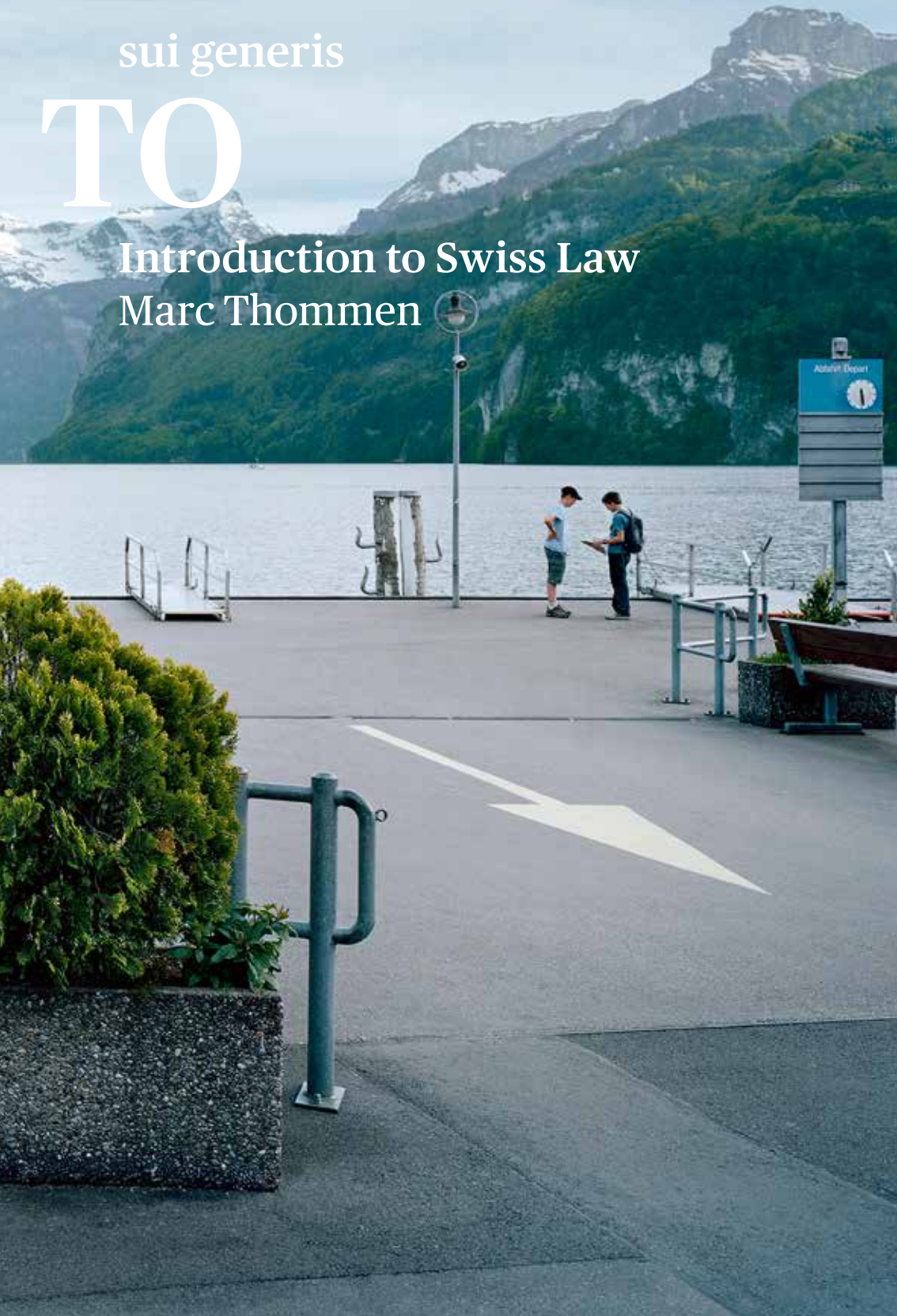


sui generis

TO

Introduction to Swiss Law  
Marc Thommen





Marc Thommen

# **Introduction to Swiss Law**

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Marc Thommen

# **Introduction to Swiss Law**

sui generis, Zurich 2022



# Preface

«*The storm is master. Man is like a ball, tossed among winds and waves*», says the fisherman in Act IV of Friedrich Schiller's epic *Wilhelm Tell*. In the late 13<sup>th</sup> century, dramatic events are said to have taken place in this lake basin. Across the lake on the right is the Rütli, the meadow where the Swiss conspired to become a confederation. On the left, the rider of the red motorbike glances towards a rock which juts into the lake. If Schiller is to be believed, on a stormy crossing one night, Wilhelm Tell escaped from his captors onto this saving ledge, the Tell Plateau. Today, everything is neatly organised on the quay in Brunnen/Schwyz. Arrows indicate the flow of traffic and clocks show the next departure times. The metal hooks on the pile mooring stick into the sky like bull horns. Nothing spoils the idyll. Whether the two boys on the dock are aware of the drama that once unfolded behind them or whether they are simply studying the timetable is left to the viewer to decide.

As in our first edition, the cover picture comes from the volume "Heimatland" (Homeland) by Basel photographer, Julian Salinas. In this work, Salinas tries to avoid the familiar clichés and capture Switzerland in all its layers and complexities. This introduction, too, attempts to capture the Swiss legal landscape in all its nuances. My colleagues from the Faculty of Law at the University of Zurich have contributed chapters on their fields of expertise. From the foundations of law (history, philosophy, and sociology) to the classic topics of public, private and criminal law, we have tried to cover the substantive and procedural aspects of the Swiss legal system. The institutions of the legislative, executive and judicial branches of the Swiss government are explained. In all chapters, the underlying principles are considered and some landmark cases are discussed.

First, I thank my colleagues who agreed to contribute to this project. The generous financial support of Zurich Law Faculty made it possible to publish this volume as an Open Access Textbook. Furthermore, I thank Julian Salinas for allowing us to use his photography. I would also like to thank Maxim Staehelin for the typesetting and Wendelin Hess and Beat Müller for publishing the book. My greatest thanks go to Luisa Lichtenberger, Caroline Ruggli and Chrissie Symington for their very thorough proofreading and careful editing of the manuscripts. Without their support, this book would not have been published.

Zurich, 20 April 2022  
*Marc Thommen*





# About This Book

What are the origins of direct democracy in Switzerland? How does the Swiss judiciary function? What are the principles of Swiss civil, contract and administrative law? What is the role of public service broadcasting in the political decision-making process? What are the leading cases in tax law? What forms of euthanasia are legal in Switzerland? In this introduction 19 legal scholars of the University of Zurich Law Faculty try to answer these questions and give the reader an overview of Swiss public, private and criminal law. As the first comprehensive introduction to Swiss law in English, it is addressed to both lawyers from abroad and incoming students to the University of Zurich.

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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**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 legislative process (VII.) and the citation and publication of the case law (VIII.) are examined.

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1 For an excellent (official) introduction see: The Swiss Confederation—A Brief Guide, 2022 ([perma.cc/KSJ9-TX5S](https://perma.cc/KSJ9-TX5S)).

# I. Trivia

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, 62% of all Swiss inhabitants speak (Swiss) German, 23% French, 8% Italian, and 0.5% Romansh.

Article 4 of the Constitution of the Swiss Confederation states: “*The National Languages are German, French, Italian, and Romansh.*”<sup>2</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>3</sup> Romansh-speaking individuals can address cantonal or federal authorities in Romansh.

The Confederation spreads over 41,000 kilometres squared (km<sup>2</sup>),<sup>4</sup> making it just a little bit bigger than Bhutan (38,000 km<sup>2</sup>) and little smaller than the Netherlands (41,500 km<sup>2</sup>). In 2020, Switzerland reported a GDP of USD 752 Billion, which, according to an International Monetary Fund ranking, placed Switzerland at the 19<sup>th</sup> position worldwide. Further, in terms of its GDP *per capita* of around USD 87,000, Switzerland ranked in second place, closely following Luxembourg.<sup>5</sup>

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. Near Geneva, on the Swiss and French border, is the European Organization

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2 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.fedlex.admin.ch \(perma.cc/7ARN-UVSH\)](http://www.fedlex.admin.ch/perma.cc/7ARN-UVSH).

3 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.fedlex.admin.ch \(perma.cc/MZZ9-MH77\)](http://www.fedlex.admin.ch/perma.cc/MZZ9-MH77).

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

5 World Bank Data.

for Nuclear Research (CERN),<sup>6</sup> an institution operating the largest particle physics laboratory in the world and famously credited with having invented the internet.<sup>7</sup>

Switzerland 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 26<sup>th</sup> out of 38 OECD countries for gender inequality in salaries, with a difference of around 15%. 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>8</sup>

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

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

8 You can find these and more interesting facts about Switzerland on [www.expatica.com](http://www.expatica.com) ([perma.cc/2CWD-2U66](https://perma.cc/2CWD-2U66)); The Swiss Confederation—A Brief Guide, 2022 ([perma.cc/KSJ9-TX5S](https://perma.cc/KSJ9-TX5S)).



## II. History

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*”, a commons near Seelisberg/Uri. This legend also made its way into FRIEDRICH SCHILLER’s drama of William Tell (1804). Today, the date of Switzerland’s national holiday is the 1<sup>st</sup> of August.

The modern Swiss federal state 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, most of the founding fathers recognised that a centralised political system 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, they drew up a constitution for a Swiss federal state. Its two main features were (and still are) the separation of powers at the federal level (III.) and the sovereignty of the cantons (IV.).<sup>9</sup>

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9 This topic is discussed in more detail in the chapter on Legal History, pp. 27.

## III. Confederation

As will be explained in greater detail by MATTHIAS OESCH in the chapter on Constitutional Law,<sup>10</sup> the Swiss federal state is defined by its three levels of government: the Confederation, the cantons, and the communes.<sup>11</sup> The Confederation is the top level. Only tasks that the cantons are unable to perform or that need uniform regulation are allocated to the Confederation (Article 43a Constitution). The Confederation is responsible for inter alia 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.

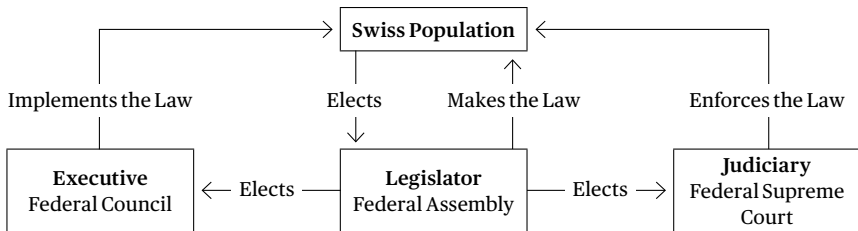


Figure 1: Separation of Powers in Switzerland

### 1. Federal Assembly

Following the example of the Constitution of the United States of America, Switzerland has a bicameral system for the Federal Assembly with the National Council acting as the “House of Representatives” and the Council of States as the “Senate”. The Federal Assembly is the supreme authority of the Confederation. It resides in Bern.<sup>12</sup>

<sup>10</sup> See chapter on Constitutional Law, pp. 113.

<sup>11</sup> See Title 3 of the Constitution (“Confederation, Cantons and Communes”).

<sup>12</sup> Article 32 I of the Federal Act on the Federal Assembly of 13 December 2002 (Parliament Act, ParlA), SR 171.10; see for an English version of the Parliament Act [www.fedlex.admin.ch](http://www.fedlex.admin.ch) (perma.cc/7YDF-CY3T).

The *National Council* is composed of 200 representatives of the people. 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 12 and Glarus sends only one. General elections are held every four years.

In the *Council of States* there are 46 representatives of the cantons (Article 150 I Constitution). 20 cantons get to appoint two delegates, six mostly smaller cantons only have one vote in the Council of States.<sup>13</sup>

Both chambers are of equal standing. 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. It is the head of the Federal Administration and also resides in Bern.<sup>14</sup> The seven members of the Federal Council act as the government of Switzerland. They are elected by the two chambers of the Federal Assembly for a term of four years.<sup>15</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. Federal Councillors cannot be impeached.<sup>16</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, 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 of the Confederation primarily has a representative task.

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13 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’]”.

14 Article 58 of the Government and Administration Organisation Act of 21 March 1997 (GAOA), SR 172.010; see for an English version of the Organisation Act [www.fedlex.admin.ch/perma.cc/QUS6-GJUR](http://www.fedlex.admin.ch/perma.cc/QUS6-GJUR)

15 See Articles 174 et seqq. Constitution.

16 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).

### 3. Federal Supreme Court

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 six 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. 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 concerns over judicial independence and discrimination against non-party members.<sup>17</sup>

Re-election of Federal Supreme Court Justices is possible and indeed standard. 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. However, in recent years interference with judicial impartiality has increased at re-elections to the bench of the Federal Supreme Court. In 2020 the Swiss People's Party recommended that their own Justice YVES DONZALLAZ should not be re-elected because he did not decide cases in line with the party politics.

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,<sup>18</sup> the two social law divisions reside in Lucerne.

The Federal Supreme Court is the supreme judicial authority of the Confederation (Article 188 I Constitution). Its two main tasks are to supervise the uniform application of the federal law and to protect individual constitutional rights.

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, as it did, for example, in the case of the surveillance measures of the Police

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17 See for example: GRECO—Group of States against Corruption / Council of Europe, Second Compliance Report of Fourth Evaluation Round, Corruption prevention in respect of Members of Parliament, Judges and Prosecutors, Evaluation Report, Switzerland, adopted by GRECO at its 87<sup>th</sup> Plenary Meeting, Strasbourg, 22-25 March 2021 ([perma.cc/8X6N-WQAU](https://perma.cc/8X6N-WQAU)), p. 8.

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

Act of the Canton of Zurich.<sup>19</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 as well as the checks and balances operating between the branches of government, this restriction on 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.

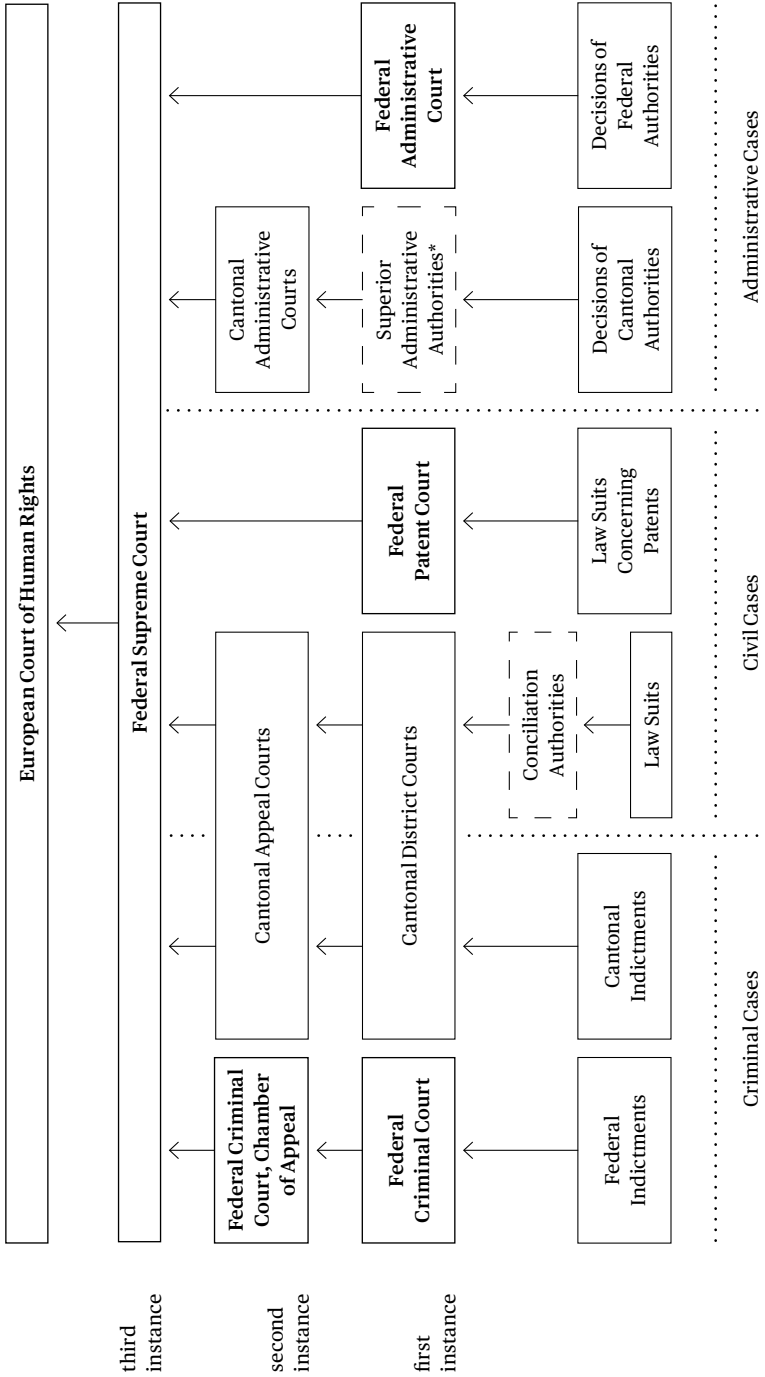
In 2021, the Federal Supreme Court decided 7,509 cases. Most of these cases (4,199) were decided by a panel of three Justices. In 549 important cases a panel of five Justices sat on the case. 2,761 cases, which were clearly inadmissible or manifestly ill-founded, were decided by one Justice. In every case, one Justice is charged with drawing up the judgment. Thus, on average each one of the 38 Justices is responsible for drafting 197 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 in which 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. Although the law allows for a hearing, the parties *de facto* never get to plead their case orally at the Court. The Court decides most cases by way of circulation. This means that the draft judgment 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 deliberation on the case. Thus, the “public hearings” that take place at the Supreme Court are not actual hearings, but public deliberations. 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 deliberation presents an alternative opportunity for them to utter such opinions.<sup>20</sup> Such public sessions are very rare in practice (less than 1% of the cases in 2021).

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19 DFC 136 I 87.

20 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.



\*Varying systems from canton to canton.

Figure 2: Swiss Court Hierarchy<sup>21</sup>

## IV. Cantons

Understanding the role of the cantons is key in being able to understand the Swiss federal system. The Constitution of 1848—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). Traditionally, there were only a limited number of tasks vested in the Confederation. In recent years, however, the Confederation has assumed greater responsibility for example in civil and criminal procedural law.

Each canton must provide for a democratic system of government (Article 51 Constitution). 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. 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. For example, a cantonal government (executive) issues permits to build houses. If such a permit is refused 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.

## V. Communes

At the third layer of the Swiss federal landscape are the communes, i.e. cities and villages. In 2021, there were 2,172 communes in Switzerland. The City of Zurich is the largest commune (ca. 415,000 inhabitants) and the village of Kammersrohr is the smallest (28 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 and the local police. 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 acts as the legislative body. They decide on the statute (“constitution”) of the commune and elect the local government or mayor.<sup>22</sup>

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22 The Swiss Confederation—A Brief Guide, 2022 (perma.cc/KSJ9-TX5S), 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 then be examined separately. A more thorough examination of direct democracy within Switzerland will be undertaken in MATTHIAS OESCH's chapter on Constitutional Law.<sup>23</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 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>24</sup>

The importance of the *coniuratio* in the narrative of the Swiss nation 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 must be also of legal age, i.e. 18 years, and must not “*lack legal capacity due to mental illness or mental incapacity*” (Article 136I Constitution).<sup>25</sup> Dual citizens are allowed to vote, as are Swiss citizens who live abroad. In contrast, as already mentioned, foreigners who live, work, and

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23 See chapter on Constitutional Law, pp. 113.

24 See chapter on Legal History p. 32.

25 See also Article 2 of the Federal Act on Political Rights of 17 December 1976 (PRA), SR 161.1; see for an English version of the PRA [www.fedlex.admin.ch \(perma.cc/BT37-GZJU\)](http://www.fedlex.admin.ch/perma.cc/BT37-GZJU).

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>26</sup> this total exclusion of foreigners (25% of population) from political participation is questionable. However, the darkest chapter in the history of political rights in Switzerland remains women's suffrage. On the federal level, women only obtained the right to vote in 1971.

Direct democracy is commonly defined as a political system in which 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 Constitution). Only when the majority of the Swiss cantons and people approve the amendment does it gain legal force. For example, on 30 September 2016, the Federal Assembly decided to simplify regulations on the naturalisation of third generation immigrants and stateless children. To fulfil this, the legislator had to change Article 38 of the Constitution and submit it 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>27</sup>

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. 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 had gathered over 113,000 signatures in support of the initiative. The Federal Council and the Federal Assembly recommended that the people 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 20 cantons

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26 See the article "Becoming a citizen" on: [www.swissinfo.ch](http://www.swissinfo.ch/perma.cc/Y6QP-URFS) (perma.cc/Y6QP-URFS).

27 Federal Gazette No. 17 of 2 May 2017, pp. 3387 (BBl 2017 3387).

approved the initiative. Since 1893, a total of 227 popular initiatives have been put to the vote, but only 25 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 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 (i.e. it is not top-down in the manner set out above). 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.<sup>28</sup> Since 1875, 84 of the 203 “referenda” have been successful, thus bringing down laws passed by the legislator.<sup>29</sup>

## 2. Cantonal Level

At the cantonal level women’s suffrage was an even darker chapter: 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>30</sup>

Article 51 I of the Federal Constitution obliges the cantons to provide a democratic constitution which must be subject to the approval of the people through a mandatory referendum, and which the people must be able to revise via a popular initiative. The specific requirements concerning 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 (Articles 23 and 24 Constitution/ZH).<sup>31</sup>

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

29 The Swiss Confederation – A Brief Guide, 2022 ([perma.cc/KSJ9-TX5S](https://perma.cc/KSJ9-TX5S)), p. 22.

30 For an in-depth discussion of DFC 116 Ia 359, see chapter on Constitutional Law, pp. 133.

31 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

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. In the Canton of Zurich, 3,000 eligible people can request that cantonal acts be submitted to a vote of the people (“*optional referendum*”). In Zurich any 6,000 eligible people can also 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: new large public investments are submitted to the public for approval.<sup>32</sup> In the Canton of Zurich, the financial referendum can be held on an optional basis against new one-time investments of more than 4 Million Francs as well as against new recurring investments of more than 400,000 Francs annually.

Furthermore, one of the oldest forms of direct democracy in Switzerland is the “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, notably, conflicts with the constitutional right to submit a secret vote. Today, the Cantons of Appenzell Innerrhoden and Glarus are the only remaining cantons using this form of direct democracy.

### 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 that there shall be an initiative, a referendum, and a right to make requests on communal level. As explained above (V.), in most Swiss villages it is the communal assembly, a personal reunion of all citizens, that is the legislative body.<sup>33</sup> 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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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).

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

33 These communal assemblies must not be confused with the “cantonal assemblies” of Glarus and Appenzell Innerrhoden discussed in VI.2.

## VII. Legislative Process

How are laws made in Switzerland?<sup>34</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 full-fledged marriage for same-sex partners. The proposals were submitted to a first national consultation procedure.<sup>35</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>36</sup>

Most participants of the consultation favoured the introduction of registered partnerships 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.

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 to the Federal Assembly.<sup>37</sup>

At the Federal Assembly, the draft on registered partnerships 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 whether 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, then handed the amended draft to the Council of States.

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34 See also: The Swiss Confederation – A Brief Guide, 2022 ([perma.cc/KSJ9-TX5S](https://perma.cc/KSJ9-TX5S)), pp. 32.

35 Article 21 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.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/N2ER-4CCH](https://perma.cc/N2ER-4CCH)).

36 Article 4 Consultation Procedure Act.

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

The Council of States then 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 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>38</sup> The two issues that were fiercely contested during the parliamentary debate were whether to allow same-sex couples to adopt children and whether to grant them access to in-vitro fertilization (IVF). Both questions were answered in the negative.

Following the Federal Assembly's decision, the act had to be published in the Federal Gazette.<sup>39</sup> The Federal Gazette is the official journal of the Confederation. Preliminary drafts and drafts of federal acts, as well as explanatory reports and the Federal Council's dispatches, must all be published in the Federal Gazette. With the act's official publication, the 100-day period for any 50,000 Swiss citizens to demand an optional "referendum" commenced. At this stage, the Evangelical People's Party of Switzerland led the opposition against the 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 act would end the discrimination that same-sex couples faced on matters like inheritance and social security benefits. On 5 June 2005, the national poll was held. 58% of the Swiss electorate voted in favour of registered partnerships.<sup>40</sup> The voter turnout was 56.5%. The Federal Council set the act's date of entry into force as 1 January 2007.

The movement to improve the legal status of same-sex couples did not stop in 2007. On 18 December 2020 Parliament passed the "marriage for all" Act. This act allows lesbian and gay couples to marry and adopt children. Conservative parties tried to fight this act in a referendum. However, on 26 September 2021 64% of Swiss voters accepted the "marriage for all" Act. This act will enter into force on 1 July 2022.

For a federal law to be properly enacted, it must be published in the official compilation of federal legislation. It is through this publication that federal acts acquire binding legal force.<sup>41</sup> The official compilation is a chronological

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38 Federal Act on the Registered Partnership for Same-Sex Couples of 18 June 2004 (Partnership Act), SR 211.231 ([perma.cc/B65A-LPZ8](https://perma.cc/B65A-LPZ8)).

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39 Federal Gazette No. 25 of 29 June 2004, p. 3137 (BBl 2004 3137).

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40 Federal Gazette No. 34 of 30 August 2005, p. 5183 (BBl 2005 5183).

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41 In Switzerland, it is now the digital version (as opposed to the paper version) which is the legally binding version.

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. This compilation lists all federal laws according to their content. The numeration starts with 1, constitutional law: the Swiss Federal Constitution is classified with the code 101. Private law acts are all assigned numbers starting with 2: the civil code is classified with the number 210. Family Laws are enumerated starting at 211. As the Act on Registered Partnerships mainly concerns the family law status of same-sex partners, it was allocated the number 211.231. Giving an act its own unique number allows for the unequivocal identification of all federal acts. Numbers starting with “0.” 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 0.101, for example.

## VIII. 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>42</sup>

The Federal Supreme Court has a statutory duty to ensure the public are informed as to its jurisprudence. According to the Supreme Court's own rules of procedure,<sup>43</sup> this information can be provided in four different ways: in the official compilation (1.), on the internet (2.), by making judgments physically accessible to the public (3.), and through press releases (4.).

### 1. Official Compilation

The Federal Supreme Court publishes landmark cases in its *official compilation* of decisions. 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>44</sup> By virtue of their publication in the official compilation, decisions are regarded as binding precedents. The decisions included in the official compilation are edited, printed, and published in yearly volumes. They are cited as DFC, e.g. "DFC 113 IV 58".<sup>45</sup> "DFC" stands for Decision of the Federal [Supreme] Court.<sup>46</sup>

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. Thus, using the example of DFC 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:

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42 For the citation of cases by the European Court of Human Rights see their guidelines ([perma.cc/XWF2-5PLD](https://perma.cc/XWF2-5PLD)).

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43 Article 57 Regulations for the Federal Supreme Court of 20 November 2006, SR 173.110.131.

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44 See pp. 18.

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45 For a discussion of the merits of this "rolling stones" case see chapter on Criminal Law, p. 425.

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46 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 (DTE).



- 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>47</sup>

Thus, for example, DFC 113 IV 58 is a case regarding criminal law (in this particular case, co-offending in negligent homicide). The last group of digits designates the relevant page(s) within the volume, so in this example, p. 58. Sometimes more specific citations can be found, for example: DFC 113 IV 58 c. 2 (60). Here, the citation only refers to consideration No. 2 of the judgment on page 60.

As previously mentioned, it is only the landmark cases that are published in the official compilation. In 2021, the Swiss Federal Supreme Court handled 7,509 cases: only 233 (3%) 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; 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>48</sup> The language used in the proceedings at the Federal Supreme Court is usually determined by the language used in the cantonal proceedings. There are no official translations of the Supreme Court decisions.<sup>49</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 have deemed most relevant in the case. To get access to the full judgment, one needs to know the case number which—from volume DFC 128 (2005) onwards—can be found on the

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47 In the volumes DFC 98 to DFC 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.

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48 Federal Supreme Court decisions in Romansh are extremely rare. See for example: DFC 122 193.

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49 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.

header of the officially published decisions (see below 2.). The full versions of the pre-2005 decisions are much harder to find.

## 2. Online Publication

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 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>50</sup> are accessible at the Court’s (still) not very user-friendly homepage.<sup>51</sup> Up to this day the Court only publishes its final judgements; not its interim ones. Further, there are several thousand decisions from the 1990s that the Court possesses in electronic form but, for no obvious reason, refuses to make publicly available.

Nowadays the final decisions can be found on the homepage in their complete version, 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).

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50 Listed under the enigmatic header of “further decisions from 2000 onwards” (“weitere Urteile ab 2000”; [perma.cc/Y2PW-BNV9](https://perma.cc/Y2PW-BNV9)).

51 See the official site of the Federal Supreme Court [www.bger.ch](http://www.bger.ch) ([perma.cc/NRA3-CL7T](https://perma.cc/NRA3-CL7T)), or, for a significantly more user-friendly version, this privately run site: [www.bger.li](http://www.bger.li) ([perma.cc/52DF-9KY4](https://perma.cc/52DF-9KY4)).

Every case is assigned a specific case number (such as 6B\_266/2021).<sup>52</sup> The first digit indicates by which chamber the case was decided:

- 1 = 1<sup>st</sup> Chamber of Public Law
- 2 = 2<sup>nd</sup> Chamber of Public Law
- 3 = not yet attributed
- 4 = 1<sup>st</sup> Chamber of Civil Law
- 5 = 2<sup>nd</sup> Chamber of Civil Law
- 6 = Chamber of Criminal Law
- 7 = not yet attributed
- 8 = 1<sup>st</sup> Chamber of Social Law
- 9 = 2<sup>nd</sup> Chamber of Social Law

The following capital letter relates to the type of procedure:

- A = Complaint in civil matters
- B = Complaint in criminal matters
- C = Complaint in public law matters
- D = Subsidiary constitutional complaint
- E = Competence dispute, civil claims
- F = Review
- G = Rectifications

Lastly, the digits after the underscore are linked to the chronology of the decision. Hence, the case number 6B\_266/2021 indicates that this case was the 266<sup>th</sup> complaint, relating to a criminal matter, in 2021 and which was assigned to the criminal law chamber of the Federal Supreme Court. The case was decided on 21 October 2021 by the Federal Justices Christian Denys (at the time president of the Criminal Law Chamber), Giuseppe Muschietti and Sonja Koch. Andreas Traub was the law clerk on this case. “A” was the defendant. The responding party was the public prosecutor of the Canton of Schwyz. According to the citation guidelines of the Federal Supreme Court, this “ordinary” case is to be cited as follows: Judgment of the Federal Supreme Court 6B\_266/2021 of 21 October 2021.

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

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52 This numeration only applies to cases that were decided after the enactment of the Federal Supreme Court Act on 1 January 2007.

is not true for the remaining 97% 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.

### 3. Public Pronouncement

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 publications are anonymised:<sup>53</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 public to find out whether a judgment had been rendered against a specific person. Only on the very rare occasion of a public deliberation, i.e. in less than 1% of all cases, were the names of the parties publicised. Thus, acknowledging the problem, the Court found a compromise. For four weeks after a decision is taken, the judgments of the Federal Supreme Court are put at public disposal, without any anonymisation. 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. Anyone 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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<sup>53</sup> 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. DFC 87 IV 13, OERTLY v. PUBLIC PROSECUTOR OF THE CANTON OF ZURICH), in recent years the Court has increasingly anonymised 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 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. Therefore, Swiss legal culture is also defined by the mechanisms and concepts it utilises to manage, coordinate and mediate these pluralities, whose most important element is the practice and tradition of federalism<sup>2</sup>. For example, the idea of the Swiss “*Willensnation*”, i. e. a nation which rests on their members will, a nation by will,<sup>3</sup> was an important conceptual

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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.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/7ARN-UVSH](https://perma.cc/7ARN-UVSH)).

2 As a survey see PAOLO DARDANELLI, Federal Democracy in Switzerland, in Michael A. Burgess / Alain-G. Gagnon (eds.), *Federal Democracies*, London / New York 2010, pp. 142, p. 145 and *passim*.

3 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; ID., *Coping with deviance: Swiss nationhood in the long nineteenth century*, *Nations and Nationalism* 17(4) 2011, pp. 756-774, ([doi.org/10.1111/j.1469-8129.2011.00518.x](https://doi.org/10.1111/j.1469-8129.2011.00518.x)); see also ANTOINE CHALET, *Switzerland as a ‘fractured nation’*, *Nations and Nationalism* 17(4) 2011, pp. 738-755, ([doi.org/10.1111/j.1469-8129.2011.00520.x](https://doi.org/10.1111/j.1469-8129.2011.00520.x)); for a survey on the current academic debate on the identity of Switzerland as national-state or multinational state see MARC HELBLING / NENAD STOJANOVIĆ, *Switzerland: challenging the big theories of nationalism*, *Nations and Nationalism* 17(4) 2011, pp. 712-717, ([doi.org/10.1111/j.1469-8129.2011.00516.x](https://doi.org/10.1111/j.1469-8129.2011.00516.x)).

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 because it is perceived to be a particular strong device of expressing the will of the people.<sup>4</sup> 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 can be discussed here.

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 those 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.

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4 As an outline with perspective on economic policy see for example LARS P. FELD / GEBHARD KIRCHGÄSSNER, Direct Democracy, Political Culture, and the Outcome of Economic Policy: a Report on the Swiss Experience, *European Journal of Political Economy* 16(2) 2000, pp. 287-306 (doi.org/10.1016/S0176-2680(00)00003-3).

## 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>5</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.<sup>6</sup>

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5 The Federal Charter of 1291, Preamble; the English translation follows the proposal by the *Bundesbriefmuseum*, [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/WB95-DKAD](https://perma.cc/WB95-DKAD)). On this charter and the current debates about it see ALBERT WINKLER, *The Federal Charter of 1291 and the Founding of the Swiss State*, *Swiss American Historical Society Review* 50(3) 2014, pp. 33–50 ([perma.cc/GC9R-XHXX](https://perma.cc/GC9R-XHXX)).

6 As a survey see CLIVE H. CHURCH/RANDOLPH C. HEAD, *A Concise History of Switzerland*, Cambridge 2013 (6<sup>th</sup> printing 2017), pp. 23–25, p. 42. In more depth see: MICHAEL BUTLER, *The Politics of Myth: The Case of William Tell*, in: William Collins Donahue / Scott D. Denham (eds.), *History and Literature: Essays in Honor of Karl S. Guthke*, Tübingen 2000, pp. 73–90, pp. 74 and *passim*; RANDOLPH C. HEAD, *William Tell and His Comrades: Association and Fraternity in the Propaganda of Fifteenth- and Sixteenth-Century Switzerland*, *The Journal of Modern History*, 67(3) 1995, pp. 527–557 ([perma.cc/8E35-BF2X](https://perma.cc/8E35-BF2X)).

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 present in regions without strong royal or noble dominion,<sup>7</sup> as a basic means of social and moreover political self-organisation, which enjoyed binding force by virtue of autonomously created legal normativity.

Sworn unions, public peaces, and covenants were also key instruments in developing further coordination and cooperation in the in the area corresponding to present-day Switzerland<sup>8</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<sup>9</sup>. Secondly, several so-called charters (*Briefe*), whose validity was based on the idea of sworn union (*coniuratio*) and public peaces (*Landfriede*)<sup>10</sup>, consolidated the organisational structures of the emerging confederacy: the

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7 For a very short, but coherent survey see KARL UBL, Corporate Order, in: Brill's Encyclopedia of the Middle Ages (doi.org/10.1163/2213-2139\_bema\_SIM\_033682).

8 For an outline of this period in Swiss history see ROGER SABLONIER, The Swiss Confederation, in: Christopher Allmand (ed.), The New Cambridge Medieval History, vol. 7, Cambridge 1998, pp. 645-670, www.cambridge.org (doi.org/10.1017/CHOL9780521382960.033).

9 RANDOLPH C. HEAD, Shared Lordship, Authority, and Administration: The Exercise of Dominion in the Gemeine Herrschaften of the Swiss Confederation, 1417-1600, Central European History 30(4) 1997, (cit. HEAD, Shared Lordship, Authority, and Administration), pp. 489-512 (doi.org/10.1017/S0008938900015636).

10 As a case study see RANDOLPH C. HEAD, Fragmented Dominion, Fragmented Churches: The Institutionalization of the Landfrieden in the Thurgau, 1531-1610, in: Archiv für Reformationsgeschichte—Archive for Reformation History 96 (2005), pp. 117-144 (doi.org/10.14315/arg-2005-0107).

Treaty on Clerics 1370 (*Pfaffenbrief*)<sup>11</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 territorial closure found a typical normative concretisation. The Sempach Treaty of 1393 (*Sempacherbrief*)<sup>12</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 Verkommnis*) between Uri, Schwyz, Unterwalden, Luzern, Zurich, Glarus, Zug, and Bern, as well as Freiburg and Solothurn confirmed the former conventions.<sup>13</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.<sup>14</sup> 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>15</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>16</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

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11 CHURCH/HEAD, p. 31.

12 CHURCH/HEAD, p. 33.

13 CHURCH/HEAD, pp. 58; SABLONIER, pp. 662.

14 SABLONIER, pp. 660–661; CHURCH/HEAD, pp. 74–79.

15 On the latter aspect see HEAD, Shared Lordship, Authority and Administration, pp. 489.

16 As a survey see SABLONIER, pp. 656.

*of the city by themselves*".<sup>17</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>18</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<sup>19</sup>. 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.<sup>20</sup> 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 Pfäfers, which it has from ancient times on all things, over people and goods*".<sup>21</sup> In reality, however, *Offnungen* usually represented the result of negotiations about claims, duties, and rights between all participants, and were largely based on consensual action.<sup>22</sup>

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17 Original: Züricher Richtebrief 1304, Introduction, II.21, in: Daniel Bitterli (ed.), Die Rechtsquellen des Kantons Zürich, Neue Folge, Erster Teil, Erste Reihe, Erster Band, Basel/Zürich 2011, [www.ssrq.ch](http://www.ssrq.ch) (perma.cc/68ND-6ATQ), p. 1: „*Hie vahet an das buoch der gesezeden der burger von Zurich ... Djise 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.*“

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18 First Sworn Compact, *Erster Geschworener Brief* 16th 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 ban und sol dar zu Zurich in die stat niemer mere komen*“.

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19 As an outline see HERBERT KALB, Customary Law, in: Brill's Encyclopedia of the Middle Ages (dx.doi.org/10.1163/2213-2139\_bema\_SIM\_033739).

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20 SIMON TEUSCHER, Lords' Rights and Peasant Stories: Writing and the Formation of Tradition in the later Middle Ages, Philadelphia 2012.

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21 Original: SIBYLLE MALAMUD / PASCALE SUTTER, 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, Basel 2013, No. 8, pp. 6, [www.ssrq.ch](http://www.ssrq.ch) (perma.cc/6DJJ-QU5S), p. 7: „*Dis sint des gotzhuses von Pfäfers rehtungen, die es von alter behebt an allen sachen, uber lüt und über güt*“.

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22 On the whole issue see SIMON TEUSCHER, Lords' Rights and Peasant Stories: Writing and the Formation of Tradition in the later Middle Ages, Philadelphia 2012.

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 (not only) 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.<sup>23</sup>

The “sumptuary law” (*Sittenmandat*) represented a particularly widespread type of legislation during the 16<sup>th</sup> and the 17<sup>th</sup> centuries.<sup>24</sup> 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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23 As general survey see WILHELM BRAUNEDER / DIETHELM KLIPPEL, Legislation, in: Encyclopedia of Early Modern History Online (dx.doi.org/10.1163/2352-0272\_emho\_COM\_020129).

24 GIORGIO RIELLO / ULINKA RUBLACK (eds.), *The Right to Dress: Sumptuary Laws in a Global Perspective*, c.1200-1800, Cambridge 2019 (doi.org/10.1017/9781108567541).

# 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>25</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>26</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 mechanisms.<sup>27</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>28</sup> At the same time, public services in

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25 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, [www.oxfordscholarship.com](http://www.oxfordscholarship.com) (doi.org/10.1093/acprof:oso/9780198723059.001.0001). 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.

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26 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 ([perma.cc/SF3K-FCWM](http://perma.cc/SF3K-FCWM)).

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

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28 See the contributions in: Jose Luis Cardoso / Pedro Lains (eds.), *Paying for the Liberal State, The Rise of Public Finance in Nineteenth-Century Europe*, Cambridge 2010, [www.cambridge.org](http://www.cambridge.org) (doi.org/10.1017/CBO9780511845109).



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>29</sup> Given the spatial limitations of this essay, 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>30</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; *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>31</sup> The new state adopted

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

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

31 MARK LERNER, *A Laboratory of Liberty: The Transformation of Political Culture in Republican Switzerland, 1750-1848*, Leiden/Boston 2012 (doi.org/10.1163/9789004214644).

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>32</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>33</sup> It was indicative of the restorative intention of this treaty that 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>34</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

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32 Constitution of the Helvetic Republic of 12 April 1798, Article 1 II; Original: “*Esgiebt 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.*”

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33 Original: Bundesvertrag zwischen XXII Cantonen, 7<sup>th</sup> August 1815, in Offizielle Sammlung der das Schweizerische Staatsrecht betreffenden Aktenstücke, der in Kraft bestehenden Eidgenössischen Beschlüsse, Verordnungen und Concordate, und der zwischen der Eidgenossenschaft und den benachbarten Staaten abgeschlossenen besonderen Verträge, Zurich 1820, ([perma.cc/2EMX-T5NY](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.*”

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

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>35</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>36</sup> A result of these confessional antagonism was to a certain extent also represented by the Federal Constitution of 1848,<sup>37</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.

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35 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.”

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

37 The Federal Constitution of the Swiss Confederation, September 12, 1848 with Article XLI and XLVIII as amended January 14, 1866, Bern 1867 ([archive.org/details/federalconstitu00switgooq](http://archive.org/details/federalconstitu00switgooq)).

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>38</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. 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 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>39</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

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38 Adopted on 29<sup>th</sup> May 1874, see for the English text [www.servat.unibe.ch \(perma.cc/ZZD6-ATDW\)](http://www.servat.unibe.ch/perma.cc/ZZD6-ATDW).

39 For an overall account MATTHIEU LEIMGRUBER, *Solidarity without the State? Business and the Shaping of the Swiss Welfare State, 1890-2000*, Cambridge 2008/2009 (doi.org/10.1017/CBO9780511497094).

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 parliamentarian 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 authorized to issue rules “if necessary in divergence from economic freedom”.<sup>40</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

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40 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”.

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>41</sup> by *prevention* emerged in the Swiss Federal Constitution (thus beyond mere 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>42</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.

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41 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 Considerations*, in: *Rechtsgeschichte—Legal History* Rg 25 (2017), ([doi.org/10.12946/rg25/020-044](https://doi.org/10.12946/rg25/020-044)), pp. 20, pp. 29, p. 34 with further references.

42 See chapter on Constitutional Law, pp. 113.

### 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 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 repubblica e cantone del Ticino*], Civil Law Code in Zurich 1853–1855 [*Privatrechtliches Gesetzbuch*], and it 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. Basically, 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 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 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

# History of International Law

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# I. Introduction

This chapter aims to provide an overview of the peculiarities of Switzerland's contribution to the history and development of international law, considering the origins of Switzerland's place within the international community today.

Switzerland is one of the most prominent states in terms of hosting international organisations and NGOs. The international community values Switzerland's role as a mediator, due to its long-standing international policy of neutrality: under the Peace of Westphalia of 1648, Switzerland's independence was recognized by the European powers. Further, after the Napoleonic wars, at the Congress of Vienna in 1814/1815 and within the Treaty of Paris (20 November 1815), the perpetual neutrality of Switzerland was formally recognised by the wider international community. Switzerland also enjoys a positive international reputation, stemming from its humanitarian commitments, which first began to take shape during the 19<sup>th</sup> century. But what has been most critical in determining Switzerland's international position as it stands today?

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> centuries. The first development to be discussed is the dissemination of 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 were key here: he made an essential contribution to the evolution of modern international law (II.2.) The second development was the emergence of international humanitarian law in Switzerland in the 19<sup>th</sup> century, which led to Swiss pre-eminence in this field. First, the creation of the International Committee of the Red Cross by, among others, HENRY DUNANT will be discussed (III.1.). Then, the efforts of Zurich-born lawyer JOHANN CASPAR BLUNTSCHLI towards codifying international law and his founding of the Institute of International Law (Institut de Droit International) with GUSTAVE MOYNIER will be addressed (III.2.).

## II. Theories of Natural Law and the 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. It achieved significant 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 THOMASIUS, 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 the law of nations theories circulated. The most critical 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 no actual “school” within the natural law movement, with the term “*école*” historians are referring to the common ideas shared by those authors who, during their careers as professors and editors, played a crucial role in the dissemination of natural law theories. Moreover, the term reflects that the abovementioned scholars all had a strong inclination towards Enlightenment theories and all lived in Switzerland (particularly in the French-speaking part).

The Huguenot<sup>1</sup> and French citizen JEAN BARBEYRAC was already a well-established natural law scholar when he arrived in Lausanne in 1711. He was renowned throughout Europe for his widely annotated French translations of SAMUEL PUFENDORF’s significant 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

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1 A Huguenot was “*A French Protestant of the 16<sup>th</sup> and 17<sup>th</sup> centuries. Largely Calvinist, the Huguenots suffered severe persecution at the hands of the Catholic majority, and many thousands emigrated from France*” (Source: Oxford Dictionary, [perma.cc/Z6YD-DDGH](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 the law of nations. He held

arriving in Lausanne, BARBEYRAC also translated the writings of RICHARD CUMBERLAND as well as HUGO GROTIUS' "The Rights of War and Peace", translated 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 based on his notes. BURLAMAQUI's notebooks (cahiers) provided the basis for some other scholars to publish pieces that expanded on his natural law theory. One such scholar was FORTUNATO BARTOLOMEO DE FELICE (1723-1789), who was a former Catholic priest and professor in Rome and Naples. He fled to Bern in 1757, converted to Protestantism then became a central 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 Diderot and d'Alembert's *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. Here, DE FELICE incorporated some of BURLAMAQUI's unpublished thoughts, gathered from the latter's notebooks on natural law. DE FELICE also included his own comments and analysis within these publications.

## 2. Emer de Vattel and his *The 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. During his study in Geneva,

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the first European chair in natural law and the law of nations in Heidelberg in 1661. BARBEYRAC translated PUFENDORF's 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 iure belli ac pacis*: Courtin vs Barbeyrac, *Translation Studies*, 5(1) 2012, pp. 33 ([doi.org/10.1080/14781700.2012.628811](https://doi.org/10.1080/14781700.2012.628811)).

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.

he had become acquainted with natural law, and presumably would have had JEAN JACQUES BURLAMAQUI as his professor. VATTEL had not set out with a solid intention to produce a work on the law of nations. Instead, he had initially only intended to produce 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 subsequently decided to write a more independent work inspired by WOLFF'S theory of the law of nature and nations.

To give some historical context, VATTEL wrote his *The Law of Nations* ten years after the publication of "The Spirit of Laws" ("L'esprit des lois") by MONTESQUIEU and four years before the "The Social Contract" ("Du contrat social") by ROUSSEAU. Nevertheless, his work made a vital contribution to the development of modern international law.<sup>6</sup> The core of VATTEL'S "The Law of Nations" was an emphasis of the tension between the law of nature and the law of nations. He criticised his predecessors for constructing the law of nations from theoretical deductions derived 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 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*, as EMMANUELLE JOUANNET has pointed out. VATTEL focused on the inter-state perspective: he

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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 GOTTFRIED WILHELM LEIBNIZ and IMMANUEL KANT.

6 VINCENT CHETAU, *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.

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.



considered the law of nations as the law governing relations between states. For Vattel, the individual is part of the state's internal sphere.<sup>8</sup> He wrote that 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 picture, thereby perceiving nations as compact entities confronting each other within a distinct sphere of action. International society thus becomes a literal “society” of sovereign, equal, and independent states—each bound by the fundamental obligation of self-preservation.<sup>10</sup> It was Vattel who established the principle that sovereign states are the legal subjects of classical international law.

For Vattel, the norms governing the conduct of sovereign states had a dual origin: norms imposed by natural law and those set by the positive law of nations. Only states “*by virtue of their sovereign will, have the capacity to determine the applicability of international legal rights and obligation*”.<sup>11</sup> In this regard, it can be said that Vattel opened the door to the modern idea of sovereignty.<sup>12</sup> He theorised a law of nations that was very much in line with the state of European society at the time of the Enlightenment, the period within which Vattel was writing.<sup>13</sup> “The Law of Nations” set the benchmark for a new political and legal science and was subject 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 its 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>14</sup>

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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; doi.org/10.1093/law/9780199599752.003.0054), p. 1118. See also EMMANUELLE JOUANNET, *The Liberal- Welfarist Law of Nations, A History of International Law*, translated by Christopher Sutcliffe, Cambridge 2012.

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9 Vattel, p. 67.

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10 JOUANNET, Emer de Vattel, p. 1118.

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11 JOUANNET, Emer de Vattel, p. 1119.

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12 JOUANNET, Emer de Vattel, p. 1119.

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13 JOUANNET, Emer de Vattel, p. 1119.

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14 CHARLES G. FENWICK, *The Authority of Vattel*, in *American Political Science Review*, 7(3) 1913 (doi.org/10.2307/1944965), pp. 395; see also CHETAIL, pp. 251.

### III. The Era of International Humanitarian Law

Throughout the 19<sup>th</sup> century, the Swiss and European legal environment was marked by continuous efforts to codify international law and the development of international humanitarian law. The 19<sup>th</sup> century can genuinely be regarded as the century of international law *par excellence*. During this period, international law began to assume its precise characteristics and a separate legal science began to appear—a distinct subject from diplomacy and natural law. The protagonists pushing the development of this particular subject were international lawyers. A scholar recently wrote:

*“[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; yet they also thought it necessary to spread a new legal science over the world—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>15</sup>

The international lawyers of this century 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. The Holy Alliance in 1815 had laid the ground for the development of a new international order. However, the order of 1815 had to be redesigned in the mid-19<sup>th</sup> century due to the Crimean war, which ended with the agreement of the Paris Treaty of 1856. The key developments in international law during the 19<sup>th</sup> century, in particular those spearheaded by Swiss jurists and thinkers, were the emergence of the international humanitarian law, the creation of the International Law Institute (Institut de Droit International) in 1873 and various attempts to codify international law.

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15 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.

## 1. Henry Dunant and the International Committee of the Red Cross

HENRY DUNANT (1828–1910), a 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 Swiss family. From 1853, he worked in North Africa, overseeing the French colonies' commercial interests. In Algeria, having encountered difficulties with the French authorities, he travelled to meet NAPOLEON III in Italy, where the latter was battling Austrian forces. In 1859, DUNANT arrived in the small town of Solferino and was confronted with the sight of almost 40,000 soldiers lying dead or wounded on the battlefield. 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 due to a lack of knowledge or proper care. In response to this unfortunate situation, DUNANT brought in food, water, and supplies to ensure adequate basic medical aid. He rallied assistance from the local population and made no distinction between the nationalities of the wounded. The term “all brothers” came to represent the rationale for providing impartial medical assistance in armed conflict.

DUNANT recorded his experience in Italy in “A Memory of Solferino”, which he wrote upon his return to Geneva and published in 1862. Within this book, he campaigned for the humane treatment of combatants and the protection of the wounded during warfare. The Geneva Public Welfare Society, chaired by the jurist GUSTAVE MOYNIER, received DUNANT's plea positively and formed 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 to 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 represented.<sup>16</sup>

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

In 1864, the Swiss government called a second conference that resulted in the adoption of the *Geneva 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 were:

- 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>17</sup>



Figure 1: Henri Dunant (1828-1910)<sup>18</sup>

The first Geneva Convention of 1864 regulating the protection of 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 today constitute 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)*. In addition, three Additional Protocols to the Convention were developed: the first two in 1977 and the third in 2005. The second

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17 DIETRICH SCHINDLER / JIŘÍ TOMAN, *The Laws of Armed Conflicts*, Dordrecht 1998, pp. 280.

18 Source: Red Cross and Red Crescent ([perma.cc/A4LD-RTRC](https://perma.cc/A4LD-RTRC)).

Additional Protocol explicitly extends the scope of international humanitarian law to non-international armed conflicts.<sup>19</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>20</sup>

Despite his achievements in the field of humanitarian law, DUNANT's life might be considered somewhat unfortunate. In 1867, his commercial interests in Algeria took a downturn leading to his eventual bankruptcy. Worst of all, he was forced to resign from the Red Cross—the very organisation his ideas had inspired. As a result, he left Geneva in 1867. From 1887 until he died 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.

## 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 de Droit International) in Ghent on 8 September 1873. Presenting itself as an authority on the legal conscience of the civilised world, it aimed to promote the development of international law. It vowed to raise awareness of international law, to solidify its general principles 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 still exists today.<sup>21</sup>

The founders of the Institute, who convened for three days for its development in September 1873 in the Salle de l'Arsenal of 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 BESOBRASSOF (Russia), GUSTAVE MOYNIER (Switzerland),

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19 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.

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

21 More information on the website of the Institute: [www.idi-iil.org/en](http://www.idi-iil.org/en) ([perma.cc/692V-FLTK](https://perma.cc/692V-FLTK)).

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, GUSTAVE MOYNIER and JOHANN CASPAR BLUNTSCHLI, came from Switzerland. These two influential persons will now be discussed in more detail.

### a) **Gustave Moynier (1826-1910)**

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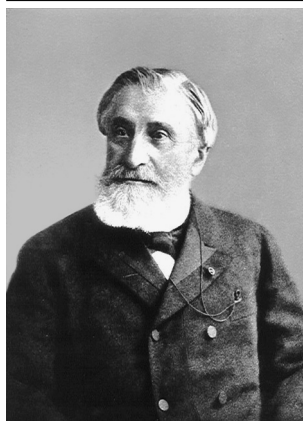


Figure 2: Gustave Moynier (1826-1910)<sup>22</sup>

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GUSTAVE MOYNIER (1826-1910) played a significant role in shaping the foundations of international humanitarian law in two respects. 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 necessary financial independence to allow him to dedicate his time to considerations of public welfare upon his return to Geneva in 1851. MOYNIER's attention had been caught by DUNANT's witness account and associated analysis of the battle at Solferino. He brought DUNANT's vision of institutionalising care for the wounded during armed conflict to the attention of the Geneva Society for Public Welfare. MOYNIER played an active role in the organisation. However, his pragmatic approach eventually clashed with the idealism of DUNANT, leading to the deterioration of their relationship. Ultimately, DUNANT was

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22 Source: Red Cross and Red Crescent ([perma.cc/5V32-X9JZ](https://perma.cc/5V32-X9JZ)).

required to leave the organisation, while MOYNIER remained its president until his death.<sup>23</sup>

Remarkably, considering the 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”). In this draft, he proposed a panel that would decide on potential violations of the Geneva Convention occurring during a war between member states. MOYNIER saw the need to enforce the Convention and suggested the attribution of direct criminal responsibility to perpetrators and the imposition of monetary penalties against belligerent states.<sup>24</sup>

His draft proposal was widely recognised but also heavily criticised. Some lamented the lack of an enforcing authority concerning the proposals. Others did not see the need for a new institution, preferring to adhere to traditional means of bilateral arbitration. Interestingly, following the publication of his draft proposal, MOYNIER himself had a fundamental change of heart. Later, he opposed 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>25</sup>

Aside from the proposal for an international criminal tribunal, MOYNIER also drafted a manual that aimed to codify already existing legal principles of warfare. This *Manual on the Laws of War on Land* was more favourably received, 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>26</sup>

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

24 CHRISTOPHER KEITH HALL, *The First Proposal for a Permanent International Criminal Court*, *International Review of the Red Cross*, 38(322) 1998 ([perma.cc/8MS2-DFWP](https://perma.cc/8MS2-DFWP)), pp. 57.

25 HALL, pp. 57.

26 VON TSCHARNER, pp. 36.

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



Figure 3: Johann Caspar Bluntschli (1808–1881)<sup>27</sup>

JOHANN CASPAR BLUNTSCHLI (1808–1881) was born in Zurich. He attended school there, subsequently moving to Berlin and Bonn to complete his legal studies and eventually gaining 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 substantially influenced BLUNTSCHLI'S work and teaching. Upon returning to Zurich in 1830, he became extraordinary professor in 1833 and then an 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 did successfully. 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 left his hometown to live in Germany. He became a professor in Munich and later Heidelberg and assumed several offices in German political life.

BLUNTSCHLI wrote two significant works of international law:

- The Modern Law of War (Das moderne Kriegsrecht; 1866)
- The Modern International Law of Civilized States (Das moderne Völkerrecht der civilisirten 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

<sup>27</sup> Source: Wikipedia, with reference to: Reproduction from Zurich – Geschichte Kultur Wirtschaft. Gebrüder Fretz, Zurich 1931 ([perma.cc/5KNN-XFGQ](https://perma.cc/5KNN-XFGQ)).



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>28</sup> BLUNTSCHLI and LIEBER maintained contact via intensive written correspondence on various topics, from law to 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 of LIEBER’S Code were expanded upon by BLUNTSCHLI in his 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 demonstrate the legal quality of international law by overcoming the perceived conflict 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>29</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 fundamental law of nations in three general parts:

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

BLUNTSCHLI said of his 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>30</sup>

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28 SILJA VÖNEKY, Francis Lieber (1798-1872), in: Bardo Fassbender / Anne Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford 2012, (doi.org/10.1093/law/9780199599752.003.0058) pp. 1137.

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

30 HERBERT BAXTER ADAMS, *Bluntschli’s Life-Work*, Baltimore 1884, p. 26.

## IV. Conclusion

Switzerland and its jurists, such as EMER DE VATTEL, GUSTAVE MOYNIER and JOHANN CASPAR BLUNTSCHLI, and social activists, like HENRY DUNANT, have played a leading role in the development of international law throughout history. Studying the emergence of international humanitarian law and the theories of international law in their historical context contributes to a deeper understanding of the evolution of international humanitarian law and international law over the centuries.

The political and legal culture and environment in Switzerland from the 18<sup>th</sup> century onwards served as a haven for the free exchange of ideas with no fear of political repercussions: not only for the Swiss natives but also for intellectuals all over Europe. In this sense, Switzerland has been vital in promoting the development of international law through its active role as a state in the international community and by providing a fertile breeding ground for individual ideas.

To this day, Switzerland has maintained this status in the international community, being home not only to the International Committee of the Red Cross based in Geneva but also to Geneva's United Nations Office, the World Trade Organization (WTO), the World Health Organization (WHO), the World Intellectual Property Organization (WIPO) and, among many other important UN programmes, 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 but a few. VATTEL summarised his praise for his native Switzerland in his "The Law of Nations": *"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>31</sup>

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31 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 their 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 the police or, in extreme cases, even military operations launched 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, would 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 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

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

the principle of non-refoulement, a *ius cogens* norm that prevents a country from returning asylum seekers to a country in which they would be likely to face persecution based on race, religion, nationality, membership of a particular social group or political opinion.<sup>2</sup> Is this rule 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.

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2 See Article 33 of the Convention and Protocol relating to the Status of Refugees, 1951 (Geneva Convention), ([perma.cc/Z926-AM4U](https://perma.cc/Z926-AM4U)).



## 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 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 concept 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 some other ethical principle? 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>

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. A very basic framework of this type is created through the Universal Declaration of Human Rights<sup>5</sup> and other human

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

4 See MATTHIAS MAHLMANN, *Rechtsphilosophie und Rechtstheorie*, 6<sup>th</sup> edition, Baden-Baden 2021, paragraph 28.

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

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). 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.

## 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 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 had a transformative effect on important parts of the world in the 20<sup>th</sup> 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 their potential for such far-reaching practical consequences. There must be scrutiny of whether they are actually defensible and their claims must be supported 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 MAX WEBER, whose theory uses a variety of factors as opposed to 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? 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

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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: Piers Beirne / Robert Sharlet (eds.), *Selected Writings on Marxism and Law*, 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).

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).

arriving on Italian shores, boarding a rubber boat in Libya or stranded in a pacific camp on the way to Australia.

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.

Normative theory also enquires into what we owe one another. Do we have 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?

Legal Philosophy asks questions about concrete institutions of the law. Some questions have already been mentioned above: they enquire 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 either too expansive or too limited, and in what area, if so?

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 aspect 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.

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?

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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.).

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? To what extent are privacy rights justified? Is it true that the modern 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 states?

#### 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: 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 interpretation of the law.

There is a very rich body of discussion about this matter: starting in antiquity, pursued in the natural law tradition and continued today. At least the two key areas previously 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 (that which made it necessary to consider relevant theories 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 that those norms that have been enacted following a certain procedure—for example, the idea that 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>

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16 HART, pp. 97.

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

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, following prescribed procedures, and 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 which thus obliges 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.

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?

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

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.

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

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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, [www.ssrn.com \(perma.cc/ZZD3-FKYT\)](http://www.ssrn.com/perma.cc/ZZD3-FKYT).



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 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

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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.

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, [www.oxcon.oup.com](http://www.oxcon.oup.com) (perma.cc/8VT3-8V86).

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 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 withstand 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.

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 the agents enacting them actually believe as such. 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.

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

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25 Corpus Iuris Civilis, Dig. 1.1.10.

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

27 MICHAEL WALZER, *The Spheres of Justice*, New York 1983.

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

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 the maintenance of 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 regarding the distribution of grades. But any inequality has to be reconcilable with the basic equality of human beings, a principle 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 / Andras Sajó (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 conceivable that such a rule could be applied by 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 another, always at the same time as an end, never merely as a means.”*<sup>34</sup>

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>

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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.”*).

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.

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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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 continued 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 the question 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 an ongoing 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 their 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, 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.

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38 For an overview see MAHLMANN, *Mind and Rights*, pp. 80.

