Hence the principle now only applies where

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34 Judgment of the Federal Supreme Court 4A\_4/2015 of 9 March 2015, consideration 2; Judgment of the Federal Supreme Court 4A\_247/2013 of 14 October 2013, consideration 2.1.2.

35 BGE 140 III 636.

the party mistakenly addresses the appeal to the court that delivered the disputed judgement: as soon as the appeal is filed with this court, the deadline is considered to be met. By contrast, if an appeal remedy is filed with any other incompetent authority, compliance with the deadline can only be assumed if the incompetent authority forwards the documents towards the competent authority within the deadline: notably, such authorities have no legal obligation to do so. Of course this argumentation is not without cynicism as the Federal Supreme Court obviously does not have the confidence in the cantonal courts to determine the competent authority but requests the exact same thing from the claimant.

As the claimant in this case had filed the appeal against the judgement of the employment court with the employment court itself, the deadline was met.

## 5. INCORRECT INSTRUCTIONS ON OBJECTION REMEDIES<sup>36</sup>

In this case, a party raised an objection to the decision of a supervisory authority in debt enforcement matters to the Federal Supreme Court, under the assumption the deadline for raising such an objection was 30 days from notification of the original decision. In this case, because the claimant objected to the decision of a cantonal supervisory authority in debt enforcement matters, the deadline was only 10 days. The party had been given incorrect instructions on the deadline by the supervisory authority. The Federal Supreme Court stated that, according to federal law, such incorrect instructions must not result in disadvantages for the party in question (Article 49 Federal Supreme Court Act).

But the Federal Supreme Court decided that this provision is only applicable if the party did not know and also could not have known despite exercising reasonable diligence that the instruction was incorrect. Further, it established that a person who is not legally trained and who is not represented by a legal agent cannot be blamed for not realising that an instruction was incorrect, except where they have relevant knowledge from prior proceedings. As this exception was not applicable in this case, the Federal Supreme Court declared the objection admissible despite the fact that the party had failed to comply with the 10 day deadline.

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<sup>36</sup> BGE 135 III 374.

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# Marc Thommen

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# I. Criminal Code

This first section is intended to introduce and explain the development of the Swiss Criminal Code, starting with a brief history of the codification of criminal law across Switzerland (1.). Next, the gradual development of the criminal code we have today, designed by Carl Stooss, is examined (2.). The content and form of this current criminal code will be outlined (3.), before some particularities of the code are analysed in more detail: namely, the dualism of sanctions (4.), the death penalty in Swiss law (5.), and the regulations on assisted suicide and euthanasia (6.).

## 1. HISTORY

The first comprehensive codification of criminal law in Switzerland – the *Code pénal de la République helvétique 1799* – was inspired by the ideals of the French Revolution, such as equality in sentencing and the abolishment of general confiscations.<sup>1</sup> However, this codification was not to last for long: after the decline of the Helvetic Republic in 1803, the cantons regained their right to create and apply their own criminal codes. The canton of Fribourg, for example, reintroduced the *Constitutio Criminalis* of Emperor Carl V of 1532 (“Carolina”);<sup>2</sup> this Code provided on one hand for some brutal forms of punishment such as drawing and quartering, on the other hand it had once been quite modern for it also “advanced” individual rights and protected suspects from excessive legal arbitrariness (e.g. no torture without probable cause, no leading questions, compensation if tortured illegally, etc.). Of course, in the 19th century the Carolina was hopelessly outdated.

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1 STEFAN TRECHSEL/MARTIN KILLIAS, *Criminal Law*, in Francois Dessemontet/Tugrul Ansay, (eds.), *Introduction to Swiss Law*, 3<sup>rd</sup> edition, The Hague 2004, pp. 245, p. 246.

2 NADINE ZURKINDEN, *National characteristics, fundamental principles, and history of criminal law in Switzerland*, in Ulrich Sieber/Konstanze Jarvers/Emily Silverman (eds.), *National Criminal Law in a Comparative Legal Context*, Vol 1.1, Berlin 2013, pp. 205, p. 295.



The Switzerland we know today was founded in 1848 in the aftermath of the *Sonderbund* war, which was a civil war between Catholic and Protestant cantons. The seven Catholic cantons who formed the *Sonderbund* opposed the impending centralisation of Switzerland as they feared that their interests would be marginalized by the majority of Protestant cantons. It was the Protestants that prevailed in the *Sonderbund* war, but it is the lasting legacy of the Swiss founding fathers – and especially of the president of the constitutional convention ULRICH OCHSENBEIN – that the interests of the defeated were also taken into account, when drafting the Constitution which followed this conflict. Hence, it was not a central Swiss Republic but the *Swiss Confederation* that emerged at this point.



Figure 1: Ulrich Ochsenbein, 1811–1890<sup>3</sup>

One of the main features of this federal system founded in 1848 is the autonomy of the 25 cantons:<sup>4</sup> the cantons kept their legislative independence. So even after Switzerland was founded as a modern federal state, the cantons retained their own criminal codes. Considering the size of the cantons (for example, even today the canton of Glarus has a population of only 40'000 inhabitants) this variety of criminal codes proved to be very inefficient. Therefore, the Swiss Lawyers Association held, at its general assembly of 1887,

<sup>3</sup> Source: Britannica (<https://perma.cc/EC7V-CTE4>).

<sup>4</sup> There were 25 cantons at this point in history. The canton which was added later is that of Jura, which acceded to the Federation in 1979, becoming the 26<sup>th</sup> Swiss canton.

that an “efficient and successful fight against crime is not possible as long as the fragmentation of cantonal criminal codes persists.”<sup>5</sup>

## 2. LEGISLATION

Following this declaration by the Swiss Lawyers Association, the Swiss Federal Council asked CARL STOOSS, a professor of criminal law at the University of Bern, to draw up a comparative compendium of all the cantonal criminal codes. In 1892, CARL STOOSS published his comparative analysis. He pointed out that the foundations of Swiss criminal law were “quite cosmopolitan”, drawing from Romanic and German sources. While the French influence of the Code pénal of 1799 persisted in the cantons of the Romandie (western, French-speaking part of Switzerland), the codes of the central and eastern (German-speaking) cantons were more inspired by the Austro-Hungarian codification.

Interestingly, three cantons were missing in CARL STOOSS’ compilation: Uri, Unterwalden and Appenzell Innerrhoden. The reason for this was that these small cantons had no formal criminal codes, only a few written sources of law at that time. Fribourg, as mentioned, still relied on the “Carolina”. CARL STOOSS’ compilation of the cantonal codes focused on what was viewed as the core of the criminal law (murder, assault, theft, fraud, rape, etc.). The minor “police offences” (vagrancy, begging, alcoholism, gambling, and lottery) were not covered. The cantonal rules on the death penalty became a part of the compilation even though capital punishment was already highly controversial by this time.

In 1893, CARL STOOSS published his first draft of the Criminal Code. At that time, nobody anticipated that the legislative procedure would take a record-breaking 50 years to achieve completion. Up until 1916, three commissions of experts deliberated on various drafts of the code. In 1918, the Swiss Federal Council handed its dispatch<sup>6</sup> to Parliament. It was another ten years before the Federal Assembly entered the debate in 1928; following

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5 This is an own translation of a quote from Carl Stooss’ 1890 comparative compendium on cantonal criminal codes, p. IX (<https://perma.cc/S2EE-LT6M>).

6 The term “dispatch” (German: *Botschaft*; French: *message*) is the official term used by the Swiss government for explanatory reports to draft legislation; resembling a White Paper in the UK; see Chapter Swiss Legal System, p. 28.

this, they actually spent a further ten years deliberating the Code. Finally, on 21 December 1937, the still highly controversial Swiss Criminal Code was adopted. The opponents claimed that a unified codification for Switzerland undermined cantonal autonomy in the crucial field of criminal law. Catholic groups also opposed the Code because it legalised (medically warranted) abortions.<sup>7</sup>

The Code's abolition of the death penalty was also still a controversial issue.<sup>8</sup> The Code thus had to be submitted to a referendum. On 3 July 1938, a slim majority of 53.5 % of the electorate approved the new criminal code. The Code officially came into force on 1 January 1942.

### 3. CONTENT<sup>9</sup>

In the Swiss criminal law of today, there are three types of offences: felonies, misdemeanours, and contraventions. *Felonies* are offences that carry a custodial sentence of more than three years, the maximum custodial sentence usually being 20 years. Some felonies (e.g. murder, aggravated hostage-taking) carry a life sentence (Article 40). *Misdemeanours* are offences that carry a custodial sentence not exceeding three years or a monetary penalty (Article 10). Monetary penalties are composed of penalty units. The quantity of the units (a maximum of 180; Article 34 I) reflects the culpability of the offender, while the amount charged per unit reflects the offender's financial situation (currently CHF 30 – 3'000, while allowing courts the possibility of lowering this minimum to CHF 10 where special financial circumstances exist; Article 34 II). Finally, *contraventions* are criminal acts that are punishable only with a fine (Article 103). The maximum fine is usually CHF 10'000 (Article 106).

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7 ZURKINDEN, p. 296 with further references.

8 ZURKINDEN, p. 296 with further references.

9 In the following text, where Articles are mentioned without referencing their source of law, they are located in the Swiss Criminal Code of 21 December 1997, SR 311.0; see for an English version of the Swiss Criminal Code [www.admin.ch](http://www.admin.ch) (<https://perma.cc/4QS4-CWQ5>).

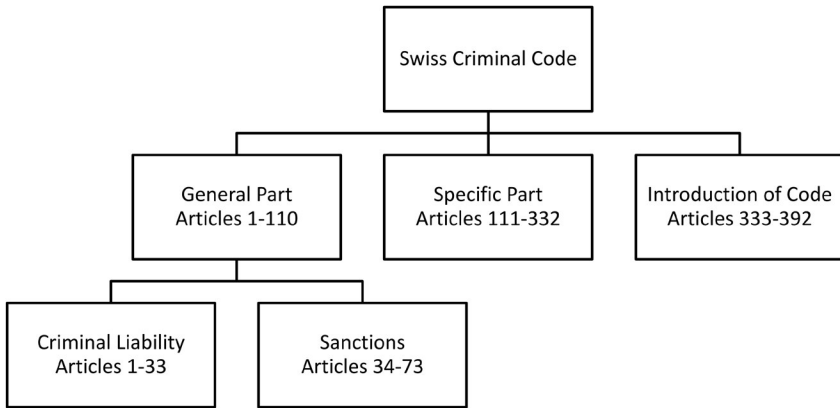


Figure 2: Structure of the Swiss Criminal Code

The Swiss Criminal Code contains 392 Articles. It is divided up into three books.

*Part I* (Articles 1–110) mainly regulates the *general provisions* on criminal liability (omissions, intention and negligence, justifications, guilt, responsibility, attempt, and participation) and sanctions (e.g. custodial sentences, monetary penalties, suspension of sentences, parole, therapeutic measures, and indefinite incarceration). For example, there are two types of intention in Swiss criminal law: these are contained in Article 12. Article 12 encompasses both direct intent and conditional intent. Direct intent is possessed when the offender both knows that a particular consequence is possible and wants this consequence to occur.<sup>10</sup> Conditional intent, or *dolus eventualis*, is possessed when the offender realises that the consequence is possible and accepts this risk – albeit not necessarily wanting the harm to occur. In this sort of case, the offender is indifferent about whether or not the harm will occur.<sup>11</sup>

The Swiss legislator’s decision to introduce a general part that sets up the common elements of crime and sentencing followed a long tradition. The Italian Renaissance jurist TIBERIO DECIANI (1509–1582) is credited with being the first to coin the idea of splitting up criminal codes into general and specific parts in his *Tractatus Criminalis* of 1590. Criminal codes which were created before this, such as the Carolina (1532), only contained specific, casuistic

10 ANNA PETRIG/NADINE ZURKINDEN, *Swiss Criminal Law*, Zurich/St. Gallen 2015, p. 69.

11 PETRIG/ZURKINDEN, p. 70.

provisions. The move towards including both general and specific parts allowed criminal codes to be kept much shorter. By creating general rules for all crimes, the legislator also better fulfilled the *nulla poena sine lege* principle;<sup>12</sup> having general rules removes any gaps in criminal liability that would otherwise have to be filled by analogy. Further, by predetermining liability in a general manner, the legislator hoped to minimize the influence of courts and academics on the interpretation of criminal codes.

*Part II* covers the specific provisions (Articles 111–332): it establishes criminal offences which protect individual interests such as life and limb (murder, assault), property (theft, fraud), honour (defamation), liberty (coercion, hostage taking, unlawful entry) or sexual integrity (rape, exploitation, pornography, sexual harassment). In addition, criminal offences which protect collective interests such as families (incest, bigamy), public safety (arson), public health (transmission of diseases), public order (rioting, criminal organisations, racial discrimination), genocide and war crimes, trading interests (counterfeiting, forgery), national security (high treason, espionage), judicial interests (false accusation, money laundering, perjury), and state interests (abuse of public office, bribery) were also included.

*Part III* (Articles 333–392) deals with the introduction and application of the Swiss Criminal Code.

Many criminal provisions exist outwith the Criminal Code: for example, road traffic offences, drug crimes, and illegal use of weapons all form part of specific federal codes.<sup>13</sup> In practice, these laws are highly relevant, in particular road traffic offences.<sup>14</sup>

<sup>12</sup> A key principle in Swiss law, meaning “no penalty without law” (see pp. 385.).

<sup>13</sup> Federal Act on Road Traffic of 19 December 1958, SR 741.01; Federal Act on Narcotics and Psychotropic Substances of 3 October 1951 (Narcotics Act, NarcA), SR 812.121, see for an English version [www.admin.ch](http://www.admin.ch) (<https://perma.cc/BU2C-495F>); Federal Act on Weapons, Weapon Equipment and Ammunition of 20 June 1997, SR 514.54.

