Felix Uhlmann

Swiss Administrative Law

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Foreword*

Who may read this book? I hope that it is read by foreign scholars. Administrative law, in my opinion, is an excellent subject for comparison. Yet, it is the poor sister of comparative constitutional law, which itself is the poor sister of comparative private law, as one scholar has put it[1]. This leads not only to a complicated relationship between siblings but also to a relatively underdeveloped field of comparative methodology[2]. This book does not compare. But it has the ambition to be understood by readers coming from different legal cultures. This makes it necessary to explain some aspects of Swiss administrative law bearing in mind what foreign readers would expect to find in this book. Against this background, reference will be made to concepts of Swiss administrative law that may seem apparent to Swiss experts and at the same time not readily accepted by other legal orders, such as the concept of legitimate expectations and their important role in the Swiss legal order. On the other hand, some rather uncharacteristic legal terms of Swiss administrative law may be used to emphasise administrative actions that do not comply with relevant legal principles. The term "ultra vires" for example is somewhat "foreign" to Swiss administrative law but may be helpful for further explaining. In this respect the book tries to be more than just the abridgment of the larger treatises of Swiss administrative law.

I also hope that students and practitioners make use of this book. There is very little material available in English on Swiss administrative law. The book may help to put original sources into context. Readers may find helpful the very condensed and practical information on various subjects of the discipline. Of course, the book is no substitute for in-depth comparison. It is rather a starting point and a friendly invitation for further research.

Different groups of readers are typically interested in different questions. Academics like to read on problems and debates in Swiss administrative law, students and practitioners seek swift orientation. I have tried to be as clear as possible and I do not go into every debate. After all, Swiss scholars are relatively harmonious among themselves and towards the courts – maybe best explained by the small size of Switzerland, the love for compromise of its in-

* Disclaimer: This book contains verbatim excerpts from UHLMANN, Administrative Law as well as UHLMANN, Administrative Procedure, both written by the author himself.

1 GINSBURG, p. 61.

2 TSCHANNEN/MÜLLER/KERN, n. 24, 349 *et seq.*

habitants and the unavoidable interchange of court and university personnel[3]. Hopefully, this also leads to a manageable number of footnotes, concentrating on selected legal material and court cases. The latter are the bedrock of administrative law and, in my opinion, indispensable for its proper understanding.

Yet, there is another challenge the writing of this book brought to the forefront. It is a truism, attributed to Pascal, Voltaire, Goethe, Twain, Marx and others that it is more difficult to keep things short than lengthy. Being the co-author of a treatise on Swiss administrative law[4] already, I can very well understand the dangers of wordiness, and I am certainly not above it. In the last edition in German some passages on procedure that are amply covered by other legal literature were deleted. The expectation to make the book shorter was proven wrong; the newly gained space was happily filled with other subjects of administrative law.

For this book, I initially set out a limit of 100 pages – which I clearly missed, yet who would ever argue that slightly more than 130 pages would be detrimental? It will have omissions, but I hope that there is enough content that readers may find helpful for their aims. Feedback is always appreciated.

I would like to express my gratitude for the generous financial support for the open access of this book by the Publication Fund for Humanities and Social Sciences of the Library of the Univerity of Zurich. I would furthermore like to thank my (former) assistants MLaw Jasna Mosimann-Stojanovic, MLaw Rico Tanner, MLaw Daniel M. Meier, lic. iur. Eva Scheifele and Dr. iur. Katerina Akestoridi for their outstanding support creating this book.

Zurich, January 2026
Felix Uhlmann

[3] Tschannen, Systeme des Allgemeinen Verwaltungsrechts, pp. 189 *et seq*., 195.
[4] Ulrich Häfelin/Georg Müller/Felix Uhlmann, Allgemeines Verwaltungsrecht, 8th edition, Zürich/St. Gallen 2020.

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List of Abbreviations

AA	Federal Act on the Aviation (Aviation Act) = Bundesgesetz über die Luftfahrt (Luftfahrtgesetz, LFG) vom 21. Dezember 1948 (SR 748.0)
AI	Artificial Intelligence
AMLA	Federal Act on Combating Money Laundering an Terrorist Financing (Anti-Money Laundering Act) = Bundesgesetz über die Bekämpfung der Geldwäscherei und der Terrorismusfinanzierung (Geldwäschereigesetz, GwG) vom 10. Oktober 1997 (SR 955.0)
AMPIS	Federal Act on Measures for Protection of Internal Security = Bundesgesetz über Massnahmen zur Wahrung der inneren Sicherheit (BWIS) vom 21. März 1997 (SR 120)
APA	Federal Administrative Procedure Act = Federal Act on Administrative Procedure (Administrative Procedure Act) = Bundesgesetz über das Verwaltungsverfahren (Verwaltungsverfahrensgesetz, VwVG) vom 20. Dezember 1968 (SR 172.021)
Art(s).	Article(s)
AsylA	Asylum Act = Asylgesetz (AsylG) vom 26. Juni 1998 (SR 142.31)
BankA	Federal Act on Banks and Saving Banks (Bank Act) = Bundesgesetz über die Banken und Sparkassen (Bankengesetz, BankG) vom 8. November 1934 (SR 952.0)
BBl	Bundesblatt = Federal Gazette
BGE	Entscheidungen des Schweizerischen Bundesgerichts (Amtliche Sammlung) = Decisions of the Swiss Federal Supreme Court (official collection)
BSK	Basler Kommentar = Basel Commentary
CartA	Federal Act on Cartels and other Restraints of Competition (Cartel Act) = Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG) vom 6. Oktober 1995 (SR 251)
CC	Swiss Civil Code = Schweizerisches Zivilgesetzbuch (ZGB) vom 10. Dezember 1907 (SR 210)
CETS	Council of Europe Treaty Series
CFR	Charter of Fundamental Rights of the European Union
CH	Swiss Confederation
Chap.	Chapter
cit.	cited as

CNN	Cable News Network (Atlanta, US)
CO	Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) = Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht) (OR) vom 30. März 1911 (SR 220)
CO_2	Carbon dioxide
CO_2 Act	Federal Act on the Reduction of CO_2 Emissions = Bundesgesetz über die Reduktion der CO_2-Emissionen (CO_2-Gesetz) vom 23. Dezember 2011 (SR 641.71)
COMCO	Competition Commission (Bern)
ComCom	Federal Communications Commission (Bern)
consid.	consideration(s)
Const.	Federal Constitution of the Swiss Confederation = Bundesverfassung der Schweizerischen Eidgenossenschaft (BV) vom 18. April 1999 (SR 101)
CPA	Federal Act on the Consultation Procedure (Consultation Procedure Act) = Bundesgesetz über das Vernehmlassungsverfahren (Vernehmlassungsgesetz, VlG) vom 18. März 2005 (SR 172.061)
CPC	Swiss Civil Procedure Code (Civil Procedure Code) = Schweizerische Zivilprozessordnung (Zivilprozessordnung, ZPO) vom 19. Dezember 2008 (SR 272)
CPIA	Federal Act on the Targets in Climate Protection, the Innovation and the Strengthening of Energy Security = Bundesgesetz über die Ziele im Klimaschutz, die Innovation und die Stärkung der Energiesicherheit (KIG) vom 30. September 2022 (SR 814.310)
DAA	Agreement between the Swiss Confederation and the European Community concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (Dublin-Association-Agreement) = Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Europäischen Gemeinschaft über die Kriterien und Verfahren zur Bestimmung des zuständigen Staates für die Prüfung eines in einem Mitgliedstaat oder in der Schweiz gestellten Asylantrags (Dublin-Assoziierungs Abkommen, DAA) in Kraft getreten am 1. März 2008 (SR 0.142.392.68)
DFTA	Federal Act on Direct Federal Taxes = Bundesgesetz über die direkte Bundessteuer (DBG) vom 14. Dezember 1990 (SR 642.11)
Diss.	Dissertation

e.g.	exempli gratia
EA	Energy Act = Energiegesetz (EnG) vom 30. September 2016 (SR 730.0)
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) = Konvention zum Schutze der Menschenrechte und Grundfreiheiten (Europäische Menschenrechtskonvention) vom 4. November 1950 (SR 0.101)
ECJ	European Court of Justice (Luxembourg)
ect.	et cetera
ed(s).	editor(s)
EEA	European Economic Area
EFTA	European Free Trade Association
EMA	Federal Act on the Use of Police Coercion and Police Measures within the Scope of the Confederation (Enforcement Measures Act) = Bundesgesetz über die Anwendung polizeilichen Zwangs und polizeilicher Massnahmen im Zuständigkeitsbereich des Bundes (Zwangsanwendungsgesetz, ZAG) vom 20. März 2008 (SR 364)
EPA	Federal Act on the Protection of the Environment (Environmental Protection Act) = Bundesgesetz über den Umweltschutz (Umweltschutzgesetz, USG) vom 7. Oktober 1983 (SR 814.01)
ESA	Federal Electricity Supply Act = Bundesgesetz über die Stromversorgung (Stromversorgungsgesetz, StromVG) vom 23. März 2007 (SR 734.7)
et al.	et alii
et seq(q).	et sequitur/et sequentes
ETH	Eidgenössische Technische Hochschule(n) = Federal Institute(s) of Technology (Zurich/Lausanne)
EU/EC	European Union/European Community
FACA	Federal Act on the Federal Administrative Court (Federal Administrative Court Act) = Bundesgesetz über das Bundesverwaltungsgericht (Verwaltungsgerichtsgesetz, VGG) vom 17. Juni 2005 (SR 173.32)
FADP	Federal Act on Data Protection (Data Protection Act) = Bundesgesetz über den Datenschutz (Datenschutzgesetz, DSG) vom 25. September 2020 (SR 235.1)
FAF	Federal Act on Fishing = Bundesgesetz über die Fischerei (BGF) vom 21. Juni 1991 (SR 923.0)

FEA	Federal Act on the Expropriation (Federal Expropriation Act) = Bundesgesetz über die Enteignung (Enteignungsgesetz, EntG) vom 20. Juni 1930 (SR 711)
FinIA	Federal Act on Financial Institutions (Financial Institutions Act) = Bundesgesetz über die Finanzinstitute (Finanzinstitutsgesetz, FINIG) vom 15. Juni 2018 (SR 954.1)
FINMA	Swiss Financial Market Supervisory Authority (Bern)
FINMASA	Federal Act on the Swiss Financial Market Supervisory Authority (Financial Market Supervision Act) = Bundesgesetz über die Eidgenössische Finanzmarktaufsicht (Finanzmarktaufsichtsgesetz, FINMAG) vom 22. Juni 2007 (SR 956.1)
FinMIA	Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act) = Bundesgesetz über die Finanzmarktinfrastrukturen und das Marktverhalten im Effekten- und Derivatehandel (Finanzmarktinfrastrukturgesetz, FinfraG) vom 19. Juni 2015 (SR 958.1)
FinSA	Federal Act on Financial Services (Financial Services Act) = Bundesgesetz über die Finanzdienstleistungen (Finanzdienstleistungsgesetz, FIDLEG) vom 15. Juni 2018 (SR 950.1)
FLA	Federal Act on the Liability of the Confederation, Members of its Authorities and its Officials (Federal Liability Act = Bundesgesetz über die Verantwortlichkeit des Bundes sowie seiner Behördemitglieder und Beamten (Verantwortlichkeitsgesetz, VG) vom 14. März 1958 (SR 170.32)
FMPA	Agreement between the Swiss Confederation, of the one part, and the European Community and its Member States, of the other, on the free movement of persons (Free Movement of Persons Agreement) = Abkommen zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit (Freizügigkeitsabkommen, FZA) in Kraft getreten am 1 Juni 2002 (SR 0.142.112.681)
FNIA	Federal Act on Foreign Nationals and Integration (Foreign Nationals and Integration Act) = Bundesgesetz über die Ausländerinnen und Ausländer und über die Integration (Ausländer- und Integrationsgesetz, AIG) vom 16. Dezember 2005 (SR 142.20)
FOCA	Federal Office of Aviation (Bern)
FoIA	Federal Act on Freedom of Information in the Administration (Freedom of Information Act) = Bundesgesetz über das Öffentlichkeitsprinzip der Verwaltung (Öffentlichkeitsgesetz, BGÖ) vom 17. Dezember 2004 (SR 152.3)

ForA	Federal Act on the Forest (Forest Act) = Bundesgesetz über den Wald (Waldgesetz, WaG) vom 4. Oktober 1991 (SR 921.0)
FOT	Federal Office of Transportation (Bern)
FPA	Federal Personnel Act = Bundespersonalgesetz (BPG) vom 24. März 2000 (SR 172.220.1)
FSCA	Federal Act on the Federal Supreme Court (Federal Supreme Court Act) = Bundesgesetz über das Bundesgericht (Bundesgerichtsgesetz, BGG) vom 17. Juni 2005 (SR 173.110)
GAOA	Government and Administration Organisation Act = Regierungs- und Verwaltungsorganisationsgesetz (RVOG) vom 21. März 1997 (SR 172.010)
GPR	Government Procurement Agreement = Revidiertes Übereinkommen über das öffentliche Beschaffungswesen vom 15. April 1994 (SR 0.632.231.422)
GPSSL Act	Federal Act on the General Part of Social Security Law = Bundesgesetz über den Allgemeinen Teil des Sozialversicherungsrechts (ATSG) vom 6. Oktober 2000 (SR 830.1)
GTA	Federal Act on Non-Human Gene Technology (Gene Technology Act) = Bundesgesetz über die Gentechnik im Ausserhumanbereich (Gentechnikgesetz, GTG) vom 21. März 2003 (SR 814.91)
Habil.	Habilitation
HEA	Federal Act on Hydraulic Engineering (Hydraulic Engineering Act) = Bundesgesetz über den Wasserbau (Wasserbaugesetz, WBG) vom 21. Juni 1991 (SR 721.100)
HEdA	Federal Act on Funding and Coordination of the Swiss Higher Education Sector (Higher Education Act) = Bundesgesetz über die Förderung der Hochschulen und die Koordination im schweizerischen Hochschulbereich (Hochschulförderungs- und -koordinationsgesetz, HFKG) vom 30. September 2011 (SR 414.20)
HIA	Federal Act on Health Insurance = Bundesgesetz über die Krankenversicherung (KVG) vom 18. März 1994 (SR 832.10)
HK	Handkommentar = Hand Commentary
HuntA	Federal Act on Hunting and the Protection of Feral Mammals and Birds (Hunting Act) = Bundesgesetz über die Jagd und den Schutz wildlebender Säugetiere und Vögel (Jagdgesetz, JSG) vom 20. Juni 1986 (SR 922.0)
i.e.	id est
ibid.	ibidem

ICA	Independent Complaints Authority for Radio and Television (Bern)
IntelSA	Federal Act on the Intelligence Service (Intelligence Service Act) = Bundesgesetz über den Nachrichtendienst (Nachrichtendienstgesetz, NDG) vom 25. September 2015 (SR 121)
ISA	Federal Act on the Supervision of Insurance Companies (Insurance Supervision Act) = Bundesgesetz betreffend die Aufsicht über Versicherungsunternehmen (Versicherungsaufsichtsgesetz, VAG) vom 17. Dezember 2004 (SR 961.01)
Komm.	Kommentar = Commentary
KV ZH	Verfassung des Kantons Zürich vom 27. Februar 2005 (LS 101) = Constitution of the Canton of Zürich
lit.	litera
LS	Loseblattsammlung des Kantons Zürich = Systematic Compilation of Cantonal Legislation (Canton of Zurich)
Ltd.	Limited Company
MA	Federal Act on Army and Military Administration (Military Act) = Bundesgesetz über die Armee und die Militärverwaltung (Militärgesetz, MG) vom 3. Februar 1995 (SR 510.10)
MedBG	Bundesgesetz über die universitären Medizinalberufe (Medizinalberufegesetz) vom 23. Juni 2006 (SR 811.11) = Federal Act on the Universitary Medical Occupations (MedOA)
MinTO	Ordinance on the Minimum Taxation of Large Corporate Groups (Minimum Taxation Ordinance) = Verordnung über die Mindestbesteuerung grosser Unternehmensgruppen (Mindestbesteuerungsverordnung, MindStV) vom 22. Dezember 2023 (SR 642.161)
n.	note
NBA	Federal Act on the Swiss National Bank (National Bank Act) = Bundesgesetz über die Schweizerische Nationalbank (Nationalbankgesetz, NBG) vom 3. Oktober 2003 (SR 951.11)
NCHA	Federal Act on the Protection of Nature and Cultural Heritage = Bundesgesetz über den Natur- und Heimatschutz (NHG) vom 1. Juli 1966 (SR 451)
NEA	Nuclear Energy Act = Kernenergiegesetz (KEG) vom 21. März 2003 (SR 732.1)
No./Nr.	Number
NZZ	Neue Zürcher Zeitung (Zurich)

OASI	Old Age and Survivors Insurance = Alters- und Hinterlassenenversicherung
OASI Act	Federal Act on the Old Age and Survivors Insurance = Bundesgesetz über die Alters- und Hinterlassenenversicherung (AHVG) vom 20. Dezember 1946 (SR 831.10)
OECD	Organisation for Economic Co-operation and Development
OFCOM	Federal Office of Communications (Bern)
OFK	Orell Füssli Kommentar = Orell Füssli Commentary
OIA	Federal Act on Occupational Old Age, Survivors and Disability Insurance = Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge (BVG) vom 25. Juni 1982 (SR 831.40)
p(p).	page(s)
PA	Post Act = Postgesetz (PG) vom 17. Dezember 2010 (SR 783.0)
para(s).	paragraph(s)
POA	Federal Act on the Organisation of Swiss Post (Post Organisation Act) = Bundesgesetz über die Organisation der Schweizerischen Post (Postorganisationsgesetz, POG) vom 17. Dezember 2010 (SR 783.1)
POA ZH	Police Organisation Act of the Canton of Zurich = Polizeiorganisationsgesetz des Kantons Zürich (POG ZH) vom 29. November 2004 (LS 551.1)
PolA ZH	Police Act of the Canton of Zurich = Polizeigesetz des Kantons Zürich (PolG ZH) vom 23. April 2007 (LS 550.1)
PostCom	Federal Postal Services Commission (Bern)
PPA	Federal Act on Public Procurement (Federal Public Procurement Act) = Bundesgesetz über das öffentliche Beschaffungswesen (BöB) vom 21. Juni 2019 (SR 172.056.1)
Prax-Komm.	Praxiskommentar = Practice Commentary
PTA	Federal Act on Public Transportation (Public Transportation Act) = Bundesgesetz über die Personenbeförderung (Personenbeförderungsgesetz, PBG) vom 20. März 2009 (SR 745.1)
PTSA	Federal Act on the Security Units of Public Transport Companies = Bundesgesetz über die Sicherheitsorgane der Transportunternehmen im öffentlichen Verkehr (BGST) vom 18. Juni 2010 (SR 745.2)
PTT	Post, Telephone and Telegraph Enterprises (dissolved, Bern)

PublA	Federal Act on the Compilations of Federal Legislation and the Federal Gazette (Publications Act) = Bundesgesetz über die Sammlungen des Bundesrechts und das Bundesblatt (Publikationsgesetz, PublG) vom 18. Juni 2004 (SR 170.512)
RTVA	Federal Act on Radio and Television = Bundesgesetz über Radio und Fernsehen (RTVG) vom 24. März 2006 (SR 784.40)
SAA	Agreement between the Swiss Confederation, the European Union and the European Community on the association of this state with the implementation, application and development of the Schengen acquis (Schengen-Association-Agreement) = Abkommen zwischen der Schweizerischen Eidgenossenschaft, der Europäischen Union und der Europäischen Gemeinschaft über die Assoziierung dieses Staates bei der Umsetzung, Anwendung und Entwicklung des Schengen-Besitzstands (Schengen-Assoziierungs-Abkommen, SAA) in Kraft getreten am 1. März 2008 (SR 0.362.31)
SCA	Federal Act on Swiss Citizenship (Swiss Citizenship Act) = Bundesgesetz über das Schweizer Bürgerrecht (Bürgerrechtsgesetz, BüG) vom 20. Juni 2014 (SR 141.0)
SCC	Swiss Criminal Code = Schweizerisches Strafgesetzbuch (StGB) vom 21. Dezember 1937 (SR 311.0)
SEA	Stock Exchange Act = Bundesgesetz über die Börsen und den Effektenhandel (Börsengesetz, BEHG) vom 24. März 1995 (SR 954.1) (out of force, replaced by the FinIA)
SEM	State Secretariat for Migration (Bern)
SFRA	Federal Act on the Swiss Federal Railways = Bundesgesetz über die Schweizerischen Bundesbahnen (SBBG) vom 20. März 1998 (SR 742.31)
SG-Komm.	St. Galler Kommentar = St. Gallen Commentary
SHK	Stämpflis Handkommentar = Stämpfli's Hand Commentary
SJZ	Schweizer Juristen-Zeitung = Swiss Jurists' Newspaper (Zurich)
SNB	Swiss National Bank
SPA	Federal Act on Spatial Planning (Spatial Planning Act) = Bundesgesetz über die Raumplanung (Raumplanungsgesetz, RPG) vom 22. Juni 1997 (SR 700)
SPO	Spatial Planning Ordinance
SR	Systematische Sammlung des Bundesrechts = Systematic Compilation of Federal Legislation

SRF	Schweizer Radio und Fernsehen = Swiss Radio and Television (subsidiary of SRG SSR, Zurich)
SRG SSR	Schweizerische Radio- und Fernsehgesellschaft / Société suisse de radiodiffusion et télévision = Swiss Broadcasting Corporation (Bern)
SZW/RSDA	Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht/ Revue suisse de droit des affaires et du marché financier = Swiss Review of Business and Financial Market Law (Zurich)
TAA	Federal Act on the Organisation of the Federal Telecommunications Agency (Telecommunications Agency Act) = Bundesgesetz über die Organisation der Telekommunikationsunternehmung des Bundes (Telekommunikationsunternehmungsgesetz, TUG) vom 30. April 1997 (SR 784.11)
TCA	Telecommunications Act = Fernmeldegesetz (FMG) vom 30. April 1997 (SR 784.10)
THA	Federal Act on the Harmonisation of Direct Taxes of the Cantons and Communes = Bundesgesetz über die Harmonisierung der direkten Steuern der Kantone und Gemeinden (StHG) vom 14. Dezember 1990 (SR 642.14)
TPA	Federal Act on Medicinal Products and Medical Devices (Therapeutic Products Act) = Bundesgesetz über Arzneimittel und Medizinprodukte (Heilmittelgesetz, HMG) vom 15. Dezember 2000 (SR 812.21)
UIICA	Federal Act on the Obligatory Unemployment Insurance and Insolvency Compensation = Bundesgesetz über die obligatorische Arbeitslosenversicherung und die Insolvenzentschädigung (AVIG) vom 25. Juni 1982 (SR 837.0)
UN	United Nations
US	United States of America
UVP	Umweltverträglichkeitsprüfung = environmental impact assessment
v.	versus
VAT	Value Added Tax
VAT Act	Federal Act on the Value Added Tax (Value Added Tax Act) = Bundesgesetz über die Mehrwertsteuer (Mehrwertsteuergesetz, MWSTG) vom 12. Juni 2009 (SR 641.20)
Vol.	Volume
VOSTRA	Vollautomatisiertes Strafregister = Fully automated criminal records system

VOSTRA Ordinance	Ordinance on the Criminal Registry = Verordnung über das Strafregister (VOSTRA-Verordnung) vom 29. September 2006 (SR 331)
VPETA	Federal Act on Vocational and Professional Education and Training (Vocational and Professional Education and Training Act) = Bundesgesetz über die Berufsbildung (Berufsbildungsgesetz, BBG) vom 13. Dezember 2002 (SR 412.10)
VRG/ZH	Verwaltungsrechtspflegegesetz des Kantons Zürich (LS 175.2) = Administrative Procedure Act of the Canton of Zurich
WPA	Federal Act on the Protection of Waters (Waters Protection Act) = Bundesgesetz über den Schutz der Gewässer (Gewässerschutzgesetz, GSchG) vom 24. Januar 1991 (SR 814.20)
WRA	Federal Act on the Use of Water Power (Water Right Act) = Bundesgesetz über die Nutzbarmachung der Wasserkräfte (Wasserrechtsgesetz, WRG) vom 22. Dezember 1916 (SR 721.80)
ZBl	Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (Zurich)

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A) Constitutional Background

Further Reading

Tom Ginsburg, Written constitutions and the administrative state: on the constitutional character of administrative law, in: Susan Rose-Ackerman/Peter L. Lindseth/Blake Emerson (eds.), Comparative Administrative Law, 2nd edition, Cheltenham 2017, pp. 60 et seqq.