Third, normative principles are central: there is no theory of human rights that does not contain them. Principles of justice are important because they clarify why only a system of equal rights is a legitimate system of rights. In addition, principles of obligatory human solidarity and respect for human beings that, in particular, justify our concern for others are of key relevance; 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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**Legal Sociology**

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The purpose of this text is to provide a brief introduction to the discipline of legal sociology in Switzerland. As a first step, legal sociology's place as a discipline within legal science is considered 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 Switzerland's specific form of direct democracy and the constitutional safeguards that are in place to secure it. The case study has arisen from the fundamental effects techno-economic developments have had on 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 became particularly pertinent following the development of Onelog, a joint single sign-on (SSO) option of the SRG and the country's largest media companies, including Ringier, NZZ and TX Group. The SSO requires users to login and thus allows the SRG to benefit from joint user data collection with other media companies and therefore to position itself on the international online advertising market. However, there is some concern regarding its constitutional function in Switzerland.



# I. What is Legal Sociology?

## 1. Discipline

Legal sociology, alongside 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* of the legal realm. Naturally, in the case of legal sociology, this is its relationship with the discipline of sociology. According to EMILE DURKHEIM, one of the principal founders of this social science, sociology is a science that studies social phenomena as *social facts*: that is manners of acting, thinking and feeling in society that can be objectively observed.<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 by an observer who is impartial and not influenced by personal beliefs, attitudes or values. 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: in other words, they are fundamentally concerned with the systematic relationship between various abstract principles, which can be used to reach logical 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.

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: the terms sociology of law, sociological jurisprudence, jurisprudential sociology, law and

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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*, 2<sup>nd</sup> edition, Oxford 1992 (1984), p. 11.

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

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 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: in other words, they must examine the law from a position that is independent from the discipline itself. At the same time, legal sociologists do not content themselves with simply observing and describing the law from an external, sociological perspective; instead, they look to incorporate their findings into the legal system, in order to improve the law’s workings.

The origins of the scientific study of law and society date back to the turn of the 20<sup>th</sup> century when two lawyers, EUGEN EHRLICH (in Europe) and ROSCOE POUND (in the United States), together formulated an argument for the rejection of a formalist conception of the law (where law is encapsulated in a closed and self-sufficient realm of jurisprudence). 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, which is what sociologists are concerned with, the statement that something “ought” to be the case, as the law does, prescribes a normative end. Although it has been more than a century since the pioneers first struggled over the paradox of engaging in a sociological analysis of the law, the distinction between description (“is”) and prescription (“ought”) still presents a methodological challenge to legal sociology today.

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4 ROSCOE POUND, *Law in Books and Law in Action*, *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*, *Harvard Law Review*, 24(8), 1911, pp. 591, p. 594.

## 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 allows the legal sociologist to consider 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 development and overall functioning. The approach is decidedly objectivist; it aims at a value-free observation and description of factual law-related developments, without letting normative preconceptions dictate the outcome. To better understand the operation and effect of the law, legal sociology develops *theories* about social structure and the law's function within a society of ever-growing complexity.

But what exactly is a theory? A theory is generally defined as an abstract scientific idea or model that aims to describe a certain aspect of reality. Further, beyond mere descriptions, a theory normally also attempts to provide explanatory (causal) statements about a given reality. A *social* theory, more specifically, aims to explain social phenomena. To truly meet the definition of a "science", these explanations must be verified through empiric observation. The purpose of using theory in the social sciences is primarily complexity management: a theory provides for a simplified model of the particular social phenomena that the researcher is attempting to observe, describe and test. Without it, the observed social phenomena would be overly complex, and the observation would not be distinct from background noise. It would 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 always having to take account of the world's full complexity in her work. As to the conception of theories, 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. The key difference between the two approaches is that the former attempts to create

a new theory, while the latter is concerned with analysing a theory which already exists.

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. However, the main challenge this discipline encounters relates to the previously discussed 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 of melding the law with the social sciences is a paradox. The route 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. This is necessary to fully understand the social dimension of the legal problems at issue, but a second step is necessary to attempt 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 it is essential if legal sociology is to contribute to the law’s improvement.

## II. Case Study: Law, Society and Direct Democracy

The political system in Switzerland is characterised by a specific form of direct democracy provided for by the Federal Constitution.<sup>6</sup> In the following section, firstly the autonomy of the political system in Switzerland will be analysed from a sociological perspective. Secondly, the societal preconditions of direct democracy in Switzerland will be identified. Third, an assessment of ongoing changes in the media system will provide the empiric basis for a normative analysis of the Constitution's requirement that mass media in general and public service broadcasting contribute to the effective functioning of democracy in Switzerland.

### 1. Political Autonomy

When I refer to political autonomy, I have something particular in mind: the understanding of politics as an autonomous sub-system of society, in the sense of NIKLAS LUHMANN's theory of autopoietic social systems. The term "autopoietic" describes something that reproduces its elements out of its own elements. Autonomy of politics therefore implies that the political system is capable of self-reproduction according to its own political (rather than economic or religious, for example) rules. LUHMANN conceptualises society itself as an *autopoietic social system*.<sup>7</sup> The elements of a social system are communications (as opposed to humans, or the 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 "understanding".<sup>9</sup> In a communication process, the distinction

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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.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/7ARN-UVSH](https://perma.cc/7ARN-UVSH)).

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*, *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.

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

between utterance and information that is made by the first communication is understood by the second one. While an utterance is an act of expression, information refers to the distinction between the act of the expression and its content. Similarly, the existence of a system implies a distinction between the system itself and the environment it belongs to. 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 (the function of which is to generalise normative expectations), both legislation and constitutions provide for important mechanisms of *structural coupling* between the two systems. Statutes are simultaneously important in law and politics. Through legislation, the law prescribes the form that statutes must have. Politics, on the other hand, uses statutes 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 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. For example, a newly adopted statute that compels the courts to fundamentally shift from their previous jurisprudence. A constitution is a second mechanism of 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’s constitution thus provides “*political*

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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.

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.

*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”. When applying these terms in the context of LUHMANN’s theory of social systems, the terms articulate self-descriptions of the political system at different junctures in the process of societal differentiation. In this sense, the first stage (the bourgeois state) describes an absolutist rule where there is “*a sovereign state power with a monopoly on coercive force as the sole source of legal authority*”.<sup>16</sup> The second stage (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 between executive and judicial powers leads to the taming of the administrative apparatus; individuals can go to court to seek the protection of their liberties. 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

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

14 SANDRA BRAMAN, *The Autopoietic State: Communication and Democratic Potential in the Net*, *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.

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, checked and publicised 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 (Swiss citizens have been participating in mandatory referendums on constitutional amendments since 1848, in optional referendums on statutory amendments since 1874 and in popular initiatives 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 resources that need to be renewed continuously and indefinitely. Of these 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 vibrant 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*

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18 HABERMAS, pp. 360.

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



*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 "enlarged mentality" (*erweiterte Denkungsart*) to describe an individual's capability to consider a problem from the perspective of an adversary, in addition to his own. 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 of including the adversary's perspective in one's own considerations is a key precondition for rational discourse and any form of democratic politics. Education is of primary importance in ensuring that cultural resources are maintained and developed. 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 of a given ballot topic. Citizens receive the education necessary for making competent decisions about such challenging issues from a minimum set of public guarantees at various stages 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 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 continuously 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 the role 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

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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), 3<sup>rd</sup> book, 18<sup>th</sup> chapter.

21 IMMANUEL KANT as quoted in JÖRG PAUL MÜLLER, *Die demokratische Verfassung*, 2<sup>nd</sup> edition, Zurich 2009 (2002), p. 91 (translation by the author).

and powerful effect” on the decision-making of the public in a democratic society.<sup>22</sup> Moreover, the Court stresses television’s importance in strengthening pluralism within such a society.<sup>23</sup> Accordingly, the duties of the Swiss radio and television system regarding “education”, “cultural development”, “free shaping of opinion” and “entertainment” as listed in Article 93 II Constitution must be interpreted from a pro-democracy perspective. When implementing these four goals, radio and television must take into account 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 listed as means to reach these goals (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 help secure a generally accessible and diverse offering of the high-quality information that people need 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 original context—what prevents these new stories, images, and non-facts from becoming an adequate substitute for reality and factuality?”<sup>24</sup>*

Her answer: it is, above all, philosophers, scientists and artists, independent historians and judges as well as journalists who are responsible for ensuring adherence to facts, working according to an “existential mode of truth-telling”.<sup>25</sup> Indeed, combating political lies with diligently researched and checked facts is one of the most important duties of journalism.<sup>26</sup>

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

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23 ECtHR, *Schweizerische Radio- und Fernsehgesellschaft and publisuisse SA v. Switzerland*, App no 41723/14, 22 December 2020, paragraph 81.

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

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25 ARENDT, p. 259.

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

In order to assist their decision-making, citizens in a direct democracy depend significantly on the mass media distinguishing between factual accounts and the opinions of the newspaper or broadcaster's own collaborators and guest contributors. For ARENDT, if opinions are formed based on facts, then facts and opinions are no antagonists. 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>27</sup> The problem for journalism is that facts are expensive to research and check; thus, it can be tempting for the mass media to respond to the current economic pressure by replacing hard facts with (cheap) opinions.<sup>28</sup> When facts are upstaged by unfounded opinions it is inevitable that the credibility of the mass media suffers—as the transatlantic concern with “fake news” or “*Lügenpresse*” demonstrates.<sup>29</sup> Deflated citizens retreat into their “echo chambers” where any news is trustworthy as long as it is shared between like-minded people.

Although scandal has always played a role in the economy of the mass media, the factual basis of news has ultimately remained the touchstone of professional journalism. Is this about to change under conditions of online blogs and social media? Selected by personalisation technologies, outrageous or scandalous posts appear on top of a Facebook user's newsfeed (for example) because they are most likely to match the type of information that had previously attracted her attention, based on previous activities and searches.

CASS SUNSTEIN is one of the earliest and most prominent critics of content personalisation technologies, identifying commercialisation of freedom, echo chambers and fragmentation of public spheres among the technology's main social costs.<sup>30</sup> A number of scholars have challenged his thesis as being too negative<sup>31</sup> and SUNSTEIN himself refined his analysis in later publications.<sup>32</sup> There are certainly gains from personalisation technologies: for example, personalised medicine in the realm of healthcare or recommender systems in private entertainment. Whether the social effects of online content personalisation are positive or negative depends, on balance, on the state of social and

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27 ARENDT, p. 238.

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28 GARTON ASH, p. 195.

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29 See, for example, The Economist, America's alt-right learns to speak Nazi: “*Lügenpresse*”, 2016 ([perma.cc/3SPQ-S9YX](https://perma.cc/3SPQ-S9YX)).

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30 CASS R. SUNSTEIN, Republic.com 2.0, Princeton 2007.

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31 For an overview, see CHRISTOPH B. GRABER, The Future of Online Content Personalisation, in University of Zurich, i-call Working Paper Series, 2016 ([dx.doi.org/10.2139/ssrn.2847008](https://dx.doi.org/10.2139/ssrn.2847008)), pp. 8–9.

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

legal institutions in a given democracy. It is essential to have, as an antidote to echo chambers and political fragmentation, a system of generally accessible public education and a media system providing for impartial and reliable information. With regards to the media, this is confirmed by the University of Oxford's Reuters Institute for the Study of Journalism, which provides the most comprehensive ongoing comparative survey of news consumption in the world. The survey's 2019 edition, which covered more than 75,000 people in 38 national markets and six continents, demonstrates that people living in democratic states where quality news brands are prevalent have greater trust in the media, and the spread of populism and the danger of political fragmentation and polarisation is reduced.<sup>33</sup>

### 3. Public Service Broadcasting

As mentioned above, the Constitution provides that public service broadcasting (PSB) is 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 radio and television to further democratic goals may be striking to a foreign, particularly non-European, observer.<sup>34</sup> Before elaborating on the legal framework behind public service broadcasting under Swiss law and discussing potential future developments by virtue 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 sourcing information, 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

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33 NIC NEWMAN et al., Reuters Institute Digital News Report 2019, 2019 ([perma.cc/22PZ-NPHS](https://perma.cc/22PZ-NPHS)); ANNE SCHULZ, Where Populist Citizens Get the News: An Investigation of News Audience Polarization Along Populist Attitudes in 11 Countries, *Communication Monographs*, 86(1), 2019, pp. 88-111.

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

offers from the Swiss mass media. Young people in particular very much focus their Internet media consumption on those global sources. According to the 2020 Media Quality Yearbook of the Research Institute for the Public Sphere and Society at the University of Zurich (*“Forschungszentrum Öffentlichkeit und Gesellschaft”*),<sup>35</sup> social media (mostly accessed through smartphones) are the main source of information for 34% of 18- to 24-year-olds. Only an alarmingly small 48% of 18- to 24-year-olds consider journalistic independence crucial—which lends some explanation as to why the main news source of that age group is social media.

Google (mainly via its ownership of YouTube) and Facebook (including WhatsApp and Instagram) cooperate with the global media corporations and disseminate their content on their platforms. According to a representative survey involving over 2000 Internet users in Switzerland, 36% of users already consume their news via Facebook. These findings explain why Swiss media companies are now cooperating with the social media giant. It is commuter newspapers and tabloids rather than quality newspapers that dominate the Swiss-origin media currently available on Facebook.

Empiric research confirms that there is an ongoing migration of advertising revenues to the Internet in general and the large platform sites in particular. Advertising revenue is thus 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.

Recent surveys confirm that those who frequently use quality news brands including 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.

As a preventive 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 based on 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. As a solution, they are joining

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35 FORSCHUNGSZENTRUM ÖFFENTLICHKEIT UND GESELLSCHAFT / UNIVERSITÄT ZÜRICH, Jahrbuch Qualität der Medien, Basel 2020 ([perma.cc/EVA6-9V3Z](https://perma.cc/EVA6-9V3Z)).

forces with partner companies. In 2020, the SRG, Ringier, NZZ and TX Group started a login alliance called Onelog. Its purpose is to establish an alliance between Swiss media companies which are utilising targeting technologies. Targeting technologies shall increase user attention online and thus contribute to levelling the playing field on the advertising market—a market that is dominated by global players including Facebook, Google, Amazon, or Alibaba. The SSO option allows the involved media companies to collect detailed information about the online behaviour of their customers, mutually share that data and benefit from the knowledge gained in the use of targeting technologies.

### **b) Personalisation Technologies**

The SRG so far seems to limit the login requirement to its streaming app “Play Suisse”, thus making the SSO subject to voluntary opting-in for the rest of its services. The establishment of Onelog nonetheless raises the principal question of whether the SRG’s use of personalisation technologies would be reconcilable with the broadcaster’s public service remit as defined by Swiss law.

Machine learning, data mining, data analysis and other techniques of artificial intelligence 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>36</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 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 set out above, 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. By virtue of the economic and cultural particularities of Switzerland, different options for implementing this public mandate are possible. In 2014, under the order of a parliamentary committee, the Swiss

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

Government published a report which reflected on structural change in the media sector in Switzerland and considered its effect on the media sector's fulfilment of the constitutional public service mandate (considering radio and television in particular). This reflection was paralleled by political pressure from right-leaning groups demanding an open debate about the institutional implementation of the public service mandate. In 2016, partially in response to these pressures, the Swiss government produced a further report reviewing the definition of public service broadcasting and analysing the relationship between private electronic media and the SRG in fulfilling the public service mandate. These reports and debates show that there is a general awareness amongst policymakers of the ongoing structural change in the media system and its potentially far-reaching consequences. However, so far there is no consensus on how politics should respond to this issue. In 2018, a majority of 71.6% of the citizens and all cantons voted against a popular initiative that wanted to abolish the compulsory levy which serves to finance the SRG and public broadcasting in Switzerland. Although there was considerable critique of the SRG (including their expansionist business practices and the excess of shallow entertainment available on their service) 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>37</sup>

Accordingly, there is a strong likelihood that the current institutional setting will continue to prevail for the next couple of years. This setting legally obliges 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 (authorised with a licence and partly financed via the broadcasting levy) provide their services mainly at local and regional levels.

Article 24 Radio and Television Act<sup>38</sup> sets out the SRG's comprehensive public service mandate. First, the SRG must meet high quality standards as regards the news and other produced content. The SRG must also ensure that its programmes are able to reach the entire Swiss population. Further, the public service broadcaster must advance cohesion between different regions and cultures in Switzerland. In this regard, the SRG is required to contribute to linguistic exchange between language regions and to financially equalise

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37 See the article "Attack on public broadcasting licence fee clearly fails" on Swissinfo, 4 March 2018 ([perma.cc/L28R-YXQ3](https://perma.cc/L28R-YXQ3)).

38 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.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/MVZ5-DMQ5](https://perma.cc/MVZ5-DMQ5)).

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 the availability of quality programmes across Switzerland. This model ensures 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: 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 335 per household per year.

If Swiss law justifies the SRG's privileged position by pointing to the mandate that the broadcaster fulfils in promoting democracy and cohesion, then it is of primordial importance that the SRG's content reaches the entire population. The personalisation of content could potentially conflict with these stipulations. The SRG should provide a counter-balance to the risks of political fragmentation and polarisation and ensure that high quality content reaches the entire population in Switzerland.

The fundamental challenge for the SRG will be to educate young people on the importance of quality media in ensuring the future of democracy and cohesion in Switzerland, and to persuade them that the public service broadcaster guarantees reliable information. To achieve this, the SRG will need to further 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 strategies intended to expose young audiences to perspectives that are qualitatively distinct from those encountered on social media and to enable them to recognise quality media?



### III. Summary

Legal sociology is an empirical 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 subsequently that a change of perspective occurs, from objective description to normative prescription. Accordingly, the legal sociologist wears two hats: the hat of a social scientist who observes law from an external sociological perspective and the hat of a jurist who ponders 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 affects the interaction between law and society and the functioning of direct democracy in Switzerland. The selection of news via personalisation technologies and other forms of artificial intelligence potentially interferes with the concept of direct democracy, which presupposes that citizens are competent to take their own 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 key resource that direct democracy needs for its reproduction are citizens who are capable of forming their own independent opinions on the many political issues they are supposed to consider at the ballot box. According to the Constitution, two institutions are primarily responsible for enabling citizens to meet the requirements of this task: first, a system of generally accessible public education and second, 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 to fulfil its public service mandate: to guarantee high quality and diverse information and to contribute to cohesion between the different cultures in the country. The SRG can only discharge this duty if its programmes can reach the entire population. Personalisation of content—a potentially tempting business strategy in the ongoing competition (with global platform corporations) for user attention—would most likely contradict this aim. However, further research on content personalisation and a consideration of how this technology could be utilised 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

## 1. History and Overview

Until 1848, the ancient Swiss cantons 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 create the Swiss Confederation, agreed under pressure from the then predominant European powers during the reorganisation of Europe at the Congress of Vienna. At the same congress, the other European states officially recognised the borders of the Swiss Confederation and its neutrality.

In 1847, a civil war broke out in the Swiss Confederation, in which the (predominantly liberal) Protestant cantons fought against the (predominantly conservative) Catholic cantons. The conflict erupted after the Catholic cantons founded a separate alliance (*Sonderbund*), which the Protestant cantons considered a violation of 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, a new Constitution was put into force, although various Catholic cantons opposed both its content and the entire concept of the creation of a new federation. The new Constitution created a modern federal state. Enumerated policy areas fell under the competence of the Confederation, 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 at the federal level. Three separate branches of government were established: the Federal Assembly (the legislative branch) and the Federal Council (the executive branch) as permanent institutions, and the Federal Supreme Court as an ad hoc institution (the judicial branch). In part, the new Constitution was 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;

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1 ALEXANDER MISIC / NICOLE TÖPPERWIEN, *Constitutional Law in Switzerland*, 2<sup>nd</sup> edition, Bern 2018, 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.

under this instrument, citizens could request a binding vote on federal acts which the parliament planned to enact. Further, the 1874 overhaul established the Federal Supreme Court as a permanent court. The army was also 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, there were several revisions to the Constitution. The competences of the federal level were gradually enhanced. Moreover, the concept of direct democracy thrived: 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 rights).<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 and to provide a clear structure, without making any substantial changes to its content. The new text came into force in 2000 and is the version in force today.<sup>3</sup> It contains all the typical elements of a federal state's modern constitution (short of providing for the constitutional review of federal acts).

Constitutional law and practice in Switzerland are heavily influenced by international law. A prime example of this is the impact 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 interpretation. However, despite Switzerland's traditionally friendly, inclusive approach towards international law, the Constitution continues to promote 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 8,700,000 inhabitants. 6,490,000 of these inhabitants are Swiss citizens. The rest—i.e. 26% of the population—are foreign nationals; a very significant proportion. Moreover, 330,000 persons commute across the

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2 See below, pp.133.

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

4 See the chapter on International Relations, pp.137.



borders to and from Switzerland, often on a daily basis. 780,000 Swiss citizens live abroad.

The national languages of Switzerland are German (the first language of 62% of the population), French (23%), Italian (8%) and Romansh (0.5%).

### a) Swiss Citizens

Citizenship in Switzerland is based on the concept that a citizen has three citizenships: communal, cantonal and Swiss (Article 37).<sup>5</sup> These citizenships are connected: in particular, cantonal and communal citizenships are prerequisites for Swiss citizenship. Swiss law permits dual citizenship, i.e. being both a citizen of Switzerland and a citizen of another country.

Citizenship can be acquired by law or through naturalisation (Article 38). The prerequisites are defined by federal and cantonal law. The minimum requirements are laid out in the Swiss Citizenship Act<sup>6</sup>:

- Swiss citizenship is acquired by law, i.e. automatically, by children who have one parent with Swiss citizenship (Article 1 Swiss Citizenship Act). Thereby, Switzerland follows the principle of *ius sanguinis*.
- Swiss citizenship is acquired through naturalisation, i.e. by an official decree, when an applicant fulfils the requirements stipulated by federal and cantonal law (Articles 9–19 Swiss Citizenship Act). Federal law requires that the successful applicant must be integrated into the Swiss society, be accustomed to the Swiss way of life, have resided in Switzerland for a certain period of time (ten years for adults) and not pose a danger to the national security of Switzerland. The cantons usually require that an applicant speaks one of the canton's official languages and that he or she has resided in the canton for a certain period of time (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 protecting the fundamental rights of those involved, by the electorate in secret ballot votes.<sup>7</sup> A simplified procedure for naturalisation applies to certain foreign nationals: in particular, spouses of Swiss citizens and third generation immigrants.

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5 In this chapter, any reference to an “Article” without specific mention of the Act is a reference to the Federal Constitution of the Swiss Confederation of 18 April 1999 (SR101).

6 Federal Act on Swiss Citizenship of 20 June 2014 (Swiss Citizenship Act, SCA), SR 141.0; for an English version of the Swiss Citizenship Act see [www.fedlex.admin.ch](http://www.fedlex.admin.ch/perma.cc/78TH-QK7W) (perma.cc/78TH-QK7W).

7 See pp. 134.

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). Swiss citizens benefit from the freedom of domicile in Switzerland (Article 24), from the protection against expulsion, extradition and deportation (Article 25) and from diplomatic protection abroad.
- Swiss men have a duty to complete a period of mandatory military service. For women, military service is possible but voluntary (Article 59).

Swiss citizenship can be lost by law, i.e. automatically, or by official decree. It is lost by law, for instance, if 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). Swiss citizenship can be revoked by an official decree if a Swiss citizen, who also possesses another citizenship, seriously violates the interests or reputation of Switzerland, for example (Article 42 Swiss Citizenship Act). These rules are adherent to the international principle that leaving an individual stateless should be avoided.

## **b) Foreign Nationals**

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 provide some explanation for this. First, the economic prosperity of the country has led to a high demand for manpower from abroad. Second, 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. Third, 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.

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. In particular, in 2010, the people and the cantons approved the initiative “for the expulsion of criminal foreign nationals”. This initiative stated that foreign nationals who commit one of the enumerated crimes–

such as homicide, rape, and robbery—or even those who have improperly claimed social insurance or social welfare benefits, will lose the right of residence automatically and must be deported (Article 121 III-VI). The Federal Assembly tried to implement the initiative in a manner compliant with international law; in particular, it included a hardship clause exception to expulsion in scenarios where the individual interest of the foreign national to remain in Switzerland prevails over the public interest in expulsion. Another popular initiative dealing with immigration, entitled “against mass immigration” (“*Gegen Masseneinwanderung*”), was approved by the people and the 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 121*a* and 197 No. 11). Read as a whole, these provisions are obviously directed at 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. In response, 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, in that it leaves these people—26% of the population, paying taxes as Swiss citizens do—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 the right to vote at cantonal and communal levels if certain conditions are met.

### 3. Fundamental Rights

The Constitution contains a comprehensive catalogue of fundamental rights, starting with the right to 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). Article 35 mandates that fundamental rights must be respected throughout the entire legal system. Individuals can invoke them against state authorities and private persons are bound by them when they

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8 See the chapter on International Relations, pp. 137.

exercise a state function. Finally, fundamental rights must be considered by the state, where appropriate, in its regulation of relationships between individuals. This includes the obligation to draft new laws and interpret existing laws in a manner that is compatible with fundamental rights (the so-called indirect third-party effect). For instance, marriage and family law is to be shaped and interpreted consistently with the right to marry and to have a family (Article 14). However, Article 36 makes it clear that guaranteed rights do not apply in an absolute manner. Restrictions are possible if 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 protect fundamental rights. In some cases, the protection offered goes beyond that in the Federal Constitution. For instance, Article 15 of the Constitution of the Canton of Zurich guarantees the right to found, organize and attend private educational institutions.
- International treaties are highly relevant for the protection of fundamental rights in Switzerland. Most importantly, the European Convention on Human Rights (ECHR) has been attributed a quasi-constitutional status by the Federal Supreme Court.<sup>9</sup>

Individuals can directly invoke fundamental rights which are guaranteed by the Federal Constitution before administrative authorities and the courts. For example, such rights can be invoked in cases where the courts or administrative authorities are reviewing cantonal laws or decisions. 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, which mandates that the Federal Supreme Court and the other law-applying authorities apply federal acts and international law. This precludes any possibility of the courts declaring federal acts invalid even if they are shown to be incompatible with fundamental rights guaranteed by the Federal Constitution.<sup>10</sup>

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9 DFC 117 Ib 367.

10 See pp. 130.

## 4. Confederation, 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 Confederation, the cantons and the communes (municipalities). The principle of subsidiarity (Article 5*a*) dictates that the Confederation should only interfere with regulation if the cantons or communes are unable to regulate a particular matter themselves. This arrangement helps to preserve the societal, linguistic and cultural diversity throughout the country. The people are encouraged to participate in political debates and decision-making at the cantonal and communal level. Further, the federal bicameral parliamentary system ensures that the cantons participate in the law-making process at the federal level.<sup>11</sup> The cantons are also involved in any revision of the federal Constitution: the Constitution cannot be revised without the approval of a majority of the cantons.

Overall, the above arrangements ensure that the Swiss federal system has a unique “bottom-up” character.<sup>12</sup> Simultaneously, it is acknowledged that the federal level and the cantons shall cooperate and support each other in the fulfilment of their duties (Article 44). An essential element in achieving this goal is the use of national equalisation payments, both between the individual cantons and between the Confederation and the cantons. These payments contribute to the promotion of internal cohesion (Article 2 II). In 2021, they have thus far amounted to more than CHF 5 billion.<sup>13</sup>

The characteristic features of the three levels of government are the following:

- The Confederation is composed of both the people and the cantons (Article 1). Competences must be assigned to the Confederation by the Constitution (Article 42). These competences are enumerated largely in Articles 54-125. Federal law takes precedence over cantonal and communal law (Article 49). This remains the case even where the Federal Assembly passes acts which, according to the Constitution, are outside its competence.<sup>14</sup>

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11 See pp. 123.

12 HALLER, n. 92; s. also MISIC/TÖPPERWIEN, n. 289.

13 Federal Department of Finance, Factsheet: National Fiscal Equalization (NFA), 2021 ([perma.cc/5ZDY-D8EU](https://perma.cc/5ZDY-D8EU)).

14 See pp. 130 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>15</sup> Zurich is the canton with the biggest population, with 1,560,000 inhabitants, while the Canton of Appenzell Innerrhoden is the smallest, counting just 16,300 inhabitants. Despite differences in size and population, all cantons are equal in respect of their legal status. The cantons possess all competences which have not been assigned to the federal level (Articles 3 and 42). Cantons are also able to conclude inter-cantonal agreements amongst themselves (Article 48).<sup>16</sup>
- The third level of government is made up of some 2,170 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 the size of the communes differ greatly. The Commune of Zurich is the biggest, counting some 422,000 inhabitants; the Commune of Bister (Canton of Valais) is the smallest, counting only 33 inhabitants. The level of autonomy given to the communes is determined by the cantons (Article 50). The communes organise decision-making in communal matters—such as local taxes, local police, primary education and planning of land use—themselves.

Over the last few decades, the federal system has come under increasing pressure in various ways. First, there has been an ongoing shift of competences from the cantons to the federal level.<sup>17</sup> Second, Switzerland's growing tendency to enter into and rely on international treaties often contributes to a tacit neutralisation of cantonal competences. The various bilateral agreements with the EU provide an example of this, such as the harmonisation of the mutual recognition of professional qualifications based on the Agreement on the Free Movement of Persons. Accordingly, to ensure that the cantons retain some influence over the conclusion of treaties which may affect their powers, consultation and cooperation between the different layers of government is even more important today than in the past. Third, there is some controversy over the principle that all cantons have an equal standing in votes on the revision of the Constitution. This rule does not quite fit with the principle that all Swiss citizens are equal and possess one vote each. In reality, a citizen of the Canton of Uri possesses a voting power which is almost 40 times weightier

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15 The six half-cantons—Appenzell Ausserrhoden and Appenzell Innerrhoden; Basel Stadt and Basel Landschaft; and Obwalden and Nidwalden—are known as “half-cantons” because they originated from internal divisions in the three cantons Appenzell, Basel and Unterwalden.

16 See, for example, the chapter on Criminal Procedure, pp. 431.

17 HALLER, n. 65.

than the voting power of a citizen of the Canton of Zurich. This inequality is a consequence of the deliberate choice to create a Confederation which consists of both the people and the cantons.

## 5. Federal Assembly, Federal Council, Federal Courts

At the federal level, the separation of powers between the branches of government is guaranteed (in order to ensure a system with the necessary checks and balances):

- The Federal Assembly is the legislature (Articles 148-173). 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 population. Currently, the Canton of Zurich has 35 seats, while six cantons have only one seat (e.g. Appenzell Innerrhoden). In each canton, the proportional representation electoral system is used. The Council of States consists of 46 members. Generally, each canton is represented by two delegates (whereby half-cantons delegate one person). 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). It consists of seven members (councillors) who are elected by the United Federal Assembly for a term of four years. In 2013, the people and the cantons rejected an initiative which proposed that councillors would be elected directly by the people. Re-elections are possible and routine; there have in fact only been four instances in which councillors have not been re-elected since 1848.<sup>18</sup> The various geographical and linguistic regions of the country are usually represented. Moreover, all major political parties are represented based on a tacit agreement

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18 HALLER, n. 300.

between the major parties.<sup>19</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 (Foreign Affairs; Home Affairs; Justice and Police; Defence, Civil Protection and Sport; Finance; Economic Affairs, Education and Research; Environment, Transport, Energy and Communications). The Federal Council decides on the objectives of government policy, thereby ideally 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 in Switzerland (Articles 188–191c). 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, 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 or Administrative Courts.<sup>20</sup> The independence of the judges 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 parliamentary groups (*Fraktionen*) are the Swiss People’s Party (SVP) with 62 seats, the Social Democratic Party (SPS) with 48 seats, the Centre Group (the former Christian Democratic People’s Party, together with the EVP and the BDP) with 44 seats, and the Liberal group (FDP) with 41 seats. These four groups are also represented in the Federal Council.<sup>21</sup> The federal judges are also elected based on party membership. The combination of judges’ party membership along with their relatively short term of office (six years) means that they face more scrutiny than judges in other jurisdictions, where judges may have longer terms of office but do not face the possibility of periodic re-elections.

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19 See pp. 128.

20 See pp. 130 for the limited extent of constitutional review in Switzerland.

21 See pp. 128.



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

## II. Principles

The Swiss political system is characterised by certain particularities which distinguish it from theoretical models of political systems and from those systems which exist in other states.

### 1. (Semi-) Direct Democracy

Swiss citizens are regularly called upon to vote on specific political issues. Their decisions are legally binding. On the federal level, popular initiatives and referenda are the relevant instruments. Accordingly, the Swiss system is often termed a semi-direct democracy, combining elements of a representative system with strong direct democratic elements.<sup>22</sup> In addition, the cantons and communes are free to set up their own systems and methods for further facilitating 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 138-139b). In order for the popular initiative to be implemented, a majority of the people and cantons have to approve it.

Any 100,000 eligible voters may make a general or specific proposal to revise the Constitution. The time period for the collection of these 100,000 signatures is 18 months from the official publication of the initiative. The drafters are free to choose an appropriate title, as long as it is not misleading. Accordingly, drafters tend to label initiatives with lurid titles in order to “sell” them on the political market. In 2013 an initiative “against rip-offs” was approved, introducing a cap on the salary a CEO and other members of the executive board of a company can earn, in order to combat excessive earnings.

Initiatives must not violate peremptory norms of international law (*ius cogens*, Article 139 III). The initiative entitled “enforcing the expulsion of criminal foreign nationals” of 2016 fell foul of this standard. It was declared partially invalid by the Federal Assembly.

Traditionally, popular initiatives have been launched by minorities or interest groups on issues the established political parties do not want to take

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22 See for the societal preconditions upon which the Swiss model of direct democracy depends the chapter on Legal Sociology, pp. 100.

up in parliament. In recent years, political parties have begun to take recourse to initiatives themselves, by-passing the classic parliamentary process. The constitution provides for the Federal Assembly to submit a counter-proposal to an initiative if it so wishes; 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 draw up 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.

The people and the cantons have become more willing to approve popular initiatives over the last twenty years. Out of the 25 initiatives which were approved since the creation of this instrument in 1871, 13 were approved of after 2002. Amongst these were various initiatives which were incompatible with international law; a problematic development.<sup>23</sup>

## **b) Referendum**

A referendum allows citizens to vote on a constitutional revision, a federal act, or an international treaty (Articles 140-142). Two types exist in Switzerland:

- A mandatory referendum: 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 emergency acts not based on a constitutional provision, the majority of the people and the cantons must approve the proposal.
- An optional referendum: this can be requested by 50,000 citizens against, in particular, the enactment of a federal act and the conclusion of an international treaty. To request such a referendum, the required 50,000 signatures must be collected within 100 days of the official publication of the act or treaty. Here, solely the people's vote is decisive; approval by the cantons is not necessary.

Since 1874, when the optional referendum was introduced, 200 referenda have been held. In 116 votes, the people approved the act or treaty in question: e.g., in 2002, an act which legalised abortions during the first twelve weeks of pregnancy was approved (Article 119 Swiss Criminal Code). In 84 votes the acts or treaties were dismissed: e.g., in 2014, the people rejected the Federal Act on the purchasing of new military airplane fighters (Gripen).

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23 See pp. 130 and the chapter on International Relations, pp. 150.

The existence of the referendum in Switzerland modifies the representative system. It is the main instrument of control of the Federal Assembly and compensates for the lack of a fully-fledged parliamentary opposition.<sup>24</sup> It forces the Federal Assembly to take into account the concerns of as many political parties and stakeholders as possible to ensure that the proposal can survive a possible referendum. Effectively, the citizens of Switzerland themselves become a key opposition to the Federal Assembly. Thus, the Swiss “referendum democracy” is often also referred to as “consensus-oriented democracy”.<sup>25</sup>

### c) “Landsgemeinde” as Cantonal Particularity

The cantons are free to choose their own models to ensure 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 revisions of the cantonal Constitutions, the enactment of cantonal laws, and elections. Pending issues are openly debated. Votes and elections are held in public by hand-raising. Usually, the votes are counted by the estimation of the chairman or chairwoman.

From a legal viewpoint, the *Landsgemeinden* are controversial. Open voting conflicts with the right to submit a secret vote (Article 34). Citizens who are unable to attend—such as elderly or ill people or people with professional commitments—are excluded from exercising their political rights. Still, the Federal Supreme Court has held that these restrictions do not amount to a violation of the Federal Constitution.<sup>26</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>27</sup> The strongest party selects the prime minister and forms the government, occasionally together with other parties as a coalition.

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24 HALLER, n. 7.

25 PATRICIA EGLI, Introduction to Swiss Constitutional Law, 2<sup>nd</sup> edition, Zurich / St. Gallen 2020, p. 65; MISIC/TÖPPERWIEN, n. 26, 97; HALLER, n. 227.

26 DFC 121 I 138.

27 HALLER, n. 238 et seq.

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 and in the aftermath of the introduction of the referendum in 1874 and the popular initiative for a partial revision of the Constitution in 1891, 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) (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 FDP, the SPS, and the CVP and of one member of the 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 SVP gained one seat; they now have two members in the Federal Council, to the detriment of the CVP which has only had one seat since then.<sup>28</sup> Both the FDP and the 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 of legislation 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 potential referendum. The collegiate system of a multi-party government is an essential part of the Swiss "concordance democracy".<sup>29</sup>

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 debate over the pros and cons of the Swiss model is resurrected, and the public watches the resulting commotion in the Federal Palace with fascination. Nevertheless, it seems likely that the magic formula will continue to form the basis for the composition of the Federal Council, although

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28 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). Moreover, in 2021, the Christian Democratic People's Party (CVP) has been renamed The Centre, when it merged with the Conservative Democratic Party (BDP).

29 HALLER, n. 227; EGLI, p. 97.

perhaps in future its composition will more readily adapt to actual developments with respect to the popularity of the parties.

### 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 and decisions invalid if they are incompatible—is a characteristic of most European legal systems. In Switzerland, however, the courts are restricted in their review of federal acts (Article 190). Therefore, federal acts must be applied even if they violate the Constitution.

Essentially, the Federal Assembly interprets the Constitution when enacting federal laws. This includes making an assessment as to whether federal acts are compatible with fundamental rights and whether the Federal Assembly is empowered by the Constitution to enact legislation in a specific policy area. The allocation of competences and responsibilities in this manner was a deliberate choice, approved by the people and the cantons. Attempts to introduce constitutional review of federal acts by the judiciary have repeatedly failed to gain political support.

The drawbacks of this system are obvious. For example, the Federal Assembly is not best placed to guarantee fundamental rights, acting as it does through majority voting. A recent example of an act which is to some extent incompatible with fundamental rights is the Federal Act on Police Measures to Combat Terrorism, which was nonetheless approved by the people in a referendum in 2021. At least there is some protection offered by the practices of the Federal Supreme Court which compensates for the deficiencies in the protection of fundamental rights:

- The Federal Supreme Court consistently interprets federal acts in a manner which is compatible with fundamental rights, thereby adhering to the method of interpreting the law in conformity with the Constitution.<sup>30</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>31</sup> By doing so, the Federal Supreme Court puts pressure on the Federal Assembly to remedy the deficiencies.

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30 See e.g. DFC 137 I 351.

31 See e.g. DFC 136 I 65.

- The Federal Supreme Court accepts cases in which it is called upon to review federal acts in terms of their compatibility with the ECHR.<sup>32</sup> The possibility for citizens to directly invoke their rights under the ECHR before the Federal Supreme Court 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 in that individual's situation.

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>33</sup> Indirectly, this case law again influences the law-making process at the federal level, as the Federal Assembly can understand and take into account what the court will likely regard as constitutionally unacceptable.<sup>34</sup>

#### 4. Excursus: The COVID-19 Pandemic

In February 2020, the COVID-19 pandemic hit Switzerland. Shortly thereafter, the Federal Council decreed measures to combat the pandemic. The measures included: border checks; the closing of schools, shops, restaurants, bars, and leisure and entertainment facilities; the prohibition of public gatherings; the obligation to work at home, and the introduction of short-term support payments for employees and emergency loans for businesses. In part, these measures were based on the Epidemics Act.<sup>35</sup> They were also partially based on Article 185 III which empowers the Federal Council to issue ordinances and decisions to counter threats of serious disruption to public order or internal or external security.

The COVID-19 pandemic and its handling by the authorities brought four key constitutional issues to the forefront. First, the political system in Switzerland is based on consensus and integration.<sup>36</sup> Unfortunately, this particularity comes at the price of less centralised—and therefore in some respects

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32 DFC 125 II 417; see the chapter on International Relations, p. 153.

33 See pp. 133.

34 HALLER, n. 569.

35 Federal Act on Combating Communicable Human Diseases of 28 September 2012 (Epidemics Act, EPA), SR 818.101 ([perma.cc/TL9T-S9YU](https://perma.cc/TL9T-S9YU)).

36 See pp. 128.

weaker—leadership and accountability, features which are critical in a state of emergency.<sup>37</sup> Second, the Federal Assembly suspended its sessions after the Federal Council declared the “extraordinary situation”. It left the Federal Council entirely alone to deal with and respond to the pandemic. It was only in August 2020 that the Parliament issued the COVID-19 Act in which it approved the measures taken by the Federal Council.<sup>38</sup> The role which the Parliament has played in combating the pandemic and its repercussions has, arguably, remained too marginal. Third, there was a somewhat tense relationship of cooperation between the Federal Council and the cantons. At times, the latter criticized the rigid measures enacted by the former. However, the cantons were not able to come up with tailor-made policies on their own. It might be that, in this respect, federalism has ultimately been weakened by the pandemic. Fourth, the courts have played only a marginal role during the pandemic. This is puzzling as many of the measures imposed severe restrictions on fundamental rights. One potential reason for the courts’ lack of involvement is that ordinances enacted by the Federal Council cannot be challenged as such (Article 189 IV). Moreover, at least some of the measures enacted by the Federal Council based on the Epidemics Act have since been “immunised” by the Parliament’s COVID-19 Act (cf. Article 190).<sup>39</sup>

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37 Cf. also JOHANNES REICH, Switzerland, in: Richard Albert et al. (eds.), 2020 Global Review of Constitutional Law, I-COConnect-Clough Center, 2021, pp. 293, p. 295.

38 Federal Act on the Statutory Principles for Ordinances of the Federal Council on Combating the COVID-19 Epidemic of 25 September 2020 (COVID-19 Act), SR 818.102 ([perma.cc/3DGS-6P3U](https://perma.cc/3DGS-6P3U)).

39 See for the limited constitutional review exercised in Switzerland p. 130.



### III. Landmark Cases

Although the Federal Supreme Court's powers are limited with respect to constitutional review of federal acts, it takes an active role in protecting fundamental rights, as the following two cases demonstrate.

#### 1. Women's Suffrage<sup>40</sup>

In 1989, a woman named THERESA ROHNER requested that the cantonal authorities allowed her to participate at the *Landsgemeinde* of the Canton of Appenzell Innerrhoden. The cantonal authorities rejected her application: Article 16 of the cantonal Constitution did not grant political rights to women. 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 asked the Federal Supreme Court to 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. It determined that the exclusion of women from the cantonal electorate violated the clause on equal treatment of men and women (now Article 8 II). 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 the Federal Constitution. Consequently, the Canton of Appenzell Innerrhoden was required to grant political rights to women. 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 some men) for equal treatment regarding political rights. On the federal level, women had already been granted full

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40 DFC 116 Ia 359.

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 (now Article 136). The Canton of Appenzell Inner-rhoden was the last canton to follow suit. Frustratingly and somewhat depressingly, the male electorate of the canton was not ready to introduce women's suffrage itself. Rather, the Federal Supreme Court had to step in.

## 2. Naturalisation and Fundamental Rights<sup>41</sup>

In 2000, the electorate of the Commune of Emmen (Canton of Lucerne) was called upon to decide on 23 applications for naturalisation through a ballot vote. The people voted in favour of the naturalisation of only eight applicants, who were all Italian citizens. All applications by citizens of ex-Yugoslavian countries were rejected. Some of them had been born in Switzerland and had always lived here. Four 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. 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). In particular, the prohibition of discrimination applies (Article 8 II). 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 in such circumstances; negative decisions must be backed up with adequate reasoning (Article 29 II). This right to be heard will therefore be violated *per se* in cases in which the electorate decides on naturalisation in a secret ballot vote: no justification for a negative decision is delivered in such a process. As such, it is no longer permissible for applications for naturalisation to be decided 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 shed some further light on the requirements in this area. 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.<sup>42</sup> Today, a significant number of communal electorates retain the

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41 DFC 129 I 217.

42 See e.g. DFC 129 I 232; DFC 130 I 140; DFC 135 I 49; DFC 139 I 169.

competence to decide on the naturalisation of foreign nationals; the estimated figure is approximately 800 communes.

Not everyone was satisfied with the Federal Supreme Court's judgement: in 2008, the 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 rejected the initiative. Instead, the Federal Assembly codified the basic elements of the Federal Supreme Court's case law in the Federal Act on Swiss Citizenship (Articles 15-17).

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Matthias Oesch

# International Relations

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# I. Treaties

Switzerland has traditionally adopted 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, therefore, that Switzerland participates in numerous international organisations and treaty networks. Today, Switzerland's membership in the United Nations (UN) is the foundation to Switzerland's international relations. Switzerland is also a member of various other international organisations and treaty networks, which cover almost every conceivable policy field: for example, 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 is the European Convention on Human Rights (ECHR), which has been attributed a quasi-constitutional status by the Federal Supreme Court.<sup>1</sup> Switzerland is not a member of the North Atlantic Treaty Organisation (NATO); however, it does participate in Partnership for Peace (PfP), a NATO programme of practical bilateral cooperation between individual Euro-Atlantic partner countries and NATO.

Despite its location at the heart of the continent, surrounded by three of the six founding members of the European Economic Community (EEC), Switzerland is not a member of the European Union (EU). Still, maintaining close and stable relations with the EU and its member states is of significant importance to Switzerland.

## 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 to co-operate on the international level. Its outreach, both in terms of its membership and the variety of subjects which it has the competence to deal with, is unrivalled by any other international organisation. Currently, its membership encompasses 193 member states. Various programmes, funds,

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1 See the chapter on Constitutional Law, pp. 119.

and specialised agencies also operate under the UN, each having their own membership 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 headquarters of the UN in Europe are at the Palais des Nations, in Geneva, which was originally built to house the League of Nations, the predecessor of the UN (1920-1946).

Switzerland did not join the UN until 2002. The accession process was instigated by a popular initiative; the people and the cantons approved of the accession. 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> It has 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, being a member of the Security Council would not compromise Switzerland's policy of neutrality.<sup>3</sup>

## 2. Trade and Investment

The World Trade Organization (WTO) sets out the basic legal framework for international trade. It was founded in 1995 as the successor to the General Agreement on Tariffs and Trade (GATT) of 1947 and, in terms of its aims and objectives, largely followed in the latter's footsteps. 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 GATT of 1994 (also embracing various side-agreements, on issues such as technical barriers to trade, agriculture,

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2 Federal Department of Foreign Affairs (FDFA; [perma.cc/3RCP-RK CJ](https://perma.cc/3RCP-RK CJ)).

3 For more detail on Switzerland's policy of neutrality, see p. 148.



safeguards, antidumping, 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 also allowing members 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 can render binding rulings (albeit, currently, the Appellate Body's proper functioning is seriously put into question given the United States' practice of blocking the appointment of new judges). 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 GATT 1947. It had become a member of the GATT in 1966 (having applied its rules de facto since 1960). Subsequently, when the WTO became its successor in 1995, Switzerland was an original member. Since then, the WTO has provided the backbone to Swiss external economic relations. Under the WTO, Swiss companies can profit from binding market access rights abroad. Further, Switzerland can actively participate in WTO dispute settlement proceedings as a complaining or defending party. It has participated in such proceedings twice to date. In 2002/2003, it was a complaining party in the US – Steel case.<sup>4</sup> Switzerland is also a complaining party in a case which was initiated against the US in 2019, also concerning additional tariffs on steel products.<sup>5</sup>

Aside from WTO agreements, Switzerland has also concluded a series of free trade agreements with countries all over the globe.<sup>6</sup> In addition to the European Free Trade Association (EFTA) and the Free Trade Agreement with the EU, Switzerland currently has a network of 32 free trade agreements with 42 partners. In practice, Switzerland has tended to enter into free trade agreements alongside its EFTA partners Norway, Iceland, and Liechtenstein; examples include 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

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4 See pp. 157.

5 US – Certain Measures on Steel and Aluminium Products, WT/DS556, pending.

6 State Secretariat for Economic Affairs (SECO; [perma.cc/7C7N-PGGN](https://perma.cc/7C7N-PGGN)).

also entered into agreements on its own; this was the case for Switzerland's agreements with Japan, China, and the United Kingdom. The main objective of free trade agreements is not just 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, to avoid being at a comparative disadvantage to competitors in the EU. Another potential example is the possible (although currently highly unlikely) conclusion of the Transatlantic Trade and Investment Partnership between the EU and the US (TTIP) which would result in even clearer disadvantages for Swiss companies vis-à-vis their competitors in the EU; Switzerland would again have to act to attempt to level the playing field.

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

### **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 this may compromise its position of neutrality, independency, and autonomy in external trade matters. However, in 1948 Switzerland did join the Organisation for European Economic Co-operation (OEEC), which had the key purpose of administering the European Recovery Program (Marshall Plan), as an original member at its creation. In 1961, the OEEC was renamed the OECD, and both its mandate and membership broadened substantially. As for 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 today, 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. In 1974, it also ratified the ECHR. In 1972, Switzerland and the EEC concluded a Free Trade Agreement which has provided 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) which was renamed as the Organisation for Security and Co-operation in Europe (OSCE) in 1994. In 1992, the people and the cantons rejected the proposal of Switzerland's accession to the European Economic Area (EEA). Thereafter, Switzerland has focused, *faute de mieux*, on concluding sectoral treaties with the EC/EU, combined with the policy of adapting Swiss law autonomously to EU law. This approach—the Swiss model of European integration, so to speak—has proven successful.

## **b) Bilateral Agreements**

Together with the Free Trade Agreement of 1972, the two sets of bilateral agreements of 1999 and 2004 (the “Bilaterals I” and the “Bilaterals II”) provide the basic legal framework for Swiss-EU relations. 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 Switzerland from “cherry picking”; in particular, the EU 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 (Schengen/Dublin, taxation of savings, fight against fraud, trade in processed agricultural products, MEDIA, environment, statistics, pensions of former EU officials, and education and youth programmes). The Bilaterals II do not contain a guillotine clause; it is only the Schengen/Dublin association agreements that share a common fate. The main agreements are supplemented by over 100 other (secondary) agreements. Institutionally, the agreements fail to provide for anything further than the classic tools of diplomacy. Dispute resolution under such agreements is therefore effected via various specified mixed committees, with decisions made by consensus.

Since 2004, only a few new agreements have been concluded, amongst them an agreement on customs facilitation and security which substantially revised an older version (1990/2009), an agreement on the cooperation of competition authorities (2013), and an agreement on the linking of the EU and Swiss trading system for CO<sub>2</sub>-equivalent emission allowances (2017). Switzerland is also a member of 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 for Swiss representatives to be integrated into EU transgovernmental structures. It ensures that Swiss representatives remain informed on ongoing developments and can have some influence on matters, mainly by relying on the power of the pen (“decision shaping”). Naturally, they do not possess voting rights (and thus cannot be formally involved in “decision-making”).

The Swiss people and the cantons have repeatedly affirmed the Swiss model of European integration, by voting in favour of the conclusion of those bilateral agreements, which were put to a referendum, and rejecting popular initiatives to the contrary.<sup>7</sup> However, a problematic situation arose in 2014, when the people and the cantons approved the initiative “against mass immigration” (“*Gegen Masseneinwanderung*”). According to the initiative’s newly introduced Articles 121a and 197 No. 11 Constitution,<sup>8</sup> Switzerland shall control the immigration of foreign nationals autonomously, by introducing annual quotas and granting Swiss citizens priority on the job market. Treaties which contradict these provisions must be renegotiated and amended. Shortly after the approval of the initiative, the EU made it clear that it was not willing to renegotiate the Agreement on the Free Movement of Persons, which as set out above is part of the Bilaterals I. Against this background, the Federal Assembly decided to implement the initiative in a way that ensured it would not violate this agreement.<sup>9</sup> In the context of Swiss-EU relations, this outcome has been welcomed. However, from a constitutional law perspective, it is problematic. The wording of the provisions introduced with the initiative is clear, and the implementing legislation fails to reflect this properly. However, notably, the people and the cantons rejected the initiative “for moderate immigration” (“*Begrenzungsinitiative*”) in 2020, which would have required the termination of the Agreement on the Free Movement of Persons had it been successful. Thereby, the people and the cantons arguably implicitly confirmed the Federal Assembly’s implementation of the initiative “against mass immigration”.

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7 See pp. 150.

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

9 See for the supremacy of this agreement over Swiss law pp. 155.

Since 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 to ensure their correct interpretation and application, and dispute resolution. An institutional agreement would apply to both existing and future market access agreements which are based on EU law. In 2014, Switzerland and the EU commenced negotiations. In 2021, however, Switzerland decided to end the negotiations without signing the draft text. The Federal Council identified substantial differences between Switzerland and the EU as the cause of the breakdown of the negotiations. Switzerland's decision here is regrettable. It could be advantageous for Switzerland to have the increasingly complex treaty network established on a new, clearer basis: this would enhance legal security, transparency, and efficiency. The institutional agreement envisaged by the EU would give both the EU and Switzerland a right to bring disputes before a juridical body (under the proposed draft text, this body would be an arbitration panel which would have to involve the European Court of Justice if a dispute concerned the interpretation of EU law). Switzerland would not depend exclusively on the goodwill of the EU in resolving disputes as is the case today. With no institutional agreement, the EU is no longer prepared to update the existing agreements on a regular basis. Nor is it conceivable to conclude new market access agreements, (e.g. an agreement on electricity and an agreement on financial services). The result is an erosion of the highly valued bilateral approach; no appealing prospect!

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

Alongside the tight network of bilateral agreements, Switzerland 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>10</sup> Of course, it remains entirely possible for Switzerland to deviate from EU regulations and directives. In reality, however, this is only done where there are cogent political or economic reasons for doing so.

Overall, the policy of autonomous adaptation has led to the systematic adoption of EU law. Autonomous adaptation is typically utilized for legislation

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10 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 (BBl 1988 III 249; own translation).

concerning technical regulations and standards, data protection, and financial markets. It has been estimated that 40-60% of all federal acts and ordinances are directly or indirectly influenced by EU law; this is certainly no insignificant proportion. Notably, today the autonomous adaptation of Swiss law to EU law is no longer limited to legislation with cross-border significance. Accelerated by spill-over effects, EU law has infiltrated the Swiss legal order across the board.

## 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 competences of the 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.

### 1. Goals and Means

The Constitution specifies the goals which Switzerland shall pursue in its international relations. These goals in part reflect Switzerland's self-interest as a state, although there are also provisions directing the authorities to act altruistically (Preamble, Articles 2 IV, 54 II and 101 I Constitution). For example, it is stated 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 are 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, found its way into the transitional provisions (Article 197 No. 1 Constitution).

Switzerland's constitutional goals are framed in rather abstract terms. Therefore, in practice it falls to the relevant authorities to use their discretion to concretise them when deciding 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 considered in the context of free trade agreements. The Constitution provides no real guidance in this context. There was in fact some debate over the issue when Switzerland negotiated and concluded its Free Trade Agreement with China in 2014. There was concern that such an agreement could lead to human rights violations, if the principle of free trade was

relied upon as an end in itself. The eventual result of these concerns and resulting negotiations was an agreement that reaffirms both parties' commitment to respect selected fundamental rights and "fundamental norms of international relations" in the Preamble and is supplemented by a side-agreement on labour and employment.

Some argue that the concept of neutrality also amounts to a guiding principle of Swiss foreign policy. Back in 1815, at the Congress of Vienna, the then predominant European powers recognised the neutrality of the Swiss confederation. This status has been reaffirmed several times since, 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>11</sup> Rather, neutrality is used as one of many instruments to achieve the above-mentioned goals.

## 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. In exercising its treaty-making power, the federation can end up dealing with policy areas which internally would fall within the cantons' domain. Therefore, when dealing with such matters, the federal authorities are obliged to protect the interests of the cantons 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, however, the increasing reliance on 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, such as cantonal police, recognition of professional qualifications, and public procurement. Accordingly, to ensure that the cantons' interests are not ignored or undermined, consultation and cooperation between the different layers of government is 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

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11 ALEXANDER MISIC / NICOLE TÖPPERWIEN, *Constitutional Law in Switzerland*, 2<sup>nd</sup> edition, Bern 2018, n. 24; WALTER HALLER, *The Swiss Constitution in a Comparative Context*, 2<sup>nd</sup> edition, Zurich / St. Gallen 2016, n. 2, n. 71 et. seq.



(KdK) which helps coordinate the efforts of the cantons to pool their interests and speak with one stronger, louder voice.

The cantons are also competent to independently conclude international treaties in areas which fall under their remit, provided 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 Supreme Court**

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>12</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 Federal Assembly's right of participation (Article 184 Constitution). The Federal Council 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 with limited scope on its own. This competence arises, inter alia, where a treaty does not establish new obligations for Switzerland or where a treaty primarily concerns the authorities and technical administrative issues (Article 7a of the Government and Administration Organisation Act).<sup>13</sup>
- The Federal Assembly participates in shaping foreign policy and supervises the maintenance of good foreign relations (Article 166 Constitution). Its agreement is a necessary condition for the conclusion of treaties (unless the Federal Council has capacity to do so on its own). However, the Federal Assembly can only approve or reject a signed treaty in toto. Therefore, particularly in the case of "package deals" (such as the accession to the WTO),<sup>14</sup> the Federal Assembly realistically has no choice other than

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12 See the chapter on Constitutional Law, pp. 123.

13 Government and Administration Organisation Act of 21 March 1997 (GAOA), SR 172.010. See for an English version of the act [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/L6NT-ZSMV](https://perma.cc/L6NT-ZSMV)).

14 See pp. 140.

to “wave” a treaty through. This is problematic from a democratic point of view. There is no opportunity for the Federal Assembly to subject the treaty at issue to proper scrutiny, or to suggest necessary amendments. At least, it is mandatory for the Federal Council to consult the Foreign Affairs Committees of the National Council and the Council of States before adopting a negotiation mandate. Further, these committees are periodically informed about ongoing negotiations, to ensure they can meaningfully participate in consultations.

- The Federal Supreme Court acts on appeal, hearing cases decided either by the highest cantonal courts or by other federal courts. As part of this function, it is also sometimes required to interpret international law, thereby shaping the relationship between international law and Swiss law.<sup>15</sup>

The ongoing shift in law-making from the domestic sphere towards the international fora—the latter developed both through treaties and the development of soft law—has led to a readjustment of the power balance between the Federal Assembly and the Federal Council (including the Federal Administration). The increased power of the latter results in the opposite effect for the former. It would therefore be advisable to consider and implement new procedures in international law-making which would allow the thorough participation of the Federal Assembly, as well as cantons and civil society groups, from the preparatory stage to the conclusion of negotiations. Currently, such groups’ ability to participate in the treaty-making process is, from a democratic viewpoint, too limited.

### 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 Switzerland.<sup>16</sup> The instruments are two distinct creations, but have a similarly strong impact on Swiss international relations:

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<sup>15</sup> See pp. 152.

<sup>16</sup> For more information on these instruments, see the chapter on Constitutional Law, pp. 126.

- A popular initiative allows a minimum of 100,000 citizens to demand a vote on a proposed revision of the Constitution (Articles 138-139b 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 Switzerland's accession to the UN, which was approved by the people and the cantons in 2002. This was a positive step forward in terms of Switzerland's integration into the international community. However, over the last decade, an increasing number of initiatives which are incompatible with international law have been approved. 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 such initiatives presents problems. This is particularly the case when the initiatives violate basic norms of international law. For example, 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. 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 for the Swiss authorities to fully implement such initiatives. There have been proposals for reform in this problematic area. For example, there have been calls to introduce a provision requiring a popular initiative to comply with basic fundamental rights, as guaranteed, for instance, under the ECHR, in order to be valid. However, crucially, any revision to this effect would itself require the approval of the people and the cantons, which may pose a real obstacle.<sup>17</sup>
- 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 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 Switzerland's envisaged accession to the EEA, eventually rejected by the people and the cantons in 1992, was conducted under these provisions given its political and economic significance. In

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17 HALLER, n. 597 et seqq.

addition, a so-called “optional” referendum can be requested by 50,000 citizens against the conclusion of an international treaty that: 1. is of unlimited duration and cannot be terminated; 2. provides for accession to an international organisation; 3. contains important legislative provisions or requires the enactment of federal legislation for implementation. The outcome of an optional referendum is determined by the vote of the people; the majority vote 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 by optional referenda. In 2021, the people approved the conclusion of the Free Trade Agreement with Indonesia, albeit with a remarkably close margin of 51.6% of the votes.

When voting on treaty referenda, the people often do not possess a real choice (a situation which somewhat mirrors that faced by the Federal Assembly in the case of “package deals”). Practical constraints and opportunity costs can de facto force the people into approving a treaty. Typical examples of this sort of situation are votes on amendments required to keep the Schengen/Dublin association agreements in line with dynamic EU law, because rejecting such amendments would seriously endanger the fate of the underlying agreements. Therefore, when the people approved the incorporation of Regulation (EC) No 2252/2004 on biometrics in passports and travel documents into the Schengen Agreement in 2008, with 50.1% of the votes, many breathed a sigh of relief; a rejection could have threatened the future of the Schengen Agreement and, by virtue of the guillotine clause previously discussed, that of the Dublin Agreement. The same relief was palpable when the people approved the incorporation of a revision of Directive 91/477/EEC on control of the acquisition and possession of weapons into the Schengen Agreement in 2019, with 63.7% of the votes.

### **3. Relationship Between International Law and Swiss Law**

The federal authorities and the cantons are obliged to respect international law in all their actions (Article 5 IV Constitution). Based on this principle and that known as *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. It has, over the course of decades, set out the following key principles:

- Swiss law follows the monist tradition. Therefore, treaties which have been duly entered into force automatically become part of domestic law. A separate process of incorporation is not necessary.<sup>18</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>19</sup> However, the *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 must be respected in all cases.<sup>20</sup> The *Schubert* exception does not apply to such treaties.<sup>21</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>22</sup>
- One 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>23</sup>
- Individuals can invoke treaty provisions in proceedings before public authorities directly if they are self-executing, i.e. if they confer rights on individuals and are sufficiently clear and unconditional to preclude any need for implementing legislation.<sup>24</sup> Typically, human rights treaties as well as the main bilateral agreements with the EU are directly applicable. However, 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>25</sup> The Federal Supreme Court has also, time and again, refused to directly apply the Free Trade Agreement

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18 See already DFC 7 I 774, a judgment of the Federal Supreme Court of 1881.