<sup>14</sup> In 2016, there were 57'518 convictions of adults for road traffic offences, which is 52 % of all 109'116 convictions of adults (source: Federal Statistical Office: <https://perma.cc/QP23-E83X>).

### 4. DUALISM OF SANCTIONS

Sanctions are the consequences imposed for criminal acts. In Switzerland there are two main categories of sanctions: sentences and measures. Sentences (monetary penalties, custodial sentences, fines) are retributive in nature. They are mainly backward-looking: their aim is to reprimand and punish offenders for their wrongdoing. Measures, on the other hand, are preventive in nature. Thus, they are predominantly forward-looking: they are designed to protect society from dangerous offenders by either curing them of any mental deficiencies or addictions (therapeutic measures) or by permanently incapacitating them (indefinite incarceration).

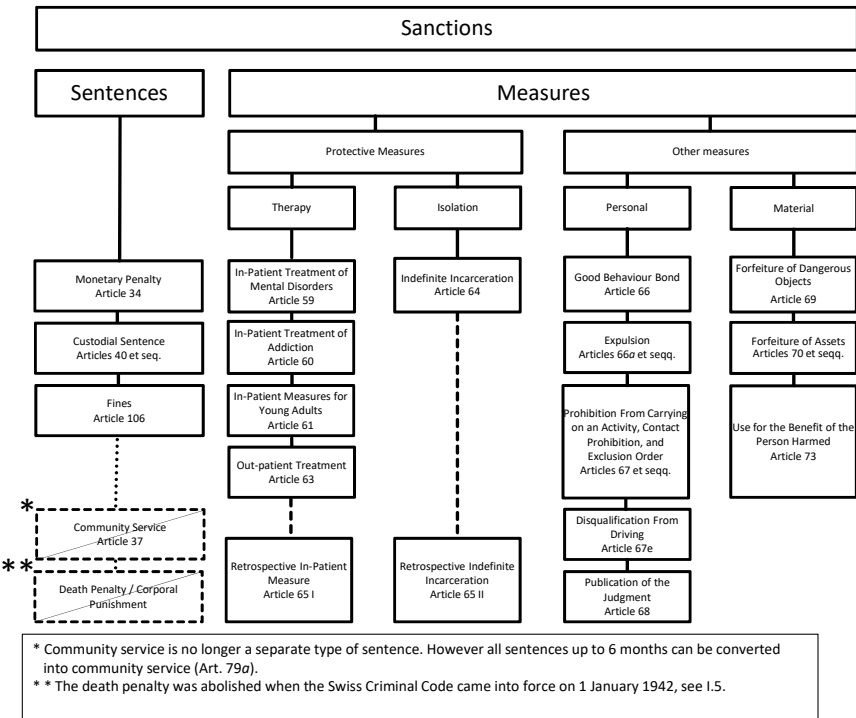


Figure 3: Dual System of Sanctions

This dual system of sanctions was CARL STOOSS' invention. The idea received universal acclaim, and other jurisdictions soon followed the approach.<sup>15</sup>

CARL STOOSS' new concept was successful because it appeased one of the fiercest debates to occur in criminal law: the debate over the legitimacy of criminal punishment. Scholars fought over this idea throughout the 18<sup>th</sup> and 19<sup>th</sup> century. What gives the state the right to inflict harm upon offenders? There were three possible answers: (1) They deserve it, i.e. just desert.<sup>16</sup> (2) It will teach them a lesson about their behaviour and thus deter future offending, i.e. special prevention.<sup>17</sup> (3) The threat and enforcement of criminal punishment will deter wider society from offending as well, i.e. general prevention.<sup>18</sup>

Just desert theories of punishment are only about retribution for past acts. They are also called *absolute* theories because they assert that punishment does not have to serve any future societal goals. In contrast, special and general prevention are known as *relative* theories because punishment always has to relate to a future societal goal (deterrence, safety etc.).

These fundamentally different views on punishment led to two opposing schools of thought. The *classical* school around KARL BINDING (1841–1920) advocated that punishment can and must only be concerned with retribution. Sentences are imposed because offenders need to get their just deserts

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15 ZURKINDEN, p. 304

16 Just desert/retribution was the starting point of the absolute theories of punishment purported by IMMANUEL KANT and GEORG FRIEDRICH WILHELM HEGEL. These theories were known as “absolute” because punishment was *absolved* from serving any future societal goals. Such theorists strictly viewed punishment as a retributive act against the offender. Punishment was thus viewed as a necessary act of communication to demonstrate the condemnation of an autonomous agent who had chosen to break the law.

17 Special prevention was advocated by CHRISTOPH CARL STÜBEL and KARL VON GROLMAN. They argued for a criminal law system that should effectively prevent the offender from reoffending.

18 General prevention was championed by PAUL JOHANN ANSELM RITTER VON FEUERBACH. He opposed special prevention because tying punishment to the offender's future likelihood of reoffending (rather than connecting punishment to the past criminal act) would leave the offender's punishment entirely at the discretion of the judge. This could lead to perverse outcomes: for example, someone who had repeatedly committed petty theft could, under this principle, be imprisoned for life due to the statistical likelihood that they would steal again. In FEUERBACH's opinion, however, it was permissible to try to educate and deter the general public through punishment.

for their crimes. Contrastingly, the *modernists* championed (special) prevention as the main goal of criminal punishment. One of their strongest advocates, FRANZ VON LISZT (1851–1919), opposed the idea of having retribution as a sole focus in his main oeuvre, ‘Purpose in Criminal Law’ (1882). There, he asserted that punishment must achieve at least one of the following goals: to heal offenders, to scare them straight, or to permanently incapacitate them.

Both schools had legitimate points: the classical school rightly pointed out that theories of prevention turned offenders from autonomous human beings into mere objects, by shaping them as people into a form that better meets societal needs (special prevention) or by making an example out of them to deter criminality in the wider public (general prevention). The offender is used as a means to an end and is not respected as an autonomous moral agent. Simultaneously, the modernists were also right to assert that punishment cannot be entirely detached from its effects: it must also serve societal ends like the reintegration of offenders. Therefore, the modernists advocated for the use of new instruments in the criminal law, like the employment of fines, parole, educational prison schemes, pedagogical rather than punitive sanctions for young offenders, and the protection of society from dangerous offenders.

CARL STOOSS’ landmark achievement was to accommodate both schools’ beliefs in his dual system of sanctions, formalised in the Criminal Code.<sup>19</sup> Sentences should serve the purpose of retribution, while measures must serve societal ends like reintegration or maintaining safety.

## 5. DEATH PENALTY

The most controversial sanction is capital punishment. Today, the death penalty is prohibited (Article 10 I Constitution).<sup>20</sup> In 2002, Switzerland ratified Protocol No 13 to the ECHR, concerning the abolition of the death penalty in all circumstances.

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<sup>19</sup> ZURKINDEN, p. 304.

<sup>20</sup> Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.admin.ch \(https://perma.cc/M8UJ-S369\)](https://perma.cc/M8UJ-S369).



Throughout the Middle Ages and into modern times, the death penalty was commonly employed in Switzerland. It also holds the unfortunate record of being the last country in Europe to have executed a person for witchcraft: On 13 June 1782 ANNA GÖLDI<sup>21</sup> was beheaded immediately after the council of Glarus had convicted her of witchery. Of course, she had only confessed under torture.

Later, both the Code pénal of 1799 and the cantonal criminal codes of the early 19<sup>th</sup> century provided for the death penalty in the case of crimes like murder, aggravated robbery, or arson. Beheading by sword or guillotine was the most common means of execution. Under the influence of enlightenment thinkers like BECCARIA and VOLTAIRE, the Federal Constitution of 1848 banned the death penalty for political crimes. In the following decades, several cantons<sup>22</sup> entirely abolished it. Further, in 1874, Article 65 of the Federal Constitution issued a total ban. Yet, unfortunately, this prohibition only lasted for a couple of years. After a series of murder cases in the late 1870s, the ban on the death penalty was revoked by popular vote. Henceforth, the death penalty, again, was only forbidden for political crimes. This led to several cantons reintroducing capital punishment.<sup>23</sup>

In the making of the Swiss Criminal Code, the death penalty was subject to fierce debate, but the ultimate decision was to ban it in all cases, for all crimes. This decision was made in 1937 by the federal legislator, even though up until 1999,<sup>24</sup> the Constitution would have allowed the death

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21 ANNA GÖLDI was employed as a maid by JOHANN JAKOB TSCHUDI, a rich physician and politician in Glarus. She was accused of having put needles in the milk of TSCHUDI's daughter, although later examinations of the case suggest that TSCHUDI may have been conducting an extra-marital affair with GÖLDI and that this may have been the actual cause of the accusation of witchcraft. Differing recollections of this case are unclear on whether ANNA'S last name was GÖLDI or GÖLDIN.

22 Including Fribourg, Neuchâtel, Zurich, Ticino, Geneva, Basel Stadt, Basel Landschaft, and Solothurn.

23 Appenzell Innerrhoden, Obwalden, Schwyz, Zug, St. Gallen, Lucerne, Valais, Schaffhausen, and Fribourg.

24 Switzerland ratified the "Second Option Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty" on 16 June 1994. This protocol obliges state parties to take all necessary measures to abolish the death penalty within their jurisdiction, during both war and peace time. Switzerland implemented the protocol into the revision of the Swiss Federal Constitution of 20<sup>th</sup> November 1996, but the Constitution did not formally enter into force until 1 January 2000.

penalty to be used as the means of punishment for all crimes except political ones.

For the cantons, the enactment of the Swiss Criminal Code meant that their provisions on the death penalty would become invalid (Article 336 lit. b Criminal Code of 1937). However, in the time between Parliament's decision to abolish the death penalty (21 December 1937) and the official enactment of the Swiss Criminal Code (1 January 1942), two more convicted murderers were executed. The last execution mandated under civic jurisdiction was that of HANS VOLLENWEIDER, an offender who had killed a young policeman. In the early morning of 18 October 1940, at the prison of Sarnen in Obwalden, he ascended the scaffold. This execution was highly contested: even the widow of the policeman had asked for a pardon. Furthermore, the Federal Criminal Code of the Military allowed the death penalty until 1992. During and after World War II, 35 persons were sentenced to death for military crimes such as high treason, and 17 of them were executed.

As mentioned above, Switzerland has now, as of 3 May 2002, ratified Protocol 13 of the ECHR, thereby committing to banning the death penalty in all circumstances without the possibility of derogation. There is not, however, total clarity regarding the extent to which this Protocol would prevent Switzerland from re-introducing the death penalty. Some argue that the Swiss Constitution could be modified by a popular initiative (Article 139 Constitution) in a way that explicitly and intentionally violates Protocol 13, which would allow Switzerland to reintroduce the death penalty.<sup>25</sup>

Aside from this legal issue, public debate over the use of the death penalty continues. In 1985, a popular initiative<sup>26</sup> "to Save our Youth" was launched to reinstate the death penalty for selling hard drugs. The committee, however,

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25 This sort of argument makes use of the so called *Schubert* exception, which is discussed in the chapter on International Relations on pp. 179.). The case establishes that where the Federal Assembly has intentionally enacted legislation which violates the treaty obligation, the authorities shall apply the federal act. The *Schubert* exception does not apply in the case of treaties which guarantee fundamental rights, such as the ECHR; the rights conferred by such instruments must be respected in all cases. However, there has been no explicit decision as of yet regarding whether the Schubert exception would apply to a conflict between a treaty, even one which guarantees fundamental rights, and the Constitution.

26 Then Article 121 II Constitution of 1874; today: Article 139 Constitution.

failed to collect the necessary 100'000 signatures. In 2010, the family members of a murder victim started a popular initiative entitled "Death Penalty for Murder with Sexual Abuse". It turned out to actually be a PR-stunt to raise awareness for victims of such a crime, and their families. Nevertheless, it once again sparked huge controversy.

## 6. EUTHANASIA / ASSISTED SUICIDE

A further particularity worth discussing is the Swiss regulation on euthanasia and assisted suicide. Regarding suicidal persons themselves, as CARL STOOS had stated already in 1894: they "*deserve pity, not punishment.*" Thus, attempted suicide is not a crime under Swiss Law. It was, however, at the time of drafting the Criminal Code, a matter of some controversy whether this removal of criminal liability should also be stretched to cover persons who aid and abet suicide.

The legislator decided that helping someone to die out of compassion and empathy should not constitute criminal wrongdoing. The legality of *assisted suicide* results from Article 115 e contrario: any person who, *for selfish motives*, incites or assists another person to commit suicide is liable to a custodial sentence of up to five years or to a monetary penalty. Criminal liability is only warranted if the incitement or assistance to suicide is driven by selfish motives: for example, the possibility of financial gain. Due to this regulation, a physician who provides a person who wishes to die with a lethal dose of Natrium-Pentobarbital (NaP) is not liable. Nor are organisations such as Exit or Dignitas that provide comfort and assistance in suicide, as long as they operate on a non-profit basis. However, family members who help their loved-ones commit suicide, even by simply accompanying them to an organisation like Dignitas, are put at risk by this provision: due to their likely position as heirs to the suicidal individual, they might be viewed as having acted for selfish motives even if, in reality, they were spurred by compassion.