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1. Constitutional and Administrative Law

Administrative law is more than just the practical side of the Constitution, practiced by those not competent enough to approach the "sacred territory" of constitutional law[5]. Constitutional principles are of fundamental importance for administrative law whereas administrative practice gives substance to the interpretation and meaning of the Constitution. This *mutual influence* is clearly evident in areas where independent constitutional doctrine is hardly developed and needs to be substantiated by administrative law, *e.g.* in the realm of state liability[6]. However, landmark cases of the Swiss Supreme Court such as those on the universal extent of the principle of legality have – at least officially – little bearing on the alleged violation of fundamental rights[7]. Such examples do not refute the huge influence of the Constitution on administrative law. They constitute a warning post for an overly deductive reasoning, starting out with the Constitution as the supreme source of (national) law and overlooking the importance of the rather inductive case-by-case method of administrative reasoning. 1

The line between constitutional and administrative law is not always clear. Some essential principles lie in the legal limbo between the Constitution and 2

5 Häfelin/Müller/Uhlmann, n. 51 *et seqq.*; *see also* Nolte, p. 191, 201.

6 Uhlmann, Administrative Law, p. 164; *see e.g.* BGE 118 Ib 473 consid. 6.

7 BGE 103 Ia 369 ("Waeffler") consid. 5. *et seq.*: concerning restricted admissions policy to university studies (*numerus clausus*). The Swiss Supreme Court concluded that at least the basic lines of such important educational policy decisions must be stated at the legislative level, *see also infra section* 35.

administrative practice. These principles are formulated at the federal and cantonal level, although very often cantons adopt federal practice. To make things more complex, thereby federal law influences cantonal law and practice generally only by "example setting". For instance, the principle of legal certainty is floating around with no distinct harbour so far[8]. Accordingly, it is debatable to what extent the principle of non-retroactivity, which has its foundation in the Swiss Constitution is binding on the legislator[9]. Nevertheless, there are areas in which the line between constitutional and administrative law can be likely identified. With respect to this, the Swiss Supreme Court, if called upon procedural defects for example, meticulously distinguishes between the guarantees set out in the relevant legislation (federal or cantonal) and in constitutional law[10].

2. Constitutional Principles in Administrative Law

3 First and foremost, constitutional law shapes many of the fundamental principles of administrative law[11]. It has been addressed that not all – but most of them – are clearly attributable to the Constitution. The principle of legality, the duty to act in the interest of the public and the principle of proportionality are all set out in Art. 5 of the Swiss Constitution. If one wants to locate the Swiss "*Rechtsstaat*" ("*Rule of Law*") – a term only hesitantly used by Swiss courts and scholars[12] – Article 5 of the Swiss Constitution is the right source.

4 The principles of legality, public interest and proportionality are also echoed in Art. 36 of the Swiss Constitution. The provision sets out the necessary conditions under which fundamental rights can be restrained. The Swiss Supreme Court ruled that the meaning of these principles in both provisions – Art. 5 and Art. 36 Const. – cannot be simply equated[13]. Yet, it is not clear if – and to what

8 Art. 5 Const.; Häfelin/Müller/Uhlmann, n. 322 *et seq.*, 625 *et seq.*

9 *See* Art. 5 Const.; Biaggini, Komm. BV, Art. 5, n. 5; Häfelin/Müller/Uhlmann, n. 269 *et seq.*, 322 *et seq.*

10 Arts. 29 *et seq.* Const.; Häfelin/Müller/Uhlmann, n. 1040 *et seq.*; *see infra sections 82 et seqq.*

11 Uhlmann, Codification, pp. 276 *et seqq.*

12 Biaggini, Komm. BV, Art. 5, n. 2; Epiney, BSK BV, Art. 5, n. 16 *et seq.*

13 BGE 138 I 378 ("Glarnersach") consid. 8.2: in this case, the Federal Supreme Court had to decide on the validity of a statutory provision entitling the cantonal insurance company of Glarus (called "*Glarnersach*") – originally only offering building insurances – to offer different insurance activities in competition with private insurance companies. The court held that the economic activity of the state did not infringe fundamental rights (Art. 36 Const.).

extent – there are substantial conceptual and content-related differences between the provisions. In practical terms, legality, public interest and proportionality may be understood analogously in Art. 5 and Art. 36 Const. Essentially, cases concerning the restriction of fundamental rights are crucial for cases dealing with matters of administrative law and vice versa[14].

Further, the *equal protection clause* (Art. 8 Const.) has long been the source for the Swiss Supreme Court to deduct a wide array of principles for lawful administrative behaviour[15]. This holds especially true for procedural fairness, now explicitly enshrined in Art. 29 and Art. 30 Const. Strongly related but distinct from the equal protection clause is the *protection against arbitrariness*, a rather unique constitutional guarantee. It is found in Art. 9 Const., together with the *duty to act in good faith*, which is the basis for the doctrine of *legitimate expectations*. 5

3. Legislative and Executive Powers

State organisation is a typical field of constitutional law. The Swiss Constitution of 1848, totally revised in 1874 and redrafted in 1999, bears substantial resemblance to the US Constitution[16]. The Federal Assembly has two chambers comparable to the US Senate and the House of Representatives, though the powers of the Swiss chambers are totally equalised[17]. Switzerland has not opted for a presidential system. The executive branch (Federal Council) consists of seven members, elected by the Federal Assembly following each general election of Parliament. They form a broad coalition government, roughly representing each major party in the Federal Assembly. The need for a broad coalition is usually explained by the system of direct democracy which is the core of the Swiss political system. As every new law (and every amendment thereof) is subject to a possible referendum, only a large coalition may govern 6

Hence the subject was reviewed according to the more lenient test of Art. 5 para. 2 Const.; *see also* Häfelin/Müller/Uhlmann, n. 489.

14 *See e.g.* BGE 149 II 354 consid. 2.5; BGE 149 I 291 consid. 5.8; BGE 147 I 450 consid. 3.2.4.

15 Häfelin/Haller/Keller/Thurnherr, n. 872; Müller/Schefer, p. 653; Tschannen/Müller/Kern, n. 506; BGE 149 I 125 consid. 5.1; BGE 147 V 423 consid. 5.1.2; BGE 141 I 153 consid. 5.1; BGE 131 I 105 consid. 3.1.

16 Egli, pp. 7 *et seq.*; Haller, n. 13 *et seqq.*, 29 *et seqq.*; Misic/Töpperwien, n. 12 *et seqq.*; *for further reading cf.*, Biaggini, Staatsrecht, § 8 n. 1 *et seqq.*; Häfelin/Haller/Keller/Thurnherr, n. 28 *et seqq.*

17 Art. 148 para. 2 Const.; Egli, pp. 96 *et seq.*; Haller, n. 258 *et seq.*; Häfelin/Haller/Keller/Thurnherr, n. 1785; Thurnherr, BSK BV, Art. 148, n. 18 *et seq.*; Tschannen, Staatsrecht CH, n. 1113.

effectively and implement unpopular measures[18]. Government is stable during the election period (four years) since Parliament may not recall Government or any members thereof.

7 From an administrative law perspective, government and administrative authorities are usually understood to be the same, or maybe more precisely, government is simply the head of the administration. There are some prerogatives the government enjoys, such as the power to legislate[19], immunity[20], to review acts of hierarchically subordinate administrative entities[21] and to benefit from limited public liability. Still, if the federal or cantonal government have to take or review an administrative decision, substantial principles such as proportionality and procedural guarantees are applicable. Given this structure, there is no fundamental difference between an issue requiring an administrative decision being resolved by the government and a case handled by a subordinated agency. This particularity of Swiss administrative law is enhanced further by the fact that government may directly intervene in proceedings before its agencies as the typical organisational structure draws a direct hierarchical line from government to the lower administrative bodies. Hence, there is no clear demarcation line between administrative and government action, albeit the former being subject to a different set of legal rules than the latter.

8 Turning to the relationship of administration and parliament, it is not surprising that the former must execute the laws of the latter given parliament's supervisory power over government, including the administration. Interestingly, Swiss parliaments are typically weakly staffed and rely on administrative expertise of the personnel from the government[22]. This holds also true in the field of law-making as it is most commonly the government and its administration that prepare bills even if the initiative for such drafts comes from parliament. In recent years, one may arguably observe a shift towards a better staffed and more active parliament. Still, the administration (of government) remains central for many tasks of the parliament such as expert opinions, drafts, consultation of stakeholders etc.[23].

18 Egli, pp. 103 *et seq.*; Haller, n. 227; Häfelin/Haller/Keller/Thurnherr, n. 1996.
19 Art. 182 para. 1 Const.; Egli, p. 36.
20 Art. 162 para. 1 Const.; Biaggini, Komm. BV, Art. 187, n. 20 *et seq.*; Haller, n. 283.
21 Art. 187 para. 1 lit. d Const.; Egli, p. 107; Haller, n. 321; Kiener/Rütsche/Kuhn, n. 1375 *et seqq.*
22 Müller/Uhlmann/Höfler, n. 456 *et seq.*
23 Haller, n. 522; Müller/Uhlmann/Höfler, n. 457 *et seq.*, 467 *et seqq.*

4. Judiciary

The Swiss Supreme Court (or Federal Supreme Court; *Schweizerisches Bundesgericht/Tribunal Fédéral/Tribunale federale*) hears cases from all areas of the law, including constitutional matters. It is relatively large in size (40 judges) and many cases may be brought to the court as there is no preliminary review procedure, strictly speaking (Art. 1 para. 3, *see e.g.* Arts. 72 *et seqq.*, 113 *et seqq.* of the Federal Supreme Court Act [FSCA]). It has full judicial power over the cantons although there is an exception to this since cantonal constitutions are primarily reviewed by the Federal Parliament[24]. The court will only intervene against the interpretation of cantonal law by cantonal authorities if there is an infringement of federal law, namely the Swiss Constitution. By contrast, the Swiss Supreme Court may not invalidate federal laws (Art. 190 Const.) but only secondary federal legislation. The court has carved out some exceptions in the case of a breach of the European Convention on Human Rights (ECHR)[25] and sometimes stretches the limits of constitutional "interpretation" of federal law[26]. Yet, it is still the Federal Assembly that is primarily responsible for its laws to be constitutional. Reforms to establish a system of full constitutional review have repeatedly failed[27]. 9

There is also a Swiss Federal Administrative Court (*Bundesverwaltungsgericht/Tribunal Administratif Fédéral/Tribunale amministrativo federale*) but it would be a false assumption to consider this court as the primary provider of court practice in the field of administrative law. The court is not only relatively new (founded in 2007) but competes with state courts as it will be explained in the next paragraph. It is also subordinated to the Swiss Supreme Court that has the power to review most cases.[28] Still, as the sheer number of cases of the Swiss Federal Administrative Court is impressive, the court clearly shapes Swiss administrative law and is an excellent point of reference if no pertinent decision from the Swiss Supreme Court is available. 10

24 Art. 51 para. 2 Const.; Häfelin/Haller/Keller/Thurnherr, n. 1249 *et seq.*

25 Egli, p. 173; Haller, n. 596; in the following cases, the Swiss Supreme Court ruled that federal law – including the Federal Constitution – violating the European Convention of Human Rights shall not be applied: Federal Supreme Court decision 2C_716/2014 of 26 November 2015 consid. 3.2, concerning the revocation and non-extension of residence permits; BGE 139 I 16 consid. 5.; BGE 125 II 417 ("PKK") consid. 4.d about the confiscation of propaganda material of the Kurdish association PKK through Swiss customs authorities.

26 Tschannen, Staatsrecht CH, n. 443 *et seq.*; BGE 125 II 417 consid. 4.c.

27 Biaggini, Komm. BV, Art. 190, n. 3; Rhinow et al., n. 224; BBl 1997 I 1 *et seq.*, 505 *et seq.*

28 Häfelin/Haller/Keller/Thurnherr, n. 2066, 2117; Häfelin/Müller/Uhlmann, n. 2076.

5. Federalism

11 Again, with some resemblance to the US, the Swiss Constitution provides for a federal system of government. The Swiss Constitution enumerates federal powers[29] and the principle of subsidiarity applies, although its legal significance is not clearly outlined[30]. On the practical side and more importantly, (again) Article 190 of the Swiss Constitution must be taken into account: The Swiss Supreme Court may not invalidate a federal law for transgression of power by federal authorities, hence giving the Parliament the final say over this question. Still, the power of the cantons should not be underestimated. A federal law unanimously opposed by the cantons has little, if any, political chances in the national Parliament. The cantons may even call for a popular referendum (Art. 141 para. 1 Const.). Although rarely used, the "threat" of it is of significance[31].

12 Cantons are generally in charge of the implementation of federal law[32]. "Implementation" is indeed the proper term as federal law often needs to be supplemented by cantonal legislation to become fully operational. Many cases of administrative law involve the application of federal and of cantonal law and to add complexity, also communal law. In the federal system it is not completely unlikely that cantons foster a relationship with communes (or municipalities), the smallest political divisions within the cantons which have an executive and a legislative branch (Voter's Assembly or Parliament) but no judiciary.

13 As in many federal systems, federal laws trump (or, more politely, take precedence over[33]) cantonal law but the question which often arises is whether a federal regulation is indeed exclusive or whether it leaves room for additional cantonal law. The question is of practical importance as private entities may challenge a cantonal decision (or a cantonal law) on the grounds of Art. 49 Const. which is understood as a fundamental right, guaranteeing the prece-

29 Art. 3 Const.; *e.g.* Art. 60 Const. (armed forces/military affairs), Art. 87 Const. (railways and other modes of transport), Art. 90 Const. and Art. 118 para. 2 lit. c Const. (nuclear energy), Art. 74 Const. (protection of the environment); HALLER, n. 62 *et seqq.*; LADNER, Organization and Provision, p. 27; MISIC/TÖPPERWIEN, n. 30 *et seqq.*

30 Art. 5a Const.; BIAGGINI, Komm. BV, Art. 5a, n. 6 *et seq.*; EGLI, p. 42; HALLER/KÖLZ/GÄCHTER, n. 531; HÄFELIN/HALLER/KELLER/THURNHERR, n. 1296; KLEY, Staatsrecht, § 10 n. 20, § 12 n. 10.

31 EHRENZELLER/NOBS/DIGGELMANN, SG-Komm. BV, Art. 141, n. 19; EPINEY/FREI/DIEZIG, BSK BV, Art. 141, n. 14; HÄFELIN/HALLER/KELLER/THURNHERR, n. 1203 *et seq.*; EGLI, p. 47; MALINVERNI/HOTTELIER/HERTIG RANDALL/FLÜCKIGER, n. 849 *et seqq.*

32 Art. 46 Const.; BIAGGINI, Komm. BV, Art. 46, n. 2 *et seqq.*; EGLI, pp. 56 *et seq.*; HÄFELIN/HALLER/KELLER/THURNHERR, n. 1351 *et seqq.*; LADNER, Society, p. 14.

33 Art. 49 Const.; HÄFELIN/HALLER/KELLER/THURNHERR, n. 1424 *et seqq.*

dence of federal law over any conflicting provisions of cantonal law and binding the confederation to ensure that cantons comply with federal legislation[34].

The common arrangement of federal law being implemented by the cantons also influences the court system. Roughly speaking, if a case is first decided by the cantonal authorities, it is up to the cantonal courts to review it and only as a last resort will the Swiss Supreme Court be involved. The Federal Administrative Court reviews solely cases from federal authorities (about issues relating, for example, to competition law or banking law, to name a few), a detail that may be easily overlooked as the name of the court may suggest that *all* cases involving federal administrative law are reviewed by it. In effect, the content of administrative law is shaped by cantonal courts, the Federal Administrative Court and the Swiss Supreme Court alike. The Swiss Supreme Court reviews cases both from cantonal courts and the Federal Administrative Court, most notably on the grounds that federal law is not properly applied or that constitutional rights have been violated (Art. 86 FSCA). Within this framework, cantonal courts and the Federal Administrative Court should not be understood in a hierarchical but rather a parallel relation and cases from both are subject to an appeal before the Swiss Supreme Court[35]. 14

The federal system may also explain why the term "Swiss administrative law" is somewhat misleading. In legal terms, the cantons are free to arrange their matters according to their administrative needs. As long as the constitutional restrictions are respected and the cantonal law does not come into conflict with a federal legislation in a specific area, cantons may institute their own legal instruments of administrative law and procedure. There are, indeed, areas where cantonal differences are sensible, *e.g.* the employment of civil servants and state liability. Nevertheless, the governing legal principles, the main forms of administrative action, the broad strikes of administrative organisation are all quite alike in federal and state government. Hence, it may ultimately be argued that the expression "Swiss administrative law" is justified. 15

34 Häfelin/Haller/Keller/Thurnherr, n. 1428; BGE 129 I 402 consid. 2. *et seq.* (on the right to abortion).

35 *In contrast to the cantonal cases, not every case from the Federal Administrative Court may go to the Swiss Supreme Court, see* Art. 1 para. 2 Federal Administrative Court Act (FACA).

6. Direct Democracy

16 *Direct democracy* is a trademark of Switzerland. Instruments of direct democracy are found in great variety on the federal, cantonal and communal level. If one wants to point out the typical features of the system, the following two constitutional rights are the most distinct: a) citizens' right to challenge every new legal provision through a referendum and b) the right to a formulated popular initiative (Arts. 138 *et seqq.* Const.). The referendum is the only way to challenge newly passed laws (as an act of Parliament) or certain international treaties. A simple majority is enough to have the law passed or rejected.[36] As noted before, the right to a referendum is the typical explanation for the need of a broad coalition government. It comes as no surprise that a possible referendum slows down the legislative process considerably, given not only the time needed for the referendum itself but also for extensive participation of political parties, representatives of the cantons and interest groups beforehand by way of consultation in order to appease possible referendum groups[37]. This explains why Switzerland may have difficulties to keep up with the regulative speed of international organisations from time to time, irrespective of the fact that it is open to question whether the speed and quality of that regulatory process is indeed desirable.

17 The right to a formulated popular initiative is an important tool. On the federal level, 100,000 signatures are enough to initiate the process for a constitutional amendment[38]. The sponsors phrase the text of the initiative and therefore are free to propose adjustments to the Constitution according to their desired outcomes. Federal Parliament, as the only guardian, may invalidate the initiative only if it violates peremptory norms of public international law, if it concerns more than a single subject or the initiative is simply impossible to realise[39]. Chances for invalidation are rare[40], and even moderately gifted drafters would bring forth a valid initiative. Parliament may oppose the initiative politically, especially by means of a counter proposal but cannot alter the wording of the initiative's text even if it is poorly drafted and unclear.

18 Passing the initiative is only slightly more challenging than passing a law through the referendum process. On the federal level, a simple majority of the

36 Ladner, Society, p. 15.
37 Müller/Uhlmann/Höfler, n. 180, 423 *et seq.*, 494; Pasquier, p. 236.
38 Art. 138 para. 1 and Art. 139 para. 1 Const.
39 Art. 139 para. 3 and Art. 173 para. 1 lit. f Const.; Egli, pp. 76 *et seqq.*; Haller, n. 511 *et seqq.*; Häfelin/Haller/Keller/Thurnherr, n. 2186 *et seqq.*
40 Moeckli, pp. 33, 36.

electorate and the cantons is sufficient, making the Swiss Constitution one of the most flexible constitutions. Yet, at the same time, constitutional amendments, including the ones initiated by Federal Parliament, are numerous, making the reading of the Swiss Constitution of 1874 difficult if not chaotic. The poor reading of the perforated, due to multiple amendments, Constitution of 1874 was one of the reasons – apart from political realism – to set out the constitutional reform which led to the Constitution of 1999 as a simple "*recodification*" ("*Nachführung*")[41].

19 Notwithstanding its liberal character within the Swiss political realm, direct democracy has become the "Trojan horse" of the governance system. In a nutshell, Switzerland has begun to accept more and more extreme initiatives in recent years, including a prohibition on minarets, compulsory deportation of criminal immigrants and quotas on immigration while an initiative that challenges the hierarchical relation of international law with Swiss Constitutional Law was rejected in 2018.[42] It seems that the political system that has been able to ameliorate radical initiatives for decades through counter proposals, and if necessary, by building a political coalition against such initiatives, is failing. Direct democracy has become a source of major concern for many Swiss scholars. The unfettered power of the "people" through popular initiatives is indeed worrisome, all the more so because a political solution is not in sight as the curtailment of popular initiatives is not expected to stand a chance in Parliament, not to mention in a popular vote[43].