19 DFC 99 Ib 39.

20 See pp. 155.

21 DFC 125 II 417; DFC 142 II 35.

22 See DFC 139 I 16.

23 DFC 94 I 669.

24 DFC 124 III 90.

25 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.

with the EU of 1972. This mercantilist approach is controversial; the debate typically turns on the competing interests of ensuring the effectiveness of international law versus maintaining both balanced international legal relations (reciprocity) and the domestic balance of powers. Concerns over the lack of adequate democratic representation in international law-making also typically form part of the debate.

In 2018, the people and the cantons rejected the popular initiative “Swiss law instead of foreign judges (self-determination initiative)” (“*Schweizer Recht statt fremde Richter [Selbstbestimmungsinitiative]*”). The proposed text stated that 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*). The rejection of this initiative was widely welcomed, and rightly so. The idea of establishing a rigid hierarchy between the Constitution and international law oversimplifies the complex interplay between these spheres. The initiative would have endangered both legal security and Switzerland’s reputation as a reliable partner in international relations.

### III. Landmark Cases

The following section examines two key cases which demonstrate Switzerland's interaction with the international community. The first case set out below, 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 Switzerland and the EU (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<sup>26</sup>

The background of this case concerned AA, a citizen of the Dominican Republic, who had been residing in Switzerland since 2002. In the same year, she gave birth to a boy, BA. C, the father of BA, was 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. However, BA was granted a residence permit, derived from his father's right of residence. The authority argued that BA's residence in Switzerland did not mean that AA was entitled to 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 Federal Supreme Court confirmed the decision of the cantonal authority upon appeal. This outcome was not of any particular note. However, the Court made interesting points by way of introduction to its judgment, where it considered and thereby clarified two issues which had been the subject of heated debate following the approval of the popular initiative

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26 DFC142 II 35.

“against mass immigration” (“*Gegen Masseneinwanderung*”, 2014).<sup>27</sup> First, the Federal Supreme Court confirmed that the Agreement on the Free Movement of Persons is to be interpreted in a manner that is compatible with the European Court of Justice (ECJ) case law on EU law provisions on the free movement of persons. Switzerland’s parallel interpretation of the agreement—i.e. an interpretation which follows that of the ECJ—is supported by the Preamble of said agreement which declares that its objective is “*to bring about the free movement of persons (...) 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 (VCLT). There is no explicit obligation on Switzerland to follow ECJ judgements, except in the case of those judgements rendered before June 1999 (Article 16 Agreement on the Free Movement of Persons). However, Switzerland should only follow its own autonomous interpretation if there are cogent reasons to do so. In this judgment, the Federal Supreme Court made it clear that the new Articles 121a and 197 No. 11 Constitution do not constitute such cogent reasons. Thus, it interpreted the Agreement on the Free Movement of Persons in line with the relevant case law of the ECJ 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 considered the relationship 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 said agreement in full knowledge of the legal and political consequences of such an action. Thus, it can be concluded that the *Schubert* exception does not apply to the Agreement on the Free Movement of Persons (as set out above).<sup>28</sup> The Federal Supreme Court based this finding on the fact that said agreement harmonises the legal order (sectoral participation in the common market) by realising a basic freedom, as well as on the fact that EU law is directly applicable in EU member states and claims supremacy over national laws. It was not clear whether these comments were relevant considerations in deciding the case (thus forming part of its *ratio decidendi*) or whether they were *obiter dicta*.

The message from this Federal Supreme Court judgment was 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 in these circumstances,

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27 See p.144.

28 See pp.153.



and the Federal Supreme Court would continue to uphold these rights. In fact, following the ruling, the Federal Assembly implemented the new provisions in a way that ensured the Agreement on the Free Movement of Persons was respected.<sup>29</sup>

Unsurprisingly, the judgment of the Federal Supreme Court has been received controversially. On a positive note, the judgment has enhanced legal security and upheld the reliability of Switzerland in the realm of external relations.

## 2. US Safeguard Measures on Steel Products

In 2002, the President of the United States, George W. Bush, imposed safeguard measures on various steel products. The measures consisted of additional tariffs set at values from 8% to 30% and were intended “to facilitate positive adjustment to competition from imports of certain steel products”.<sup>30</sup> Consequently, some products of foreign steel producers were prevented from entering 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: a tariff quota system intended to limit trade diversion resulting from US protectionism. The EU measures, however, 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 inconsistent with Article XIX GATT 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 consultations between the relevant parties proved unfruitful, a panel was established to examine the matter. The panel determined that the conditions for the imposition of safeguard measures were not met for any US steel product at issue. On appeal, the Appellate Body confirmed the ruling.<sup>31</sup>

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29 See pp. 144.

30 US Presidential Proclamation No. 7529 of 5 March 2002.

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

After the Appellate Body had issued its report, President Bush terminated the safeguard measures. A combination of some of the following reasons were likely relevant to his decision:

- The Appellate Body had 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.
- 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.
- 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 industry than good to the steel-producing industry. Thus, from an economic viewpoint, the termination of the measures was somewhat logical.
- WTO law permits members affected by WTO law-incompatible safeguard measures to apply re-balancing measures.<sup>32</sup> As such, some co-complainants, who participated in the WTO dispute settlement 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>33</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 potentially harmful effects of re-balancing measures taken against the US.

The Swiss delegation was content with the final outcome: Switzerland had successfully relied on WTO law and prevailed over the United States, resulting in the termination of the harmful safeguard measures. However, there

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32 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.

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33 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.

were some caveats. For example, although the US measures were eventually declared unlawful, in the meantime, Swiss steel producers suffered real damage, due to the trade-restrictive measures imposed by both the US and the EU, as well as a loss of market shares, which then had to be tediously regained. In light of this, it is somewhat problematic that the WTO dispute settlement mechanism does not provide for the award of compensation for damage suffered due to unlawful actions.

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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 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 developed through 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, 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 number can vary widely 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.fedlex.admin.ch/perma.cc/7ARN-UVSH](http://www.fedlex.admin.ch/perma.cc/7ARN-UVSH).

## II. Principles of Administrative Action

### 1. Constitutional Principles in Administrative Law

The relationship between constitutional and administrative law may be characterised as one of *mutual influence*. Administrative law and practice give real substance to the meaning of the Constitution. Some constitutional provisions are best understood through the lens of administrative statutes. On the other hand, constitutional principles are essential for the application of administrative law.

### 2. Principle of Legality

#### a) Legal Basis for Administrative Action

The principle of legality (or the rule of law) is prone to many different interpretations. 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).

#### b) Legality of the Law

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 legal basis for the rule must meet *minimal qualitative requirements*: first, the legal basis must not be *unduly vague* and second, *important decisions* must be taken by the *legislator*.

The prohibition of *unduly vague* laws is a commonly accepted principle. The Swiss Federal Supreme Court requires that law must be precise enough to allow citizens to adjust their behaviour and to foresee its consequences.<sup>2</sup>

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2 DFC 146 I 1 c. 3.1.2; DFC 139 I 280 c. 5.1.



For example, may the legislator stipulate that billboards on houses must be “aesthetically satisfying” and leave the concretisation of this rule to administrative agencies and courts? The Federal Supreme Court upheld this legislation, acknowledging that every law by its very nature will contain some vagueness. The Court was also influenced by factors like the limitations of language, the impossibility of regulating every potential future situation, and the need to allow discretion when reaching its decision.<sup>3</sup> The standard of scrutiny is higher in cases which engage fundamental rights.<sup>4</sup> A more deferential standard of judicial review is typical in cases which concern technical areas or foreign policy.

The second requirement is that important decisions must be taken by the legislator. The legislator (and not, notably, the government) must decide on every important aspect of regulation: “*All significant provisions that establish binding legal rules must be enacted in the form of a Federal Act*” (Article 164 I Constitution). For example, court practice has established that fees and levies are significant provisions that must be regulated by the law.<sup>5</sup>

### c) Delegated Legislation

Parliament can delegate legislation to the executive branch. Such legislation can take two forms: 1. purely executive and 2. quasi-legislative. In the first case, legislation merely “fills in the gaps” in the law or defines a broad term 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 II Constitution).<sup>6</sup>

Secondary legislation is considered quasi-legislative if it creates new obligations or rights; in such cases, a delegation clause is required. The delegation clause must fulfil four prerequisites. Firstly, it must not be excluded by the Constitution. Secondly, it must be found in the law itself. Thirdly, it can only regulate precisely predefined and limited areas. For example, the legislator may not leave it up to an administrative body to regulate the way it employs its workers: such a competence is simply too extensive and broad. Finally, the legislator must outline the general features of the regulation. The legislator must decide upon the important issues of the delegated matter. If any of the four prerequisites are not met, then the principle of legality is violated.

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3 DFC 146 I 7 c. 6.2.2.

4 DFC 146 I 11 c. 3.1.2.

5 Cf. DFC 146 II 97 c. 2.2.4.

6 Cf. DFC 141 II 169 c. 3.3.

#### d) Judicial Review

All aspects of the principle of legality can individually be subject to judicial review. For example, a school-boy who is expelled due to his bad behaviour may bring a case claiming that the authorities have no sufficient legal 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.<sup>7</sup> Alternatively, the school-boy may claim that due to its importance, his expulsion must be regulated by the law itself—a challenge that was successfully brought in 2013 against a school regulation restricting the wearing of headscarves.<sup>8</sup>

### 3. Public Interest

The Constitution requires that “*state activities must be conducted in the public interest*” (Article 5 II Constitution). Public interest in a matter may be deduced from the Constitution and Acts of Parliament but is generally quite adaptable as a concept over time. The public interest principle essentially sets the benchmark for the proportionality test, which balances public and private interests.

### 4. Proportionality

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

The principle encompasses a *threefold test* based on the end pursued (which typically must be in the public interest) and the means employed. The means must be: (1) suitable to achieve the end; (2) necessary in the sense that milder means prove inefficient and finally, (3) bearable, i.e. the public interest must outweigh the compromised private interest. All three requirements must be satisfied. For example, restricting helicopter flights from some ports to protect a certain area in the mountains has been found to be “unsuitable” to achieve the aim where that area could easily be accessed through other ports

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7 DFC 129 I 35 c. 7.8 et seqq.

8 DFC 139 I 280.

not falling under the restriction,<sup>9</sup> while a general prohibition on storing medication abroad was found not to be “necessary” when quality could have been guaranteed by having the foreign authorities conduct inspections.<sup>10</sup> Finally, the courts have found that although the public interest in preserving a natural reserve may outweigh the owner’s interest in building houses in its centre, it may be considered “unbearable” for the owners at the border of it.<sup>11</sup>

## 5. Legitimate Expectations

### a) Basis

The protection of legitimate expectations is primarily based on Article 9 Constitution. The most cogent basis for establishing a legitimate expectation is an *administrative contract*. Rights granted under an administrative contract may be “vested” rights, like the right to property. Such vested rights may only be revoked where due compensation is offered.

Substantial protection is also offered if a private party has relied on an *administrative decision*. Administrative decisions are the cornerstone of administrative action and are analysed in detail below. Administrative decisions, by their very definition, serve to clarify and settle a legal situation.

Legitimate expectations may also stem from *misinformation* or *incorrect advice* by the government. The courts require that such advice is provided on an individual basis; general information displayed on the governmental website is not sufficient. However, 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 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.

Finally, no protection arises from *administrative passivity*. In theory, this doctrine means that an illegal situation may never become legal under the doctrine of legitimate expectations. The authorities can still intervene at any time, even where they have tolerated the illegality for decades.

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9 DFC 128 II 292 c. 5.1.

10 DFC 131 II 44 c. 4.4.

11 DFC 94 I 52 c. 3.

## b) Legitimacy of Expectations

Expectations must always be *legitimate* in order to be protected. This will not be the case if the private party was aware that the basis for his expectation 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 that this information was incorrect.<sup>12</sup>

## c) Private Arrangements

Expectations are only protected if arrangements have been made based on them. The protection is usually stronger where significant steps have been taken based on the expectation: for instance, a house which has been built based upon a wrongful building permit (which would qualify as an *administrative decision*). In contrast, the protection of the individual's expectations may be less substantial if only insignificant preparatory work for the house has been executed.

## d) Causality

There must be a *causal link* between the basis for legitimate expectations and the arrangements made based upon this. If the house had been built before the faulty permit was given, there would be no causal link between the permit and the arrangements and no legitimate expectations to be protected.

## e) Balancing Test

Finally, a *balancing* exercise between ensuring the proper application of the law versus protecting the individual's expectations must be performed. It may be that the basis for the expectations is sound and the (causal) arrangements made based on this have been substantial but that this still does not outweigh the advantages of ensuring the proper application of the law. For example, a person who had legitimately relied on a building permit was nonetheless required to demolish his/her house where there was a high avalanche risk in the area: the public interest clearly trumped the financial interests of the owner.<sup>13</sup>

The application of the principle is flexible. Alternative measures can be employed to lessen otherwise harsh effects: for example, allowing for an additional deadline in cases where incorrect instructions on the right to appeal

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12 Cf. for false instructions on the right to appeal DFC 135 III 374 c. 1.2.2.2.

13 See Judgment of the Federal Supreme Court 1C\_567/2014 of 14 July 2015 c. 5.2.

have been provided, or requiring transition periods in cases of abrupt and unexpected changes to administrative practice. Compensation will be considered as a remedy where the expectation was justified but cannot be upheld due to a more compelling public interest (for example, the aforementioned example of the house constructed in a danger zone). However, courts are relatively reluctant to offer compensation.

## 6. Good Faith

The principle of good faith 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 a building permit may violate the individual's legitimate expectations while also acting in a manifestly contradictory manner.

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>14</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.

## 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

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14 Decision of the former Federal Insurance Court (now integrated in the Federal Supreme Court) EVGE 1951, p. 205, pp. 206.

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>15</sup> In any case, the error by the administration must be *manifest*—although, as a former Swiss Federal Supreme Court judge shrewdly put it, there is nothing more arbitrary than the doctrine of arbitrariness itself. The principle is often invoked when there are no more specific grounds at hand to challenge state action (typically for procedural reasons).

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15 DFC 146 II 111 c. 5.1.1.

# III. Forms of Administrative Action

## 1. Administrative Decisions

Administrative decisions can be jocularly considered the Pythagorean Theorem of Swiss administrative law. Administrative decisions stand at the centre of many administrative doctrines. If one understands the notion of an administrative decision, one has 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*.<sup>16</sup> Administrative decisions are *the common form of administrative action: “The power to administer includes the power to issue administrative decisions”*.<sup>17</sup>

Administrative decisions are attractive because they create *legal certainty*. They are also the bridge to—and a prerequisite for—*enforcement*. 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. For example, being granted a licence to run a business provides no guarantee that a new law will not introduce stricter conditions.

However, the courts will not exercise their power to modify administrative decisions if, for example, a private person has just narrowly missed the time limit to file an appeal against the decision. In this respect, administrative decisions have a similar effect to court decisions. If they go unchallenged, they gain legal force. However, administrative decisions do not have absolute or indefinite legal force. For example, the Swiss driver’s license does not have an expiration date but it can obviously be revoked in the case of serious traffic offenses.<sup>18</sup>

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16 See chapter on Administrative Procedure, pp. 188.

17 DFC 115 V 375 c. 3b.

18 See Article 15c I and Article 16c II Federal Road Traffic Act of 19 December 1958, SR 741.01.

### a) Definition

Article 5 I of the Federal Act on Administrative Procedure<sup>19</sup> defines an administrative decision:

*“Administrative decisions are acts of the authorities in individual cases that are based on the public law of the Confederation and have as their subject matter the following:*

*the establishment, amendment or withdrawal of rights or obligations; a finding of the existence, non-existence or extent of rights or obligations; 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.”*

The term “administrative decision” as it is used in this book is close to *Verfügung* in German or *décision* in French. Instead of the term “administrative decision”, one may also talk about an “administrative act”, which comes closer to the terms *Verwaltungsakt* in Germany or *acte administratif* in France.

### b) Rights and Obligations

An administrative decision *establishes, amends or withdraws rights or obligations*. Indeed, this is the *raison d'être* of an administrative decision. Other forms of administrative actions may have legal consequences, which are not intended but are at most accepted as necessary collateral damage in the fulfilment of a particular aim—for example, a police officer who accidentally harms an innocent bystander in exercise of his duties. 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, both establishing the citizen’s duty to pay the tax and 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). Finally, an administrative decision may simply confirm an existing legal situation, thus providing legal certainty for the party requesting the confirmation (e.g. a

19 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.fedlex.admin.ch/perma.cc/67U9-NZN4](http://www.fedlex.admin.ch/perma.cc/67U9-NZN4).



decision confirming that a certain private business practice is in accordance with existing environmental regulations, 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 which must be issued formally as an administrative decision, and which actions do not. The administration would often prefer not to issue an administrative decision as this forecloses the right to appeal and the right to be heard. The Swiss Federal Supreme Court has held that there must be an administrative decision before a public organisation takes action which disrupts energy services<sup>20</sup> or in cases involving the unsolicited transfer of a civil servant to another post.<sup>21</sup> In contrast, there was no need for an administrative decision where a post office was renamed in a small rural community.<sup>22</sup> The Court has also ruled that not only the issuance of the university degree but also a single grades may constitute an administrative decision if the award of a distinction depends upon that grade.<sup>23</sup> In all of 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.

### c) Individual Acts

Administrative decisions concern individual cases. Swiss doctrine would typically label the decision as individual (one person) and concrete (one situation), in contrast to rule-making, which is perceived as general and abstract.

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. The paramount example is traffic regulation, illustrated by a well-known case which prohibited riding (and driving) on the banks of river *Töss*.<sup>24</sup>

### d) Unilateral Acts

Swiss administrative law unfolds around the idea of the “sovereignty” of administrative action. Administrative action entails that the state has the

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20 DFC 137 I 120 c. 5.5; see also pp. 200.

21 DFC 136 I 323 c. 4.

22 Cf. DFC 109 Ib 253 c. 1.

23 DFC 136 I 229 c. 2.6.

24 DFC 101 Ia 73.

power to act unilaterally as regards its citizens. Conversely, the state may also act through administrative or private law contracts, thereby entering into a bilateral agreement with a citizen (see 2. and 3. below).

In theory, discerning a unilateral state action from an action that originated from an administrative or private law contract seems to be a straightforward exercise. However, it should be noted that administrative decisions do not simply rain down onto unaware private subjects; these subjects are often substantially involved in the decision-making process. The right to be heard ensures interplay between the state and private individuals. This allows an individual to negotiate with the authority even where the action takes the form of an administrative decision.

To conclude a contract with a citizen, rather than acting via an administrative decision, the authority must possess a certain *level of discretion*. No contract can be concluded if there is no room for negotiations. The authority will have such discretion in circumstance where 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>25</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 authority is legally required to act through the form of an administrative decision.<sup>26</sup> As administrative decisions are the usual form of action, the burden for justifying contracts falls on the authority (see Article 16 Act on Public Subsidies)<sup>27</sup>.

### e) Public Law

Administrative decisions must be grounded in public law (Article 5 Administrative Procedure Act). 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 the question of whether a decision is grounded in public law by applying the theories of *sovereignty or subordination*, of *interest and mandate*, and of *consequences or modality*.<sup>28</sup>

Public law is typically at issue if administrative actions are directly fulfilling public interests or a public mandate. On the other hand, administrative actions may qualify as falling under private law if the agency actions are

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25 E.g. DFC 128 III 250.

26 E.g. § 12 Act of the Canton of Zurich on the Public Personnel of 27 September 1988, 177.10.

27 Federal Act on Public Subsidies of 5 October 1990, SR 616.1.

28 DFC 138 II 134 c. 4.1.

motivated by profit. If the agency benefits from special powers over private individuals, this can be considered as a clear indication of the matter falling within the public law sphere. Finally, the legislator may determine 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 designated this matter as falling within the private law sphere, and the Court accepted this designation.<sup>29</sup>

### f) Form

Administrative decisions must meet certain requirements of form: they must be handed down in writing, be named as such, give reasoning for the decision and inform the recipient of any available legal remedies.<sup>30</sup> If the administrative decision was not effectively delivered, it is usually contestable on this ground. However, it does not cease to be an administrative decision. Where there is some doubt, the competent authority may be requested to clarify the nature of its action.

## 2. Administrative Law Contracts

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.

A favourable aspect of acting under an administrative contract is its *stability*. Administrative contracts may grant “vested rights” 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 being offered to the affected individual. Vested rights create tension between the need for administrative stability and state sovereignty. 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. However, if the legislator was able to overrule such contractual rights through new

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29 DFC 138 I 289 c. 2.2; DFC 131 II 162 c. 2.2.

30 See, for administrative decisions based upon federal law, Judgment of the Federal Administrative Court B-4720/2019 of 14 July 2014 c. 2.2.

legislation, this would undermine administrative stability and the willingness of private parties to conclude contracts with the government. The Swiss Federal Supreme Court has dealt with numerous cases in which the extent of respect which should be paid to vested rights has been considered.<sup>31</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>32</sup>

### 3. Private Law Contracts

The administration may also conclude private law contracts. However, it must justify its decision to enter into a private law contract. Doctrine has largely been skeptical about whether the state should be permitted to “escape into private law”. Private law contracts are tempting for the state as they allow the substantial and procedural guarantees of administrative law to be evaded.

For that reason, court practice and doctrine only acknowledge limited areas where the administration may operate in the field of private law: public procurement, the management of financial assets of the state, and profit-oriented state action. The legislator is not prevented, however, from providing that this form of administrative action may be used in other fields in future.

### 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”; Article 25a Administrative Procedure Act) of administrative bodies do not. Most actions performed within the framework of schools or hospitals do not amount to legal actions (although there may sometimes be a fine line). A police car patrolling a neighbourhood does not trigger any legal effect; nor does the dissemination of governmental information. Swiss cheese producers suffered substantial losses when the federal agency on public health warned about possible contamination of listeriosis in Vacherin Mont d’Or, but nonetheless this did not affect the legal situation of the cheese producers.<sup>33</sup>

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31 See, inter alia, DFC 126 II 171; DFC 127 II 69; DFC 132 II 485; DFC 145 II 140.

32 DFC 134 I 23 c. 7.1.

33 DFC 118 lb 473; p. 178.

To challenge such action, one can resort to a state liability claim in order to challenge informal acts, but these cases are notoriously difficult for individuals to succeed in (due to, for example, the burden of proof, the necessity of illegality of the state action etc.). The cheese producers were not successful in their challenge against the public health federal agency's announcement mentioned above.<sup>34</sup>

Due to such concerns over the difficulty of challenging "real acts", Article 25a Administrative Procedure Act was introduced: persons affected may request that an administrative decision is taken on informal acts that concern them specifically (such as would have been the case in the example of the cheese producers). If this request is granted, the administrative decision can be challenged before the courts. The request may target past, current, or future administrative action and is directed to the administrative authority responsible for that action. To be entitled to make such a request, a person must prove that they possess an interest worthy of protection.<sup>35</sup>

## 5. Administrative Rulemaking

In contrast to other countries, in Switzerland, administrative rulemaking is not subject to specific procedural rules. This means that, for example, companies will only find out about changes in secondary legislation which may affect them through official publication of the new rules. Only legislation introduced by Parliament is subject to compulsory public consultation.<sup>36</sup> However, authorities usually involve interested parties when changing secondary legislation as a matter of practice. Also, administrative rulemaking in the form of delegated legislation must respect the principle of legality.

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34 DFC 118 Ib 473 c. 6.

35 See § 10c Administrative Procedure Act of the Canton of Zurich of 24 May 1959, 175.2.

36 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.fedlex.admin.ch](http://www.fedlex.admin.ch) (perma.cc/2JJ3-JVUW). In particular, there is no right to be heard during the law making process, DFC 137 I 305 c. 2.4.

## IV. Landmark Cases

### 1. State Liability: Vacherin Mont d'Or<sup>37</sup>

To expand on the example of the Swiss cheese producers briefly mentioned above: 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 of this cheese, 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 before the Federal Supreme Court. The plaintiffs claimed that they had suffered damages (i.e. reduced sales) through this allegedly legally and factually wrong, inadequate, inappropriate and late information which the Swiss authorities had published.

The Court reasoned that according to Article 3 of the Federal Act on State Liability,<sup>38</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 have been violated (focusing on the results of the conduct) or if the conduct is contrary to provisions of the statutory law, (thus focusing on the conduct of the tortfeasor).

The plaintiffs could not invoke any legally protected interests since pure assets are, as such, not legally protected. Pure financial loss does not qualify as tort. Thus, the Court considered whether the federal authorities, in informing the public about possible health risks, had violated statutory law.

The Epidemics Act<sup>39</sup> governs information which the federal authorities may provide related to combating infectious diseases. The Court emphasised that the Swiss Confederation can only be held liable for the provision of such information if the authorities had informed the public in an unjustifiably erroneous manner. The Court found no such errors in the announcement made. 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 rejected the claim.

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37 DFC 118 lb 473.

38 Federal Act on State Liability of 14 March 1958, SR 170.32.

39 Former Federal Act on Measures against Human Infectious Diseases of 18 December 1970, AS 1974 1071.

## 2. Protections of Legitimate Expectations: Piano Teacher<sup>40</sup>

X was a piano student at the Conservatory in the Canton of Fribourg. On June 26, 2008, he failed his final exam—a piano recital performed in front of an audience—due to being a state of discomfort and experiencing emotional blockage.

The board of examiners allowed X to resit his 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 that he successfully completed the study program.

The director of the Conservatory, however, asked the competent agency—the Direction of Education, Culture, and Sport of the Canton of Fribourg—not to issue a diploma to X since he had not performed publicly. On 2 March 2009, the Direction therefore 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 ordered 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 decision regarding the passing of the repeat exam was legally erroneous. The Court then examined whether the Direction could lawfully revoke the administrative decision or whether instead X could invoke the protection of his legitimate expectations (Article 9 Constitution).

The Court emphasised that X had a legitimate expectation that the resolution of the board of examiners to renounce the requirement for performance in front of a 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 individual’s 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 emphasised the adverse consequences that X would face if the diploma was not 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 prohibited from revoking the administrative act. X obtained his diploma.

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40 DFC 137 I 69.

### 3. Principle of Legality: Headscarf<sup>41</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, such a regulation must be issued by the *legislator*.

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 that these provisions did not constitute a sufficient legal basis for banning headscarves at schools, particularly when one considered the important requirement 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 organisational planning of the school fell within their scope of powers and that they accordingly possessed the right to issue school regulations. The Court reasoned that the school authorities, based upon said delegation clause, were empowered to create certain internal rules. However, it found that the asserted delegation clause did not in any way concern the restriction of fundamental rights such as the freedom of religion and conscience and that, consequently, the rule did not meet the delegated legislation pre-requisites (set out earlier in this chapter). Thus, the Court held that there was no legal basis for banning headscarves at schools.

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41 DFC 139 I 280.



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Felix Uhlmann

# Administrative Procedure

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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 (eds.), *The Principle of Effective Legal Protection in Administrative Law, A European Comparison*, London 2017, pp. 304. It is also largely based on the following sources from the Swiss literature on administrative law: GIOVANNI BIAGGINI, *Kommentar Bundesverfassung der Schweizerischen Eidgenossenschaft*, 2<sup>nd</sup> edition, Zurich 2017; ULRICH HÄFELIN / GEORG MÜLLER / FELIX UHLMANN, *Allgemeines Verwaltungsrecht*, 8<sup>th</sup> edition, Zurich / St. Gallen 2020; REGINA KIENER / BERNHARD RÜTSCHKE / MATHIAS KUHN, *Öffentliches Verfahrensrecht*, 3<sup>rd</sup> edition, Zurich / St. Gallen 2021; RENÉ RHINOW / HEINRICH KOLLER / CHRISTINA KISS / DANIELA THURNHERR / DENISE BRÜHL-MOSER, *Öffentliches Prozessrecht, Grundlagen und Bundesrechtspflege*, 4<sup>th</sup> edition, Basel 2021.

# I. Legal Sources

## 1. Historical Developments

The Swiss Constitution of 1874, which was the predecessor of the current Constitution, guaranteed only a limited range of procedural rights<sup>1</sup> and substantive fundamental rights. Subsequently, over the course of the 20<sup>th</sup> century, the Swiss Federal Supreme Court developed many procedural guarantees through its case law, such as the right to be heard and other principles of effective legal protection. The Court relied on the equal protection clause in the Swiss Constitution to develop these rights.

In the 20<sup>th</sup> century, shortcomings of legal procedure typically stemmed from a deficit of independent judicial control. Many Swiss cantonal and federal rules only granted limited access to courts in administrative matters. The typical legal recourse for any perceived injustices in this area was an appeal to the hierarchically higher administrative body, including the Federal Council or the executive of the cantons. An appeal to the Swiss Federal Supreme Court was possible in some cases and excluded or reduced to a review with very limited scrutiny in others. The Swiss system did not permit access to independent and full judicial review in administrative matters, which was incompatible with the European Convention of Human Rights (ECHR) as far as the protection of “civil rights” was concerned. The ECHR’s concept of “civil rights” included matters that were officially considered “administrative” under Swiss law, for example: disputes concerning bar exams; the withdrawal of a professional license; 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 take action to extend judicial control over “administrative” matters. Such developments, among other factors, led to the framework of the current Swiss Constitution and to the reform of the Swiss judicial process.<sup>2</sup>

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1 For example, the right to be sued at one’s home court.

2 ALEXANDER MISIC/NICOLE TÖPPERWIEN, *Constitutional Law in Switzerland*, 2<sup>nd</sup> edition, Alphen aan den Rijn 2018, n. 241 et seqq.

## 2. Constitutional Framework

The current Swiss Constitution<sup>3</sup> dedicates three Articles to the codification of procedural rights: Articles 29, 29a, and 30. Articles 29 and 30 Constitution set out the rights which must be granted *within* a certain procedure (e.g. administrative procedures) while Article 29a Constitution, a later addition introduced on 1 January 2007, stipulates a right to access judicial proceedings. Together, these provisions are the cornerstone of the 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. Article 29 I Constitution reads as follows:

*“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 judicial, and whether they concern civil, criminal, constitutional or administrative matters. Article 29 Constitution also explicitly sets out that these procedural guarantees encompass fundamental rights such as the right to be heard (II) or the right to legal aid (III). It also includes the right to “fair treatment”, which allows the courts to further develop procedural rights under this umbrella.

Article 30 Constitution imposes additional specific guarantees which 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 its judgments shall be made public<sup>4</sup>.

Article 29a Constitution sets out the conditions for access to court:

*“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” is defined by relevant procedural law and constitutional practice. Only the law itself may restrict access to court, and the Constitution emphasises that this may only be done in exceptional circumstances.

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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.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/7ARN-UVSH](https://perma.cc/7ARN-UVSH)).

4 The law may restrict this guarantee and often does so in administrative matters. Hence, parties requesting hearings typically rely on Article 6 ECHR.

Article 29a Constitution was clearly inspired by Article 19 IV of the German *Grundgesetz* (*Rechtsweggarantie*).<sup>5</sup>

The Constitution remains silent on the question of the scope of judicial review. Article 29a Constitution is generally understood as guaranteeing only a right to a single, first instance review of the facts and of the law by a court. The right to appeal, especially 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 of access to the Swiss Federal Supreme Court (Article 191 Constitution). Article 29a Constitution is also unequivocal in its stipulation that an (administrative) court may not review matters of administrative discretion; this does not fall under the guaranteed right to 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 by federal and cantonal legislation. The Administrative Procedure Act<sup>6</sup> applies to the federal authorities when taking administrative decisions. It also applies partly to the Swiss Federal Administrative Court. There are also additional acts which regulate the Swiss Federal Administrative Court<sup>7</sup> and the Swiss Federal Supreme Court.<sup>8</sup>

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 notably different definitions of an administrative act in cantonal law. Hence, the definition of administrative acts is virtually the same at both the federal and cantonal level.

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5 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. [...]"

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6 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.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/N4DR-USRZ](https://perma.cc/N4DR-USRZ)).

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7 Federal Administrative Court Act of 17 June 2005, SR 173.32.

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8 Federal Supreme Court Act of 17 June 2005, SR 173.110.

## II. Procedural Rights and Principles

### 1. Administrative Action

In Switzerland, whether there is a legal remedy for an administrative action is generally 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 the right to a legal remedy, either from the administration or the courts, or sometimes both.<sup>9</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 will be taken by administrative decision. The answer is that administrative decisions must be issued where the administration’s actions amount to a determination of the rights and obligations of private individuals. This distinction was explained in the chapter on Administrative Law.<sup>10</sup>

Article 5 Administrative Procedure Act defines administrative decisions. This Article also specifies that enforcement measures, interim orders, decisions on objections, appeal decisions etc. will fall under the scope of this clause. In some circumstances, an administrative decision may simply be 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>11</sup>

The link between administrative decisions and legal protection for individuals illustrates why private parties concerned with an administrative matter are often looking for—or, in the words of one scholar, “*hunting for*”<sup>12</sup>—this specific form of administrative action to be taken. Other types of state action not clothed in the form administrative decisions are real acts (*Realakte, actes matériels, atti materiali*). They have traditionally encompassed acts such as

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9 See MISIC/TÖPPERWIEN, n. 738 and 763.

10 See chapter on Administrative Law, pp. 172.

11 See Article 25 II Administrative Procedure Act.

12 SERGIO GIACOMINI, Vom „Jagdmachen auf Verfügung“ Ein Diskussionsbeitrag, Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 1993, pp. 237, p. 239.



teaching in schools, treatments in hospitals, police action, public information etc. Legal protection against such acts was traditionally weak. People could resort to state liability claims for a remedy but this was by no means a perfect solution.<sup>13</sup> Thus, the federal legislator introduced Article 25a Administrative Procedure Act to improve legal protection: this provision establishes that everyone with an “*interest that is worthy of protection*”<sup>14</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 when they are acting within their own domain. In practice, cantons have taken a variety of approaches in response to the introduction of this Article. In some cases, they have copied the provision; in others they have either opted for their own independent solutions (such as allowing for a direct appeal against real acts) or made no change at all. There was a legal challenge as to whether a canton making no change at all was permissible under Article 29a Constitution. According to the Federal Supreme Court, the cantons are free to choose their own method of providing legal protection against real acts as long as at minimum they allow for judicial review where a case concerns interests worth of protection.<sup>15</sup> Whether a state liability claim meets the requirements of Article 29a Constitution in such circumstances must be decided on a case-by-case basis.

## 2. Right to be Heard

As set out above, when administrative bodies act through an administrative decision, a number of procedural rights are triggered.<sup>16</sup> The most important guarantee is the right to be heard.<sup>17</sup> This right applies to both administrative and court proceedings.

The right to be heard encompasses, inter alia: the right to access documents relevant to the matter; the right to propose witnesses and other means

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13 FELIX UHLMANN, The principle of effective legal protection in Swiss administrative law, in: Zoltán Sente / Konrad Lachmayer (eds.), *The Principle of Effective Legal Protection in Administrative Law, A European Comparison*, London 2017, pp. 304, p. 307.

14 See DFC 146 V 38 c. 4.3.2.

15 Cf. DFC 143 I 336.

16 For simplicity, the following paragraphs only discuss procedural rights under constitutional federal law. The legal situation in the cantons is very similar, partly because of the compulsory nature of constitutional law, and partly because they follow the example set out by federal law.

17 PATRICIA EGLI, *Introduction to Swiss Constitutional Law*, 2<sup>nd</sup> edition, Zurich/St. Gallen 2020, p. 159; MISIC/TÖPPERWIEN, n. 645 et seq.

of evidence to support your case; and the right to be informed of the possible administrative decision beforehand. As noted above, the right to be heard is recognised by the Swiss Constitution. Procedural law and court practice have further solidified this right in specific situations, as well as providing for some restrictions to 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 requires a balancing exercise of various interests being undertaken. If a restriction is necessary, for example on the right to access relevant documents as part of the right to be heard, the court will generally try to summarise the content of the document for the relevant party 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>18</sup>

Access to documents is probably the most important aspect of the right to be heard, and it has by far the widest scope. The right may also be violated if relevant evidence is rejected by the court, for example a refusal to hear witnesses (although note that witness hearings are relatively rare in administrative cases) or a refusal to admit expert evidence. The court must also take the relevant parties' arguments into account. If a decision has been taken before the parties' arguments were even considered, the right to be heard is clearly violated. Further, an important safeguard in ensuring that parties' arguments are considered is the requirement for the authority to give oral or written reasons for their decisions. In the authority's decision, it must also deal with the private parties' arguments, although this can be done briefly. The decision reasoning must also be sufficiently clear so as not to hinder any right to 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; conversely, if no administrative act has been issued, they will know that the process is still ongoing. This obligation goes hand in hand with the duty of the authority to be transparent about the 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 relevant parties with the procedure it follows. The latter point is illustrated by a

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18 A notorious example involved nuclear weapons construction plans 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 7 July 2009, pp. 5007 (BBl 2009 5007)]).

decision of the Swiss Federal Supreme Court, which is set out in greater detail later in this chapter. The case facts concerned a local authority who had invited applicants for naturalisation to an informal “get-to-know” session. They had not, however, 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 naturalisation applicants to have a basic knowledge of Switzerland, it is not acceptable to test that knowledge without first giving them proper notice: the local authority had therefore breached the applicants’ right to be heard.<sup>19</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 to be 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 I 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 the circumstances of the case. Such circumstances may include the complexity of the case, the urgency of the matter and the behaviour of the parties. However, any internal issues within the relevant authority, i.e. staff shortages, are certainly not a valid ground for delay.

### 4. Right to Legal Aid and to Counsel

The final important aspect of overall procedural fairness is the right to legal aid.<sup>20</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 necessary in order to safeguard their rights, they also have the right to free legal representation in court.”*

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

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19 DFC 140 I 99.

20 EGLI, p. 159; MISIC/TÖPPERWIEN, n. 647 et seqq.

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 a 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 be represented by anybody with capacity to act, rather than only by a qualified lawyer, even at the Swiss Federal Supreme Court.

## 5. Right to Appeal

As previously discussed,<sup>21</sup> an action being taken by administrative decision implies that there is a legal remedy available against that decision. The administrative decision must contain instructions on the legal remedies available. 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. Any restriction on the right to legal recourse must be clearly stated in legislation and must only be applicable in exceptional cases. In practice, such 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 which concern the exercise of administrative discretion and where court scrutiny would therefore be inappropriate, 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 is demanded by the Swiss Constitution.

Matters are more complicated if third parties wish to 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 procedural rights, in terms of their material interest in participating: “*Parties are persons whose*

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21 See pp. 188.

*rights or obligations are intended to be affected by the ruling.*”<sup>22</sup> This is a similar wording to that used for the definition of *locus standi* in an appeal. The right to appeal is granted to anyone who is *specifically affected by the contested administrative decision* and who has an interest that is worthy of protection in the revocation or amendment of the administrative decision (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—subject to tighter restrictions—competitors.

## 6. Right to Challenge Legislation

Most legislation can be challenged in an individual 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 for the legislation was lawful (*vorfrageweise, inzidente, konkrete Normenkontrolle*). If this test is met, the court further examines whether the law was applied correctly.

Article 190 Constitution expressly prevents judicial review of legislation, requiring the court to apply federal laws even where the court finds the law to be unconstitutional.

A direct challenge to legislation (*abstrakte, direkte Normenkontrolle*) is possible against cantonal laws and ordinances. 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>23</sup> The cases that challenge cantonal laws are typically decided directly by the Swiss Federal Supreme Court where 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 legislation, it may give important guidelines for the cantonal authorities on how to apply the law to ensure the constitutional boundaries are respected. This occurred in a case concerning police legislation enacted by the Canton of Zurich, discussed in further detail below. Cantonal constitutions are not subject to judicial control as they must be approved by the Swiss Parliament (Article 51 II and 172 II Constitution). There is no possibility to lodge a direct challenge against federal laws and ordinances.

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22 Article 6 Administrative Procedure Act also states that “*other persons, organizations or authorities who have a legal remedy against the ruling*” are parties.

23 DFC 128 I 167 c. 4.3; DFC 122 I 44 c. 2a.

The legal standing for challenging cantonal legislation is far broader than in cases concerning administrative decisions. A person may challenge legislation if she or he can claim that there is a possibility—even a remote one—that she or he will be affected by the act (*virtuelles Betroffensein*). 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 applied in practice.

### 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>24</sup> before the introduction of the current Swiss Constitution, often only hierarchically higher administrative bodies could provide legal protection against action taken by bodies lower in rank. This was problematic given that these superior bodies were not institutionally independent. However, it is important not to understate 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-informed about 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; while courts typically do not review questions of administrative discretion, supervisory administrative bodies show less, if any, restraint.

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 review instances, including a review by the cantonal executive. 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>25</sup>

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, in practice this can occur in areas that

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24 See p. 185.

25 See the grounds for appeal in Articles 95 et seqq. Federal Supreme Court Act.

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 can review questions of law, fact and administrative discretion. However, judicial practice over time has led to the courts typically exercising some restraint in the area of administrative discretion; 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). 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.

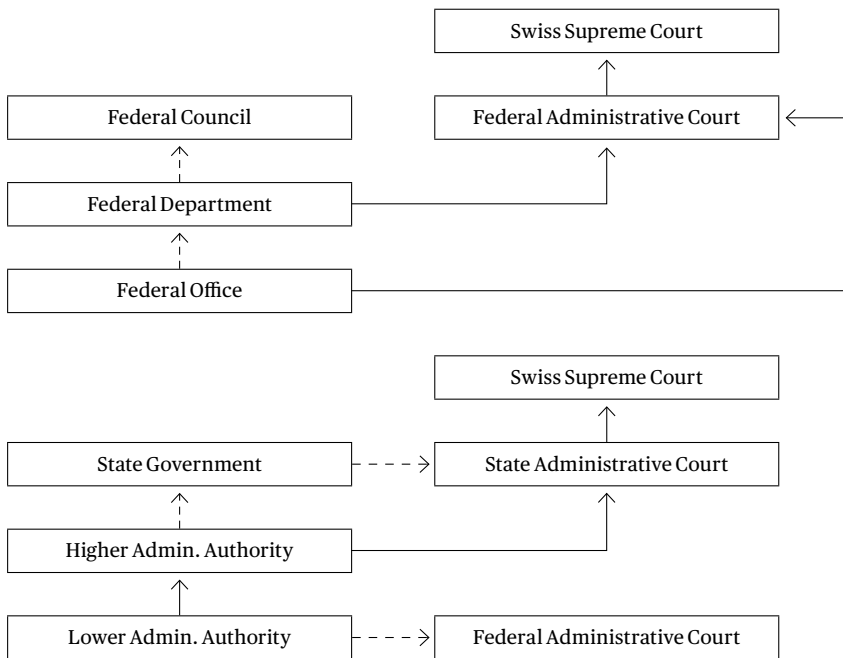


Figure 1: Appeal System before Cantonal (State) and Federal Authorities



## 2. Courts

As highlighted above, judicial control by the courts is guaranteed under Article 29a Constitution. Hence, most administrative acts may be challenged before an administrative court directly (e.g. acts of the Federal Administration) or indirectly via recourse to higher administrative bodies (e.g. acts of the cantonal administration).<sup>26</sup> The law may only “*preclude the determination by the courts of certain exceptional categories of case*” (Article 29a Constitution).

However, the most important restriction on judicial control in Switzerland 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 precisely, Swiss courts must apply federal laws even if they are considered unconstitutional. Judicial practice has carved out some exceptions to the court’s required abstinence in this area, such as federal laws which violate the ECHR. The Swiss Federal Supreme Court will not apply a federal law which is in conflict with the ECHR. Still, a substantial part of federal legislation is not susceptible to court nullification even in the case of a violation of the Constitution. Swiss cantons, for example, 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 remain with the legislator itself, rather than the courts, as it is the legislator who possesses the highest degree of democratic legitimation. The federal legislator is above any constitutional control, for example by the courts, but it is not above the Constitution itself; it is still officially bound by the Constitution and must respect it. This means that the federal Parliament itself must decide upon questions over the constitutionality of federal laws—a function it regularly exercises, supported by the expert opinion of the Federal Department of Justice. The Swiss government have made several attempts to abolish Article 190 Constitution, all of which 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 any Swiss court, including cantonal courts and civil or criminal courts. In individual cases, constitutional questions may even be decided by administrative bodies. Hence, Switzerland has opted for a so-called “diffuse” system of constitutional review, closer to the US court system than to the German model of concentrated constitutional review.

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26 See, for an overview, MISIC/TÖPPERWIEN, n. 251 et seq.

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 is required by the lower authority or if it is considered that the lower authority could use its discretion to decide the case.

Both appellate administrative authorities and the courts may grant interim relief. Typically, an appeal has an automatic suspensive effect against the action or decision under challenge. 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 interim relief by conducting a balancing test between the interests of the state and those of the private parties concerned. If they believe that the final outcome of the case is clearly predictable, they also may take this probable outcome into account in considering the granting of such measures. Such decisions are often of great practical importance: for example, cases on public procurement often do not continue once the public authority has legally concluded the contract with its chosen private partner; if suspensive effect is denied, the claimants may only recover their costs from the procedure but not be able to conclude the contract.

### 3. Other Bodies and Procedures

In the federal system, special committees which served a judicial function used to exist, however, with the exception of the Independent Complaints Authority for Radio and Television, these have been abolished. The committees were replaced by the Federal Administrative Court which is now competent to review any decision which has been taken by the Federal Administration. In the cantons, special committees do still exist, most notably in the areas of construction, taxes and culture.

In some cantons, the institution of the Ombudsman has some practical significance. On the federal level, an initiative to introduce the Ombudsman failed. There are however two independent, personalised bodies which have responsibility for overseeing state-regulated prices (*Eidgenössischer Preisüberwacher*) and for data protection and transparency of the public administration (*Eidgenössischer Datenschutz- und Öffentlichkeitsbeauftragter* [“EDÖB”]). Both may grant legal remedies but in practice their most efficient tools are negotiation with the administration and ensuring the public are informed of their rights.

The EDÖB may also initiate legal proceedings against private parties; he has done so previously in an important case against Google (google street view).<sup>27</sup>

Another route through which parties can challenge administrative action is Alternative Dispute Resolution (ADR), which was introduced by 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 allow for any useful conclusions to be drawn 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 is often still relevant due to the bilateral treaties or due to an autonomous decision by the Swiss authorities to implement EU law (*autonomer Nachvollzug*).<sup>28</sup> In terms of the substantive legal protection available in Switzerland, EU law is largely irrelevant; the procedure for invoking legal protection is predominantly dictated by domestic Swiss law.<sup>29</sup>

In contrast, the jurisprudence of the European Court of Human Rights (“ECtHR”) has been central in leading to enhanced legal protection in relation to administrative matters in Switzerland. The key change following on from such jurisprudence was granting access to court review for administrative matters. As explained above, it was deemed insufficient for protection from the administration to only be available in “civil matters”; it was necessary for such protection to also encompass areas technically falling under Swiss administrative law. The ECtHR continues to influence administrative procedure in Switzerland to date. This was seen recently in Swiss jurisprudence concerning the right to reply. The Swiss Federal Supreme Court has now shaped a practice that seems to be consistent with the ECtHR requirements: all documents submitted to the court by one party in court proceedings must be forwarded to all the other parties.<sup>30</sup> In administrative proceedings, this requirement extends to all relevant documents submitted by a party to the authorities and/or the court in a given case.

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27 DFC 138 II 346.

28 See chapter on International Relations, pp. 142.

29 See for the current process of negotiation chapter on International Relations, pp. 144.

30 See DFC 137 I 195.

## IV. Landmark Cases

### 1. Necessity of Issuing an Administrative Decision: IWB<sup>31</sup>

The case of IWB was an important case concerning when an administrative decision must be issued. The facts of the case revolved around X, who was a tenant in a Basel property. For two years, the owner of the property X rented had 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 indicated that it would stop the supply of electricity should the outstanding amount not be paid by the end of a set period. The set period then expired, with no payment having been made by the owner. Consequently, IWB informed the tenants of the property that the supply of electricity would be cut off, via a letter sent by ordinary (i.e. non-recorded) mail dated 9 April 2008. The energy supply for the elevator and hot water boiler was then stopped between 23 April and 30 May 2008. After IWB was informed about a pregnant woman living in the property, it restarted the electricity supply.

Acting on behalf of X, the Basel Tenants' Association appealed the decision to cut off the supply of energy to the superior administrative body (the Building Department) on 29 May 2008. On 14 July 2008, the Department dismissed the appeal without considering it on the merits, as the energy supply had already been reinstated. It rejected the claim for compensatory relief. X unsuccessfully challenged this decision before both the cantonal government (the *Regierungsrat* of the Canton of Basel-Stadt) and, subsequently, 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 had been violated because the decision to cut off energy had not been issued in the form of an administrative decision and therefore, despite being a tenant of the property, he had been given no opportunity to put forward his position on the planned measure.

In its judgment, the Court emphasised that IWB is legally obliged to supply electricity. According to the statutory law, supply may only be stopped if,

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31 DFC137 I120.

inter alia, it does not constitute unreasonable hardship for third parties (such as the owner's tenants). On this basis, the Court reasoned that ordering such a stoppage must be considered as an interference with the tenants' rights. The order therefore qualified as an administrative decision and should have been issued as such, rather than as real act. Consequently, not only property owners but also tenants and other affected persons should have been afforded the opportunity to be heard and the right to express their objections against the planned supply stoppage beforehand (in particular, to allow them to make submissions as to any unreasonable hardship that would be caused by the measure). With respect to the information letter that had been issued by IWB to the tenants on 9 April 2008, the Court held that this was not a sufficient basis for laypersons to exercise their rights. Hence, the Court found that X's right to be heard had been violated.

## 2. Procedural Fairness: Naturalisation<sup>32</sup>

This case considered the requirements of procedural fairness in the context of naturalisation applications. The background to the case was that a married couple (A and B) and their children (C and D) had applied for citizenship in the municipality of Weiningen (Canton of Zurich). By a letter dated 8 October 2012, the municipal Naturalisation Commission invited the family for a "conversation" with the municipal authorities, which, according to the invitation letter, was for the purpose of getting to know the applicants and exploring their motivation for applying to be naturalized. In reality, however, during this "conversation" the Commission assessed the suitability of the applicants for citizenship. Subsequently, the municipality rejected their application on the grounds that they were not well integrated into the Swiss lifestyle, lacked proper 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, before 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) had been violated by being invited to a personal interview for the apparent purpose of a mere "conversation" and, instead, having had their suitability for naturalisation unexpectedly assessed.

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32 DFC 140 I 99.

The Court found that the procedural guarantees of the Constitution applied to the naturalisation process; namely in this case the right to be heard (Article 29 I Constitution), which also entails the right to be informed of the formal and substantive pre-requisites of the naturalisation process. The Court also stated that according to the principle of good faith (Article 5 III Constitution), parties could reasonably expect the state not to deviate from the announced course of proceedings without prior notice.

The Court stated that it is within the municipality's discretion to consider asking general knowledge questions about Switzerland at *some* point during the naturalization process; however, given the early stage of the proceedings and the indications within the invitation letter, A, B, C and D could legitimately expect that such an examination would take place later on rather than during the (early) personal interview, allowing them to prepare beforehand. Consequently, the Court held that the municipality had violated the family's right to fair proceedings and their right to be heard, as well as the principle of good faith.

Due to the formal nature of the right to be heard, the Court quashed the challenged decision and referred the case back to the municipality for further fact-finding and to take the required procedural steps.

As was touched upon above, this case also demonstrates the flexibility of the right to be heard; it is a practical instrument which the courts can use to intervene against any form of unfair administrative process. Importantly, it is not restricted to certain case groups. Article 29 Constitution applies to *all* state proceedings where a decision affects the rights or duties of individuals, be it before the courts (in civil, criminal or public law cases) or non-judicial bodies, including the government and parliament.

### **3. Direct Challenge to Legislation: Police Act of Zurich<sup>33</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 was intended to create a statutory basis for the performance of police duties, and police measures taken to maintain public order and safety. The Police Act was challenged by a group composed of private persons, a lawyer's association and political parties directly before the Swiss Federal Supreme Court (*abstrakte, direkte Normenkontrolle*). It was claimed that various provisions violated the Federal Constitution, the Euro-

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33 DFC 136 I 87.

pean Convention on Human Rights (ECHR), and the International Covenant on Civil and Political rights (ICCPR).

In its judgment, the Court reasoned that in general, when assessing the constitutionality of cantonal legislation, it is crucial to consider whether it is possible to interpret the cantonal provision in a way that is consistent with the relevant constitutional guarantees.

It is important to note that while the Court could only decide to rescind or uphold the challenged legislation, its judgment and reasoning was inevitably going to have a strong impact on the future (constitutional) application of the Police Act: the authorities would have to act in accordance with the Court's judgment and any restrictions set out within. Acting otherwise through administrative acts or real acts based on the Police Act would risk such acts being challenged and subsequently quashed.

The Court then examined the procedural aspects of the police custody regime, in particular the provisions under the Police Act which established the requirements for taking a person into police custody. As the Police Act did not outline any legal remedies for acts under this regime, the general rules of legal protection in the Canton of Zurich would have applied, i.e. the affected person would have to challenge their custody before the superior administrative body. Only after having exhausted these administrative remedies would an appeal to the Administrative Court of the Canton of Zurich—i.e. a judicial body—be possible. The Court reasoned that Article 5 IV ECHR does not prevent member states from implementing some form of administrative control before allowing access to judicial proceedings, as long as a judicial decision is rendered “speedily”.<sup>34</sup> 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 considered that the term “at any time” required there to be *direct* access to the courts, without the requirement for prior proceedings before administrative bodies. Thus, Article 31 IV Constitution sets requirements that go beyond the general right to judicial proceedings according to Article 29a Constitution. As a result, the Court held that the Police Act violated Article 31 IV Constitution and requested that the cantonal legislator implemented provisions on legal protection that met the requirements set out by Article 31 IV Constitution for persons taken into police custody.<sup>35</sup>

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34 Article 5 IV ECHR states that “[e]veryone 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.”

35 The Police Act was then amended by the Parliament of the Canton of Zurich. Nowadays, an appeal to the Compulsory Measures Court is available.

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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 Confederation, 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 Confederation. Therefore, the Confederation is only allowed to levy those taxes which the Constitution exclusively grants it 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)
- 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)

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 power and are even permitted to create new taxes, they do not have unlimited discretion over the design of their tax system. Some taxes

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1 See, for a more detailed explanation on Swiss federalism, the chapter on Constitutional Law, pp. 113.

2 See for more detail on the topic of Swiss tax law: 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.fedlex.admin.ch](http://www.fedlex.admin.ch) (perma.cc/7ARN-UVSH).

are exclusively reserved to be levied by the Confederation.<sup>4</sup> Further, the cantons are limited by the Federal Tax Harmonisation Act which obliges them to levy certain types of taxes. Finally, they are restricted by Article 49 Constitution which states that 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>5</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 of a taxpayer who lived in one canton and owned real estate property in another. Furthermore, an exit tax could be imposed if an individual or a legal entity relocated from one canton to another.

In order to remove these obstacles, in a referendum of 12 June 1977, the Swiss people accepted a new federal competence allowing the federal legislator to harmonise cantonal and federal direct tax law. Subsequently, the Federal 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.

The Federal Tax Harmonisation Act significantly improved tax coordination in Switzerland, introducing tax harmonisation with regards to direct taxes between the Confederation 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 detail, whilst others leave a certain scope of action and some room for interpretation to the cantons. Tax rates and tax allowances are, however, not within the scope of the federal competence. In this regard the cantons remain fully sovereign. Hence, tax competition between the cantons and between the municipalities is not hindered by the Federal Tax Harmonisation Act.<sup>6</sup>

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4 According to Article 134 Constitution, these are the value added tax, the stamp duty, the withholding tax as well as special consumption taxes. In contrast, income taxes are levied on the federal and cantonal levels and, depending on the cantonal order, on the communal level as well.

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5 See for more detail on this subsection and on the chapter as a whole: SIMONEK, *Tax Coordination*, pp. 236.

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6 See pp. 218.

## 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. It requires that tax laws be subject to an optional referendum. Furthermore, the law must be specific enough 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 contributes 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. Although the principle of universality aims to prevent the application of any privileges or discrimination, Swiss tax law nevertheless contains certain privileges which are considered justified due to their fulfilment of other constitutional principles and objectives. In particular, certain tax incentives granted to foreign wealthy taxpayers, such as the lump-sum taxation,<sup>7</sup> are considered justified by the goal of fostering the growth of 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 burden 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 equal treatment requires that taxpayers living in the same economic and personal situation and deriving the same amount of taxable income be taxed equally.<sup>8</sup> On the other hand, vertical equal treatment

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7 See p. 214.

8 See p. 223 for a leading court decision with regard to equal horizontal taxation of married and non-married couples.

requires that taxpayers in different economic and personal situations and/or with different levels of taxable income be taxed differently. Vertical equality particularly refers to the design of the tax scale and to the question of whether progressive, proportional or degressive tax rates should be chosen.<sup>9</sup>

#### **d) Prohibition of Inter-Cantonal Double Taxation**

Since 1874, the Constitution has explicitly prohibited 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, or if the business income of a taxpayer is taxed in two cantons. No law has been enacted to prevent inter-cantonal double taxation. Instead, the Federal Supreme Court developed a dense network of rules covering the allocation of taxing rights between the cantons. Although over time some of these rules have been incorporated into the Federal Tax Harmonisation Act, the majority of the inter-cantonal allocation rules are still 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 to the taxation of net wealth. All other income or net wealth, including income from employment or 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 life, in particular the place where his or her family lives and where he or she is integrated into social life).

Furthermore, the constitutional prohibition of inter-cantonal double taxation entails a non-discrimination rule: a taxpayer who is subject to taxation on only part of his income in a particular canton (limited tax liability) may not be treated less favourably than a taxpayer who is subject to taxation on all of his income (unlimited tax liability) in that particular 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

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9 See pp. 223 for a leading court decision on degressive income tax rates.

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 key 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 consistent 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.

If the criteria for tax avoidance are met, the taxpayer's action is disregarded and instead it is fictitiously assumed that the taxpayer would have chosen a reasonable course of action, on which basis he or she is then taxed. If, for example, the taxpayer tries to convert taxable dividend income into tax-free capital gain by using a completely inappropriate transaction structure and thereby fulfils the conditions for tax avoidance, taxable income from dividend instead is assumed and taxed accordingly.

In addition, the principle of protecting a legitimate expectation is important in the context of the Swiss tax ruling practice.<sup>11</sup>

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10 See for more detail on this subsection 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.

11 See for more details on the Swiss tax ruling practice pp. 224.

## 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 Confederation. The Confederation's right to levy a direct federal tax has been prolonged ever since and today the competence is enshrined in Article 128 Constitution.<sup>12</sup> The authorisation is still limited in time, relying on repeated extensions by popular vote (currently the Confederation has been granted the competence until 2035; Article 196 No. 13 Constitution).<sup>13</sup> As a consequence, the Confederation 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 Confederation 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.

##### bb) Federal Individual Income Tax

The federal individual income tax is levied from Swiss tax residents as well as from non-residents who have an economic attachment to Switzerland.

Tax residency is assumed if an individual either intends to live permanently in Switzerland (so-called "tax domicile"); 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 (so-called "tax abode"; 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 immoveable properties that are

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12 See 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., 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.



situated abroad. Income derived from one of these sources is unilaterally exempt from taxation in Switzerland (Article 6 I Federal Direct Tax Act). Additionally, the rules set forth in double taxation treaties need to be taken into account.

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, 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).<sup>15</sup> Consequently, losses incurred on such private assets cannot be deducted either. Capital gains realised on business assets are, in contrast, fully taxable while losses incurred on business assets are fully deductible although limited to a time period of seven years. 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 an individual incidentally acts as a professional trader without having registered a business, for example in connection with securities or real estate.

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) and of partners living in a 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 (although this is capped at a certain amount),<sup>16</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

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15 On the cantonal level, capital gains on real estate are however taxed, principally, with a separate real estate capital gains tax.

16 Costs for private transportation are only deductible if no public transportation is available.

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 couples 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: one for single persons and one for married couples and/or families and single persons living together with minor children or 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%, while a taxable income of CHF 200,000 is subject to a tax rate of 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 895,900 (for married couples).<sup>17</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 taxpayer's 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 Direct Tax Act). The precise justification of the very favourable lump-sum taxation is disputed, but its goal is mainly considered to be that of attracting very wealthy people to Switzerland. On the cantonal level, some cantons removed lump-sum taxation in order to better ensure equality (e.g. Zurich and Basel Stadt).

Tax assessment is based on a personal tax return to be completed 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 (Article 2 Federal Direct Tax Act).

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17 Tax rates for the tax year 2021.

### cc) Federal Corporate Income Tax

Legal entities that either have their statutory seat or their place of effective management in Switzerland are subject to the federal corporate income tax, known as 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 take place in their entirety. Thereby, the day-to-day business decisions taken by the company are at the core of what constitutes the place of effective management, as opposed to merely strategic or administrative decisions.

Swiss income tax law generally follows the 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 taxed transparently, 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 individual income tax, legal entity 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% (Article 68 Federal Direct Tax Act). 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 total amount of federal, cantonal and communal taxes. A reduced tax rate of 4.25% applies for associations, foundations and other legal entities (Article 71 Federal Direct Tax Act).

The required date for filing the tax return depends on the balance sheet and financial reporting date of the legal entity that is usually specified in the company's articles of association. 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 to comply with 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 (Articles 83-90 Federal Direct Tax Act). The employer of such an individual is thus obliged to deduct the source tax directly from the salary and forward it to the tax administration. The source tax is principally a final tax replacing the ordinary income tax, however, a retrospective ordinary assessment follows in certain situations, for example, if a taxpayer derives a gross income from employment of more than CHF 120,000.

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). New rules on source taxation of non-residents came into force on 1 January 2021. Implementing a Federal Supreme Court decision of 26 January 2010,<sup>18</sup> the so-called *Schumacker doctrine* of the European Court of Justice was adopted in Swiss tax law: a non-resident taxpayer may request an ordinary assessment in certain situations, in particular where he or she receives 90% or more of his or her world-wide income in Switzerland (Article 99a Federal Direct Tax Act and Article 14 Ordinance on Source Taxation for the Federal Direct Tax).