*Passive euthanasia* is also allowed by Swiss criminal law. This term refers to situations in which death ensues from a deliberate decision not to intervene or not to pursue life-saving measures, where the failure to act corresponds with the will of the person concerned. For example, when a person with a heart attack has refused CPR, or an elderly person with

pneumonia refuses to be treated with antibiotics, or the parenteral nutrition of a person in coma is discontinued, where this is what the coma patient himself would have wished. Generally under Swiss law, a deliberate failure to save someone's life can lead to criminal responsibility for homicide by omission (Articles 111 et seqq.).<sup>27</sup> This applies only when the person failing to act is under a legal or contractual obligation to safeguard the victim's life (Article 11). Physicians or spouses would generally have such an obligation. However, in the circumstances outlined above, criminal responsibility is not incurred. Their general obligation to act to safeguard life is outweighed by the fact that intervening against the patient's will in such a case would in itself constitute a crime (for example, assault or coercion).

*Active euthanasia* is not permitted by Swiss criminal law. This term refers to situations where a person's death is caused by a wilful *act*, where this act was requested by the person. An example would be the administration of a lethal injection to a person who wishes to die.<sup>28</sup> Actively killing someone is a crime under Swiss law, even if the "victim" explicitly asks to be killed. According to Article 114 ("Homicide at the request of the victim"), any person who for commendable motives, and in particular out of compassion, causes the death of a person at that person's own genuine and insistent request is liable to a custodial sentence of up to three years or to a monetary penalty. When this rule was drafted in the early 20<sup>th</sup> century, the legislators decided that "*the principle that all life is untouchable*" prevented them from legalising consensual killings. There is, however, a substantially reduced sentence; killing someone who has given their consent is only a misdemeanour.

There are two key problems with the law's absolute prohibition on active euthanasia in Switzerland. Firstly, contrary to what the legislators of the early 20<sup>th</sup> century claimed to be the case, it is clear that life is not "untouchable" under Swiss law. This is illustrated by, for example, the law on passive euthanasia or the legality of killing in self-defence (Article 15). Secondly, it is highly controversial whether turning off a life-sustaining

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27 Liability can also ensue from Article 128 ("*Any person who fails to offer aid to another ... who is in immediate life-threatening danger, in circumstances where the person either could reasonably have been expected to offer aid.*").

28 Judgement of the Bezirksgericht Dielsdorf/ZH, 15 December 2003 (Nr. GG030076).

machine is to be viewed as an active behaviour punishable by Article 114. It has been argued that such an action simply allows the person's health condition to kill them, rather than the removal of the machine being the cause of death.<sup>29</sup> Further, arguably removing any life-sustaining measures is morally equivalent to never beginning them in the first place – which Swiss law permits. Today, the debate on whether the active killing of persons who are unable to kill themselves can be justified rages on.

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29 As was argued in the famous British case of *Airedale National Health Service Trust v Bland* (1993) 1 All ER 821 by the House of Lords, concerning the removal of life-sustaining treatment from a 17 year old boy in a persistent vegetative state: e.g. see Lord Goff at 867.

## II. Principles

This section discusses key principles followed in the Swiss legal system. Two of the main principles in Swiss criminal law are the principle of legality (1.) and the principle of no punishment without culpability (2.). The principle of legality contains many sub-principles which will be further analysed; subsequently, the notion of culpability itself in Swiss law is examined.

### 1. NULLA POENA SINE LEGE

Swiss criminal law is first of all dominated by the *principle of legality*. Article 1 states that sanctions (i.e. sentences and measures) may only be imposed for a behaviour that the law explicitly threatens with punishment.<sup>30</sup> Article 1 thus encompasses two principles. Firstly, there is the principle of *nullum crimen sine lege*: no act or omission shall be considered a crime unless the law explicitly says so. For example, today there is no rule in the Swiss criminal code prohibiting homosexual acts.<sup>31</sup> Thus, they are not a crime and courts cannot declare them illegal. Secondly, Article 1 contains the principle *nulla poena sine lege*: no penalty without law. This principle stipulates that all sanctions imposed for criminal acts must be provided for in the law. For example, the death penalty has been abolished in Switzerland. This means that no one in Switzerland can be sentenced to death, even for the most heinous crime.

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30 The “official” translation of Article 1 by the Swiss Government is incorrect in many ways: “No penalty (recte: sanction) without a law. No one may be punished (recte: no sanctions may be imposed) for an act (recte: or omission) unless it has been expressly declared to be an offence (recte: by the law).”

31 The Swiss Criminal Code of 21 December 1937 abolished the criminal liability of homosexuality between adults and introduced an age of consent of 20 years, as opposed to 16 years in the case of sexual acts between opposite-sex partners. With the criminal law reform of 1990, the age of consent was lowered to 16 years.

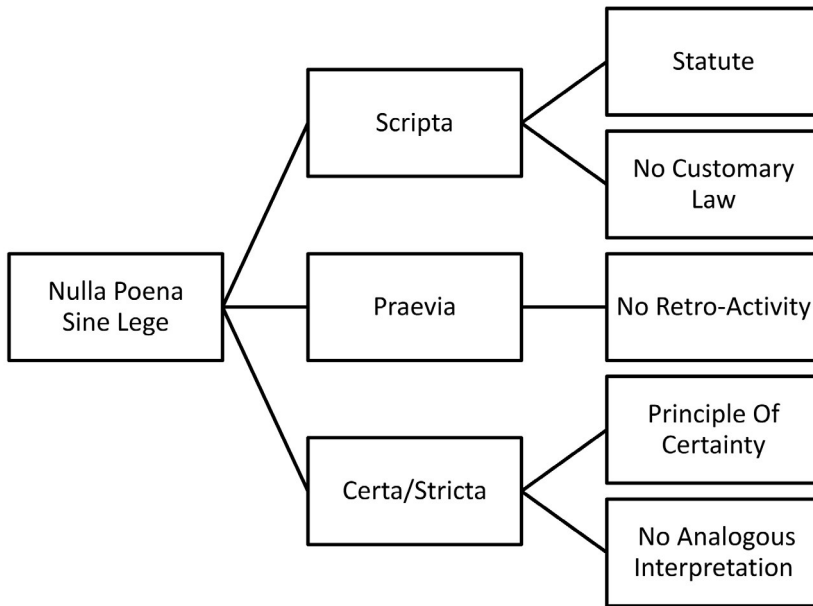


Figure 4: Principle of Legality

The nulla poena sine lege principle is commonly used as a *pars pro toto* term which encompasses the *nullum crimen* principle as well. The nulla poena sine lege principle has been refined into a set of sub-principles that have a strong impact on the practical application of the criminal law.

The first sub-principle of nulla poena sine lege is the nulla poena sine lege *scripta* principle: no penalty without *written* law. This principle precludes the creation or existence of customary criminal law; all crimes must be laid down by a formal Act of Parliament. For example, several cantonal criminal codes used to prohibit extra-marital sexual relations: such a prohibition could not be reintroduced today by declaring it a customary criminal rule.

The second sub-principle is the nulla poena sine lege *praevia* principle: no penalty without *pre-existing* law. In general, criminal law may not be applied retroactively (Article 2 I) unless the new provision is more lenient (Article 2 II). For example, since 1 October 2002, abortions have been completely legalised during the first 12 weeks of the pregnancy (before this, abortions were only permitted for medical reasons). Because the new 12-weeks-rule is milder, it could be applied retroactively.

The third sub-principle is the *nulla poena sine lege certa/stricta* principle, which demands that the elements of a crime and the sanctions which apply to it be *clearly defined*. Addressees of rules must get a fair warning: they must know exactly what the consequences of their actions will be. An example of a provision which infringes this principle is Article 303, which imposes an unspecified monetary or custodial sentence for false accusations. An offender can face any sentence from 3 units of monetary penalty to 20 years of imprisonment. The *nulla poena sine lege certa/stricta* principle also prohibits criminal law operating on the basis of analogies. For example, Article 215 prohibits bigamy: this prohibition could not be extended to cohabitation by analogy, to meet a case where a woman has two boyfriends at a time.

## 2. NULLA POENA SINE CULPA

“Punishment without guilt is nonsense, barbarism”, wrote ERNST HAFTER, one of the early and influential criminal law scholars in Switzerland, in 1946. The principle *nulla poena sine culpa* (*keine Strafe ohne Schuld*; no punishment without culpability) is crucial to Swiss criminal law. In fact, to understand the notion of *Schuld* is to understand the concept of Swiss criminal law itself. *Schuld* has many different meanings; it can be used interchangeably to convey notions like culpability, guilt, blame, fault, and responsibility.

# Criminal Liability

Elements of Crime	Objective Elements - Offender - Object of the Crime - Act - Result - Causation	Subjective Elements - Direct Intent - Conditional Intent	Objective Wrong
Unlawfulness	Justification - Self-Defence - Necessity - Consent		
Culpability	- Criminal Responsibility - Error of Law - Unreasonableness		Subjective Blame

Figure 5: Criminal Liability



Criminal liability in Swiss law is a three-stage concept: all three stages of the test must be met in order for criminal liability to apply. First, the objective and subjective elements of the crime (*Tatbestandsmässigkeit*) have to be established: has the victim been killed by the defendant (objective element; “*actus reus*”)? Did the defendant kill the victim intentionally (subjective element; “*mens rea*”)? Second, the unlawfulness (*Rechtswidrigkeit*) of the act has to be determined. Did the defendant kill in legitimate self-defence? Was a theft of food warranted by the necessity to survive? Did the masochist consent to violent sexual practices? Third, the culpability (*Schuld*) of the offender has to be assessed. Can the defendant be blamed for the act? Perpetrators can only be held responsible for their unlawful acts if they were able to both grasp the demands imposed on them by legal rules and act accordingly (Article 19).

Culpability can be excluded on three different grounds. The first ground is the defendant’s lack of *criminal responsibility*. If wrongdoers are unable to understand the wrongfulness of their act they cannot be held to account. An example of this is when the offender has a severely low IQ. However, it should be noted that this ground is not often accepted by courts. Children under the age of ten are legally excluded from criminal responsibility (Article 3 Juvenile Criminal Law Act)<sup>32</sup>. Their inability to fully assess wrongfulness is presumed by law. Criminal responsibility is also excluded if a person is able to assess wrongfulness but is unable to act accordingly. In most cases where culpability is excluded, it is under this ground of inability to control one’s actions despite knowing they are wrong. This ability to restrain oneself may be absent in some manifestations of paranoid schizophrenia. Further, it can be absent where the defendant is under the influence of extreme emotions and acts in the heat of the moment. The typical example of this latter sort of case is where the defendant, just previously to committing an offence of assault, has found out that his/her partner is conducting an affair.

The second ground for the exclusion of culpability is an *error of law*. Again, in this situation the person is not aware of the wrongfulness of their act. Yet the reason for this failure is not a mental deficiency: instead, it is missing or incorrect information about the law. However, the standard is high. Error of law is only accepted as grounds for excluding culpability if the perpetrator both did not and, crucially, could not have known that he or she was acting unlawfully. In a famous case from 1978, a 19-year-old Sicilian immigrant had sex with a 15-year-old Swiss girl. He successfully claimed that he did not know

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32 Juvenile Criminal Law Act of 20 June 2003, SR 311.1.

the concept of the legal age of consent. He had thought that sexual intercourse with a minor was only punishable if he did not intend to marry his sexual partner.<sup>33</sup> It is highly questionable whether the Federal Supreme Court would still rule today that this man *could* not have known that his act was illegal.

Thirdly, culpability is excluded if the wrongdoer could not have been reasonably expected to act lawfully. An example of when this *unreasonableness* standard can be met is where a perpetrator kills a person in order to save his or her own life. Had the famous English *R v. Dudley and Stephens* case of 1884<sup>34</sup> – where three shipwrecked sailors killed and then ate a cabin boy to avoid starvation – been judged in Switzerland, the defendants would have had to be acquitted. Though the killing was unlawful, it would have been excusable under Swiss law to end the boy's life in such extreme circumstances, meaning the defendants would not have met the culpability test. They could not reasonably have been expected to sacrifice their own lives, by not killing and eating the cabin boy.

There is one hugely intriguing problem regarding culpability which remains unsolved. If culpability is about blaming someone for having acted unlawfully, then it must be established that this person *could* have acted differently. In other words, culpability hinges on free will; there can be no culpability without freedom of will. If, as some believe, our actions are predetermined, then we cannot be blamed for having “chosen” to do something illegal. The current state of knowledge allows us neither to prove nor disprove freedom of will. Currently, the notion that any perpetrator could have chosen to behave otherwise is therefore merely presumed as an “inevitable fiction” in (Swiss) criminal law.

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33 BGE 104 IV 217.

34 *R v. Dudley and Stephens* (1884) 14 QBD (Queen's Bench Division) 273 DC.

## III. Landmark Cases

The Federal Supreme Court in Lausanne is Switzerland's highest court. Its criminal law division was formerly known as the *Court of Cassation*. In dealing with criminal law, its main task is to secure the consistent application of the Swiss Criminal Code throughout Switzerland. In the following paragraphs, some landmark rulings of the Federal Supreme Court will be discussed.

### 1. ROLLING STONES<sup>35</sup>

In the evening of 21 April 1983, two men (A and B) were on their way home from their cabin in the Töss river valley near Zurich. They spotted two big stones (individually weighing 52 kg and 100 kg) at the top of slope so steep that the bottom was not visible. They decided to roll these stones down the slope. A pushed the 52 kg stone down the hill, whilst B pushed the heavier, 100 kg stone. One of these stones struck and killed a fisherman at the foot of the slope. However, it could not be established which of the two stones had killed him, and therefore who – A or B – had been responsible for the death.