20 From an administrative law perspective, these initiatives are noteworthy for two reasons. Firstly, they contain even more often provisions of *directly applicable administrative law*. This means that an individual administrative decision may rely solely on constitutional law, without recourse to concretisation through laws and secondary legislation being necessary[44]. Examples are the protection of moors and wetlands (Art. 78 para. 5 Const.), some prohibitions in the area of reproductive medicine and gene technology (Art. 119 Const.), the building of second homes (Art. 75b Const.) and minarets (Art. 72 para. 3 Const.) too. The Swiss Supreme Court took a restrictive view on the direct applicabil-

41 Biaggini, Staatsrecht, § 8 n. 30; Häfelin/Haller/Keller/Thurnherr, n. 53; Misic/Töpperwien, n. 20; *see also* Tschannen, Staatsrecht CH, n. 77 *et seqq*., 228.

42 Federal popular initiative "Schweizer Recht statt fremde Richter" (Selbstbestimmungsinitiative) = "Swiss judges instead of foreign judges" (self-determination initiative), BBl 2017 5411, rejected by 66.2%.

43 BBl 2014 2337; Häfelin/Haller/Keller/Thurnherr, n. 2196 *et seqq*.; Moeckli, pp. 41 *et seq*.

44 Häfelin/Müller/Uhlmann, n. 54 *et seqq*.

ity of a constitutional provision expelling criminal immigrants[45]. A following initiative, technically overriding this decision, was rejected in a popular vote in 2016[46]. Still, the issue remains highly contentious and will likely keep voters, media, courts and scholars busy[47].

21 The second impact of these initiatives on administrative law is maybe even more influential. Some initiatives violate long-standing administrative and constitutional law principles. By way of example, the initiative on the compulsory expulsion of criminal immigrants openly targeted the principle of proportionality[48]. Similarly, an initiative to introduce an inheritance tax was considered impermissibly retroactive even by those sympathetic to it. However, the initiative was deemed valid under constitutional law and was voted upon[49]. A popular initiative, whether successful or unsuccessful in the end, unavoidably weakens the foundation of these principles, putting them at the disposal of the legislature for determining their meaning[50]. Be that as it may, it is too early to measure the impact initiatives have on foundational legal principles, but it is not arbitrary to say that respect for these principles is diminishing.

7. Fundamental Rights

22 As most modern Constitutions, the Swiss Constitution starts out with a long list of constitutional rights. It contains an equal protection clause (Art. 8 Const.), a clause protecting against arbitrary conduct and guaranteeing the principle of good faith (Art. 9 Const.) and provides for procedural guarantees (Arts. 29 *et seqq.* Const.). All these provisions are of relevance to administrative law. More complex is the foundation of other administrative principles such as the duty of the state to act on a legal basis, in the public interest and propor-

45 BGE 139 I 16 consid. 4.3.2.

46 Federal popular initiative "Zur Durchsetzung der Ausschaffung krimineller Ausländer" (Durchsetzungsinitiative) = "Enforcement of the deportation of criminal immigrants" (enforcement initiative), BBl 2016 3715; *for wording and considerations of the Swiss Federal Council see* BBl 2013 9459.

47 Not least given that the issue of criminal immigrants has been gaining traction across Western societies anyway.

48 Federal popular Initiative "Für die Ausschaffung krimineller Ausländer" (Ausschaffungsinitiative) = "Deportation of criminal immigrants" (deportation initiative), BBl 2009 5097; *see also* HÄFELIN/HALLER/KELLER/THURNHERR, n. 2130; HÄFELIN/MÜLLER/UHLMANN, n. 520.

49 Federal popular Initiative "Millionen-Erbschaften besteuern für unsere AHV" (Erbschaftssteuerreform) = "Taxing million-inheritances in favour of our AHV" (inheritance tax reform), BBl 2014 125, rejected on 14 June 2015, BBl 2015 6313.

50 HÄFELIN/HALLER/KELLER/THURNHERR, n. 2130 *et seqq.*; TSCHANNEN, Staatsrecht CH, n. 1796.

tionately (Art. 5 Const.).[51] Other fundamental rights may concern typical areas of administration such as policing (in correlation with the right to life and to personal freedom in Art. 10 Const.) and schooling (protection of children and young people in Art. 11 Const. and education in Art. 62 Const.), expropriation of property and assets (right to ownership in Art. 26 Const.), economic regulation (economic freedom in Art. 27 Const.) etc.

There is one area of administrative law, in which fundamental rights have significantly shaped the doctrine. Over a long period, the Swiss Supreme Court has reviewed hundreds of cases concerning the *public domain*. Whether the public domain was used for rallies and protests[52], commercial activities[53] or sports[54], fundamental rights have often played a decisive role. The Swiss Supreme Court has acknowledged – interestingly enough, more than 40 years ago in a case concerning prostitutes in Geneva – that the public domain must be open for the exercise of fundamental rights. In the case of the prostitutes, the right in question was economic freedom[55]. A denial of access to the public domain is considered a governmental restriction which places government under the burden of Art. 36 Const.: the administration must demonstrate a legal basis, a public interest and compliance with the principle of proportionality in order to justify such constraints on fundamental rights[56]. 23

8. International Treaties and European Law

a) International Treaties

International treaties are subject to a referendum process, depending on whether they concern the accession to an organisation for collective security or to a supranational community (mandatory referendum, Art. 140 para. 1 lit. b Const.), are of unlimited duration or contain important legislative provisions (optional referendum, Art. 141 para. 1 lit d Const.). In 2015, a member of parlia- 24

51 *See infra* sections 28 *et seqq*.

52 *E.g.* BGE 132 I 256; BGE 127 I 164 (restrictions of freedom of assembly and requirement of prior permission); *further reading cf.* BIAGGINI, Komm. BV, Art. 22, n. 7 *et seqq*.; HÄFELIN/HALLER/KELLER/THURNHERR, n. 546 *et seq*., 576 *et seqq*.

53 *E.g.* BGE 138 I 274 (hanging placards and posters in the public space of a railway station); BGE 126 I 133 (advertisement campaign in the public domain [street]).

54 *E.g.* BGE 137 I 31 (intervention against violence during sport events in public stadiums).

55 HÄFELIN/HALLER/KELLER/THURNHERR, n. 788; Federal Supreme Court decision 2C_106/2015 of 26 June 2015; BGE 101 Ia 473.

56 BIAGGINI, Komm. BV, Art. 22, n 13; HÄFELIN/HALLER/KELLER/THURNHERR, n. 640 *et seqq*.

ment proposed a constitutional amendment bringing these provisions in congruence with the referendum process for laws and constitutional amendments, which however failed to materialise as the motion was rejected 6 years and one federal election later[57].

25 International treaties are directly applicable as a source of law in Switzerland, provided that the provisions therein are *self-executing*, *i.e.* precise enough to be directly applied in court[58]. The rank of international treaties may be compared to laws as they both enjoy the same privilege of being exempted from full judicial review (Art. 190 Const.). In case of conflict, international treaties normally pre-empt national law. The most common example is the application of the ECHR, which the Swiss Supreme Court enforces routinely. This practice is also based on the Swiss Constitution, although Art. 5 para. 4 Const. only mentions that the confederation and the cantons "shall respect international law". It has yet to be settled whether the legislator may deliberately deviate from this practice and allow a newer constitutional provision whereby national law may prevail over international law and if not, examine the possibility of derogating from the binding effect of international law as an alternative[59]. As the chances of radical initiatives to be passed have been increased, it is very likely that such a case will occur in the future.

b) European Union Law

26 There is an eerie silence about European Union Law in the Swiss Constitution. Needless to say, Switzerland is not part of the European Union and will not be in the foreseeable future. However, the influence of the European Union and its law is palpable. Switzerland has not only concluded substantial bilateral agreements that refer to European law[60] but will regularly streamline its legislation in respect of it, using the euphemism – if not the sheer contradictory term of – "*autonomous adaptation*" ("*autonomer Nachvollzug*") to describe this harmonisation process[61]. The European Union may not directly legislate in Switzerland but in the areas covered by bilateral agreements, "*mixed committees*" ("*gemischte Ausschüsse*")

57 *See* Parliamentary Motion 15.3557 of Andrea Caroni in <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20153557> *and* BBl 2020 1271, p. 1271.

58 Gächter, Staatsrecht, § 23 n. 137; Häfelin/Haller/Keller/Thurnherr, n. 2365 *et seqq.*; Häfelin/Müller/Uhlmann, n. 123; BGE 140 II 185 consid. 4.2.

59 Biaggini, Staatsrecht, § 9 n. 36 *et seqq.*; Häfelin/Müller/Uhlmann, n. 128 *et seq.*

60 Häfelin/Müller/Uhlmann, n. 129.

61 Tschannen/Müller/Kern, n. 361 *et seqq.*; Uhlmann, Administrative Procedure, pp. 198 *et seq.*; Uhlmann, Codification, p. 289.

declare newer EU legislation applicable[62]. Also, the Swiss Supreme Court ponders newer European practice when applying Swiss law. Hence, conformity with EU law is an important aspect of statutory interpretation, especially for comparable areas of Swiss law[63] in an effort to achieve an ideally parallel development of the domestic legal system[64] to EU legislation.

Politically, the relationship between Switzerland and the European Union has been ambivalent; following decades of sectorial cooperation, which materialised in the adoption of the *Bilaterals I and II*[65], the parties embarked on negotiations on an "*institutional agreement*" ("*Institutionelles Rahmenabkommen*") in 2014 which the Swiss government ended up not signing seven years later[66]. Since then, significant progress has been made in the run-up to a new package of agreements in the "familiar" manner – the *Bilaterals III*[67]. While the negotiations have been concluded in December 2024 and the agreements now enter the parliamentary consultation phase[68], voices in the domestic political arena urge the necessity of a mandatory referendum according to Art. 140 para. 1 lit. b Const.[69] which is regarded as unfounded by experts given that the agreements in question lack supranational character[70]. With a referendum likely taking place in 2027, consultations with cantons, municipalities and 27

62 *For an overview of mixed committees and their declarations see* Federal Department of Foreign Affairs, "Beschlüsse der gemischten Ausschüsse", Information page of 30 December 2024, in: <https://www.europa.eda.admin.ch/de/beschluesse-der-gemischten-ausschuesse>; Uhlmann, Administrative Procedure, pp. 198 *et seq.*

63 Häfelin/Müller/Uhlmann, n. 129 *et seqq.*; Tschannen/Müller/Kern, n. 360 *et seqq.*; *see also* BGE 143 II 518 consid. 5.6.1; BGE 136 II 5 consid. 3.4; BGE 130 II 1 consid. 3.6.1.

64 *Ibid.*

65 *For an overview of all bilateral agreements between Switzerland and the EU see* Federal Department of Foreign Affairs, "Bilateral agreements and cooperations since 2004", Information page of 24 January 2025, in: <https://www.europa.eda.admin.ch/en/bilateral-agreements-and-cooperations-since-2004>.

66 *See* Federal Department of Foreign Affairs, "No signing of Swiss-EU institutional agreement", Press release of 26 May 2021, in: <https://www.eda.admin.ch/eda/en/fdfa/fdfa/aktuell/news.html/content/eda/en/meta/news/2021/5/26/83705>.

67 *For an overview of the package see* Federal Department of Foreign Affairs, "Package Switzerland-EU", Information page of 13 June 2025, in: <https://www.europa.eda.admin.ch/en/package-switzerland-eu>.

68 *See* Federal Department of Foreign Affairs, "Federal Council takes note of substantive conclusion of Swiss–EU negotiations", Press release of 20 December 2024, in: <https://www.eda.admin.ch/eda/en/fdfa/fdfa/aktuell/news.html/content/eda/en/meta/news/2024/12/20/103692.html>.

69 *See* SRF, "Ratskommission gegen obligatorisches EU-Referendum", Article of 11 February 2025, in: <https://perma.cc/JJ2B-J5SQ>.

70 *See e.g.* Epiney/Frei/Diezig, BSK BV, Art. 140, n. 14 *et seqq.*; Rhinow/Müller, p. 18.

other interested parties finalised in October 2025[71] and the Federal Council has since signed an agreement on the participation in EU programmes in November 2025[72]. Regardless thereof, it remains to be seen how the future of the relationship – and consequently the dynamic of the EU's influence on Swiss administrative law – will develop in the future.

71 Federal Department of Foreign Affairs, "Switzerland-EU package: consultation results", Press release of 5 December 2025, in: <https://www.europa.eda.admin.ch/en/switzerland-eu-package-bilateral-iii-consultation-results>.

72 Federal Office of Foreign Affairs, "Switzerland and EU sign agreement on Swiss participation in EU programmes", Press release of 10 November 2025, in: <https://www.europa.eda.admin.ch/en/newnsb/_AfAX1ioyLE_IqIi_raOP>.

B) Principles of Administrative Action

Further Reading

JOHN S. BELL, *Comparative Administrative Law, in: Mathias Reimann/Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2nd edition, Oxford 2019*

GEORG MÜLLER, Inhalt und Formen der Rechtssetzung als Problem der demokratischen Kompetenzordnung, Habil. 1978, Basel 1979

BENJAMIN SCHINDLER, Verwaltungsermessen, Gestaltungskompetenzen der öffentlichen Verwaltung in der Schweiz, Habil. Zürich, Zürich/St. Gallen 2010

1. Legality

Further Reading

FELIX UHLMANN/FLORIAN FLEISCHMANN, Das Legalitätsprinzip – Überlegungen aus dem Blickwinkel der Wissenschaft, in: Felix Uhlmann (ed.), Das Legalitätsprinzip in Verwaltungsrecht und Rechtsetzungslehre, 15. Jahrestagung des Zentrums für Rechtsetzungslehre, Zürich/St. Gallen 2017, pp. 7 *et seqq.*

a) Legality through the Law

The principle of legality (or the "rule of law") refers to the idea of restraining governmental power by means of the law. Most legal traditions know forms and traits of this principle, but the precise meaning and interpretation may differ from country to country[73]. The Swiss understanding of the notion is close to the German tradition but has developed some distinctive features. For example, the distinction between *precedence of the law* ("*Gesetzesvorrang*") and *statutory reservations* ("*Gesetzesvorbehalt*")[74] has nearly ceased in Switzer- 28

73 UHLMANN, Administrative Law, pp. 164 *et seq.*

74 BIAGGINI, Komm. BV, Art. 5, n. 7 *et seqq.*; EPINEY, BSK BV, Art. 5, n. 39; KARLEN, pp. 44 *et seqq.*; TSCHANNEN/MÜLLER/KERN, n. 394; WEERTS, pp. 80 *et seqq.*

land[75]. The Swiss Constitution outlines the principle of legality in Art. 5 para. 1 Const.: "All activities of the state are based on and limited by law". Accordingly, every form of administrative action must be traced back to a statutory provision. The emphasis lies on finding a basis that justifies state actions *within the law*, hence diminishing the relevance of the idea that limitations on governmental power can be imposed *through law*. In a landmark decision almost fifty years ago the Swiss Supreme Court stated that a legal basis is necessary not only for restrictions on administrative action but also for the administration of services such as universities[76]. More recently, Swiss scholars have discussed whether purely informative activities of the state require a legal basis too. It is generally accepted that a legal basis must exist even if such activities may be implicitly included in the power to administrate[77]. There are little, if any, implied powers for government, at least not in ordinary circumstances[78].

29 Administrative action may be deemed *ultra vires* – although Swiss doctrine does not use this term – if the administrative authority cannot demonstrate an adequate legal basis for its action. Interestingly, a challenge on this ground overlaps with the question of the *correct application of the law* given that Government typically oversteps its competences when relying on an incorrect statutory interpretation[79].

b) Legality of the Law

30 The principle of legality is not only a challenge to administrative action *through* law and *based on law* but also a powerful tool directed *against the law* itself. The principle requires not only a legal basis for administrative action but also a basis that satisfies *minimal qualitative requirements*[80]. In essence, the legal basis of an administrative action may not be *unduly vague*, and *important decisions* must be taken by the *legislator*[81].

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75 Häfelin/Müller/Uhlmann, n. 336 *et seq. with reference to* n. 325; Uhlmann/Fleischmann pp. 9 *et seq.*; *dissenting:* Epiney, BSK BV, Art. 5, n. 39.

76 Griffel, Allgemeines Verwaltungsrecht, n. 150; Häfelin/Müller/Uhlmann, n. 379 *et seqq.*; Karlen, pp. 45, 48; Mächler, pp. 102 *et seq.*; Tschannen/Müller/Kern, n. 409 *et seqq.*; BGE 103 Ia 369 ("Waeffler") consid. 5. *et seq.*

77 Epiney, BSK BV, Art. 5, n. 50; Häfelin/Müller/Uhlmann, n. 383.

78 Stauffer von May, n. 200 *with further references.*

79 Uhlmann/Fleischmann, p. 14.

80 Biaggini, Komm. BV, Art. 36, n. 9; Uhlmann, Administrative Law, p. 164; Uhlmann/Fleischmann, pp. 14 *et seq.*

81 Uhlmann, Administrative Law, p. 164; Zen-Ruffinen, Vol. 1, n. 327.

The prohibition of *unduly vague* law is commonly recognised. The Swiss Supreme Court requires that the law must be precise enough to allow citizens to adjust their behaviour according to the legal situation and to foresee the consequences of their behaviour[82]. The Court acknowledges that every law bears some vagueness due to its abstract nature, limitations of language, the impossibility to regulate every potential future situation, and the need for administrative discretion in performing official acts or duties. The standard of review is stricter in cases of significant restrictions, typically involving fundamental rights, and more lenient if state action is not compulsory[83]. A more deferent judicial review is also perceptible in technical areas of the law and in other areas that are notoriously difficult to regulate such as foreign policy[84]. 31

The second requirement is more complex. In its most simple form, it compels the *legislator to 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" (Art. 164 para. 1 Const.)[85]. It is not always discernible which provi- 32

82 BGE 109 Ia 273 consid. 4.d: "Das Gesetz muss so präzise formuliert sein, dass der Bürger sein Verhalten danach einrichten und die Folgen eines bestimmten Verhaltens mit einem den Umständen entsprechenden Grad an Gewissheit erkennen kann." In English: "The law must be sufficiently precise in order to allow the citizen to behave accordingly and to foresee the possible consequences with a degree of certainty that seems proper under the circumstances of the situation."; *see also* BGE 139 I 280 consid. 5.1 (*see also translated summary in* Uhlmann, Administrative Law, pp. 180 *et seq.*); BGE 138 IV 13 consid. 4.1 (*see also translated summary in* Thommen, Criminal Law, in: Introduction, pp. 427 *et seq.*); BGE 136 II 304 consid. 7.6; BGE 136 I 87 consid. 3.1 (*see also translated summary in* Uhlmann, Administrative Procedure, in: Introduction, pp. 202 *et seqq.*); Egli, p. 123; Misic/Töpperwien, n. 533; Griffel, Allgemeines Verwaltungsrecht, n. 102 *et seqq.*; Häfelin/Müller/Uhlmann, n. 329, 342 *et seqq.*; Karlen, pp. 49 *et seqq.*; Tschannen/Müller/Kern, n. 403 *et seqq.*; Zen-Ruffinen, Vol. 1, n. 344.

83 BGE 139 II 243 consid. 10; BGE 138 IV 13 consid. 4.1 (*see also translated summary in* Thommen, Criminal Law, in: Introduction, pp. 427 *et seq.*); BGE 136 II 304 consid. 7.6; BGE 136 I 87 consid. 3.1 (*see also translated summary in* Uhlmann, Administrative Procedure, in: Introduction, pp. 202 *et seqq.*); BGE 135 I 169 consid. 5.4.1; BGE 131 II 13 consid. 6.5.1; Griffel, Allgemeines Verwaltungsrecht n. 102 *et seqq.*; Häfelin/Müller/Uhlmann, n. 344 *et seqq.*; Karlen, p. 49; Misic/Töpperwien, n. 533; Tschannen/Müller/Kern, n. 404; Uhlmann, Administrative Law, p. 164; *see for non-compulsory state action* Federal Supreme Court decision 8D_9/2013 of 11 August 2014 consid. 5.2; BGE 129 I 161 consid. 2.2.

84 BGE 138 II 42 consid. 4.2.3; Häfelin/Müller/Uhlmann, n. 344, 389; Karlen, pp. 49 *et seqq.*; Misic/Töpperwien, n. 533; Müller/Uhlmann/Höfler, n. 255; Uhlmann, Administrative Law, pp. 164 *et seq.*; Uhlmann/Fleischmann, pp. 12 *et seq.*, 21.

85 Egli, pp. 30 *et seq.*; Griffel, Allgemeines Verwaltungsrecht n. 109; Häfelin/Müller/Uhlmann, n. 350; Karlen, p. 47; Misic/Töpperwien, n. 534; Müller/Uhlmann/Höfler, n. 233; Tschannen/Müller/Kern, n. 389, 401; Uhlmann, Administrative Law, p. 165; Uhlmann/Fleischmann, p. 10; Weerts, p. 74.; Zen-Ruffinen, Vol. 1, n. 343. Technically, this

sion is significant and therefore has to be enacted by Parliament. Thus, this requirement needs to be determined on the basis of relevant and substantive criteria of the provision itself. Therefore, financial implications on the state and its citizens and the number of citizens affected by the correspondent legislation have to be analysed. Further aspects of significance include administrative burdens restricting (fundamental) rights as well as imposing obligations and more interestingly, the fact that democratically legitimated legislation will more likely be accepted by individuals concerned[86].

33 In conclusion, a challenge of an administrative action is possible on the account of vagueness of the legal basis or if a legislative basis for the respective administrative action cannot be determined. The principle of legality further includes the hierarchy of the law. If the applicable rule covers an important question, that has not been addressed in any way by the legislator, the principle of legality is violated[87]. It is obvious that this requirement is closely related to the aspects of delegated or secondary legislation, to which the discussion now turns.

c) Delegated Legislation

34 As in many states, delegated legislation is of huge importance in Switzerland. The Swiss Supreme Court has dealt with delegated legislation of the cantons for decades but less so with delegated legislation deriving from Federal acts given that judicial review of Federal laws, and in particular, the delegation clause itself, is barred by Art. 190 Const. The general idea of delegated legislation is the same for federal and cantonal law, though highly complex in its details.