#### b) Withholding (Anticipatory) Tax

The law covering the federal withholding tax is the Federal Act and Ordinance on Withholding Tax.<sup>19</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)<sup>20</sup> and on certain insurance benefits (Article 1 Federal Withholding Tax Act). The Swiss debtor (e.g. a Swiss bank paying out interest on bank accounts or a Swiss company distributing dividends) is obliged by law to withhold the tax at source.

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18 See pp. 225.

19 Federal Act on Withholding Tax of 13 October 1965, SR 642.21; Ordinance on Withholding Tax of 19 December 1966, SR 642.211.

20 In principle, however, taxation of lottery winnings is restricted to amounts exceeding CHF 1 million.

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 annuities and 8% for other insurance benefits.

The purpose of the withholding (anticipatory) tax is to secure correct income tax declarations 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>21</sup>

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 provision of certain services that are not considered to be consumed in Switzerland.

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 not systematically have to bear any final tax costs. With regards to VAT, a taxable person is anyone who carries on a business activity in Switzerland. Currently, exemptions exist for businesses that generate a worldwide turnover of less than CHF 100,000 per year or CHF 150,000<sup>22</sup> 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.

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21 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.fedlex.admin.ch](http://www.fedlex.admin.ch/perma.cc/JWD3-TNJ5) (perma.cc/JWD3-TNJ5).

22 CHF 250'000 as of 1 January 2023.

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, food, water, drugs and newspapers (Article 25 Value Added Tax Act). The maximum VAT rates are set out within 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 the additional revenue generated is used for a specific purpose, such as the development of railway infrastructure or to support the social security system through additional financial means.

#### **d) Other Taxes**

According to the Federal Act on Stamp Duties,<sup>23</sup> the Confederation levies three types of stamp duties: 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 Confederation is also permitted to levy further consumption taxes, for example: a tobacco tax, a beer and 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 Confederation levies a CO<sub>2</sub> tax and a federal casino tax.

## **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 Federal Tax Harmonisation Act (Articles 3 et seq. Federal Tax Harmonisation Act). As already mentioned, tax allowances and tax rates are not harmonised. As such, the income tax rates vary considerably between the cantons and, additionally, between the communes of a canton. Traditionally, the municipalities with the lowest income tax rates are located in the Cantons of Schwyz and Zug. The more expensive regions are traditionally found in the French part of Switzerland. For example, a single

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23 Federal Act on Stamp Duties of 27 June 1973, SR 641.10.

person with a taxable income of CHF 100,000 per year pays cantonal and communal income taxes at a total rate of 7.65%<sup>24</sup> if he or she lives in Wollerau (Canton Schwyz) and at a total rate of 22.62%<sup>25</sup> if he or she lives in Les Verrières (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>26</sup>

Up to this day, political efforts to restrict the cantons' sovereignty to autonomously determine their income tax rates have been unsuccessful. The positive effects resulting from tax competition have thus far been accorded more weight than considerations of equality, particularly since tax competition is considered to foster the spending discipline of the cantons (and communes) and to uphold their right of fiscal self-determination. Furthermore, there is a fiscal equalisation system in place on both the cantonal and the federal level that aims to somewhat balance out the different burdens, financial strengths and financial needs of the 26 cantons (and the various communes).

#### bb) Net Wealth Tax for Individuals

Based on Article 2 Federal 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 Federal Tax Harmonisation Act).

Assets are usually assessed at fair market value at the end of the tax year (Article 14 and Article 17 Federal 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>27</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>28</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. Again, the relevant provisions with regards to the tax subject, the tax object,

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24 Including the federal income tax the total rate amounts to 10.5% (tax year 2021).

25 Including the federal income tax the total rate amounts to 25.5% (tax year 2021).

26 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 2021.

27 For a single person without children for the year 2021.

28 Maximum tax rate for a single person without children for the tax year 2021.

the tax period, the tax procedure, and the tax penal law are harmonised and are very similar or even identical to the federal net-profit tax. The tax rates are, however, not harmonised.

On 1 January 2020, the Federal Act on Tax Reform and Financing of Social Insurance (TRAF) came into force and led to the abolishment of several cantonal preferential tax regimes. In their place, the TRAF introduced new instruments into the Federal Tax Harmonisation Act: in particular, a mandatory patent box regime that must be introduced by the cantons or as an optional instrument an additional deduction for qualifying research and development expenses. Further, as a consequence of the TRAF, most cantons have reduced their corporate income tax rates. At present, the ordinary tax rates for corporations range between 11.9% in the Canton of Zug to 21% in the Canton of Bern (the total of the effective federal, cantonal and communal tax rates in the canton's capital).<sup>29</sup> The tax rates of the low-tax cantons will be adjusted again to comply with the minimum tax rate of 15% agreed by the OECD and G20 member states for multinational companies with a turnover of more than EUR 750 million (Pillar Two). Switzerland plans to introduce the qualified domestic top-up-tax as well as the income inclusion rule and the undertaxed payments rule. It is expected that the implementation of the minimum tax will enter into force on 1 January 2024.

#### bb) Capital Tax

The cantons are also obliged to levy a capital tax on a legal entity's equity. For corporations, the taxable equity includes the paid-in share capital, any capital contributions made by the shareholders, and taxed hidden reserves. In almost all cantons the tax rate is proportional and ranges from 0.001% in the Cantons of Uri and Obwalden to 0.5% in the Cantons of Neuchâtel and Valais.

### c) Further Cantonal Taxes

#### aa) Inheritance and Gift Taxes

Inheritance and gifts are not subject to income tax on the federal or cantonal level. However, almost all cantons levy a special inheritance and/or gift tax.<sup>30</sup> Inheritance and gift taxes are not harmonised.

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29 Tax rates for the tax year 2021. "Effective tax rate" means the applicable tax rate before deduction of the taxes.

30 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.



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 deceased'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 (i.e. the 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 immoveable 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 immoveable property. This tax qualifies as a special kind of income tax. Even though the real estate capital gains tax is one of the harmonised taxes (Article 2 Federal Tax Harmonisation Act), there is much less harmonisation here as compared to harmonisation regarding individual and corporate income taxes. However, the Federal 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 Federal 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 immoveable 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 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS), which aims to facilitate the implementation of the minimum standard outlined in the BEPS final report. The Convention came into force on 1 December 2019. Further, on 1 January 2017, the Convention on Mutual Administrative Assistance in Tax Matters took effect in Switzerland. Drafted by the OECD and the Council of Europe, the Convention is today's most comprehensive multilateral instrument applicable to all forms of tax co-operation which tackles tax evasion and avoidance. Subsequently, Switzerland also ratified the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country 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 these treaties also cover 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, Switzerland has to date only concluded eight 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 a political, economic and cultural level. Over the years, countless bilateral agreements have been concluded to govern this relationship. From a tax perspective the most important agreements are the Agreement on Free Movement of Persons which prohibits—inter alia—discrimination of EU nationals in Switzerland and vice versa,<sup>31</sup> and the Agreement on Automatic Exchange of Information in Tax Matters which replaced the former Agreement on the Taxation of Savings Income as of 1 January 2017.

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31 See for a landmark case on the application of the Agreement on Free Movement of Persons pp. 225.

## 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>32</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 receiving the same taxable income.

As mentioned above, 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.

### 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>33</sup>

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32 DFC 110 Ia 7.

33 DFC 133 I 206.

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:

<b>Taxable Income</b>	<b>Tax (in CHF)</b>	<b>Tax Rate</b>
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 the proposed partially degressive tax scale infringed 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 for taxable income over CHF 300,000 would be arbitrary and could not 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 to income rates.

### **3. Principle of Good Faith: Swiss Ruling Practice**

A Swiss company belonging to a Swiss group set up a permanent establishment in the Cayman Islands. 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 would 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 would be attributed to the Swiss

company. The cantonal tax administration informed the Swiss company about this position in February 2005. This resulted in a dispute which was eventually brought before the Federal Supreme Court.

Advance tax rulings are of high practical importance in Swiss tax practice. Taxpayers are able to ask 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.

In the above-mentioned decision, the Federal Supreme Court confirmed 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, must have taken steps that cannot be easily undone;
- the law must not have changed; and
- the public interest must 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>34</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 their good faith.

#### **4. Principle of Non-Discrimination: Salary Withholding Tax**

X, a Swiss national living in France, commuted to Geneva every day for work. According to the double taxation treaty concluded between Switzerland and France, Switzerland was allowed to tax X's income from his 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>35</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 were 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 therefore had to consider X's personal situation and was not allowed to tax him less favourably than a Swiss tax resident. Due to this decision, the law on the source taxation of employment income was amended.<sup>36</sup>

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35 DFC 136 II 241.

36 See p. 216.

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Peter Georg Picht / Goran Studen

# Civil Law Principles and Family 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 Republic's decline in 1803, 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 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, Neuchatel, 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 remain uninfluenced by foreign legislation (for instance Zurich). Finally, a final group of central cantons (inter alia, Uri, Schwyz, Glarus, and Appenzell) completely abstained from enacting any comprehensive civil law legislation.<sup>1</sup>

The codification of the Canton of Zurich (1856) by Professor JOHANN CASPAR BLUNTSCHLI was influential. It was Switzerland's first independently codified cantonal civil code. BLUNTSCHLI's work was well-recognised both nationally and internationally and it served as a model for the later codification and harmonisation of civil law on the federal level.

However, the Swiss civil law landscape was to remain heterogeneous throughout the second half of the 19<sup>th</sup> century. The 25 cantons<sup>2</sup> (i.e. federal states) retained their legislative independence, leading to a variety of civil codes. In the 1860s, 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. Shortly thereafter, Article 64 of the Constitution (1874) empowered the Confederation to legislate on all legal matters relating to commerce. The Code of Obligations was passed on 14 June

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1 PETER TUOR/BERNHARD SCHNYDER/JORG SCHMID/ALEXANDRA JUNGO, *Das Schweizerische Zivilgesetzbuch*, 14<sup>th</sup> edition, Zurich 2015, § 1 n. 2 et seqq.

2 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.

1881.<sup>3</sup> Finally, in 1898, the people and the cantons transferred the competence regarding civil law matters to the federal legislator.



Figure 1: Johann Caspar Bluntschli (1808-1881)<sup>4</sup>

## 2. Legislation

To address the fragmented civil system, the Federal Council mandated Professor EUGEN HUBER 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.

Following the comparative analysis, HUBER published the first draft of the Civil Code in 1900. From 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 came into force on 1 January 1912.

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3 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 separate (rather than continued from the Civil Code) article numbering. Therefore, this chapter does not address the Code of Obligations and its underlying principles (for details on the Code of Obligations see the chapter on Contract and Tort Law, pp. 317).

4 Source: Wikipedia, with reference to: *Reproduction from Zurich—Geschichte Kultur Wirtschaft*. Gebrüder Fretz, Zurich 1932 ([perma.cc/5KNN-XFGQ](https://perma.cc/5KNN-XFGQ)).

5 Notably, HUBER's assistance was mandated several years before the 1898 referendum 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 Confederation 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 on with the project immediately; see for details on the Criminal Code the chapter on Criminal Law, pp. 409.



Figure 2: Eugen Huber (1849-1923)<sup>6</sup>

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### 3. Gender Equality

Upon entering into force in 1912, the Swiss Civil Code was in many ways a very modern work of legislation, which drew the admiration of foreign legal scholars.

In some ways, the Swiss Civil Code also managed to improve the legal position of women compared to the cantonal laws of the past. This first modernisation of women's rights was mainly driven by Switzerland's women's movement, inspired and led by EMILIE KEMPIN-SPYRI, who graduated from the University of Zurich in 1887, and thereby became the first female in Europe to earn a PhD in law.

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Figure 3: Emilie Kempin-Spyri (1853-1901)<sup>7</sup>

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6 Source: Wikipedia ([perma.cc/EQ7T-E2UV](https://perma.cc/EQ7T-E2UV)).

7 Source: Wikipedia ([perma.cc/2BL8-FVZF](https://perma.cc/2BL8-FVZF)).

Having said this, in terms of gender equality, the Swiss Civil Code remained very much a child of its time and, de facto, married women remained hugely restricted in their ability to act independently. They needed their husband's consent for any significant legal transaction.

It was not until the last quarter of the 20<sup>th</sup> century that the hierarchical male-leadership model of marriage was replaced by a new, partnership-based model of marriage and family. First, in the 1970s, adoption and child law was revised, which also improved the position of mothers. In 1988, the revised Marriage and Marital Property Law came into force, based on the principle of equal rights. On 1 January 2013, the major revision of the law on marital names came into force. Since then, the bride and groom have been able to retain their family names upon marriage (Article 160 I). However, they can declare that they wish to use one of their names as their common name (Article 160 II). If the bride and groom retain their family names, they must also determine at the time of marriage which family name their joint children shall bear (Article 160 III). A new child support law has also been in force since 1 January 2017. Under this law, parents have to decide who is to provide practical care for the child and who is to contribute to the care of the child through monetary payments. Since 2007, the registered partnership between persons of the same sex has been permitted under a separate federal law (*Partnerschaftsgesetz*; Same-Sex Partnership Act).<sup>8</sup> Finally, after a lengthy process dating back to 2013, in September 2021 the Swiss people overwhelmingly voted in favour of legislation allowing same-sex marriages as of 1 July 2022.

Despite these improvements, a lot remains to be done. The Swiss Civil Code in its current form does not adequately take into account the many forms of family cohabitation outside of a traditional marriage. Today's demands for a modern civil law thus call for more dynamic regulations that acknowledge new norms and values. One such example where Swiss civil law remains behind the curve is the lack of provisions in the area of non-marital cohabitation. While non-marital long-term relationships are nowadays commonplace, only recently the Swiss National Council refused to introduce regulations aiming at enhancing the legal position of cohabiting couples. Furthermore, legal problems and uncertainties remain in the dissolution of non-marital partnerships, since divorce law does not apply to them.

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8 Federal Act on Registered Partnership for Same-Sex Couples of 18 June 2004, SR 211.231, see for an English version [www.fedlex.admin.ch \(perma.cc/B65A-LPZ8\)](http://www.fedlex.admin.ch/perma.cc/B65A-LPZ8).

## 4. Content<sup>9</sup>

The Civil Code is comprised of 977 Articles.

The introduction contains ten articles, which contain general principles of Swiss law (application of the law, good faith, relationship between federal and cantonal law, and rules of evidence).

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 such as an individual's place of origin and domicile. The section on legal persons contains fundamental principles (Articles 52-59) that are universally applicable to all legal persons under Swiss law (such as the separate legal personality of legal entities, their capacity to act and to acquire rights and obligations, their seat, and rules pertaining to their dissolution). Articles 60-79 specifically address associations and Articles 80-89a deal with foundations.<sup>10</sup>

Part 2 is dedicated to *Family Law* (Articles 90-456). It addresses the marital law and marital property law. The family law part 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 deputyship) and introduces the instruments of the health care proxy and the living will into Swiss civil law.

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 testamentary dispositions, executors, the commencement and legal effects of succession as well as the division of the estate.<sup>11</sup>

Part 4 (Articles 641-977) focuses on *Property Law*.<sup>12</sup>

The final title contains 251 commencement and implementing provisions, which, inter alia, regulate the transitional relationship between this federal Code and its cantonal predecessors.

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9 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.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/DG3C-PVHW](https://perma.cc/DG3C-PVHW)).

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10 See chapter on Law of Persons, pp. 253.

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11 See chapter on Inheritance Law, pp. 275.

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12 See chapter on Property law, pp. 297.

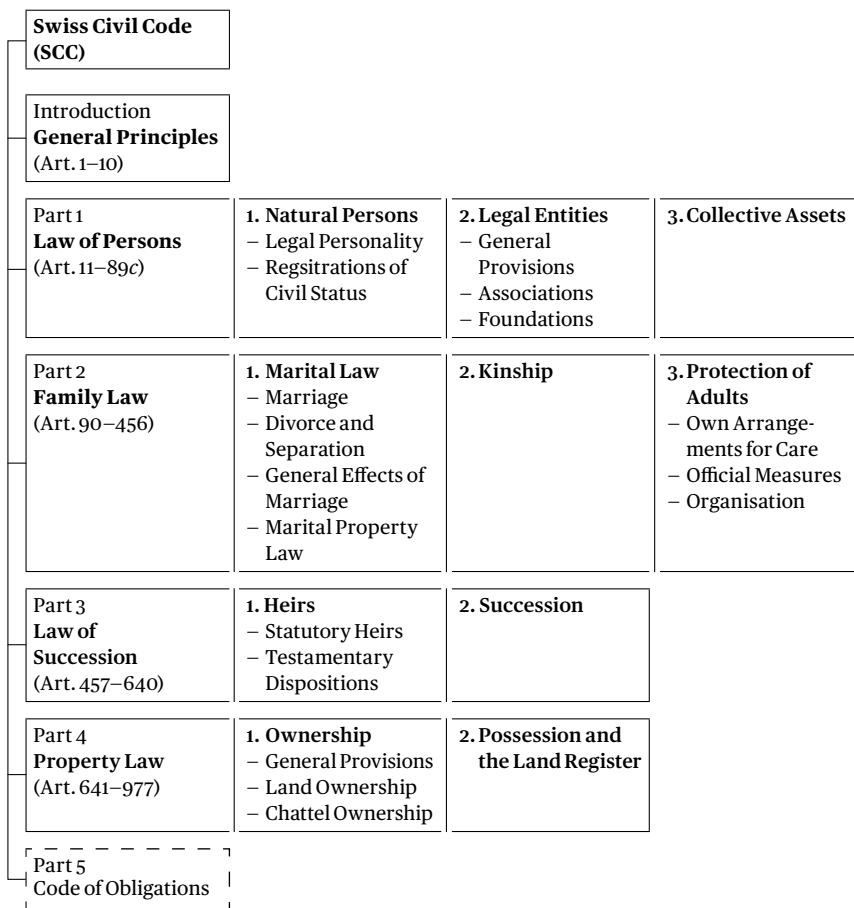


Figure 4: Structure of the Civil Code

## 5. Marital Property Law

Swiss family law establishes three marital property regimes to govern the ownership of property: (i) the marital property regime of participation in acquired property; (ii) the community of property; and (iii) the separation of property. Participation in acquired property constitutes the default regime. It applies if the spouses do not conclude a pre- or post-nuptial agreement.

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 and the assets they acquired during the marriage.<sup>13</sup>

The *acquired property* under this regime comprises the assets which a spouse acquired for valuable consideration during the marital property regime, in particular (Article 197 II):

- 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 law (Article 198), a spouse's *individual property* comprises:

- personal belongings used exclusively by that spouse (e.g. jewellery, musical instruments, etc.);
- assets belonging to one spouse at the beginning of the matrimonial property regime as well as donated and inherited property;
- claims for satisfaction; and
- acquisitions substituting or replacing individual assets.

The marital property regime is dissolved on the occurrence of one of the following: (i) divorce, (ii) death of a spouse, or (iii) the implementation of a different regime (e.g. conclusion of a marriage contract changing the marital property regime). In the case of dissolution of the marital property regime of participation in acquired 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 and 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

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13 By default, registered partners live under the property regime of separation of property, see Article 18 of the Same-Sex Partnership Act. 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.

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 enjoys the benefits of his or her individual property. If the regime of separation of property is dissolved, each spouse keeps his or her individual property.

## 6. 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 (Article 80 et seqq.) or inheritance law (see Article 493) to meet the costs of raising, endowing or supporting family members, or for other “*similar purposes*”. However, the establishment of (new) fee tails is explicitly prohibited (Article 335 II, Article 488 II).<sup>14</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 is not permissible.<sup>15</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 Swiss civil law. Perhaps indicating a shift towards a less strict approach, the Federal Supreme Court held in 2009 that Article 335 is not a so-called *Loi d’application immédiate* preventing the legal recognition of maintenance foundations established under foreign law.<sup>16</sup>

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14 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.

15 DFC 71 I 265.

16 DFC 135 III 614.

## II. Principles

### 1. Application and Interpretation of the Law

According to Article 1, which addresses the relationship between statutory law and judicial power, the court must apply the law to all legal questions which it can provide an answer to, either by directly applying its wording or by interpreting its terms (paragraph 1). 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 (paragraph 2). When applying and interpreting the law, the court shall follow established doctrine and tradition (paragraph 3).

Article 1 can be regarded as the civil law's expression of the constitutionally protected and fundamental principle of the *rule of law*: 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, it explicitly identifies established doctrine and case law as two relevant considerations of methodological interpretation in the process of finding justice.<sup>17</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 legislator and establish a rule that could serve as a general statutory law-provision. Even 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.

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17 "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.

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 follow the interpretation that is most in line with the fundamental values enshrined in the Swiss Constitution.<sup>18</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 in the round: 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 it is confronted with the facts of an individual case. In this way, the rule ultimately comes to life through interpretation.<sup>19</sup>

This pragmatic approach is criticised in legal doctrine. On closer examination, it can be convincingly argued that the Federal Supreme Court simply wants to keep the door open for any future interpretation of a certain law. Whether such a blurring of boundaries between the different interpretation methods strengthens legal certainty, is, however, highly doubtful. In addition, with this approach, it becomes increasingly difficult to draw the line

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18 DFC106 Ia 33.

19 DFC136 III 23 c. 6.6.2.1.

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; it is universally applicable and has validity in all aspects of Swiss law.<sup>20</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 the *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 law or 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 principles of integrity into the civil law.<sup>21</sup>

The principle of good faith reveals an important facet of Swiss civil law. Article 2 is the gateway and focal point for the legal interpretation of, among others, contracts, actions, etc., and, where necessary, the creation of amendments or supplements to legal declarations of intention. Under this Article, 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*

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20 DFC 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 the chapter on Administrative Law, pp. 169.

21 Hence, it is not surprising that the sub-principle of mutual respect has much 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.

*of trust*.<sup>22</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 and the ambiguity rule. In particular, in the context of general terms and conditions (GTCs), where an unusual or surprising wording was implemented without this being explicitly brought to the attention of the other party, 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 the courts to correct or prevent unbearable consequences which might otherwise undermine trust in the legal system's ability to provide fair and reasonable (and morally acceptable) results.<sup>23</sup> According to established case law of the Federal Supreme Court, a blatant abuse of the law will not be granted legal protection (Article 2 II).<sup>24</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 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.

For 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 notarised deed of sale from CHF 6 million to CHF 5 million. However,

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22 This applies to declarations of intention which must 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. a testament), the Federal Supreme Court applies the so-called principle of intent (*Willenstheorie*) 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.

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23 DFC 125 III 257 c. 2 a.

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24 Among others, Judgement of the Federal Supreme Court 4A\_141/2008 of 8 December 2009.

they agree that the buyer shall pay the seller the difference in cash. If the buyer, upon signing the notarised 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 must be notarised, such approach could promote illicit behaviour between colluding parties and undermine the trust of the general public. Therefore, Article 2 II prohibits the seller from invoking the invalidity argument.<sup>25</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 a previous act 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 expectation.

For example: company X (a limited liability company) has rented business premises from company Y (a company limited by shares) 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 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 to 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 that the old rental agreement officially expired and with only minor issues left to negotiate, the CEO of company Y suddenly sent

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25 Interestingly, in similar cases (DFC 92 II 323 and DFC 104 II 99 [see below, pp. 248]) the Federal Court declined to apply Article 2 II on the basis that the other party had wilfully 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 on and faith in entries in the land register.

an e-mail to company X stating that “*as you are aware, the rental agreement is expiring today*” and demanded that company X “*remove any installations and to make sure to hand over the premises in the original condition by 5.00 pm today at the latest*”.

Based on the CEO’s behaviour here, company X could 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 that a contract renewal could be expected and then subsequently abruptly abandoning the negotiations, the CEO of company Y acted in a contradictory manner.

As a result and based on Article 2 II, company Y could neither claim that the original rental agreement expired nor demand that company X hand over the business premises in the original condition.

### 3. 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>26</sup> However, it was deemed necessary that the Civil Code should address certain procedural issues regarding evidence, which could not be separated from the substantive civil law.

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>27</sup> Conversely, the party arguing that a claim is unsubstantiated or unenforceable bears the burden of proving 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 an extension).

Further, the legislator of the Civil Code foresaw potential evidence-related problems with regards 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,

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26 As a matter of fact, it is only since a referendum decided in 2000 that the competence for procedural law has been 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. 387; see for an English version of the Civil Procedure Code [www.fedlex.admin.ch/perma.cc/DXA5-U5RV](http://www.fedlex.admin.ch/perma.cc/DXA5-U5RV).

27 TUOR/SCHNYDER/SCHMID, § 7 n. 7.



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 the dealer price paid by professional car dealers is approximately CHF 40,000. In such a case, the low price on offer from B should alarm A. Given 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 consider 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>28</sup>

## 4. Capacity of Judgement

Under Swiss law, in order for one’s actions to have legal effect, one must have capacity of judgement. According to Article 16, a person is capable of exercising judgement if he or she does not lack the capacity to act rationally because of his or her age, mental disability or disorder, intoxication, or due to other similar circumstances. Capacity of judgment is not determined in the abstract, but in the context of the 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, the (only) relevant determination is whether the prospective spouses are mentally capable of both understanding the general concept of marriage and deciding to get married 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 the prospective spouses would also be capable of concluding a complex legal contract. Further, capacity of judgement only requires the capacity to act rationally, not responsibly. Whether it is a good idea for an 18-year-old to get married is equally irrelevant.

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 assertion. However, *capacity of judgement* is presumed under Swiss civil law. Consequently, when entering into a contract, each party can assume that the other is legally capable. This presumption

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28 For a similar case see DFC 107 II 41; see also DFC 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.

cannot be rebutted easily. Even in cases involving a person who brings repeated legal suits, the presumption cannot be easily rebutted. As the Federal Supreme Court held, it would be unfair to automatically regard every person who tries to enforce his/her alleged rights in a stubborn manner through all possible means (and who occasionally even disregards norms of common decency) as a psychopathic querulant incapable of judgement.<sup>29</sup>

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 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 guardianship authority, A started taking care of E in July 1988 and the two women developed a close personal relationship. In September 1988, E, accompanied by A, drew up a new notarised testament appointing A as E's sole heiress. Shortly afterwards E died. 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 declared the second testament void. The Court held that the presumption of capacity of judgement cannot be invoked if the person concerned, according to his or her general constitution, must normally and in all probability be regarded as incapable of exercising judgment. Consequently, the burden of proof was shifted to the person arguing in favour of capacity of judgement (which in this case was A).<sup>30</sup>

However, this decision raises two questions: firstly, how can a person ever provide indisputable proof of capability of judgement, in particular in cases where the person concerned is deceased? Secondly, in an ageing society one must be careful not to jump to the conclusion that a person above a certain age or suffering from a mental disorder cannot have capacity of 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 potentially less obvious cases than the one described above.

In the above case, the Federal Supreme Court prevented a legacy hunter from obtaining the deceased's inheritance and the judgment is therefore understandable and morally justified in its outcome. However, the Court's findings regarding the assessment of evidence of capacity leave a stale aftertaste. Has the Federal Supreme Court thrown the baby out with the bathwater by

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29 DFC 98 Ia 324 c 3.

30 Judgment of the Federal Supreme Court 5C.33/2004 of 6 October 2004 (in particular, c. 3.1. and 3.2).

opening the door to a de facto reversal of the burden of proof in cases involving old age and mental decline? If it has, the consequences would be far-reaching and, in view of increasing life expectancy, questionable from a socio-political point of view.

## 5. Separation Principle

Part 1 of the Civil Code regulates the legal personality of legal persons, mainly societies or bodies, in Switzerland. In Swiss law, legal persons possess all the same rights and duties as natural persons, except for those rights 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-a-vis third parties. In this regard, Swiss civil law follows the so-called *separation principle*.

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>31</sup>

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<sup>31</sup> 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 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.

### 1. Formal Invalidity and Good Faith (Article 2)<sup>32</sup>

On 21 September 1971, the claimant (the seller) entered into a notarised *preliminary* contract with the defendant (the buyer) for the sale of several plots of land. Until November 1972, the defendant had several new buildings erected on the purchased property. On 3 November 1972, the *final* contract was notarised and the change of ownership was registered in the land register. Subsequently, the defendant paid the claimant the amount of CHF 720,000 (as per the notarised final agreement), while refusing to pay an additional CHF 100,000 which he had verbally promised to pay to the claimant. The claimant initiated court proceedings, asking the courts to declare the two notarised contracts null and void and arguing that the ownership of the properties in question should be transferred back to him.

In its decision, the Federal Supreme Court had the chance to define the relationship between formal invalidity (as the formally agreed price between the parties differed from the one they informally had agreed) and the principle of good faith (Article 2).

The Federal Supreme Court started by explaining that the notarised contract deliberately contained a wrong (i.e. lower than the “real”) purchase price, thus making the contract void due to lack of form.<sup>33</sup> Against this background, the Court had to decide whether the claimant could successfully argue that the final contract did not observe the formal requirements while he himself had agreed to such improper behaviour (by agreeing to the formally undeclared amount of an additional payment).

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32 DFC 104 II 99.

33 Cf. DFC 98 II 316.

The Court held that the claimant was barred from claiming the remaining CHF 100,000 due to an abuse of rights on his part.

Further, the Court held that the legal situation intentionally created by the parties through the execution of the notarised (final) purchase contract must remain in place.

## 2. Uniform Calculation of Maintenance<sup>34</sup>

With a decision of 9 February 2021, the Federal Supreme Court added to a series of rulings which have fundamentally changed Swiss maintenance law.

Wife A and husband B got married on 8 March 2002. Together they have a son, C, who was born in 2005. The spouses had been separated (and had not lived together) since December 2015. In August 2016, the husband was ordered to pay monthly alimony payments of CHF 1,800 for his son C and CHF 10,000 for his wife A. This court order was confirmed by the higher court in October 2017.

In January 2018, B applied for divorce. In the divorce proceedings, the competent court re-assessed the alimony payments from B to C and A. In 2019, the appeal court modified the alimony payments in favour of the son C, while significantly reducing the monthly alimony amounts payable to the wife from CHF 10,000 to CHF 4,400 from December 2021 onwards (this was essentially due to a drop in husband A's income). Following an appeal from A, the wife, the Federal Supreme Court had to deal with two key issues of post-marital maintenance and alimony:

*First*, the Federal Supreme Court found that the unexpected change of method applied by the appellate court when calculating the post-marital maintenance and alimony was not arbitrary. Due to the decrease in the husband's net income, the cantonal Court had switched to the two-step method of calculation with surplus distribution. Under this method, the total income of the spouses is compared to the basic needs of both parties (including the needs of the child) and any surplus is divided, allowing the child to participate in the surplus. For many years, the Federal Supreme Court had allowed the use of a plethora of different calculation methods in the area of alimony/maintenance and had only intervened to correct any inadmissible mixing of different methods. However, in its landmark decision of 11 November 2020, the Federal Supreme Court unified the maintenance methodology. As a result of this ruling, the two-step method must be applied when calculating child alimony.<sup>35</sup>

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34 Judgment of the Federal Supreme Court 5A\_800/2019 of 9 February 2021.

35 Judgment of the Federal Supreme Court 5A\_311/2019 of 11 November 2020.

In another landmark ruling dated 2 February 2021, the court extended this methodology to the post-marital maintenance and alimony of spouses.<sup>36</sup> Against this, the application of the two-step method by the appellate court was therefore not arbitrary, but in the words of the Federal Supreme Court, will in fact be the relevant method applied in any future decisions.

*Second* and most notably, the Federal Supreme Court ruled that it was reasonable for the wife to take up employment in order to provide for herself. Continuing the trend started in previous rulings, the Court further strengthened the principle of prioritising spouses' self-sufficiency. The Federal Supreme Court held that after four years of separation, resumption of the joint household was not to be expected, and the wife could therefore be reasonably expected to take up employment. This was especially so considering the child's advanced age and the fact that he was in full-time school care.

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36 Judgment of the Federal Supreme Court 5A\_891/2018 of 2 February 2021.

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Elisabetta Fiocchi Malaspina / Giulia Rossi

# Law of Persons

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# I. Legislation

The Swiss Civil Code contains provisions relating to the law of natural persons, set out at Article 11 to 51.<sup>1</sup> The Swiss Civil Code also sets out the law governing juridical persons, including associations and foundations, at Article 52 to 89c.

## 1. Natural Persons

The Civil Code regulates the rights of individuals: for example, the enjoyment and exercise of civil rights; the ability to act; the rules on the degree of kinship; the concept of domicile; the beginning and the end of legal personality (including the determination of the moment of birth and death); and actions that can be taken to protect one's personality. The second chapter of the first title contains provisions on civil status: registration requirements, data protection and disclosure, the obligations of registrars, the supervisory authorities, and relative disciplinary measures.

### a) Adults and Capacity

The exercise of civil rights is defined as the ability to acquire rights and incur obligations by one's acts. According to Article 13, persons of age (18 years and over) and who are capable of judgment can exercise civil rights. On the other hand, persons incapable of judgment, minors and persons under general guardianship, in principle, cannot exercise civil rights unless the law provides otherwise.

A person has capacity of judgement if he/she does not lack the ability to act rationally, by virtue of being underage, having a mental disability or disorder, being intoxicated or because of some other similar circumstance. It is expressly set out that a person who is "*incapable of judgement cannot create legal effect by his or her actions*" (Article 18).

Therefore, under Article 13, a person of age and with capacity of judgement may exercise civil rights; that is, they are able to exercise self-determination in

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1 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; for an English version of the Civil Code see [www.fedlex.admin.ch](http://www.fedlex.admin.ch) (perma.cc/DG3C-PVHW).

a wholly independent and autonomous way. The individual, therefore, has the possibility and the capacity to make commitments, i.e. to enter into obligations.

Article 19 et seqq. of the Civil Code contain a series of provisions that protect subjects capable of judgement but who are unable to act: the principle that is derived from these Articles is that assumption of obligations and any renunciation of rights cannot take place without the consent of their legal representative. This consent may be given expressly, tacitly or retrospectively (Article 19a). In cases of gratuitous benefits and minor matters of daily life (Article 19 II), the consent of the legal representative is not required. For example, a 14-year-old can receive a laptop as a gift from her grandmother, without the consent of the legal representative, but not a house as this entails obligations, not merely benefits. Furthermore, a 14-year-old can buy a pack of chewing gum without the consent of her legal representative, but not a car.

## **b) Place of Origin and Domicile**

According to Article 22 of the Swiss Civil Code, the place of origin of a person is determined by his/her citizenship, which is governed by public law. Where a person is a citizen of more than one place, then the place “*which he or she is or was most recently resident or, in the absence of any such residence, the one in which he or she or his or her ancestors last acquired citizenship*” is considered to be his/her place of origin.

Domicile is defined by Article 23 as the place where a person both lives and intends to settle permanently. It differs from simple residence for the purpose of education, for example, and from “business domicile”, defined as where the person concerned mainly carries out work activities. For example, living in a student dormitory does not constitute a new residence at the place of the university, as long as the student concerned regularly returns to the parental home.

## **c) Beginning and End of “Personality”**

Article 31 of the Civil Code identifies the beginning and end of “personality”, stating that “*personality rights begin on the birth of the living child*” and end with the subject’s death. It also specifies that an unborn child can enjoy civil rights provided it survives birth.

Articles 34 to 38 of the Civil Code regulate the procedure for legally establishing the death of a person who has been missing for a lengthy period. According to Article 36, a request for a person to be officially declared “presumed dead” may be made to the court “if at least one year has passed since

the life-threatening event or at least five years have passed since the last sign of life.” The court must then put out a public request for any person with information to come forward within a specified time period (a minimum of one year). If no notable news of the missing person is received and the missing person does not come forward, he or she will be declared presumed dead, with all the corresponding consequences, such as the opening of the succession and the dissolution of the marriage.

A tragic example of such a declaration of presumed death is the case of Bruno Manser, a Swiss ethnologist and environmental and human rights activist who lived with the Penan tribe in Sarawak, Malaysia and organized several blockades against logging companies. Manser disappeared in May 2000 during his last trip to Sarawak and was officially declared presumed dead on 10 March 2005.

## 2. Juridical Persons

In chapter one of its second title (Articles 52 to 59), the Civil Code deals with the concept of legal entities. Under Swiss Law, such entities are referred to as “juridical” persons, in contrast to “natural” persons whose rights and obligations are regulated in the first title.

### a) Associations

One of the categories of legal entity regulated in the Civil Code is the association, which must be established for specific political, religious, scientific, artistic, charitable or recreational purposes. The purpose may not be commercial. The association must use its assets for the purpose specified. The Swiss Alpine Club, a mountaineering association founded in 1863, is an example of such an association.

Chapter two (Articles 60 to 79) of the second title regulates associations, establishing the modalities of their constitution and organisation; the exercise of the right to vote; their accounting and auditing requirements; the rights and duties of their members; rules relating to possible exclusion of members and concerning the association’s assets; and the dissolution of the association.

According to Article 64, the general meeting of members is “*the supreme governing body*” of the association, being responsible for decisions regarding the admission and exclusion of members and for electing the association’s committee. According to Article 69, the committee has both the right and duty

to safeguard the interests of the association and to represent it in accordance with the articles of association. According to Article 69a, the committee further has the task of maintaining the association's business ledgers. Articles 74 et seqq. set out the rules relating to members. Changes to the aims of the association cannot be imposed on members without their consent. Members also have the right to legally challenge resolutions adopted by the general meeting deemed contrary to the law or the articles of association, within one month of learning of the resolution. However, to be able to challenge the resolution, they must not have consented to it at the meeting.

Resolutions are passed by the general meeting, duly convened by the committee, where all members have equal voting rights (Article 67).

Regarding dissolution, the Civil Code provides that this should occur by law in the case of the association's insolvency or when the committee can no longer be constituted in accordance with the articles of association (Article 77). Furthermore, Article 78 states that the court may compel dissolution at the request of an interested party in circumstances where the association has an illicit or immoral purpose.

For example, an association whose purpose is to assist members in evading taxes could be dissolved by a court because of its illegal purpose.

## **b) Foundations**

Chapter three (Articles 80 to 89c) of the second title covers the rules concerning foundations,<sup>2</sup> in particular regarding their constitution, form, rules for their accounting and auditing, and regarding the regulation of the so-called family and ecclesiastical foundations as well as employee benefit foundations. The foundation is best understood as self-owned special-purpose assets that either directly or indirectly benefit a group of persons (the beneficiaries), depending on the purpose of the foundation. As it is difficult to change the purpose of a foundation retrospectively, they are suitable as an estate planning instrument, whether to keep assets together or to protect a company from being taken over and split up by several heirs.

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2 As explained in the chapter on Civil Law Principles and Family Law, pp. 229, a foundation is not a trust. While common law "trusts" and the concept of "foundations", as understood in most European civil law countries, share common features (such as the fact that their existence provides for certain beneficiaries or the general public), there are considerable differences between the two: a Swiss foundation is a legal entity with own rights and obligations, common law trusts are characterised by the separation of legal ownership and economic interest whereby a trustee (and not the trust) becomes the legal owner of the trust assets and acts as fiduciary in the economic interest if the beneficiaries.

Foundations are established when certain assets are designated “*for a particular purpose*”. Article 81 provides that a foundation may be created by public deed and by the testamentary disposition of the deceased. In the latter case, it may be contested by the heirs. Foundations must also be registered in the commercial register, where the board members must be indicated (Articles 83 et seqq.).

Article 89a of the Civil Code also establishes a particular type of foundation called “*employee benefits schemes*”. Employee benefit schemes differ from typical foundations in terms of their potential beneficiaries and purposes: only employees or their relatives can be beneficiaries under employee benefit schemes. The foundation is financed by contributions from the employee and employer.<sup>3</sup> The beneficiaries must be provided with complete information regarding the foundation’s organisation, activity, and financial status. Beneficiaries can also legally request the distribution of the foundation’s benefits.

The last two articles of the Swiss Civil Code dealing with law of persons cover publicly collected assets. In these cases, a purpose is determined and assets are then publicly collected for this purpose through donations. This differs from the foundation, where existing assets are dedicated to a particular purpose. For example, publicly collected assets could include collections after a fire to support the victims or collections to commemorate a public figure.

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3 These schemes are a fundamental component of Switzerland’s “three pillar” social system. For further information see, for example: Social security in Switzerland, AVS/ AI Information Centre, Federal Social Insurance Office and State Secretariat for Economic Affairs, January 2021 ([perma.cc/62UQ-ZQZF](https://perma.cc/62UQ-ZQZF)) or “Brochure Switzerland’s old-age insurance system: A tried-and-tested system—in simple terms” ([perma.cc/5GL2-Z84A](https://perma.cc/5GL2-Z84A)).

## II. Principles

Differing from other Swiss legal codes, the Swiss Civil Code does not contain a “general part” setting out basic legal concepts. However, the law of persons defines who and what can perform legally relevant acts and regulates legal entities; as such, it is of fundamental importance and has a very close connection with other areas of private law. Therefore, the proper functioning of the entire private law is primarily determined by the law of persons, as set out in the Swiss Civil Code.

### 1. Natural Persons and Juridical Persons

The most important principle of the law of persons is the distinction between a natural person and a legal entity. A natural person (essentially, a human being) enjoys civil rights and can acquire rights and contract obligations by their acts within the limits of the law. These limits are specified in Article 13, which states that a person of age, i.e. 18 years or over, and of sound mind can exercise civil rights.

A juridical person can be defined as a single entity consisting of several natural or legal persons or assets, which is recognised by law as having the capacity to act under certain conditions in accordance with its purpose, which must be legitimate and moral. As mentioned above, legal entities that serve the purpose of, for example, tax fraud are not recognised in law.

To understand the concept of a legal entity, it is necessary to analyse two key theories developed during the 19<sup>th</sup> century: firstly, the so-called theory of fiction, advocated by the German jurist FRIEDRICH KARL SAVIGNY (1779–1861), who was the founder of the German Historical School; and secondly, the so-called theory of reality, advocated by the German jurist OTTO VON GIERKE (1841–1921).

According to the theory of fiction, moral persons are created using a “*fictio iuris*”: the legislator pretends that entities other than man have, like man, the attributes of a person. The legislator extends, fictitiously, the category of human beings and creates a kind of artificial man. On the other hand, in the theory of reality developed by GIERKE, legal persons are—like man—endowed with their own will and are bearers of their own interest, distinct from that of the natural persons who make up the members.



The distinction between the theories is particularly important in assessing the legal person's capacity to commit a tort. According to the theory of fiction, responsibility is attributed to the persons behind it, while according to the theory of reality, it is per se possible to attribute responsibility to the legal person.

In principle, Switzerland followed the theory of reality, although it was further developed to a certain extent by the so-called abstraction theory. This theory sought to combine the advantages of the fiction and reality theories in the sense of a compromise. Legal persons are neither mere fictions nor pure "natural beings". Rather, according to this theory, they are abstractions of something actual and thus do not have to be fictitious because they already exist. The extent of the rights granted to a legal person in Switzerland should therefore be governed by what society wants to grant them. This led to Article 53, which states that legal persons are entitled to all rights that are not by their nature linked to being human, such as gender.

As a result, the scope of legal capacity of legal persons has expanded from the mere recognition of property rights to the granting of comprehensive personal rights. For example, legal persons can also invoke freedom of belief to a limited extent.

Legal entities are liable to fulfil any contractual obligations entered into and for the acts of their governing bodies. Outside of contractual obligations, they may also be liable, for example, as principals for the acts of employees or as owners of real property on the basis of certain attribution norms.

## 2. Legal Entities and Their Rights

As mentioned above, the Swiss Civil Code essentially embraces the theory of reality: Article 55 I states that "*the governing bodies express the will of the legal entity*" and according to Article 55 II, "*they bind the legal entity by concluding transactions and by their other actions*".

The Civil Code establishes, from a general point of view, the principle of the enjoyment of civil rights by legal entities, who possess both rights and obligations, provided that the bodies provided for by law have been created with this explicit purpose.

There is a *numerus clausus* of legal forms possible for legal entities, with the rationale being the protection of legal transactions (see also the chapter on Company Law). Mixed forms are prohibited. The result is a limit on the possible forms of legal entity that can be parties to a legal transaction. Further, as legal entities are subject to clear legal regulations (governing e.g., their

capital, representation, name, liability), legal certainty and legitimate expectations regarding these entities and their operation are established.

### 3. Protection of Legal Personality

Article 27 of the Civil Code prohibits an individual from renouncing his/her legal capacity. This provision also prohibits individuals from forfeiting or limiting their freedom in a manner which is incompatible with the law and morality. If the restrictions in a contract are too limiting for the individual, this is called excessive binding. Excessive binding can result, for example, from the duration of the contractual obligation or from excessively intensive non-compete clauses in professional sport.<sup>4</sup>

There are a series of provisions regarding infringements of personality rights (Article 28 et seqq), e.g. providing for judicial intervention to stop imminent or current infringements or to ascertain their illegality (Article 28a). For example, one can bring an action to defend oneself against defamatory and untrue statements in the media. Individuals who have suffered an infringement to their personal integrity can, under Article 28b, ask a judge to prohibit the infringer from certain actions: for example, in cases concerning stalking, approaching or accessing certain places, staying in certain areas and contacting the victim.

Regarding the use of a name, the provisions in the Civil Code establish the general principle that if a person's right to use a name is contested, he/she can request legal recognition; where a person has good cause, Article 30 provides that the canton may authorise a change of name. An example of a recognised "good cause" is the case of a child who, after the divorce of the parents, wishes to take the surname of the parent with custody over him or her (see Landmark cases: Change of Name I, case 4). Another example is a person who wishes to change their first name to reflect their perceived gender. Moreover, on the death of one of the two spouses, it is always possible to ask the registrar for "restoration" of one's surname before marriage.

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4 As an example, see DFC 102 II 211, concerning the agreements between a football club and a player which, upon termination of the employment relationship, allowed the club to refuse the player a leaving certificate with the consequence that he could not transfer to another club and would therefore be excluded from the National League for a period of two years.

## 4. Civil Status and Registration

Articles 39 to 51 cover the registration of civil status. Civil status comprises information on a particular subject, e.g. birth, marriage, death, citizenship, and a person's personal and family status (for example, parentage).<sup>5</sup> This information is particularly relevant for the issuance of identity documents, the determination of heirs, the determination of citizenship (and thus also the right to vote), and, on a more impersonal level, it is also used for population statistics.

In relation to civil status documentation, Article 43a of the Civil Code provides that the Federal Council must protect the personality and fundamental rights of the person whose personal data are being processed. This Article further provides for the Federal Council to regulate the disclosure of personal data to private individuals with a direct interest worthy of protection and to designate the authorities (outside the register authorities) to which data necessary for the performance of their official duties can be disclosed, regularly or upon request (Article 43a II and III). In accordance with Art. 58 of the Civil Status Order (ZStV, SR 211.112.2) enacted by the Federal Council, the register authorities are obliged to disclose to Swiss courts and administrative authorities the civil status data that is indispensable for the performance of their statutory duties on request. This inter-institutional request of personal data should always be subsidiary, i.e., after prior efforts to obtain the required information from the data subject have been unsuccessful. Exceptions are cases in which a special legal basis grants a direct claim. Such an example can be found in Art. 32 of the Federal Social Insurance Law Act, General Part (ATSG, SR 830.1), in which it is stipulated that upon written and justified request authorities shall disclose data required for the determination of benefits, the prevention of unjustified withdrawals and in cases of recourse to liable third parties.

Paragraph 4 of Article 43a explicitly lists authorities that have an independent right to retrieve personal data from the register authorities automatically. This includes, for example, the federal agency responsible for investigations into missing persons.

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5 Closely related to this issue is that of the protection of personal data. On 25 September 2020 the Federal Law on data protection (dating back to 1992) was totally revised to adapt this legislation to social conditions and technologies, and to bring it closer to more recent, modern regulations on data protection in force in Europe (in particular *General Data Protection Regulation*, (EU) no 2016/679. See: MARIUSZ KRZYSZTOFEK, *GDPR: Personal Data Protection in the European Union*, Alphen aan den Rijn 2021.)

## III. Landmark Cases

### 1. Uwe Barschel<sup>6</sup>

In this case, the Federal Supreme Court found that certain strictly personal rights can continue to exist even after death.

Following a political scandal in Germany in late summer 1987, Uwe Barschel, Minister-President of Schleswig-Holstein, was forced to step down from office. While on holiday in the Canary Islands, he was summoned to the parliamentary commission in charge of investigating his role in a political scandal. He was obliged to return to Germany. Knowing that Barschel would stop briefly in Geneva on his return journey, the editorial staff of a magazine sent a journalist, K, there to interview him. K tried several times to reach Barschel in his hotel room, but without success. Shortly after, K was able to enter Barschel's room as the door had been left ajar. He took some documents out of the room to photograph them. When K returned to the room later after taking photographs of the documents, he discovered Barschel's lifeless body in the bathtub full of water. He informed the hotel management, who called the police.

During his two visits to Barschel's room, K took 51 photos of the hotel room, the documents and the body of the deceased. Many of these photos were published in the press.

Subsequently, the relatives of the deceased filed a complaint for violation of domicile (Article 186 of the Criminal Code) and disturbance of the peace of the dead (Article 262 of the Criminal Code). These are crimes that the state only prosecutes upon complaint. In principle, according to Article 30 of the Criminal Code,<sup>7</sup> only the person who was harmed by the act can file a complaint for the punishment of the person responsible. In certain cases, however, the relatives may also file a criminal complaint in place of the deceased, in accordance with Article 30 IV Criminal Code.<sup>8</sup> In any event, in this matter the court first had to decide whether Barschel had been injured by K's acts,

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6 DFC 118 IV 319.

7 Article 30 I of the Criminal Code states: "*If an act shall be liable to prosecution only if a complaint is filed, any person who suffers harm due to the act may request that the person responsible be prosecuted.*"

8 Article 30 IV of the Criminal Code states: "*If the person suffering harm dies without filing the criminal complaint or without expressly waiving his right to file the criminal complaint, his next of kin are entitled to file the complaint.*"

because Barschel was already deceased at the time of the act. In order for an individual to suffer an injury, it is presupposed that the individual holds strictly personal rights. Regarding this question, the Federal Supreme Court focused on the concept of personality under civil law. Therefore, the Federal Supreme Court had to decide whether the rights attributed to Barschel during his life could continue to exist after his death. As discussed above, Article 31 I of the Civil Code states that personality ends with death. However, the Federal Supreme Court held that the end of the capacity to enjoy civil rights (Article 11 of the Civil Code) at death does not automatically entail the loss of all protection conveyed by personality rights. Some personality rights persist even after death, without passing to the heirs. From this, the Federal Supreme Court concluded that the deceased could still be the victim of personality-related offences and violation of domicile immediately after his death.<sup>9</sup>

In this case, the Federal Supreme Court recognised the lasting effect of the right of personality beyond death, as well as establishing somewhat of a protective zone (“taboo zone”) in terms of criminal law around those who have recently deceased.

This is a welcome judgment of the Federal Supreme Court, especially regarding the prosecution of personality-related offences. Furthermore, the procedural basis for such cases was laid out by the legislator in Article 30 IV of the Criminal Code. Thus, the decision is not objectionable from a substantive or procedural point of view.

## 2. Challenged Autopsy

In another ruling,<sup>10</sup> two mentally ill siblings committed assisted suicide by taking a lethal drug with the help of the Swiss association “Dignitas”. Shortly before doing so, they each gave a general power of attorney to a lawyer allowing him to act on their behalf in dealings with “*the police, the examining magistrate, the civil registry office, the burial office of the city of Zurich, etc. in relation to my voluntary death.*” After the death of the siblings, the district public prosecutor’s office ordered that the autopsy be performed. The appointed lawyer filed a constitutional appeal against this order on behalf of the deceased.

The Federal Supreme Court did not examine the material question of whether an autopsy should be permitted in this case. Instead, the Federal Supreme Court rejected the constitutional appeal because it considered that

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9 DFC 118 IV 319 c. 3.

10 DFC 129 I 302 c. 1.2.3.

the procedural requirements had not been met. The Federal Supreme Court addressed differences in legal opinion regarding the existence of independent protection of the personality *post mortem*. It ultimately denied the existence of such protection, declaring legal action in the name of a deceased person to be inadmissible. With reference to Article 31 I of the Civil Code, the Federal Supreme Court rejected the notion that deceased persons could have capacity to enjoy civil rights under Article 11 of the Civil Code, and consequently also the right to sue. Legal doctrine on Article 31 of the Civil Code also recognises that no one can bring a lawsuit as a representative of a deceased person.

The Federal Supreme Court did confirm the effects of the right of personality beyond death in some areas in its judgment on this case (for example, the information contained in a patient's medical file is protected by confidentiality even after death)<sup>11</sup>. However, it held that surviving relatives cannot bring legal action in the name of the deceased, only in their own name.

By granting certain rights to deceased persons even after death, but at the same time rejecting their enforcement by those acting on behalf of the deceased, the Federal Supreme Court has created unclear conditions. The fact that deceased persons should ultimately only be left with unenforceable rights is neither practical nor comprehensible. It is to be hoped that the Federal Supreme Court will provide clarity regarding this situation in future.

### 3. Caisse de Famille<sup>12</sup>

In 1922, a married couple (BX and CX) set up a family foundation under the name of “*Caisse de famille X*” pursuant to Article 335 I of the Civil Code. The purpose of the foundation was “*to provide for the education, maintenance and other similar expenses of family members*” (Article 2 I of the deed of foundation). In the deed of foundation, the founders limited the circle of beneficiaries to direct descendants of the founders who bore the same surname (“X” – Article 6 I of the deed of foundation). Thus, the foundation excluded women from its circle of beneficiaries if they got married and subsequently changed their names.<sup>13</sup>

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11 Judgment of the Federal Supreme Court 2P\_339/1994 of 26 April 1995 c. 3b (published in: Pra 85/1996 No. 94 p. 289 et seqq.).

12 DFC 133 III 167 (Judgment of the Federal Supreme Court 5C\_68/2006 of 30 November 2006).

13 According to the marriage law in force prior to 31 December 1987, female descendants lost their maiden surname on marriage and therefore relevant female descendants of this particular family would have also lost their status as beneficiaries, for themselves and their descendants.

When the founders died, they left behind three children: DX, EY (maiden name X) and FX. EY's son, AY, asked the board of directors to change the foundation's purpose, extending the circle of beneficiaries to include all female descendants of the founders. In an appeal to the Federal Supreme Court, AY requested that the purpose of the foundation be amended (pursuant to Article 86 of the Civil Code) on the basis that the current purpose was illicit and immoral (pursuant to Article 88 of the Civil Code).

According to Article 86 I of the Civil Code, modification of a foundation's purpose is admissible only "*where the original objects have altered in significance or effect to such an extent that the foundation has plainly become estranged from the founder's intentions*". In the case in question, the Federal Supreme Court rejected AY's request to modify the foundation's purpose, as the necessary conditions had not been fulfilled. On the one hand, there had been no objective change to the significance or effect of the foundation's original objects. The Federal Supreme Court found that, although marriage law had changed considerably, particularly regarding maintenance and naming obligations,<sup>14</sup> the founding couple had voluntarily and knowingly restricted the circle of beneficiaries to prolong the existence of the foundation and to ensure that its assets would not be quickly depleted due to an excessive increase in the number of eligible family members. On the other hand, no alienation from the original intention of the founders had taken place. A change of purpose would have been justified if, in the light of the change in circumstances that had occurred, the will of the founders could no longer be carried out in the manner envisaged by the founding statutes. Regardless of the changes in marriage law, the founders' original intention for the circle of beneficiaries to be limited could still be achieved.

In addition, the Federal Supreme Court addressed the issue of unlawfulness and immorality (Article 88 I No. 2 of the Civil Code) of the purpose of the foundation and the description of its circle of beneficiaries. A provision is considered immoral if it violates prevailing morality, that is, the general sense of decency or the ethical principles and standards of value inherent in the general legal system. The Federal Supreme Court recognised that, since the foundation was established in 1922, there had been a significant change in the position of women in society and in the family. In particular, the revised Federal Constitution guarantees legal equality in Article 8, according to which

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14 According to former Article 160 II of the Civil Code, a husband had to provide for the maintenance of his wife and child in an adequate manner, while according to current Article 163 of the Civil Code, spouses must "*jointly provide for the proper maintenance of the family, each according to his or her ability*".

*“Men and women have equal rights [...] particularly in the family, in education, and in the workplace”* (Article 8 III of the Constitution).

However, except for the principle of equal pay (which applies to the state and private employers alike), this guarantee of fundamental rights is addressed solely to the state and does not impose obligations on private parties. Consequently, there is no general principle of equal treatment for men and women in Swiss private law. In particular, the private autonomy and freedom of founders are not limited by the principle of equality of Article 8 of the Federal Constitution and Article 335 I of the Civil Code must not be interpreted according to this principle.

In principle, therefore, the founders could treat separate beneficiaries of their family foundation differently, provided they did not violate the statutory entitlement of the survivors or other rules of protection. The restriction of the circle of beneficiaries to a certain group of family members was of a practical and traditional nature and was cognisant of the limited resources available to a family foundation. The family foundation in question fits into the tradition of many similar institutions created in the eighteenth and nineteenth centuries and which were normally reserved for male descendants only. Female descendants left the foundation of origin on marriage and became part of the corresponding foundation of their husbands. As a result, it was not the mere fact of being a female descendant that was determinative of whether or not a person was within the circle of beneficiaries; rather, it was whether that female got married and changed their surname.

Finally, the Court considered that the daughters of the beneficiary could have maintained their status as beneficiaries of the foundation by keeping their maiden name.<sup>15</sup>

Overall, the Federal Supreme Court did not consider that this provision was immoral, either at the time of the foundation’s creation or at the time of the decision.

This decision of the Federal Supreme Court is to be supported. The limitation of the group of beneficiaries, according to which only direct descendants of the founders who bore the same surname could be beneficiaries of the foundation, was not linked to the sex of the beneficiary but to his/her name, thereby avoiding discrimination on the basis of gender. After the revision of

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15 This regulation is no longer in force. Under the current marriage law, prospective spouses can decide at the time of marriage whether to keep their maiden name or to use the married name of one spouse as their surname (Article 160 I and II of the Civil Code). Furthermore, the law states: *“If the prospective spouses retain their surnames, they decide which of the surnames their children will bear”* (Article 160 III of the Civil Code).



the law in 1988, women were entitled to keep their surname after marriage. The first generation (consisting of both sons and daughters) was thus able to ensure that they would benefit from the foundation. Under the current law, descendants can also be beneficiaries of the foundation if, upon marrying, they use the X family name (under the current law, women can keep their own name upon marriage or both partners can take the woman's maiden name as the family name). Alternatively, descendants who did not retain the name X could subsequently seek a change of name to fit into the circle of beneficiaries via a request to court. In the present case, AY only applied for the purpose of the foundation to be changed: he did not request a name change. How the Federal Supreme Court would have judged the case if a change of name had been requested by AY remains open. It is likely that the Federal Supreme Court would have weighed the interests of the foundation against AY's interests in a change of name in order to decide on such a matter.

#### **4. Change of Name I**

In its decision of 23 October 2014, the Federal Supreme Court established a new practice regarding the requirements for a legal change of name.<sup>16</sup>

BA was born on 6 June 2001 to AA (father) and CA (mother). The parents had already separated by the time of B's birth, with B consequently living alone in her mother's care. On 24 September 2001, the district court finalised AA and CA's divorce and CA, the mother, obtained exclusive parental authority. After the divorce, the mother reverted to the use of her maiden surname, "D".

On 9 February 2013, the mother, now known as CD, asked the competent authority to change her daughter's surname from "A" to "D" and approval was granted. On 23 April 2014, AA appealed this approval to the Federal Supreme Court, asking that the name change request be refused while his daughter remained under the age of majority (18 years), on the basis that until this point she would not possess the required maturity to make such a decision.

The Federal Supreme Court first stated that the right to a name or change of name is one of the strictly personal rights; a category of rights which people capable of judgment but lacking the capacity to exercise civil rights may exercise with full autonomy (Article 19c I of the Civil Code). Consequently, a request for a change of name cannot depend on the requester reaching the age of majority or possessing the ability to exercise civil rights (Article 13 of the Civil Code); only the capacity for judgment is decisive. A 12-year-old girl who acts

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16 DFC140 III 577.

of her own free will and without pressure from her mother can therefore validly decide to change her name.<sup>17</sup>

In principle, a person's civil name is immutable. In certain family law contexts,<sup>18</sup> however, the law grants the possibility of changing a name. The requirements for the official authorisation of a name change have undergone a significant change in recent years. As of 1 January 2013, the competent authority can authorise a change of name if there is "good cause"<sup>19</sup>. This, according to the Federal Supreme Court, should result in a more generous treatment in granting name changes, so that any cause which does not "seem totally trivial" must be accorded respect. Even purely subjective reasons are considered good cause, provided they reach a certain level of seriousness and have an underlying rationale.

Under the previous wording of the law, only a "serious cause"<sup>20</sup> could warrant a name change. The Federal Supreme Court has acknowledged that the amendment to the law aimed at reducing the barriers to changing one's name. However, the amended law does not allow anyone to change their name at will. Above all, the renaming of children growing up in so-called patchwork families must be interpreted "openly" and only in the interest of the child. A child must have the right to share the name of the parent they are brought up by, if so requested. A concrete, serious social disadvantage is no longer a prerequisite for a change of name. For example, the evidenced need for a child's name to match their parental guardian has been considered "good cause" pursuant to Article 30 I of the Civil Code.

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17 This derives from the analogy with Article 270b of the Civil Code regarding the consent of the child of unmarried parents to a change of name: "If the child has attained the age of twelve, his or her surname may only be changed if he or she consents."

18 See Article 270 II of the Civil Code regarding children of married parents: "Within one year of the birth of their first child, the parents may request that the child take the surname of the other parent." See also Article 270a II of the Civil Code regarding children of unmarried parents: "If joint parental responsibility is established after the birth of the first child, either parent may within a year of its establishment declare before the civil registrar that the child should take the other parent's name before marriage. This declaration applies to all common children, regardless of who is given parental responsibility." Also see the Final Title with the Commencement and Implementing Provisions of the Civil Code, Article 8a: "A spouse who changed his or her name on marriage before the amendment to this Code of 30 September 2011 came into force may declare to the civil registrar at any time that he or she wishes to use his or her name before marriage again."

19 Article 30 I of the Civil Code.

20 See former Article 30 I of the Civil Code: "The government of the canton of residence may permit a person to change his or her name for a serious cause." A serious cause required reasons related to the name itself or a request that, if denied, would lead to concrete and serious social disadvantages. Legal theory was particularly restrictive in this sense and took into consideration only objective reasons put forward by the applicant.