When the case came before the Supreme Court, the judges held that A and B were criminally liable as co-offenders for negligent homicide. Up until that ruling, the notion of co-offending was strictly limited to intentional crimes. This seemed logical because the conventional view of co-offending generally requires the existence of a conspiracy: at least two persons who embark on a common criminal pursuit. However, in the “rolling stones” case there was no joint decision (conspiracy) to kill the fisherman. By deciding to roll the stones down the slope, A and B jointly engaged in a grossly negligent behaviour that caused the death of the fisherman. The Supreme Court ruling was an attempt to overcome problems of evidence, by employing the tools of the substantive criminal law.<sup>36</sup>

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<sup>35</sup> BGE 113 IV 58.

<sup>36</sup> Concurring that the Supreme Court's reasoning was flawed, PETRIG/ZURKINDEN argue that it would have been better to hold A and B liable for negligent, parallel perpetration

## 2. DOMESTIC TYRANT<sup>37</sup>

X was a very poorly integrated immigrant from Kosovo. She was married to Y, whom she had five children with. Y constantly abused X: he beat her with the cable of a vacuum cleaner, he threw a butcher's knife at her, he banned her from leaving the house and tore up her passport. In January 1993, he told their eldest daughter that her mother was going to die during the course of that year. On 15 March 1993, Y showed his wife a revolver he had bought in order to kill her. He then put it under his pillow and went to sleep. At one o'clock in the morning, X took the revolver and shot Y dead while he was sleeping.

The Supreme Court ruled that X had acted in a state of excusable necessity to end her suffering. The killing of her husband was unlawful (Article 113 – manslaughter): there was no legal justification for her actions. She had not acted in legitimate self-defence (Article 15) for Y was not imminently about to attack her. However, she did not act culpably (Article 19 – excusable act in a situation of necessity). She was excused because her life was in danger and she saw no other way out.<sup>38</sup>

This 1995 case seems to send out a very strong message against domestic violence. However, its applicability should not be over-interpreted. X's situation was extreme: the law would normally still expect victims of abuse to call for help before resorting to such an act.

## 3. DEADLY CAR RACE<sup>39</sup>

In the late evening on 3 September 1999, two motorists who had never met before and who were both driving a Volkswagen Corrado started a car race on a cross-country road near Lucerne. As the two drivers were approaching the village of Gelfingen at a speed of approximately 130km/h, one driver sought to overtake the other. He subsequently lost control of his car, which veered onto the sidewalk and hit two teenagers who were killed instantly.

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by omission – this presupposes A and B are in “guarantor” position due to the fact they both created a risk (i.e. they would incur criminal liability for failing to prevent each other from rolling the stones down the hill), p. 124.

37 BGE 122 IV 1

38 See unreasonableness standard, p. 389.

39 BGE 130 IV 58.

Both of the drivers were convicted of homicide (Article 111) and sentenced to 6.5 years of imprisonment. The Federal Supreme Court upheld this conviction. For the first time in a binding precedent, persons responsible for a fatal car accident were convicted of homicide with conditional intent (*dolus eventualis*). Up until that case, even accidents caused by gross carelessness were always classified as criminal negligence. The Supreme Court argued that not only did the drivers know that their behaviour was extremely dangerous, but that by putting achieving victory in the race above everything else, they had willingly accepted a deadly outcome.

From a retributive point of view the decision can be understood. The maximum penalty of 3 years for a negligent double homicide just did not fit the crime. From a dogmatic point of view, however, the ruling is highly problematic. The drivers *knowingly* incurred an extremely high risk by engaging in a car race. But the Court made a large leap from here: the fact that the drivers knew of the risk led the Court to the conclusion that they had accepted the fatal outcome. To draw a straight inference from what someone *knew* to what someone *wanted* has far-reaching consequences for criminal liability in general. It is highly unlikely that the drivers *wanted* to kill the teenagers, or even that they were indifferent to such an outcome.<sup>40</sup> It is much more likely that they (wrongly) trusted their driving skills and hoped for a lucky outcome.<sup>41</sup> In other words, they willingly accepted the *risk* of death, but they did not accept the actual outcome of death. Thus, they should have been convicted for life endangerment (Article 129) which allows a maximum prison sentence of 7.5 years.<sup>42</sup>

#### 4. HIKING IN THE NUDE<sup>43</sup>

On a warm and sunny Sunday afternoon in autumn 2009, 45-year-old X was hiking in the nude through the mountains of Appenzell Innerrhoden. He walked by a fire-pit where a family with young children was resting and past a

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40 As is required for the offender to possess conditional intent, see p. 375.

41 See BGE 133 IV 9

42 According to Article 129, this crime can mandate a custodial sentence not exceeding five years or a monetary penalty. In cases of multiple endangerment or when committed in combination with other offences, this maximum sentence can be elevated by 150 %, i.e. it can be up to 7.5 years (see Article 49).

43 BGE 138 IV 13.

Christian rehabilitation centre for people with drug-addictions. A woman who observed him filed a report with the local police.

Article 19 of the relevant cantonal code which regulated “*indecent behaviour*” provided that “*any person publicly displaying indecent behaviour is liable to a fine.*” The Federal Supreme Court first considered whether the Canton of Appenzell Innerrhoden had exceeded its legislative powers by legislating on indecent behaviour, considering the fact that the Federal Parliament has exclusive legislative competence in the field of sexual offences. The court found that because walking in the nude did not qualify as exhibitionism, sexual harassment, or pornography, the cantonal legislator possessed the power to legislate on indecency. Secondly, the Court considered whether the notion of “indecent behaviour” in Article 19 was sufficiently clear to satisfy the *nulla poena sine lege* principle. They held that the provision was sufficiently clear, deeming walking in the nude as obviously indecent behaviour.

Both of the Court’s assessments are questionable. When considering the issue of the canton’s competence to legislate on indecent behaviour, it should be noted that the Federal Parliament generally restricted sexual offences to harmful behaviour (rape, sexual harassment, etc.). Parliament made some specific exceptions (e.g. exhibitionism, pornography) to this general rule: this can be interpreted as the federal legislator setting the outer limit for the criminalisation of immoral conduct. Hence, following this view, there was no room for a cantonal rule on indecent behaviour: Appenzell Innerrhoden had acted out-with their legislative competence. Regarding the Court’s ruling that Article 19 was sufficiently clear to satisfy the principle of *nulla poena sine lege*, here they missed the key point. The question was not whether hiking in the nude *can* be classified as indecent behaviour, but whether such a classification was foreseeable given the broad and changeable notion of “indecency”. If the legislator wants to ban walking in the nude, they must and should issue an unambiguous rule, for example: “Any person who displays nudity in public is liable to a fine.”

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# Marc Thommen

## Criminal Procedure

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# I. Criminal Procedure Code

The first section of this chapter examines the constitutional framework within which the laws on criminal procedure in Switzerland operate (1.) and gives a brief history of criminal procedural laws in Switzerland, before embarking on an examination of the key developments en route to the eventual codification of the unified Swiss Criminal Procedure Code in 2011 (2.). Finally, the Code's layout and provisions are analysed (3.).

## 1. CONSTITUTIONAL FRAMEWORK

Switzerland is a federal republic. All competencies that are not vested in the confederation are exercised by the cantons (Article 3 Constitution).<sup>1</sup> Criminal law and criminal procedure were traditionally a key legislative area for the cantons: neither the Constitution of 1848 nor the one of 1874 provided for centralised legislative powers. However, towards the end of the 19<sup>th</sup> century pressure mounted on parliament to draw up a criminal code to deal with the substantive criminal offences for all of Switzerland. On 13 November 1898, the confederation became entitled to legislate in the field of substantive criminal law.<sup>2</sup>

From this point, it would be a further 102 years before the confederation finally obtained the power to legislate in the field of *criminal procedure*. Throughout the 20<sup>th</sup> century, there were more than 50 different codes of criminal procedure applicable in Switzerland: 26 cantonal codes of criminal procedure, 26 cantonal regulations on Juvenile Justice, the procedural code of 1934 on Federal Criminal Justice, the administrative criminal procedure code of 1974, and the criminal procedure code of the Swiss Military in 1979. This variety of procedural rules proved to be extremely inefficient in practical terms:

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1 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.admin.ch](https://www.admin.ch) (<https://perma.cc/M8UJ-S369>).

2 For details on the enactment of the Swiss Criminal Code of 21 December 1937, SR 311.0, see the chapter on Criminal Law, pp. 369; see for an English version of the Swiss Criminal Code [www.admin.ch](https://www.admin.ch) (<https://perma.cc/4QS4-CWQ5>).

for example, it made the prosecution of interstate and transnational (organised) crime very difficult. Further, many of the existing procedural codes stood increasingly at odds with the jurisprudence of the European Court of Human Rights and the Swiss Federal Supreme Court. At the turn of the millennium, it was clear to everyone that criminal procedural law needed to be standardised on a national level. The reform of the Swiss Justice System was put to popular vote and approved in a landslide victory on 12 March 2000.<sup>3</sup> This cleared the way for the drafting of Swiss criminal and civil procedure codes.

Before embarking on a discussion of the legislative process leading to the adoption of a unified code of criminal procedure, it should be noted that despite such a development, there are three domains the cantons retain full responsibility. These areas are the *organisation* of the courts, the *administration* of justice in criminal cases and the *execution* of sentences and measures (Article 123 II Constitution). Firstly, the cantons remain responsible for establishing their own court system. For example, they can decide whether they want *district* courts to be responsible for settling criminal and civil cases for a specific area (as is the case in the canton of Zurich) or a *cantonal* criminal court with an exclusive jurisdiction in criminal matters (as is the case in Lucerne and Basel Stadt). They can also set up rules on the eligibility of judges. For example, federal law does not preclude the existence of lay judges.<sup>4</sup> This means that cantons retain the power to allow laymen on the bench: many cantons do so, although Zurich has recently banned them. Regarding the regulation of juries, the federal rules on the main hearings at court do not contain provisions on jury selection and/or instruction. Thus, trial by jury, which used to be quite widespread, is almost entirely excluded today.<sup>5</sup> Nevertheless, the canton of Ticino still continues to hold jury trials. Further, the cantons can decide whether they want to allow the publication of dissenting opinions.

Secondly, the administration of criminal justice lies in the hands of the cantons: although the Swiss Criminal Code of 21 December 1937 is an act of the *federal* parliament, it is administered by *cantonal* courts. There are only

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3 86.4 % of the voters and all cantons approved the reform. The turnout was at 42 %.

4 NADINE ZURKINDEN, National characteristics, fundamental principles, and history of criminal law in Switzerland, in Ulrich Sieber/Konstanze Jarvers/Emily Silverman (eds.), National Criminal Law in a Comparative Legal Context, Vol 1.1, Berlin 2013, pp. 205, p. 221.

5 "A jury is not explicitly prohibited but is probably inadmissible due to a lack of provisions governing the division of tasks within the court and a lack of special procedural provisions", ZURKINDEN, p. 221.

a handful of very serious crimes<sup>6</sup> against national interests prosecuted by the Attorney General of Switzerland and tried by the Federal Criminal Court in Bellinzona.

Finally, the cantons are mainly responsible for the execution of the (dual) system of sanctions:<sup>7</sup> in the executing of *sentences*, the cantons have to provide penitentiary institutions, a system for the collection of monetary penalties and fines, and probation offices. For the execution of *measures*, the cantons must install suitable institutions to treat those with addictions and mental deficiencies. Indefinite incarceration is usually executed in high-security sections of regular prisons. Such a penitentiary system is too expensive for every canton to be expected to individually create one. The cantons have therefore united their efforts in several inter-cantonal agreements (“concordats”<sup>8</sup>).

## 2. LEGISLATION

As mentioned, by the end of the 20<sup>th</sup> century it was becoming increasingly clear that there was a need to standardise criminal procedure in Switzerland. Thus, in 1994, a commission of experts was established with the set purpose of exploring the possibility of creating a unified criminal procedure. In 1997 they produced their completed report, entitled “From 29 to 1”. They proposed to unify 29 of the existing criminal justice codes for *adults* (26 cantonal criminal codes of procedure, the procedural code on Federal Criminal Justice and the administrative and military criminal codes of procedure) in one federal code of criminal Procedure. The commission decided to postpone the unification of procedural legislation on Juvenile Justice for the time-being.

In 1999, one year before the confederation obtained the power to regulate criminal procedure on a national level, the Federal Council mandated NIKLAUS SCHMID, professor of criminal law at the University of Zurich, to draw up a Federal Code of Criminal Procedure.<sup>9</sup> The commission’s idea of

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6 For the crimes under federal jurisdiction see Articles 23 and 24 Criminal Procedure Code

7 See the chapter on Criminal Law, pp. 377.

8 See the chapter on Constitutional Law, p. 399.

9 In defiance of the commission’s proposed postponement of this issue, the Federal Council also decided to proceed with unifying the codes on Juvenile Justice. Thus, the President of the Juvenile Justice Court of Valais, JEAN ZERMATTEN, was commissioned to draft a Swiss Juvenile Justice code.

integrating the administrative and military criminal procedure codes was overruled.

From 2001–2003, the two preliminary drafts were submitted to a national consultation procedure (Article 3 Consultation Procedure Act).<sup>10</sup> Almost everyone welcomed the idea of unification. The most controversial issue was that of who should be in charge of the preliminary proceedings: should it be the sole responsibility of the prosecutor or should it also involve investigative judges or magistrates? In relation to this particular issue, the Government proposed in its dispatch<sup>11</sup> of 21 December 2005 that the Federal Assembly should introduce a purely prosecutorial system, meaning that the preliminary proceedings would indeed be the sole responsibility of the prosecutor's office. This proposal was followed by Parliament. Subsequently, after less than one year of debates Parliament passed the Swiss Criminal Procedure Code on 5 October 2007. It entered into force on 1 January 2011.<sup>12</sup>

The nationwide standardisation of criminal procedure under the Swiss Criminal Procedure Code of 2011 was an important step in the right direction in many ways. For defence counsels, it has become a lot easier to represent defendants in other cantons. They now only have to be familiar with one, unified law of criminal procedure. This means a better standard of representation for accused persons; their interests will be better protected. The unification has also sparked a national academic debate about different aspects of Swiss criminal procedure. Before the unification, hardly anything was published on cantonal procedure codes, meaning that lawyers and judges looking for an answer to a particular legal problem would not have much literature to rely on. This seriously hindered discussion of the topic, which to some extent hindered progress or change, although the Supreme Court was making great efforts to introduce progressive measures into the cantonal procedure codes.