35 The challenge begins with the term "*delegated*". Many provisions in secondary legislation rely on a specific clause in the law, some of them do not. If sec-

provision applies only to the federal legislator but its essence is applicable also to the cantons through Arts. 5 and 36 Const. The wording of the provision is far from clear, the terms "significant" and "fundamental" probably mean the same in this context. Art. 164 para. 2 Const. regulating delegated legislation also raises questions. *See for an overview of the controversy* KAUFMANN, pp. 437 *et seqq.*; *see also* BGE 141 II 169 consid. 3.2; MÜLLER/UHLMANN/HÖFLER, n. 234 *et seq.*; UHLMANN/FLEISCHMANN pp. 10, 17 *et seq.*

86 BGE 134 I 322 consid. 2.6.3; BGE 133 II 331 consid. 7.2.1; BGE 130 I 1 consid. 3.4.2; HÄFELIN/MÜLLER/UHLMANN, n. 353 *et seqq.*; KARLEN, p. 48; MÜLLER/UHLMANN/HÖFLER, n. 235 *et seqq.*; TSCHANNEN/MÜLLER/KERN, n. 389 *et seqq.*; UHLMANN/FLEISCHMANN, p. 11; WEERTS, p. 74.

87 UHLMANN, Administrative Law, p. 165; UHLMANN/FLEISCHMANN, p. 15; WEERTS, pp. 74, 83; ZEN-RUFFINEN, Vol. 1, n. 335, 347.

ondary legislation merely "fills in the gaps" in the law or simply defines a broad term in the law more precisely, no delegation clause is needed[88]. The Federal Council ensures the implementation of legislation and therefore has the power to enact secondary legislation (Art. 182 Const.)[89]. These purely "*executive*" provisions ("*vollziehend*", "*Vollziehungsverordnung*") are based on the law itself and merely make it applicable more readily. By contrast, a delegation clause is needed if secondary legislation creates new obligations or deviates from the law. One may call these provisions "*quasi-legislative*" ("*gesetzesvertretend*", "*gesetzesvertretende Verordnung*") as they regulate what is typically decided by the legislator.

Hence, if dealing with secondary legislation, the first and foremost difficult task is to classify the legal provisions as purely executive or as quasi-legislative. In most cases, ordinances of the executive branch do not indicate *prima facie* the nature of their provisions. A typical ordinance will usually mix executive with quasi-legislative provisions[90]. Furthermore, as many decisions of the Swiss Supreme Court imply, the distinction is more straightforward in abstract terms but elusive in practice[91]. That said, some scholars have proposed to abolish the distinction altogether, but it has persisted[92]. 36

Notwithstanding the above, if one has safely assorted a provision into one or the other category of secondary legislation, the question of delegation can be approached more easily. Undoubtedly, things are simpler if one has concluded that the provision is executive in nature. In this case, the provision has already passed the legality test as long as it lies within the boundaries set out by the 37

88 BGE 141 II 169 consid. 3.3; BGE 139 II 460 consid. 2.1; EGLI, p. 36; GRIFFEL, Allgemeines Verwaltungsrecht, n. 118; HÄFELIN/MÜLLER/UHLMANN, n. 100 *et seqq*., 369; KARLEN, p. 90; TSCHANNEN/MÜLLER/KERN, n. 312, 316, 422; UHLMANN, Administrative Law, p. 165; UHLMANN/FLEISCHMANN, p. 18.

89 BIAGGINI, Komm. BV, Art. 182, n. 4; EGLI, p. 36; HÄFELIN/MÜLLER/UHLMANN, n. 100; KARLEN, p. 90; KÜNZLI, BSK BV, Art. 182, n. 18; TSCHANNEN, SG-Komm. BV, Art. 182, n. 12; TSCHANNEN/MÜLLER/KERN, n. 37, 312; UHLMANN, Administrative Law, p. 165; WEERTS, pp. 74 *et seq*. The cantonal constitutions explicitly or implicitly confer the same power to cantonal governments, *see for example* Art. 67 para. 2 Constitution of the Canton of Zurich: "Er [der Regierungsrat] kann Verordnungen über den Vollzug von Gesetzen erlassen." = "He [the State Council] can issue regulations on the enforcement of laws."; *see also* HÄNER, Komm. KV ZH, Art. 67, n. 11 *et seqq*.

90 GRIFFEL, Allgemeines Verwaltungsrecht, n. 120 *et seq*.; HÄFELIN/MÜLLER/UHLMANN, n. 93 *et seqq*.; TSCHANNEN/MÜLLER/KERN, n. 311 *et seq*.

91 *See e.g.* Federal Supreme Court decision B 10/05 of 30 March 2006 consid. 8.2.2.

92 EICHENBERGER, pp. 31 *et seqq*.; MÜLLER, p. 189; *see also* HÄFELIN/MÜLLER/UHLMANN, n. 375 *et seqq*.

law. Nonetheless, one may still challenge the law itself, *e.g.* for being overly vague.

38 The test is more challenging when dealing with provisions that are *stricto sensu* delegated provisions and therefore quasi-legislative. Again, the provisions must be within the boundaries of the delegation clause, or in other words, they must be "covered" by the law. Additionally, delegated provisions presuppose a closer look at the delegation clause itself: the legislator may not delegate randomly, only delegation clauses that satisfy certain criteria are permissible under the principle of legality.

39 In a long-established doctrine, the courts have introduced four prerequisites that should be fulfilled for a proper delegation clause, of which only the latter two are of practical importance since the others rarely pose a problem. First, the delegation should *not be excluded by the Constitution* – which is almost never the case. Second, the delegation clause must be found *in the law itself* – which is almost always the case. Third, and more intriguing, only a "*precisely defined matter*" ("*… bestimmte, genau umschriebene Materie …*") may be configured by delegated legislation. For example, the legislator may not leave it up to an autonomous administrative body to regulate how it employs its workers as such a competence is just too ample. Fourth, the legislator must outline the "*broad strokes of the regulation*" ("*…Grundzüge der delegierten Materie…*")[93]. In this respect, the doctrine mirrors what was said above about the legality of the law: the legislator must decide the important issues[94]. If any of these prerequisites is not met, the principle of legality is violated.

40 There is more to be said on secondary legislation. Not all secondary legislation, whether executive or substitutionary, derives from the law. Some ordinances may directly rest on the Constitution. This holds especially true in cases of urgency (Art. 185 para. 3 Const.)[95] but also, all the more often, for constitutional amendments requiring a deadline for implementation[96]. One may call these

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93 BGE 142 I 26 consid. 3.3; BGE 128 I 113 consid. 3.c *et seqq.*; BGE 118 Ia 245 consid. 3.b; BGE 115 Ia 378 consid. 3.a; Egli, p. 36; Griffel, Allgemeines Verwaltungsrecht, n. 119; Häfelin/Müller/Uhlmann, n. 368 *with reference to* n. 353 *et seq.*, 372; Karlen, pp. 48 *et seq.*; Tanquerel/Bernard, n. 493; Tschannen/Müller/Kern, n. 423; Uhlmann, Administrative Law, pp. 165 *et seq.*; Zen-Ruffinen, Vol. 1, n. 69.

94 *See supra section* 6.

95 Egli, p. 36; Häfelin/Müller/Uhlmann, n. 369, 385, 2637 *et seqq.*; Karlen, p. 91; Tschannen/Müller/Kern, n. 309 *with further references.*

96 *E.g.* Art. 197 para. 1 Const. "If the relevant legislation does not come into force within two years of the adoption of Article 75b, the Federal Council shall issue the required implementing provisions on construction, sale and recording in the land register by ordinance.";

ordinances "*autonomous*" ("*selbständig*"), in contrast to ordinances "*dependent*" on the law ("*unselbständig*"). Their validity must be analysed in the light of the respective constitutional provision.

Another important distinction of secondary legislation refers to (or is associated with) the very nature of the regulation. In Swiss administrative law, secondary legislation comes in the form of ordinances, formally passed by the Federal Council or the government of the cantons. Subdelegation of legislative powers may also be possible[97]. Such ordinances are part of the official compilation of federal and state legislation[98]. They must be properly announced in the official gazette before entering into force[99] and are – if deemed important enough – subject to an official *participation procedure* ("*Vernehmlassung*")[100]. They differ from laws only in authorship (that is not Parliament but the executive branch) and in rank since a law would pre-empt an ordinance in case of conflict. 41

"Regulation" includes various forms: *e.g.* internal instructions to other administrative entities or civil servants, rules for best practice, guidelines to citizens for better understanding of the law, policy statements, white books etc. Swiss courts and doctrine do not consider such forms of regulatory framework intrinsically delegated legislation but solely "*administrative provisions*" ("*Verwaltungsverordnungen*", comparable to "*Verwaltungsvorschriften*" in Germany). They are permissible if the issuing body has the necessary implementing power or is just hierarchically superior to the addressee[101]. In principle, they cannot be binding on private parties, it is the privilege of the law and of secondary legislation ("*Rechtsverordnungen*") to have that effect. Nevertheless, it is possible that such provisions exceptionally have "*external effects*" on private 42

Art. 197 para. 2 Const. "If the implementing legislation for Article 121a has not come into force within three years of its adoption by the People and the Cantons, the Federal Council shall issue temporary implementing provisions in the form of an ordinance."; *see also* KARLEN, p. 91; *for a general discussion of constitutional amendments see supra section 6.*

97 *On the federal level see* Art. 48 Government and Administration Organisation Act (GAOA); GÄCHTER, Staatsrecht, § 22 n. 38; KARLEN, pp. 91 *et seq.*; *for further reading see* SÄGESSER, Komm. RVOG, Art. 48, n. 5 *et seqq.*

98 *On the federal level see* Art. 2 Publications Act (PublA).

99 *On the federal level see* Art. 7 PublA.

100 *On the federal level see* Art. 3 Consultation Procedure Act (CPA).

101 GRIFFEL, Allgemeines Verwaltungsrecht, n. 126 *with further references*; HÄFELIN/MÜLLER/UHLMANN, n. 81 *et seq. with further references*; KARLEN, pp. 94 *et seq. with further references*; TSCHANNEN/MÜLLER/KERN, n. 1114; UHLMANN/BINDER, pp. 153 *et seq.*

parties ("*Aussenwirkung*") and can be challenged[102]. Courts will not enforce administrative provisions but will take them into account because they express the first and often deciding reading of the law through the administration, forming thus common administrative practice[103].

d) Judicial Review

43 Judicial review is possible on the basis of all aspects of the principle of legality. By way of example, a schoolboy expelled for bad behaviour may claim that the authorities have no basis for expulsion in his case and have, thus, overstepped their competences. This is a challenge to the application of the law[104]. The schoolboy may also contend that his dismissal is illegal because the ruling is based on a statutory provision that is too vague, giving the authorities unfettered discretion[105]. Further, the schoolboy may defy the legal basis on the grounds that the expulsion should have been regulated by the law itself and not by secondary legislation – a challenge that was successfully brought forward in 2013 against school regulation targeting headscarves[106].

44 It is not uncommon for these challenges to be combined. The principle of legality covers all the aforementioned aspects, and the distinction between them is not always simple. Yet, the distinction may be important under *procedural aspects*. As discussed above, the Swiss Supreme Court must apply federal legislation, notwithstanding possible conflicts with the Constitution (Art. 190 Const.). In these cases applicants may only contend that federal legislation was not properly applied. Similarly, not all aspects of the principle of legality may be brought forward when cantonal law is applied and the Swiss Supreme Court will typically defer to the interpretation of cantonal courts[107].

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102 But there is an exception to this exception: If an administrative body has issued an administrative act ("*Verfügung*") based on the respective administrative provision, the administrative act has to be challenged if such a challenge is reasonable for the private party, GRIFFEL, Allgemeines Verwaltungsrecht, n. 129; HÄFELIN/MÜLLER/UHLMANN, n. 87.

103 GRIFFEL, Allgemeines Verwaltungsrecht, n. 127; HÄFELIN/MÜLLER/UHLMANN, n. 83 *et seq.*; KARLEN, p. 95; TSCHANNEN/MÜLLER/KERN, n. 1116 *et seqq.*; UHLMANN/BINDER, pp. 156 *et seqq.*

104 *See e.g.* BGE 129 I 35 consid. 7.8.

105 *See e.g.* BGE 129 I 12 consid. 8.5, although in this case the court decided that the legal basis was sufficient. The special legal nature of the disciplinary regulation of the school justified a more general wording of the law.

106 BGE 139 I 280 consid. 5.4 (*see also translated summary in* UHLMANN, Administrative Law, pp. 180 *et seq.*); *see* UHLMANN, Administrative Law, p. 166.

107 *See supra section* 14.

2. Public Interest and Proportionality

Further Reading

DAVID HOFSTETTER, Das Verhältnismässigkeitsprinzip als Grundlage rechtsstaatlichen Handelns (Art. 5 Abs. 2 BV), Diss. Zürich, Zürich/Basel/Genf 2014

MARKUS MÜLLER, Verhältnismässigkeit: Gedanken zu einem Zauberwürfel, 2nd edition, Bern 2023 (cit. MÜLLER, Verhältnismässigkeit, p. __)

MARTIN PHILIPP WYSS, Öffentliche Interessen – Interessen der Öffentlichkeit?: Das öffentliche Interesse im schweizerischen Staats- und Verwaltungsrecht, Habil., Bern 2001 (cit. WYSS, Öffentliche Interessen, § __ n. __)

a) Public Interest

Swiss administrative law – as many European legal orders do – ascribes to public law "a distinctive mission", a concept which is usually attributed to Ulpian[108]. This distinguishing element has far reaching consequences for the divide between public and private law which will be analysed in detail[109]. It also elevates the idea of public interest to a driving factor of administrative action: "*State activities must be conducted in the public interest*" (Art. 5 para. 2 Const.). Comparable to the principles of legality and proportionality, the public interest is mentioned as a general rule for state action (Art. 5 para. 2 Const.) and as prerequisite for restrictions on fundamental rights (Art. 36 para. 2 Const.)[110]. 45

The constitutional status of this principle should not lead us to overestimate the merits of it. In fact, the duty of the administration to act in the public interest alone is rather soft and doesn't have considerable practical consequences. It may be argued that its omnipresence in administrative law constitutes its very weakness. Even its definition bears some features of circularity, which ultimately attenuates its significance: if one searches for the characteristics of the different facets of public interest, one must necessarily turn to the laws and their goals as set by the legislator; hence, it is basically the legislator 46

108 BELL, p. 1253 *with further references*; WYSS, Öffentliche Interessen, § 5 n. 3 *et seqq.*

109 *See infra section* 132.

110 UHLMANN, Codification, p. 278; ZEN-RUFFINEN, Vol. 1, n. 383, 391, 433.

that defines public interest[111]. To make matters worse, public interest is only vaguely defined by the legislator and receives flexible interpretation over time and place by courts[112]. For example, the Swiss Supreme Court found regulation on buying, breeding and possessing dogs that potentially pose a high risk to the public permissible, on the account that the "sense of security" – *i.e.* not security itself – may qualify as a public interest[113]. Not much better seems the approach to the case of cell towers, the construction of which may be banned as many people consider them "unsecure, unattractive or otherwise unpleasant"[114]. Admittedly, there are caveats in these decisions, but they clearly show ample judicial deference to what public authorities consider to be in the interest of the public.

47 The principle of public interest springs into life when taken in consideration together with other principles or rights and first and foremost, with the principle of *proportionality*. The public interest sets the benchmark for the proportionality test, most obviously by introducing proper balancing between public and private interests[115]. The public interest is also reflected in the *prohibition of arbitrariness*, preventing laws that are "*utterly pointless*" ("*sinn- und zwecklos*")[116]. In connection with fundamental rights, the definition of admissible public interests may be delineated with narrower terms, *e.g.* prohibiting state intervention in targeting free competition (Art. 27 in conjunction with Art. 94 Const.)[117]. Exceptionally, state action may fail the public interest test: it

111 Epiney, BSK BV, Art. 5, n. 63; Griffel, Allgemeines Verwaltungsrecht, n. 192 *et seqq.*; Wyss, Öffentliche Interessen, § 3 n. 301 *et seqq.*; Schindler/Tschumi, SG-Komm. BV, Art. 5, n. 44; Zen-Ruffinen, Vol. 1, n. 385.

112 BGE 138 I 378 consid. 8.3; Egli, p. 124; Griffel, Allgemeines Verwaltungsrecht, n. 193; Haller, n. 376; Häfelin/Müller/Uhlmann, n. 465; Karlen, p. 56; Misic/Töpperwien, n. 536; Schindler/Tschumi, SG-Komm. BV, Art. 5, n. 50; Tschannen/Müller/Kern, n. 445; Vallender/Hettich, n. 287 *et seq.*; Zen-Ruffinen, Vol. 1, n. 386; *see also* BGE 140 II 33 consid. 6.1 *et seq.* (in which the Federal Supreme Court recognised compelling public and private interests in having Christmas lights); BGE 138 II 346 consid. 10.6.1 (in which the Federal Supreme Court saw "Google Streetview" as subject to the interest of the public).

113 BGE 136 I 1 consid. 4.4.2.

114 BGE 138 II 173 consid. 7.4.3.

115 Egli, p. 125; Griffel, Allgemeines Verwaltungsrecht n. 159 *et seq.*, 191; Haller, n. 378; Häfelin/Müller/Uhlmann, n. 487, 496 *et seqq.*; Karlen, pp. 55, 60 *et seq.*; Misic/Töpperwien, n. 540; Tschannen/Müller/Kern, n. 448; Uhlmann, Administrative Law, p. 166; Zen-Ruffinen, Vol. 1, n. 438; *see infra section* 50.

116 *See infra sections* 75 *et seqq.*

117 Kiener/Kälin/Wyttenbach, n. 1545 *et seqq.*; Tanquerel/Bernard, n. 542.

is intensely debated whether state economic activity is permissible when the sole objective is to generate revenues for the state[118].

It should be also noted that administrative authorities are often confronted with sensitive cases in which numerous public and private interests have to be balanced[119]. In such an event, only proper assessment of these interests will lead to decisions that make full and proper use of the administrative discretion the authorities are entrusted with[120]. 48

b) Proportionality

The principle of proportionality, after the principle of legality and the duty to act in the public interest, is the third principle in the list of Art. 5 and Art. 36 Const. which is set as a general requirement for state action (Art. 5) and a prerequisite for the restriction of fundamental rights (Art. 36). Its proper application is considered as a question of law which allows courts to intervene. The law itself may be subject to a proportionality test. Some restrictions apply before the Swiss Supreme Court as it may not fully review cantonal law[121]. Nevertheless, the number of cases decided under this principle is impressive[122]. 49

Congruent with the German understanding, the principle of proportionality encompasses a *threefold test* based on a comparison between the end pursued (in public interest[123]) and the means employed. The means must be (1) *suitable* ("*geeignet*") for the end, they must be (2) *necessary* ("*erforderlich*") in the sense that milder means have proven to be inefficient and they must be (3) *bearable* ("*zumutbar*"), *i.e.*, the end must outweigh the private interest. All three prereq- 50

118 BGE 138 I 378 ("Glarnersach") consid. 8.6; Biaggini et al., p. 56; Griffel, Allgemeines Verwaltungsrecht n. 252 *et seq.*; Häfelin/Müller/Uhlmann, n. 484; Karlen, pp. 56 *et seq.*; Tschannen/Müller/Kern, n. 261 *et seqq*; Vallender/Hettich, n. 287 *et seq.*

119 Häfelin/Müller/Uhlmann, n. 496 *et seqq.*; Tschannen/Müller/Kern, n. 448; Zen-Ruffinen, Vol. 1, n. 421 *et seqq.*

120 *See infra section* 77.

121 *For the proportionality test in general see* BGE 142 I 49 consid. 9.1; Egli, p. 125; Griffel, Allgemeines Verwaltungsrecht, n. 153 *et seqq.*; Haller, n. 378; Häfelin/Müller/Uhlmann, n. 514 *et seqq.*; Karlen, pp. 59 *et seqq.*; Misic/Töpperwien, n. 539 *et seqq.*; Tschannen/Müller/Kern, n. 452 *et seqq.*; Uhlmann, Administrative Law, pp. 166 *et seq.*; Zen-Ruffinen, Vol. 1, n. 440 *et seqq.*; the Court however reviews the proportionality of cantonal acts if fundamental rights are involved (Häfelin/Müller/Uhlmann, n. 519; Schweizer/Krebs, SG-Komm. BV, Art. 36, n. 18 *et seqq.*; *for further reading see* Hofstetter, n. 549 *et seqq.*), otherwise only under the deferential standard of arbitrariness *see infra sections* 75 *et seqq.*

122 *For an overview see* Wiederkehr/Richli, Vol. 1, n. 1735 *et seqq.*

123 *See supra section* 47.

uisites must be satisfied, otherwise the administrative action will fail the test. For example, restricting helicopter flights from some ports to protect a certain area in the mountains proves to be unsuitable if the same area may be easily accessed through other ports not falling under the restriction[124]. A general prohibition to store medication abroad on the grounds that inspection of the respective facilities by Swiss authorities must be possible, is not necessary if the same level of the product's desired quality can be achieved through inspections by the foreign competent authorities (assuming the petitioner's willingness to bear the additional costs)[125]. Lastly, as for the third step of the test, the establishment of a natural reserve may outweigh the owner's interest to build houses in the centre but it may become unbearable for owners at the border of the reserve[126] and – as was held in a more recent case in the context of the COVID-19 pandemic – a certification requirement for the physical attendance of university classes is disproportionate given that the choice between a vaccination and consistent testing (without any form of financial aid for students in need) creates a burden (not least a significant financial one in the latter option) which outweighs the public interest in the protection of public health[127].

51 Although the general concept of the principle of proportionality is well known and seems to be straightforward, it hides some questions that may not be readily answered. To start with, there are no clear rules that determine who bears the *burden of proof* in a case. Consider the following: if a new rule is introduced that requires restaurants to offer a soft drink cheaper than beer, must the government prove that this measure efficiently deters minors from drinking or must the bar keepers prove its inappropriateness? Courts circumvent the question or give at least ample leeway to legislative and administrative discretion[128]. As it has been illustrated in the meandering language of the Swiss Supreme Court in a relevant case, "it may well be that the measure has no sizeable effect but this does not mean that it is completely ineffective [...]. There exist only few measures against alcoholism and the ones available

124 BGE 128 II 292 consid. 5.1.
125 BGE 131 II 44 consid. 4.4.
126 BGE 94 I 52 consid. 3.
127 BGE 149 I 191 consid. 7.7.
128 The burden of proof rule of Art. 8 Swiss Civil Code (CC) applies as a general legal principle in public law. It states: "Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact."; *see* BVGE 2008/24 consid. 7.2; Kiener/Rütsche/Kuhn, n. 766.

should not be readily dismissed"[129]. It is true that the review gets stricter if substantial interests or fundamental rights are involved[130] but it remains difficult to predict which party carries the risk associated with the lack of evidence.