In the case of B, she had lived with her mother since birth and had always used her mother's surname "D", both at school and in everyday life. B's teacher also confirmed that B always signed with the surname "D" and introduced herself with it. Based on the circumstances (in particular, B having lived with CD from birth and B's actual use of the name), the Federal Supreme Court came to the conclusion that the name change requested from "A" to "D" was supported by reasons amounting to a good cause and that authorisation to change the name was therefore compatible with federal law.

This decision of the Federal Supreme Court appears legally sound. By allowing B's name change, the Federal Supreme Court allowed her official name to reflect her actual circumstances, to which there should be no objection. Subjective motives constitute a "good cause" within the meaning of the law.

## 5. Change of Name II

In 2018, the Federal Supreme Court further liberalised the practice regarding name changes. Until then, the legislative amendment to Article 30 I of the Civil Code (and the greater flexibility associated with it) was applied mainly to cases concerning a change of civil status or children from patchwork families, but not in ordinary name change procedures. However, in its ruling of 26 October 2018, the Federal Supreme Court stated that there was no longer any reason to limit the legal benefits to these specific cases only, meaning that the concept of "*good cause*" had to be evaluated more flexibly than under the previous concept of "*serious reasons*" in other name change procedures too.<sup>21</sup>

The facts of this particular case concerned a Swiss-French citizen Jean-Louis Loeb, who asked to change his name to "Loeb-Picard" (with or without the hyphen). He argued that although his surname "Loeb" was registered in the register of civil status (and consequently also on his identity card), he was known both by the French and Swiss administrative authorities and by third parties (in his private and professional capacity) by the name "Loeb-Picard". Furthermore, the surname "Picard" connected him to the family of his maternal grandfather, a famous architect and property owner, from whom he had inherited a business. The surname "Picard" had been a real brand for decades. Finally, the fact that his official name did not match the name he was most known by, led to the claimant having to constantly explain himself, and this led to a loss of credibility.

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21 Judgment of the Federal Supreme Court 5A\_461/2018 of 26 October 2018 c. 3.2.

In considering Loeb's case, the Federal Supreme Court first stated in general terms that the request for a change of name must always have a specific justification, which cannot be illegal, abusive or immoral. The name itself must also comply with the law and must not prejudice the name of a third party. Despite the change in the law, the principle of the immutability of one's name persists and names must not lose their crucial identifying function. However, the subjective or emotional reasons of the applicant cannot be ignored—as in the past—if they are of a certain weight and have an underlying rationale. Moreover, the Federal Supreme Court ruled that the official recognition of a pseudonym (for example, a stage name, or *nom de plume*) can also be a legitimate reason for a name change, if the respective conditions for the pseudonym to appear as an official addition on the passport are met. In this case, applicants must prove (by bringing, for example, contracts, press articles, posters, etc.) that their stage name is objectively significant in their financial and social life.

In the present case, the Federal Supreme Court concluded that the lower court had failed to properly exercise its discretion by not giving sufficient consideration to the documents submitted by the applicant in order to justify the name change. The Court considered that these documents did justify the request for a name change and granted the change of name pursuant to Article 30 I of the Civil Code.

Since the (most recent) revision, a change of name no longer requires a “*serious reason*”, only a “*good cause*”. In the present decision, the Federal Supreme Court specified that subjective motives can also satisfy the requirement of a “*good cause*”. The newly created approach to name changes is to be welcomed. It allows the relevant cantonal authorities to sufficiently examine the subjective component of the change of name and thus give an increasingly fairer consideration to the individual case when making the decision. Moreover, there is no reason why subjective reasons should not suffice for a change of name.

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Peter Georg Picht / Caroline Kopp

# Inheritance Law

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# I. Swiss Civil Code

Part 3 of the Swiss Civil Code (Articles 457–640)<sup>1</sup> regulates Swiss inheritance law. It is divided into two parts:

- the heirs (Articles 457–536)
- the succession (Articles 537–640).

The former part includes rules on intestate succession (Articles 457–461) and succession due to disposition, along with the right to a compulsory share (Articles 467–536). In general, it deals with the question of “who” inherits “what”.

The latter part addresses the commencement of the succession process (Articles 537–550) and the effects of succession (Articles 551–601) as well as the division of the estate (Articles 602–640). This part is, thus, more concerned with the technical “how” of the implementation of the inheritance process.

Outside the Civil Code, there are relevant provisions on inheritance tax law (special cantonal law)<sup>2</sup>, international inheritance law (Articles 86–96 Federal Law on Private International Law)<sup>3</sup> and some special provisions on inheritance law for rural land (Article 620 Civil Code in conjunction with the Federal Act of 4 October 1991 on Rural Land Rights)<sup>4</sup>.

Following a parliamentary motion by councillor of state FELIX GUTZWILLER in 2011 (“*For a contemporary inheritance law*”), the Federal Council undertook a reform of Swiss inheritance law. The reform project is divided into three

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1 Swiss Civil Code of 10 December 1907, SR 210; see for an English version of the Swiss Civil Code [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/DG3C-PVHW](https://perma.cc/DG3C-PVHW)). Since English is not an official language of the Swiss Confederation, the English version has no legal force.

2 In the Canton of Zurich there is for example the Law on Inheritance and Gift Taxes from 28<sup>th</sup> September 1986, 632.1.

3 Federal Law on Private International Law of 18 December 1987, SR 291; see for an English version of the Swiss Private International Law [www.admin.ch](http://www.admin.ch) ([perma.cc/Q2HP-G8ET](https://perma.cc/Q2HP-G8ET)). The provisions are expected to be reformed and adapted to developments abroad due to the provisions of the Regulation (EU) No. 650/2012 of the European Parliament and of the council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession ([perma.cc/DEN9-Q8RM](https://perma.cc/DEN9-Q8RM)).

4 Federal Act on Rural Land Rights of 4 October 1991 (SR 211.412.11).

parts—a political one, a technical one<sup>5</sup> and one on the succession of companies under inheritance law. At the end of 2020, Parliament accepted a draft of the first part. The project's biggest innovation is that the strict regulations of forced heirship will be relaxed: the compulsory quota for descendants will be reduced from  $\frac{3}{4}$  to  $\frac{1}{2}$  and parents of the deceased will lose their right to compulsory heirship completely. The first changes will come into force on 1 January 2023,<sup>6</sup> affecting (testamentary and intestate) successions occurring after that date (so-called *date-of-death principle*, Articles 15 and 16 Commencement and Implementing Provisions of the Civil Code).

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5 The political part essentially implements the GUTZWILLER motion, while the technical part deals with further revision concerns, such as the question of an audio-visual emergency testament.

6 Decision of the Federal Council of 19<sup>th</sup> May 2021. See further LOUISE LUTZ SCIAMANNA, *Nachlassplanung im Vorfeld der Erbrechtsrevision(en)*, AJP 2021, pp. 325 for more details on the upcoming law reform.

## II. Principles

A key characteristic of Swiss inheritance law is the principle of *eo ipso* acquisition of an estate through universal succession (Article 560 I). 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 the deceased's assets and debts automatically, without the requirement of any formal act by the heirs and/or any administrative or judicial body.

As a result of the *principle of universal succession* claims, rights of ownership, limited rights in rem, and rights of possession of the deceased, but also his/her debts, automatically pass to the heirs. The principle applies to both statutory and testamentary heirs. To protect heirs from receiving unwanted or over-indebted/insolvent estates, every heir has the right to renounce the inheritance within three months of learning 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).

Another characteristic of Swiss inheritance law is the relatively far-reaching rules on *statutory entitlement* (Article 471). Under these rules, a significant part of the deceased's estate is normally bound in favour of his statutory heirs and is not subject to his disposal. These inheritance law rules have been subjected to revisions due to being considered too strict.

### 1. The Heirs

#### a) Intestate Succession

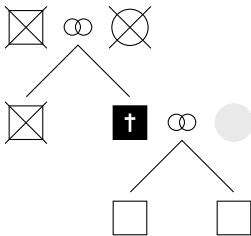
If the deceased doesn't leave a will (intestate succession), the Civil Code designates his relatives, spouse, or as *ultima ratio* the state (canton or commune) as statutory heirs, who will be eligible for a certain quota of the estate (Articles 457-466).

Articles 457-460 regulate the intestate succession of the *deceased's relatives*. The principle behind this succession is the "*system of parentelic succession*". A parentela is a group of blood relatives who are connected by a common head of family. There are three groups of relatives entitled to inherit: the descendants of the deceased (1<sup>st</sup> parentela, Article 457), the parents of the deceased and their descendants (2<sup>nd</sup> parentela, Article 458), the grandparents of the deceased and their descendants (3<sup>rd</sup> parentela, Article 459). More distant relatives are not considered and have no legal right of inheritance (Article 460).

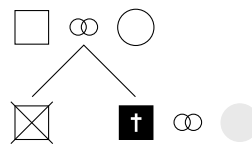
Four core rules determine the statutory heirs from the group of eligible relatives.<sup>7</sup>

*First*, the closer parentela excludes the more distant parentelae, and within one parentela those closer to the deceased exclude the more distant ones (*exclusion principle*). To illustrate: if the deceased has two children, they become his statutory heirs according to Article 457, since they are part of the 1<sup>st</sup> parentela as his descendants. His other relatives, for instance his parents and siblings (2<sup>nd</sup> parentela), are therefore excluded from intestate succession (Example 1). If the deceased has no children, his parents, as heads of the 2<sup>nd</sup> parentela (Article 458), become his statutory heirs. His brother is excluded: although he is part of the 2<sup>nd</sup> parentela as descendant of the deceased's parents, he is also more remote from the deceased than his parents (Example 2).

Example 1

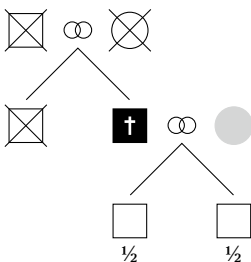


Example 2

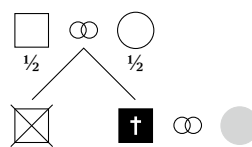


*Second*, all members of a parentela who inherit do so in equal shares (*principle of equality*), cf. Articles 457 II, 458 II, 459 III.

Example 1



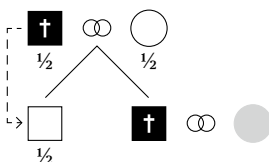
Example 2



<sup>7</sup> In the following examples, the black filled boxes with the cross represent a deceased person, i.e. the testator/testatrix or, if there is more than one black box, a predeceased relative of him/her. The white, unfilled boxes represent the heirs, whereas the white, crossed-out boxes indicate that a person does not inherit anything. For illustrative purposes, the spouse of the testator/testatrix in Example 1 and Example 2 is treated as if he or she does not exist (grey filled boxes). Round boxes symbolize women, rectangular boxes men. The two rings symbolize marriage.

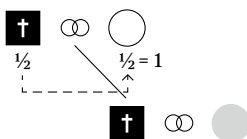
*Third*, where a member of a parentela predeceases the deceased, his descendants take over his position regarding inheritance (*principle of entry*), cf. Articles 457 III, 458 III, 459 III. In Example 2 above, if the father of the testator were to predecease, the mother inherits half of the estate (*principle of equality*) and the brother steps into the position of his dead father and inherits the remaining half of the estate, cf. Article 458 III.

Example 2 – Alt. 1



*Fourth*, when one of the statutory heirs predeceases without any descendants, his share of the inheritance falls to the co-heirs of the same level in equal parts (*principle of accretion*), cf. Articles 458 IV, 459 IV and V. This fourth rule only applies subsidiarily to the third rule. For example: The deceased has no children and no siblings, and his father has predeceased. Thus, there are no heirs of the 1<sup>st</sup> parentela and, hence, the heirs of the 2<sup>nd</sup> parentela are appointed: father and mother as parents inheriting half of the estate each (Article 458 I and II). Since the father of the testator is dead and has no descendants, the third rule (Article 458 III) cannot be applied and the fourth rule applies (Article 458 IV): the share of the predeceased father falls to the mother, who is then sole heir.

Example 2 – Alt. 2

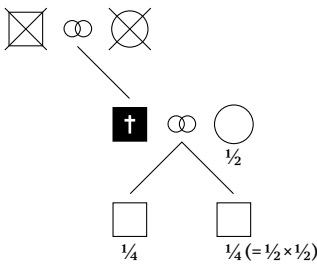


Article 462 stipulates that the *spouse* or *registered partner*<sup>8</sup> of the deceased is a statutory heir. The size of her/his inheritance depends on the parentela

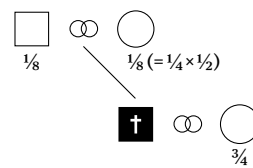
8 The legal institution of registered partnership is for same-sex couples, as under Swiss Law, marriage is currently only possible between opposite-sex partners. At the end of 2020, the Swiss legislator decided to change the Civil Code in order to permit marriage irrespective of the sexes of the spouses. This amendment was subjected to a referendum that took place on 26 September 2021. Since the amendment was accepted, the literal differentiation in Article 462 between “*spouse*” and “*registered partner*” will become obsolete over time, as existing same-sex partnerships remain valid and can be transformed into marriage, but new ones cannot be registered anymore.

she/he co-inherits with. If inheriting alongside heirs of the 1<sup>st</sup> parentela, the spouse/registered partner receives half of the estate (No. 1, Example 3–Alt. 1). If inheriting alongside heirs of the 2<sup>nd</sup> parentela, she/he inherits three-quarters of the estate (No. 2, Example 3–Alt. 2). If there are no relatives within the 1<sup>st</sup> or 2<sup>nd</sup> parentela, the spouse/registered partner inherits the entire estate (No. 3). Upon finalised divorce, the ex-spouse/registered partner loses her/his right of inheritance (Article 120 II). According to the current reform of inheritance law, the spouse/registered partner will also lose her/his right to a compulsory share (not her/his legal right of succession) when the deceased dies during pending divorce proceedings and some additional conditions are met (cf. draft Article 472).

Example 3 – Alt. 1



Example 3 – Alt. 2



In case the deceased leaves neither relatives in the sense of Articles 457–459 nor a spouse, Article 466 determines that *the canton or commune* is the statutory heir, with cantonal law regulating the details.

## b) Succession Due to Disposition

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 by way of a will (Article 470 I). Within the limits set by the *numerus clausus* of types of testamentary dispositions, the testator/testatrix may, in principle, freely allocate his/her property after death (Article 481 I).

The Civil Code stipulates testaments and contracts of succession as the two types of wills. The main difference between them is that the testament is unilateral and revocable, whereas the contract of succession is at least bilateral and irrevocable. Common features of both instruments are that the successor him-/herself must testate and decide on the succession (*absolute strictly personal right*). The testator/testatrix can only delegate these arrangements to a

very limited extent, for instance by giving instructions on how to implement details of dispositions made by him/her.<sup>9</sup>

Article 467 grants the right to make testamentary dispositions and Article 468 the right to enter contracts of succession. For both types of wills, the testator/testatrix must be at least 18 years old and possess capacity of judgement (see Article 16). As an example, a person who is severely affected by dementia cannot make testamentary dispositions. However, capacity of judgement is legally presumed until proven otherwise.<sup>10</sup> Lack of capacity of judgement does not automatically lead to invalidity of the will. Because of the “*favor testamenti*” principle, an invalidity claim (Article 519 I No. 1) must be raised within a certain deadline (Article 521).

### Articles 498–511: on testamentary forms

According to Article 498, there are three forms of testaments: the public testament (Articles 499–504), the handwritten testament (Article 505) and the oral testament (Articles 506–508, also known as the “emergency will”). In principle, a testator/testatrix may change his/her will any time until death (Articles 509–511) and testamentary dispositions to the contrary are inadmissible. It is only by way of contracts of succession that the testator/testatrix can become bound during his/her lifetime.

The establishment of the *public testament* (Articles 499–504) takes place in front of two witnesses (Articles 498, 501) and by a notary certified according to cantonal law. While the notary drafts the will, the testator/testatrix needs to sign it (Article 500) and the notary himself/herself has to store the deed or to hand it over to a public office for storage (Article 504). Advantages of the public testament are not only this safe storage but also the notary advice available to the testator/testatrix.

The *handwritten testament*, regulated in Article 505, sets out the principle that the testator/testatrix can testify without any third person involvement. Article 505 I enumerates some conditions necessary for the testament’s formal validity. To demonstrate the authenticity of the testament, it is crucial that the will is handwritten by the testator/testatrix in full. If someone else writes the will or guides the hand of the testator/testatrix, the testament will be inadmissible.<sup>11</sup> An exact date must also be put on the will. This is practically relevant in cases in which the testator/testatrix loses his/her capacity of judgement

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9 PETER BREITSCHMID, Kommentierung zu Artikel 498 ZGB, in: Thomas Geiser / Stephan Wolf (eds.), Basler Kommentar, Zivilgesetzbuch II, 6th edition, Basel 2019, n 12 et seqq.

10 DFC 117 II 231 c. 2.b); DFC 124 III 5 c. 1 b); DFC 134 II 235 c. 4.3.3.

11 See DFC 98 II 73. In this decision, the Federal Supreme Court deals with the question until which degree the help of outside by writing is admissible.

and it is necessary to establish whether the will was issued before or after this occurrence. However, the lack of an exact date can only lead to invalidity if an invalidity claim is raised and if the exact date is relevant and cannot be proven otherwise (Article 520a). At the end of the text, the testator/testatrix has to sign the will. With the help of the signature, the testator/testatrix should be identifiable. A signature with a pseudonym or a shortcut is permissible.<sup>12</sup>

The *oral testament* (Articles 506–508) is not a real alternative to the public or handwritten testament. Rather, it is subsidiary to the other forms and only acceptable in emergency cases: for example, imminent risk of death, breakdown in communications, epidemics or war events. Articles 506 II and 507 regulate the requirements for the establishment of an oral testament. In particular, two neutral<sup>13</sup> witnesses must set down the will in writing, sign it and lodge it with a judicial authority, without delay, together with a declaration that the testator/testatrix was in full possession of his or her testamentary capacity and that he or she informed them of his or her will in the special circumstances prevailing at that time. Instead, the two witnesses may also have the will recorded by a judicial authority along with the same declaration. The oral testament is only valid for fourteen days after the point of time from which the testator/testatrix can again make use of one of the other forms of testament (Article 508).

### Articles 512–515: contracts of succession

Unlike a testament, the contract of succession is always at least bilateral and has binding effect. The formal requirements correspond to those for a public will (Article 512 I in conjunction with Articles 499–504). Both parties must simultaneously be present and conclude the contract before the notary (Article 512 II).

Despite the binding effect of the contract of succession, it is possible to annul the contract. In principle, annulment is only possible by mutual written agreement (Article 513 I). Otherwise, unilateral annulment requires a behaviour of the other party that constitutes grounds for disinheritance (Article 513 II, 477). Furthermore, the contract lapses by law in case the contractual legatee predeceases (Article 515). Where the parties to the contract agree to certain benefits during the lifetime of the testator/testatrix, one party can terminate the contract unilaterally if the agreed benefits are not forthcoming (Article 514). This may be the case if the heir cannot provide the agreed care to the testator/testatrix.

According to current case law, even after the conclusion of a contract of succession, the testator/testatrix is in principle free to dispose of his/her assets

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12 DFC 57 II 15.

13 DFC 143 III 640.



by means of gifts during his/her lifetime (Article 494 II). Gifts made after the contract by the testator/testatrix to third parties can only be successfully challenged by the contractual legatee (Article 494 III) if the contract of succession contains an (explicit or implicit) prohibition to make donations or if the legatee can prove in court that the testator/testatrix obviously intended to harm him/her by the subsequent gift.<sup>14</sup> The upcoming inheritance law reform will, however, overturn this case law. According to the proposed draft Article 494 III, the contractual legatee can, unless the contract of succession provides otherwise, challenge gifts *inter vivos* insofar as they affect her/his entitlements. In the future, making gifts after the conclusion of a contract of succession that are not merely of a customary occasional nature will be prohibited.

**Articles 481-497: *numerus clausus* of testamentary dispositions**

The content of testamentary dispositions is limited by the law. Inheritance law provides an exclusive list of permitted types of dispositions (mainly regulated in Articles 481-497). According to this list, a disposition in a testament (there are slight differences for contracts of succession) may contain:

Condition (Article 482)	<i>“My grandson A is to become my sole heir if he successfully completes his studies by the age of 25.”</i>
Appointment of an heir (Article 483)	<i>“My neighbour F is to become my sole heir.”</i>
Legacy (Articles 484-486) <sup>15</sup>	<i>“My granddaughter F is to receive CHF 20,000 on my death as legacy.”</i>
Substitute disposition in the event of predecease (Article 487)	<i>“In the event that my son and heir H should predecease me, my neighbour F shall inherit in his place.”</i>
Provisional succession and reversionary inheritance (Article 488-492a)	<i>“My long-term partner C is to become my sole heiress as a provisional heiress. She may use and consume the remainder of the estate in the sense of a reversionary inheritance. On her death, the remaining assets are to go to my son B as remainderman.”</i>

Figure 1: Permitted types of testamentary dispositions

In case that a disposition in a testament or contract of succession is deficient, the *interpretation* of the respective provision becomes paramount. Articles 519-520a list grounds for deficiency. In such cases, the real will of the testator/

14 DFC 140 III 193.

15 The legacy (Articles 484-486) is, under Swiss law, a title (Article 562 I) and not a legal position in rem.

testatrix is decisive.<sup>16</sup> Circumstances outside the testament may be taken into account, as long as these are indicated in the document (“*theory of indication*”). The Federal Supreme Court has moved away from the “*theory of indication*” in connection with the contracts of succession.<sup>17</sup> This means that judges can use external facts to interpret the contract of succession without any indication as such in the text itself. If the true will cannot be ascertained because of a gap in the testament, the testament must be interpreted in accordance with the hypothetical will of the testator/testatrix. Finally, there are some legal presumptions which guide interpretation. According to the “*favor testamenti*” principle, a disposition should be preserved, if possible, by giving it a valid, permissible meaning, even though the principle cannot heal real defects of a will.

*Example:* A widow, H, died without any descendants. In October 1986 she created a testament and pronounced “*Mister C.F. Dupont, [address in New York City, USA]*” as her sole heir. Unfortunately, investigations established that there was no person with the initials C.F. in the Dupont-line familiar with the heir. However, there was a relevant person with the initials C.C. (Charles Constant). Due to the rule of interpretation in Article 469 III, the words C.F. in the testament can be reinterpreted to C.C. given there was an obvious error regarding the initials from the person announced as her heir. On top of that, there were two persons with the same initials: “*C.C. senior*” and “*C.C. junior*”, providing the additional problem of interpreting an ambiguous declaration of intent. Due to the “*favor testamenti*” principle and given that C.C. senior died more than 20 years before the testatrix wrote her testament, C.C. junior was declared as heir.<sup>18</sup>

If someone wishes to contest the defectiveness of a disposition, he/she must file an action for invalidity, provided he/she has legal standing, for example as the prior beneficiary of the will supposedly revoked by another will (Articles 519–521).

*Example:* A widowed man D had no descendants. He established a public testament with A, B and C as his sole heirs. In a later testament, he revoked all previous testamentary dispositions and designated E as his new sole heir. A, B and C brought an action for invalidity in the sense of Article 519 I regarding D’s last will. According to Article 519 II, the plaintiffs have the right to sue since they would profit if the court declared the last will as invalid, and similarly would suffer if the last will was allowed to stand. In this case, the former testament is declared valid again, meaning that A, B and C become D’s

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16 DFC 133 III 406; Judgment of the Federal Supreme Court 5A\_850/2010 of 4 May 2011.

17 DFC 127 III 529; DFC 133 III 406. The Federal Supreme Court left the question open if it extends its decision on testaments.

18 Cf. DFC 124 III 414.

heirs.<sup>19</sup> A's friend G, on the other hand, who thinks that A has been treated unfairly by D, does not possess the right to sue.

### c) Right to a Compulsory Share

The freedom to make a will is significantly limited by Switzerland's restrictive regime of forced, statutory entitlements. Under this regime, only the "disposable part" of a testator/testatrix's assets can be passed on following death at his or her discretion (Article 470 para.1); a substantial quota of the testator/testatrix's assets is reserved for the testator/testatrix's offspring (three-quarters of the statutory inheritance entitlement), spouse (half), and parents (half) (Article 471).<sup>20</sup> Siblings or other relatives, although potential statutory heirs, are not entitled to a compulsory share. Furthermore, the testator/testatrix can legitimately deprive an heir of his or her compulsory heirship by way of disinheritance (Articles 477 et seq., for example where the heir has committed a serious crime against the testator/testatrix or a person close to the testator/testatrix).

The compulsory heirs do not simply receive the right to make a claim for payment against the testator/testatrix's estate; they receive a share in the estate *ex lege*. Thus, they obtain an absolute right, which does not only have effect between certain individuals, but towards all others. If an heir does not receive at least the value of her/his statutory entitlement, he/she can sue, within a forfeiture period (Article 533), against any excessively favoured person for the reduction of the excessive dispositions to the legally permitted extent (Article 522 I). Finally, to prevent the testator/testatrix from violating statutory entitlements by dispositions *inter vivos* (e.g. gifts), such dispositions can be abated after the testator/testatrix's death (Article 527).

*Example:* At the time of his death, the testator (whose spouse died a couple of years previously), leaves behind both a daughter and assets of around CHF 1 million. The testator always wished "to leave the world a better place" and has, over a period of three years prior to his death, made various donations totalling CHF 9 million to charitable institutions. In his testament, the testator has appointed his daughter as sole heiress. In spite of this formally generous

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19 Cf. as more complex example DFC 83 II 507, 509.

20 The upcoming inheritance law reform (cf. above) will extend the freedom of disposition under inheritance law. It has been decided that the compulsory quota for descendants will be minimised from three-quarters to half (see draft Article 471) and parents of the deceased will lose their statutory entitlement completely (see draft Article 470 I e contrario). Furthermore, the spouse will lose her/his right to a compulsory share in case of a consensual pending divorce proceeding (draft of Article 472). In this case, she/he will also no longer have any right to claim entitlements from dispositions on death, unless the testator/testatrix has ordered otherwise (draft of Article 120 III No. 2).

appointment, the *inter-vivos*-donations substantially undermine the daughter's compulsory share. Without the deceased's donations, the estate would have amounted to CHF 10 million and the daughter would have been entitled to a compulsory portion of three-quarters of the estate (Article 471 I), i.e. CHF 7.5 million. However, given the donations, she only gets CHF 1 million under the testament. According to Article 527 No. 3, however, 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 inheritance.

## 2. The Succession

While the first part of the inheritance law addresses the issues of how to designate an heir and assign an inheritance to him/her, the second part regulates the "how"—the implementation of the inheritance process. This includes, in general, provisions on the transfer of the estate, as well as on the possibility of the heirs to actually inherit (for example: capacity to inherit, unworthiness to inherit and disclaimer of succession). Furthermore, there are provisions on the division and liability of the estate. The following section provides an overview of these provisions.

### a) Transfer of the Estate

The estate of the deceased passes *ex officio* to the heirs (Article 560 I), whether they are statutory heirs or heirs by disposition. As a consequence of this *principle of universal succession*, the heirs obtain a legal position *in rem* in the complete estate. Whether assets or liabilities: everything is transferred automatically to the heirs without any further formal act. However, the estate initially forms a kind of separate asset.

To protect the inheritance, for example in cases of the heir's permanent absence or unsettled succession rights, the responsible authority can *ex officio* order security measures under Articles 551–555 in conjunction with cantonal law.<sup>21</sup>

If, nevertheless, an unauthorised person gains hold of an object of inheritance, the heir(s) can sue this person within a certain deadline for surrender of the object (*inheritance action*, Articles 598 et. seq.). A *rei vindicatio* (*property action*, Article 641 II) is also possible.

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21 In the Canton of Zurich, the District Court is responsible for such measures.

## b) Requirements for the Heirs

While natural persons can inherit both as statutory and testamentary heirs, legal entities can only be appointed as heirs by way of testamentary disposition. Pursuant to Article 542, an heir must be alive and capable of inheriting at the time of succession.

In addition, unlike disinheritance by a willed disposition, unworthiness to inherit is exercised *ex officio*: in certain constellations (for example, if a person wilfully and unlawfully caused or attempted to cause the death of the deceased) 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 descendants inherit from the deceased as if the person unworthy to inherit had predeceased the deceased (Article 541). A pardon of the testator/testatrix, however, will prevent the heir being deemed unworthy to inherit (Article 540 II).

If the heir is alive, capable and worthy of inheriting at the time of succession, he/she can only slip out of his/her role as heir by declaring his/her renouncement within a three-month deadline (Articles 566 et. seq.). This may be attempted, for example, if the estate is over-indebted. Otherwise, he/she acquires the inheritance unconditionally (Article 571 para. 1). Unconditional inheritance equally occurs if the heir actively engages in matters of administration of the estate before the expiry of the three-month period and this exceeds mere administrative measures (Article 571 II). An alternative to the outright renouncement is the application for a public inventory (Articles 580-592) or the initiation of an official liquidation (Articles 593-597).

## c) Division of the Estate

Often there is more than only one heir. The co-heirs then form a joint heirship (Article 602 I). This joint heirship arises *eo ipso* with the death of the deceased and the group of co-heirs inherit everything together as joint ownership (Article 602 II). Thus, the estate is a special asset (see also Articles 652-654a). The end of this joint heirship is heralded with the division of the inheritance. The purpose of the division is therefore to transfer the objects of the estate from the joint heirship to the sole right of the individual heirs. Every co-heir can at any time request that the estate be divided (Article 604 I) and, if necessary, sue for this right (*partition action*).<sup>22</sup> It is only in rare cases that the division can be postponed (Articles 605, 604 II, contract-bound).

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22 Judgment of the Federal Supreme Court 5A\_357/2016 of 12 April 2017.

Within the division of the inheritance, the co-heirs have only a right to a certain quota from the estate and not to a special object. There are two types of division: the real division (“*once the lots have been formed and received*”) and the contract of division (“*on conclusion of the contract of division*”) (Article 634 I). The essential feature of real division is the simultaneous execution of the obligation and disposal transaction (comparable to a gift by hand, Article 242 Code of Obligations). Every object of the estate needs its own, appropriate act of disposition. The distribution and with that the division between the heirs becomes binding step by step. The contract of division of the estate is an obligatory, mutual agreement of all heirs to divide the estate in a certain way and to perform the acts of disposition necessary for the final execution of the contract. With the contract of division, a binding effect can be created before the final execution of the division. For larger estates this is a more attractive option, in that the division can be completed more easily and quickly.

#### **d) The Liability**

Before an inheritance can be divided, all liabilities must be settled, Article 603. Co-heirs are jointly and severally liable for obligations of the deceased and obligations arising from the decease (e.g. funeral expenses).

After the division, it may subsequently turn out that the value of the individual estate items was lower than the heirs had assumed at the time of division. In addition, it may be that the assigned inheritance object belongs to a third party or that the assigned claim is worthless due to the debtor’s insolvency. In these cases, Article 637 is the relevant rule on liability between the co-heirs. At this stage, co-heirs are mutually liable in proportion to their inheritance quota for the estate property as if they were purchasers and vendors (Art. 637 I). In respect of claims as part of the divided estate, the co-heirs are jointly liable as simple guarantors for the debtor’s solvency, in the amount at which such claims are brought. This results from the fact that they guarantee each other the existence of these claims during the division (Article 637 II, Article 495 CO).

*Example:* A testator leaves the spouse and two descendants whose shares of the inheritance correspond to the statutory inheritance quotas (surviving spouse: half, the two descendants each: one-quarter, Article 462 No. 1, Article 457). In the division of the inheritance, one descendant receives a certain inheritance object at the imputed value of CHF 20. If the object proves worthless or is rightfully claimed by a third party, the surviving spouse owes the entitled descendant CHF 10 ( $\frac{1}{2}$  of 20) and the other descendant CHF 5 ( $\frac{1}{4}$  of 20).

However, subject to consent of the creditors and for a period of five years following division, co-heirs are still jointly and severally liable (with all their property, Article 639) for debts of the deceased.

## III. Landmark Cases

### 1. Legacy Hunter<sup>23</sup>

In 2006, the Federal Supreme Court was given the (rare) opportunity to (i) shed light on the question of 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 (“testatrix”) was a widow, born on 7 February 1907. She remained childless. In her last years, due to an accident, she lived in a nursing home where she remained until she died on 9 July 1995.

K (“plaintiff”) was part of a family that belonged to the circle of friends and acquaintances of the testatrix. According to a will dated 31 August 1987, the testatrix appointed the plaintiff as her sole heir. In a supplement to that will, the testatrix confirmed the plaintiff’s position as sole heir on 10 March 1991.

B (“defendant”) acted as the testatrix’s lawyer from 1991 until, presumably, her death. His service to the testatrix included advising her on inheritance matters. When asked about her wishes regarding her estate, the testatrix replied to the defendant with the words: “That’s you.” During a visit at the nursing home in April 1994, the defendant was informed by the testatrix about her will and was told that he had been appointed as her sole heir. The testatrix originally instructed him in her testament from November 1992/1993 to pay out a certain sum as legacy to the plaintiff. However, in a testament dated on 2 December 1993, she confirmed only the dispositions in favour of the defendant. Finally, in a letter to the defendant dated 25 February 1995, the testatrix expressly revoked all previous testamentary dispositions and instructions, except for those in favour of the defendant. The defendant took the testament dated on 2 December 1993 with him when he left the testatrix following his visit to the nursing home in April 1994.

In addition to being in a relationship of trust with the testatrix as her appointed lawyer, the defendant exercised great personal influence over the testatrix. The testatrix had, through constant gifts, attempted to gain and maintain the friendship and affection of the defendant. The defendant was almost the sole confidante for the testatrix. The testatrix assumed that the defendant’s consideration towards her was the result of genuine friendship

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23 DFC 132 III 305.



and affection, and in this context she designated him as her sole heir. The defendant, on the other hand, did not act out of friendship, but out of a wish to enrich himself. As the court found, these true intentions of the defendant remained hidden from the testatrix.

The plaintiff challenged the defendant's appointment as the sole heir and executor of the testatrix 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, i.e. that the last will of 2 December 1993 was valid. However, the appellate court ultimately allowed the claim by finding that, although the final will was valid, the defendant was unworthy to inherit and an inappropriate executor.

In an appeal, the defendant requested to be reinstated as executor and declared sole heir of the testatrix. The appeal was dismissed by the Federal Supreme Court. As to the question of defendant's unworthiness to inherit, the Federal Supreme Court had to consider whether the defendant, as the lawyer of the testatrix, 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 testatrix from making a new and/or revoking the existing (final) will.

Firstly, the Court held that a malicious act or omission pursuant to Article 540 I No 3 does not require a criminal act to be 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 deceased did not make or revoke a will. In cases of a potential failure to provide advice and information, hypothetical causality must be established. In other words, one must consider whether—based on the ordinary course of events and the general experience of life—a testatrix would have made, amended, or revoked a testament had he/she been properly informed.

The Court then turned to the question whether the defendant was under a legal obligation to inform the testatrix about his true intentions which were not based on genuine friendship and about the conflict of interest arising from his simultaneous position as the testatrix's appointed sole heir and lawyer. The Court underlined that from 1991 until her death the defendant was the only confidante for the testatrix. From the testatrix'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 testatrix about his true—i.e. purely economic—intentions

and the conflict of interest as the testatrix's appointed heir and lawyer, the defendant caused the testatrix to believe that they were connected by a genuine friendship. Against this background, the testatrix maintained the designation of the defendant as sole heir and executor until her death. Interestingly, the Court did consider that the testatrix, 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 testatrix 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 conduct qualified as grave misconduct, resulting in his unworthiness to inherit and to act as executor.

This jurisdiction of the Federal Supreme Court widens the notion of a "legacy hunter" through an broad interpretation of Article 540 I No. 3. This could lead to difficulties in distinguishing between affectionately meant gifts and frowned-upon flattery. It should not be the task of the courts to decide whether a client's present to his/her attorney arises from a relationship of dependence between them both or is merely a nice gesture. Not every lawyer appointed as heir should be stigmatised as a legacy hunter. The testator's freedom of disposal should still be the principal concern.

## 2. The Revocation of the Revocation<sup>24</sup>

Both court judgements referenced and discussed in this section deal with the issue of "*the revocation of the revocation*", in the case of multiple wills by the same testator.

In the case at issue, the testator drew up a will in favour of his life partner, C, that included a legacy of CHF 10 million. Two years later he drew up another testament that only provided a monthly payment to C for a certain period and included the passage: "*This will supersedes all previous testamentary dispositions and wills including all addenda thereto.*" The testator destroyed this last will with undisputed intention to cancel it.

Subsequently, C brought an action against the heirs and demanded payment of her legacy of CHF 10 million. The courts rejected the claim, and the case went to the Federal Supreme Court twice before it was finally dismissed.

In the DFC 144 III 81, the Court underlines that there is a mandatory, essential right of the testator to freely revoke his testamentary dispositions at any time. Such revocation, however, presupposes that the testator actually

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24 DFC 144 III 81 and Judgment of the Federal Supreme Court 5A\_69/2019 of 20 July 2019.

expresses his intent to revoke in one of the forms provided for by law (Article 509 et seq.). The revocation itself is a last will and prevents the revoked testamentary dispositions from having any legal effects after death of the testator. Nevertheless, the revocation by destruction is only significant if the destroyed document was a will in the legal sense. Since this had not been established by the lower court, the Federal Supreme Court ruled that the question of the existence of a will should not have been left open by the High Court of the Canton Zurich. If the High Court had found that there was a will, there would then be the different question of (i) whether the testator, with the revocation, had also expressed his legal intention to revive an earlier testamentary disposition which had been revoked in the will in question and (ii) under which conditions such a “revocation of the revocation” is valid.

At the remittal back the High Court of the Canton of Zurich, the High Court found a testamentary intention in the later will, in particular with regard to its clause revoking all earlier testamentary dispositions. In a second step, the question was which consequences resulted from the destruction of the later will. By way of interpretation, the High Court found that the testator did not express the required “*animus revivendi*” in one of the forms prescribed by law by destroying the later will. Therefore, the initial will had not been revived by the destruction of the subsequent one.

The Federal Supreme Court confirmed the ruling of the High Court of the Canton Zurich in its decision of 20<sup>th</sup> July 2019 (5A\_69/2019). In its decision, it once again expressly clarified that the destroyed will is still relevant despite its destruction. It would be misleading to consider that the first disposition is decisive, since it is the only document that still exists. On the contrary, revocation by destruction (Article 510, I) has no effect different from the other forms of revocation (Articles 509, 511). The mere act of destroying the document does not have the effect of reviving the earlier, revoked will. Irrespective of the form of revocation, the revival of a previous will presupposes the testator’s intention to reinstate the original will. Such a will could not be established in the case at hand. In particular, it could not be clearly determined whether the testator was still aware of the existence of the earlier will at the time of revocation.

The decisions of the Federal Supreme Court are convincing and very instructive concerning the basic principles which regulate the revocation of wills and in particular the common issue of the “revocation of the revocation”.

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Ruth Arnet

# Property Law

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# I. Swiss Civil Code (Property Law)

Before embarking on an introduction to Swiss property law, an overview of the system must be given. Property law is regulated within the fourth part of the Swiss Civil Code (Articles 641-977). This fourth part is divided into three divisions. The first division deals with ownership (Articles 641-729), covering the general provisions, as well as land ownership and ownership of mobile goods. The second division contains the legal provisions on limited rights in rem, namely the provisions on easements and mortgages as well as on charges on chattels in Articles 730-918. Finally, the third division regulates possession and contains provisions on the land register in Articles 919-977. Property law thus forms a separate part of the Swiss Civil Code.<sup>1</sup> This system also provides for a basic subdivision between rights to movable, mobile items, chattels, and rights to immovable property and real estate.

## 1. Legal object

Property law regulates the content, creation, and termination of the rights existing in an object and assigns these rights to a particular person.<sup>2</sup> Property law thus regulates the legal state of an “object”. Everyone has an idea of what an object is based on our life experience. But how is an object defined within the legal framework of property law in the Swiss Civil Code?

Article 641 Civil Code, the very first legal provision in the property law section, deals with ownership of an object. It reads as follows: “I. *The owner of an object is free to dispose of it as he or she sees fit within the limits of the law.* II. *He or she has the right to reclaim it from anyone withholding it from him or her and to protect it against any unwarranted interference.*” So the law itself does not provide us with a definition of the legal concept of the object; it only states that the owner of an object can dispose of it at will within the limits of

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1 See chapter on Civil Law Principles and Family Law, pp. 229.

2 This text is based on several fundamental publications on Swiss property law that are available exclusively in our national languages. In line with the general concept and purpose of this textbook, instead of citing sources in the footnotes, the fundamental literature which has been used is listed in the Selected Bibliography.

the legal system. However, Swiss property law is based on doctrine and jurisprudence, under which the concept of the “object” has been developed. This concept is characterised by various elements, namely by the attributes of impersonality, corporeality, delimitation, and legal controllability.

### a) Impersonality

The first prerequisite to the Swiss legal concept of an object is impersonality. A human being cannot be considered as an object in the legal sense. That is why the human body cannot be an object. Rather, according to the legal provisions on persons, the human body forms part of the legal personality according to Articles 27 et seqq. Civil Code. But what about the human corpse? According to Article 31 I Civil Code, the legal personality ends with death. As the body is part of the legal personality, the body no longer retains any legal competence after death. Corpses and parts of corpses are therefore treated as objects, where piety does not exclude this. One might consider the example of mummies like “Ötzi”,<sup>3</sup> or skeletons; these would be legal objects which one can buy and sell like other items. And what about parts of the human body? Parts of the human body, such as hair or organs, can become objects if they are no longer connected to the human body. By separation from the body, the person acquires ownership over the former part of his or her own body. This results from the so-called substantive principle established by Article 643 I Civil Code, according to which whoever is the owner of an object is also owner of its natural fruits. So, if a person has beautiful, long hair, this in itself is not an object; but in the moment he or she cuts the hair off, the hair becomes a legal object.

For organ transplants, the legal situation is more complex.<sup>4</sup> As long as an organ remains connected to the body, it is not an object but forms part of the legal personality of the donor. The donor can dispose of the organ, however, and as soon as the organ is removed from his or her body, the disposal takes legal effect. This possibility of disposal is, however, considerably restricted: ownership may only be transferred to a third party free of charge, and trading with human organs for the purpose of a transplant is excluded by Article 119a III Constitution (Article 6 Transplantation Act).

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3 On the history of the discovery of the prehistoric Iceman see WALTER KUTSCHERA / WERNER ROM, Ötzi, the prehistoric Iceman, Nuclear Instruments and Methods in Physics Research Section B: Beam Interactions with Materials and Atoms, Vol. 164-165, 2000, pp. 12 (doi.org/10.1016/S0168-583X(99)01196-9).

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4 Cf. Federal Act on the Transplantation of Organs, Tissues and Cells (Transplantation Act) of 8 October 2004, SR 810.21; see for an English version of the Transplantation Act [www.fedlex.admin.ch/perma.cc/G7DC-GUJA](http://www.fedlex.admin.ch/perma.cc/G7DC-GUJA).



The impersonality requirement also plays a major role in the discussion of the legal status of human organisms such as human embryos in vitro or egg cells when separated from the female body. These questions are regulated by specific laws, in particular the Reproductive Medicine Act.<sup>5</sup> Whether human organisms are objects in the legal sense is controversial: the concept of a legal object, as we have seen regarding the human corpse, is also influenced by moral and ethical values. On the one hand, a human embryo in vitro is—under the condition of being born (Article 31 II Civil Code)—a human being with its own personality (Articles 27 et seqq. Civil Code). But this is complicated by the fact that in the in vitro phase, there is no certainty that a human being will grow from the fertilized egg cell. If the embryo in vitro was to be considered an object in the legal sense, negotiability must be very restricted, similar to the legal status of a human egg or sperm cell.<sup>6</sup> In any case, Article 119 II e Constitution prohibits trade in human organisms and products derived from embryos. The sale and acquisition of these is, in fact, a punishable offence (cf. Article 32 II RMA).

## **b) Corporeality**

The second requirement for an “object” in the property law sense to meet is corporeality: in principle, only physically tangible, three-dimensional items have the quality of a legal object. However, there is a legal exception to the element of corporeality: energies and forces of nature like waterpower, electricity, and nuclear power are treated as objects (Article 713 Civil Code).

Particularly difficult questions arise with the increasing importance of digitalisation. For example, what about data? Can digital data qualify as a legal object and therefore be governed by our property law rules, although the element of corporeality is missing? According to the concept of corporeality, digital data, but also tokens, like a currency token in a blockchain, are not objects because they have no physical appearance and do not therefore fulfil the legal criteria, but still these creations are of great economic importance. Some authors are of the opinion that digital data and algorithms could in practice be treated as legal objects and that property law could apply without any amendment of the law. But this would not get around the reality of the fact that data does not fit into the legal categorisation of an “object”. Therefore, it might be more helpful to introduce a new type of an absolute right to incorporeal items. Discussion over this matter in Switzerland is only just beginning.

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5 Federal Act on Medically Assisted Reproduction (Reproductive Medicine Act, RMA) of 18 December 1998, SR 810.11; see for an English version of the Reproductive Medicine Act [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/ED8P-L9AY](https://perma.cc/ED8P-L9AY)).

6 Cf. Articles 18 et seqq. RMA.

### c) **Delimitation**

The criterion of delimitation requires that the legal object has either a physical or an economic independence. An object is physically independent if it exists for itself and has a separate, defined existence; it must represent a physical unit. In the case of movable objects, the physical delimitation already results from the physical boundaries of the object. Think of a book: a book, with all its parts, is a specific physical unit with its own independent existence. In the case of liquid or gaseous substances, the bottling in a container has the effect of delimitation. With real estates this physical delimitation results from the land register plans and the boundary markings on the area. In the case of objects as sand or cereal, not a single grain of sand or cereal but a customary quantity of sand or cereal is considered a separate, economic unit.

### d) **Controllability**

A final element of the notion of objects is their “controllability”, both factual and legal: it must be possible to submit the object to human will and it must be covered by legislation. The sun, the moon and the stars, the air or the open sea are not fully controllable by humans; these are so-called common goods, *res communes omnium*. However, domination over the object must not only be possible, but also legally possible. A legal object is one which can be acquired, appropriated, or used in accordance with our legal system. Whereas under Roman law sacred objects (*res sacrae*) were considered legally uncontrollable, under Swiss law the human body lacks legal controllability, since the concept of legal objects is also influenced by ethical standards. In this respect, the element of legal controllability again intersects with impersonality.

### e) **Animals**

A special regulation exists for animals: after numerous initiatives, on 4 October 2002 the Swiss Parliament adopted the basic rule in Article 641a Civil Code and amended various provisions in the Swiss Code of Obligations, Criminal Code and Federal Statute on Enforcement Proceedings and Bankruptcy. The amendments, which came into force on 1 April 2003, aimed to improve the legal position of animals and—in some specific provisions—to take greater account of the special relationships people have with their pets. Article 641a Civil Code reads as follows: “*I. Animals are not objects. II. Where no special provisions exist for animals, they are subject to the provisions governing objects.*” However, the provision in Article 641a Civil Code is of declaratory significance

only; it does not create a new category in property law. Animals continue to be regarded as legal objects and have no legal capacity of their own. Since they are “movable” objects in practical terms and were legally regarded as movable objects before the revision, animals are systemically close to chattel in property law terms.

Specific provisions, to which Article 641a II Civil Code refers, can be found in Article 482 IV Civil Code. For example, in the event that an animal receives a bequest by testamentary disposition, this disposition is deemed to be a burden for the heirs to care for the animal in an animal-friendly manner. Article 651a Civil Code regulates the allocation of ownership of a co-owned domestic animal in the case of dissolution of the co-ownership. In such cases, sole ownership is allocated to the party who can better ensure the protection of the animal's welfare, for example in respect of the accommodation available to the animal. Outside of the property law regime, there are also some specific provisions on animals in the Swiss Code of Obligations. Article 42 III Code of Obligations states that in the case of pets, the costs of treatment may, within appropriate limits, be claimed as a legal damage even if the costs paid exceed the value of the animal. Furthermore, according to Article 43 I<sup>bis</sup> Code of Obligations, in the case of injury or killing of a pet, the judge may take appropriate account of its sentimental value to its owner or his dependants.

## **f) Categories**

The Swiss Civil Code already distinguishes between movable objects, chattels, and immovable objects (see I.1. above). Chattels are objects which are not connected to the ground and which can be moved from place to place at any time without causing damage to the object itself (Article 713 Civil Code). Conversely, the concept of immovable property can be found in Article 655 Civil Code. In Swiss Law, immovable property can consist of a parcel of land including the buildings thereon (Article 655 II No. 1, Article 667 Civil Code), a distinct and permanent right recorded in the land register (Article 655 II No. 2 and III Civil Code), mines (Article 655 II No. 3 Civil Code), or a co-ownership share in immovable property (Article 655 II No. 4 Civil Code). These last three categories are rights rather than physical objects, but are nonetheless legally treated as immovable objects.

## 2. Right in rem

### a) Characteristics

In addition to the notion of the legal object, the concept of “right in rem” is a basic concept of property law. Historically, the legal nature of these rights in rem were controversial. One view considered that the immediacy of legal power conveyed is the distinguishing feature of the legal nature of the rights in rem. According to another view, the distinguished nature of the rights in rem stems from the fact that they apply “erga omnes”, i.e. against all, and thus have an “absolute exclusion” effect. From this perspective, the right in rem consists in the exclusion of third parties from disturbing or hindering the person entitled in rem in the actual and legal use and disposal of the object.

In the modern doctrine of property law, both elements are usually cited; the right in rem is defined as a combination of having the immediate legal control over the object and the right to exclude third parties (erga omnes effect). The functional conceptualisation of the right in rem is therefore based on a description of its effects. If you compare the right in rem with a right in personam, such as a claim from a contract of sale, you will find that the latter right does not establish immediate power over an object; rather, it is a right directed against a person on whose conduct the control of the matter depends. Furthermore, it is directed exclusively against your contractual partner; in contrast, rights in rem work as absolute rights not only against a certain person but against everyone. Since rights in rem are effective against everyone, it must be possible for persons to recognise these rights where they exist. Rights in rem are therefore subject to the principle of publicity (see II.1. below).

### b) Types

*Ownership*, on the one hand, is referred to as the full right in rem: the owner has all possible rights over the object, and his or her powers encompass the object in its entirety. *Limited rights in rem*, on the other hand, refer to one or more of the rights that can form part of ownership. The limited rights in rem are furthermore categorised into so-called rights of use and exploitation rights. *Rights of use* are those which grant the holder the right to utilise the object, i.e. to use the object directly within the limits set by the law. This is the case with the easements (Articles 730 et seqq. Civil Code). The real burden is a mixture between a right to use and an exploitation right, which is very rare in a practical context. According to Article 782 I Civil Code, a real burden obliges an owner of immovable property to fulfil an obligation to a beneficiary for which

he or she is liable solely with the immovable property (cf. Articles 782 et seqq. Civil Code). Thus, the owner of a section of forest can be charged with the real burden that he or she must deliver a certain amount of wood to another person each year. The owner is not personally liable for this delivery, but if he or she does not fulfil this duty, the liability lies with his or her section. In case of default on the part of the owner, the beneficiary has the right to payment out of the proceeds of the sale of the section of forest owned. *Exploitation rights*, on the other hand, are not rights of use but rights which can secure a claim: In the event of default on the part of the debtor concerning the fulfilment of a secured claim, the creditor has the right to payment out of the proceeds of the forced property sale. So, under certain conditions, exploitation rights grant the entitled person the possibility of participating in other monetary values by the forced sale of the encumbered object. Such exploitation rights are mortgages (mortgage contracts, Articles 824 et seqq. Civil Code, and mortgage certificates, Articles 842 et seqq. Civil Code) on immovable objects and pledges on movable objects (Articles 884 et seqq. Civil Code). Property and limited rights in rem therefore differ in two respects. Firstly, in quantitative terms: the property right establishes full sovereignty over an object, while limited rights in rem establish only partial sovereignty rights. Secondly, they differ qualitatively in that the limited rights in rem constitute encumbrances or limitations of ownership.

### 3. Ownership and Possession

An important distinction is that between the legal status of the owner and that of the possessor. *Ownership* is the full right in rem (cf. I.2. above; Article 641 Civil Code). *Possession* (Articles 919–941 Civil Code), on the other hand, is not a right, but denotes the mere fact of actual dominion over an object,<sup>7</sup> to which legal consequences are attached. However, the concept of possession can also be understood as the totality of legal effects that the law attaches to factual control.

Possession establishes a whole series of legal remedies that serve to protect this factual dominion over an object. While ownership of an immovable object is transferred by the conclusion of a legal transaction in a specific form (Article 657 Civil Code) and the application for registration (Article 963 Civil Code) of transfer of ownership in the land register (Article 656 I Civil Code, cf. on the principle of entry II.2. below), possession plays a central role in the

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7 DFC 85 II 275.

creation and transfer of rights in rem for chattel—including, in particular, the right of ownership. The transfer of ownership of a movable object takes place through the conclusion of a contract (purchase, donation, exchange) and the transfer of possession of that object (Article 714 I Civil Code), most often embodied by the handing over of the object (“traditio”, Articles 922 et seq. Civil Code, cf. on the principle of tradition II.2. below).

But what happens where the seller is not, in reality, the owner of the chattel? If a buyer concludes a contract of sale of a movable object with the seller and has possession of it transferred to him or her without the seller being the owner of the object, the buyer may nevertheless acquire ownership under certain conditions. There are therefore exceptions to the principle of “*nemo plus iuris transferre potest quam ipse habet*”. A buyer can acquire ownership (or a limited right in rem) from a person who is not legally authorised to dispose of it, if the seller was entrusted with the object by the owner (e.g. by rent, lease, deposition) and the buyer did not know and should not have known (good faith, Article 3 Civil Code) that his or her contractual partner lacked the authority to dispose of it (Article 933 Civil Code). In this case, the buyer validly acquires ownership (Article 714 II Civil Code). If, on the other hand, the object was stolen or lost, or if the possessor was otherwise dispossessed of it against his or her will, he or she can reclaim the object from a subsequent buyer. If more than five years have passed, however, reclaiming the object will only be possible if the buyer was not acting in good faith (Article 934, Article 936 I Civil Code). Good faith is presumed in Swiss law (Article 3 I Civil Code);<sup>8</sup> bad faith has to be proven by the person who claims to be the lawful owner.

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8 See chapter on Civil Law Principles and Family Law, pp. 229.

## II. Principles

Besides the fundamental concepts of the legal object, of the right in rem, and possession, property law is based on general principles that have legal-political and legal-dogmatic functions and are of central importance for the application of property law as a whole. Their content is only indirectly expressed in the law, with a legal definition of these principles lacking throughout the legislation.

These principles of property law are the principle of publicity, as already mentioned above in the context of “rights in rem” (see I.2. above), the principle of tradition and entry, the principle of *numerus clausus*, the principle of speciality, the principle of causality, the principle of accession, and the principle of priority.

### 1. Publicity

According to the principle of publicity, rights in rem—and in the field of immovable property law, certain other rights (e.g. priority notices, Article 959 et seqq. Civil Code)—must be identifiable by everyone, i.e. open to public inspection. The *erga omnes* effect of rights in rem (see I.2. above) presupposes that these rights must be recognisable for all persons potentially subject to their effect. The implementation of this principle requires that the law provides instruments capable of creating publicity in the first place, i.e. by which rights in rem are identifiable to other persons.

Different instruments are used as such means of publicity for movable and immovable property. For *chattel*, the main means of publicity is possession (Articles 919 et seq. Civil Code), in that the existence of a right in rem is inferred based on possession. The possessor of a chattel is presumed to be its owner (Article 930 I Civil Code).

In the law of *immovable property*, the land register (Articles 942 et seq. Civil Code) assumes the basic publicity function (Articles 971-974 Civil Code). This publicity function is reflected in the fact that generally rights in rem to immovable property only come into existence once they have been entered in the land register; this is the so-called principle of entry (see II.2. below).

## 2. Tradition and Entry

The principle of tradition applies generally to movable objects (see I.1. above). It requires that, in addition to a valid underlying transaction, the transfer of possession of the object from a seller to an acquirer (by “traditio”) must occur for the legal acquisition of a real right in a movable object (Article 714 I Civil Code, cf. III. Landmark Cases below).

The principle of entry is (mainly) applicable to immovable objects (see I.1. above). According to this principle, the creation and transfer of rights in rem to real estate generally take place through the transfer’s entry in the land register (as to the transfer of ownership see Article 656 I Civil Code).

## 3. Numerus Clausus

Since the principle of publicity plays a fundamental role by requiring rights in rem to be recognisable to all persons involved in legal transactions, it is helpful if the number and the content of rights in rem are limited by the law: Publicity is easier to achieve if the rights in rem are typified and standardised to the extent that there are no arbitrary variations of rights in rem, and to ensure that only a clearly defined number of types of rights in rem can exist. This requirement is met by the principle of numerus clausus: the law’s confinement of rights in rem to a fixed number (numerus clausus). In addition, according to the numerus clausus principle, the legal system also determines the content of rights in rem. The content of rights in rem is therefore determined by the limits set by the law. Due to this mandatory principle, it is, for example, not possible for the parties to establish new types of ownership or easements that the law does not provide for. If an agreement between parties violates the principle of numerus clausus, this has heavy consequences: such agreements will be null and void (Article 20 I Code of Obligations).<sup>9</sup>

## 4. Speciality

According to the principle of speciality, also known as the principle of individuality, rights in rem concerning chattel and immovable property can only arise in individual items, i.e. in single, specific objects. This principle is expressly set out as regards mortgages in Article 797 I Civil Code: where a mortgage is

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9 See DFC 111 II 134 c. 5; DFC 103 II 176 c. 2 and 4.



created, the immovable property that it encumbers must be clearly specified. The principle of speciality is further reflected in the legal requirement that each item of immovable property registered in the land register must have its own folio and number (main register, Article 945 I Civil Code).

## 5. Causality

To understand the principle of causality, a distinction must be made between the *causa* and the so-called *disposal transaction*. For the transfer of ownership, the “*causa*” establishes the duty of the seller to make a disposition, and is therefore also referred to as the underlying transaction or contract; within the process of acquiring legal ownership of an object, for example, the “*causa*” would be the contract of sale. Underlying transactions include, e.g., contracts of sale (Articles 184 et seq. Code of Obligations), donations (Articles 239 et seq. Code of Obligations), contracts on easements (Article 732 I Civil Code), or mortgages (Article 799 II Civil Code).

According to the principle of causality, the *disposal transaction* depends on the *underlying contract* (*causa*).<sup>10</sup> Therefore, a valid underlying transaction is indispensable for the disposal transaction based on it to be legally valid. For immovable property, the principle is based on Article 974 II Civil Code, which says that an entry in the land register is unwarranted if it lacks legal basis or was made on the basis of an invalid transaction. For movable property, the principle is based on the case law of the Federal Supreme Court (cf. III. Landmark Cases below).

In the case of chattel, the relevant *disposal transaction* for transfer of ownership is the transfer of possession, in particular through “tradition” (Article 714 I Civil Code, see II.2. above). In real estate law, the disposal transaction (usually) takes place in the form of an application for registration at the land register (Article 963, Article 656 I Civil Code). It is interesting to note that other jurisdictions do not follow the principle of causality. German property law, for example, follows the principle of abstraction, according to which the validity of the transfer of possession by the transferor to the acquirer in order to fulfil the contract of sale does not depend on the validity of the underlying contract. The legal situation in France or Italy on the other hand is based on the principle of consensus: there is no need of a disposal transaction at all in order to transfer (for instance) ownership since ownership is transferred to the buyer by contractual agreement alone.

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10 DFC 119 II 326 c. 2.c.

## 6. Accession

According to the principle of accession, constituent parts of an object share its legal status. To illustrate: a right in rem existing in an object with several constituent parts—which according to doctrine are considered essential to the object and which could not be detached without destroying, damaging or altering it—also covers those individual components (Article 642 Civil Code); the components share the legal status of the main object. Therefore, the wheel of a car, as a component of the car, shares the legal situation of the car; whoever is the owner of the car is also the owner of the wheel. In its function, the principle of accession thus protects the entire entity of a functional combination of objects. Everything which belongs to the existence of an object and cannot be separated without its destruction, damage, or alteration, is a constituent part of the object in this sense (Article 642 II Civil Code).

For *immovable property*, the principle of accession arises from Article 667 II Civil Code: the ownership of land includes, subject to legal limitations, all buildings and plants as well as springs. This means that the owner of a parcel of land is also the owner of all buildings on that plot of land, as well as of all trees, shrubs, and springs. However, the law allows certain exceptions to the principle of accession for immovable property. The most frequent case is the so-called building right (Article 675 I and Articles 779 et seqq. Civil Code). If a building right is recorded in the land register, the owner of the parcel of land and the owner of the construction built on the ground or dug into the land may be different persons; the principle of accession can therefore be broken by the specific instrument of the building right.

## 7. Priority of Age

According to the principle of priority of age, the rank of limited rights in rem in an object is determined by their order of creation or registration: the earlier established right takes precedence over the later established right (“*prior tempore potior iure*”).

This ranking is determined differently for movable and immovable property: in the case of movable property, the time of the establishment of the respective limited rights in rem is decisive for the order of priority (cf. for pledges Article 893 II Civil Code). In contrast, for limited rights in rem in immovable property, the time of registration of said right in the land register is decisive (Article 972 I Civil Code).

The importance of the principle of priority of age comes into play when two or more limited rights in rem concerning an object compete with each other: for example, when an easement and a mortgage encumber the same immovable property. Which right prevails? The principle of priority of age answers this question insofar as the older right takes precedence over the younger right. But there is a legal exception to that rule: the principle does not apply between several mortgages on immovable property. The rank of a mortgage is determined by the terms of the agreement between the owner of the object and the creditor of the mortgage (Articles 813 et seq. Civil Code).

## III. Landmark cases

### 1. Principle of Causality<sup>11</sup>

On 13 May 1927, the seller (N) sold his residential building, which contained a workshop and store, to the buyer K for a price of CHF 54,000. The contract of sale stipulated that the transfer of ownership should be entered in the land register by 1 July 1927 at the latest. The parties fixed the date on which the buyer was to take possession of the property for 1 July 1927. According to the contract of sale, all existing machines with tools, store equipment including tires, gasoline, and oil supplies, as well as the entire warehouse at current prices were also sold and included in the sale price. The object of the contract of sale was therefore both a section of land, i.e. an immovable object (including a building), and a number of movable items, i.e. tools, tires, etc., set out in an inventory.