Still, today there remains much room for progress. The *organisation* of the criminal justice authorities and the *execution* of sanctions, which are

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10 Federal Act on the Consultation Procedure of 18 March 2005 (Consultation Procedure Act, CPA), SR 172.061; see for an English version of the Consultation Procedure Act [www.admin.ch](http://www.admin.ch) (<https://perma.cc/6MCM-KXYG>); see for legislative procedure the Chapter Swiss Legal System, pp. 27.

11 The term “dispatch” (German: *Botschaft*; French: *message*) is the term used by the Swiss government for explanatory reports to draft legislation; resembling a White Paper in the UK; see Chapter Swiss Legal System p. 28.

12 The Swiss Juvenile Criminal Procedure Code was adopted on 20 March 2009 and entered into force on 1 January 2011 (SR 312.1).

currently still areas in which the cantons have exclusive competence, need to be harmonised on a national level. The administrative and military criminal codes are out-dated, too; it is unfortunate that the Federal Council dropped the idea of standardising these back at the turn of the millennium.

The two biggest contemporary challenges in terms of legislation on criminal procedure, however, lie outside the subject's traditional realm. Firstly, with the threat of terrorism constantly evolving and increasing, one key challenge is the need to bring police and secret service legislation (both on a cantonal and federal level) in line with criminal procedure legislation. For example, can information from police-intercepted phone calls be handed over to the criminal justice authorities, considering the fact that such information may have been intercepted before there was any adequate level of suspicion against a person? Secondly, administrative laws provide for many sanctions that have traditionally not been regarded as criminal penalties: for example, federal agencies can ban bank managers from their profession (Article 33 Financial Market Supervision Act)<sup>13</sup> or close down pharmaceutical firms (Article 66 Therapeutic Products Act).<sup>14</sup> These sanctions clearly meet the standard of 'criminal charges' as assessed in case law dealing with Article 6 I ECHR.<sup>15</sup> Hence, the procedures which lead to these sanctions being imposed must also meet criminal procedure standards (e.g. *nemo tenetur*).<sup>16</sup>

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13 Federal Act on the Swiss Financial Market Supervisory Authority of 22 June 2007 (Financial Market Supervision Act, FINMASA), SR 956.1 ("[1.] *If the Swiss Financial Market Supervisory Authority (FINMA) detects a serious violation of supervisory provisions, it may prohibit the person responsible from acting in a management capacity at any person or entity subject to its supervision. [2.] The prohibition from practising a profession may be imposed for a period of up to five years.*").

14 Federal Act on Medicinal Products and Medical Devices of 15 December 2000 (Therapeutic Products Act, TPA), SR 812.21 („[1.] *The Agency may take all administrative measures necessary to enforce this Act. 2 In particular it may: c. close down establishments.*“).

15 In assessing the applicability of the criminal aspect of Article 6 ECHR, the case of *Engel and Others v. the Netherlands*, App no 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, ECtHR 8 June 1976, provides three relevant criteria at paragraphs 82–83: the classification of the act in domestic law; the nature of the offence; and the severity of the penalty that the person concerned risks incurring. The first criteria is only a starting-point for the Court's examination – even if the conduct is not classified as criminal in the domestic law, the Court will still delve behind this classification to examine the actual substance of the offence and make its own independent assessment.

16 For „*nemo tenetur*“ see pp. 412.

### 3. CONTENT<sup>17</sup>

The Swiss Criminal Procedure Code contains 457 Articles. They are divided up into 12 parts. The Swiss Juvenile Criminal Procedure Code has roughly the same structure but is much shorter (54 Articles). It is conceptualised as a *lex specialis*: if a specific problem is not regulated in the Juvenile Criminal Procedure Code, the Swiss Code of Criminal Procedure applies.

*Part 1* (Articles 1–11) regulates *basic principles* of criminal procedure such as fairness, independence, speediness, *ex officio* investigation, mandatory prosecution and prosecutorial discretion, presumption of innocence, *in dubio pro reo*, or double jeopardy.

*Part 2* (Articles 12–103) regulates the *criminal justice authorities* (police, prosecution, and courts). As mentioned, the legislator decided to establish a *prosecutorial system*. The preliminary proceedings are therefore led solely by the prosecutor (Article 61 lit. a). There is no (independent) investigative

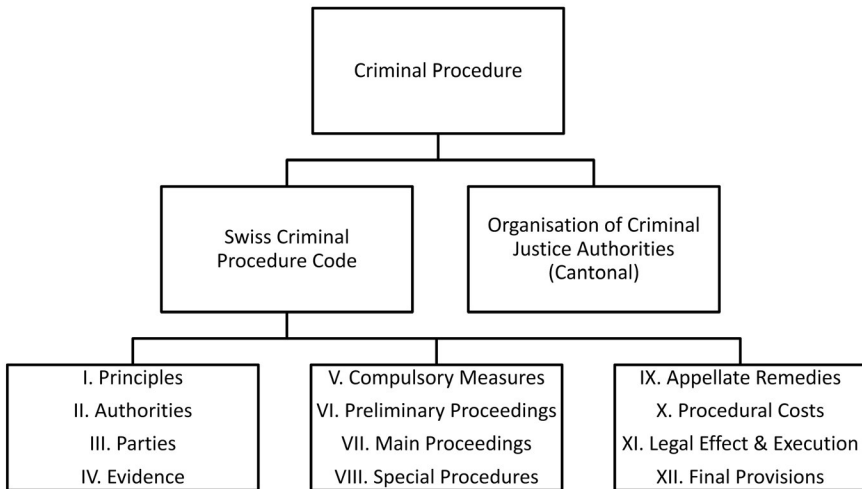


Figure 1: Criminal Procedure Laws

<sup>17</sup> In the following text, where Articles are mentioned without referencing their source of law, they are located in the Swiss Criminal Procedure Code of 5 October 2007 (Criminal Procedure Code, CrimPC), SR 312.0; see for an English version of the Criminal Procedure Code [www.admin.ch](http://www.admin.ch) (<https://perma.cc/6S55-6MBC>).

judge or magistrate in charge of the proceedings. Some intrusive investigative measures, such as detention on remand or wire-tapping of phones, have to be ordered or approved by a judge at the “compulsory measures court” (Article 18 I) but the actual investigation is still conducted by the prosecutor. Trial cases are handled by the courts of first instance (Article 19). Their decisions can be taken to the court of appeal (Article 21). The appeal to and the proceedings of the Swiss Federal Supreme Court are regulated in the (separate) Federal Act of 17 June 2005 on the Federal Supreme Court. Part 2 also contains provisions on the cantonal/federal jurisdiction (Articles 22 et seqq.), recusal (Articles 56 et seqq.), or disciplinary measures (Article 64) as well as general procedural rules (oral and public proceedings, language, written records, service of decisions, time limits, and file management).

*Part 3* (Articles 104–138) defines the *parties* and the *other persons* involved in the proceedings (witnesses, experts, defence counsels, etc.). The parties are the accused, the private claimant and the prosecutor (Article 104). The *accused* is a person suspected, accused of or charged with an offence (Article 111). The *accused* is the technical term used for the defendant. The *private claimant* is a harmed person who voluntarily participates in the criminal proceedings (Article 118). There are three categories of harmed persons: (1) the aggrieved: a person whose rights have been directly violated by the criminal offence (Article 115), e.g. a defrauded person; (2) the victim: an aggrieved person whose bodily, sexual or psychological integrity was directly affected by the criminal offence (Article 116), for example a person raped and/or seriously injured; (3) the private claimant: both the aggrieved person and the victim can declare that they want to participate as a private claimant in the proceedings (Article 119). The private claimant is not merely an accessory participant to the proceedings but a party on equal standing with the accused. Private claimants have access to the files, can participate in hearings with the accused, appoint their own legal adviser, or request that evidence be taken (Article 107). They can file their civil claims in the criminal proceedings (Article 122). They even have a say in the prosecution and conviction of a defendant (“criminal claim”, Article 119 II lit. a). For example, they could request that specific charges be pursued: the parents in the case of the teenagers killed in the deadly car race discussed in the chapter on criminal law could have requested that the defendants be charged with intentional killing (Article 111 Criminal Code) rather than negligent killing (Article 117 Criminal Code).



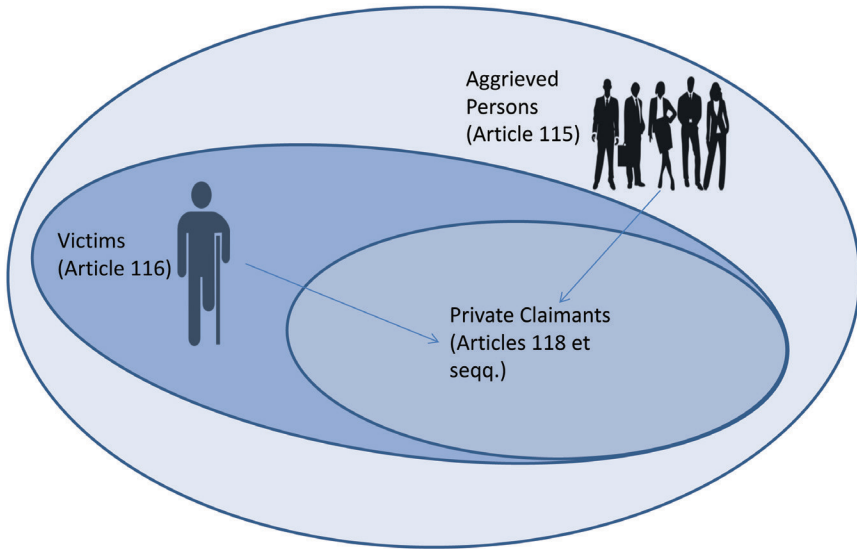


Figure 2: Categories of Harmed Persons

The *prosecution* only becomes a party to proceedings at the eventual court hearing. During the preliminary phase, the prosecution is the head of proceedings (Article 61 lit. a). This shifting of roles from the head of the proceedings into a party to the proceedings is a particularity of the prosecutorial system. In some of the previous cantonal systems, an independent magistrate was in charge of the preliminary proceedings and the prosecution was a party throughout the preliminary and principal proceedings.

*Part 4* (Articles 139–195) of the Federal Code of Criminal Procedure contains the rules on *evidence*. Criminal justice authorities can rely on any lawful evidence deemed suitable to determine the truth (Article 139). Evidence shall not be taken in relation to facts which are insignificant, obvious, well known to the criminal justice authorities, or which have already been sufficiently proven in law (Article 139 II). The ‘sufficiently proven’ clause is problematic. It allows criminal justice authorities to engage in a so-called anticipated assessment of evidence. For example, prosecutors or judges can refuse a request to hear a witness for the defence at any time if they have already decided on the facts on the basis of the file (Article 318 II). This makes it much harder for the defence to tell their side of the story and could potentially conflict with Article 6 III lit. d ECHR which guarantees the defendant’s right to “examine or have examined witnesses against him and to obtain the attendance and

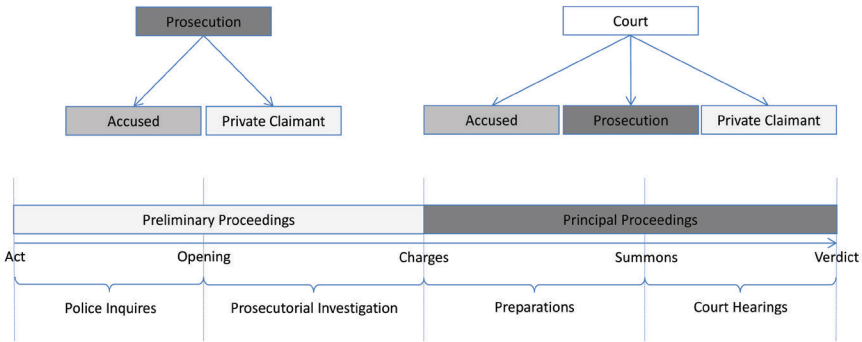


Figure 3: Role of the Prosecution in the Proceedings

examination of witnesses on his behalf under the same conditions as witnesses against him.” However, in this regard it should be noted that generally the European Court of Human Rights leaves it to the national courts to assess the relevance of the evidence which defendants request to bring forth.<sup>18</sup>

Parties have certain rights regarding the taking of evidence under *Part 4*. Most importantly, they have the right to be present when evidence is taken (Article 147 I). Private claimants and co-defendants can participate in every hearing of the accused,<sup>19</sup> and vice versa. This rule was meant to enforce the participatory rights of the parties. There are however practical problems to be solved: what if 250 persons have been defrauded in a Ponzi scheme and all of them want to participate in the interrogation of the accused? Or what if co-defendants attend the hearing of the accused, then adjust their own statements to avoid criminal liability? Thus, the Supreme Court has allowed for some narrow exceptions to the right to participation.<sup>20</sup> These restrictions do not apply to the defence coun-

18 The fundamental aim of Article 6 III lit. d ECHR is to ensure full “equality of arms” rather than mandating the examination of every witness on the defendant’s behalf (*Perna v. Italy*, App no 48898/99, ECtHR, 6 May 2003, paragraph 29). However, when a request by a defendant to examine witnesses is sufficiently reasoned, not vexatious, relevant to the subject matter of the accusation, and could potentially have strengthened the accused’s position, relevant reasons for dismissing such a request must be given by the authorities (*Polyakov v. Russia*, App no 77018/01, ECtHR, 29 January 2009, paragraphs 34–35).