The second point to be raised, concerns the interplay between proportionality and *administrative discretion*. While administrative discretion is typically exempted from judicial control[131], the proportionality of a state measure is not. However, in practice, questions of discretion and proportionality are hard to keep apart: The expulsion of a schoolboy for bad behaviour – to pick up the example discussed above[132] – may be considered as a question of discretion but may also be easily rephrased as a question of proportionality, which is what every good lawyer should argue for. In my view, Swiss courts and doctrine have not satisfactorily distinguished between those two questions. 52

Finally, the principle of proportionality includes a challenging aspect that was triggered by a decision of the Swiss Supreme Court in a case concerning medical treatment and is associated with the purposes underlying the application of the principle, especially in the context of the administration of services. The court, among other considerations, rejected an expensive medical treatment on the grounds that the costs were not proportionate in light of the expected medical benefits for the patient[133]. In this case, the application of the principle was *reversed* in a way, *i.e.* it was not used as grounds for invalidation of a state action but for its justification. Typically, private parties benefit from the principle of proportionality and invoke it against state intervention[134]. It is in my view doubtful that state services can be reduced only in reference to the principle of proportionality (because they seem "too expensive"), more generally 53

129 BGE 109 Ia 33 consid. 4.c: "Die von der angefochtenen Norm erstrebte Preisparität mag möglicherweise keine starke Wirkung gegen den Alkoholismus entfalten, sie braucht aber nicht völlig wirkungslos zu sein. […] Es gibt insgesamt nur bescheidene Mittel gegen Alkoholismus und Alkoholmissbrauch: die wenigen, die es gibt, dürfen nicht verschmäht werden." In English: "The price parity sought by the contested provision may not have a strong effect against alcoholism, but it doesn't need to be completely ineffective. […] There are altogether only modest remedies against alcoholism and alcohol abuse: the few that actually exist should not be disdained.".

130 BGE 130 I 16 consid. 5.1, 5.4; Häfelin/Müller/Uhlmann, n. 517; Schindler/Tschumi, SG-Komm. BV, Art. 5, n. 52, 60 *et seq*.

131 *See infra section* 77.

132 *See supra section* 43.

133 BGE 136 V 395 consid. 7.4 *et seqq*.

134 Uhlmann/Bukovac, p. 50.

whether the principle can be used to the disadvantage of private parties at all[135]. The question remains unanswered by the Swiss Supreme Court.

c) Proportionality and Administrative Fees

54 There is an abundance of fees in federal, cantonal and municipal legislation, which makes their categorisation almost impossible, all the more so because the legislator may freely introduce new forms[136]. Still, there are some similarities in their structural features[137] and constitutional law sets noticeable restrictions on their imposition, mainly through the principle of proportionality.

55 Typically, fees are opposed to taxes. Whereas taxes are due without any related state service in return, fees usually reflect an administrative activity. There is a form of *exchange* between state services on the one hand and fees on the other, though the exchange does not need to be voluntary. The principle of proportionality requires a "reasonable relationship" between state services and fees. The configuration of such a relationship may be quite simple when state services can be equally offered by private enterprises and one can establish something like a market value to draw comparisons (*e.g.* the fees for the translation of a court document). It is, of course, more difficult to do so for services exclusively executed by the state (*e.g.* fees for the procedure for a criminal conviction) although, even in the latter case, one may come up with some analogies (*e.g.* police v. private security firms) or just estimate governmental costs. Courts will intervene if fees are grossly disproportionate against the background of governmental action. In this context, the principle of proportionality is usually designated "*principle of equivalence*" ("*Äquivalenzprinzip*")[138].

56 The imposition of fees and levies must respect other principles too. Court practice requires that the total revenue of fees from a specific area of state action do not exceed costs, enunciating this proposition in the "*principle of cost recovery*" ("*Kostendeckungsprinzip*"). The discussion about the source of this principle is

135 Griffel, Allgemeines Verwaltungsrecht n. 156; Häfelin/Müller/Uhlmann, n. 520; Müller, Verhältnismässigkeit, pp. 52 *et seqq.* (who argues in favour of the application of the principle of proportionality to the disadvantage of parties); Tschannen/Müller/Kern, n. 470 *et seq*; Uhlmann/Bukovac, p. 51.

136 Griffel, Allgemeines Verwaltungsrecht n. 473 *et seq.*; Häfelin/Müller/Uhlmann, n. 2757; Tanquerel/Bernard, n. 483 *et seq.*; Tschannen/Müller/Kern, n. 1587 *et seqq.*

137 *For an overview see* Tschannen/Müller/Kern, n. 1587, 1590 *et seqq.*

138 BGE 141 I 105 consid. 3.3.2; BGE 140 I 176 consid. 5.2; BGE 139 III 334 consid. 3.2.4; BGE 130 III 225 consid. 2.3; Griffel, Allgemeines Verwaltungsrecht n. 488 *et seqq.*; Häfelin/Müller/Uhlmann, n. 2785 *et seqq.*; Karlen, p. 429; Tschannen/Müller/Kern, n. 1641 *et seqq.*

not fully settled; one may attach it to proportionality or to the very nature of fees[139]. The principle does not apply to all fees[140], and the legislator may overrule it if the constitutional requirements for taxation (Art. 127 Const.) are respected[141].

The principles of equivalence and of cost recovery play a remarkable role if one turns to the *legal basis* for fees and levies. Court practice has established that fees and levies must be regulated in the law, clearly identifying who must pay what amount in respect to which service[142]. This requirement for a clear legal provision that determines fees and levies, may be weakened if the obliged party can reasonably foresee the amount due in the light of the principles of equivalence and of cost recovery[143]. On a more abstract level, one may contend that the principle of legality is moderated through the principle of proportionality. In other words, the principle of proportionality may be *invoked against* fees and levies in the form of the principles of equivalence and cost recovery but may also help to *defend* the legal basis for them that would be considered overly vague without recourse to this principle[144]. 57

3. Protection of Legitimate Expectations and of Good Faith

Further Reading

THOMAS GÄCHTER, Rechtsmissbrauch im öffentlichen Recht, Habil. Zürich 2002, Zürich/Genf 2005 (cit. GÄCHTER, Rechtsmissbrauch, p. __)

139 HÄFELIN/MÜLLER/UHLMANN, n. 2760, 2778; *for further reading see* WYSS, Kausalabgaben, pp. 97 *et seqq. with further references.*

140 *For an overview see* HÄFELIN/MÜLLER/UHLMANN, n. 2781 *et seqq.*

141 GRIFFEL, Allgemeines Verwaltungsrecht n. 486; HÄFELIN/MÜLLER/UHLMANN, n. 2781; KARLEN, pp. 429 *et seq.*; TSCHANNEN/MÜLLER/KERN, n. 1636.

142 BGE 149 II 177 consid. 8.3; BGE 141 V 509 consid. 7.1.1; BGE 134 I 179 consid. 6.1; BGE 132 I 117 consid. 4.2; GRIFFEL, Allgemeines Verwaltungsrecht n. 475 *et seqq.*; HÄFELIN/MÜLLER/UHLMANN, n. 2799 *et seqq.*; TSCHANNEN/MÜLLER/KERN, n. 1650 *et seqq.*

143 BGE 141 V 509 consid. 7.1.1 *et seq.*; BGE 132 II 371 consid. 2.1; BGE 132 I 117 consid. 4.2; BGE 130 I 113 consid. 2.2; GRIFFEL, Allgemeines Verwaltungsrecht n. 481 *et seqq.*; HÄFELIN/MÜLLER/UHLMANN, n. 2806 *et seqq.*; KARLEN, p. 430; TANQUEREL/BERNARD, n. 484 *et seq.*; TSCHANNEN/MÜLLER/KERN, n. 1655 *et seqq.*

144 UHLMANN, Kausalabgaben, pp. 88; WYSS, Kausalabgaben, pp. 73, 93 *et seq. with further references.*

BEATRICE WEBER-DÜRLER, Vertrauensschutz im öffentlichen Recht, Habil. Zürich, Basel/Frankfurt 1983

a) Overview

58 The protection of legitimate expectations (Art. 9 Const.) and of good faith (Art. 5 para. 3 Const.) is a powerful tool to overcome injustice in individual cases. Both principles help to correct shortcomings that may stem from a schematic application of the principle of legality. Typical cases of legitimate expectations involve a *balancing test* between the principle of legality and legitimate expectations[145]. Interestingly enough, though, the latter are not explicitly mentioned in the Swiss Constitution but are generally understood as vested in Art. 9 Const., which provides protection against state action that is not taken in good faith (or that is arbitrary)[146]. That said, Art. 9 Const. constitutes one of the two occasions in which good faith is constitutionally guaranteed, the second being Art. 5 para. 3 Const., under which both state institutions and private parties must act in good faith. The following point is of legal significance here: While neither the state nor its citizens may act in bad faith, legitimate expectations may only be created on the part of the state and invoked by the citizens against the state only[147]. Within this framework, Art. 9 Const. creates a fundamental right[148] for citizens, which is what underlines the legal prestige of good faith and legitimate expectations.

145 BGE 137 I 69 consid. 2.6 (*see also translated summary in* UHLMANN, Administrative Law, pp. 179 *et seq.*); EGLI, p. 160; GRIFFEL, Allgemeines Verwaltungsrecht n. 172, 183 *et seqq.*; HÄFELIN/MÜLLER/UHLMANN, n. 626; KARLEN, p. 65; EGLI/KRADOLFER, SG-Komm. BV, Art. 9, n. 82 *et seqq.*; TSCHANNEN/MÜLLER/KERN, n. 482 *et seq.*; TSCHENTSCHER, BSK BV, Art. 9, n. 15; UHLMANN, Administrative Law, pp. 168 *et seq.*; WEBER-DÜRLER, pp. 112 *et seq.*

146 EGLI, p. 160; HALLER, n. 460; HÄFELIN/MÜLLER/UHLMANN, n. 622, 624; EGLI/KRADOLFER, SG-Komm. BV, Art. 9, n. 68 *et seq.*; MISIC/TÖPPERWIEN, n. 553; RHINOW/SCHEFER/UEBERSAX, n. 1996 *et seq.*; UHLMANN, Administrative Law, pp. 166 *et seq.*

147 HÄFELIN/MÜLLER/UHLMANN, n. 621.

148 EGLI, p. 160; GRIFFEL, Allgemeines Verwaltungsrecht n. 170; HALLER, n. 459 *et seq.*; HÄFELIN/MÜLLER/UHLMANN, n. 622; KARLEN, p. 63; MISIC/TÖPPERWIEN, n. 552; RHINOW/SCHEFER/UEBERSAX, n. 1989; TSCHANNEN/MÜLLER/KERN, n. 476.

b) Legitimate Expectations

a. General Prerequisites

Many doctrinal lines have been written about the protection of legitimate expectations and an abundance of cases has been decided[149]. The crucial starting point in determining whether legitimate expectations have been created and therefore need protection is to evaluate the *basis* that has triggered them: the stronger the basis, the higher the level of protection is. For example, a (formal) administrative act is a stronger basis than the information provided by the authorities about an administrative issue[150]. To this end, courts usually conform to precedent court decisions in which the bases for the expectations have long been consolidated given their recurrence over time as a theme of jurisprudential settlement. 59

If one may distil general principles notwithstanding different bases, one may conclude on the following: The expectations must always be *legitimate*. There is no legitimacy if the private party knew that the basis is unsound or erroneous[151]; a trained lawyer may not rely on governmental information if a simple review of the law would have proved it wrong[152] but maybe a layman can. If for example a layman legitimately relied on information given by an administrative body that the deadline to file an appeal is thirty days, the court may have to review the case on day thirty even if the time limit for the appeal was actually shorter.[153] Hence, an analysis on legitimate expectations is always conducted on a case-by-case basis involving all the details of the case[154]. 60

A conflict between the protection of legitimate expectations and the application of the law may occur if dispositions were made on the basis of individual 61

149 *For the doctrinal lines concerning protection of legitimate expectations see* KARLEN, p. 64; TSCHANNEN/MÜLLER/KERN, n. 479; *for an overview of the case law see* WIEDERKEHR/RICHLI, Vol. 1, n. 1970 *et seqq*.

150 *See infra section* 120.

151 BGE 141 I 161 consid. 3.1 (concerning tax rulings [previous information from a tax office]); BGE 137 II 182 consid. 3.6.2 (concerning governmental information); BGE 137 I 69 consid. 2.5.1 *et seq*. (concerning a resolution of the board of examiners [*see also translated summary in* UHLMANN, Administrative Law, pp. 179 *et seq*.]); BGE 136 II 359 consid. 7.1 (concerning illegally built buildings); GÄCHTER, Rechtsmissbrauch, pp. 217 *et seqq*.

152 BGE 134 I 199 consid. 1.3.1; BGE 129 II 125 consid. 3.3; BGE 124 I 255 consid. 1.a.a.

153 Federal Supreme Court decision 8C_50/2007 of 4 September 2007 consid. 5.

154 UHLMANN, Administrative Law, p. 168.

legitimate expectations[155]. Private dispositions may be understood as the manifestation of the expectations and in that sense they may also reflect the financial impact that expectations may bear as a result – something similar to the concept of damages, though not in the technical legal sense of the term. The economic impact is greater, for instance, when a house has already been built in a zone not suitable for buildings and has to be fully demolished, and less if only insignificant preparatory work for the house has to be executed[156]. Clearly, if no dispositions have been made, legitimate expectations are hardly protected.

62 A third element of legitimate expectations requires a *causal link* between the legitimate basis and the disposition[157]. If the house in the previous example had been built before or without the faulty permit, obviously the permit could not be causal for the futile disposition. Therefore, no legitimate expectations were to be protected.

63 The last general requisite to rely on in order to substantiate a claim of legitimate expectations requires a *balancing test between legality and expectations*: It may be that the basis for the expectations is sound and the (causal) dispositions are substantial but that they do not outweigh the proper application of the law, or, maybe more precisely, the values and interests protected by that law[158]. A person, who has legitimately but falsely relied on a building permit will have to demolish their house if there is a high risk of avalanches in this area[159]. In such a case the public interest clearly trumps the financial interests of the owner. On the contrary, a flat which is situated in a residential zone yet unlawfully used by an erotic services business may continue to be so if the situation has been known and tolerated by planning authorities for multiple decades, thus creating a legitimate expectation which outweighs the public interest in the upholding of zone conformity[160].

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155 Egli, p. 160; Griffel, Allgemeines Verwaltungsrecht n. 180 *et seq.*; Haller, n. 460; Häfelin/Müller/Uhlmann, n. 659 *et seq.*; Karlen, p. 65; Misic/Töpperwien, n. 553; Tanquerel/Bernard, n. 578; Tschannen/Müller/Kern, n. 486; Uhlmann, Administrative Law, p. 168.

156 *E.g.* Decision of the Administrative Court of the Canton of Solothurn SOG 2007 Nr. 16 of 5 January 2007 consid. 3.c; Uhlmann, Administrative Law, pp. 168 *et seq.*

157 Griffel, Allgemeines Verwaltungsrecht n. 182; Häfelin/Müller/Uhlmann, n. 663; Karlen, p. 65; Tanquerel/Bernard, n. 578; Tschannen/Müller/Kern, n. 486; Uhlmann, Administrative Law, p. 168.

158 Egli, p. 160; Griffel, Allgemeines Verwaltungsrecht n. 183 *et seqq.*; Häfelin/Müller/Uhlmann, n. 664; Misic/Töpperwien, n. 553; Tanquerel/Bernard, 579; Tschannen/Müller/Kern, n. 487; Uhlmann, Administrative Law, p. 168.

159 Federal Supreme Court decision 1C_567/2014 of 14 July 2015 consid. 5.

160 Federal Supreme Court decision 1P.768/2000 of 19 September 2001 consid. 4.c.

The example shows the potential *power* the protection of the legitimate interests features: it may overturn the proper application of the law. If the exception to the law is the more suitable solution, courts will usually favour this outcome. The principle is however flexible. One may also think of alternatives, *e.g.* an additional deadline in cases of incorrect instruction on the right to appeal or transition periods in cases of otherwise abrupt and unexpected changes to administrative practice. Compensation is and should be considered, especially in circumstances when legitimate expectations are justified in principle but fall short in respect of a compelling public interest (*e.g.* the aforementioned building in a danger zone) but courts are relatively reluctant[161]. The latter cases can be understood as a special form of state liability[162]. 64

b. Bases for Legitimate Expectations

Turning from the general prerequisites for the protection of legitimate expectations to the individual bases as their underpinning, one may roughly rank the bases as follows. The most cogent basis for legitimate expectations is an *administrative contract*, which if permissibly concluded may protect the private party even against a subsequent adaptation of the law. Rights granted under an administrative contract may be "*vested rights*" ("*wohlerworbene Rechte*") and are protected like the right to property. They may only be revoked against due compensation or not at all[163]. 65

Substantial protection is also offered if a private party relies on an *administrative act* ("*Verfügung*"). Challenges of administrative acts resulted in numerous cases on legitimate expectations. This led to an established doctrine of *non-revokable administrative acts*, though the term is not entirely convincing[164]. Administrative acts by their very definition serve to clarify and settle a legal situation. They often govern a legal relationship over time. Yet, it may become necessary to adapt the administrative act if the legal or factual situation changes[165]. 66

161 Griffel, Allgemeines Verwaltungsrecht n. 183 *et seqq.*; Häfelin/Müller/Uhlmann, n. 700 *et seqq.*; Karlen, p. 67 *with further references*; Tschannen/Müller/Kern, n. 488; Uhlmann, Administrative Law, pp. 168 *et seq.*, Weber-Dürler, pp. 175 *et seqq.*

162 *See infra section* 155.

163 *See infra section* 209.

164 Griffel, Allgemeines Verwaltungsrecht n. 174, 225; Häfelin/Müller/Uhlmann, n. 628 *with further references*; Tschannen/Müller/Kern, n. 485, 871 *et seqq.*; Uhlmann, Administrative Law, p. 195; Vallender/Hettich, n. 390 *et seqq.*

165 *See infra section* 122.

67 Many cases involving legitimate interests concern *misinformation* or *incorrect advice* from government[166]. The basis is potent enough to lead to the non-application of the law in a specific case and more general[167]. This may be the reason why the courts require that the advice is given on an individual basis; general information displayed on the governmental website will not satisfy the prerequisites of legitimate expectations[168]. This approach is understandable in practical terms, but it is hard to explain why one should have more trust in a single call to a civil servant than in an official governmental announcement[169]. Courts also require that the advice is without reservation, that it is given by the competent authority and that the factual and legal situation has not changed since the advice had been given[170].

68 *Court and administrative practice* are further bases for legitimate expectations[171]. Consequently, there is a comparably strong burden on courts and administrative authorities to maintain their practices. Traditionally, this is attributed to the equal protection clause[172] but seems to fit more readily into the doctrine of the protection of legitimate interests. The protection is two-dimensional since it relies on a formal and a substantive component. In light of the former, it requires that any change of practice should be duly announced so that private parties adapt their behaviour accordingly[173]. In this respect a change of practice generates for courts or the administration an obligation

166 Griffel, Allgemeines Verwaltungsrecht n. 175; Häfelin/Müller/Uhlmann, n. 667 *et seqq.*; Karlen, pp. 65 *et seq.*; Misic/Töpperwien, n. 553; Tschannen/Müller/Kern, n. 489 *et seq.*; Uhlmann, Administrative Law, p. 167, Weber-Dürler, pp. 210 *et seqq.*

167 *E.g.* BGE 121 V 65 (a widow received – despite a lack of legal entitlement – based on legitimate expectations a claim to a pension due to incomplete and ambiguous information from the consulate).

168 BGE 125 I 267 consid. 4.c; Griffel, Allgemeines Verwaltungsrecht n. 178; Häfelin/Müller/Uhlmann, n. 669 *et seq.*; Tschannen/Müller/Kern, n. 489; Uhlmann, Administrative Law, p. 167.

169 Uhlmann, Administrative Law, p. 167.

170 Häfelin/Müller/Uhlmann, n. 676 *et seqq.*, 695 *et seqq.*; Karlen, pp. 65 *et seq.*; Tschannen/Müller/Kern, n. 489; Uhlmann, Administrative Law, pp. 167 *et seq.*

171 Griffel, Allgemeines Verwaltungsrecht n. 189; Häfelin/Müller/Uhlmann, n. 637 *et seqq. with further references*; Karlen, p. 66; Uhlmann, Administrative Law, p. 169; Weber-Dürler, pp. 153 *et seqq.*

172 *E.g.* BGE 141 V 585 consid. 5.2; Tschannen/Müller/Kern, n. 515; Uhlmann, Administrative Law, p. 169; *but see also the decisions in which the Supreme Court sees it as an aspect of good faith and legitimate expectations*: BGE 142 V 551 consid. 4.1; BGE 140 IV 74 consid. 4.2; BGE 140 I 394 consid. 7.2.

173 BGE 133 V 96 consid. 4.4.6 (concerning a change in practice with respect to the appealable time or formalities for the complaint); BGE 132 II 153 consid. 5.1 (concerning a procedural practice change).

comparable to what is required from government when a new law is introduced, namely an obligation for proper publication[174]. If this condition is observed, courts and administrative authorities may choose any suitable means to introduce the change of practice. As far as the material component is concerned, legitimate expectations afford the leverage of a substantial challenge to a change of practice since a new one is only permissible if there are valid reasons for change, the change is categorical and it is considered an improved application of the law[175].

Limited expectations are created through law. The Swiss Supreme Court has laconically formulated that one must always expect the law to change. While this is true, there is also the expectation that the change is not sudden and extremely disadvantageous in its substance. That's why courts have required in some instances the legislator to foresee (or provide for) due transition periods in an effort to mitigate the risks. Consequently, the possibility of cases to arise on this basis is relatively rare[176]. 69

More protection may be given under the *doctrine of non-retroactivity* that has developed independently from the protection of legitimate interests[177] but may be, in my opinion, best rooted in Art. 9 Const.[178]. Courts have intervened against "*proper retroactivity*" ("*echte Rückwirkung*") of supervening laws regulating facts that evolved entirely in the past. Exemptions are possible if a clear 70

174 *See for ordinary publication* Art. 7 para. 1 PublA; *see also* GÄCHTER, Staatsrecht, § 23 n. 46 *et seq.*; TSCHANNEN, Staatsrecht CH, n. 1637 *with further references*; UHLMANN, Administrative Law, p. 169.