The buyer (K) moved into the purchased house—with the consent of the seller, N—one week before 1 July 1927 and began to control the inventory of the warehouse. He discovered that the actual stock of movable objects did not correspond to the inventory. On 30 June 1927, the buyer K informed the seller N that he considered the entire contract to be non-binding on him because he was induced to enter into a contract by N's fraud (Article 28 Code of Obligations). As K challenged the contract of sale in due time (according to Article 31 Code of Obligations), the contract of sale, i.e. the underlying contract, was therefore unilaterally non-binding.

Consequently, the registration and entry of the transfer of ownership in the land register did not take place. Thus, no transfer of ownership to K concerning the immovable property by registration in the land register took place. But who was now the owner of the movable objects? Was the ownership transferred to K with the transfer of possession due to the non-binding contract of sale for the buyer? These questions became even more pertinent after bankruptcy proceedings were opened against N, meaning that all items owned by N were to fall into the bankruptcy estate for the purpose of covering the outstanding claims of N's creditors.

It was therefore crucial to determine whether K had already acquired ownership of the movable objects. If he had, the ownership would now lie with K, and the objects subject to the contract of sale, i.e. machines with tools,

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11 DFC 55 II 302.

store equipment including tires, gasoline, and oil stocks, as well as the entire warehouse, would not fall into the bankruptcy estate of N.

K was in possession of the inventory items; the transfer of possession, the disposal transaction (cf. II.5. above) had therefore taken place. But could K, the buyer, become the owner based on the transfer of possession, in spite of the fact that the underlying contract of sale was not binding? Or, in other words: does the principle of causality also apply to movable property?

The Swiss Federal Supreme Court held that, since the Civil Code established the principle of causality for immovable property in Article 974 II Civil Code (cf. II.5. above) while leaving this undetermined for movable property, no valid transfer of ownership had taken place in the absence of a valid contract of sale (underlying contract, cf. II.5. above). Therefore, N remained the owner; the objects of purchase fell into N's bankruptcy estate. With this decision, the Federal Supreme Court extended the principle of causality according to Article 974 II Civil Code as regards transactions on chattels.

So, the Federal Supreme Court convincingly created consistency in property law's principle of causality as it applies to movables and immovables.

## 2. Bona Fide Acquisition<sup>12</sup>

B was an art collector who owned a significant collection of modern works of art. In July 1989, he purchased (through C Limited, acting as the buyer) the painting "Servant with Samovar" for a sale price of USD 1.05 million. The painting is a work of the Russian artist Kazimir Malevich. Malevich painted it in the creative period of the so-called "Cubo-Futurism" in 1914 (the development of which is attributed to the Russian avant-garde). The painting was sold on commission (Articles 425 et seqq. Code of Obligations): the formal seller was D from the E Gallery in Geneva. The seller behind the contract between D and B remained unknown to B. Based on the contract of sale and the transfer of possession to B (Article 714 I Civil Code), B claimed to be the legal owner of the painting. On 23 March 2004, A filed an action against B for the restitution of the painting. He claimed that his father had acquired the painting in 1970 and that it had been stolen in 1978 from his parents' apartment in Leningrad (now St. Petersburg). As the sole heir of his parents, he requested the restitution of the painting.

According to Article 714 I Civil Code, the transfer of ownership of a chattel requires the delivery of possession to the buyer. A person who, in good

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12 DFC 139 III 305.

faith, receives possession of a chattel based on a sales contract will become its owner, even if the seller is not authorised to alienate it, as soon his or her possession of it is protected according to the provisions governing possession (Article 714 II Civil Code, cf. I.3. above). Article 714 II Civil Code refers to the provisions of Articles 933 et seq. Civil Code: a person who takes possession of a chattel in good faith in order to become its owner or to acquire a limited right in rem is protected therein, even if the chattel was entrusted to the seller without any authority to effect the transfer (Article 933 Civil Code). However, as set out earlier in this chapter, a possessor whose chattel has been stolen or lost, or who has otherwise been dispossessed of it against his or her will, may reclaim it from any possessor within a period of five years (Article 934 I Civil Code). A person who has not acquired a chattel in good faith may be required by the previous possessor to return it at any time (Article 936 I Civil Code).

In this case, the painting had not been entrusted to the seller by the original owner (Article 933 Civil Code); rather, it had been stolen. However, since the action was filed many years after expiration of the delay of the 5 year period (Article 934 I Civil Code), the plaintiff A had to prove that the buyer B was not in good faith in order to be able to reclaim the painting (Article 936 Civil Code). The Federal Supreme Court noted that the degree of scrutiny which the buyer must exercise during a purchase will depend on the circumstances (Article 3 II Civil Code). What this provision means in the individual case is largely a matter of discretion (Article 4 Civil Code). In particular, the prevailing practice in the relevant industry must be included in the consideration. According to the established case law of the Federal Supreme Court, there is no general obligation on the part of the buyer to inquire into the existence of the seller's power of disposal; it is only where there are concrete reasons for suspicion that the buyer will be obligated to enquire into the specific circumstances of the seller's ownership. More stringent requirements are to be imposed on those branches of business which are particularly exposed to the offer of goods of doubtful origin and consequently of goods with defects of title, as is the case with the trade in second-hand goods of all kinds. Even if this does not impose a general duty to inquire, in these cases there is a duty to clarify or inquire with regard to the right of disposal of the seller not only where there is a concrete suspicion of a legal defect, but when there is reason to be suspicious due to the circumstances. These increased due diligence requirements are not limited to the buyer in commercial transactions; rather, the decisive factor is the buyer's familiarity with the specific sector.

In the opinion of the Federal Supreme Court, B could not claim good faith because he had failed to take reasonable precautions (for example by seeking further clarification as to D's title, etc.) despite concrete grounds for suspicion

regarding the seller's right of disposal. Consequently, A could demand the return of the painting by way of an action for possession (Article 936 Civil Code), and since B was not protected in his possession, he had not acquired ownership (Article 714 II Civil Code e contrario, cf. I.3. above).

The Federal Supreme Court thus established high standards on the precautionary measures and diligence duties which buyers in the art trade should take, which seems convincing in view of the fact that this field is often exposed to dubious transactions.

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Tina Huber-Purtschert

# Contract and Tort Law

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# I. Codes

Swiss contract and tort law 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<sup>2</sup> on March 30, 1911; together with the other parts of the Civil Code, it entered into force on January 1<sup>st</sup>, 1912. The Code of Obligations is filed in the classified compilation of federal legislation, under number 220.<sup>3</sup> The basis of contract and tort law (albeit with some minor and major retouches since its conception) 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 influences from the German Civil Code, but due to the Swiss legislator's aforementioned ambitions of simplicity, it is much easier to read. Exemplifying this, Swiss contract law is often chosen by the parties as the law applicable to their contract, particularly in the context of commercial arbitration.

The articles concerning contract and tort law can be found in the first two divisions of the Code of Obligations. The first division, which also contains the general provisions, covers the following subjects within its 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)

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1 In the following text, where Articles are mentioned without further referencing, 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; see for the English version of the Code of Obligations [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/GYF5-DP5S](https://perma.cc/GYF5-DP5S)).

2 "Obligation" derives from the Latin "obligare" which means to bind, to oblige.

3 For a discussion of the classified compilation of federal legislation see chapter Swiss Legal System, pp. 18.

- Special Relationships relating to Obligations (joint and several obligations, conditional obligations, earnest money,<sup>4</sup> forfeit money,<sup>5</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>6</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>7</sup>

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, instead opting for a retouch in select areas only. In general, the retouch concentrated on harmonising prescription (aside from some unrelated, minor changes<sup>8</sup>), a revision which entered into force on January 1<sup>st</sup>, 2020.

The second division of the Code of Obligations covers, in Articles 184-551, the different types of contractual relationship which can be created (so-called nominate contracts), namely the following:

Sale and exchange (Articles 184-238), including *inter alia* 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 253-273c) and usufructuary lease<sup>9</sup> (Articles 275-304)

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4 Earnest money is a payment made on conclusion of a contract which the contractual partner may retain in the event of non-performance.

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5 Forfeit money is a payment made on the conclusion of a contract in order to compensate for the paying party being granted the right to withdraw from the contract.

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6 Swiss Civil Code of 10 December 1907, SR 210; see for an English version of the Civil Code [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/DG3C-PVHW](https://perma.cc/DG3C-PVHW)).

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7 For example, Article 18 which covers the interpretation of contracts is applicable to the interpretation of testamentary dispositions. The law of succession is contained in the Civil Code, starting at Article 457 Civil Code.

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8 For example, the introduction of liability in respect of cryptographic keys used to generate electronic signatures or seals (Article 59a).

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9 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).

- 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
- *Contract for work and services* (Articles 363-379)
- Publishing contract (Articles 380-393)
- Agency contracts (Articles 394-418v), including the *simple agency contract* and special agency contracts
- Agency without authority (Articles 419-424)
- Commission contract (Articles 425-439)
- Contract of carriage (Articles 440-457)
- Registered power of attorney and other forms of commercial agency (Articles 458-465)
- Payment instruction (Articles 466-471)
- Contract of bailment (Articles 472-491)
- Contract of surety (Articles 492-512)
- Gambling and betting (Articles 513-515a)
- 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>10</sup>

Not all of the regulated contracts listed above carry the same practical significance. The most important types of contract are explained below under II.9.

Although contractual rules are generally located in the Code of Obligations, other federal acts, ordinances and treaties also contain contractual rules, for example the Consumer Credit Act<sup>11</sup> (not yet available in English), the Product Liability Act<sup>12</sup> (not yet available in English), or the Package Travel Act<sup>13</sup> (available in English). Also of importance is the United Nations Convention on Contracts for the International Sale of Goods (CISG),<sup>14</sup> which is also considered part of Swiss law since Switzerland's ratification of this instrument.

How do the general and specific provisions of the two first divisions of the Code of Obligations interact? While the general provisions of the Code of Obligations regulate basic questions and contain rules relating to all types of

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<sup>10</sup> See chapter on Corporate and Banking Law, p. 348.

<sup>11</sup> Federal Act on Consumer Credit of 23 March 2001, SR 221.214.1.

<sup>12</sup> Federal Act on Product Liability of 18 June 2010, SR 221.112.944.

<sup>13</sup> Federal Act on Package Travel of 18 June 1993, SR 944.3; see for an English version of the Package Travel Act [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/5HDU-9XGG](https://perma.cc/5HDU-9XGG)).

<sup>14</sup> United Nations Convention for the International Sale of Goods of 11 April 1980 (CISG), SR 0.221.211.1.

contracts, the provisions on the types of contractual relationship only stipulate rules for specific types of contracts. Thus, in any given case, one must first determine whether the situation before them concerns 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 relevant, the general provisions apply. For example, the provisions about the sale of chattel regulate the rights of the customer in the event of defects in the contractual object (Articles 197 et seqq.) and the time limit applicable to these claims (two years after delivery of the object to the buyer, Article 210 I). In contrast, there is no provision in these specific rules as to the time limit for payment of the purchase price. Therefore, to answer this question, we have to apply the general provisions, which stipulate that the time limit is ten years (Article 127).

## II. Principles

Swiss contract law follows the principle of *freedom of contract*. This means that no one is *obliged* 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>15</sup> a 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 of a breach of contract. Regarding *the form* of a contract, the Swiss Code of Obligations generally does not impose any requirements: a contract may therefore be concluded orally or even through implicitly consenting behaviour (Article 1). Such an implicitly consenting behaviour can be seen, for instance, in the act of putting a good on the checkout belt at a self-service supermarket. 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, 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. The topics discussed will follow the lifespan of a contract.

### 1. Conclusion of a Contract

The conclusion of a contract requires a mutual expression of intent by the parties, which can be express or implied (Article 1). That means that the parties must agree on every basic point (*essentialia negotii*); only secondary terms may be left open (Article 2). The basic points of a contract are determined by

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15 A person who is *of age* and *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).

the characteristics of the contract under discussion.<sup>16</sup> The usual process for concluding a contract is an offer and then the unconditional acceptance of this offer by the other contractual party: e.g. a shop offers a blouse for CHF 150 and the customer accepts by bringing the item to the cash desk with the intention to pay that price for it. (Note that the *essentialia negotii* of a chattel sale are that the seller undertakes to deliver the sold item and to transfer ownership of it to the buyer in return for the sale price, which the buyer undertakes to pay to the seller. Therefore, the seller and buyer have to agree on the item sold and the sale price.) 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), which must then be accepted in order for the contract to be concluded. Alternatively, Party A may ask Party B for an offer, which Party A can accept upon receipt (e.g. the customer asks for the total price of two blouses). What is without doubt is that a valid offer and a valid acceptance are always needed at some stage in the process for a contract to be concluded.

Contractual parties must have capacity to act in order to create rights and obligations through their actions (Article 12 Civil Code).<sup>17</sup> A contract can be concluded not only by a party with capacity to act 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>18</sup> Commercial representatives act on behalf of a trading, manufacturing, or other commercial business, with the rules for non-commercial representation applying in all other representation cases.

## 2. Interpretation of a Contract

The interpretation of a contract is always initially based 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, for instance, both parties call the subject of their sales contract “cat” although it is biologically a dog, that does not matter. They willingly agreed on that specific pet in a so-called *natural consensus*. Only where there is doubt

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16 Nominate vs. innominate contracts, see pp.333.

17 For the prerequisites of the capacity to act see fn. 15.

18 It should also be noted that representation rules are also contained in company law, e.g. Article 718 et seqq. concerning the board of directors of companies limited by shares.



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 considered to stem 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 and did, in good faith, understand it. For example, if a customer orders “chips” in a Swiss restaurant, the waiter will bring him or her potato crisps and not French fries (the latter are called “Pommes frites”). Therefore, an English customer who 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>19</sup> The concept of normative consensus protects the contractual party acting in good faith by requiring the other party to act if he or she does not intend to stick to the contract.

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. For example, when an American wine dealer orders wine for 12 “dollars” a bottle from an Australian winemaker during an international wine fair in Germany and both parties understood the price as in his or her home country currency (the American Dollar and the Australian Dollar, respectively), both interpretations of the price are equally admissible, since the circumstances (here the wine fair outside of both home countries) do not favour one interpretation. Therefore, no valid contract would have been concluded in this instance.

### 3. 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 concerning a specific item that was incinerated before the conclusion of the contract). Second, a contract is also void where its terms are unlawful or immoral (Article 20 I; the classic case would be a contract for the sale of prohibited

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19 See below, 4. Defects in Consent, pp. 326.

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).

## 4. Defects in Consent

The conclusion of a contract is defective if one party consented erroneously (a. Fundamental error), or was deceived (b. Fraud) or forced into the contract (c. Duress).

### a) Fundamental error

To contest a contract because of an error, the party must prove that he or she was operating under a fundamental error when entering into a contract (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 in accordance with the principle of confidence (*normative consensus*) but where one party had a differing intention (e.g. the English customer who ordered chips in a Swiss restaurant and realises only upon delivery that the food he really intended to order was French fries or when a customer orders a bunch of roses from a florist and realises only upon delivery that the flowers he meant to order were not roses but tulips). The case of fundamental error which has the greatest impact (because it often concerns an error discovered years after the conclusion of the contract) is paragraph I No. 4: an error which relates to specific facts which the party acting in error considered in good faith to be a fundamental basis for the contract. An example would be a buyer and seller who thought they were agreeing to the sale of a real Picasso painting for CHF 4 million, but later discovered the object of the contract to be a copy. A party acting on an error caused by his own negligence and invoking that error to repudiate a contract is liable for any damage arising from the nullity of the agreement (Article 26).

### b) Fraud

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 would be the case of a jeweler who knowingly sells a gold-plated bracelet under the description of a pure gold bracelet.

### **c) Duress**

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 or her own life, limb, reputation, property, or to those of a person close to him or her (Article 30 I). For example, a person may enter into a sales contract for restaurant equipment because the seller threatens to harm the buyer's restaurant business by telling everybody about some hygiene issues the buyer's restaurant had in the past.

### **d) Consequences of fundamental error, fraud and duress**

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 merely voidable. This means that the party whose consent was defective must notify the other party of this defect to invalidate the contract. Where the party wishing to invalidate the contract does not notify the other party of the defect in consent within one year (forfeiture limit), the contract is deemed to have been ratified and can no longer be invalidated (Article 31 I). The one-year limit starts to run from the point when the error or the fraud was discovered or from the time that the duress ended (Article 31 II).

## **5. Unfair Advantage**

One finds somewhat of a "mixture" between defect in consent and defect in content in the case of unfair advantage. This is a situation where there is a clear discrepancy between the performance required and the consideration agreed upon under a contract, as a result of one party's exploitation of the other's straitened circumstances, inexperience, or thoughtlessness. In such circumstances, the injured party can 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 at ten times the market price to a bride on the night before her wedding, after she has discovered that her original wedding dress has been stolen.

## 6. 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.

### a) 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 result not only 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 for a right to compensation being established (aside from the breach of the contract) are damage, causality between the damage and the breach, and misconduct attributable to the other party (the obligor). All prerequisites must be satisfied in order for a valid claim to be made out. The last prerequisite is assumed in a contractual relationship, so that the burden of proof is shifted from the obligee (or creditor) to the obligor (or 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 fiduciary who misses the deadline for filing a tax declaration for his client must compensate his client for the fine (damage), since missing a deadline is a fundamental breach of a fiduciary's duty of care (breach of the contract by missing a contractual duty), missing the deadline was the cause of the fine (casuality between damage and the breach) and the fiduciary cannot present any reason to exculpate himself (misconduct attributable to the obligor).

Where an obligation is due, the obligor is generally in default as soon as he or she receives a formal reminder from the obligee (Article 102 I). A due obligation means that the obligee can demand performance and the obligor must perform. If neither the contract itself nor the nature of the legal relationship establishes a due date for performance, it can be assumed that performance should be made or can be demanded immediately (Article 75). Where a deadline (e.g. 31<sup>st</sup> January 2022) for performance of the obligation has been agreed,

the obligor is automatically in default upon the expiry of the deadline (Article 102 II). 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). An obligee who does not receive 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: (i) compel performance and sue for damages in connection with the delay or (ii) forego subsequent performance (first right to choose), and either claim damages for non-performance or simply withdraw from the contract altogether (second right to choose) (Article 107 II). For example, when a person orders a new car which is to be delivered later than agreed, he or she can either still wait for the car (compel performance) and in addition claim compensation for the cost of incurring a rental car (damages for non-performance) or cancel the order (withdraw from the contract).

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 (e.g. in the above example, if the buyer had to pay a higher sum to re-order the same car from another garage, the buyer would have the right to be compensated for the difference in the sales price). 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 (e.g. the customer does not owe the car dealer any sum of money and any saving the buyer makes when re-ordering the car at another garage for a lower sum is his own gain). 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 can be claimed in order to obtain the price difference. If one has lost interest in the contractual object or if performance can be obtained at a cheaper price from another supplier, it is best to withdraw from the contract.

## **b) Unjust enrichment**

A person who has enriched him- or herself 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 performs his contractual duty (e.g. pays the sale price) under a contract that suffers from a defect in consent, subsequently discovers the defect in consent and successfully invokes it, thus invalidating the contract. For example, when the person mentioned under section II.4.a, who bought a Picasso copy rather than the anticipated original for CHF 4 million, successfully invalidated the contract, he or she can ask for the CHF 4 million back from the seller under the title of an unjust enrichment, since the seller has been enriched by CHF 4 million at the expense of the buyer, as there is no longer any just cause.

### **c) 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 contained 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.).

As per Article 41, the prerequisites for a valid claim in tort, aside from damage and illegality, are causality between the damage and the conduct giving rise to liability 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 prerequisite “misconduct attributable to the defendant” is not assumed as it is in a contractual claim, meaning that the damaged party must prove all four prerequisites. For example, a man who accidentally 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 have been at least 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). For example, the liability of property owners according to Article 58 would mean that a house owner is liable for the damage a loose tile falling from the roof causes to a person walking by. Finally, such provisions can often be found in special codes (the code concerning road

traffic,<sup>20</sup> which regulates the liability of a motor vehicle owner, is probably the most practically relevant of these).

## 7. 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 would lead to a more appropriate result than the application of non-contractual principles. The Code of Obligations provides for only a few quasi-contractual claims. For example, a quasi-contractual claim is allowed under Article 26 I, whereby 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. Thus, if a customer orders roses but meant to order tulips,<sup>21</sup> she has to pay for the roses if the florist cannot sell them to anyone else and therefore suffers a loss. The customer is not liable if, for example, she always orders tulips from that florist, and the florist should have known that she had meant to order tulips rather than roses. Doctrine and court-practice have widened the category of quasi-contractual claims. Prominent examples are the liability after inspired confidence based on trust<sup>22</sup> or the liability for fault in concluding a contract (*culpa in contrahendo*). *Culpa in contrahendo* refers to the culpable breach of duties arising from a pre-contractual obligation such as e.g. conducting contract negotiations without the will to conclude any contract.

## 8. Prescription

Under Swiss law, most claims (with some exceptions, largely arising in the field of real estate: e.g. Article 807 Civil Code, which provides that claims regarding a mortgage recorded in the land register are not subject to prescription) prescribe after a certain amount of time, meaning that the claims cannot be enforced, regardless of their validity. The concept of prescription is based on the motives of legal certainty, legal peace and the avoidance of litigation. As a concept, it must be strictly distinguished from forfeiture limits. Whereas

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20 Federal Act on Road Transport of 19 December 1958, SR 741.01.

21 See p. 326.

22 See the Swissair Case, p. 335.

prescribed 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 (e.g. the one year period to invalidate a contract according to Article 31 mentioned under II.4.a is a forfeiture limit). A prescribed claim 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 prescribe *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 work carried out by tradesmen and craftsmen, doctors, advocates, and notaries, and work performed by employees etc. (Article 128). The legal and policy justification for this shortened prescription period is the fact that the claims in these groups of cases are based on bilateral contracts, where customary practice would entail a quick settlement and where it is uncommon to either rely upon a written contract or keep a receipt. The limitation period commences from the moment the debt becomes due (Article 130 I).

Obligations in tort and obligations stemming from unjust enrichment do not only have to meet an absolute prescription period; a relative prescription period must also be respected. In tort, claims become *time-barred* three years after the injured party became aware of the loss/damage and of the identity of the person liable (Article 60 I). In unjust enrichment, the period is three years after the date on which the injured party learned of their claim (Article 67 I). These are the relative prescription periods. In all circumstances, however, claims will prescribe ten years after the date on which the loss/damage was caused (tort) or the claim first arose (unjust enrichment): this is the absolute prescription period.<sup>23</sup>

An exception applies to claims arising from an injury or death: no matter the underlying cause of action (contractual or tort), they prescribe three years from the date on which the person suffering damage became aware of the damage (and of the identity of the person liable for it) but in any event twenty years after the date on which the harmful conduct took place or ceased (Articles 128a and 60 Ibis).

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23 Articles 60 I and 67 I.



## 9. 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) which govern the respective type of contract. Each type of contract has its own particularities. The most relevant types of contract are the following:

### a) 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 does not require 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).

### b) 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 payment of compensation (rent) is the compulsory element for the contract to be characterised as a lease (while for a loan contract, for example, the compulsory element is that the contract makes an object available free of charge).

### c) 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 or her a salary based on the amount of time he works (time wage) or the number of tasks he or she completes (piece work) (Article 319 I).

### d) 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 for a contract for work and services is agreement on a measurable result that can be guaranteed.<sup>24</sup>

### e) 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 whether or not the contract has a successful result.<sup>25</sup>

A simple agency contract is the traditional type of contract governing the 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 revoked or terminated at any time by either party (Article 404 I),<sup>26</sup> which is related to the principle that there will be mutual trust between such contractual parties. 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).

## 10. Innominate Contracts

Articles 184–551 cover so-called “nominate” 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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24 See the Market Value Estimate Case, p. 336.

25 In contrast to the contract for work and services, see the Market Value Estimate Case, p. 336.

26 See the Revocability of Simple Agency Contracts Case, pp. 336.

## III. Landmark Cases

### 1. Swissair<sup>27</sup>

#### Liability after inspired confidence based on trust

In this important case, the claimant had concluded a contract with a subsidiary company of the Swissair Group concerning intended membership rights to use luxury residences near golf courses in different countries. The claimant paid an initial fee of CHF 90,000. Subsequently, the project came to nothing, the subsidiary company having gone bankrupt. The claimant then asked for his money back from the Swissair Group. However, the group denied the existence of a claim on the basis that 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 had heavily emphasised its affiliation to the Swissair group and the latter's approval of the project in its publicity for the membership. 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 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. After this decision, which seems to have reached a balanced conclusion, there were concerns that the judiciary would overstretch the application of liability after inspired confidence based on trust in future rulings. In reality, time has demonstrated the courts' ability to exercise proper restraint: there are only a few cases where the liability incurred in this case has been reaffirmed.

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27 DFC 120 II 331.

## 2. Market Value Estimate<sup>28</sup>

### Delineation between a contract for work and services and a simple agency contract

The matter in dispute in this case was the defendant's market value estimate of a piece of real estate. This estimate was the basis for the calculation of the claimant's share of inheritance. Five years after the estimate was provided, 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 was to be measured against, the 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 the value of real estate is based on discretion and that the result of such an expert opinion cannot be measured objectively. Therefore, the Federal Supreme Court qualified the contract as a simple agency contract and not as a contract for work and services: consequently, they denied the claimant's entitlement to 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. The fundamental distinction is whether a specific outcome can be guaranteed or not. The more a work process can be standardised, the more an outcome can be guaranteed, and the more likely the contract will be one for work and services.

## 3. Revocability of Simple Agency Contracts<sup>29</sup>

### Revocability at any time of simple agency contract is compulsory

In this case, the claimant and the defendant had agreed on an advisory contract concerning accounting services. It was undisputed between the parties that the consultancy agreement qualified 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 Federal Supreme Court, Article 404 I is mandatory and cannot be altered by contractual provisions. The Court also rejected the

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28 DFC 127 III 328.

29 DFC 115 II 464.

argument that only contracts governed by personal trust, as opposed to all simple agency contracts, should be revocable at any time. According to the Court, the unambiguous wording of the legal text does not allow for such a differentiation. The claimant's claim was thus dismissed.

This strict interpretation of Article 404 seems to be appropriate in cases where mutual trust between the contractual parties is key. However, in cases where the subject of the contract has more of an administrative touch, such a strict interpretation of Article 404 seems overly one-sided and the inclusion of a notice period seems more appropriate.

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Kern Alexander

# Corporate and Banking Law

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# I. Codes

## 1. Civil Code

The Swiss Civil Code of 10 December 1907 (SR 210; CC) contains important provisions relating to legal entities in general (Articles 52–59 CC), associations (Articles 60–79 CC), and foundations (Articles 80–89c CC).

## 2. Code of Obligations

Articles on Swiss Company Law are found in the following divisions of the Swiss Code of Obligations of 30 March 1911 (SR 220; CO): i) in the last part of division two, which is concerned with the simple partnership (Articles 530–551 CO); ii) in division three, which covers commercial enterprises and the cooperative company (Articles 552–926 CO); iii) in division four on commercial register, business names and commercial accounting (Articles 927–964f CO); and (iv) division five regarding negotiable securities (Articles 965–1186 CO).

On 19 June 2020, the Swiss parliament adopted the final text of the amendments to some corporate law provisions in the CO (Corporate Law Reform). The Corporate Law Reform revises the articles concerning companies limited by shares (Articles 620–763 CO). It aims to incorporate into federal law the Ordinance Against Excessive Remuneration in Listed Companies Limited by Shares (20 November 2013, SR 221.331) and to improve corporate governance at listed and non-listed companies. Generally, the Corporate Law Reform introduces more flexible rules on company foundation and capital. Additionally, the rules on companies limited by shares are to be brought in line with new accounting standards.<sup>1</sup>

Most provisions of the Corporate Law Reform are not expected to be implemented until 2023. However, the provisions outlined in the following paragraphs entered into force as of 1 January 2021:<sup>2</sup>

The Act introduces gender quotas (Article 734f CO) for listed companies in Switzerland which meet at least two of the following thresholds, as set out in Article 727 I CO:

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1 See Federal Office of Justice, Revision of Company Law ([perma.cc/76B8-LY44](https://perma.cc/76B8-LY44)).

2 See for an overview SEVERIN ROELLI et al., New Provisions in Swiss Corporate Law and Changes to the Commercial Register Ordinance, Pestalozzi 2021 ([perma.cc/V8UU-RTG5](https://perma.cc/V8UU-RTG5)).

- (i) have total assets which exceed CHF 20 million;
- (ii) have a sales revenue which exceeds CHF 40 million;
- (iii) employ on average more than 250 staff full-time, annually.

Listed companies which meet at least two of the above conditions must ensure that women make up at least 30% of their board of directors and 20% of their executive committee. The quotas are not binding but companies who fail to meet them must provide an explanation for this.

To address the problem of Swiss companies involved in the extraction of natural resources bribing or providing other illicit benefits to foreign governments, new transparency requirements for companies in the commodities sector require the disclosure of any payments made to government entities of CHF 100,000 or more per fiscal year (Article 964a-f CO). The new transparency requirements only apply to listed Swiss companies or companies that both exceed the thresholds of Article 727 I CO as set out above and that are involved the extraction of minerals, oil, natural gas or in the harvesting of timber in primary forests (Article 964a I CO).

### 3. Financial market regulation

In relation to companies that participate in the financial market, act as financial institutions, or provide financial services, further relevant provisions can be found in the acts set out in the following paragraphs.

The Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 (Financial Market Infrastructure Act, SR 958.1; FinMIA) governs the organisation and operation of financial market infrastructures, and the conduct of financial market participants in securities and derivatives trading (Article 1 FinMIA). The Federal Act on Financial Services (Financial Services Act, of 15 June 2018, SR 950.1; FinSA) establishes requirements for honesty, diligence, and transparency in the provision of financial services and offering of financial instruments, which are intended to protect the clients of financial services providers (Article 1 FinSA). The Federal Act on Financial Institutions of 15 June 2018 (Financial Institutions Act, SR 954.1; FinIA) aims to protect investors and clients of financial institutions and ensure the proper functioning of the financial market (Article 1 FinIA).<sup>3</sup>

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3 See for a concretisation of these Acts: Financial Services Ordinance (6 November 2019, SR 950.11; [perma.cc/3W73-2LDJ](https://perma.cc/3W73-2LDJ)); Financial Market Infrastructure Ordinance (25 November 2015, SR 958.11; [perma.cc/E5XA-V7EP](https://perma.cc/E5XA-V7EP)); Financial Institutions Ordinance (6 November 2019, SR 954.11; [perma.cc/YS9Z-ZRME](https://perma.cc/YS9Z-ZRME)).

The Federal Act on Banks and Saving Banks of 8 November 1934 (Banking Act, 952.0) regulates banks to ensure depositor protection and reduce risks to the financial system. The Banking Act was amended to include a bank resolution regime (section XI: measures in case of impending insolvency and section XII: liquidation of insolvent banks), deposits protection scheme (Article 37a Banking Act), requirements for systemically important (“too big to fail”) banks (section V: systemically important banks), capital requirements (section VI: capital requirements), and provisions on dormant assets (section XIIIa: dormant assets).

The Federal Act on Collective Investment Schemes of 23 June 2006 (Collective Investment Schemes Act, SR 951.31; CISA) sets out further rules for collective investment schemes, or simply funds, to ensure investor protection, transparency, and the proper functioning of the market (Article 1 CISA).

The act on the Swiss Financial Market Authority of 22 June 2007 (Financial Market Supervision Act, SR 956.1; FINMAG) is the legal basis for the establishment and mandate of the Swiss Financial Market Authority (FINMA). It contains organisational provisions for FINMA (Article 5 et seqq.) and prescribes the supervisory instruments available to the body (Article 24 et seqq.). It also defines the persons and entities who can be subject to supervision (Article 3). The Act defines the rules for cooperation with other domestic and foreign authorities (Article 38 et seqq.). In Article 44 et seqq., the provisions which deal with the violation of certain provisions of financial law (i.e. insider dealing) are set forth.

## 4. Miscellaneous

The Merger Act of 3 October 2003 (SR 221.301) also contains rules relevant to Swiss companies engaging in merger and acquisition activities.

The Act on Combating Money Laundering and Terrorist Financing of 10 October 1997 (Anti-Money Laundering Act; SR 955.0) regulates the prohibition of offences defined in the Swiss Criminal Code: money laundering (Article 305<sup>bis</sup>) and terrorist financing (Article 260<sup>quinquies</sup> Swiss Criminal Code). The Act also requires financial institutions and businesses carrying out financial transactions to carry out certain due diligence (Article 1). It applies broadly to financial intermediaries, natural persons and legal entities that deal in goods commercially and which, in doing so, accept cash (dealers) (Article 2). The act specifies the duties and due diligence financial intermediaries are required to carry out, including verification of the identity of customers and counterparties and the duty to keep records (Article 3 et seqq.). If an institution suspects

money laundering, there is a duty to report this to the appropriate authorities (Article 9). Individuals suspected of money laundering may have their assets frozen by the authorities (Article 10). In addition, Article 12 et seqq. set forth the provisions on the supervision and licencing of financial institutions and the verification of financial transactions by institutions and other businesses.

## II. Principles

### 1. Company Forms

Swiss law does not allow parties to establish companies in any form. Rather, there are fixed types of company forms (*numerus clauses*) that can be utilised.<sup>4</sup> First, the *simple partnership* (Articles 530–551 CO) is a contractual relationship between two or more natural persons who agree to combine their efforts or resources in order to achieve a common goal (Article 530 I CO). A simple partnership has no distinct legal entity from its members. Thus, it cannot be represented under a company name. Furthermore, the members of a simple partnership are jointly liable without limitation for obligations incurred by the simple partnership (Article 537 I CO). The simple partnership can be established by written or oral contract, but the simple partnership cannot be registered in the commercial register. The flexibility and simple founding procedures for the simple partnership make it a popular and common form of entity for both economic and non-economic ventures. An example of a simple partnership is attorneys within a single practice who are sharing an office space. Often, the formation of a simple partnership goes unnoticed by its members, as the partnership contract is not subject to any formal requirements. For example, people living together in a shared apartment can form a simple partnership.

The *general partnership* (Articles 552–593 CO) refers to a partnership in which two or more natural persons join together, without limiting their liability towards creditors of the partnership, in order to operate a trading, manufacturing or other form of commercial business (Article 552 I CO). A general partnership has no legal personality but can be represented under its own name (Article 552 I CO) and acquire rights, obligations, represent parties, bring proceedings, or be sued in its own name (Article 562 CO). It can be established by written or oral contract, but, if used for non-commercial purposes, the general partnership is only established after it has been placed on the commercial register (Article 553 CO). General partnerships are popular with small businesses run by several people, such as restaurants, tradespeople and small law firms. An example of a general partnership is the Restaurant Reithalle, Bloch + Salzmann domiciled in Zurich.<sup>5</sup>

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4 See chapter on Competition and Commercial Law, p. 363.

5 See Central Business Name Index, Restaurant Reithalle, Bloch + Salzmann ([perma.cc/77GT-STQP](https://perma.cc/77GT-STQP)).

A *limited partnership* (Articles 594-619 CO) is a partnership in which two or more persons join together in order to operate a trading, manufacturing or other form of commercial business in such a manner that at least one person has unlimited liability (general partner) but one or more persons have liability which is limited to the amount of their specific contribution (limited partner) (Article 594 I CO). The limited partnership is established by contract, but if used for non-commercial purposes, legal personality is only acquired after registration with the commercial register (Article 595 CO). Family businesses often opt for the company form of limited partnership. To illustrate, the limited partnership Udo Jürgens Bockelmann & CO comes to mind, which manages the rights of the famous German singer Udo Jürgens.<sup>6</sup>

The *company limited by shares* (Articles 620-763 CO)<sup>7</sup> is a company with its own business name whose pre-determined capital (share capital) as set out in the articles of associations is divided into shares and whose liabilities are payable only from the company assets (Article 620 I CO). Shareholders are not personally liable for the company's obligations (Article 620 II CO). Furthermore, shareholders cannot be required to contribute more than the amount fixed for a subscription of shares (Article 680 CO), unless otherwise stipulated in a separate shareholders' agreement.

To form a company limited by shares, the founding members must declare by public deed that they wish to form a company limited by shares and draft the articles of association (thereby constituting the governing bodies) (Article 629 CO). Legal personality is acquired at the point of registration with the commercial register (Article 640 CO). The company is governed by the general meeting of members (Articles 698-706b CO) which acts as the supreme governing body, elects the board of directors (Articles 707-726 CO), manages the company, undertakes other delegated tasks and appoints the external auditors (Articles 727-731b CO).

Along with the limited liability company, the company limited by shares is the most common legal company form used in Switzerland.<sup>8</sup> This popularity derives from the unique attributes of this particular entity, including limiting the liability of individual shareholders to the extent of their capital investment, the transferability of shareholder membership interests, and the proportionate sharing of profits by shareholders based on their respective capital investments. Companies limited by shares are often used for large commercial

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6 See Central Business Name Index, Udo Jürgens Bockelmann & CO ([perma.cc/5XFU-E47T](https://perma.cc/5XFU-E47T)).

7 See chapter on Competition and Commercial Law, p. 363.

8 See SME Portal for small and medium-sized enterprises, Limited company: One of the most common legal forms ([perma.cc/EX2M-S3MB](https://perma.cc/EX2M-S3MB)).

enterprises as the company structure allows the involvement of a large number of shareholders providing capital while allowing for operational governance by non-shareholders. Many world-renowned Swiss companies such as Credit Suisse, Nestlé, Novartis and UBS are companies limited by shares.

The *partnership limited by shares* (Articles 764-771 CO) is a partnership whose capital is divided into shares and in which one or more partners have unlimited joint liability in the same way general partners have (Article 764 I CO). This company form plays only a secondary role in Swiss commercial activities. In the past, some Swiss private banks were formed as partnerships limited by shares. Currently, the private bank Reichmuth & Co is one of the few private banks still registered as a partnership limited by shares.

The *limited liability company* (Articles 772-827 CO) is an incorporated company with separate legal personality and a nominal capital specified in the articles of association, in which one or more persons or commercial enterprises participate (Article 772 I CO).<sup>9</sup> The limited liability company has recently increased in popularity because the rules governing the formation of limited liability companies have been relaxed. Unilever Schweiz GmbH, belonging to the multinational consumer goods company Unilever, is an example of a limited liability company.<sup>10</sup>

The *cooperative company* (Article 828-926 CO) is a legal entity formed by an unlimited number of persons or commercial enterprises, which has the primary aim of promoting or safeguarding the economic interests of its members by way of collective self-help or which is established for charitable purposes (Article 828 I CO). The cooperative company is formed after the articles of association have been approved by the constituting assembly and after registration with the commercial register (Article 830 CO). It is governed by the general meeting (Articles 879-893 CO), the board (Articles 894-905 CO) and the statutory auditor (Article 906 CO). A famous example of a cooperative company is the Swiss retail and supermarket giant Migros.<sup>11</sup>

*Associations* (Articles 60-79 CC) are legal entities with a political, religious, scientific, cultural, charitable, social or other non-commercial purpose. They are established and acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association (Article 60 CC). Associations cannot pursue a commercial purpose but they can conduct commercial operations in pursuit of their non-commercial purpose

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9 See chapter on Competition and Commercial Law, p. 377 et seq., discussing details of LLC structure.

10 See Central Business Name Index, Unilever Schweiz GmbH ([perma.cc/P9HR-QZWD](https://perma.cc/P9HR-QZWD)).

11 See Migros, report 2020, Organisation & Structure ([perma.cc/YQ2T-Z3U5](https://perma.cc/YQ2T-Z3U5)).

(Article 61 CC). They are governed by the general meeting of their members (Articles 64–68 CC), the committee (Article 69 CC) and their auditors (Article 69b CC). Due to their flexibility, associations are suited and widely used in Switzerland to pursue non-commercial purposes. Additionally, associations are often used for professional or industry associations such as the Federation of the International Football Association (FIFA).

The *investment company with variable capital (SICAV)* (Articles 36–97 CISA) and the *investment company with fixed capital (SICAF)* (Articles 110–118 CISA) are both companies limited by shares with the purpose of investing collective capital. However, the SICAV differs from a traditional company limited by shares as its capital is, by definition, not fixed in advance (Article 36 I lit. a CISA). The *limited partnership for collective investment* (Articles 98–109 CISA) is a partnership in which at least one member has unlimited liability (general partner), with other members having liability up to a specified amount (Article 98 I CISA). Its sole objective is to invest collectively. Avobis Real Estate SICAV is—despite the misleading addition of SICAV in its name—an investment company with fixed capital.<sup>12</sup> Dufour SICAV, on the other hand, is an investment company with variable capital.<sup>13</sup> Finally, the UBS Clean Energy Infrastructure Switzerland, Kommanditgesellschaft für kollektive Kapitalanlagen is an example of a limited partnership for collective investment.<sup>14</sup>

## 2. Partnerships and legal entities

If a partnership is formed, no separate legal entity is created. However, even if general and limited partnerships do not form a separate legal entity, Articles 562 and 602 CO prescribe that general and limited partnerships can, under their company name, acquire and assert rights and incur liabilities.

Corporations (i.e. the company limited by shares, the limited liability company, cooperative company, SICAV and SICAF and the association) have legal entity status separate from their members. Therefore, they acquire rights and incur liabilities and are subject to the same rights and obligations as natural persons, so far as these rights and obligations are not, due to their nature, limited to natural persons.

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12 See Central Business Name Index, Avobis Real Estate Funds SICAV ([perma.cc/H7KA-2J5C](https://perma.cc/H7KA-2J5C)).

13 See Central Business Name Index, DUF0UR SICAV ([perma.cc/TR3D-K3PT](https://perma.cc/TR3D-K3PT)).

14 See Central Business Name Index, UBS Clean Energy Infrastructure Switzerland, Kommanditgesellschaft für kollektive Kapitalanlagen ([perma.cc/3LJY-76UX](https://perma.cc/3LJY-76UX)).



### 3. Liability

A distinction must be made between the liability of the company and the liability of the individual members who own shares in the company. In general and limited partnerships, a general partner is liable individually for the debts and other claims against the partnership. However, in a limited partnership, limited partners (Article 594 I CO) are only liable to the extent of their investment in the partnership. The partnership itself is not liable because it lacks legal personality.

Corporations (e.g. companies limited by shares, limited liability companies, cooperative companies and associations) have a separate legal personality to their members and thus incur separate liabilities. Thus, members of corporation are generally not personally liable for the liabilities incurred under the name of the corporation. However, persons that take part in the management of a company and certain members with a special role in the company, such as founders, are liable where they have intentionally or negligently violated of their duties (Article 753 et seq. CO).

Corporate social responsibility has become an important area of concern for the Swiss public. On 29 November 2020, the Swiss electorate narrowly rejected the popular initiative “For responsible businesses—protecting human rights and the environment” (Responsible Business Initiative). The initiative proposed that Swiss companies would have to take certain actions and submit reports in the event that they detected violations of international human rights or environmental standards (proposed Article 101a II lit. a and lit. b Federal Constitution of the Swiss Confederation). This initiative would also have subjected Swiss companies to potential liability for damages caused by their subsidiaries in foreign jurisdictions for actions or omissions that violate international human rights and environmental standards, unless the Swiss corporation was able to prove that it had complied with its due diligence obligations in order to avoid such violations (proposed Article 101a II lit. c Federal Constitution).

Following the rejection of the initiative, the indirect counter-proposal by the Swiss Parliament was approved in 2021. The key elements of the indirect counter-proposal include: 1) non-financial reporting obligations for companies of public interest that exceed certain thresholds (proposed Article 964<sup>bis</sup> et seq. CO); and 2) due diligence obligations for Swiss companies that import or process minerals or metals from conflict or high-risk areas or offer products and services where there are reasonable grounds to suspect that child labour was involved. (proposed Article 694<sup>quinqies</sup> CO). Violations of these new obligations can result in fines up to CHF 100,000 where the company has acted with intention and up to CHF 50,000 in case of negligence (proposed Article 325<sup>ter</sup> Criminal Code).

The date on which the indirect counter-proposal will enter into force is, at the time of writing, not yet known. It will depend on whether an optional referendum is held to express opposition to the indirect counter-proposal.

## 4. Corporate Governance

Corporate governance addresses the need to balance the role of shareholders (as the company's owners) with the role of the board of directors and other corporate agents. Rules on corporate governance are flexible in Switzerland and mostly based on a soft law approach. For example, *economiesuisse*, the federation of Swiss businesses, has issued a Swiss code of best practice for corporate governance.<sup>15</sup>

Soft law corporate governance guidelines and recommendations are supplemented, however, by the legal requirements of the Code of Obligations and other applicable provisions of Swiss law. In the Code of Obligations there are general requirements which govern the organisational structure of companies and prescribe certain duties, such as the duty of care imposed on the board of directors and on individual directors when acting for the company.

Further corporate governance provisions can be found in the Ordinance Against Excessive Remuneration in Listed Companies Limited by Shares of 20 November 2013 (with the Corporate Law Reform these provisions will be moved to the CO) and the FINMA Circular 2017/1. The latter sets out rules for FINMA regulated companies regarding corporate governance, risk management, internal control system, and internal audit.<sup>16</sup>

## 5. Voting rights and restrictions on transfer of shares

In partnerships, resolutions by the partners generally require the consent of all partners before they can be adopted, unless the partnership agreement provides for a resolution to be passed by majority vote (Article 534 CO). In absence of a different understanding in the partnership agreement, the majority is defined as the numerical majority of the partners (Article 534 II CO).

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15 *Economiesuisse*, Swiss code of best practice for corporate governance, 2016 ([perma.cc/J7HT-X84N](https://perma.cc/J7HT-X84N)).

16 See DANIEL RAUN and ANNETTE WEBER, Changes for listed Companies under the Corporate Law reform: Gender Quotas and Say-on-Pay, CAPLAW-Swiss Capital Market Law, 5/2020, p. 15 et seq., ([perma.cc/6KKJ-BD6C](https://perma.cc/6KKJ-BD6C)).

Regarding changes to membership, partnerships do not allow new members to be freely admitted. Generally, this requires the consent of the other members. If a partner resigns his membership then the partnership is dissolved, unless otherwise stipulated in the partnership agreement (Article 576 CO).<sup>17</sup>

In companies limited by shares, voting rights are attached to shares. The shareholders exercise their voting rights at the general meetings of shareholders in proportion to the total nominal value of the shares belonging to them (Article 692 I CO). However, the articles of association can stipulate that voting rights are determined by the number of shares belonging to each shareholder such that each share confers one vote, regardless of nominal value (Article 693 I CO). In such a case, shares with a lower nominal value have the same voting rights as shares with a higher nominal value. This confers more voting power to the holder of shares with lower nominal value. It should be noted that the allocation of voting rights according to the number of shares is not possible for votes on certain resolutions (e.g. election of external auditors or resolution concerning the initiation of a liability action; Article 693 III CO).

Shares of companies limited by shares are generally freely transferable. For registered shares, transfer can only be restricted in limited circumstances. Registered shares which have not been fully paid-up, for instance, may only be transferred with the consent of the company (Article 685 CO). Otherwise, the company may refuse to give consent to the transfer of unlisted registered shares for any valid reasons expressly set out in the articles of association or where the acquirer fails to expressly declare that he has acquired the shares in his own name and for his own account (Article 685b CO). Alternatively, the company can refuse to consent to the transfer of unlisted registered shares if it offers to acquire and take over the seller's shares at the real value (Article 685b I CO). In case of listed registered shares, the company may refuse to accept an acquirer of shares as a shareholder only where the articles of association set out a percentage limit on the registered shares for which an acquirer must be recognized as shareholder and the acquirer exceeds this percentage limit (Article 685d CO).

Transfer restrictions are a tool often used by shareholders to keep control over a company. If the abovementioned transfer restrictions apply, acquirers of shares cannot exert their voting right. In case of unlisted registered shares, this is because without the consent of the company the ownership of the shares (and all associated rights) remains with the seller (Article 685c CO). In relation to listed registered shares, the associated rights pass to the acquirer (Article 685f CO). However, the acquirer cannot exert his voting rights for shares that are not registered in the share ledger.

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17 LUKAS HANDSCHIN, Swiss Company Law, Zurich / St. Gallen 2008, p. 106 et seq.

Transfer restrictions on registered shares are often the subject of legal disputes. Famously, such restrictions were at the center of a long takeover-battle between the Burkard family and the board of directors of Sika AG. The legal question at issue was whether the transfer restrictions contained in the articles of association of Sika AG would also apply if control over Sika AG was acquired indirectly, by a body acquiring shares of a holding company with a controlling stake in Sika AG. This legal question was decided by a court of first instance. It ruled that the transfer restrictions also apply where control is transferred indirectly. The decision was appealed, but the parties subsequently settled the dispute before the appeal court could rule on the issue. Thus, no final judgment settling this question was obtained. It is submitted that the applicability of transfer restrictions to indirect acquisitions of control will depend on the wording of the transfer restriction clause in the relevant articles of association. If the clause can be construed to have a broad meaning, it is reasonable to assume that it should also apply in cases of indirect acquisition of control. Thus, special attention should be given when drafting such clauses if a company wishes to avoid this effect.

In limited liability companies, the voting rights of company members are also determined by the nominal value of their capital contribution (Article 806 I CO). This will be the case unless the articles of association specify otherwise, in which case each member, regardless of the amount of their capital contribution, will be accorded one vote. Where the nominal value of a member's contribution is determinative, capital contributions with the lowest nominal value must be accorded a worth of at least one tenth of the nominal value of the other capital contributions (Article 806 II CO). Regarding limited liability companies, the assignment of capital contributions is restricted. An assignment requires consent of the members of the general meeting (Article 786 I CO). However, the articles of association can, *inter alia*, waive the requirement of consent or stipulate grounds which will justify the refusal of consent (Article 786 II CO).

## 6. Company-groups

Company-groups refer to several companies connected by a common economic interest. Swiss company law addresses company-groups in a range of fragmented provisions (e.g. consolidated accounts, Article 963 *et seq.* CO; acquisition by subsidiaries, Article 659*b* CO; approval of accounts and allocation of profit, Article 731 III CO; notification duty, Article 120 FinMIA; financial groups, Article 3*c* Banking Act).

Swiss company law follows the “principle of separation” for company-groups. Companies belonging to a company-group are considered, both internally and externally, as distinct legal entities. This clashes with the objective of company-groups to operate in economic unity with common management.

From this underlying principle, it follows that the management of each company that forms part of a company-group must act in the interest of the individual company and not the interest of the company-group. Thus, when two companies of a company-group enter into business transactions, management must ensure that the business transaction is carried out “at arms-length”. Otherwise, it risks the voidability of the transaction, with the potential for personal liability being incurred by the members.

Regarding liability within company-groups, a parent company is not liable for the action of its subsidiaries. However, Swiss company law recognizes certain exceptions to this principle. Parent company liability can arise based on an agreement with the subsidiary, a comfort letter, trust in groups or tortious conduct. Furthermore, the parent company and its management may be liable for the actions of its subsidiary if it acts as the *de facto* governing body of the subsidiary (see Article 754 CO). Finally, if the parent company abuses the law by claiming legal independence of the subsidiary in bad faith, the corporate veil can be pierced, i.e. the parent company will be held liable for the conduct of the subsidiary.

## 7. Bank secrecy

### a) Historical background

The concept of Swiss bank secrecy is based on Article 47 of the 1934 Banking Act. Switzerland adopted Article 47 as a way to attract foreign liquid capital and bank deposits to support the Swiss economy, in the aftermath of the economic and social crisis following World War I and the economic depression of the 1930s. By prohibiting the disclosure of bank account holders’ identities to their home governments, the Swiss policy promoted foreign tax evasion and attracted “refugee capital” from millions of Jews, other ethnic groups and political dissidents who were subject to systematic persecution and extermination by German and Austrian authorities. These persecuted groups transferred hundreds of millions in cash, liquid capital (i.e., securities), commodities and gold into bank accounts and insurance policies at Swiss banks and other Swiss institutions, often using numbered accounts and other indicia of anonymity.

The Independent Commission of Eminent Persons (ICEP)<sup>18</sup> issued a report in 1997 on the role of Swiss banks in receiving hundreds of millions of Swiss francs of deposits from Jewish and other persecuted groups from Germany and Austria during the 1930s and 1940s.<sup>19</sup> The ICEP identified in 1999 around 53,000 accounts that had an estimated value of over CHF 500 million and that likely belonged to victims of the Holocaust. The ICEP and the Swiss Federal Banking Commission jointly established an Independent Claims Tribunal with the mandate of identifying accounts in Swiss banks that had belonged to victims of Nazi persecution and that had lain dormant since May 1945. Once identified, the owners or their heirs could reclaim them.<sup>20</sup>

The ICEP 1997 report concluded that although there was no evidence of systematic destruction of the records of victim accounts and no organized discrimination against the accounts of victims, nor concerted efforts to divert the funds of victims for improper purposes, there was widespread evidence that some Swiss banks had engaged in questionable and deceitful conduct in handling the accounts of victims. This included withholding information from Holocaust victims and their families about their accounts<sup>21</sup> and the inappropriate closing of accounts. There had also been a failure to keep adequate records, and a general lack of diligence—even active resistance—in responding to claims by victims and their families, as well as to earlier private and official inquiries about dormant accounts.<sup>22</sup> Many Swiss banks made little or no effort to respond to private and official inquiries, and in some situations banks were advised by the Swiss Bankers Association (SBA) itself to provide what the ICEP considered as “limited (and, therefore, incomplete and, consequently, misleading) responses”.<sup>23</sup>

Swiss banks justified their lack of transparency and uncooperative conduct as being in accordance with Swiss law. During this time, the absence of

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18 The so-called Volcker Commission was established in 1996 to investigate dormant Swiss bank accounts that had been in existence since World War II. The Commission was based on a memorandum of understanding between the World Jewish Restitution Organization, the World Jewish Congress and the Swiss Bankers Association with the objective to both identify Swiss bank accounts opened by victims of Nazi persecution and assess the treatment of accounts of victims of Nazi persecution by Swiss banks.

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19 Independent Committee of Eminent Persons (ICEP), Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks (the “Volcker Report”), Bern 1999, p. 10 et seqq.

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20 In October 2001 the Independent Claims Tribunal completed its assignment regarding the resolution of claims to dormant accounts published in 1997.

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21 ICEP, p. 13, and Annex 5, paras 5-11.

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22 ICEP, p. 13.

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23 ICEP, p. 13, citing Annex 5, paras 37-41.

a Swiss escheat law dealing with unclaimed property in banks allowed dormant accounts and other assets to remain indefinitely with the banks. This was in contrast to most other developed countries' escheat laws which required unclaimed banks assets to be transferred to the state after a given time period. Swiss banks, however, were able to use their original account contract terms to impose charges on dormant accounts over time until the account surplus was exhausted and the account could be closed. In addition, Swiss banks were not required to keep records on dormant accounts, which also undermined any efforts they did make to respond to claims regarding them. Where banks did keep records, they largely made them inaccessible, particularly to claimants (often heirs to the dormant accounts of Holocaust victims). The lack of transparency in bank practices and the inadequate legal framework for protecting the assets of dormant accounts meant that banks were not held to rigorous standards in terms of properly accounting for the funds they held in a fiduciary capacity.

Eventually, in 1962 the Special Federal Council Decree was passed, adopting the escheat law and thereby allowing assets of dormant accounts to revert to state ownership. It also introduced rules requiring banks to monitor and keep records on dormant accounts.<sup>24</sup> The Council's Decree also required banks to: identify dormant assets; appoint legal representatives and find beneficiaries of or legal successors to such account holders; have beneficiaries declared missing to allow the conducting of inheritance proceedings where necessary; and transfer unallocated assets to a separate fund that would be allocated later in a claims resolution process. In 1995, the SBA introduced guidelines regarding dormant assets, applicable to all accounts where there had been no contact with a beneficiary for at least ten years. The guidelines were revised in 2000, requiring banks to take appropriate measures to ensure they did not lose contact with clients. If contact cannot be established for at least ten years, the bank must undertake adequate research (for example to try to establish the whereabouts of the client) and mark the assets as dormant. The banks must also refrain from charging inappropriate fees and costs and from seeking unjustified account access through any other measures.

The SBA Guidelines also require that banks must report certain information regarding all assets and deposit boxes held with a value over CHF 500. The information must be reported to a database which only the banking ombudsman has access to. If no client contact has been made for 60 years and

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24 See Federal Council Decree of 20 December 1962 on Dormant Assets/accounts (BBl 1963 I 23). See also Banking Ombudsman ([perma.cc/7M3Y-Z22S](https://perma.cc/7M3Y-Z22S)) and Swiss Banking Association ([perma.cc/HA5Y-Q3PL](https://perma.cc/HA5Y-Q3PL)).

the dormant assets amount to over CHF 500 (or an unknown value) then the bank must publish the dormant assets on the internet. If no client contact is made within one year from the date of publication, the assets are transferred to the Swiss Confederation. Assets worth less than CHF 500 should be transferred to the Swiss Confederation without any need for prior publication after 60 years.<sup>25</sup> Subsequent banking legislation today creates a time-unlimited obligation to repay deposits and to keep detailed records containing information on the current status of accounts and their owners.

## **b) Current regulation**

Article 47 Banking Act sets out the sanctions for violating the principle of bank secrecy. This provision applies to all companies that fall under the definition of a bank as defined by Swiss banking law. The Banking Act defines a *bank* as an institution primarily active in the financial sector that at a minimum: (i) accepts deposits from the public in excess of CHF 100 million on a professional basis or that publicly advertises as doing so; (ii) accepts deposits from the public up to CHF 100 million on a professional basis or that publicly advertises as doing so, and which invests or gives interest on deposits received from the public; or (iii) refinances itself on a large scale via loans from other banks (that do not own any significant holdings in it) in order to provide credit for its own account and in any manner possible for any number of persons or companies with which it does not form an economic unit (Article 1a Banking Act).

The provisions of the Banking Act also apply to persons primarily active in the financial sector, and who: (i) accept deposits from the public up to CHF 100 million on a professional basis or cryptobased assets designated by the Federal Council or who publicly advertise as doing so; and (ii) neither invest or give interest on these deposits from the public (Article 1b Banking Act). Finally, branches of foreign banks established in Switzerland and representatives of foreign banks in Switzerland are also covered by the provisions of Swiss banking law (Article 2 Banking Act).

Under Article 47, it is a criminal offence (which carries a potential sentence of up to three years in prison) to intentionally disclose confidential information, for anyone who has had such information entrusted to them or observed by them in their capacity as:

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25 See Articles 37l and 37m Banking Act, introduced 1 January 2015.



- (i) a member of an executive or supervisory body, employee, representative, or liquidator of a bank, or;
- (ii) a person that is primarily active in the financial sector and who accepts deposits from the public up to CHF 100 million on a professional basis (or who publicly advertises as doing so) and who neither invests or gives interest on these deposits from the public; or
- (iii) as a member of a body or employee of an audit firm

Similarly, a person who attempts to induce a violation of this secrecy requirement, who discloses confidential information to third parties, or who uses this information for his own benefit or the benefit of others will also be committing the offence outlined above, and could on conviction be sentenced to a custodial sentence of up to three years or to a monetary penalty.

In addition to Article 47 Banking Act, contractual obligations as well as the stipulations in Article 28 CC (concerned with the protection of privacy) can provide a legal basis for a bank's obligation regarding the non-disclosure of any information regarding their customers' bank accounts.

The obligation of the bank to maintain bank secrecy, however, is not absolute. There are several exemptions which may allow confidential information to be passed to third parties without the risk of incurring criminal (or civil) liability in a particular circumstance: for instance, requests for information as part of criminal proceedings or account information disclosed to legal representatives of the account holders and their heirs if the bank first obtains the consent of the account holder. Bank account information can also be disclosed to the Swiss social security agency and to Swiss courts and tribunals as part of administrative and civil proceedings and in bankruptcy cases; based on requests for mutual legal and administrative assistance from foreign governments and courts involving alleged criminal offences; as part of disclosure obligations in securities and derivatives transactions and where the bank holds any suspicion of money laundering and/or terrorist financing.

In the circumstance of tax investigations and enforcement actions, banks are only required to disclose account information regarding tax code violations where this is required in ongoing criminal proceedings; the same obligation does not apply where only administrative proceedings are in issue. Regarding foreign tax investigations, Switzerland has adopted a number of double taxation treaties as part of the Automatic Exchange of Information standard as discussed below, obliging Switzerland to render administrative assistance in civil and criminal tax investigations and enforcement proceedings.

### c) Automatic Exchange of Information

Switzerland has agreed to the *Automatic Exchange of Information (AEOI)*:<sup>26</sup> an international standard which governs how tax authorities exchange information regarding taxpayers. The instrument aims to increase transparency and prevent cross-border tax evasion. Based on the AEOI, financial institutions are required to report information to the relevant tax authority of their jurisdiction regarding the contents and account holders of designated bank accounts. The Swiss tax authority then sends the information received to the tax authority in the state where the client has residency.

AEOI becomes operative when a state enters a bilateral agreement with another state providing for the mutual and automatic exchange of information between the states, provided certain safeguards and procedures are met. To create the legal basis for the AEOI in Switzerland, the Swiss authorities introduced the Convention on Mutual Administrative Assistance in Tax Matters, the Multilateral Competent Authority Agreement and the Federal Act on the International Automatic Exchange of Information in Tax Matters.

AEOI partner states of Switzerland include Argentina, Brazil, Canada, the European Union, Russia, and the United Kingdom. For example, on 1 January 2017, the agreement between the EU and Switzerland on the automatic exchange of information on financial accounts entered into force. This agreement was a protocol to the agreement between the EU and Switzerland regarding measures equivalent to the EU Savings Tax Directive (2003/48/EG).

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26 Developed by the OECD in response to a G20 request and approved by the OECD council on 15 July 2014.