19 Article 147 I guarantees that parties have the right to be present when the public prosecutor and the courts take evidence and to put questions to the persons being questioned.

20 See BGE 139 IV 25; this case held that in cases with more than one accused person, the accused person may be excluded from participating in the questioning of the co-accused where there is a concrete risk of collusion. However, a mere abstract danger of collusion does not justify the exclusion of the accused from participating. See also BGE 140 IV

sel's presence in police examination hearings: he or she may always be present from the very beginning of the police investigation (Article 159 II).

Part 4 also sets out the rules for the proper taking of evidence. It is prohibited to obtain evidence through coercion, violence, threats, promises, deception or through any measures that interfere with a person's freedom of will (Article 140 I). Hence, neither drugs nor polygraphs may be administered, not even when the individual consents to their use (Article 140 II).

Regarding the exclusion of evidence, Article 141 sets out three pivotal rules in this area. Firstly, evidence obtained through coercion (torture etc.) is *strictly* inadmissible (Article 140 I), as is evidence that the Swiss Code of Criminal Procedure explicitly declares to be inadmissible. For example, statements given by the accused without a prior caution of his or her right to remain silent are declared inadmissible by Article 158 II. Secondly, evidence obtained in a *criminal manner* or in violation of rules protecting the *validity* of the evidence shall not be used, unless its use is essential to prosecuting serious criminal offences (Article 141 II). If the police forge a search warrant, for example, then any evidence obtained during the search would have been obtained in a *criminal manner*, as forgery of a document by a public official is a criminal offence (Article 317 Criminal Code). 'Validity rules' are designed to protect fundamental rights of the accused: if a witness is not cautioned to tell the truth, for example, then "*the examination hearing is invalid*" (Article 177 I). Such evidence is *generally* inadmissible, unless, as stated above, it is needed to secure the conviction of a serious crime. Courts having to review such evidence must conduct a balancing exercise:<sup>21</sup> the private interests of the accused have to be

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172: this case established that the right of accused persons to participate in evidence-gathering does not apply to separate proceedings against other accused persons (where the other accused persons were involved in the same criminal incident but are being tried wholly separately as opposed to as a co-accused).

21 Strangely, the fact that the evidence could have been obtained legally is viewed to be an argument in favour of its admissibility. Inadmissibility would, however, be a far more logical sanction: if evidence can be obtained lawfully then it should be obtained lawfully. See the same argument in the context of the fruit of the poisonous tree doctrine by JOHN D. JACKSON/SARAH J. SUMMERS, *The Internationalisation of Criminal Evidence, Beyond the Common Law and Civil Law Traditions*, Cambridge 2012, pp. 191 ("*Clearly, it could equally be argued that the fruit of the poisonous tree ought not be relied upon as evidence in such circumstances precisely because the authorities could have obtained the evidence lawfully.*"). The test formally required by the Supreme Court jurisprudence of whether evidence could have been legally obtained did not make it into the new Code and can henceforth be disregarded.

weighed against the public interest in finding the truth and securing a conviction for the relevant crime. The graver the alleged crime, the more the public interest will prevail.<sup>22</sup> Finally, evidence “obtained in violation of administrative rules shall be usable” (Article 141 III). ‘Administrative rules’ are designed to guarantee the smooth administration of criminal proceedings. Their violation has no consequence. The provision on the search of mobile phones has - not very convincingly - been qualified as an administrative rule.<sup>23</sup>

The Swiss Code of Criminal Procedure contains no statutory exclusion of *hearsay evidence*.<sup>24</sup> Whilst Article 169 of the Swiss Civil Procedure Code<sup>25</sup> forbids such evidence, indirect evidence is admissible in criminal procedure and can be assessed freely by the criminal justice authorities (Article 10 II).

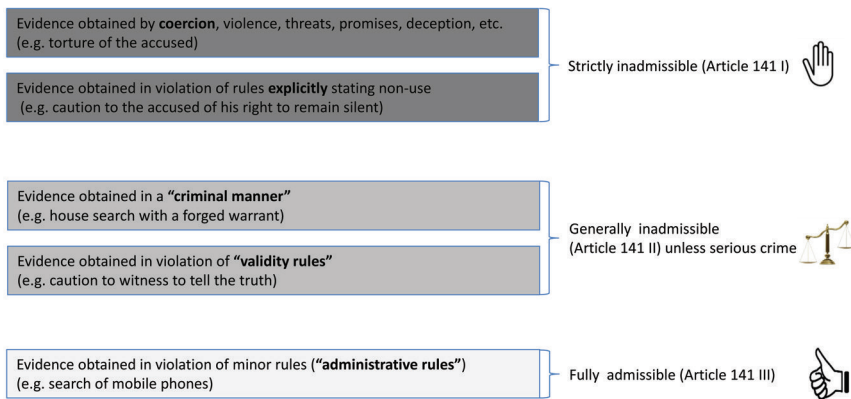


Figure 4: Evidence Exclusion

22 BGE 130 I 126.

23 BGE 139 IV 128.

24 STEFAN TRECHSEL/SARAH J. SUMMERS, *Human Rights in Criminal Proceedings*, Oxford 2006, p. 322.

25 Swiss Civil Procedure code of 19 December 2008 (Civil Procedure Code, CPC), SR 272; see for an English version of the Civil Procedure Code [www.admin.ch \(https://perma.cc/99QZ-BZ8T\)](https://perma.cc/99QZ-BZ8T).

The rules on evidence exclusion set out in *Part 4* are unconvincing. One key concern is the fact that illegally obtained evidence can be used if a serious crime is at issue (Article 141 II). For the accused, this means that the bigger the crime he is accused of, the smaller his chances of a fair trial.<sup>26</sup> This is problematic considering the possibility that severe sentences and thus a more severe deprivation of liberty will be imposed for more serious crimes; one would hope that in such cases, the trial and investigative process should be as fair and reliable as possible. Moreover, it is very hard in practice to draw a clear line between validity and administrative rules. This means that the defining of these terms is overly open to judicial discretion, leading to little protection for the accused. For example, the duty to obtain a search warrant has been viewed as an administrative rule in the past,<sup>27</sup> even though house searches clearly involve a strong interference with the accused's privacy interests. This demonstrates the ease of interpreting the category of rule (validity or administrative) to the detriment of the accused's interests, and means the administrative rules lose their deterrent effect to an extent.<sup>28</sup>

*Part 5* (Articles 196–298d) determines the permissible coercive measures criminal justice authorities can resort to. Coercive measures are procedural actions of the criminal justice authorities which interfere with fundamental rights. They have multiple purposes, including: (a) to secure evidence (searches of premises/records/persons, post-mortems, DNA analysis, seizure, covert surveillance of communication, of whereabouts and of banking connections, and undercover operations); (b) to ensure the presence of persons in the proceedings (summons, arrest, detention on remand, bail) and (c) to ensure that the final decision can be enforced (seizure of assets, security detention). Most of the coercive measures available under *Part 5* can be ordered by the prosecution. Some measures that strongly interfere with fundamental rights have to be ordered by a judge at the “compulsory measures court”, for example, detention on remand or DNA mass screening. Some measures like surveillance of telecommunications or undercover operations must

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26 MARC THOMMEN/MOJAN SAMADI, *The Bigger the Crime, the Smaller the Chance of a Fair Trial?*, in *European Journal of Crime, Criminal Law and Criminal Justice* 24 (2016), pp. 65, p. 65.

27 The consequences of unlawful searches are controversial – the evidence thus obtained has also been viewed as fully usable, see *Judgement of the Federal Supreme Court BGE 96 I 437 (von Däniken versus the Canton of Graubünden)*.

28 For a comprehensive overview of the debate over the admissibility of evidence, see THOMMEN/SAMADI.

at least be approved retroactively by such a court. Interestingly, the search of premises, a very intrusive measure, can be ordered by the prosecution alone without any need for court approval. The only explanation for this is that the power to order searches has traditionally belonged to the prosecution. The prosecutor can also order the freezing of assets without judicial approval. However, the accused and other persons affected by the freezing can take the order to court.

The remaining parts of the Swiss Code of Criminal Procedure are less pertinent in the context of this chapter and as such will not be discussed in any depth. *Part 6* (Articles 299–327) sets out the rules for the preliminary proceedings (police inquiries, opening and dropping prosecutorial investigation, charges). *Part 7* (Articles 328–351) regulates the principal proceedings at first instance (examination of the charge, hearing, taking of the evidence, pleadings, judgement) and *Part 8* (Articles 352–378) specifies the special proceedings available (summary penalty order, abridged and in absentia proceedings, proceedings in cases of insanity, non-conviction-based confiscation proceedings). *Part 9* (Articles 379–415) sets out the legal remedies available to various parties (complaints, appeals, retrials). *Part 10* (Articles 416–436) regulates the costs of the proceedings and compensation, while *Part 11* (Articles 437–444) sets out the rules of enforcement. Finally, *Part 12* (Articles 445–457) is the provision on the implementation of the Code.

## II. Principles

Criminal procedures in Switzerland are constrained by a set of principles laid out by the Swiss Code of Criminal Procedure. Firstly, the state has a monopoly on criminal justice (Article 2). Further, human dignity and fairness must be respected (Article 3). Criminal justice authorities are independent and only bound by the law (Article 4), and must investigate and proceed without undue delay (Article 5). According to the accusation principle, courts cannot start criminal proceedings themselves; charges have to be brought to them by the prosecution (Article 9). Courts assess evidence freely (Article 10 II), not following specific rules but their ‘conviction intime’.<sup>29</sup> Court hearings are public and verdicts must be pronounced publicly (Article 69). In the following paragraphs, three other fundamental principles will be examined.

### 1. EX OFFICIO INVESTIGATION

The Swiss criminal justice system is traditionally viewed as possessing an inquisitorial structure.<sup>30</sup> The criminal justice authorities, i.e. the prosecution and the courts, cannot rely on the facts presented to them by the parties but have to inquire into the “material” truth *ex officio*. They have to investigate exculpatory and incriminatory circumstances with equal care (Article 6 II). Whether it is suitable to delegate the task of investigating exculpatory evidence to the prosecution, whose institutional duty is to obtain as many

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29 Defined as the judge’s “inner or personal conviction” in KARIM A.A. KHAN/CAROLINE BUISMAN/CHRIS GOSNELL, *Principles of Evidence in International Criminal Justice*, Oxford 2010, p. 36.

30 Critical on the inquisitorial-accusatorial divide: SARAH J. SUMMERS, *Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford 2007, pp. 179, s.a. pp. 3 (“*The Enduring legacy of the Inquisitorial/Accusatorial Divide*”); detailed criticism by JACQUELINE HODGSON, *French Criminal Justice: a Comparative Account of the Investigation and Prosecution of Crime in France* Oxford 2005, p. 241 (“*Given these different theoretical procedural constructions ... it becomes more difficult to speak of ‘the trial’ in a way that makes sense across jurisdictions.*”).

convictions as possible, is a highly debated issue. The *courts*, on the other hand, preside over the parties. They are in a much better position to weigh arguments for and against the accused's guilt. The problem with this is that this role is not properly exercised until the case comes to court; by this point, the accused may already be at a disadvantage because of the "cherry-picking" of evidence by the prosecutor. Due to the inquisitorial structure of the proceedings, witnesses in the Swiss system are questioned by the President of the court: they are not subjected to cross examination by the parties. Another much debated issue is, of course, whether criminal proceedings can ever actually be expected to reveal the "whole truth". Apart from the epistemological dilemma that there is no objective truth untainted by subjective interpretation, criminal proceedings are also practically ill-suited to find the truth: the defendant may remain silent or even lie,<sup>31</sup> and the criminal justice authorities only have limited means and resources available to them in order to investigate the material facts.

## 2. MANDATORY INVESTIGATION

The prosecution of known or suspected criminal acts is mandatory (Article 7). The rationale behind mandatory investigation is equality of treatment: no one shall escape criminal liability, regardless of personal characteristics or circumstances. However, there are certain minor offences that are prosecuted only on complaint, e.g. acts of aggression (Article 126 Criminal Code), common assault (Article 123 I Criminal Code), or criminal damage (Article 144 I Criminal Code). A prosecution only takes place, if the person who was harmed requests that the person responsible be prosecuted by filing a complaint (Article 30 I Criminal Code). Unless otherwise indicated in the Specific Part of the Criminal Code, all offences are prosecuted *ex officio*.

In Switzerland, there is only very limited prosecutorial discretion to not open an investigation or drop charges (Article 8). Prosecution can be discontinued if defendants have already been severely affected by their acts<sup>32</sup> for example, this was the case where a defendant's careless driving resulted in

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31 That an accused person may lie to the criminal justice authorities is not entirely uncontested. Some authors suggest that in principle there is a right to lie; however this is limited by the criminal prohibitions on false accusation (Article 303 Criminal Code).

32 Article 54 Criminal Code: *"Effect on the offender of his act - If the offender is so seriously affected by the immediate consequences of his act that a penalty would be inappropriate,*



the death of her husband and grave injuries to her children.<sup>33</sup> Charges can also be dropped if reparations are made to the victim for any losses.<sup>34</sup> This exception is problematic because it conflicts with the equality of treatment rationale behind mandatory investigation: by allowing charges to be dropped where reparations have been made, Switzerland makes an exception to criminal liability that is available only to those wealthy enough to properly compensate victims.