175 In the words of the Supreme Court in BGE 144 III 209 consid. 2.3: "Eine Änderung der Praxis lässt sich regelmässig nur begründen, wenn die neue Lösung besserer Erkenntnis der *ratio legis*, veränderten äusseren Verhältnissen oder gewandelter Rechtsanschauung entspricht; andernfalls ist die bisherige Praxis beizubehalten. Eine Praxisänderung muss sich deshalb auf ernsthafte sachliche Gründe stützen können, die – vor allem im Interesse der Rechtssicherheit – umso gewichtiger sein müssen, je länger die als falsch oder nicht mehr zeitgemäss erachtete Rechtsanwendung gehandhabt worden ist." In English: "A change of practice can only be regularly justified if the new solution corresponds to a better understanding of the *ratio legis*, changed external circumstances or changed legal view; otherwise the current practice is to be maintained. A change of practice must therefore be based on serious factual reasons which, particularly in the interests of legal certainty, must be all the more important the longer the misapplication of the law, which has been considered to be wrong or outdated, has taken place."; *see also* BGE 144 III 285 consid. 2.2; HÄFELIN/MÜLLER/UHLMANN, n. 589 *et seqq.*; TSCHANNEN/MÜLLER/KERN, n. 518; UHLMANN, Administrative Law, p. 169.

176 BGE 134 I 23 consid. 7.5 *et seqq.*; BGE 130 I 26 consid. 8.1.

177 HÄFELIN/MÜLLER/UHLMANN, n. 266; KARLEN, pp. 66 *et seq.*; UHLMANN, Administrative Law, p. 169.

178 Another "candidate" may be the principle of legality as the law applied is not valid.

legislative intent, a substantial public interest and the intention for moderate application of retroactivity in time can be identified[179]. More deference is given to the regulation of ongoing circumstances, the so-called "*pseudo-retroactivity*" ("*unechte Rückwirkung*")[180]. To give an example, the legislator may lower the salary of a civil servant who is employed for twelve months, after the first six months of employment and for the rest of the engagement. Even so, the protection of legitimate expectations may require that the cut is not confoundedly substantial as the employee has planned their engagement on the assumption of a higher salary for the whole period[181].

71 Finally, little protection comes from *administrative passivity*. In theory, an illegal situation may never become legal, and authorities may intervene at any time even if they tolerated the situation for decades and the private person was in good faith all this time. It is arguably obvious that such an intervention would hardly be upheld by courts. There are however court decisions that were less strict and offered some protection from administrative passivity[182].

c) Good Faith

72 The principle to act in good faith has a long tradition. Its original source was Art. 2 of the Swiss Civil Code (CC), targeting grossly unfair behaviour of private parties: "Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations. The manifest abuse of a right is not protected by law." Later on, the principle of good faith was extended to behaviour from and towards the state[183]. Nowadays, the principle is found in Art. 5 para. 3 Const., binding on both state and private parties, and in Art. 9

179 BGE 138 I 189 consid. 3.4; BGE 126 V 134 consid. 4.a; BGE 101 Ia 231 consid. 3.c; Griffel Allgemeines Verwaltungsrecht, n. 306 *et seqq.*; Häfelin/Müller/Uhlmann, n. 268 *et seqq.*; Karlen, pp. 112 *et seq.*; Tschannen/Müller/Kern, n. 497 *et seqq.*; Uhlmann, Administrative Law, p. 169.

180 BGE 138 I 189 consid. 3.4; BGE 126 V 134 consid. 4.a; Griffel, Allgemeines Verwaltungsrecht n. 309 *et seq.*; Häfelin/Müller/Uhlmann, n. 279 *et seqq.*; Karlen, pp. 113 *et seq.*; Tschannen/Müller/Kern, n. 502; Uhlmann, Administrative Law, p. 169.

181 Federal Supreme Court decision P.24/1976 of 15 December 1976.

182 BGE 136 II 359 consid. 7 *et seq.*; BGE 107 Ia 121 consid. 1; Federal Supreme Court decision 1P.768/2000 of 19 September 2001 consid. 4.c; Federal Supreme Court decision 1A.19/2001 of 22 August 2001 consid. 4.b; Federal Supreme Court decision 1P.768/2000 of 19 September 2001 consid. 4.c (already mentioned, *see supra section* 63); Häfelin/Müller/Uhlmann, n. 651; Uhlmann, Administrative Law, p. 168; Weber-Dürler, pp. 228 *et seqq.*

183 Gächter, Rechtsmissbrauch, pp. 113 *et seqq.*; Griffel, Allgemeines Verwaltungsrecht, n. 170; Karlen, p. 63; Tanquerel/Bernard, n. 566 *et seq.*; Uhlmann, Administrative Law, p. 169.

Const. as a fundamental right of individuals in relation to state authorities' actions.

Due to its casuistic nature, it is not easy to break down the principle of good faith into the constituent elements of the notion[184]. Maybe the most prevalent ideas in which the principle of good faith can be analysed are those of contradictory behaviour and manifest abuse of a right. The *prohibition of contradictory behaviour* highlights the closeness of good faith to the protection of legitimate expectations: an authority which requests the demolition of a property revoking an otherwise falsely issued building permit, may violate the individual's legitimate expectations[185] but it also acts manifestly contradictory if it requests the demolition for no good reason. Contradictory behaviour may also be recorded in private action, most likely in procedural settings: a private party must recuse a biased judge in due time and may not do so only after losing the case, hoping for a "free shot" of the first proceedings[186]. Accordingly, when defective administrative action forces the private parties to react in a certain way, they may not rely on these defects indefinitely, especially if they are obvious[187]. 73

The reproach of abuse of a right is often the applicant's last recourse for substantiating a claim and the court's only legitimising basis for rejecting it if everything else fails. An older case may shed light on this proposition: a woman was convicted for the manslaughter of her husband. After her release, the question before the courts was whether she was entitled to a widow's pension. Apparently, she fulfilled all necessary qualifications and nothing in the relevant legislation precluded her from getting the pension. However, the former *Federal Insurance Court* had no issue rejecting her claim for a pension as legal protection is only given to rights obtained in good faith[188]. The legislator later amended the relevant legislation, bridging an existing gap that until then was provisionally filled in by court practice relying on the principle of good faith[189]. 74

184 Karlen, pp. 67 *et seq.*; *for an overview of the case law see* Wiederkehr/Richli, Vol. 1, n. 1964 *et seqq.*

185 *See supra section* 62.

186 BGE 143 V 66 consid. 4.3; BGE 132 II 485 consid. 4.3; BGE 126 III 249 consid. 3; Gächter, Rechtsmissbrauch, pp. 310 *et seqq.*

187 *E.g.* BGE 138 I 97 consid. 4.1.5 (procedural errors usually have to be asserted immediately); Gächter, Rechtsmissbrauch, pp. 304 *et seqq.*

188 Decision of the former Federal Insurance Court (now integrated into the Swiss Supreme Court) EVGE 1951, pp. 205 *et seqq.*: "[…] der Rechtsschutz nicht schlechthin besteht, sondern nur im Schutze berechtigter, mit Treu und Glauben vereinbarter Interessen." (*see also summary in* Häfelin/Müller/Uhlmann, n. 725).

189 Häfelin/Müller/Uhlmann, n. 725.

4. Prohibition of Arbitrariness (Reasonableness)

Further Reading

FELIX UHLMANN, Das Willkürverbot (Art. 9 BV), Habil. Basel, Bern 2005 (cit. UHLMANN, Willkürverbot, n. __)

75 The prohibition of arbitrariness is a very special, if not unique, feature of Swiss administrative and constitutional law. In a nutshell, it prevents grossly erroneous administrative action, irrespective of whether the fault was legal or factual. Arbitrariness may be invoked against the abuse of administrative discretion, the violation of accepted legal principles or natural justice[190] and laws, which may be arbitrary by just being merely unreasonable. In any case, the error must be *manifest* – although, as a former Swiss Supreme Court judge cunningly put it, there is nothing more arbitrary than the jurisprudence on the doctrine of arbitrariness[191]. Cases have occurred in abundance[192] but it is hard to set clear-cut criteria whereby these cases in which the principle finds application can be concretised, making it difficult to avoid a piecemeal examination of them[193].

76 The prohibition of arbitrariness is nowadays enshrined in Art. 9 Const. but goes way further back as part of the equal protection clause[194]. The question is

190 BGE 141 I 70 consid. 2.2: "Eine willkürliche Anwendung kantonalen Rechts liegt vor, wenn der angefochtene Entscheid offensichtlich unhaltbar ist, mit der tatsächlichen Situation in klarem Widerspruch steht, eine Norm oder einen unumstrittenen Rechtsgrundsatz krass verletzt oder in stossender Weise dem Gerechtigkeitsgedanken zuwiderläuft. Das Bundesgericht hebt einen Entscheid jedoch nur auf, wenn nicht bloss die Begründung, sondern auch dessen Ergebnis unhaltbar ist. Dass eine andere Lösung ebenfalls als vertretbar oder gar als zutreffender erscheinen mag, genügt nicht." In English: "An arbitrary application of cantonal law occurs when the contested decision is manifestly untenable, clearly contradicts the actual situation, grossly violates a norm or an uncontroversial legal principle, or in an abusive manner conflicts the concept of justice. However, the Federal Supreme Court only annuls a decision if not only the reasoning, but also its result is untenable. That another solution may also seem justifiable or even more appropriate is not enough.".

191 In German: "Es gibt nichts Willkürlicheres als die Willkür-Rechtsprechung des Bundesgerichts", *see* NZZ, "Juristische Spitzfindigkeiten um einen Kirchenaustritt", Article of 3 December 2008, p. 19.

192 *For an overview see* UHLMANN, Willkürverbot, pp. 457 *et seqq*.

193 UHLMANN, Willkürverbot, n. 33 *et seqq*.

194 EGLI, p. 160; HALLER, n. 457; KIENER/KÄLIN/WYTTENBACH, n. 1660 *et seq*.; MISIC/TÖPPERWIEN, n. 517; UHLMANN, Willkürverbot, n. 24 *et seqq*.; TANQUEREL/BERNARD, n. 606.

why an advanced legal system like the Swiss is in need of quite such an obsolete clause. The answer is found in the logic of *judicial control* through the Swiss Supreme Court. Given that the Court usually does not review questions of fact and cantonal law, the prohibition of arbitrariness transforms gross errors engendered by cantonal authorities into a constitutional matter, consequently granting the Supreme Court the power to intervene[195].

By the same token, arbitrariness draws a line between areas of judicial control and *administrative discretion*, the latter not being subjected to review by the courts either. Despite the fact that the doctrine of administrative discretion follows a different dogmatic line, it is safe to say that arbitrary behaviour falls clearly outside the scope of permissive discretion and will be corrected by the courts[196] which even tend to use similar language to articulate that, as in cases of alleged arbitrariness[197]. 77

Nevertheless, the procedural arrangements of administrative law lead to a kind of practical subsidiarity of Art. 9 Const.: if there are better grounds to challenge an administrative act because, for example, it violates federal law or the principle of proportionality, one would not resort to the prohibition of arbitrariness – or would only do so as a complementary legal account and to em- 78

195 Still, some procedural caution is needed: *see* BGE 133 I 185 consid. 4.1 *et seqq.*; some scholars criticise this practice, *see* KIENER/RÜTSCHE/KUHN, n. 1876 *et seq.*; MISIC/TÖPPERWIEN, n. 551; RHINOW ET AL., n. 2104.

196 HÄFELIN/MÜLLER/UHLMANN, n. 434; KARLEN, pp. 127 *et seq.*; UHLMANN, Willkürverbot, n. 57, 469 *et seqq.*

197 *See e.g.* BGE 128 III 156 consid. 1.a: "Il y a excès ou abus du pouvoir d'appréciation lorsque la décision attaquée repose sur une appréciation insoutenable des circonstances de fait, qu'elle est inconciliable avec les règles du droit et de l'équité, qu'elle omet de tenir compte de tous les éléments de fait propres à fonder la décision ou encore lorsqu'elle prend au contraire en considération des circonstances qui ne sont pas pertinentes." In English: "There is an excess or abuse of discretion where the contested decision is based on an unsustainable assessment of the factual circumstances, is irreconcilable with the rules of law and fairness, fails to take into account all the factual elements the decision is based on or, on the contrary, takes into consideration circumstances that are not relevant."; *see also* BGE 141 V 365 consid. 1.2: "Ermessensmissbrauch ist gegeben, wenn die Behörde zwar im Rahmen des ihr eingeräumten Ermessens bleibt, sich aber von unsachlichen, dem Zweck der massgebenden Vorschriften fremden Erwägungen leiten lässt, oder allgemeine Rechtsprinzipien, wie das Verbot von Willkür und von rechtsungleicher Behandlung, das Gebot von Treu und Glauben sowie den Grundsatz der Verhältnismässigkeit verletzt." In English: "Abuse of discretion occurs when the authority remains within the scope of the discretion granted to it but is guided by irrelevant considerations that are alien to the purpose of the relevant provisions, or violates general legal principles, such as the prohibition of arbitrary and unequal treatment, the requirement of good faith and the principle of proportionality.".

ploy stronger legal language. Therefore, Art. 9 Const. is invoked predominantly when there is no other legitimising basis for elevating factual or legal matters to a question of constitutional law.

5. Procedural Guarantees

Further Reading

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 (cit.* UHLMANN, *The principle of effective legal protection, p. __)*

a) Procedural Guarantees and Forms of Action

79 To understand procedural guarantees in Swiss administrative law, it might be helpful to acknowledge three fundamental assumptions that are self-explaining for Swiss lawyers but far from obvious for scholars and practitioners in other jurisdictions who may examine the issue from a comparative perspective. First, procedural guarantees in Swiss administrative law are *intrinsically linked to the form of action*. Most administrative law treatises start out with (and concentrate on) an analysis of the forms of administrative action because they determine the procedural protection. Indeed, the Swiss Constitution requires "judicial and administrative proceedings" (Art. 29 para. 1 Const.) or a "legal dispute" (Art. 29a Const.) to prompt the respective guarantees. While it is true that not all forms of administrative action require an "administrative proceeding", the importance of the latter in triggering judicial protection and procedural guarantees is immediate as opposed to other forms of actions, such as contracts, rulemaking etc. which may not necessarily do so. Corroborative to this is a surprisingly short and almost trivial provision of the Federal Administrative Procedure Act (Art. 44 APA) regarding the possibility to appeal within the context of administrative procedural law. It reads "*Any administrative decision shall be subject to an appeal*" – more elegantly in German or French: "*Die Verfügung unterliegt der Beschwerde / La décision est sujette à recours*." By reference to administrative decisions, the law implicitly acknowledges not only a certain procedure but also a right to an appeal. Hence, Swiss lawyers, courts, and scholars are almost obsessed to find – or, in the words of

one scholar, hunt for[198] – administrative decisions. The significance of administrative proceedings as a form of action will be explained in detail in the chapter on administrative action[199] but it is useful that these preliminary remarks are kept in mind from the outset while exploring procedural rights.

b) Procedural Guarantees in Administrative and Court Proceedings

A second preliminary remark concerns the *likeness of agency and judicial administrative procedures*. Indeed, the procedure before an administrative body does not significantly differ from proceedings before an administrative court, including the Swiss Supreme Court. Certainly, the procedure becomes more adversarial once a case has been appealed to an administrative court since the latter has extended powers to require documents and summon witnesses as mandated by the right to be heard by an independent court. Still, the fundamental idea of procedural fairness is not so different in the two procedures. For example, the right to be heard encompassing the crucial rights to access files and to give grounds for the decision are basically the same; a biased civil servant is not much better than a biased judge. Finally, the right of a person lacking sufficient means not to be burdened by administrative or judicial costs and enjoy the right to legal aid applies to both cases[200]. 80

It is in this logic that Art. 29 and Art. 30 Const. should be read: Art. 29 guarantees the aforementioned rights for all ("general procedural guarantees") judicial and administrative proceedings, including proceedings before the decision maker of first instance which is typically an administrative authority. Art. 30 provides additional rights for judicial proceedings. Some special guarantees apply in cases of deprivation of liberty (Art. 31) and in criminal proceedings (Art. 32)[201]. 81

198 In German: "Jagdmachen auf Verfügungen"; *for further reading see* GIACOMINI, pp. 237 *et seqq*.

199 *See infra section* 118.

200 Federal Supreme Court decision 2C_412/2023 of 22 December 2023 consid. 3.1 *et seq.*; HÄFELIN/MÜLLER/UHLMANN, n. 1058 *et seqq.*; KIENER/RÜTSCHE/KUHN, n. 251 *et seq.*, 1697 *et seq.*

201 EGLI, p. 163; HALLER, n. 463; KIENER/KÄLIN/WYTTENBACH, n. 2023; KIENER/RÜTSCHE/KUHN, n. 189; MISIC/TÖPPERWIEN, n. 639; RHINOW ET AL., n. 266 *et seqq.*; UHLMANN, Administrative Procedure, in: Introduction, p. 189.

c) Procedural Guarantees as "Formal" Rights

82 The third preliminary remark concerns the very nature of procedural rights. Swiss courts and doctrine consider them as "formal" in the sense that a violation of these principles may lead to an annulment of the administrative decision irrespective of the chances on the merit[202]. On some occasions even, for example in areas of extensive discretion of the administration such as the execution of university entrance examinations or the bar exams for lawyers[203], procedural rights are often the only effective remedy. Most court decisions will examine formal complaints first as success on these grounds will render further review obsolete and the case will be referred back to the agency of first instance for a new decision.

83 Yet, the above applies in theory. In practice, it is not uncommon that courts will go on to the merits of the case notwithstanding procedural faults. This may be just done for purposes of efficiency as their decision might be subject to a further appeal, and in this case, it might prevent a procedural loop if the appellate court requires a decision on the merits that should have been reached by the court of first instance[204]. A more extensive decision covering both procedural and substantive grounds is often in the interest of the private party as it leads to swifter proceedings. But not always: The situation gets much more delicate if the court admits that the decision is procedurally defective but rejects the appeal on the merits. In these cases, the formal nature of procedural rights does not prevail over the substance of the case. The formal defects are "cured" through the court.

84 For a long period, such "*healings*" ("*Heilung*") of procedural defects were regularly performed by courts, including the Swiss Supreme Court. It was understood that if, for instance, the right to be heard was violated by the administration, a full hearing before the court would cure these defects. Newer case law leans towards a stricter application of procedural rights. Healing should be the exception, should not be applied in cases of severe violations of procedural rights and should only be allowed if the court can fully review the case on the merits. In these situations, healing is permissible only if a return to the decision maker of first instance is pure formality and a mere loss of time[205].

202 BGE 144 IV 302 consid. 3.1; BGE 137 I 195 consid. 2.2; BGE 127 V 431 consid. 3.d.a.a; EGLI, p. 163; HALLER, n. 465; KIENER/KÄLIN/WYTTENBACH, n. 2037 *et seqq.*; KIENER/RÜTSCHE/KUHN, n. 271 *et seqq.*; MISIC/TÖPPERWIEN, n. 645; RHINOW ET AL., n. 270.

203 *E.g.* Federal Administrative Court decision B-6604/2010 of 29 June 2011 consid. 6.

204 *E.g.* BGE 142 II 218 consid. 2.8.1.

205 *Ibid.*

d) Right to be heard

It is not an exaggeration to say that the right to be heard is the cornerstone of procedural fairness in Swiss administrative law. The Swiss Supreme Court had extensive jurisprudence around this right in its long and creative case-law, using as a base the equal protection clause under the Swiss Constitution of 1874[206]. At present, the right to be heard is explicitly guaranteed in Art. 29 para. 2 of the Swiss Constitution. Alongside that, some federal and state acts on administrative procedure and special legislation may define the right further, which makes it necessary to consult them as well[207]. In practical terms, though, it is often enough to rely on the Federal Constitution as it guarantees most attributes of procedural fairness. 85

Turning to the substance of the right to be heard, the right first and foremost guarantees the possibility to voice concerns and raise arguments before the administrative authority or the court that will make a decision. The right can be invoked during the whole procedure. In order to do so, the guarantee requires some ancillary rights that make the arguments effective. The private party has the … 86

… right to access the files: All relevant documents must be disclosed[208]. The authority may preclude access in case of overriding state or third-party interests but these restrictions are applied quite narrowly and after a balancing test between the right to be heard itself and state or third-party interests, especially if full access to the file is denied. Even then the authority is required to find a way to inform the individual on the substance of these documents[209]. Sometimes a dispute arises around the question which documents are relevant 87

206 Häfelin/Müller/Uhlmann, n. 1003; Kiener/Kälin/Wyttenbach, n. 2008; Kiener/Rütsche/Kuhn, n. 179; Misic/Töpperwien, n. 638, 646; Rhinow et al., n. 256 *et seq.*; Uhlmann, The principle of effective legal protection, p. 304.

207 *E.g.* Arts. 11, 18, 26 *et seqq.* and 35 para. 1 APA; Häfelin/Müller/Uhlmann, n. 1004; Kiener/Kälin/Wyttenbach, n. 2012 *et seq.*; Kiener/Rütsche/Kuhn, n. 229; Misic/Töpperwien, n. 645; Rhinow et al., n. 261; Uhlmann, The principle of effective legal protection, p. 308.

208 Egli, p. 163; Haller, n. 465; Häfelin/Müller/Uhlmann, n. 1019 *et seqq.*; Kiener/Kälin/Wyttenbach, n. 2098 *et seqq.*; Kiener/Rütsche/Kuhn, n. 240 *et seq.*; Misic/Töpperwien, n. 646; Rhinow et al., n. 331 *et seqq.*; Uhlmann, Administrative Procedure, in: Introduction, p. 190; Uhlmann, The principle of effective legal protection, pp. 308, 314.; Zen-Ruffinen, Vol. 2, n. 464 *et seq.*

209 Art. 27 APA; *see also* Häfelin/Müller/Uhlmann, n. 1022 *et seqq.*; Kiener/Kälin/Wyttenbach, n. 2109 *et seqq.*; Kiener/Rütsche/Kuhn, n. 242; Rhinow et al., n. 337; Uhlmann, Administrative Procedure, in: Introduction, p. 190; Uhlmann, The principle of effective legal protection, p. 308; Zen-Ruffinen, Vol. 2, n. 487.

for a decision and which are "purely internal" such as drafts, background information etc., thus not subject to the right to access[210].

88 … right to be informed on the intended decision: The authority must outline its assumptions on the factual and – arguably – the legal circumstances of the case. In practice, this is often done by sending a draft decision to the party concerned[211]. On appeal, the administrative authority or the court must inform the party if it considers handing down a worse decision than the one in dispute (*reformatio in peius*). This allows the party to withdraw the appeal[212].