## III. Landmark Cases

### 1. Insider Trading—Hans Ziegler<sup>27</sup>

In a case involving the concept of “insider trading”, the Swiss Federal Criminal Court found HANS ZIEGLER guilty of the offences of breach of manufacturing or trade secrecy (Article 162 Swiss Criminal Code), industrial espionage (Article 273 Swiss Criminal Code) and exploitation of insider information (Article 154 FinMIA). The Swiss Federal Criminal Court held that ZIEGLER, while serving as a director of a listed Swiss company, had traded on the basis of inside information to enrich himself. Furthermore, the Court saw it as proven that ZIEGLER passed on confidential information to third parties. He was sentenced to a suspended prison sentence of 24 months and a probationary period of 2 years as well as a fine of CHF 10,000, although the prosecution had sought a prison sentence of five years. This case is of relevance as it adds to the limited case law on criminal provisions regarding insider trading which were introduced in 1998 and further tightened in 2013.

### 2. Geneva bank disclosure<sup>28</sup>

In April 2012, a bank domiciled in Geneva transferred data to the US Department of Justice (DOJ) without notifying the data subject, a former employee of the bank. The data concerning the former employee was not anonymised. The former employee together with another person, also a former employee, requested access to copies of all data that had been transferred to the DOJ. This request was granted by the court of first instance and the appellate court. The appellate court ordered the disclosure of the relevant data but allowed the bank to redact information relating to other clients of the bank.

The bank appealed the decision of the appellate court to the Federal Supreme Court. On appeal, the bank argued that it should not be obliged to disclose that data because the disclosure violates the principle of bank secrecy under Article 47 Banking Act. The bank argued that disclosure of the requested

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27 Judgement of the Federal Criminal Court SK.2020.36 of 22 June 2021.

28 Judgement of the Federal Supreme Court 4A\_406/2014 and 4A\_408/2014 of 12 January 2015.

data, even if information concerning other clients was redacted, would allow the former employee concerned to identify other clients. Part of the bank's argument here was that the former employee had prior knowledge of the relevant data due to his prior employment. Thus, he would be able to identify other clients referred to in the disclosed data.

The Federal Supreme Court rejected this argument. They found that it was the fact that the employee had prior knowledge of other clients contained in the requested data that would potentially enable him to identify such clients. It was not the disclosure of data in and of itself, and therefore the disclosure of data would not violate Article 47 Banking Act.

The Federal Supreme Court also held that Article 9 of the Data Protection Law was not violated because the request for copies of the relevant data was not made in an abusive manner. Furthermore, the Court could identify no overriding interest of the bank to justify preventing the disclosure. In contrast, the employee had a justifiable interest in obtaining the data to prepare his defence, as the data had already been transferred to the DOJ.

Finally, Article 8 V Data Protection Law did not justify the refusal of the request because the fact that the Federal Council had authorised the transfer of data to the US did not release the bank from its duties under private law towards its former employees.

### **3. UBS data transfer<sup>29</sup>**

In a case which also involved the principle of bank secrecy, the Federal Supreme Court held that FINMA did not have the legal authority under either Article 26 Banking Act or Article 31 FINMAG to authorise UBS AG to transfer client data to the US tax authorities. However, FINMA could use emergency powers to authorise the transfer of data. The use of emergency powers requires an immediate and serious danger to public interest. The Federal Supreme Court argued that the potential actions of the US, in case of failure to transfer the client data, posed an immediate and serious danger to the Swiss economy justifying the use of emergency powers.

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29 Judgement of the Federal Supreme Court 2C\_127/2010 of 15 July 2011.

## 4. Biber<sup>30</sup>

In the Biber Ruling, the Federal Supreme Court defined who has the capacity to sue members of the board or other responsible parties for damages caused by the breach of their duties. The background of the case is as follows: Biber Holding AG was in financial difficulties. As part of its restructuring efforts, it offered an exchange of old bonds for new shares and conversion options. However, the restructuring efforts later proved insufficient and Biber Holding AG was declared insolvent. A claimant who had acquired shares during the restructuring period claimed damages from board members of Biber. The courts of first and second instance dismissed the claimant's claim due to lack of capacity to sue.

The Federal Supreme Court held that the shareholders' or creditors' capacity to sue members of the board of a company going through insolvency proceedings depends on whether the damages claimed are direct or indirect. Direct damages are damages a company, shareholders or creditors incur individually. Indirect damages are damages shareholders or creditors incur because the company suffers a financial loss (i.e. the direct damage of a company results in an indirect damage for a shareholder or a creditor). A company can only incur direct damages, whereas shareholder or creditors can incur direct and indirect damages. Circumstances exist where both a company and shareholders or creditors incur direct damages.

In the case that only shareholders or creditors incur direct damages, shareholders or creditors have an individual capacity to sue. For example, if a shareholder does not receive his dividends he incurs a direct damage and has capacity to sue. In the case that shareholders or creditors incur indirect damages, shareholders and creditors only have a derivative capacity to sue if the insolvency administrator waives the right to assert claims. Furthermore, if both the company and the shareholders or creditors can assert direct damages, the shareholders and creditors only have capacity to sue where they can base their claim on either obligations in tort, *culpa in contrahendo* or a provision that explicitly protects shareholder or creditor interests.

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30 DFC 131 III 306 (Judgment of the Federal Supreme Court 4C.111/2004 of 9 November 2004).

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David Roth

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# I. Codes

Swiss competition and commercial law seek to foster innovation through effective and undistorted competition (II.2.) by enabling responsible business activities (II.3.). As subsets of Swiss economic law, Swiss competition and commercial law share its characteristics (II.1.). A non-exhaustive list of pertinent codes, which will be touched upon within this chapter, includes:<sup>1</sup>

- Federal Act on Cartels and other Restraints of Competition (Cartel Act, CartA);
- Federal Act against unfair competition (Unfair Competition Act, UCA);
- Federal Act on Patents for Inventions (Patents Act, PatA);
- Federal Act on Copyright and Related Rights (Copyright Act, CopA);
- Federal Act on the Protection of Designs (Designs Act, DesA);
- Federal Act on the Protection of Trade Marks and Indications of Source (Trade Mark Protection Act, TmPA);
- Swiss Civil Code (CC);
- Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations, CO);
- Federal Act on Collective Investment Schemes (Collective Investment Schemes Act, CISA);
- Federal Act on Merger, Demerger, Conversion and Transfer of Assets (Merger Act, MerA);
- Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act, FinMIA).

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1 For the English versions see [www.fedlex.admin.ch](http://www.fedlex.admin.ch): Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (Cartel Act, CartA), SR 251 ([perma.cc/TAZ5-VF8Y](http://perma.cc/TAZ5-VF8Y)); Federal Act on Patents for Inventions of 25 June 1954 (Patents Act, PatA), SR 232.14 ([perma.cc/L57H-BXAS](http://perma.cc/L57H-BXAS)); Federal Act on Copyright and Related Rights of 9 October 1992 (Copyright Act, CopA), SR 231.1 ([perma.cc/JT59-8V9U](http://perma.cc/JT59-8V9U)); Federal Act on the Protection of Designs of 5 October 2001 (Designs Act, DesA), SR 232.12 ([perma.cc/XG97-9C4D](http://perma.cc/XG97-9C4D)); Swiss Civil Code of 10 December 1907, SR 210 ([perma.cc/DG3C-PVHW](http://perma.cc/DG3C-PVHW)); Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911, SR 220 ([perma.cc/GYF5-DP5S](http://perma.cc/GYF5-DP5S)); Federal Act on Collective Investment Schemes of 23 June 2006 (Collective Investment Schemes Act, CISA), SR 951.31 ([perma.cc/R6TC-CAB9](http://perma.cc/R6TC-CAB9)); Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 (Financial Market Infrastructure Act, FinMIA), SR 958.1 ([perma.cc/5JV2-UML9](http://perma.cc/5JV2-UML9)). Further relevant codes are treated in the chapter on Corporate and Banking Law pp. 339, as well as mentioned in the text below.

## II. Principles

### 1. Characteristics of Swiss economic law

Economic law encompasses substantial areas of the traditional continental European fields of law (namely private and public law, including international and criminal law). In this respect, it is an interdisciplinary or cross-sectional subject, although it is sometimes simultaneously referred to as a separate field of law. The common denominator of economic law provisions—regardless of their location within the legal system—is their concern with economic activity and its coordination, respectively.

Swiss economic law shares many commonalities with the laws of other market economies. This is partially a historic consequence: Swiss lawmakers drew inspiration from the European—namely French and German—national codifications of *lex mercatoria* (“the Law Merchant”) and corporate law (based on Roman and Germanic corporate forms), which dated back as early as the 17<sup>th</sup>/18<sup>th</sup> century.

In contrast to the commercial law legislation of e.g. France and Germany, however, Switzerland opted for a uniform private law codification when it introduced legislation regulating commercial law on the federal level for the first time in 1883. Commercial law here refers to the private law governing commercial activity. These provisions became part of the CO, which subsequently became Part V of the CC in 1911. The rationale was that introducing a separate code for merchants would conflict with the democratic notion of equality. Thus, Switzerland has not introduced a separate commercial law code to date, in contrast to Germany (*Handelsgesetzbuch*) or France (*Code de Commerce*).

Since the enactment of the CC, the Swiss lawmaker has continued to extensively legislate in the field of economic law, notably moving beyond the regulation of just commercial law. Regulatory provisions in particular are nowadays often heavily influenced by European Union (EU)-international standards. Common standards facilitate cross-border (i.e. cross-jurisdictional) trade of goods and services (or may even be conditional). While such imperatives partially explain the commonalities between Switzerland’s economic law with those implemented in other jurisdictions, Swiss legal scholars’ traditional *faible* for comparative law is likely also relevant.

With regards to contemporary economic law, the adequacy of the traditional systematisation into private law and public law has come under increasing

scrutiny also in Switzerland, as it perpetuates the 19<sup>th</sup> century liberal distinction between society and state. Notwithstanding this, the judicial landscape remains very much shaped by the dichotomy between the civil and administrative jurisdiction and their respective procedural laws. Still, under the Swiss Civil Procedure Code (CPC), the cantons are obliged to designate a sole instance for certain civil economic disputes (such as competition and intellectual property [IP] excluding patent law; Article 5 CPC and Article 26 Patent Court Act [PatCA]). The CPC also provides for the possibility for the cantons to establish a commercial court as a sole cantonal instance (Article 6 CPC), since commercial law is regarded as “special private law”. Some larger cantons with significant economic activity, namely Argovia, Berne, St. Gall and Zurich, have opted to introduce commercial courts.

One might, however, argue that it would be preferable to establish special economic courts for the different branches of economic law—possibly even regardless of the dispute’s “private/public” nature. Such special courts would admittedly modify existing competences and could pose challenges with regard to the applicable procedural principles in a given case. The Federal Patent Court (FPC), which has been in charge of civil patent litigation since 2012, can be considered as a limited step in this direction.<sup>2</sup> On the contrary, envisaged plans for a federal competition court<sup>3</sup> or also a financial market law court have not materialised to date. Special courts would allow for the further consolidation of expertise and would also ensure that a significant particularity of economic law is safeguarded: namely, when interpreting norms of economic law—regardless of the applicable procedural law—the focus should always be on such norms’ legal-economic systematics and intentions, i.e. on the functionality of the norms.

## **2. Fostering innovation through effective and undistorted competition**

### **a) The interplay between cartel law, unfair competition law and intellectual property law**

According to Article 1 CartA, the Act’s purpose is to prevent the harmful economic or social effects of cartels and other restraints of competition, and, by doing so, to promote competition in the interest of a liberal market economy.

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2 Cf. II.2.d) below with regard to the ongoing PatA reform.

3 As an element of the failed CartA reform package, see below II.2.b)aa).

According to Article 1 UCA, the act's purpose is to ensure fair and undistorted competition in the interest of all involved parties. IP law provides exclusive rights to its owners, thereby ensuring incentives for innovation, namely new inventions applicable in industry (Article 1 I PatA), literary and artistic works (Article 1 lit. a CopA), characteristic designs of products (Article 1 DesA) and distinctive marks (Article 1 I TmPA).

Cartel law and unfair competition law thus share the common objective of ensuring competition. In line with the regulations' purposes (CartA promoting the effectiveness of competition, while UCA its fairness and undistortedness), cartel law and unfair competition law safeguard competition or the market functionalities, respectively, at different stages: The latter intervenes when competition appears to "overheat"; the former intervenes when competition appears to "undercool". However, certain factual circumstances don't pose either a "cartel case" or an "unfair competition case"; in principle, cartel law and unfair competition law are mutually applicable.

The relationship between competition (cartel and unfair competition) law and IP law is by no means less challenging. At least from a static viewpoint, the exclusivity rights conferred by IP law indeed have the potential to restrain competition. This suggests opposing objectives and hence the need for a precedence rule in case of conflict (i.e. giving priority to fostering innovation and consistently to the alleged *lex specialis* IP; cf. former U.S. inherency doctrine, original EU specific subject-matter doctrine). However, contemporary competition law is not about ensuring perfect competition but rather a level of competitive intensity that is beneficial to the innovative process. Competition law and IP law are hence—from a dynamic perspective—in point of fact complementary. Within the market economy order, competition law and IP law have the converging objectives of promoting welfare by efficiently allocating resources and fostering the technological progress.

Notwithstanding the above, there are undeniably inherent tensions that arise in specific circumstances. If IP right holders enter into license agreements or unilaterally refuse to license or grant access, cartel law may limit their "overshooting" IP rights. Unfair competition law, on the other hand, may provide further protection to an IP right holder as well as it may restrict behaviour that otherwise would be lawful under IP law. But the complementary nature as described above implicates that—whenever carrying out such complex assessments—competition law and IP law need to be interpreted holistically and therefore in line with the functional approach of economic law.

While the UCA does not contain an explicit provision covering its relationship to IP law, the first sentence of Article 3 II CartA states that "*this act does not apply to effects on competition that result exclusively from the legislation govern-*

*ing intellectual property*". In light of the above, the implied primacy of IP law is unconvincing. The cited provision does not reflect the prevailing doctrine. However, the limitation "exclusively" allows and is used for a restrictive interpretation. Moreover, the second sentence of the aforementioned para. 2 states that import restrictions based on IP rights (in particular with regard to parallel importation) shall anyway be assessed under cartel law.

## **b) Cartel law**

### **aa) Application principles**

The Federal Constitution (FC) has granted authority for the introduction of a Federal Cartel Act since 1947 (Article 31 III lit. d FC of 1874; Article 96 I FC of 2000). Despite this, it was not until 1964 that the first CartA entered into force. The regulation reflected (as did the subsequent CartA of 1986) the past legislator's fairly limited intention to prevent only misuses of restraints of competition.

The third CartA of 1996, however, represented a paradigm shift. Switzerland moved from simply enabling potential competition to safeguarding effective competition. This "modern" regulation in particular introduced the presumption of unlawfulness of "hard core cartels" (Article 5 III CartA) as well as introducing a preventive merger control. However, it did not yet provide for direct sanctions, that is financial sanctions for first time offences. This "lack of teeth" was corrected by the CartA revision of 2004, which in addition declared as presumptively unlawful certain vertical restraints (Article 5 IV CartA). Furthermore, in 2008, the Federal Supreme Court held that contractual agreements which restrain unlawfully competition were (from a civil law perspective) void/invalid *ex tunc*.<sup>4</sup>

Thus, Swiss cartel law today follows—in accordance with U.S. antitrust regulation and contemporary European competition law—the so-called interdiction principle ("*Verbotsprinzip*") rather than a misuse principle ("*Missbrauchsprinzip*").<sup>5</sup>

The revised CartA of 2004 also provided for a future evaluation of the Act, which led to a heterogeneous reform package that eventually failed in 2014. Since then, some amendments (that had proved less controversial during the reform process) have been resubmitted. These include the introduction of the internationally recognised SIEC ("significant impediment to effective competition") test, the strengthening of private enforcement as well as the

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4 See DFC 134 III 438 c. 2.2.

5 See DFC 143 II 297 c. 5.3.4.

so-called “Fair Price Initiative”. The “Fair Price Initiative”—which, following some minor adaptations, eventually obtained the Swiss parliament’s approval—aims to limit Switzerland’s status as an “island of high prices” by extending the provisions against unlawful practices by dominant undertakings of Article 7 CartA to companies with “relative market power”.

Swiss cartel law applies when the requirements of Article 2 CartA are fulfilled and the provisions at issue are effective (in terms of their temporal scope of application), subject to the reservations of Article 3 CartA.<sup>6</sup>

Article 2 CartA sets out the CartA’s material, personal and geographical scope of application. The CartA’s material scope of application reflects the three pillars of contemporary cartel law, i.e. agreements affecting competition, the exercise of market power and concentrations of undertakings. Except for the exercise of market power, these terms are defined by Article 4 CartA.<sup>7</sup> According to Article 4 I CartA, agreements affecting competition are binding or non-binding agreements and concerted practices<sup>8</sup> between undertakings operating at the same or different levels of production which have a restraint of competition as their object or effect. According to Article 4 III CartA, concentrations of undertakings are: (a) the merger of two or more previously independent undertakings; (b) any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement, by which one or more undertakings acquire direct or indirect control of one or more previously independent undertakings or parts thereof. Article 4 II CartA defines market dominance (as a qualified form of market power).

The personal scope of application explicitly encompasses “private or public undertakings”, which according to Article 2 I<sup>bis</sup> CartA are “*all consumers or suppliers of goods or services active in commerce regardless of their legal or organisational form*”. Swiss cartel law applies a functional notion of undertaking insofar as it presupposes solely an independent participation in the economic process as a supplier of goods or services (end consumers—contrary to the above-cited wording—don’t qualify as undertakings). This definition also impacts the treatment of multi-corporate enterprises: while their subsidiaries and mother company are separate legal entities from a civil law perspective, they—lacking independence—constitute *one* undertaking under cartel law.

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6 Regarding Article 3 II CartA, see II.2.a) above.

7 See however now the definition of “undertakings with relative market power” in the newly legislated Article 4 I<sup>bis</sup> CartA.

8 DFC 147 II 72 c. 3.1 (Judgment of the Federal Supreme Court 2C\_149/2018 of 4 February 2021) states that the terms “agreements” and “concerted practices” in Article 4 I CartA correspond with Article 101 of the Treaty on the Functioning of the European Union (TFEU).

On the other hand, agreements between affiliated companies typically do not have the capacity to restrict competition (“intra group exemption”).

Article 2 II CartA states that “[t]his act applies to practices that have an effect in Switzerland, even if they originate in another country” (effects doctrine).<sup>9</sup> Following a minority opinion and deviating from requirements under U.S. anti-trust and EU competition law, the Federal Supreme Court opposed a restriction or qualification insofar as only direct, substantial and notably reasonably foreseeable effects trigger the territorial scope of application; according to the Federal Supreme Court, even potential effects suffice.<sup>10</sup> Notwithstanding this, the competition authority will obviously consider the degree of “Swiss context” when exercising its discretion in taking up a case, and is not discharged from establishing an unlawful restraint of competition within Switzerland.

Article 3 I CartA—in accordance with the Act’s purpose to prevent the *harmful* effects of restraints of competition (Article 1 CartA)—excludes the application of cartel law when other statutory provisions do not allow for competition in a market because the legislator assessed competition itself as harmful (or rather anticipated market failure if competition was allowed). The *ratio legis* (underlying purpose) of these preceding provisions is thus a deliberate deviating regulation of competition parameters. This is achieved in particular by (a) establishing an official market or price scheme (e.g. in the agriculture and healthcare sector) and (b) granting special (monopoly) rights to specific undertakings to enable them to fulfil public duties (e.g. in the postal sector). On the contrary, statutory provisions with other objectives (e.g. consumer or good faith protection)—despite their possible (indirect) effect on the competitive process—are not covered by this exclusion.<sup>11</sup>

Chapter 3 of the CartA (Article 12 et seqq. CartA) regulates cartel civil law, whereas Chapter 4 (Article 18 et seqq. CartA) contains provisions which concern the administrative procedure. However, the practical significance of private enforcement remains very limited, for numerous reasons: for example, the passing-on defence is recognised,<sup>12</sup> end consumers lack the right to sue,<sup>13</sup> evidence is hard to find, and the cost of proceedings are potentially high

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9 Regarding the geographical scope of foreign cartel laws under private international cartel law, see Article 137 I Federal Act on Private International Law of 18 December 1987 (PILA), SR 291 ([perma.cc/WD6Z-FLHE](https://perma.cc/WD6Z-FLHE)).

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10 See DFC 143 II 297 c. 3.

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11 See DFC 141 III 66 c. 3.3.

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12 Distributors do not suffer a loss from an unlawful restraint if they can pass it on to the next level of the supply chain/end consumers.

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13 End consumers are not entitled to sue since an unlawful restraint does not hinder them “from entering or competing in a market”, cf. Article 12 I CartA.

and disproportionate to the suffered individual “dispersed damage”.<sup>14</sup> The upcoming cartel law reform could produce some relief. Swiss cartel law as it stands today, however, is primarily enforced under administrative law. The competent Competition Commission (COMCO), when calculating the level of an administrative sanction to be imposed against the offending party, is authorised to consider not only the sanction’s preventive and repressive effect but also the “cartel profit”. The COMCO will consider more favourably a delinquent undertaking which has reimbursed damaged parties during the course of the procedure.

#### bb) Substantive principles—significance of EU competition law

Swiss economic law in general and cartel law in particular are subject to the steady influence of international legal and economic developments.<sup>15</sup> U.S. antitrust law continues to be an important source of reference for Swiss doctrine and jurisprudence, despite conceptual differences.<sup>16</sup> In recent years, Federal Supreme Court rulings have also distilled the significance of EU law in the interpretation of the CartA’s substantive provisions.

In case of agreements between undertakings at different levels of the production and distribution chain regarding fixed or minimum prices, and agreements contained in distribution contracts regarding the allocation of territories to the extent that sales by other distributors into these territories are not permitted (Article 5 IV CartA), the Federal Supreme Court held that such vertical agreements in principle should be substantively treated in line with EU competition law.<sup>17</sup> The same should apply to horizontal agreements which concern prices, quantities and market allocations (Article 5 III CartA). Absent grounds of justification, restraints of competition pursuant to Article 5 III and IV CartA are “as a rule” unlawful due to their quality, i.e. without the need for a quantitative case-by-case examination.<sup>18</sup> This corresponds to the category

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14 Swiss civil procedure does not provide for “pre-trial discovery” investigation rights, nor for suitable class actions.

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15 See II.1 above.

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16 Cf. DFC 143 II 297 c. 5.3.4, in which the Federal Supreme Court rejected a rule of reason as applied under U.S. antitrust law with regard to vertical agreements.

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17 See DFC 143 II 297 c. 6.2.3.

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18 Cf. DFC 143 II 297 c. 5; see further III.1 below; however, Swiss parliament in early June 2021 adopted a motion, which requires the Federal Council to prepare a legislative draft with the aim of (re-)introducing a quantitative assessment of core restrictions; such an amendment of Article 5 III and IV CartA would be ill-advised: contrary to the declared intentions, it would be detrimental to legal certainty (as the reference value of EU case law would be diminished and legal assessment would become less foreseeable) and potentially weaken Swiss cartel law enforcement; furthermore, this motion is hard to reconcile with the widely supported “Fair Price Initiative” (see II.2.b)aa) above).



of agreements under Article 101 TFEU that have as their object the prevention, restriction or distortion of competition. Unlike in EU competition law, however, other unlawful agreements—not pursuant to Article 5 III and IV CartA, meaning in particular those which restrict competition only “by effect”—cannot be sanctioned directly (Article 49a I CartA).

In the context of Article 7 CartA (unlawful practices by dominant undertakings), the Federal Supreme Court had first held that the current CartA of 1996 has “no specific European policy background” and the usage of partly the same wording as contained in (now) Article 102 TFEU did not imply the binding intention of an identical regulation.<sup>19</sup> Shortly thereafter, the Federal Supreme Court then clarified that, on the contrary, the Swiss CartA strongly orients itself towards EU competition law and, as a result, the practical interpretation of Article 102 TFEU needs to be taken into account.<sup>20</sup> The Federal Supreme Court has since confirmed that unlawful practices by dominant undertakings are regulated in Article 7 CartA in principle in parallel to Article 102 TFEU and has postulated that equal matters should be treated equally.<sup>21</sup>

This suggests that there is a significant convergence of Swiss cartel law to EU competition law when it comes to dealing with unlawful restraints of competition. The same is not true, however, with regards to the assessment of concentrations of undertakings.<sup>22</sup> External growth can lead to market concentrations that basically impair competition just like restraints by agreements or restraints resulting from internal growth. Many “Swiss” markets are by comparison notably concentrated.<sup>23</sup> Notwithstanding this, the threshold for initiating a substantive assessment in Switzerland is relatively high and, moreover, exclusively turnover-related (Article 9 I CartA).<sup>24</sup> The criteria for an authorisation subject to conditions and obligations or ultimately a prohibition are that the investigation indicates that the concentration creates or strengthens a dominant position liable to eliminate effective competition, and that the concentration does not improve the conditions of competition

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19 See DFC 137 II 199 c. 4.3.2.

20 See DFC 139 I 72 c. 8.2.3.

21 See DFC 146 II 217 c. 4.3.

22 See II.2.b)aa) above for the definition of concentrations of undertakings; see II.3.b) below regarding the assessment of mergers and takeovers under MerA and FinMIA.

23 E.g. despite Switzerland’s relative smallness, according to the study “Global Powers of Retailing 2021” by Deloitte, the Swiss cooperatives Migros and Coop are among the world’s 50 largest retail suppliers (admittedly, they do not operate exclusively in Switzerland).

24 An exemption applies if an involved undertaking was finally and non-appealably held dominant in a market in Switzerland, and if the concentration concerns either that market or an adjacent/upstream or downstream market thereof, see Article 9 IV CartA.

in another market such that the harmful effects of the dominant position can be outweighed (Article 10 II CartA). This so-called “qualified market dominance” test sets in tendency a too high threshold and insufficiently reflects contemporary economic findings.<sup>25</sup>

### c) Unfair competition law

#### aa) Application principles

The UCA—just like the CartA<sup>26</sup>—contains provisions concerning civil law (Chapter 2; Article 2 et seqq. UCA) and administrative law (Chapter 3; Article 16 et seqq. UCA). Unlike cartel law, however, Swiss unfair competition law is predominantly enforced under civil law. Its origins are found in the tort law provisions of Article 50 CO of 1883 and Article 48 CO of 1911. The latter was then replaced by the first UCA of 1945, which codified the Federal Supreme Court’s settled case law. Still, the UCA of 1945 maintained a general clause in Article 1 I, which for the first time notably illustrated that unfair competition law was about ensuring (fair) competition. The second UCA of 1988 thereafter stated in Article 1 in a separate manner the (re-adapted) objective of ensuring “fair *and* undistorted competition in the interest of all concerned” (emphasis added). It is—after a number of non-fundamental modifications—still applicable to date.

Consequently, Swiss unfair competition law’s material-personal scope of application is very broad: parties do not need to be involved in a competitive process for the UCA to take effect. Unlike the CartA, the UCA does not solely apply to “undertakings”. It applies to virtually everybody whose actions are objectively able to influence the conditions of competition.<sup>27</sup> The rights to sue and to be sued in civil law matters are governed by Article 9 et seqq. UCA, also allowing end consumers to claim damage reparation.<sup>28</sup> The geographical scope of application in private international law matters follows, in principle, the effects doctrine (cf. Article 136 PILA).

By continuously emphasising the fairness aspect of competition, Article 1 UCA upholds the traditional terminology of unfair competition law, which in its tortuous origin meant that acting vis-à-vis competitors was unlawful when not according to (normative) business ethics standards. A contemporary interpretation, however, should acknowledge that unfair competition law is primarily

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25 See II.2.b)aa) above regarding the (to be welcomed) proposal of introducing the SIEC test.

26 See II.2.b)aa) above.

27 See DFC 120 II 76 c. 3a; cf. Article 2 UCA, see below II.2.c)bb).

28 See in comparison de lege lata cartel law: II.2.b)aa) above.

about safeguarding the functionalities of markets and thereby ensuring an undistorted competitive process.<sup>29</sup> In this sense, fair *means* undistorted competition.<sup>30</sup>

#### bb) Substantive principles

Article 2 to Article 8 UCA contain the substantive civil law provisions regarding unfair competition. They regulate competitive practices towards consumers and suppliers (vertical relations) as well as towards competitors (horizontal relations).<sup>31</sup> Following the basic structure of the UCA of 1945, Article 2 UCA of 1988 contains a general clause which defines as “*unfair and unlawful*” any behaviour or business practice that is deceptive or which in any other way infringes the principle of good faith and affects the relationship between suppliers and customers (objective suitability suffices). Article 2 UCA is specified by the subsequent articles. When examining a case, Article 3 et seqq. UCA—in their quality as *leges speciales*—are to be applied primarily if the behaviour in question is of a competitive nature according to Article 2 UCA. The degree to which the further elements of Article 2 in conjunction with Article 1 UCA need to be considered in this context depends on the specific clause being applied. Behaviour that violates a provision of Article 3 et seqq. UCA will notwithstanding this also breach Article 2 UCA.<sup>32</sup>

The general clause of Article 2 UCA, however, remains independently applicable. Behaviour which is in accordance with the specific clauses is *eo contrario* not necessarily lawful under Swiss unfair competition law. It is rather typically the case law on Article 2 UCA (as well as its respective predecessors) which—when sufficiently settled—then reflects in Article 3 et seqq. UCA,<sup>33</sup> whereas the lawfulness of “new” competitive practices is examined under Article 2 UCA. Such practices are privileged as there is no threat of subsequent criminal punishment even when they were conducted intentionally (see Article 23 UCA). The arguably central “principle of good faith” element of Article 2 UCA had already been laid out in Article 48 CO of 1911 and Article 1 I UCA of 1945. A functional interpretation, in line with contemporary unfair

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29 See II.2.a) above; however, the UCA also contains various provisions belonging to consumer protection law (Article 3 I lit. k to n, Article 4 lit. d and Article 8 UCA).

30 According to the prevailing doctrine and the Federal Supreme Court (DFC 133 III 431 c. 4.3), the fairness element of Article 1 UCA nevertheless still has its autonomous, traditional meaning and is hence of equal priority.

31 See III.2 below regarding the inadmissibility of the unclean hands defence.

32 See DFC 133 III 431 c. 4.

33 Article 3 et seqq. UCA admittedly also contain “genuine” legislative provisions, in particular the aforementioned consumer law provisions (fn. 29).

competition law, is crucial: the principle is violated when the behaviour in question distorts competition.<sup>34</sup>

#### **d) IP law (by the example of patent law)**

Having few resources except for ideas and creativity, Switzerland's economic prosperity depends heavily on the exploitation of research and innovation. IP rights—i.e. exclusivity rights to intangible assets—serve as a means to this end. In the following paragraphs, recent developments with regard to the protectable subject matter and the procedure for granting patents under Swiss patent law are examined.

According to Article 1 PatA, patentable inventions are new inventions applicable in industry, which are not obvious having regard to the state of the art. Article 1*a* and Article 1*b* state that the human body and (partial) sequences of a gene are not patentable as such; elements of the human body and derived (partial) gene sequences are, however, patentable if they are produced by means of a technical process, a beneficial technical effect is indicated (Article 1*a*) or their function is specifically indicated (Article 1*b*), and the further elements of Article 1 are fulfilled, and none of the exclusions in Article 2 PatA apply. Article 2 PatA excludes from patentability a non-exhaustive list of inventions whose exploitation is contrary to human dignity, that disregard the integrity of living organisms or that are in any other way contrary to public policy or morale (e.g. processes for cloning human beings and the clones obtained thereby or the use of human embryos for non-medical purposes).

While the positive requirements of Article 1 PatA determine the admissibility of Swiss patents, the law does not currently mandate an examination by the Federal Institute of Intellectual Property (FIIP) as to whether the invention is new or non-obvious (Article 59 IV PatA). Once such a national patent has been granted by the FIIP, it may be opposed by any person within nine months of its award on the limited grounds that its subject matter is not patentable under Article 1*a*, Article 1*b* and Article 2 PatA (reasons of public concern; Article 59 I and II PatA). The requirements of Article 1 PatA, on the contrary, are only fully examined in the course of a civil nullity or infringement proceeding.

It has been (since the 1970s)—and still is—possible, however, to obtain a fully examined patent for Switzerland through the European Patent Office (EPO) in Munich. The EPO's standardised examination procedure for all 38 members of the European Patent Convention (EPC; including EU member states and Switzerland) with subsequent national validation is a success story:

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34 See II.2.c)aa) above with qualification (fn. 30).

the vast majority of Switzerland's patents are fully examined European patents. One thus wonders why it would be beneficial to upgrade Switzerland's (extended) formal examination of national patents (i.e. for the FIIP also to examine novelty and inventive step). However, this is exactly what has been proposed in the current revision of the PatA. The argument is that fully examined national patents would be more attractive for small and medium enterprises (SMEs) as well as individual inventors and would increase clarity and legal certainty for patent owners and third parties. The outcome of the revision remains to be seen. However, aside from the fact that the EPC already provides for fully examined patents for Switzerland (hence there currently being no genuine necessity), it is highly doubtful that the quality *and* cost-effectiveness of the EPO examination could be matched. Furthermore, there is an apparent need for lower-cost and timelier, albeit (perceived) less reliable protection—particularly from the perspective of SMEs like e.g. software companies. If not for this reason, the current revision would likely not also propose to introduce utility models, which in fact are intended to replace today's patents, albeit incompletely (having a narrower subject-matter and a reduced protection period). Finally, the proposal maintains the administrative appeal procedure to the Federal Administrative Court (FAC) as regards to patent grant oppositions, and opposition grounds are now consequently expanded to the requirements of Article 1 PatA. Irrespectively, the FPC has the necessary expertise to assess the criteria of novelty and inventive step.<sup>35</sup> Therefore, it would be preferable that opposition proceedings fall into the FPC's jurisdiction.<sup>36</sup>

### 3. Enabling responsible<sup>37</sup> business activities

#### a) Company law

##### aa) Principle of *numerus clausus*

Swiss federal private law permits for a *numerus clausus* (closed number) of company types,<sup>38</sup> which may be categorised as partnerships and corporations. The former category contains the simple partnership (Article 530 et seqq. CO), the general partnership (Article 552 et seqq.), the limited partnership (Article 594 et seqq. CO) and—for collective investment purposes—the

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35 FPC judges might besides not act as FAC judges, see Article 10 I PatCA.

36 Cf. II.1 above.

37 See further chapter on Corporate and Banking Law, pp. 349 discussing Corporate Social Responsibility (CSR).

38 Further special company types may be found in federal public law as well as in cantonal (public and private) law, cf. Article 59 CC.

limited partnership for capital investments (Article 98 et seqq. CISA). Corporations include the company limited by shares (Article 620 et seqq. CO; “stock corporation”), the partnership limited by shares (Article 764 et seqq. CO), the limited liability company (Article 772 et seqq. CO; “LLC”) and the cooperative (Article 828 et seqq. CO). Further types exist in the form of associations (Article 60 et seqq. CC) as well as—again for collective investment purposes—investment companies with variable capital (SICAV, Article 36 et seqq. CISA) and with fixed capital (SICAF, Article 110 et seqq. CISA). There is also the category of foundations (Article 80 et seqq. CC) which, similar to corporations, are institutions of private law with their own legal personality but which are not companies as they represent associations of funds (rather than of persons). Both partnerships and corporations are in principle associations of persons but not all Swiss company types are predominantly member-oriented. Partnerships (with the exception of the limited partnership for capital investments) are indeed member-oriented to a wide degree. The cooperative and the association also centre on the relationship with their members (or at least this was the legislator’s intention). In contrast, the stock corporation is, from its conception, primarily capital-oriented, whereas the partnership limited by shares and the LLC can be seen as “mixed types”. This is best demonstrated by Article 772 I CO, according to which an LLC is a “*personenbezogene Kapitalgesellschaft*”/“*société de capitaux à caractère personnel*”/“*società die capitali di carattere personale*”, i.e. a capital company with a personal character.

Commercial companies must be recorded in the commercial register (either in order to acquire personality or for declaratory reasons). Data from this register shows that today the stock corporation and the LLC are by far the most widely used business vehicles (apart from sole proprietorships, i.e. individual natural persons operating a commercial business—these are not a company type but nonetheless require registration if revenues in any given fiscal year exceeded CHF 100,000; see Article 931 I CO). The LLC in particular has become more attractive due to legislative revisions made in 1995/2005. It is now—due to its simpler governance structure—a popular and viable alternative to the stock corporation if there is a limited number of company members and no need to access the public equity market. Other company types are—with some notable exceptions<sup>39</sup>—of limited significance.

#### bb) Organisation and liability principles

Business partners are, to a considerable extent, free to choose any company type for their commercial activities. Exceptions apply to the simple partner-

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39 E.g. the aforementioned retail suppliers (see fn. 23).

ship, which should not operate a commercial business. Further, an association must by legal definition have an ideal, non-commercial purpose (Article 60 I CC) and thus may only operate a commercial business as a means to this end (but not as its main purpose).

As for the relationship between individual members of partnerships, the legislation forms a cascade in the sense that provisions on the simple partnership are applicable to the general partnership and provisions on the general partnership are applicable to the limited partnership, subject to the partners not agreeing otherwise and to the mandatory provisions of the respective partnerships (Article 557 II and Article 598 II CO). To a large extent, partners may tailor their internal relationship according to the particularities of the cooperation. Partnership resolutions are by default made with the consent of all partners (Article 534 CO). Partners have a (waivable) fiduciary duty to not obstruct the purpose of the partnership (Article 536 CO) or otherwise engage in the line of the partnership's business, respectively (Article 561 CO). If not agreed otherwise, the limited partnerships' affairs are managed by the general partners with unlimited liability (Article 599 and Article 594 I CO), while all partners of simple and general partnerships—in accordance with their unlimited liability—have management rights (Article 535 I, Article 544 III and Article 568 I CO).

Much like the stock corporation,<sup>40</sup> the provisions on the LLC provide for three mandatory bodies: the members' general meeting (Article 804 et seqq. CO), the management board (Article 809 et seqq. CO) and the auditor (Article 818 CO). The general meeting functions as the supreme governing body of the company (Article 804 I CO). The management board is responsible for all matters which are not reserved to the general meeting by law or by the articles of association (Article 810 I CO). As a default rule—and in line with the personal character of the limited liability company<sup>41</sup>—LLC members are jointly responsible for the management of the company (Article 809 I CO). The managing directors and third parties who are involved in management must carry out their duties with all due care and safeguard the interests of the company in good faith (Article 812 I CO) as well as treat company members equally under the same circumstances (Article 813 CO). The duties of loyalty and care correspond to those duties that apply to the board of directors and third parties engaged in managing a stock corporation (as does the obligation to equal treatment of shareholders in like circumstances; Article 717 CO).<sup>42</sup> The standard of

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40 For a detailed discussion on stock corporation issues, see chapter on Corporate and Banking Law, pp. 345.

41 See II.3.a)aa) above.

42 See III.3 below regarding liability for losses arising from breach of duties.

care required of managers is the standard that a conscientious and reasonable person would adopt under the same circumstances (objective standard);<sup>43</sup> they must also exercise their respective skills fully. Even when they are not involved in the company's management, LLC members in principle have—absent the consent of all members or, if provided for by the articles of association, a qualified majority vote of the general meeting—duties of loyalty that go much beyond shareholders' duties (Article 803 and Article 808b I No. 8 CO).<sup>44</sup>

The liabilities of an LLC—again as with stock corporations—are in principle secured against its assets only (Article 794 CO).<sup>45</sup> Exceptions apply when the corporate legal entity and another person are economically identical (through legal or factual dominance), and the other person severely misuses the corporation to the detriment of third parties.<sup>46</sup> In such extraordinary situations, it is possible to lift “the corporate veil” (i.e. accessing the other person's or the company's assets; “[reverse] breakthrough”).

## **b) Reorganisation and takeover law**

Dynamic market economies require companies to make regular adjustments to their business strategies. Therefore, it can become necessary to change the company type to adapt to the altered needs of the business (e.g. from LLC to stock corporation when preparing for a stock market listing). Article 53 et seqq. MerA provide that a company can change its legal form (conversion) without modifying its legal relationships and permit a wide variety of conversions. Further forms of corporate reorganisation include the acquisition of external business, merger and demerger.<sup>47</sup> As for the latter, a company can demerge by dividing all of its assets and liabilities and transferring them to other companies (along with dissolution and deletion from the commercial register of the

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43 See DFC 139 III 24 c. 3.2

44 On the contrary, according to Article 680 I CO, shareholders may not be required, even under the articles of association, to contribute more than the amount fixed for subscription of a share on issue, i.e. duties of loyalty or care do not apply and may not be imposed on shareholders (see II.3.b) below regarding notification and mandatory offer duties that apply to shareholders of public [i.e. stock market-listed] stock corporations).

45 Article 620 I and II CO state that the liabilities of a stock corporation are payable only from the company assets and shareholders are not personally liable for the company's obligation. However, unlike stock corporations (see preceding fn.), LLCs' articles of association may to a limited degree require the company members to make additional capital contributions (Article 795 CO).

46 See Judgment of the Federal Supreme Court 5A\_498/2007 of 12 December 2010 c. 2.2.

47 Article 161 et seqq. PILA regulate cross-border reorganisations; see II.2.b)bb) above regarding the assessment of concentrations under competition law.



divesting company; “division”) or by transferring parts of its assets and liabilities to other companies, with company members receiving participation or membership rights in the acquiring companies (“spin-off”; Article 29 MerA).

The acquisition of external business is carried out by purchasing the target company’s shares (share deal) or (all or parts of) its assets and liabilities (asset deal; see Article 69 et seqq. MerA). If the target company is a stock-market listed corporation (“public company”), its shares are typically acquired through a (voluntary) public tender offer. Such an offer is mandatory when the acquiring party’s interests exceed a threshold of 33 1/3% of voting rights, provided that the target company did not raise this threshold to 49% or waived the obligation entirely in its articles of incorporation (exemptions may apply; Article 125 III and IV, Article 135 et seq. FinMIA).<sup>48</sup> The price offered must be at least as high as the stock market price or the highest price the offeror has paid in the preceding twelve months (Article 135 II FinMIA). If on expiry of the offer period, the offeror holds more than 98% of the voting rights of the target company, the remaining shares may be cancelled by court order, subject to the remaining shareholders being compensated (Article 137 FinMIA).

Mergers are a form of corporate reorganisation, by which companies agree upon one company absorbing the other(s) (absorption merger) or combining companies in a new company (combination merger); transferring companies are dissolved and deleted from the commercial register (Article 3 MerA; see Article 4 MerA for permissible company types). The merger agreement requires the approval of a qualified majority of the corporations’ supreme governing bodies and in principle by all partnership members (Article 12 II in conjunction with Article 18 MerA). Consideration in cash (instead of optionally shares of the new company) is admissible provided at least 90% of the shareholders consent; this can allow for a “squeeze-out” of dissenting minority shareholders (Article 8 II in conjunction with Article 18 V MerA).

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48 Please note that shareholders of public companies furthermore have notification duties when they fall below or exceed certain voting rights thresholds (see Article 120 FinMIA).

## III. Landmark cases

### 1. Cartel law: Assessment of agreements affecting competition

The most influential decision of recent years in Swiss cartel law was DFC 143 II 297,<sup>49</sup> which has subsequently been confirmed in DFC 144 II 194, DFC 144 II 246 and, most recently, in DFC 147 II 72. The decision greatly clarified how to assess agreements affecting competition. One recent development is of particular interest. Namely, when assessing restraints of competition pursuant to Article 5 III and IV CartA, the Federal Supreme Court only examines under Article 5 II CartA (justification on grounds of economic efficiency)—and only if proportional grounds of efficiency exist—whether the agreement in question eliminates or “merely” significantly restricts competition (see DFC 147 II 72 c. 6.5 et c. 7). This is in accordance with the Federal Supreme Court’s jurisdiction regarding the “as a rule” significance of Article 5 III and IV CartA<sup>50</sup> and, beneficially, often means that market definitions become avoidable. Furthermore, it could have the welcoming effect of making equally obsolete the overly lenient criteria for rebutting the presumption of elimination of *effective* competition in DFC 129 II 18 c. 8.3. However, the concrete effects of the agreement on the affected market(s) in question should still be considered in turn when determining the sanction according to Article 49a CartA—which may offset the benefit of omitting this assessment under Article 5 CartA.

### 2. Unfair competition law: Unclean hands defence

According to the “unclean hands” doctrine, courts may refuse to grant the protection of the law to those who do not respect the law itself. A fundamental principle of Swiss law is that every person must act in good faith in the exercise of their rights and in the performance of their obligations. The manifest abuse of a right is not protected by law (Article 2 CC).<sup>51</sup> However, the Federal

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49 See the several citations already II.2.b) above regarding its key statements.

50 See II.2.b)bb) above.

51 See further chapter on Civil Law Principles and Family Law, pp. 229.

Supreme Court held in DFC 129 III 426 c. 2.2 that there is no general rule that only those who respect the law can seek to enforce another person's respect for the law. Applying an unclean hands defence to unfair competition law would have a "paralysing effect": the action of a competitor with unclean hands would be inadmissible (regardless of its merit); potentially non-compliant competitors would refrain from litigating. This would hinder the enforcement of unfair competition law and hence be detrimental to its objective of not only protecting competitors but ensuring "fair and undistorted competition in the interest of all concerned".<sup>52</sup> Furthermore, unfair competition law would be at risk of becoming *lettre morte*, since victims might decide to imitate their competitor's infringing behaviour rather than take legal action against the behaviour (and subsequent reciprocal claims would therefore become inadmissible). Thus, the Federal Supreme Court has confirmed that—unlike in other jurisdictions—the unclean hands defence is not recognised under Swiss unfair competition law.

### 3. Company law: Business judgment rule

Article 754 I CO states, with regards to stock corporations, that members of the board of directors and all persons engaged in the business management are liable to both the company and to the individual shareholders for any losses or damage arising from any intentional or negligent breach of their duties.<sup>53</sup> According to Article 827 CO, this provision also applies to the liability of persons who are involved in the management of an LLC. Thus, for both company types, the conditions of liability are a breach of duty (under a corresponding standard of due care),<sup>54</sup> damage, and a sufficient natural and adequate causal link between the former elements. Fault (according to an objective standard) is also required.

The Federal Supreme Court held in its decision 4A\_74/2012 of 18 June 2012 c. 5.1 that courts must exercise restraint when examining business decisions that result from an irreproachable decision making process, and which were reached on an adequate information basis and free from any conflicts of interest. Courts must avoid the bias of hindsight and only rely on the information that was available when the business decision was reached. If a

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52 See II.2.c)aa) above.

53 See further with regard to the right to sue: Article 756 et seq. CO; DFC 131 III 306 c. 3.1, DFC 132 III 564 c. 3.1.

54 See II.3.a)bb) above.

business decision (that subsequently leads to a damage) meets these criteria, appears plausible and was executed properly, it will not constitute a breach of duty. If it does not meet these criteria, it must be examined without restraint (Judgment of the Federal Supreme Court 4A\_219/2015 of 8 September 2015 c. 4.2.1).

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Luisa Lichtenberger / Sophie-Katharina Matjaz

# Civil Procedure

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# I. Swiss Civil Procedure Code

The first section of this chapter gives a brief overview of 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. The third and final part of this chapter discusses the main content of the Code (3.).

## 1. Constitutional Framework<sup>2</sup>

Under the Constitution of 1848 the cantons retained legislative power in matters of civil and civil procedure law. In 1898, the Confederation gained the right to legislate on civil law. A competence in civil procedure was not conferred. However, the federal legislator included some procedural provisions into the Civil Code (which came into force in 1907), such as rules on evidence. For example, Article 8 Civil Code: this 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.

The Constitution of 1999 still did not provide for centralised legislative powers. However, the legislator was empowered to regulate the territorial jurisdiction of Swiss courts.<sup>3</sup> Subsequently, the Swiss Jurisdiction Act was

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1 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 [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/DXA5-U5RV](https://perma.cc/DXA5-U5RV)). Besides this, 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 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.

2 See chapter on Civil Law Principles and Family Law, pp. 229, for the detailed history to a unified civil law.

3 Articles 30 and 122 of the Constitution in the version dated 18 April 1999.

issued.<sup>4</sup> It contained unified rules on the territorial jurisdiction of Swiss courts in civil domestic matters.<sup>5</sup> It can be regarded as the first limited 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. The codes drew 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 Procedure Civile*. There were, however, substantial differences in the content and layout of the codes, for example in the structure of the proceedings and the procedural principles.

Nevertheless, it can be argued that a tradition of Swiss civil procedure did exist on the federal level prior to the federal code's entry into force, in two respects. First, federal laws such as the Debt Enforcement and Insolvency Act had substantial influence on civil procedure. Second, the jurisprudence of the Swiss Federal Supreme Court had a great influence on matters of procedure in civil law. For example, the Court decided in a case from 1988 that once an action is filed, the subject matter of the dispute may not be filed elsewhere between the same parties.<sup>6</sup> Still the variety of procedural codes proved to be a source of complication and legal insecurity.<sup>7</sup> Given these noted issues, the reform of the Swiss justice system was approved in a landslide on 12 March 2000.<sup>8</sup> This cleared the way for the drafting of the Civil Procedure Code.

Despite the Civil Procedure Code, the cantons retained responsibility in some procedural domains, such as the organisation of the courts and conciliation authorities (Article 122 II Constitution<sup>9</sup> and Article 3 Civil Procedure Code<sup>10</sup>), the administration of justice in civil cases, and the tariff authority.

Cantonal legislation on court structure regulates the composition of the courts and establishes the matters that fall under the courts' competence, i.e. their subject-matter jurisdiction. Federal law obliges the cantons to provide two cantonal instances of civil jurisdiction: there must be a possibility to appeal a first instance judgement to a cantonal appellate court (see Fig. 1).

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4 Federal Act on the Jurisdiction in Civil Matters of 24 March 2000 (Jurisdiction Act), SR 272, no longer in force.

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5 The Jurisdiction Act was replaced by the Civil Procedure Code on 1 January 2011.

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6 DFC 114 II 186; now codified in Article 64 Civil Procedure Code

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7 Message on the Swiss Civil Procedure Code, Federal Gazette No. 37 of 19 September 2006, pp. 7221 (BBl 2006 7221), p. 7228.

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8 86.4% of the voters and all cantons approved the reform. The turnout was 42%.

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

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10 Henceforth, Articles cited in this chapter without specific mention refer to the Civil Procedure Code.

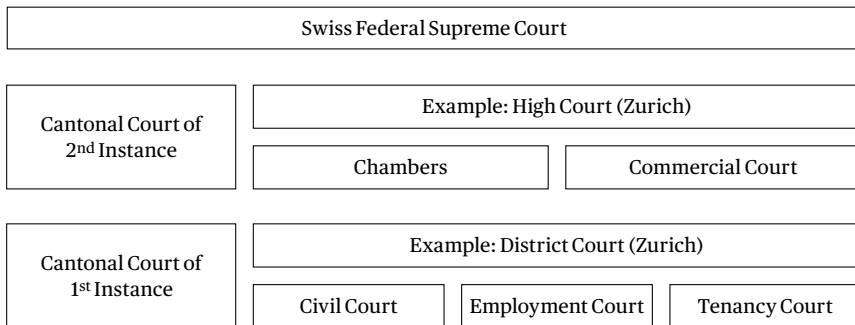


Figure 1: Court Organisation

## 2. Legislation

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, a commission of experts was established with the set purpose of considering the unification of civil procedure and producing a preliminary draft for a federal code. In 2002, the experts proposed to unify the cantonal courts’ procedures 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. The idea of unification was mostly welcomed. In particular, the fact that the proposals avoided the introduction of a US-style class action was widely approved of. However, some details of the Code faced criticism: i.e. the strong emphasis on written form for civil proceedings was criticised for being likely to lead to unnecessarily lengthy proceedings. Further, there were demands for the introduction of mediation as an alternative to conciliation proceedings.

Following the national consultation procedure, a draft of the Swiss Civil Procedure Code<sup>11</sup> and an explanatory message were issued<sup>12</sup>. Parliament passed the act on 19 December 2008. It entered into force on 1 January 2011, replacing the 26 cantonal civil procedure codes and the Jurisdiction Act.

11 Draft of the Swiss Civil Procedure Code, Federal Gazette No. 37 of 19 September 2006 (BBl 2006 7221), pp. 7413.

12 See footnote 7 for an example of a message in the Swiss legislation process.

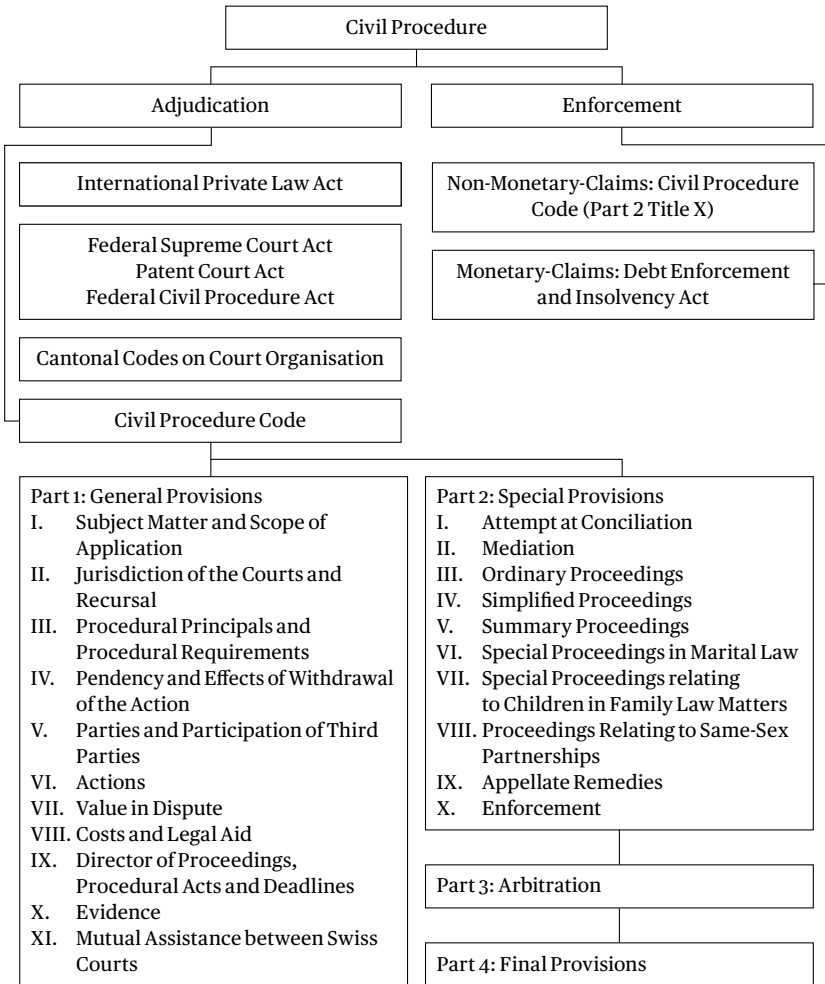


Figure 2: Civil Procedure Laws

Following the unification, it became a lot easier for lawyers to represent clients in other cantons. It also enhanced the academic debate about civil procedure in Switzerland: there had previously only been limited published material on the cantonal civil procedure codes, leading to a lack of literature for legal professionals to review and rely on. Since the Code’s introduction, there has been an increase in federal judicial activity concerning civil procedure in Switzerland, leading to enhanced predictability of court decisions and 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 difficulties for lawyers practicing in different cantons.

Another aspect which has proven controversial is the lack of collective redress mechanisms. The legislator did not introduce class action lawsuits, because they were considered to be unsuited to the Swiss legal system. Instead, courts deal with proceedings involving multiple parties by relying on existing procedural instruments: in particular, the group action for associations and organisations (Article 89)<sup>13</sup> and the general joinder of claims which were filed separately but are closely related in substance (Article 90). However, it is now widely recognised that these instruments are no substitute for proper collective redress mechanisms.

On 2 March 2018, a preliminary draft for a partial revision of the Civil Procedure Code was submitted to a national consultation procedure. It aimed to improve access to collective redress by allowing collective enforcement of monetary claims, especially mass damages. The preliminary draft provided for the establishment of a new collective settlement procedure, by which it would be possible for a person accused of a rights violation to reach a settlement with the organisation that filed the relevant group action. As the proposals for strengthening collective redress were very controversial, they were detached from the revision and will be discussed separately.

### 3. Content

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.

The procedure for the enforcement of monetary claims as well as bankruptcy matters are regulated by the Debt Enforcement and Insolvency Act. In Switzerland monetary claims can be enforced without preceding substantive judicial assessment:<sup>14</sup> the authorities in these matters are debt enforcement

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13 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 rights of the members of the group.

14 The creditor can address a demand for enforcement to the competent enforcement authority, specifying the relevant legal ground and the amount claimed (Article 67

offices and bankruptcy offices, rather than courts. Still, the court's involvement is necessary to order some procedural steps, such as the opening of bankruptcy proceedings. The provisions within the Civil Procedure Code apply to such court orders (Article 1 lit. c).

The second Title (Articles 4-51) regulates the jurisdiction of the courts. As mentioned above, subject-matter jurisdiction is governed by cantonal legislation, while territorial jurisdiction (place of jurisdiction) is regulated by federal law. The 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 specific place of jurisdiction is provided for. Specific places of jurisdiction are, for instance, provided for disputes over immovable property (Article 29), employment law (Article 34), or consumer contracts (Article 32). Most places of jurisdiction are optional: the parties may choose the court they want to have jurisdiction (Article 17). Defendants can be found to have consented tacitly to the optional jurisdiction of an incompetent court if they enter an appearance on the merits without objecting to the court's jurisdiction (Article 18). Only few places of jurisdiction are mandatory, but where this does apply it is not possible for the parties to agree on the jurisdiction and implicit acceptance by appearance is excluded.

The third Title (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 4 (Articles 62-65) governs the rules for when a claim is considered to have started (and therefore become "pending"), as well as withdrawal of the action. As soon as an action is filed, a case becomes pending and is thus considered to have been started (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 has legal capacity can be a party to proceedings (Article 66). Natural persons always

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Debt Enforcement and Insolvency Act). Upon receipt of the demand on enforcement, the enforcement authority issues an order for payment (Article 69 Debt Enforcement and Insolvency Act) and serves it on the creditor and debtor. The order contains the request to the debtor 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 paused until a court decides on the claim.

have legal capacity,<sup>15</sup> while legal entities must be pronounced to have capacity by the law. Any person with capacity to act<sup>16</sup> is considered to have the capacity to take legal action (Article 67 I). A person without capacity to act (such as children) may act through a legal representative (Article 67 I). A party may choose whether to be represented in proceedings (Article 68 I). Professional representation is essentially reserved to lawyers, although there are exceptions for tenancy and employment matters (Article 68 II).

Title 6 (Articles 84-90) regulates the three main types of actions. The first type of action is the action for performance, where the claimant demands that the court orders the defendant to do something, refrain from doing something, or tolerate something (Article 84): for example, the court may order the defendant to pay damages to the claimant. 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 or obligation (Article 87): for example, a divorce decree. Third, an action for a declaratory judgement is used to demand that the court establish whether a right or legal relationship exists (Article 88): for example, whether a valid contract exists between two parties. The action for a declaratory judgement is subsidiary to the other actions.

Title 7 contains rules on the calculation of the value in dispute, Title 8 on costs and legal aid. Title 9 includes provisions on deadlines.

Title 10 (Articles 150-193) contains the rules on evidence. 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 does not have to be proven (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 for examination evidence that is offered in the required form and timeframe. However, courts may anticipate the evaluation of evidence. This allows a judge to refuse to examine evidence if he or she is already convinced of a certain fact before taking the evidence. Some legal commentators see this practice as inherent to the free assessment of evidence and necessary with a view to the constitutionally guaranteed<sup>17</sup> "need for speed" (Article 124 I). It is certainly true that at a certain point a judge will be convinced that his or her opinion cannot be affected by considering (more) counterevidence.

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15 Article 11 Civil Code: *"Every person has legal capacity"*.

16 Article 13 Civil Code: *"A person who is of age and is capable of judgement has the capacity to act"*. See chapter on Law of Persons, pp. 255.

17 Article 29 I Constitution: *"Every person has the right to [...] have their case decided within a reasonable time"*.

Of course, the court may only refuse to accept evidence if it is sure that it will not change its opinion, not where there is any doubt and not where evidence is simply deemed generally unfit to prove a certain fact. Further, the speedy trial argument should not be turned against parties who would happily accept prolonged proceedings if they are allowed to offer more evidence.

Article 168 I lists the admissible types of evidence. One particular issue is hearsay. A witness must disclose where parts of their statement are hearsay evidence. Such statements do not possess direct evidential value but can be included as circumstantial evidence when applicable. As for expert 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 expert reports as physical records, which would afford such reports a heavier evidential weight.

As set out above, the distribution of the burden of proof is determined by Article 8 Civil Code (rather than the Civil Procedure Code): the burden of proof for establishing an alleged fact shall rest on the person who would derive rights from that fact. There are also legal provisions which establish a presumption of certain facts, as long as there is no proof to the contrary. Article 3 I Civil Code states that good faith is presumed. This means that the party invoking good faith in a given case is not required to prove it.

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, it is not possible to impose fines or sanctions. Instead, the refusal is considered during the appraisal of evidence. For example, if a party refuses to produce a document, the court might use the refusal as an indication that the document features the content claimed by the opposing party. When third parties refuse to cooperate without a valid reason, a disciplinary fine or compulsory measures may be ordered (Article 167 I), like the enforcement of witness appearances or the seizure of documents.

Title 10 also regulates illegally obtained evidence. Evidence is *formally* unlawful when a witness gives testimony without being advised of their right to refuse to cooperate. Evidence can also be obtained in infringement of the *substantive* law, for example when a letter is opened in breach of privacy (Article 179 Criminal Code)<sup>18</sup> or a conversation is secretly recorded (Article 179<sup>bis</sup>

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18 Swiss Criminal Code of 21 December 1937 (Criminal Code), SR 311.0; see for an English version of the Swiss Criminal Code [www.fedlex.admin.ch/perma.cc/V8MH+MMRB](http://www.fedlex.admin.ch/perma.cc/V8MH+MMRB).



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 higher in ex-officio investigations, e.g. in cases concerning children in family matters. The infringed private interest must also be weighed. Generally, evidence obtained through violence or threats is not admissible.

Part 2 of the Civil Procedure Code contains special provisions on conciliation (Articles 197-212) and mediation (Articles 213-218). A *conciliation* is a proceeding to reconcile the parties in an informal manner. It serves to avoid court proceedings.<sup>19</sup> The law mandates that parties go through conciliation proceedings before a case can be brought to court (Article 197).