Another part of the rationale behind obliging the prosecutor to pursue all charges was a concern to limit the arbitrational powers of the prosecution. This lack of prosecutorial discretion seems to leave very little room for plea bargaining. Prosecutors can, however, offer leniency in sentencing in exchange for, for example, a confession.<sup>35</sup> Such deals are often struck in abridged proceedings (Articles 358 et seqq.).

Of course, even though the prosecution is *legally* bound to investigate all crimes brought to their attention they can, *de facto*, refrain from opening an investigation. This is particularly possible in cases with no immediate victim party to the proceedings (for example, eco-crimes or drug-selling) as there is no one to contest the abandonment of the investigation.

### 3. NEMO TENETUR SE IPSUM ACCUSARE

No man is bound to accuse himself. This principle is enshrined in Article 113 I. In Switzerland, the privilege against self-incrimination encompasses not only a right to remain silent but also a right to refuse to co-operate with the criminal justice authorities. The accused cannot be obliged to actively hand over items or assets which are demanded by the authorities (Article 265 II lit. a). However, this does not give the accused the right to resist legal coercive measures. Thus, he or she must allow the criminal justice authorities to seize such

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*the responsible authorities shall refrain from prosecuting him, bringing him to court or punishing him."*

33 BGE 119 IV 280.

34 Article 53 Criminal Code: "*Reparation; If the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused, the competent authority shall refrain from prosecuting him, bringing him to court or punishing him if: a. the requirements for a suspended sentence (Art. 42) are fulfilled; and b. the interests of the general public and of the persons harmed in prosecution are negligible."*

35 A confession as to the facts suffices; there need not be a guilty plea in the strict sense of the term, i.e. a declaration of one's own guilt.

items or assets themselves. Obviously, the accused is protected from being forcefully coerced (for example, through torture) to provide evidence or to confess (Article 140 I). One area where the *nemo-tenetur* principle is in severe need of further implementation is in the auxiliary criminal law. For example, in Switzerland, citizens were under a legal obligation (backed up by fines) to cooperate in tax evasion proceedings. In *J.B. v. Switzerland*, the applicant had been fined CHF 4'000 under the administrative law for failing to provide information about his taxes. The European Court of Human Rights ruled that this provision violated the applicant's right not to incriminate himself.<sup>36</sup> Since this ruling, Switzerland has officially modified its tax legislation to align with the European Court of Human Rights case law.<sup>37</sup>

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<sup>36</sup> *J.B. v. Switzerland* App no 31827/96, ECtHR, 3 May 2001, at paragraphs 63 et seqq.

<sup>37</sup> The new provision is Article 57a of the Tax Harmonisation Act of 14 December 1990, SR 642.14.

### III. Institutions and Procedure

The criminal justice institutions and procedure can best be understood when following the course of a standard case. A case involving a pensioner, a farmer and a herd of cows will be discussed to shine light on how the procedural rules actually work in practice. Following this, the extent to which the Swiss criminal procedural rules comply with requirements set by the Constitution and the ECHR will be examined, focusing on three key problem areas in this regard.

On 17 June 2014, a farmer in the eastern Swiss mountains drove his cattle herd down from his alp. As he had done several times before, he passed in front of pensioner X's house. The cows ate X's grass and lavender and trampled over the meticulously groomed flowers. X, enraged, retrieved his revolver, aimed it at the cows and threatened to shoot them.

On the same day, the farmer filed a complaint at the local police station. Whilst doing so, he himself was questioned by the police. The farmer's filing of the complaint triggered the preliminary proceedings (Article 303). The preliminary proceedings are divided up into two stages:<sup>38</sup> the police inquiries and the investigation by the prosecutor (Article 299). The preliminary proceedings are led overall by the prosecution (Article 61 lit. a). The police are subject to the supervision and instructions of the prosecutor (Article 15 II). From the moment the complaint was filed by the farmer, X became "the accused" (Article 111). Through the filing of a complaint, the farmer automatically acquired the status of a private claimant (Article 118 II).

On the day after the incident, the prosecutor ordered a search of X's house, which led to the seizure of several firearms and a box of ammunition. It was during this search that X learned that a preliminary investigation had been opened against him (Article 309) for threatening behaviour (Article 180 Criminal Code) and illegal bearing of a weapon (Article 33 I lit. a Federal Weapons Act).<sup>39</sup> X was interrogated by the police (Article 307 II and Article

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<sup>38</sup> See Figure 2, p. 404.

<sup>39</sup> Federal Act on Weapons, Weapon Equipment and Ammunition of 20 June 1997 (Federal Weapons Act), SR 514.54.

312 I) – he denied the use of a firearm. He could have requested that a legal-aid defence counsel be appointed, if he had lacked the necessary finances to provide his own. However, a counsel would most probably not have been appointed for this case, as it was a trivial one (Article 132). In serious cases, for example when the accused is facing a prison sentence of more than one year, a defence counsel *must* be appointed, even against the accused’s will (Article 130). In our case, X could at any time have hired a defence counsel himself and insisted that he or she be present from the first police inquiry (Article 159 II).<sup>40</sup>

The written records of the inquiry were handed over to the prosecutor. If the prosecutor had thought it necessary, he could then have interrogated the accused: this decision is entirely within the prosecutor’s discretion. During all interrogations the private claimant and his legal adviser could have participated both purely in presence and more actively by asking questions (Article 147 I and Article 312 II). Equally, the accused and his counsel could have assisted in the prosecution’s interrogation of the private claimant and requested that additional questions be posed to him.

When the prosecution considered the investigation to be complete, it had three possibilities: (1) to discontinue the proceedings and close the case, (2) to bring charges or (3) to issue a summary penalty order. In approximately 90 % of all cases that are not closed, the prosecution issues a penalty order. This is a judgment drafted by the prosecutor with a maximum sentence of six months of imprisonment (Article 352). It contains the prosecutor’s summary assessment of the facts and their legal interpretation of the situation. In fact, if the defendant confesses to the police or if there is sufficient “objective” evidence, there need not be any prosecutorial investigation at all (Article 309 IV). On 9 September 2014, the prosecution served its penalty order to X. He was found guilty of threatening behaviour and illegal bearing of a weapon and sentenced to 90 units of monetary penalty at CHF 350.– each. The penalty was suspended with a probation period of two years. Further, he was sentenced to an unconditional fine of CHF 1’000.–. The weapon was confiscated and the costs of the proceedings were imposed on X.

Once the penalty order was issued, X had the choice to either accept it or to file an objection within ten days. Had X accepted – as about 90 % of all accused persons do – the penalty order would have come into force as a conviction,

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40 Note that ECtHR case-law stipulates that as a rule, legal assistance must be provided from the moment the suspect is taken into custody “*and not only while being questioned*” (Dayanan v. Turkey, App no 7377/03, ECtHR, 13 October 2009, paragraph 32).

without any judicial participation (Article 354 III). On 15 September 2014, however, X objected. When an objection is filed the prosecutor hears the accused himself (Article 355 I). In many cases, this is the first time the accused deals with the prosecutor in person. On 1 October 2014, X was questioned by the prosecutor in the presence of the farmer (the private claimant).

The prosecutor then has to choose between upholding the penalty order, issuing a new one, closing the investigation or bringing charges. In our case the prosecutor decided to uphold the penalty order. On 14 October 2014, he transferred the case to court. The penalty order thus constituted the indictment (Article 356 I).

With the indictment, the preliminary proceedings against X came to an end (Article 318 I). The principal proceedings at the court of first instance were commenced. From that point onwards the court was in charge of the proceedings (Article 328 II). The prosecution became a mere party to the case (Article 104 I lit. c). The court examined and admitted the charges (Article 329 I) and scheduled the principal hearing (Article 331). At any point, the court could have asked the prosecution to modify or amend the charge (Article 333 I). From 15 October 2014, X was given access to the file for ten consecutive days. Both parties may then request that more evidence is taken, for example they may request that a particular witness be heard. The presiding judge decides whether to grant this request. A refusal cannot be challenged (Article 331). On 27 November 2014, X filed a motion to take additional evidence. The court turned down this request, anticipating that this would not affect their conclusion on whether or not the revolver had been used, thereby engaging in an anticipated assessment of evidence.<sup>41</sup>

Courts of first instance are usually composed of three judges and a clerk. If the prosecution applies for less than two years of imprisonment – as occurred in this case and most cases in practice – then the case may be heard by only one judge (Article 19 II). As mentioned, federal law does not provide for jury trials, meaning trial by jury is a very rare occurrence in Switzerland. X's case was assigned to Judge FREDERIK MÜLLER, district court of Toggenburg.

The principal hearing took place on 14 January 2015. X was joined by his defence counsel (Article 336). The prosecution has to appear at court if it has requested a prison sentence of more than one year or if the court orders its

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41 See Judgment of the Federal Supreme Court 6B\_495/2016 of 16 February 2017, consideration 1.3.3.

participation (Article 337). The private claimant may be ordered to appear at the main hearings (Article 338). In X's case, both were ordered to appear at court. The court hearing was public (Article 69).

At court, it is only mandatory for the judge to interrogate the accused (Article 341 III). Private claimants, witnesses and experts may be heard – this will occur at the judge's discretion (Article 343). For all four of them, the court relies heavily on the written records of their prior interrogations conducted the preliminary proceedings (Article 343). These statements do not have to be repeated at court. The hearings are conducted by the president of the court or by the judge in charge (Article 341 I). Hence, there is no cross-examination by the parties. The parties can submit additional questions to the president, who then decides whether or not to pose this question to the person interrogated (Article 341 II). After the taking of the evidence, the parties plead in the following order: prosecution, private claimant, the accused or his or her defence counsel (Article 346). The accused always has the last word (Article 347), ensuring he or she is able to fully respond to all accusations which have been levelled against him or her.

After the hearings, the court retires to deliberate in private. The clerk participates at the deliberations as an adviser (Article 348). The court has to reach its verdict by a simple majority in cases involving a panel of judges (Article 351). Panels of judges can consist of three or five members. Only a few cantons allow judges who disagreed with the verdict to write a dissenting opinion.<sup>42</sup> In cases where there is an acquittal, the court grants the acquitted person compensation and reparation, which is done by the court *ex officio* (Article 429). In cases where there is a conviction, the court determines the sanction (penalty and/or measure)<sup>43</sup> and imposes the costs of the proceedings on the convicted person (Article 426). In the case of X, Judge MÜLLER reached his verdict on the day of the hearing. X was found guilty of threatening behaviour and illegal bearing of a weapon. He was sentenced to 40 units of monetary penalty at CHF 350.—each. The penalty was suspended and the probation period set at two years. X's revolver and ammunition were confiscated. The costs of the proceedings (CHF 3'150.—) were imposed on X.

Judge MÜLLER delivered his verdict publicly, giving his reasons in a brief oral statement (Article 84). Written reasoning of the judgment has to be provided

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<sup>42</sup> See Article 134 of the Constitution of the canton of Vaud.

<sup>43</sup> For this dual system of sanctions see Chapter Criminal Law, pp. 377.

if a sentence of more than two years has been imposed, if a party requests it, or if a party lodges an appeal (Article 82). X appealed his conviction. Hence, written reasons had to be provided.

The judgment of first instance can be appealed by all parties (Articles 381 et seqq.). On 16 January 2015, X lodged his appeal. The cantonal court of St. Gallen turned it down on 8 January 2016. X then took the appellate judgment to the Federal Supreme Court in Lausanne (Articles 78 et seqq. Federal Supreme Court Act).<sup>44</sup> The Supreme Court decided that the cantonal court had applied the Criminal Code correctly. X's property rights were infringed by the farmer. X was thus in a situation of necessity (Article 18 Criminal Code). However, the use of his revolver had been wholly disproportionate and therefore the justification of necessity did not apply. The Supreme Court further ruled that the anticipated assessment of the evidence had not been arbitrary. Thus, the cantonal court had not violated the Constitution. It rejected X's complaint on 16 February 2017. The judgment of the cantonal court was upheld.

Most provisions of the Swiss Criminal Procedure Code are in line with the Constitution and the ECHR. Some individual provisions, however, need to be reconsidered.

Firstly, the practice of anticipated assessment of evidence is problematic. It allows prosecutors to adhere to the police's assessment of the facts and courts to take the prosecutor's stand without the accused ever having a real chance to "tell his side of the story", or have any substantial involvement in the process.<sup>45</sup> This state of affairs violates the right of the accused to be heard.

A second problem is the fact that courts are currently not strictly bound by the charges brought to them. Instead, they can at any time ask the prosecutor to amend or change the indictment. This is problematic in terms of the separation of the investigative and adjudicative powers;<sup>46</sup> the court interferes with the investigative stage when they engage in this practice. Further, this power works to the detriment of the defence, for while the prosecutors are provided with an opportunity to amend a poor indictment, the defence does not get a second chance to amend poor pleadings.

The third and possibly the most persistent problem is that of the summary penalty order proceedings. Although defendants can *de iure* take their order

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44 Federal Supreme Court Act of 17 June 2005, SR 173.110.