89 … right to reply: In adversarial proceedings, every petition must be communicated to the other side in order to allow for a reaction. The Swiss Supreme Court has long struggled with this right, fearing "endless" proceedings but has eventually come in line with the case law of the European Court of Human Rights[213].

90 … right to provide evidence: The private party may actively submit evidence or may request the authority to provide for evidence, including official documents, information or testimony from third parties, reports from inspections and expert opinions[214]. The authority must allow or provide such evidence if its relevance cannot be ruled out in advance – the latter is often a delicate question of "*anticipated consideration of evidence*" ("*antiziperte Beweiswürdigung*")[215].

210 Häfelin/Müller/Uhlmann, n. 1021; Kiener/Kälin/Wyttenbach, n. 2106; Rhinow et al., n. 338; Zen-Ruffinen, Vol. 2, n. 479.

211 Egli, p. 163; Kiener/Kälin/Wyttenbach, n. 2083; Kiener/Rütsche/Kuhn, n. 232; Misic/Töpperwien, n. 646; Rhinow et al., n. 318; Uhlmann, Administrative Procedure, in: Introduction, p. 190; Uhlmann, The principle of effective legal protection, p. 308; Zen-Ruffinen, Vol. 2, n. 463, 495.

212 BGE 128 V 272 consid. 5.b.d.d *et seqq.*; BGE 122 V 166 consid. 2.a; Häfelin/Müller/Uhlmann, n. 1011.

213 BGE 138 I 154 consid. 2.3.3 *with further references*; Egli, p. 163; Häfelin/Müller/Uhlmann, n. 1016; Kiener/Kälin/Wyttenbach, n. 2089 *et seqq.*; Kiener/Rütsche/Kuhn, n. 235; Misic/Töpperwien, n. 646; Rhinow et al., n. 325 *et seq.*; Uhlmann, Administrative Procedure, in: Introduction, p. 199; Uhlmann, The principle of effective legal protection, p. 308.

214 Egli, p. 163; Haller, n. 465; Häfelin/Müller/Uhlmann, n. 1016; Kiener/Kälin/Wyttenbach, n. 2087; Kiener/Rütsche/Kuhn, n. 232 *et seq.*; Misic/Töpperwien, n. 646; Rhinow et al., n. 327 *et seq.*; Uhlmann, Administrative Procedure, in: Introduction, p. 190; Uhlmann, The principle of effective legal protection, p. 308; Zen-Ruffinen, Vol. 2, n. 473, 489 *et seqq.*

215 BGE 137 II 266 consid. 3.2; BGE 117 Ia 262 consid. 4.b; Kiener/Rütsche/Kuhn, n. 233, 686, 689; Rhinow et al., n. 329; Zen-Ruffinen, Vol. 2, n. 491.

… right to be given reasons: The authority must justify its decision. Court practice often defines this right from the procedural perspective of the right to appeal against a decision, *i.e.* the reasons upon which the authority will justify its decisions must allow the private party a meaningful appeal. Still, the right to be given reasons may be better understood as the manifestation of the authority's obligation to consider the private party's arguments. The authority may not indulge in all and every aspect of such contentions, but the decision should make plainly clear which aspects were decisive in a case[216]. 91

… right to be informed on legal remedies: It is still disputed whether the right to be heard encompasses such a guarantee[217] but the question is not of practical importance as the federal and state acts on administrative procedure clearly require this information as part of an administrative decision[218] and in any case, the information is given as a matter of administrative and court practice. 92

The right to be heard is potentially open to further development through court practice – similarly to the equal protection clause which was used by the Swiss Supreme Court as a legal basis for developing procedural rights. On this account, the right to be heard may overlap with the right to "equal and fair treatment" in Art. 29 para. 1 Const. that also serves as a catch-all provision[219]. There are indeed cases that are not clear-cut. Characteristically, the Swiss Supreme Court had to decide whether there was a violation of procedural rights when candidates for naturalisation were invited for a first informal meeting but were tested, much to their surprise, on their knowledge about Switzerland. The Swiss Supreme Court indistinctively applied Art. 29 paras. 1 and 2 Const. to this case[220], and indeed, it is usually not necessary to draw a clear line between general procedural rights and the right to be heard. 93

216 *E.g.* BGE 134 I 83 consid. 4.1; EGLI, p. 163; HÄFELIN/MÜLLER/UHLMANN, n. 1038; KIENER/KÄLIN/WYTTENBACH, n. 2115 *et seqq.*; KIENER/RÜTSCHE/KUHN, n. 243 *et seqq.*; RHINOW ET AL., n. 343 *et seqq.*; ZEN-RUFFINEN, Vol. 2, n. 501 *et seqq.*

217 Against the existence of the guarantee are BIAGGINI, Komm. BV, Art. 29, n. 16 and HÄFELIN/MÜLLER/UHLMANN, n. 1076 and in favour are STEINMANN/SCHINDLER/WYSS, SG-Komm. BV, Art. 29, n. 41.

218 Art. 35 paras. 1 and 2 APA (for cantons: Art. 1 para. 3 in conjunction with Art. 35 APA); *see also* Art. 112 para. 1 FSCA for decisions that are subject to appeal to the Federal Supreme Court.

219 KIENER/KÄLIN/WYTTENBACH, n. 2046; RHINOW ET AL., n. 275.

220 BGE 140 I 99 consid. 3.2 *et seqq.* (*see also translated summary in* UHLMANN, Administrative Procedure, in: Introduction, pp. 201 *et seq.*).

94 However, there are *limitations* on the right to be heard. First and foremost, it should be pointed out once more that the right is linked to *administrative decisions* (including court decisions) and that other forms of action may not necessarily trigger it. The right to be heard does not cover governmental rulemaking[221] and its application in cases of contracts, informal administrative actions etc. is at least doubtful. There may be a right to transparency on government's part based on special legislation[222] but this should not be confounded with the procedural rights under Art. 29 Const.

95 The right to be heard may also be constrained when a decision has to be taken *urgently* or if the aims of the intended decision would be thwarted if the private party had to be informed in advance (*e.g.* decision to execute administrative controls which in order to be effective should take place unannounced)[223]. Some procedural settings also affect the right to be heard. *Interim orders* and *enforcement measures* are often handed down with limited procedural rights being applied (*e.g.* no right to witnesses). Furthermore, there is no need to be heard if the authority *fully grants* an application to a private party or if the decision is subject to an *objection*, *i.e.* a special procedure involving the review of the case by the same authority if a private party objects[224].

e) Right to Oral Proceedings

96 It is not without a degree of irony that the right to be heard has little, if nothing, to do with the question whether the private party has a right to *oral proceedings*. Indeed, the Swiss Supreme Court explicitly rejected such requests[225]. Hence, the authority basically "hears" the parties through written submissions.

97 There is no constitutional right providing for an oral hearing before the administration. By contrast, there might be a right to oral proceedings in courts. The Swiss Supreme Court has interpreted Art. 30 Const. quite narrowly, effectively guaranteeing oral proceedings only if required by law or necessary by the rules of evidence[226]. The decision is quite symptomatic for a court system

221 *See infra section* 164.
222 *See infra section* 117.
223 Häfelin/Müller/Uhlmann, n. 1008; Kiener/Kälin/Wyttenbach, n. 2094a, 2109 *et seqq.*; Kiener/Rütsche/Kuhn, n. 194, 237, 242; Rhinow et al., n. 316, 322, 337.
224 *See* Art. 30 para. 2 APA; *see also* Häfelin/Müller/Uhlmann, n. 1010.
225 BGE 134 I 140 consid. 5.3 *with further references*.
226 BGE 128 I 288 consid. 2.3 *et seqq.*

that is hesitant to organise public proceedings in administrative matters, in my view, sometimes mistakenly under the impression that these proceedings are necessarily more time-consuming.

It comes as no surprise that parties must rely on Art. 6 ECHR to enforce oral proceedings. It is well-known that the term "civil rights" in this Article encompasses some rights in areas which are understood as administrative law in many countries[227]. Still, this applies only to a fraction of administrative law, and even in these areas, Swiss courts are reluctant to oral proceedings, urging private parties to request for them immediately at the beginning of the proceedings otherwise the right will be forfeited and not granted at all[228]. 98

f) Impartiality and Independence

Impartiality of decision-making bodies and persons is one of the most fundamental aspects of procedural fairness. From a frivolous glance at the Swiss Constitution, one might assume that it is only an element of proceedings before courts since the principle is stated in Art. 30 but not in Art. 29 Const. Such a literal reading would be mistaken; the Swiss Supreme Court has made clear through long-established case law that impartiality is fundamental to all state proceedings. Hence, impartiality is nowadays guaranteed as an element of overall fairness enshrined in Art. 29 Const[229]. Of course, one should not equalise court and administrative impartiality, and indeed, courts in some respect must satisfy higher standards, but it is essential to realise that there is much common ground[230]. 99

It is obvious that a personal interest in the outcome rules out participation in any administrative or court proceedings. Federal and cantonal acts on administrative procedure regulate the typical cases of close relatives involved in the proceedings[231]. Swiss courts and doctrine do not require that the judge or the 100

227 *For further reading see* GRABENWARTER/PABEL, § 24 n. 5 *et seqq.*; HARRENDORF/KÖNIG/VOIGT, HK EMRK, Art. 6, n. 9 *et seqq*; MISIC/PRANTL, BSK EMRK, Art. 6, n. 36.

228 BGE 134 I 331 consid. 2.3; BGE 122 V 47 consid. 3.b *et seqq.*; *see also* European Court of Human Rights decision Schuler-Zgraggen v. Switzerland (Nr. 14518/89) of 24 June 1993, n. 58; ZEN-RUFFINEN, Vol. 2, n. 475.

229 BGE 140 I 326 consid. 5.2; HALLER, n. 464; HÄFELIN/MÜLLER/UHLMANN, n. 979; KIENER/KÄLIN/WYTTENBACH, n. 2022 *et seqq.*; *with further references see* KIENER/RÜTSCHE/KUHN, n. 219, 529 *et seq.*; RHINOW ET AL., n. 303 *et seqq.*

230 *E.g.* BGE 140 I 326 consid. 5.2; HÄFELIN/MÜLLER/UHLMANN, n. 979; KIENER/KÄLIN/WYTTENBACH, n. 2062; KIENER/RÜTSCHE/KUHN, n. 529 *et seq.*; RHINOW ET AL., n. 303 *et seq.*

231 Art. 10 para. 1 APA; KIENER/RÜTSCHE/KUHN, n. 532 *et seqq.*; RHINOW ET AL., n. 1191 *et seqq.*

civil servant is indeed acting in a biased manner; it is sufficient that there is an *impression* ("*Anschein*") or maybe more graphic, a "*stench*" *of bias*[232]. Still, not every possible interest may lead to recusal. The Swiss Supreme Court did not intervene against lawyers being experts on the bar exam as the sole possibility of increased competition among future colleagues does not amount to a conflict of interests[233].

101 Another shared requirement of courts and administration is the duty to remain *open-minded for the outcome*[234]. They may not decide the case before they have heard all parties involved. In practice, however, the administration and the courts adopt a different viewpoint. By the very nature of the right to be heard, the former must outline its intentions before deciding a case. On a similar note, it is also possible that judges voice an opinion before deciding the case, either through the media[235] or because preliminary decisions must be taken, *e.g.* in respect to interim measures[236] or to grant or deny legal aid[237]. Evidently, these decisions involve an assessment of the possible outcome which is certainly acceptable and procedurally sensible in most cases. Even the Swiss Supreme Court endorses this practice. Courts regularly presume that they remain impartial for the decision on the merits but one may doubt the open-mindedness of a judge just having rejected legal aid on the basis that the appeal does not stand a chance[238]. Similar concerns arise about administrative decisions too. The Swiss Supreme Court did not see grounds for recusal in the case of an examiner who evaluated a candidate's performance as inadequate in an earlier exam[239], rendering the open-mindedness of the examiner rather questionable.

102 If one turns to the differences of court and administrative impartiality, it is predominantly the *institutional setting* that differentiates courts from administrative authorities. Government may instruct administrative authorities but certainly not the courts. Courts are *independent*. Sometimes though, the line between courts and administrative tribunals is not always clear. It depends on

232 BGE 137 II 431 consid. 5.2 with *further references*; KIENER/KÄLIN/WYTTENBACH, n. 2199; KIENER/RÜTSCHE/KUHN, n. 544; MISIC/TÖPPERWIEN, n. 234; RHINOW ET AL., n. 1195; *but see also* BGE 141 I 78 consid. 3.3 (in which it was held that simple professional collegiality does not establish any bias).

233 BGE 113 Ia 286 consid. 3.a.

234 BGE 140 I 326 consid. 6.2 *et seq*.

235 BGE 127 I 196 consid. 2.d *et seq*.; KIENER/RÜTSCHE/KUHN, n. 548; RHINOW ET AL., n. 513.

236 BGE 131 I 113 consid. 3.6; KIENER/RÜTSCHE/KUHN, n. 546; RHINOW ET AL., n. 532.

237 BGE 131 I 113 consid. 3.7.3; KIENER/RÜTSCHE/KUHN, n. 546; RHINOW ET AL., n. 533.

238 KIENER, Richterliche Unabhängigkeit, pp. 166 *et seqq*.; *dissenting:* BGE 131 I 113 consid. 3.7.3.

239 BGE 121 I 225 consid. 3.

many factors including the tribunals' election procedure of members, terms of office, structural organisation etc. whether they are truly independent from government[240]. Contrariwise, courts must be instituted by law (or be "legally constituted" as Art. 30 Const. puts it)[241] which can be considered as a collateral for their independence.

g) Right to Judicial Review and Administrative Discretion

There is a significant institutional difference between courts and administrative authorities in terms of Art. 29a Const. The provision is systematically codified between Art. 29 (general procedural guarantees) and Art. 30 Const. (judicial proceedings). Being obviously influenced by the "*Rechtsweggarantie*" in Art. 19 of the German Basic Law, Art. 29a Const. guarantees the right to a court in a legal dispute[242]. The nature of the court is not of importance as the provision is equally applicable whether the court decides on civil, penal or administrative matters. In this context, the term "legal dispute" undoubtedly includes cases in which administrative decisions have to be taken since – as indicated in the previous sections[243] – judicial protection is much more uncertain beyond this form of action. What is essential in each case, though, is the court's *independence* as explained in the paragraph above. 103

The legislator may "exceptionally" restrict admission to a court by law, a potential which the federal legislator has utilised in Art. 32 FACA exempting highly political matters such as distribution of certain gambling licences (Art. 32 para. 1 lit. h FACA), authorisations to build nuclear power plants (Art. 32 para. 1 lit. e FACA), decisions safeguarding internal and external security (Art. 32 para. 1 lit. a FACA) etc. from judicial control[244]. The cantons may intro- 104

240 BGE 123 I 87 consid. 4.a *with further references*; Häfelin/Müller/Uhlmann, n. 1191; Kiener/Rütsche/Kuhn, n. 530; Misic/Töpperwien, n. 232; Rhinow et al., n. 303.

241 Egli, pp. 164 *et seq.*; Haller, n. 470; Kiener/Kälin/Wyttenbach, n. 2184 *et seqq.*; Kiener/Rütsche/Kuhn, n. 257 *et seqq.*; Misic/Töpperwien, n. 652 *with further references*; Rhinow et al., n. 465 *et seqq.*

242 Egli, pp. 164 *et seq.*; Haller, n. 467; Häfelin/Müller/Uhlmann, n. 1183 *et seqq.*; Kiener/Kälin/Wyttenbach, n. 2178 *et seqq.*; Kiener/Rütsche/Kuhn, n. 200 *et seqq.*; Misic/Töpperwien, n. 650 *with further references*; Rhinow et al., n. 430 *et seqq.*; *see for the influence of* Art. 19 German Basic Law Botschaft über eine neue Bundesverfassung vom 20. November 1996, BBl 1197 I 1, p. 524.

243 *See supra sections* 118 *et seqq.*

244 Egli, pp. 164 *et seq.*; Haller, n. 468; Häfelin/Müller/Uhlmann, n. 1188; Kiener/Kälin/Wyttenbach, n. 2159 *et seqq.*; Kiener/Rütsche/Kuhn, n. 205 *et seqq.*; Misic/Töpperwien, n. 244; Rhinow et al., n. 438 *et seqq.*

duce their own exceptions, but the Swiss Supreme Court has adopted quite a strict view[245]. Federal legislation is immune from constitutional annulment (Art. 190 Const.).

105 An inherent but more profound limitation of Art. 29a Const. touches upon the fundamental division between court and administrative competencies, *i.e.* on the question of *administrative discretion*. Under Art. 29a Const., the guarantee of access to courts is respected by a one-time full judicial review of facts and the law[246]. Review of administrative discretion is neither required under the Swiss Constitution nor typically found in acts on administrative procedure, although special legislation may require courts to look also into administrative discretion. The Federal Administrative Court, by law, is required to review administrative discretion but the court simply carved out areas of diminished judicial scrutiny, preserving the administration's prerogative to discretion[247]. If review of administrative discretion is required for specific areas, the courts are less reluctant.

106 Notwithstanding the above, the question remains what is understood as administrative discretion. There is an abundance of theories on this subject, but it is doubtful that the "Holy Grail" of administrative law has really been found. There is a strong doctrine which follows the German approach that administrative discretion can be found only in the legal consequences of an administrative rule but not in its elements[248]. Still, this theory is unsatisfactory since the elements may be formulated quite vaguely the legislator and it is not always possible for courts to find a suitable solution. A more suitable – but also a more difficult – path is to ask for the reasons behind vague legal terms, and whether the margin of appreciation is better filled by courts or by the administration[249]. From court practice, one may cautiously infer that courts are re-

245 *E.g.* BGE 141 I 172 consid. 4.4 *et seq.* (concerning political matters); BGE 136 II 436 consid. 1.2 *et seq.* (concerning political matters); BGE 134 I 199 consid. 1.2 (concerning voting matters); KIENER/KÄLIN/WYTTENBACH, n. 2162 *et seqq.*; RHINOW ET AL., n. 448 *et seqq.*; *see also* Art. 86 et seqq. FSCA.

246 BGE 142 II 49 consid. 4.4; BGE 137 I 235 consid. 2.5; EGLI, pp. 164 *et seq.*; HALLER, n. 467; HÄFELIN/MÜLLER/UHLMANN, n. 1183, 1187; KIENER/KÄLIN/WYTTENBACH, n. 2148, 2152 *et seqq.*; KIENER/RÜTSCHE/KUHN, n. 202; RHINOW ET AL., n. 430 *et seqq.*

247 *E.g.* in the field of federal taxation *see* Federal Administrative Court decisions A-2900/2014 of 29 January 2015 consid. 2.6.2; A-4922/2012 of 14 June 2013 consid. 2.9.2; *see furthermore* Federal Supreme Court decision 2C_426/2007 of 22 November 2007 consid. 4.3.

248 GRIFFEL, Allgemeines Verwaltungsrecht, n. 256 *et seqq.*; KARLEN, pp. 123 *et seqq.*; TSCHANNEN/MÜLLER/KERN, n. 581, 583 *et seqq.*

249 TSCHANNEN/MÜLLER/KERN, n. 581, 609 *et seqq.*; *for further reading see* SCHINDLER, n. 418 *et seqq.*

luctant to go into questions of administrative expertise (*i.e.* highly technical matters)[250], policy decisions[251] and into cases requiring knowledge of local circumstances (*e.g.* the surrounding area in light of a new building construction)[252], not to mention legislative intent or legislative provisions on the distribution of discretion between courts and the administration, which are helpful but rare[253].

It should be noted that courts always can and will intervene against qualified errors of discretion which are considered a question of law, giving courts full competence for review[254]. The difficulty is of course when the differentiation between a simple error of discretion, *i.e.* one that could have been avoided with a more appropriate decision, and a qualified is subtle. The doctrine distinguishes between different forms: cases in which discretion has been overstepped, abused or not used at all, although available[255]. Constitutional principles and recourse to legislative intent may provide some guidance for separating simple errors that occur within the discretionary margin from abuse. Alternatively, one may also recur to *arbitrariness* but this notion is very vague in itself as it has been pointed out before[256]. 107

In any case, predictions on possible outcomes are extremely difficult. If it is true that one is in god's hands on the high seas and before courts, this certainly applies to cases of administrative discretion. This does not dispense private parties from navigating through these waters. On the contrary, a good lawyer will always try to phrase the matters before the court as questions of law (especially if administrative discretion is the issue in question) to show abuse of discretion. 108

250 *E.g.* BGE 140 I 68 consid. 4.2.1; BGE 135 II 384 consid. 2.2.2; BGE 131 II 680 consid. 2.3.2.

251 *E.g.* BGE 129 II 193 consid. 5.1.

252 *E.g.* BGE 97 I 573 consid. 5.

253 *E.g.* Art. 33 para. 3 lit. b Spatial Planning Act (SPA).

254 *See* Art. 49 lit. a APA; *see also* GRIFFEL, Allgemeines Verwaltungsrecht, n. 277; HÄFELIN/MÜLLER/UHLMANN, n. 434 *et seqq.*; KARLEN, pp. 127 *et seq.*; KIENER/RÜTSCHE/KUHN, n. 1571 *et seqq.*, 1602; RHINOW ET AL., n. 1120; TSCHANNEN/MÜLLER/KERN, n. 594.

255 BGE 137 V 71 consid. 5.1; GRIFFEL, Allgemeines Verwaltungsrecht, n. 271 *et seqq.*; HÄFELIN/MÜLLER/UHLMANN, n. 434 *et seq.*; KARLEN, p. 128; KIENER/RÜTSCHE/KUHN, n. 1571 *et seqq.*; RHINOW ET AL., n. 1120; TSCHANNEN/MÜLLER/KERN, n. 594 *et seqq.*

256 *See supra section* 75.

h) Right to Legal Aid

109 The Swiss Constitution guarantees the right to legal aid to anyone who does not have sufficient means and if necessary, also to free legal representation (Art. 29 para. 3 Const.)[257]. The aid can only be granted if a reasonable person would deem the chances of success sufficient, *i.e.* not without some prospect of success[258]. The right to a legal counsel depends on the complexity of the matter and the abilities of the private party: if the person may represent him- or herself before the authority without greater difficulties, a right to free legal representation will be denied[259].

i) Prohibition of Excessive Formalism

110 The Swiss Supreme Court intervenes against "excessive formalism" of lower courts and of administrative authorities. There is, for example, excessive formalism if a court disregards a power of attorney inadvertently submitted to the wrong chamber of the court[260], but not if an authority requests a written submission confirming a fax transmission[261]. The prohibition of excessive formalism, arguably based on the prohibition of arbitrariness, the duty to act in good faith or general procedural fairness[262], applies if formal rules are exe-

257 DUBEY/ZUFFEREY, n. 2619 et seqq.; EGLI, pp. 164 *et seq.*; HALLER, n. 466; MISIC/TÖPPERWIEN, n. 647; HÄFELIN/MÜLLER/UHLMANN, n. 1059; KIENER/KÄLIN/WYTTENBACH, n. 2126, 2140 *et seqq.*; KIENER/RÜTSCHE/KUHN, n. 247; RHINOW ET AL., n. 368; UHLMANN, Administrative Procedure, in: Introduction, pp. 191 *et seq.*; UHLMANN, The principle of effective legal protection, p. 309.