*Mediation* is an even less formal dispute resolution procedure. It is guided by an independent third party. Parties can agree to use mediation instead of conciliation (Article 213), but this option is only rarely used.

Title 3 of Part 2 regulates the ordinary proceedings at first instance (Articles 219-242). Ordinary proceedings are conducted in civil cases where the value of dispute exceeds CHF 30,000. Title 4 (Articles 243-247) regulates simplified proceedings. These proceedings apply in financial disputes not exceeding CHF 30,000. Title 5 (Articles 248-270) concerns summary proceedings: these are cases where the facts or the law are clear or where matters are non-contentious. 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 (Articles 308-334) establishes the legal remedies available to the parties following judgment (appeal, objection and review) and Title 10 regulates the enforcement of decisions concerning nonmonetary claims. As stated above, the enforcement of monetary 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.

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19 See III.1 below.

## II. Principles

Civil procedure 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) and the parties' right to be heard must be respected (Article 53). Court hearings are public, and judgements must both be pronounced publicly and made accessible (Article 54 I). The court applies the law *ex-officio* (Article 57). In the following paragraphs, four further fundamental principles will be examined.

### 1. Party Disposition

According to the principle of party disposition the parties have the power to decide the time, subject matter, and duration of proceedings. Therefore, *non-ultra petitia* applies: the court may not award a party anything more or different than requested (Article 58 I). The courts cannot open proceedings on their own initiative. The claimants decide what claim they want to file and whether they wish to file it. If a claim is divisible, an action for only part of the claim can be filed (Article 86). The principle of party disposition also means that the party can end the proceedings at any point through settlement, acceptance of the claim or withdrawal (Article 241). These methods will 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 is obliged to ask appropriate questions to provide an opportunity for either party to clarify or complete their submissions.

### 2. Ex-Officio Assessment

The principle of *ex-officio* assessment (Article 58 II) is an exception to the principle of party disposition. It means that the court has a duty to assess the case before it. It deprives the parties of their free disposal over the matter and the court is not bound by the parties' requests as regards the procedure of the case. The principle of *ex-officio* assessment is applied where the public interest

requires that the parties are deprived of their free disposal over proceedings, for instance to protect a weaker party (like a minor). For example, the court can award a higher sum of child maintenance than the amount requested by the claimant.

The claimant must still file an action even if *ex-officio* assessment is applicable. State authorities may only initiate civil proceedings if this is explicitly provided for by federal law (such as in Article 106 Civil Code).<sup>20</sup> Appellate proceedings can never be initiated *ex-officio*.

### 3. Party Representation

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 obtain the facts necessary for deciding the case. In Swiss civil procedure, this principle is the rule, meaning that only the facts produced by the parties can form the subject matter of the proceedings. The parties must present the court with the facts in support of their case and submit any supporting evidence (Article 55 I). This can contradict the ideal of establishing the material truth. For example, if a party does not contest allegations of its opponent, the judge has to decide on the basis of these facts, regardless of his or her conviction of the truth. However, this result is justified by the principle of individual autonomy in civil procedure.

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. As with the principle of party disposition, the principle of party representation is also complemented by the court's duty to enquire, whereby the court will ask questions to allow either party to clarify or complete their submissions where unclear or incomplete. 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 Article 247.

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<sup>20</sup> Article 106 provides that state authorities may initiate civil proceedings if for instance 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.

### 4. Ex-Officio Investigation

The principle of ex-officio investigation is an exception to the principle of party representation. It too concerns the establishment of the facts in a case. However, within the scope of the principle of ex-officio investigation the courts cannot rely on the facts presented by the parties: they must inquire into the “material” truth ex officio. While the principle is highly relevant in criminal proceedings, it does not have the same significance in civil proceedings. Civil courts cannot rely on investigation authorities. Ex-officio investigation can be limited (establish the facts) or unlimited (investigate the facts). Limited ex-officio investigation applies in disputes concerning matters of discrimination under employment law and certain tenancy matters. Unlimited ex-officio investigation applies in proceedings concerning children in family matters. The main goal of the ex-officio investigation is to protect the weaker party.

Where ex-officio investigation is required, the court questions the parties extensively and demands the production of relevant materials, for example by calling certain witnesses. Still, due to the court’s limited avenues of investigation, it remains 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 full 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:

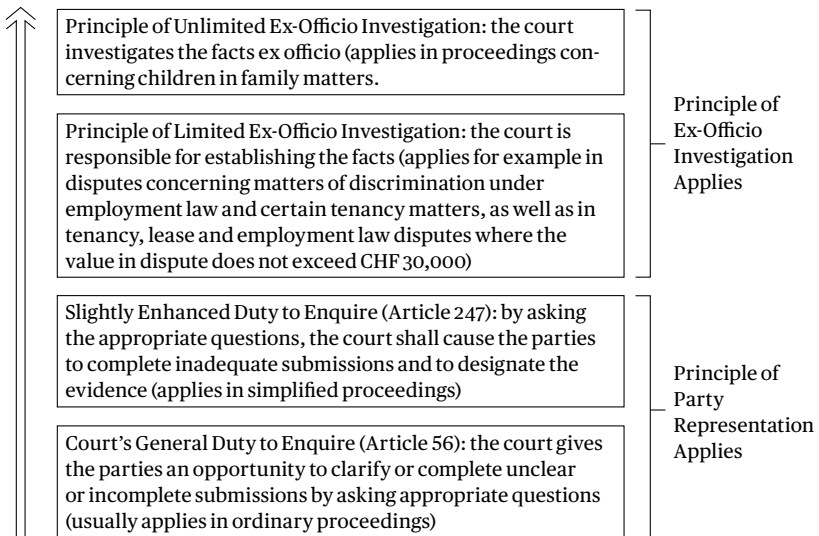


Figure 3: Levels of Court Involvement in Establishing the Facts

### III. Institutions and Procedure

The institutions and procedure of Swiss civil justice can be best understood by following their application through the course of a standard case. First, the conciliation proceedings will be explained (1.). Subsequently, the rules for ordinary proceedings will be examined in detail (2.) and a short overview of simplified and summary proceedings will be given (3.). Finally, the appellate remedies will be outlined (4.).

#### 1. Conciliation Proceedings

An attempt at conciliation is generally mandatory before a case can be brought to court (Article 197). The law does provide for exceptions. For example, in disputes exceeding CHF 100,000 parties can renounce conciliation. The federal law regulates the procedure before conciliation authorities but leaves their organisation to the cantons. Conciliation is initiated by the claimant by filing a written (Article 130 I) or oral application (Article 202 I). The application must identify the opposing party, the claim and the matter in dispute (Article 202 II). Once a case is filed, it becomes pending (Article 62).

Conciliation authorities try to help the parties reach an agreement. The procedure is less formal than in court proceedings. Conciliation hearings are generally<sup>21</sup> not open to the public. After the application is filed, the conciliation authority 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 up to CHF 2,000, the conciliation authority can decide on the merits of the claim (Article 212). If the value in dispute is below CHF 5,000, the conciliation authority may propose a judgement to the parties, which has binding effect if it is not rejected by any of the parties within 20 days (Article 211). If the parties do not reach an agreement the conciliation authority grants authorisation to proceed (Article 209 I). Authority to proceed is also granted if a judgement proposed by the conciliation authority is rejected by one or both

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21 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 public interest.

parties. Once authority to proceed has been granted, the claimant has three months to file the action in court.

## 2. Ordinary Proceedings

Court proceedings are initiated by the claimant filing a detailed statement of claim (Article 221). The court 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, the court can decide solely from the statement of claim (provided the court considers it is in a position to make a decision on the facts available to it). Otherwise, the court will summon the parties to the main hearing (Article 223 II).

After the statement of defence is received, the court has several choices regarding the next procedural steps. It can proceed directly to the main hearing, order an instruction hearing or order a second written exchange before the main hearing. 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 will have the burden of proof for each fact. An instruction hearing can be held at any time during the proceedings. According to the Civil Procedure Code, the purpose of such an instruction hearing can be to discuss the dispute informally, complete the facts,<sup>22</sup> reach an agreement, or simply prepare for the main hearing (Article 226). Judges frequently and willingly make use of such instructional hearings for one simple reason: these hearings often serve the purpose of ending a dispute at an early stage of the proceedings by leading the parties to a settlement. This is because parties often become conscious at this stage that further litigation will be very costly and offers no predictable outcome. Settling the case early is not always in the interest of those seeking justice but is instead largely in the interest of the judges, who can save themselves the time-consuming processes of taking evidence and drafting judgments. Critical voices therefore claim that instruction hearings are legally approved ways for judges to avoid additional work.

The main hearing follows a formal structure. First, there are two rounds of oral statements by each party (Article 228). The second oral statement in the main hearing provides the parties with an opportunity to comment on the

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22 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.

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. 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.

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 written statement be produced within ten days (Article 239).

Option 1	Option 2	Option 3
Conciliation Attempt		
Preparation of the Main Hearing		
<ul style="list-style-type: none"> <li>– Initiation by Action and Statement of Grounds</li> <li>– Statement of Defence</li> </ul>	<ul style="list-style-type: none"> <li>– Initiation by Action and Statement of Grounds</li> <li>– Statement of Defence</li> <li>– Instruction Hearing</li> <li>– Ruling on Evidence</li> </ul>	<ul style="list-style-type: none"> <li>– Initiation by Action and Statement of Grounds</li> <li>– Statement of Defence</li> <li>– Possibly Instruction Hearing</li> <li>– Second Exchange of Written Submissions</li> <li>– Possibly second Instruction Hearing</li> <li>– Possibly Ruling on Evidence</li> </ul>
<p>Main Hearing</p> <ul style="list-style-type: none"> <li>– Party Submissions with Reply and Rejoinder</li> <li>– Ruling on Evidence</li> <li>– Taking of Evidence</li> <li>– Closing Submissions</li> </ul>	<p>Main Hearing</p> <ul style="list-style-type: none"> <li>– Party Submissions with Reply and Rejoinder</li> <li>– Taking of Evidence</li> <li>– Closing Submissions</li> </ul>	<p>Main Hearing</p> <ul style="list-style-type: none"> <li>– Party Submissions with Reply and Rejoinder</li> <li>– Taking of Evidence</li> <li>– Closing Submissions</li> </ul>
Judgement		

Figure 4: Possible Options for the Conduct of Ordinary Proceedings

### 3. Other Proceedings

Simplified proceedings (Articles 243-247) are less formal than ordinary proceedings and attribute a more active role to the court. A claimant may submit her claim to the court orally.

Summary proceedings (Articles 248-270) are even simpler and more expedient than simplified proceedings. They mostly apply in urgent matters and requests for provisional measures (i.e. stopping the publication of defamatory writings). They also apply in specific proceedings under the Debt Enforcement and Insolvency Act. As in simplified proceedings, a claimant may present the claim orally. In the context of summary proceedings, documents are principally the only evidence used.

## 4. Appellate Proceedings

The Civil Procedure Code comprises three appellate remedies: appeal, objection, and review.

An appeal (Articles 308-318) is the ordinary remedy against decisions of first instance if the value in dispute amounts to at least CHF 10,000. Decisions in non-financial matters can always be challenged by appeal. An appeal must be filed in writing within 30 days of service of a decision (Article 311 I), and may be filed either on grounds of the incorrect application of law or the incorrect establishment of facts.

Where the conditions for lodging an appeal are not met, a party may file an objection (Articles 319-327a). Objections are admissible on the grounds of the incorrect application of the law and obviously incorrect taking of evidence (Article 320). The deadline for filing an objection is 30 days from service of a court's decision (Article 321 I), or within 10 days in summary proceedings (Article 321 II).

Finally, a party can apply to have a proceedings reopened through a review (Articles 328-333) either if significant facts are discovered which were not available in the original proceedings (Article 328 I lit. a) or if the decision was unlawfully influenced (Article 328 I lit. b). This could include situations where an offence was committed during the proceedings—for example, a party to the original proceedings committing perjury (Article 308 Criminal Code) or perjury being committed by an expert witness, or a false translation of a given document being provided (Article 307 Criminal Code). A review must be filed within 90 days of the discovery of the relevant facts (Article 329 I) and within 10 years of the date the decision came into force (Article 329 II).

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).



## IV. Landmark Cases

### 1. Dürrenmatt's Heirs<sup>23</sup>

The case of DÜRRENMATT's heirs established an important principle as to when persons will be required to appear jointly in proceedings. The famous Swiss author FRIEDRICH DÜRRENMATT died on 14 December 1990, leaving his wife CHARLOTTE DÜRRENMATT and his three children as his sole heirs. The publishing house he had worked with erroneously transferred the rights of theatrical performances of DÜRRENMATT's 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 the common property of his heirs; hence, they could only appear as joint plaintiffs. Consequently, CHARLOTTE DÜRRENMATT—who had been listed alone in the statement of claim—was not a legitimate plaintiff. This principle was largely designed to protect an heir from suffering damages or losses due to the actions of another heir alone.

This decision occurred before the Civil Procedure Code 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 the rules for when two or more persons must appear jointly in proceedings has not changed since the entry into force of the Code of Civil Procedure.

### 2. Agreement on Jurisdiction<sup>24</sup>

In a case relevant to the rules on court jurisdiction, the claimant—a lawyer—filed an action to claim 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&Cs), which the defendant had signed. The Federal Supreme Court stated that parties can only waive jurisdiction at

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23 DFC 121 III 118.

24 DFC 124 III 72.

the defendant's domicile if there is a consensus between them. Such a consensus will only exist 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 include, for example, the business experience of the waiving party and the arrangement of and emphasis on the jurisdiction clause within the T&Cs. The Federal Supreme Court established that a jurisdiction clause must be on prominent display and be clearly marked out in the T&Cs where one of the contracting parties does not have a lot of business experience. Otherwise, it cannot be assumed that that party wanted to waive jurisdiction at his or her domicile.

This principle of the interpretation of jurisdiction clauses was developed before the Federal Code of Civil Procedure entered into force. Nonetheless, the Swiss Federal Supreme Court has confirmed it in several more recent decisions following the Code's enactment.<sup>25</sup>

### **3. Filing an Appeal at a Court without Jurisdiction<sup>26</sup>**

A woman filed an action against her employer before the employment court in Zurich, which subsequently dismissed her case. She filed an appeal against this judgement on the last day of the time limit for doing so via the Swiss Postal Services, addressing it to the employment court that had dismissed her claim. In reality, the High Court of Zurich 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 there was a lack of a legal provision for situations where the deadline to appeal was missed due to the application being filed at a court without jurisdiction and that this void had not been intended by the legislator; there was thus a gap in the law.

Before the Civil Procedure Code entered into force in 2011, the Federal Supreme Court had already held that it was a "principle of civil procedure" that filing an appeal at a court without jurisdiction 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 continued to apply following the entry into force of the Civil

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25 Judgment of the Federal Supreme Court 4A\_4/2015 of 9 March 2015 c. 2; Judgment of the Federal Supreme Court 4A\_247/2013 of 14 October 2013 c. 2.1.2.

26 DFC140 III 636.

Procedure Code, albeit it held that there had been some slight modifications to the principle. In particular, given that court organisation is still an area within the cantons' domain, the Federal Supreme Court considered that it might not be possible for a federal authority or an authority from another canton that mistakenly receives an appeal to accurately determine the authority with jurisdiction, in order to forward the appeal on to it. Hence, the principle now only applies where 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 met. By contrast, if an appeal remedy is filed with any other authority without jurisdiction, compliance with the deadline can only be assumed if the authority without jurisdiction forwards the documents to the authority with jurisdiction within the deadline: notably, such authorities have no legal obligation to do so. Of course, there is some inconsistency to this rule: although the Federal Supreme Court obviously does not have confidence that the cantonal courts will be able to determine the competent authority, it nonetheless expects the claimant to do the same thing.

As the claimant in this case had filed the appeal against the judgement of the employment court with the first instance employment court itself within the time limit, the deadline was held to have been met.

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Marc Thommen

# Criminal Law

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# I. Criminal Code

The first section of this chapter sets out a brief history of the codification of criminal law across Switzerland (1.). Subsequently, the gradual development of the criminal code applicable today, as designed by CARL STOOSS, is examined (2.). The content and form of the current criminal code will then 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,<sup>1</sup> such as sentencing equality and the abolishment of general confiscations.<sup>2</sup> After the decline of the Helvetic Republic in 1803, the cantons reinstated their own criminal codes. The Canton of Fribourg, for example, reintroduced the *Constitutio Criminalis* of Emperor Carl V of 1532 (“Carolina”).<sup>3</sup>

The Switzerland we know today was founded in 1848 in the aftermath of the *Sonderbund* war. The Protestants prevailed in that war. However, the founding fathers of the Swiss Constitution took the interests of the defeated Catholics cantons into account when creating the Constitution. Hence, it was not a central Swiss Republic but the *Swiss Confederation* that emerged following the end of the civil war.

One of the main features of the federal system as founded in 1848 was the autonomy of the 25 cantons:<sup>4</sup> the cantons kept their legislative independence and thus their own criminal codes. Considering the size of the cantons (for example,

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1 STEFAN TRECHSEL / MARTIN KILLIAS, Criminal Law, in: Francois Dessemontet / Tugrul Ansay, (eds.), Introduction to Swiss Law, 3rd edition, The Hague 2004, pp. 245, p. 246.

2 General confiscation was the practice to seize all the assets of a person—often a political rival—upon conviction and thereby ruining them economically.

3 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.

4 There were 25 cantons at this point in time. In 1979 Jura became the 26<sup>th</sup> Swiss canton.

even today the Canton of Glarus has a population of only 40,000 inhabitants), the existence of numerous criminal codes proved to be very inefficient.

## 2. Legislation

At the end of the 19<sup>th</sup> century the Swiss Lawyers' Association pushed for a nationwide codification of the criminal law. The Swiss Federal Council asked CARL STOOSS, a professor of criminal law at the University of Bern, to issue a draft. In 1893 he published the first draft of the Swiss Criminal Code. At that time, nobody anticipated that the legislative procedure would take a record-breaking 50 years to complete. On 21 December 1937, the highly controversial Swiss Criminal Code was finally adopted. Its opponents claimed that a unified codification for Switzerland undermined cantonal autonomy in the crucial field of criminal law. Further, Catholic groups opposed the Code because it legalised (medically warranted) abortions.<sup>5</sup> The Code's abolition of the death penalty was also a contested issue.<sup>6</sup> On 3 July 1938, a slim majority of 53.5% of the electorate approved the new Criminal Code in a referendum. The Code officially came into force on 1 January 1942.

## 3. Content

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).<sup>7</sup> *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 (normally CHF 30–3,000, 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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5 ZURKINDEN, p. 296 with further references.

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6 ZURKINDEN, p. 296 with further references.

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7 In the following text, a reference to an "Article" which does not specify the source of law is a reference to the Swiss Criminal Code of 21 December 1937, SR 311.0; see for an English version of the Swiss Criminal Code [www.fedlex.admin.ch \(perma.cc/V8MH-MMRB\)](http://www.fedlex.admin.ch/perma.cc/V8MH-MMRB).



The Swiss Criminal Code contains 392 Articles. It is divided into three books. *Part I* (Articles 1-110) largely sets out the *general provisions* on criminal liability (omissions, intention and negligence, justifications (“defences”), 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: 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>8</sup> Conditional intent, or *dolus eventualis*, is possessed when the offender deems it possible that a certain outcome will ensue and accepts that, if it does, harm will occur.<sup>9</sup>

The Swiss legislator’s inclusion of this general part, setting up the common elements of crime and sentencing, was inspired by a long-established 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 came before this, such as the Carolina (1532), had only contained specific, casuistic provisions. The move towards including both general and specific parts allowed criminal codes to be kept much shorter. Having general rules removes any gaps in criminal liability that would otherwise have to be determined by analogy. Further, by predetermining liability in a general manner, the legislator hoped to minimise the influence of courts and academics on the interpretation of the 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). Further, it contains criminal offences which protect collective interests such as the family unit (incest, bigamy), public safety (arson), public health (transmission of diseases), public order (rioting, criminal organisations, racial discrimination), prevention of 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).

*Part III* (Articles 333-392) deals with the introduction and application of the Swiss Criminal Code.

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8 ANNA PETRIG / NADINE ZURKINDEN, *Swiss Criminal Law*, Zurich / St. Gallen 2015, p. 69.

9 PETRIG/ZURKINDEN, p. 70; see below pp. 426, Landmark Case 3 Deadly Car Race.

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>10</sup> In practice, these laws are highly relevant, in particular road traffic offences.<sup>11</sup>

## 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 and 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 either by curing them of any mental deficiencies or addictions (therapeutic measures) or by permanently incapacitating them (indefinite incarceration).

The dual system of sanctions was CARL STOOSS' invention. The idea received universal acclaim, and other jurisdictions soon followed the approach.<sup>12</sup> The new concept was successful because it appeased the debate over the legitimacy of criminal punishment. Scholars had 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) criminals deserve it, i.e. theories of just deserts; (2) punishment will teach criminals a lesson about their own behaviour and thus deter future offending, i.e. specific prevention; (3) a system of criminal punishment will also deter wider society from offending, i.e. general prevention.<sup>13</sup>

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10 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 of the Narcotics Act [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/8VTQ-QHW4](https://perma.cc/8VTQ-QHW4)); Federal Act on Weapons, Weapon Equipment and Ammunition of 20 June 1997 (Weapons Act, WA), SR 514.54; see for an English version of the Weapons Act [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/NY9Q-Q2BG](https://perma.cc/NY9Q-Q2BG)).

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11 In 2019, there were 56,521 convictions of adults for road traffic offences, which is around 53% of all 107,047 convictions of adults (source: Federal Statistical Office [[perma.cc/QS9M-ALUL](https://perma.cc/QS9M-ALUL)]). In 2020 the number of cases dropped significantly, which is probably linked to the Covid-19 pandemic.

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12 ZURKINDEN, p.304.

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13 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



Just deserts theories of punishment are only concerned with retribution for past acts. They are also called *absolute* theories because they assert that punishment does not serve any future societal goals. In contrast, special and general prevention are known as *relative* theories because punishment must always relate to a future societal goal (deterrence, safety etc.).

These fundamentally different views on punishment led to the development of two opposing schools of thought. The *classical* school spear-headed by KARL BINDING (1841-1920) advocated that punishment should only be concerned with retribution. Sentences are imposed because offenders need to get their just deserts 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), asserted that punishment must achieve at least one of the following goals: to rehabilitate (“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 treated offenders as mere objects rather than autonomous human beings, by trying to shape them into a form more in line with societal standards (special prevention) or by making an example out of them to deter criminality in the wider public (general prevention). Simultaneously, the modernists were also right to assert that punishment cannot be entirely detached from wider 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 use of fines, parole, educational prison schemes, pedagogical rather than punitive sanctions for young offenders, and of course protecting society from dangerous offenders through incarceration or internment.

CARL STOOSS’ landmark achievement was to accommodate both schools’ beliefs in his dual system of sanctions, formalised in the Criminal Code.<sup>14</sup> Sentences serve the purpose of retribution, while measures 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>15</sup> In 2002, Switzerland ratified

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14 ZURKINDEN, p. 304.

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

Protocol No. 13 to the ECHR, which requires the abolition of the death penalty in all circumstances.

Throughout the Middle Ages and into modern times, the death penalty was commonly employed in Switzerland. Switzerland 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>16</sup> was beheaded immediately after the council of Glarus convicted her of witchery. She had “confessed” under torture.<sup>17</sup>

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 abolished it entirely.<sup>18</sup> Further, in 1874, Article 65 of the Federal Constitution established a total ban. This prohibition only lasted for a couple of years, however. After a series of murder cases in the late 1870s, it was revoked by popular vote. Henceforth, the death penalty, once again, was only forbidden as punishment for political crimes. This led to several cantons reintroducing capital punishment.<sup>19</sup>

In developing the current Swiss Criminal Code, there was fierce debate over whether to include the death penalty. Ultimately, the decision was taken to establish a blanket ban. The federal legislator took this decision in 1937, even though the Constitution would have permitted the use of the death penalty as punishment for all crimes but political ones up until 2000.<sup>20</sup>

For the cantons, the enactment of the Swiss Criminal Code voided any provisions allowing the death penalty (Article 336 lit. b Criminal Code of 1937).

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16 Due to differing accounts of this case, it is unclear on whether ANNA's last name was GÖLDI or GÖLDIN.

17 ANNA GÖLDI was employed as a maid by JOHANNJAKOB 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.

18 Including Fribourg, Neuchâtel, Zurich, Ticino, Geneva, Basel-Stadt, Basel-Landschaft, and Solothurn.

19 Appenzell Innerrhoden, Obwalden, Schwyz, Zug, St. Gallen, Lucerne, Valais, Schaffhausen, and Fribourg.

20 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 peacetime. 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 come into force until 1 January 2000.

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 by cantonal authorities. 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. His execution was highly controversial: even the policeman's widow had requested a pardon.

Furthermore, the Federal Criminal Code of the Military provided for 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. In September 1944, WALTER LAUBSCHER and HERMANN GRIMM were tried for espionage. They had disclosed military defence positions (bunkers and canons) to Germany. The military tribunal found them guilty of treason and sentenced them to death. On 7 December 1944, they were executed by a military firing squad in a forest at Bachs near Zürich.

As mentioned above, on 3 May 2002, Switzerland ratified Protocol No. 13 to the ECHR, thereby committing to banning the death penalty in all circumstances without the possibility of derogation. It is not totally clear, however, that this Protocol would prevent Switzerland from re-introducing the death penalty entirely. 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 No. 13, which would allow Switzerland to reintroduce the death penalty.<sup>21</sup>

Aside from the legal aspects, public debate over the use of the death penalty continues. In 1985, a popular initiative<sup>22</sup> "to Save our Youth" was launched proposing the reinstatement of the death penalty for those convicted of selling hard drugs. The committee, however, 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 that this was just a PR-stunt to raise awareness for victims of such a crime, and their families. Nevertheless, it once again sparked huge controversy.

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21 This sort of argument employs the so-called *Schubert* exception, which is discussed in the chapter on International Relations, pp. 152: Where the Federal Assembly has intentionally enacted legislation which violates a treaty obligation, the authorities shall apply the federal act. The *Schubert* exception does not apply in the case of treaties which guarantee fundamental rights, however, such as the ECHR and the Free Movement Agreement (see as some examples DFC 125 II 417, DFC 131 II 352 and DFC 142 II 35); the rights conferred by such instruments must be respected in all cases.

22 Then Article 121 II Constitution of 1874; today: Article 139 Constitution.

## 6. Euthanasia / Assisted Suicide

A further particularity worth discussing is the Swiss regulation of euthanasia and assisted suicide. Regarding suicidal persons themselves, CARL STOOSS had stated in 1894: they “*deserve pity, not punishment*”. Thus, attempted suicide was not criminalised under Swiss Law. It was, however, at the time of drafting the Criminal Code, a matter of some controversy whether the removal of criminal liability should be widened to apply to persons who aid and abet suicide.

The legislator decided that helping someone to die out of compassion and empathy should not constitute criminal wrongdoing. *Assisted suicide* was therefore legalised in certain circumstances through 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 thus 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 commit suicide with a lethal dose of sodium pentobarbital is not liable under Article 115. 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 to commit suicide, even by simply accompanying them to an organisation like Dignitas, are often not protected by this provision: due to their likely position as heirs to the suicidal individual, they risk being deemed to have acted for selfish motives even if, in reality, they were spurred by compassion.

*Passive euthanasia* is also permitted under Swiss criminal law. This is a situation where death ensues from a deliberate decision *not* to intervene or pursue life-saving measures and this “failure” to act corresponds with the will of the person concerned. For example, a person with a heart attack who has refused cardiopulmonary resuscitation (CPR), or an elderly person with pneumonia who refuses to be treated with antibiotics, or discontinuing the parenteral nutrition of a person in coma, where this is what the coma patient herself would have wished. According to the prevailing opinion, the switching off of ventilation in paraplegic persons willing to die also falls under passive euthanasia.

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>23</sup> This only applies when the person failing to act is under a statutory or contractual obligation to safeguard the victim’s life (Article 11): for example, the victim’s physician or spouse. However, in the circumstances outlined

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23 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 could reasonably have been expected to offer aid, shall be liable*”).

above which constitute passive euthanasia, criminal responsibility is not incurred. In such a case, the obligation to safeguard life is outweighed by the fact that intervening against the patient's will would in itself constitute a crime (for example, assault or coercion).

Swiss law, however, does not permit *active euthanasia*. This encompasses situations where a person's death is caused by a willful *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>24</sup> Assisted suicide and active euthanasia can be distinguished according to who is in control of the death-inducing event. When administering a lethal injection, the doctor acts, whereas when taking a lethal dose of sodium pentobarbital, the person who wants to die is in control of what happens.

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 categorised as a misdemeanour.<sup>25</sup>

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, life is not regarded as "untouchable" under Swiss law. This is illustrated by the law on passive euthanasia or the legality of killing in self-defence (Article 15). Secondly, a line must be drawn between what is considered "active" and "passive", but this is not always simple. For example, there is an inherent problem with the prevailing view in Switzerland that turning off a life-sustaining machine at the patient's request does not constitute an *active* killing punishable by Article 114. The rationale is that removing any life-sustaining measures is morally equivalent to never beginning them in the first place—which Swiss law permits. However, switching off or unplugging a machine is clearly an *active* behavior. Rather than redefining certain acts so that they are classified as omissions to prevent any criminal liability attaching under Article 114, active euthanasia should be legalised.

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24 Judgement of the Bezirksgericht Dielsdorf/ZH, 15 December 2003 (No. GG030076).

25 See further: MARC THOMMEN, Consent, in: Pedro Caeiro / Valsamis Mitsilegas / Sabine Gless (eds.), *Elgar Encyclopedia of Crime and Criminal Justice*, Cheltenham/Northampton, 2023 (forthcoming; preprint available at [perma.cc/Y955-AGGS]).



## II. Principles

This section discusses key principles of the Swiss legal system. Two of the main principles in Swiss criminal law are legality (1.) and no punishment without culpability (2.).

### 1. Nulla Poena Sine Lege

Swiss criminal law is dominated by the *principle of legality*. Article 1 states that behaviour may only be sanctioned (i.e. through sentences and measures) where this is explicitly provided for in the law.<sup>26</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 states as such. For example, today there is no rule in the Swiss criminal code prohibiting homosexual acts.<sup>27</sup> Thus, 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 in Switzerland no one can be sentenced to death, even for the most heinous crime.

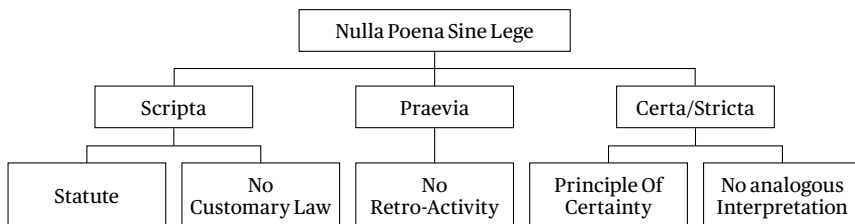


Figure 2: Principle of Legality

26 The title of Article 1 (“No penalty without a law”) in the “official” translation by the Swiss Government is incorrect; recte: no sanction without law.

27 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.

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. First, all crimes must be laid down by a *formal* act of Parliament (statute). An ordinance by the Federal Council will not suffice. Second, this principle precludes the creation or existence of customary criminal law. For example, several cantonal criminal codes used to prohibit extramarital sexual relations. The Swiss Criminal Code, however, does not explicitly classify extramarital sex as a criminal offence. Thus, a court could not convict an adulterer on the grounds that adultery is forbidden under customary law in Switzerland.

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 legalised in all circumstances 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*. Potentially affected persons 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 three units of monetary penalty to 20 years of imprisonment. The *nulla poena sine lege certa/stricta* principle also prohibits criminal law from criminalising behaviours based on analogy. 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* (no punishment without culpability) is crucial to Swiss criminal law. In fact, to understand the notion of *culpa* (“*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.

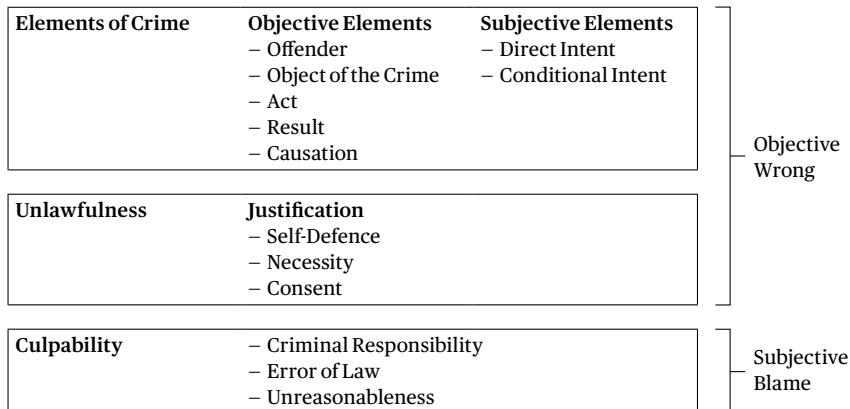


Figure 3: Criminal Liability

Criminal liability in Swiss law is a three-stage concept: all three stages of the test must be met for criminal liability to apply. First, the objective and subjective elements of the crime must 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, there is a consideration of whether the act was unlawful. 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 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 criminally held to account. An example would be an offender who has a severely low IQ, although notably this ground is rarely accepted by courts. Children under the age of ten are legally excluded from criminal responsibility (Article 3 Juvenile Criminal Law Act).<sup>28</sup> Their inability to fully assess wrongfulness is presumed by law. Criminal responsibility is also excluded if a person can assess wrongfulness but is unable to act accordingly. This is the ground which most often applies to exclude culpability in practice: an inability to control one’s actions despite knowing they are wrong. This ability to restrain oneself may be absent in some

28 Juvenile Criminal Law Act of 20 June 2003, SR 311.1.

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 the latter is where the defendant commits an assault just after discovering that his/her partner is having 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 here the reason for this failure is not a mental deficiency: instead, it is that they are unaware or have an incorrect understanding of the relevant law. However, the standard is high. An error of law will only successfully exclude 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 the concept of the legal age of consent. He had thought that sexual intercourse with a minor was only punishable if he had no intention to marry his sexual partner.<sup>29</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 to save his or her own life. Had the famous English *R v. Dudley and Stephens* case of 1884<sup>30</sup>—where three shipwrecked sailors killed and then ate a cabin boy to avoid starvation—been judged in Switzerland, the defendants would have to have been acquitted. Though the killing was unlawful, it would have been considered 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.

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29 DFC 104 IV 217.

30 *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 criminal law rulings of the Federal Supreme Court will be discussed.

### 1. Rolling Stones<sup>31</sup>

In the evening of 21 April 1983, two men (A and B) were on their way home from their cabin in the Toss river valley near Zurich. They spotted two big stones (individually weighing 52 kg and 100 kg) at the top of a 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. Until this ruling, the notion of co-offending had been strictly limited to intentional crimes. This appeared to be logical because the conventional view of co-offending generally requires a conspiracy: at least two persons who embark on a common criminal pursuit. In the “rolling stones” case there was no joint decision (conspiracy) to kill the fisherman. However, 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>32</sup>

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31 DFC 113 IV 58.

32 In agreement 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 by omission—this presupposes A and B are each in “guarantor” position to one another, due to the fact they both created a risk (i.e. they would have incurred criminal liability for failing to prevent each other from rolling the stones down the hill), p. 124.

## 2. Domestic Tyrant<sup>33</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 that year. On 15 March 1993, Y showed his wife a revolver he had bought to kill her with. 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 18–excusable act in a situation of necessity). She was excused because her life was in danger and she saw no other way out.<sup>34</sup>

This 1995 case seems to send out a very strong message against the perpetrators of 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 seek help before resorting to such an act.

## 3. Deadly Car Race<sup>35</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.

Both 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

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33 DFC 122 IV 1.

34 See unreasonableness standard, p. 424.

35 DFC 130 IV 58.

always classified as criminal negligence. The Supreme Court held 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 at that time of three years for a negligent double homicide simply did not seem to 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>36</sup> It is much more likely that they (wrongly) trusted their driving skills and hoped for a lucky outcome.<sup>37</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 holds a maximum prison sentence of 7.5 years.<sup>38</sup>

#### 4. Hiking in the Nude<sup>39</sup>

On a warm and sunny Sunday afternoon in autumn 2009, X (45 years old) 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. One 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, given that the Federal Parliament has exclusive legislative competence in the field of sexual offences. The Court found that

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36 As is required for the offender to possess conditional intent, see p. 423.

37 See DFC 133 IV 9.

38 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).

39 DFC 138 IV 13.

because hiking in the nude did not qualify as a sexual offence under federal jurisdiction, like exhibitionism (Article 194), pornography (Article 197) or sexual harassment (Article 198), the cantonal legislator was entitled to legislate on indecency. Secondly, the Court considered whether the notion of “indecent behaviour” in Article 19 of the cantonal code was sufficiently clear to satisfy the *nulla poena sine lege* principle. They held that the provision was sufficiently clear, finding that hiking in the nude was obviously indecent behaviour.

Both elements of the Court’s assessment are questionable. In terms of the canton’s competence to legislate on indecent behaviour, the Federal Parliament has generally restricted sexual offences to harmful behaviour (rape, sexual harassment, etc.). Although Parliament made some specific exceptions (e.g. exhibitionism, pornography) to this general rule, this was arguably the federal legislator setting the outer limit for the criminalisation of immoral conduct. Following this logic, there was no basis for a cantonal rule on indecent behaviour: Appenzell Innerrhoden had acted outwith their legislative competence (“*ultra vires*”).

As to the Court’s ruling that Article 19 was sufficiently clear to satisfy the principle of *nulla poena sine lege*, they missed the key point. The question was not whether hiking in the nude *could* 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 hiking in the nude, they should issue an unambiguous rule, for example: “Any person who displays nudity in public is liable to a fine.” This would protect the vital principle of legal certainty.



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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 law 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

Criminal law and criminal procedure were traditionally a key legislative area for the cantons: neither the Constitution of 1848 nor 1874 provided for centralised legislative powers.

Throughout the 20<sup>th</sup> century, more than 50 different codes of criminal procedure existed in Switzerland. This variety of procedural rules proved extremely inefficient in practical terms: 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. 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 therefore put to popular vote and approved in a landslide victory on 12 March 2000.<sup>1</sup>

## 2. Legislation

In the early 1990s, a government commission proposed the unification of the existing criminal justice codes into one Federal Code of Criminal Procedure. In 1999, the Federal Council mandated NIKLAUS SCHMID, professor of criminal law at the University of Zurich, to draw up a Federal Code of Criminal Procedure. From 2001-2003, the preliminary draft was submitted to a national consultation procedure. Almost everyone welcomed the idea of unification. The most controversial issue was whether the preliminary proceedings should

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1 86.4% of the voters and all cantons approved the reform. The turnout was 42%.

exclusively be led by a prosecutor or also involve investigative judges. Finally, the government proposed a purely prosecutorial system. This proposal was supported by Parliament. Subsequently, Parliament passed the Swiss Criminal Procedure Code on 5 October 2007. It entered into force on 1 January 2011.<sup>2</sup>

The nationwide standardisation of criminal procedure under the Swiss Criminal Procedure Code of 2007 was an important step in the right direction in many ways. For criminal defence lawyers, it became a lot easier to represent defendants in other cantons. The unification also sparked a national academic debate about Swiss criminal procedure.

Still, there remains much room for progress today. The cantonal *organisation* of the criminal justice authorities and the *execution* of sanctions must be harmonised on a national level. The Administrative and Military Criminal codes are also outdated.

The two biggest contemporary challenges in terms of legislation on criminal procedure, however, lie outside the traditional realm of the subject. Firstly, the always evolving and increasing threat of terrorism has presented the challenge of bringing police and secret service legislation in line with criminal procedure legislation. For example, one issue is whether phone calls that have been intercepted by secret service agencies can be handed over as evidence to the criminal justice authorities. Secondly, administrative laws provide for many sanctions that have traditionally not been regarded as criminal penalties: for instance, federal agencies can ban bank managers from practicing (Article 33 Financial Market Supervision Act)<sup>3</sup> or close pharmaceutical firms (Article 66 Therapeutic Products Act)<sup>4</sup>. These sanctions clearly meet the standard of “criminal charges” as developed in case law dealing with Article 6 I ECHR.<sup>5</sup> Hence, the procedures which lead to these sanctions being imposed should also meet criminal procedure standards.<sup>6</sup>

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2 The Swiss Juvenile Criminal Procedure Code was adopted on 20 March 2009 and entered into force on 1 January 2011 (SR 312.1).

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3 Federal Act on the Swiss Financial Market Supervisory Authority of 22 Juni 2007 (Financial Market Supervision Act, FINMASA), SR 956.1; see for an English version of the Financial Market Supervision Act [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/GF2U-WF7D](https://perma.cc/GF2U-WF7D)).

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4 Federal Act on Medicinal Products and Medical Devices (Therapeutic Products Act, TPA), SR 812.21; see for an English version of the Therapeutic Products Act [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/8CE5-Z27B](https://perma.cc/8CE5-Z27B)).

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5 See ECtHR, *Engel and Others v. the Netherlands*, App no 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976, paragraphs 82–83.

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6 Such as “*nemo tenetur*”, see p. 442.

### 3. Content

The Swiss Criminal Procedure Code contains 457 Articles and is divided up into 12 parts.<sup>7</sup>

*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 and double jeopardy.

*Part 2* (Articles 12-103) regulates the *criminal justice authorities* (police, prosecution, and courts). As mentioned above, the legislator established a *prosecutorial system*. The preliminary proceedings are led by the prosecutor (Article 61 lit. a). There is no (independent) investigative judge or magistrate in charge of the proceedings. Some measures, such as detention on remand or the wiretapping of phones, must be ordered or approved by a judge at the “compulsory measures court” (Article 18 I). Trial cases are handled by the courts of first instance (Article 19). Their decisions can be challenged at the court of appeal (Article 21).

*Part 3* (Articles 104-138) defines the *parties* and the *other persons* involved in the proceedings. 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 *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 have a say in the prosecution and conviction of a defendant (“criminal claim”, Article 119 II lit. a). They can also choose to file a “civil claim” against the defendant within the criminal proceedings (Article 122), to allow both criminal and civil liability to be

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<sup>7</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.fedlex.admin.ch/perma.cc/4NX9-XX6Y](http://www.fedlex.admin.ch/perma.cc/4NX9-XX6Y).

determined in the same court proceedings. For example, 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)<sup>8</sup> rather than negligent killing (Article 117 Criminal Code).<sup>9</sup> The parents could also have filed a claim for civil damages in these criminal proceedings. The criminal court would then have decided these claims (Article 124).

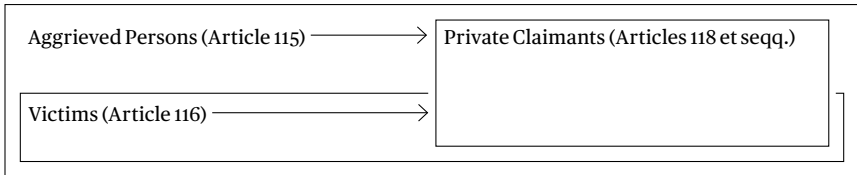


Figure 1: Private Claimants

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 is a particularity of the prosecutorial system (see Figure 2).

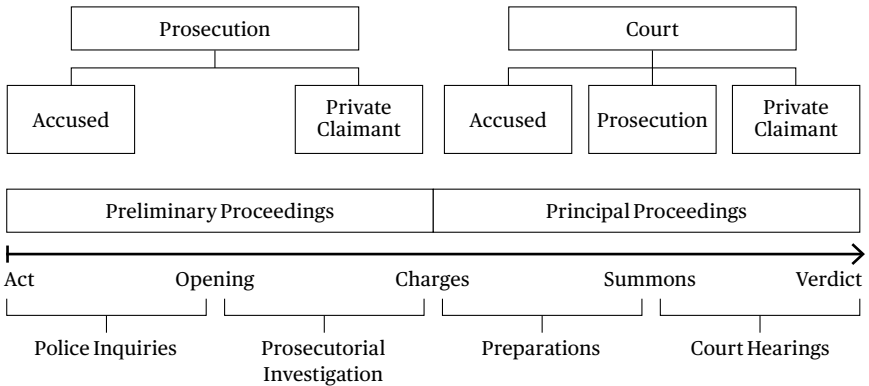


Figure 2: Role of the Prosecution in the Proceedings

8 Swiss Criminal Code of 21 December 1997, SR 311.0; see for an English version of the Criminal Code [www.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/V8MH-MMRB](https://perma.cc/V8MH-MMRB)).

9 See chapter on Criminal Law, pp. 426.



*Part 4* (Articles 139–195) contains the rules on *evidence*. Criminal justice authorities can rely on any lawfully obtained evidence deemed suitable to establish 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 made up their minds based on the files of the proceedings (Article 318 II). This makes it much harder for the defence to tell their side of the story. The rule is in potential conflict with Article 6 III lit. d ECHR which guarantees the defendant’s right to “*examine or have examined witnesses against him*”.<sup>10</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>11</sup> and vice versa. 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? In response to these potential practical issues, the Supreme Court has allowed for some narrow exceptions to the right to participation.<sup>12</sup> These restrictions do not apply to the defence counsel’s right to be present in police interrogations (Article 159 II).

Part 4 also sets out the rules for the proper taking of evidence. It prohibits the obtaining of evidence through coercion, violence, threats, promises, deception or any measures that interfere with a person’s freedom of will (Article 140 I). Hence, neither drugs nor polygraphs may be administered, not even

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10 According to ECtHR, *Perna v. Italy*, App no 48898/99, 6 May 2003, paragraph 29, the aim of Article 6 III lit. d ECHR is to ensure “equality of arms” rather than mandating the examination of every witness on the defendant’s behalf. In ECtHR, *Polyakov v. Russia*, App no 77018/01, 29 January 2009, paragraphs 34–35 the Court held that 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.

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11 Article 147 I guarantees parties the right to be present when the public prosecutor and the courts take evidence and to put questions to the persons being questioned.

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12 DFC 139 IV 25: The Court held that an accused person may be excluded from participating in the questioning of their co-accused where there is a concrete risk of collusion. See also DFC 140 IV 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.

when the individual consents to their use (Article 140 II). The Swiss Code of Criminal Procedure, in contrast to the Swiss Civil Procedure Code (Article 169), contains no statutory exclusion of *hearsay evidence*.<sup>13</sup>

Regarding the exclusion of evidence, Article 141 sets out three pivotal rules. 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 rendered 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 prosecute a serious criminal offence (Article 141 II). If the police forge a search warrant, for example, then any evidence obtained during the search is obtained in a *criminal manner*, given that 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, then “*the examination hearing is invalid*” (Article 177 I). Such evidence is *generally* inadmissible unless it is needed to secure the conviction of a serious crime. The courts must conduct a balancing exercise in this context:<sup>14</sup> the private interests of the accused must be 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>15</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 is—fairly unconvincingly—viewed to be an administrative rule.<sup>16</sup>

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13 STEFAN TRECHSEL/SARAH J. SUMMERS, *Human Rights in Criminal Proceedings*, Oxford 2006, p. 322.

14 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. However, the test formerly established by the Supreme Court of whether evidence could have been legally obtained did not make it into the new Code and can therefore henceforth be disregarded.

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15 DFC 130 I 126.

16 DFC 139 IV 128.

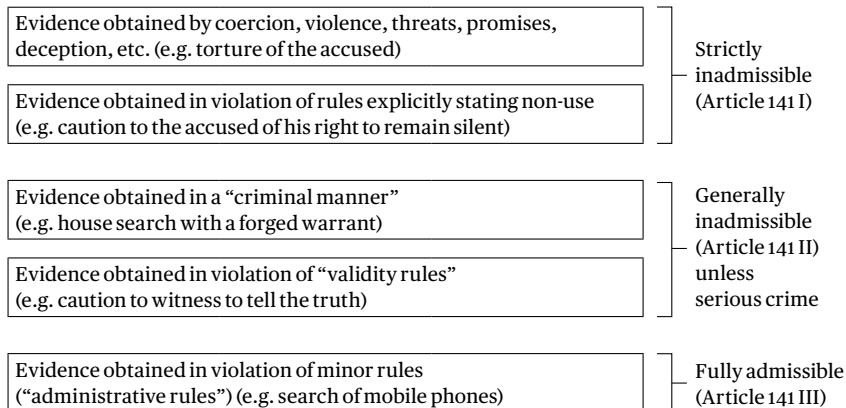


Figure 3: Evidence Exclusion

The rules on evidence exclusion need to be reconsidered. One key concern is the potential for illegally obtained evidence to be allowed into the courtroom if a serious crime is at issue (Article 141 II). For the accused, this means that the bigger the crime (and therefore the more serious the consequences for the individual accused), the smaller the chances of a fair trial.<sup>17</sup> Moreover, it is very hard to draw a clear line between validity rules and administrative rules. For example, the duty to obtain a search warrant has been viewed as an administrative rule in the past,<sup>18</sup> even though house searches clearly involve a strong interference with the accused’s privacy interests.

*Part 5* (Articles 196-298d) determines the 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, or 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 coercive measures can be ordered by the prosecution. Some measures that strongly interfere with fundamental rights must be ordered by a judge at the “compulsory measures

17 MARC THOMMEN/MOJAN SAMADI, *The Bigger the Crime, the Smaller the Chance of a Fair Trial?*, *European Journal of Crime, Criminal Law and Criminal Justice* 24(1) 2016, pp. 65 ([perma.cc/GB2F-D4ST](https://perma.cc/GB2F-D4ST)).

18 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 DFC 96 I 437 (von Daniken v. the Canton of Graubünden)*.

court”, for example, detention on remand or mass DNA screening. Some measures like surveillance of telecommunications or undercover operations must at least be retroactively approved 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 (either prior or retroactive). 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. The accused and other persons affected by the freezing order can at least challenge the order in court.

*Part 6* (Articles 299-327) sets out the rules for the preliminary proceedings (police inquiries, the opening and dropping of prosecutorial investigations, 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 (penal order, abbreviated 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 procedure in Switzerland is 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 must be brought to them by the prosecution (Article 9). Courts assess evidence freely (Article 10 II), following not specific rules but their “*conviction intime*”.<sup>19</sup> Court hearings are public and verdicts must be pronounced publicly (Article 69). In the following paragraphs, three fundamental principles will be examined.

### 1. Ex Officio Investigation

The Swiss criminal justice system is traditionally viewed as possessing an inquisitorial structure.<sup>20</sup> The criminal justice authorities (police, prosecution and courts) must inquire into the “material” truth ex officio. They must investigate exculpatory and incriminatory circumstances with equal care (Article 6 II). Whether it is acceptable to delegate the task of investigating exculpatory evidence to the prosecution is a highly debated issue. The *courts*, on the other hand, preside over the parties. They are in a much better position to consider and weigh arguments for and against the accused’s guilt. The problem, however, is that by the time the case comes to court the accused may already be at a disadvantage because of the prosecutor “cherry-picking” evidence. 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.

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19 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.

20 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*”) and JACQUELINE HODGSON, *French Criminal Justice: a Comparative Account of the Investigation and Prosecution of Crime in France*, Oxford 2005, p. 241.

## 2. Mandatory Investigation

The prosecution of criminal acts is mandatory (Article 7). 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 a complaint has been filed (Article 30 I Criminal Code).

There is only very limited prosecutorial discretion to not open an investigation or to drop charges (Article 8). Prosecution can be discontinued if defendants are considered to have already been sufficiently punished by the consequences of their actions:<sup>21</sup> an example was a defendant whose careless driving resulted in the death of her husband and grave injuries to her children.<sup>22</sup> Charges can also be dropped if reparations are made to the victim for any losses.<sup>23</sup> This exception is problematic due to its inherent inequality of treatment: escape from criminal liability is available only to those wealthy enough to properly compensate their victims.

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, especially in cases with no immediate victim (for example, eco-crimes or drug-selling).

## 3. Nemo Tenetur Se Ipsum Accusare

No one (*nemo*) is bound (*tenetur*) to accuse him- or herself (*se ipsum accusare*), Article 113 I. The privilege against self-incrimination encompasses the right to remain silent as well as the right to refuse co-operation 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 items or assets themselves. Obviously, the accused is protected from being coerced to provide evidence or to confess (Article 140 I).

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21 Article 54 Criminal Code.

22 DFC 119 IV 280.

23 Article 53 Criminal Code.

## III. Institutions and Procedure

The institutions of criminal justice and criminal procedure can best be understood by following the course of a typical case both in the preliminary (1.) and principal proceedings (2.). Subsequently, the extent to which the Swiss criminal procedural rules comply with the requirements of the Constitution and the ECHR will be examined (3.).

### 1. Preliminary Proceedings

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.

The same day, the farmer filed a complaint at the local police station and was questioned by the police. The filing of the complaint started the preliminary proceedings (Article 303). They are divided up into two stages:<sup>24</sup> the police inquiries and the investigation by the prosecutor (Article 299). The preliminary proceedings are led 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) and the farmer automatically acquired the status of a private claimant (Article 118 II).

The day after, 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>25</sup> X was interrogated by the police (Article 307 II, Article 312 I) and he denied the use of a firearm. He could have requested that a legal aid defence counsel

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<sup>24</sup> See Figure 2, p. 436.

<sup>25</sup> Federal Act on Weapons, Weapon Equipment and Ammunition of 20 June 1997 (Weapons Act, WA), SR 514.54; see for an English version of the Weapons Act [www.fedlex.admin.ch/perma.cc/NY9Q-Q2BG](http://www.fedlex.admin.ch/perma.cc/NY9Q-Q2BG).

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 fairly trivial crime (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). Alternatively, 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>26</sup>

The written records of the inquiry were then handed over to the prosecutor. If the prosecutor had thought it necessary, he could then have interrogated the accused. 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 penal 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. The requirements for issuing a penal order are either that the defendant has confessed to the police or that there is sufficient "objective" evidence as to the defendant's guilt (Article 352 I). On 9 September 2014, the prosecution served its penal order to X. He was found guilty 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 a fine of CHF 1,000. X's weapon was confiscated and he was ordered to pay the costs of the proceedings.

Once the penal 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 penal order would have come into force as a conviction, 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 private claimant (farmer).

The prosecutor then had to choose between upholding the penal order against X, issuing a new one, closing the investigation or bringing charges. In this case, the prosecutor decided to uphold the penal order and therefore the case was transferred to court. The penal order thus constituted the indictment (Article 356 I).

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26 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*" (ECtHR, *Dayanan v. Turkey*, App no 7377/03, 13 October 2009, paragraph 32).



## 2. Principle Proceedings

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 against X (Article 329 I) and scheduled the principal hearing (Article 331). From 15 October 2014, X was granted access to the court file for ten consecutive days. 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 as to whether the revolver had been used.<sup>27</sup> This refusal cannot be challenged (Article 331).

Courts of first instance are usually composed of three judges and a clerk. If the prosecution applies for less than two years of imprisonment the case may be heard by only one judge (Article 19 II). 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 must appear at court if it has requested a prison sentence of more than one year or if the court orders its participation (Article 337). The private claimant may be ordered to appear at the main hearings (Article 338). In X's case, both the prosecution and the private claimant were ordered to appear at court. The court hearing was open to the public (Article 69).

At court, the judge is required to interrogate the accused (Article 341 III). Private claimants, witnesses and experts may be heard but this will occur at the judge's discretion (Article 343). The court relies heavily on the written records of the prior interrogations conducted in the preliminary proceedings (Article 343). These statements do not have to be repeated at court. Hence, there is no cross-examination by the parties. The parties can submit additional questions to the president (Article 341 II). After the taking of the evidence, the parties plead in the following order: prosecution, private claimant and the accused or his or her defence counsel (Article 346). The accused always has the last word (Article 347), ensuring he or she can fully respond to all accusations which have been levelled against him or her.

After the hearing, the court retires to deliberate in private. The court must reach its verdict by a simple majority (Article 351). Only a few cantons allow judges who disagreed with the majority verdict to write a dissenting opinion.<sup>28</sup>

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27 See Judgment of the Federal Supreme Court 6B\_495/2016 of 16 February 2017 c.1.3.3.

28 See Article 134 of the Constitution of the Canton of Vaud.

In case of an acquittal, the defendant is compensated *ex officio* (Article 429). In cases where there is a conviction, the court determines the sanction (penalty and/or measure)<sup>29</sup> and orders the convicted person to pay the costs of the proceedings (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). It is only mandatory to produce written reasoning for the judgment in three circumstances: where a sentence of more than two years has been imposed; where a party requests it; or where a party lodges an appeal (Article 82).

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>30</sup> The Supreme Court decided that the cantonal court had applied the Criminal Code correctly. X's property rights had been infringed by the farmer. X was therefore in a situation of necessity. 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<sup>31</sup> 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.

### 3. Constitutionality

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

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29 For this dual system of sanctions see chapter on Criminal Law, pp. 414.

30 Federal Supreme Court Act of 17 June 2005, SR 173.110.

31 See above, pp. 437 and below, pp. 446.

chance to “tell his side of the story” or have any substantial involvement in the process.<sup>32</sup> This violates the accused’s right to be heard.

Secondly, 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>33</sup> the court’s practice here is an interference with the investigative stage. 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.

Third, penal order proceedings need to be improved. Although defendants can *de iure* take their penal order 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. The Swiss Code of Criminal Procedure allows penal orders to become final without being served (“fictitious service”). If a penal order is served fictitiously, it is not certain that the person concerned is aware of his conviction. Nevertheless, the sentence becomes legally binding ten days after this “service”. It is obvious that these “*secret convictions*” violate the European Convention on Human Rights. According to Article 6 ECHR, only those who know that they are about to be convicted can validly waive their right to a judicial review. The right to be informed of charges is also violated (Article 6 III lit. a ECHR). Therefore, penal orders cannot be served fictitiously. Whenever possible, they should be handed and explained to the accused in person.

Very rarely are penal orders explained or translated to the accused. This clearly violates the right to “have the free assistance of an interpreter” (Article 6 III lit. e ECHR).<sup>34</sup>

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32 For the associated problems of this state of affairs, see pp. 437.

33 The independence of the judiciary is regulated in Article 30 I Constitution (Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.fedlex.admin.ch](http://www.fedlex.admin.ch) [[perma.cc/7ARN-UVSH](http://perma.cc/7ARN-UVSH)]).

34 For an extensive analysis, see MARC THOMMEN, Penal Orders and Abbreviated Proceedings, in: Pedro Caeiro / Valsamis Mitsilegas / Sabine Gless (eds.), *Elgar Encyclopedia of Crime and Criminal Justice*, Cheltenham/Northampton 2023 (forthcoming; preprint available at [[perma.cc/J8UZ-PLLF](http://perma.cc/J8UZ-PLLF)]). The ECHR provisions on the right to a fair trial are also applicable to the pre-trial proceedings, ECtHR, *Imbrioscia v. Switzerland*, App no 13972/88, 24 November 1993, paragraph 36; ECtHR, *Pisano v. Italy*, App No 36732/97, 27 July 2000, paragraph 27; diff. TRECHSEL/SUMMERS, p. 31.

## IV. Landmark Cases

As the following cases will show, the jurisprudence of the European Court of Human Rights has had—and will no doubt continue to have—great influence in the field of criminal procedure.

### 1. Schenk v. Switzerland<sup>35</sup>

A case that had a strong impact on the exclusion of evidence was that of PIERRE SCHENK. This case was decided years before the introduction of the Federal Criminal Code of 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 trial. SCHENK 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, was whether illegally obtained evidence could be used in a criminal trial. It held: *“To conclude... that any evidence derived from unauthorised tapping must never... be used... 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>36</sup>

The Court found 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 conduct of

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35 ECtHR, Schenk v. Switzerland, App no 10862/84, 12 July 1988.

36 BGE 109 Ia 244 c. 2b, cited in ECtHR, Schenk v. Switzerland, App no 10862/84, 12 July 1988, paragraph 30.

the trial as a whole, the European Court of Human Rights concluded SCHENK had not been deprived of his right to a fair trial.

SCHENK is the leading case on the exclusion of illegally gathered evidence. The balancing test that the Supreme Court introduced was approved by the European Court of Human Rights. It later became statutory law in Switzerland.<sup>37</sup>

The worrying implications of this balancing exercise, which can allow illegally obtained evidence to be used if a serious crime is at stake, have been discussed above. A further concern with this approach is that it somewhat removes the incentive for the criminal justice authorities to comply with procedural rules.

## 2. Huber v. Switzerland<sup>38</sup>

In this case members of the “Hell’s Angels” motorcycle gang were suspected of having brought German prostitutes to Zurich and arranging their marriage to 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.”*

The European Court of Human Rights shared the view of the defence, concluding that Article 5 III ECHR had been violated. The District Attorney, who had ordered the detention 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>39</sup> Following this judgment, the

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37 See pp. 437.

38 ECtHR, Huber v. Switzerland, App no 12794/87, 23 October 1990.

39 ECtHR, Huber v. Switzerland, App no 12794/87, 23 October 1990, paragraphs 42 et seqq.

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>40</sup> Today, this task is vested in the “compulsory measures court”.<sup>41</sup>

### 3. Champ-Dollon<sup>42</sup>

“A” had been detained on remand on suspicion of large-scale cocaine trafficking. He was held for 478 days at the “Champ-Dollon” detention facility near Geneva. For 199 days total (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. He claimed that such conditions were inhuman and degrading (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 will in itself constitute a violation of Article 3 ECHR. If individual space ranges from 3–4m<sup>2</sup> per person, other detention conditions are considered 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 minimum standards required to ensure respect for A’s human rights. However, the fact that A had been detained for 157 consecutive days in a heavily overcrowded cell with virtually no time outside of this confinement led the court to declare that the conditions violated the national and international 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>43</sup>

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40 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.

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41 Article 220 I.

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42 Judgment of the Federal Supreme Court 6B\_456/2015 of 21 March 2016.

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43 See also the article “Prison overcrowding in Champ-Dollon: Federal Supreme Court judgements and an alarming medical study” [www.humanrights.ch](http://www.humanrights.ch/perma.cc/3XZK-BZVG) (perma.cc/3XZK-BZVG).

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# INTRODUCT SWISS LAW

A person wearing a silver helmet and a light-colored jacket is riding a red and white scooter on a paved area. The background features a large body of water, a metal railing, and snow-capped mountains under a clear sky. A white umbrella is visible on the left side of the frame.

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