45 For the associated problems of this state of affairs, see pp. 404.

46 The independence of the judiciary is regulated in Article 30 I Constitution: "Any person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court."

to court, in over 90 % of all cases they are *de facto* adjudicated by prosecutors. Therefore, it should be mandatory for the prosecution to interrogate the accused in person before issuing a penal order. Currently, prosecutors are not even bound to open an investigation; they can issue a penalty order solely on the basis of the police record and have it served to the accused (Article 309 IV). In such a case, it is not guaranteed that the addressee learns about his or her conviction or properly understands its dimensions. This is problematic in terms of ECHR compliance. Article 6 III lit. a ECHR requires that the accused be “*informed promptly ... of the nature and cause of the accusation against him.*”<sup>47</sup> Penalty orders are not explained to the accused in plain terms, nor are they ever translated. This latter issue clearly violates Article 6 III lit. e ECHR, which provides that everyone charged with a criminal offence must “have the free assistance of an interpreter if he cannot understand or speak the language used in court.”<sup>48</sup>

A more fundamental concern about the summary penalty order must also be addressed. The overwhelming majority of all convictions are now handed down by prosecutors under the summary penalty order procedure: thus, Swiss criminal procedure needs a general overhaul. The procedural principles discussed above were all drawn up with the principal court proceedings in mind, and thus were not properly tailored to apply to special proceedings. However, today, the summary penalty order proceedings are no longer “special proceedings”;<sup>49</sup> instead, they have become the true “principal proceedings”.<sup>50</sup> Therefore, Switzerland’s principles of modern criminal procedure should now be tailored to better address these summary proceedings, to ensure that the rights of the accused are always properly respected.

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47 In this respect, the information must be actually received by the accused; a legal presumption of receipt is insufficient (C v. Italy, App no 10889/84, 56 DR 40). In Switzerland there is in fact a very broad presumption of service. Article 88 IV states: “*Decisions to take no proceedings and summary penalty orders are deemed to be served without publication being required.*”

48 The ECHR provisions on the right to a fair trial are also applicable to the pre-trial proceedings; “*Certainly the primary purpose of Article 6 ... is to ensure a fair trial by a ‘tribunal’ ... but it does not follow that Article 6 has no application to pre-trial proceedings*” (Imbrioscia v. Switzerland, App no 13972/88, ECtHR 24 November 1993, paragraph 36; Pisano v. Italy, App No 36732/97, ECtHR, 27 July 2000, paragraph 27; diff. TRECHSEL/SUMMERS, p. 31.

49 See title of Part 8, Articles 352 et seqq., (“*Part 8 Special Procedures, Chapter 1 Summary Penalty Order Procedure, Contravention Procedure*”).

50 See title of Part 7, Articles 328 et seqq., (“*Title 7 Main Proceedings of First Instance*”).



## IV. Landmark Cases

The Federal Supreme Court in Lausanne is Switzerland's highest court. Its role in the field of criminal procedure has shifted considerably since the enactment of the Federal Code of Criminal Procedure in 2011. Before, the Supreme Court had jurisdiction over 26 different cantonal codes. Its main task was to set up common minimal standards regarding the rights of different parties for all the different codes. Because these codes were issued by the cantons, the Supreme Court had the power to nullify them. For example, in 1976, the directive on the police prisons of the canton of Zurich was partly nullified. The rules had not allowed prisoners to use their bed during the day and only allowed prisoners a walk in the open air every third day; as such, they were found to violate fundamental rights guaranteed by the Constitution.<sup>51</sup>

Nowadays, criminal procedure is regulated by a *federal* code. Because the Federal Supreme Court is bound by the laws of the Federal Parliament (Article 190 Constitution) it may not nullify provisions of the Swiss Code of Criminal Procedure, as it could do before with cantonal procedural codes. Its main task is therefore to guarantee a consistent application of the Federal Code of Criminal Procedure throughout the cantons of Switzerland. As the following cases will show, the jurisprudence of the European Court of Human Rights has an even greater influence in the field of criminal procedure than in that of substantive criminal law. In particular, the Strasbourg rulings on the right to liberty (Article 5 ECHR) and the right to a fair trial (Article 6 ECHR) have had a deep impact on the criminal procedure rules of various member states.

### 1. SCHENK V. SWITZERLAND<sup>52</sup>

One earlier case that had a strong influence on the rules which apply today surrounding the exclusion of evidence was that of PIERRE SCHENK. This case was decided years before the introduction of the Federal Criminal Code of

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<sup>51</sup> BGE 102 Ia 279.

<sup>52</sup> Schenk v. Switzerland, App no 10862/84, ECtHR, 12 July 1988.

Procedure, but the principles developed under this case are still followed in the procedural laws of Switzerland today.

SCHENK was suspected of having hired a hitman to kill his wife. The hitman, instead of executing his mission, had secretly taped a phone conversation with SCHENK and handed it to the investigating authorities. The tape was subsequently used as the main (but not sole) piece of evidence in the eventual trial against SCHENK, where he was convicted for attempted instigation to murder. Secretly recording an individual is a criminal offence in Switzerland under Article 179<sup>ter</sup> Criminal Code. The question for the Supreme Court, when it considered SCHENK'S case on appeal, was whether illegally obtained evidence could be used in a criminal trial. The Federal Supreme Court, considering this issue, held:

*“To conclude ... that any evidence derived from unauthorised tapping must never ... be used in evidence would be to adopt too dogmatic a position and would often lead to absurd results ... In such a case it is necessary to balance ... the interest of the State in having a specific suspicion confirmed ... and ... the legitimate interest of the person concerned in the protection of his personal rights”.*<sup>53</sup>

The Supreme Court considered in the case of SCHENK that the public interest in having the truth established overrode SCHENK'S privacy interests. Thus, they ultimately upheld his conviction for attempted instigation to murder, although the evidence had been obtained in an illegal manner. SCHENK took his case to the European Court of Human Rights, requesting a declaration that his right to a fair trial under Article 6 I ECHR had been violated. However, after examining the trial process as a whole, the European Court of Human Rights concluded SCHENK had not been deprived of his right to a fair trial. Important considerations which influenced this conclusion were the fact that SCHENK'S defence rights had not been disregarded and that the tape had not been the only piece of evidence used to secure his conviction.

SCHENK is the leading case on the exclusion of illegally gathered evidence. The Supreme Court, as quoted above, stated that when courts assess the admissibility of evidence they must weigh the public interest in truth-finding and securing a conviction for the relevant crime against the accused's privacy rights. This balancing approach was approved by the European Court

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53 BGE 109 Ia 244 consideration 2b, cited in *Schenk v. Switzerland*, App no 10862/84, ECtHR, 12 July 1988, paragraph 30.

of Human Rights when they heard SCHENK's case. It also later became statutory law in Switzerland: as was discussed earlier in the discussion about Part 4 of the Swiss Code of Criminal Procedure rules on exclusion of evidence,<sup>54</sup> evidence gathered "in a criminal manner" is generally excluded, unless it is needed for the conviction of a serious crime (Article 141 II). Consequently, illegally obtained evidence can be used if a serious crime is at stake. The worrying implications of this provision were outlined earlier: it means that even when procedural rules matter the most – in serious cases where there is the possibility of a severe sentence being imposed after a finding of guilt – they are still unlikely to be heeded. Further, it acts to remove any incentive the criminal justice authorities may have to comply with procedural rules.

## 2. HUBER V. SWITZERLAND<sup>55</sup>

Another case, decided in 1990, that had an influence on criminal procedural law was that of Huber v. Switzerland. Again, this case was decided before the enactment of the Federal Code of Criminal Procedure, and thus dealt with a cantonal criminal procedure regulation.

The facts of the case were that members of the "Hell's Angels" gang were suspected of having brought German prostitutes to Zurich, and subsequently forcing them to marry Swiss nationals who received payments in turn. These women were then forced into prostitution in Switzerland. The District Attorney of Zurich believed that JUTTA HUBER was one of these women. On 11 August 1983, he questioned her as a witness. She admitted making a living from prostitution but denied any ties to the "Hell's Angels". At the end of the hearing, the District Attorney remanded her in custody on suspicion of having given false evidence. She was not released until a further eight days had passed. The District Attorney then indicted her. At trial, her lawyer argued that there had been two key failures by the authorities to respect HUBER's rights; in particular those guaranteed by the ECHR. Firstly: "*anyone who is detained ... must be brought promptly before a judge ... This never happened in the present case.*" Secondly, there was a lack of independence at issue: "*the person who remanded the accused in custody, District Attorney J., is now also prosecutor.*"

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<sup>54</sup> See pp. 406.

<sup>55</sup> Huber v. Switzerland, App no 12794/87, ECtHR, 23 October 1990.

Unlike the Swiss courts, the European Court of Human Rights shared the view of the defence lawyer, concluding that Article 5 III ECHR had been violated. The District Attorney, who had ordered the detention of HUBER on remand at the preliminary stage of the proceedings, had become party to the trial by taking on the role of the prosecution. He was thus no longer “independent of the parties”<sup>56</sup>. Following this judgment, the canton of Zurich had to change its Code of Criminal Procedure, delegating the task of approving detention on remand to the President of the District Courts.<sup>57</sup> Today, this task is vested in the “compulsory measures courts”.<sup>58</sup>

### 3. CHAMP-DOLLON<sup>59</sup>

A had been detained on remand on suspicion of large scale cocaine trafficking, and was held for 478 days at the ‘Champ-Dollon’ detention facility near Geneva. For 199 days (157 of which were consecutive), he shared his three-man cell with five other inmates (the space amounted to 3.83m<sup>2</sup> per person). During that entire period he was confined to his cell for 23 hours per day. A claimed that such conditions of detention were inhuman and degrading, under Article 3 ECHR.

In its decision, the Swiss Federal Supreme Court relied heavily on the criteria set out by the European Court of Human Rights. If detainees are confined to a space of less than 3m<sup>2</sup> per person, the lack of space in itself will constitute a violation of Article 3 ECHR. If individual space ranges from 3–4m<sup>2</sup> per person, other detention conditions are considered in order to establish whether there has been an Article 3 ECHR violation, such as (day)light, ventilation, temperature, sanitary facilities, time spent outside of the cell, health conditions (for example the prevalence of tuberculosis), the quality of nutrition, and the overall duration of the detention.

The Federal Supreme Court held that the Champ-Dollon prison has been heavily over-crowded for many years. The sanitary facilities, ventilation, light, and nutrition were deemed to meet the minimal standards. However, the fact that A had been detained for 157 consecutive days in a heavily overcrowded

<sup>56</sup> Huber v. Switzerland, App no 12794/87, ECtHR, 23 October 1990, paragraphs 42 et seqq.

<sup>57</sup> Cantonal Act of 1 September 1991 for the amendment of the Cantonal Code of Criminal Procedure (OS 51/851 et seqq.), in force since 1 July 1992.

<sup>58</sup> Article 220 I: “Remand begins when it is ordered by the compulsory measures court.”

<sup>59</sup> Judgment of the Federal Supreme Court 6B\_456/2015 of 21 March 2016

cell with virtually no time outside this confinement led the court to declare that the conditions violated the national and inter-national rules on detention. Despite the successful outcome of this judgement for the applicant, there have since been numerous cases concerning the continuing severe overcrowding in Champ-Dollon, including a 2016 case where the Federal Supreme Court held that the detention standards violated Article 3 ECHR.<sup>60</sup>

#### 4. KRISTALLNACHT<sup>61</sup>

In June 2012, a Swiss case which has come to be known as Kristallnacht surfaced.<sup>62</sup> ALEXANDER MÜLLER, a local politician of the conservative Swiss People's Party in Zurich, posted a series of tweets on the social media platform "Twitter" which made derogatory comments against Muslims. The most infamous quote was: "*Maybe we need another Kristallnacht ... this time for mosques*". In the aftermath of this widely publicised post, MÜLLER had to resign from his party and leave political office. He lost his job as a credit analyst and was indicted and ultimately convicted for racial discrimination (Article 261<sup>bis</sup> Criminal Code). In order to avoid further exposure at trial, MÜLLER successfully demanded that the press coverage of the hearing be restricted. The District Judge of Uster in Zurich issued an order that forbade the media from publishing his name, picture, and any other personal details (age, residence, employer, and the web address of his blog). Anyone who contravened this order would be subject to a fine of CHF 1'000. Two journalists objected to this order and took a case all the way up to the Federal Supreme Court. They argued that the order infringed the freedom of the media (Article 17 Constitution).

The Federal Supreme Court held that the freedom of the media is a pivotal part of free speech in a democratic society. Although trials are open to the

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60 See also the article 'Prison overcrowding in Champ-Dollon: Federal Supreme Court judgements and an alarming medical study' (Source: Humanrights.ch, 18 May 2016, <https://perma.cc/3XZK-BZVG>).

61 BGE 141 I 211.

62 "Kristallnacht" refers to "*the occasion of concerted violence by Nazis throughout Germany and Austria against Jews and their property on the night of 9–10 November 1938*". It's a German word that translates literally "*to 'night of crystal', referring to the broken glass produced by the smashing of shop windows*" (source: Oxford Dictionary, <https://perma.cc/2B73-EXMZ>).

public, in practice not everybody is able to attend hearings. Therefore, the media has an essential role as a bridge of communication between the state and the general public. This information task can only be fulfilled if the media is not unjustifiably restricted in its reporting. Fundamental rights can only be restricted if: (1) there is a sufficient legal basis, (2) there is an overriding public interest and (3) the restrictions are proportionate. The Constitution explicitly provides in this regard that the essence of fundamental rights is sacrosanct, emphasising the fact that restrictions of rights are not allowed lightly (Article 36 Constitution).

The Supreme Court found that a sufficient legal basis for imposing preventive restrictions on the media was missing. In doing so, they examined Article 70 III, which states that courts can require that media reports of hearings meet specific conditions. However, this rule only applies when the general public is excluded from a trial: this was not the case here. The Court also found that there was no legal basis for this order in the cantonal laws. Thus, the order was found to be unconstitutional. The Supreme Court failed to hold that the District Court's decision had seriously violated the freedom of the media, thus reducing the impact of the Supreme Court ruling. Moreover, in this case the restrictions were unwarranted, for the defendant continues up to this day to behave in a contradictory manner to his supposed wish for total privacy; he consistently publishes posts under his full name, with pictures of himself included. By behaving as such, he seems to somewhat renounce his privacy rights.

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