258 BGE 142 III 138 consid. 5.1; HÄFELIN/MÜLLER/UHLMANN, n. 1060; KIENER/KÄLIN/WYTTENBACH, n. 2135, 2137; KIENER/RÜTSCHE/KUHN, n. 250, 253; MISIC/TÖPPERWIEN, n. 647; RHINOW ET AL., n. 392, 399 *et seq.*; UHLMANN, Administrative Law, p. 229; UHLMANN, The principle of effective legal protection, p. 309.

259 BGE 130 I 180 consid. 2.2 *with further references*; HÄFELIN/MÜLLER/UHLMANN, n. 1061; KIENER/KÄLIN/WYTTENBACH, n. 2135, 2138; KIENER/RÜTSCHE/KUHN, n. 250, 254; MISIC/TÖPPERWIEN, n. 649; RHINOW ET AL., n. 392, 401 *et seqq.*; UHLMANN, Administrative Procedure, in: Introduction, p. 192; UHLMANN, The principle of effective legal protection, p. 309.

260 BGE 113 Ia 94 consid. 2.

261 Decision of the former Appeal Commission of the Federal Department of Economic Affairs (now integrated into the Federal Administrative Court) VPB 64 [2000] Nr. 133.

262 DUBEY/ZUFFEREY, n. 2589 *et seqq.*; HÄFELIN/MÜLLER/UHLMANN, n. 1041; KIENER/KÄLIN/WYTTENBACH, n. 2070; this constitutional guarantee is enshrined in Art. 29 para. 1 Const. as far as proceedings are concerned, in contrast to the more general and holistic guarantee in Art. 9 Const., *see also* EGLI/KRADOLFER, SG-Komm. BV, Art. 9, n. 72 *et seq.*

cuted without being necessary for the procedure, hereby effectively precluding ordinary citizens from judicial protection[263].

It should be noted in this context that there is no obligation to engage a lawyer in any administrative (or constitutional) proceedings, including proceedings before the Swiss Supreme Court[264]. A reasonable person is supposedly able to look after their interests, and the prohibition of excessive formalism is a tool to enforce this idea. 111

j) Right to a Decision within Reasonable Time

All procedural rights are in vain if the administration or the court simply remains passive. Decisions must be taken within *reasonable time* as Art. 29 Const. explicitly prescribes. One finds rarely fixed time limits in statutory provisions. There are indeed many factors that may determine "reasonableness": interests at stake, complexity of the case, behaviour of the parties involved (*e.g.* length of submissions, additional requests) etc. but organisational problems of the court or of the administration never qualify as a reason for delay[265]. There is not much case law based on claims about delays in the adjudication of a matter, not because there are no delays but because legal remedies are not really effective as most of the times an appellate court may simply state that there is an undue delay and that the administration or court of first instance are those who should decide[266]. 112

263 *In the words of the Supreme Court in* BGE 142 I 10 consid. 2.4.2: "[Überspitzter Formalismus] liegt vor, wenn für ein Verfahren rigorose Formvorschriften aufgestellt werden, ohne dass die Strenge sachlich gerechtfertigt wäre, wenn die Behörde formelle Vorschriften mit übertriebener Schärfe handhabt oder an Rechtsschriften überspannte Anforderungen stellt und den Rechtssuchenden den Rechtsweg in unzulässiger Weise versperrt." In English: "[Excessive formalism] occurs when a procedure is subject to rigorous formal requirements without being objectively justified; when the authority applies formal rules with excessive severity or imposes excessive requirements on legal documents and therefore inadmissibly obstructs the parties' access to the course of law."

264 DUBEY/ZUFFEREY, n. 2618; KIENER/RÜTSCHE/KUHN, n. 611; RHINOW ET AL., n. 349; *for exceptions see e.g.* Art. 11a APA; Art. 41 FSCA; *see also* KIENER/RÜTSCHE/KUHN, n. 612 *et seqq.*; RHINOW ET AL., n. 350 *et seqq.*

265 EGLI, p. 164; HALLER, n. 464; HÄFELIN/MÜLLER/UHLMANN, n. 1045 *et seqq.*; KIENER/KÄLIN/WYTTENBACH, n. 2050 *et seqq.*; KIENER/RÜTSCHE/KUHN, n. 215 *et seq.*; MISIC/TÖPPERWIEN, n. 644; RHINOW ET AL., n. 288 *et seqq.*; UHLMANN, Administrative Procedure, in: Introduction, p. 191; UHLMANN, The principle of effective legal protection, p. 309.

266 *See for consequences of a violation* RHINOW ET AL., n. 292 *et seqq.*; UHLMANN/WÄLLE-BÄR, Praxis-Komm. VwVG, Art. 46a, n. 25 *et seqq.*

6. Further Principles

Further Reading

DANIELA THURNHERR, Das Recht auf eine gute Verwaltung nach Art. 41 der EU-Grundrechtecharta – Ein Impulsgeber für das schweizerische Recht?, in: Astrid Epiney/Tobias Fasnacht (eds.), Schweizerisches Jahrbuch für Europarecht 2011/12, Bern 2012

a) "Good Administration"?

113 As Switzerland is not part of the European Union, there is no right to a good administration in the sense of Art. 41 of the Union's Charter of Fundamental Rights (CFR)[267]. The provision has sparked only little scholarly interest in Switzerland and probably caused hardly any changes in the Swiss administration. A popular initiative proposing a right to non-bureaucratic administrative action – whatever that meant[268] – did not draw sufficient signatures[269]. The Swiss administration is certainly not above criticism and the initiative probably failed due to political mismanagement, but one may assume with due caution that there is no widespread dissatisfaction with the Swiss administration.

114 This is not to say that there is no awareness about what would constitute good administration in Switzerland. The public sector has undergone substantial reforms, especially in the rise of a *New Public Management*[270]. The principles of efficiency and accountability have been included into the organisation of the executive branch[271]. Administrative authorities have also been creative to make

267 *For further reading see* THURNHERR, pp. 447 *et seqq.*

268 *See also critically* SCHOTT, pp. 237 *et seqq.*

269 Federal Popular Initiative "Eidgenössische Volksinitiative 'Bürokratie-Stopp!'" = "Bureaucracy stop", BBl 2012 7757, p. 7757 (there was no popular vote because not enough signatures had been collected).

270 GRIFFEL, Allgemeines Verwaltungsrecht, n. 67, 624; HÄFELIN/MÜLLER/UHLMANN, n. 1578 *et seqq.*; KARLEN, pp. 76 *et seqq.*; TSCHANNEN/MÜLLER/KERN, n. 141 *et seqq.*; *for further reading see* CHAPPELET, pp. 159 *et seqq.*

271 *E.g.* "Neues Führungsmodell für die Bundesverwaltung (NFB)" = "New management model of the Federal Administration"; *for further reading see* HÄFELIN/MÜLLER/UHLMANN, n. 1580; Botschaft über die Weiterentwicklung der ziel- und ergebnisorientierten Verwaltungsführung – Neues Führungsmodell für die Bundesverwaltung (NFB) vom 20. November 2013, BBl 2014 767.

accessible new sources of revenue that have triggered some scholarly interest[272].

b) Transparency?

There is no doubt that transparency in administrative actions is a key feature of good government. There are, however, many different understandings of and approaches to the notion of transparency. Swiss law does not feature a paramount principle but recognises various forms of transparency. 115

Some transparency is provided by the fact that administrative entities are traditionally small and that many administrative functions are performed by elected officials[273]. Some administrative decisions are also subject to referenda[274]. Draft laws, typically prepared by the administration, are subject to public participation[275]. Transparency is granted in individual cases through the right to be heard[276]. Administrative action is subject to judicial review[277], parliamentary oversight[278] and possible intervention of an ombudsman[279]. Taken together, these mechanisms formed for quite a long time the Swiss standards of transparency. 116

In recent years, the federal government and many states have introduced the *principle of publicity*[280]. The general idea is that governmental files are public, and government must give reasons why confidentiality is needed. The Federal 117

272 *E.g.* BGE 138 I 378 ("*Glarnersach*"); GRIFFEL, Allgemeines Verwaltungsrecht, n. 252 *et seq.*; HÄFELIN/MÜLLER/UHLMANN, n. 1590 *et seqq.*; TSCHANNEN/MÜLLER/KERN, n. 261 *et seqq.*

273 *See for some examples* TSCHANNEN, Staatsrecht CH, n. 1814.

274 *For administrative referenda at the federal level see* Art. 141 para. 1 lit. c Const.; *see also* KLEY, Staatsrecht, § 24 n. 13 *et seqq.*; TSCHANNEN, Staatsrecht CH, n. 1802 *with further references*; *for administrative referenda at the cantonal level see* KLEY, Staatsrecht, § 24 n. 25, 28 *et seqq.*; MISIC/TÖPPERWIEN, n. 155 *et seq.*; TSCHANNEN, Staatsrecht CH, n. 1827 *et seqq.*

275 *On the federal level see* Art. 3 CPA; *see also* GÄCHTER, Staatsrecht, § 23 n. 29 *et seqq.*; GUY-ECABERT, p. 92; HALLER, n. 522; MISIC/TÖPPERWIEN, n. 80; THOMMEN, Swiss Legal System, in: Introduction, p. 17; MÜLLER/UHLMANN/HÖFLER, n. 175 *et seqq.*; TSCHANNEN, Staatsrecht CH, n. 1630 *et seq.*

276 *See supra section* 94.

277 *See infra section* 120.

278 Art. 169 para. 1 Const.; *see also* EGLI, pp. 101 *et seq.*; HALLER, n. 292; HÄFELIN/MÜLLER/UHLMANN, n. 1724 *et seqq.*; KARLEN, p. 143; KIENER, Staatsrecht, § 18 n. 41 *et seqq.*; TSCHANNEN, Staatsrecht CH, n. 1324 *et seqq.*

279 HÄFELIN/MÜLLER/UHLMANN, n. 1768 *et seqq.*; KARLEN, p. 292; UHLMANN, Administrative Procedure, in: Introduction, p. 198.

280 Art. 6 FoIA; *see also* GRIFFEL, Allgemeines Verwaltungsrecht, n. 620 *et seqq.*; HÄFELIN/MÜLLER/UHLMANN, n. 1566 *et seqq.*; KARLEN, pp. 75 *et seq.*

Act on Freedom of Information in the Administration of 17 December 2004 (FoIA) names, inter alia, as exceptions to the principle of publicity the impairment of the decision-making process of government, domestic and international security concerns and professional, business or manufacturing secrets[281]. *Whistleblowing* in the public administration is also a new but only timidly developed instrument[282]. The effect of these changes still needs to be assessed.

281 Art. 7 FoIA; *see also* GRIFFEL, Allgemeines Verwaltungsrecht, n. 621; HÄFELIN/MÜLLER/UHLMANN, n. 1568; KARLEN, pp. 75 *et seq.*

282 Art. 22a Federal Personnel Act (FPA); *see also* BBl 2008 8125, pp. 8181 *et seq.*; HÄFELIN/MÜLLER/UHLMANN, n. 2034 *et seq.*; *for further information see also the external whistleblowing platform at* Federal Audit Office – Whistleblowing Office.

C) Forms of Administrative Action

1. Administrative Decisions

a) Omnipresence of Administrative Decisions

Administrative decisions, one may jokingly argue, can be considered as the Pythagorean Theorem of Swiss administrative law. Admittedly, they are neither advanced mathematics nor can they be considered, even faintly, as brilliant as the theorem. In spite of that, administrative decisions stand at the crossroads of many administrative doctrines. If one has understood the notion of an administrative decision, one has safely mastered the private – public law divide, the shallow waters of administrative contracts, regulations and their crossovers to individual acts, and the essence of a right or duty in administrative law. 118

It has already been emphasised that administrative decisions are *intrinsically linked to judicial protection and procedural rights*[283] as they guarantee both of them. Administrative decisions are *the common form of administrative action*. "The power to administer includes the power to issue administrative decisions"[284]. Other forms often need justification and pose a problem of judicial protection.[285] 119

Administrative decisions create *legal certainty*. They are also the bridge to – and a prerequisite for – *enforcement*[286]. Rights granted by administrative decisions cannot easily be revoked and are protected as legitimate expectations[287]. Reciprocally, administration imposes duties through administrative decisions. 120

283 *See e.g.* DUBEY/ZUFFEREY, n. 1196 *et seq.*; GRIFFEL, Allgemeines Verwaltungsrecht, n. 38; HÄFELIN/MÜLLER/UHLMANN, n. 331, 854; TSCHANNEN/MÜLLER/KERN, n. 644.

284 BGE 141 II 262 consid. 5.2.2; Federal Administrative Court decision A-3766/2012 of 5 August 2013 consid. 1.4.1; this also applies to decentralised entities (as *e.g.* Geneva Airport, BGE 144 II 376 consid. 7.1 and the Intercantonal Certification Body, BGE 138 II 134 consid. 5.1) and even private parties performing administrative functions (as *e.g.* the Joint Institution under the Federal Act on Health Insurance, BGE 146 V 152 consid. 1.2.2).

285 GRIFFEL, Allgemeines Verwaltungsrecht, n. 39; HÄFELIN/MÜLLER/UHLMANN, n. 854; TSCHANNEN/MÜLLER/KERN, n. 636 *et seq.*

286 HÄFELIN/MÜLLER/UHLMANN, n. 868; TSCHANNEN/MÜLLER/KERN, n. 645; UHLMANN, Codification, p. 280.

287 HÄFELIN/MÜLLER/UHLMANN, n. 628; TSCHANNEN/MÜLLER/KERN, n. 485.

Administrative decisions have similar effects to court decisions. In this respect, they enter into legal force if unchallenged. This is not to say that administrative decisions have an absolute legal force. Court practice allows for the modification of administrative decisions if facts or the law have substantially changed but not merely if a private person has missed the time limit to file an appeal[288]. There is a possibility to change administrative decisions with an indefinite legal effect: in principle, the Swiss driver's license does not have an expiration date but obviously can be revoked in the event of serious traffic offenses. Given that the revocation of administrative decisions with an indefinite legal effect is rarely regulated in specific legislation – as it is the case for the driver's license – courts acknowledge the possibility to revoke them as an unwritten rule. By the same token, the Swiss Supreme Court has developed an unwritten right to revision when an administrative decision of indefinite legal effect is not anymore in line with the laws or the facts of the case[289].

b) Definition of Administrative Decisions

121 The Federal Act on Administrative Procedure provides for a definition of an administrative decision. In its (unofficial) English translation, Art. 5 para. 1 APA reads as follows:

> "Rulings are decisions of the authorities in individual cases that are based on the public law of the Confederation and have as their subject matter the following:
>
> a. the establishment, amendment or withdrawal of rights or obligations;
>
> b. a finding of the existence, non-existence or extent of rights or obligations;
>
> c. the rejection of applications for the establishment, amendment, withdrawal or finding of rights or obligations, or the dismissal of such applications without entering into the substance of the case."

122 It is debatable whether term "ruling" is the most suitable as it is often used to describe the administration's response to an inquiry on certain issues of administrative nature, especially in the field of taxation. The administration reviews issues that may occur in the future and have not yet been legally binding. Therefore, the administration gives its opinion in form of rulings. The administrative body uses rulings to determine how a case will be decided once it is

288 *See e.g.* BGE 137 I 69 consid. 2.3; BGE 120 Ib 42 consid. 2.b.

289 BGE 143 II 1 consid. 5.1; BGE 135 V 201 consid. 6.2; Häfelin/Müller/Uhlmann, n. 1230; Kiener/Rütsche/Kuhn, n. 1839.

brought before the authorities[290]. It seems that the term "*administrative decision*" as it is used in this book is closer to "*Verfügung*" in German or "*décision*" in French. Instead of "*administrative decision*" one may also talk about an "*administrative act*", a term that is literally closer to what is described as "*Verwaltungsakt*"[291] in Germany or "*acte administratif*"[292] in France. Although the French and German terms share many elements with the Swiss 'administrative decision' (unilateral, individual, rooted in public law), one should not equate them without due caution.

Finally, the cantons must not necessarily adopt the definition of the Federal Administrative Procedure Act. However, they tend to do so in practice[293] and even when they use other denominations, it is relatively safe to assume that in substance they follow the example set out in Art. 5 APA. 123

c) Administrative Decisions Determining Rights and Obligations

Turning to the content of Art. 5 APA, there are several key elements to consider. The most obvious is that an administrative decision *establishes, amends or withdraws rights or obligations*. Indeed, this is the *raison d'être* of an administrative decision[294]. It may be that other forms of administrative actions result in legal consequences – a police action, for instance, in the framework of which an innocent bystander is harmed – which are not intended but accepted at the very best as a necessary collateral for the actual serving purpose of the administrative act. Administrative decisions determine, confirm and stabilise purposefully a legal situation. One may have a right to build a house but is not allowed to build it before the permit has been granted and handed down in the form of an administrative decision[295]. If the administration collects taxes, it will often do so in the form of an administrative decision, thereby concretizing tax law in an individual case, establishing the citizen's duty to pay the tax and if 124

290 HÄFELIN/MÜLLER/UHLMANN, n. 733 *et seq.*; TANQUEREL/BERNARD, n. 804; *e.g.* tax rulings indicate how a certain asset might be treated once according tax returns are filed and thereby create legitimate expectations.

291 *See* § 35 of the German Administrative Procedure Act.

292 *See e.g.* Art. L211-1 of the French Code of Relations between the Public and the Administration.

293 GRIFFEL, Allgemeines Verwaltungsrecht, n. 36; HÄFELIN/MÜLLER/UHLMANN, n. 852; *see also e.g.* in the case of the Canton of Zurich: PLÜSS, Komm. VRG/ZH, § 10, n. 4 *et seqq.*

294 DUBEY/ZUFFEREY, n. 1211 *et seqq.*; HÄFELIN/MÜLLER/UHLMANN, n. 866; TSCHANNEN/MÜLLER/KERN, n. 666.

295 *Ibid.*

not paid, ipso jure set the starting point for the legal enforcement of the decision[296]. It may also be that the administrative decision is negative in substance: if a candidate for the bar exams fails their tests, the commission will confirm the result through a negative decision, granting the right to an appeal[297]. Finally, an administrative decision in form of a *declaratory decision* ("*Feststellungsverfügung*") simply confirms an existing legal situation, thus providing legal certainty for the party requesting the confirmation[298].

125 The delicate question is often which administrative actions can change the legal situation of a private individual and thus must be based on a formal administrative decision. The administration probably prefers not to issue an administrative decision, as this forecloses the right to appeal and avoids the initiation of a procedure, which would require all constitutional guarantees to be ensured throughout the process, such as the right to be heard[299]. The Swiss Supreme Court decided that the administration must issue an administrative decision in cases of an unsolicited transfer of a civil servant to another post[300] or before disrupting energy services from a public utility[301] but not if a post office is closed in a small rural community[302]. Yet, the same Court required that not only the university degree but also the issuance of single grades may constitute an administrative decision if the award of a distinction depends upon them[303]. In all cases, the Swiss Supreme Court had to decide whether state actions had legal consequences for the individual. If the question was answered in the affirmative, an administrative decision was the formal prerequisite for state action.

126 It is difficult to draw general conclusions from the specific findings of the court since the outcome of such cases is often determined by the details of the law defining individual rights and obligations[304]. The Swiss Supreme Court also

296 *Ibid.*

297 Häfelin/Müller/Uhlmann, n. 886 *et seqq.*; Tschannen/Müller/Kern, n. 700; in these cases, the administrative authority refuses the issuance of the administrative decision.

298 Dubey/Zufferey, n. 1260 *et seqq.*; Griffel, Allgemeines Verwaltungsrecht, n. 51 *et seq.*; Häfelin/Müller/Uhlmann, n. 889 *et seqq.*; Tschannen/Müller/Kern, n. 666 *et seqq.*, 696 *et seqq.*

299 Tschannen/Müller/Kern, n. 666 *et seq.*

300 BGE 136 I 323 consid. 4.2 *et seqq.*

301 BGE 137 I 120 consid. 5.1 *et seqq.*

302 BGE 109 Ib 253 consid. 1.b.

303 BGE 136 I 229 consid. 3.3.

304 Dubey/Zufferey, n. 1085 *et seqq.*; Griffel, Allgemeines Verwaltungsrecht, n. 40a; Häfelin/Müller/Uhlmann, n. 874; Tschannen/Müller/Kern, n. 678, 681.

resorts to the interests of the private party at stake, especially the need for a legal remedy[305]. This variety in the approaches has been criticised[306].

d) Administrative Decisions as Individual Acts

127 It is quite clear from the legal definition and also from the aforementioned examples that administrative decisions concern *individual cases*. Swiss doctrine typically labels the administrative decision as "*individual*" and "*concrete*" ("*individuell-konkret*") in contrast to rulemaking that is "*general*" and "*abstract*" ("*generell-abstrakt*"). Yet, the distinction is not exclusive. In general terms though, administrative decisions determine a concrete situation based on a certain procedure which encompasses fundamental guarantees. Rulemaking on the other hand, is not established on the same requirements[307].

128 The settlement of a concrete situation may have implications for the wider public. These cases constitute a critical matter under Swiss law and thus require the issuance of a so-called "*general administrative decision*" ("*Allgemeinverfügung*"). The paramount example is traffic regulation, illustrated in a well-known case which prohibited riding (and driving) on the banks of the river Töss[308]. A "*general administrative decision*" does not entirely fall within the semantic core of administrative decisions or general rulemaking. Swiss courts and doctrine have concluded to a solution that assigns such cases to administrative decisions but with some facilitation in respect to the right to be heard (and the procedure that comes with it) which is granted only to persons specifically affected, *e.g.* a homeowner living on the riverbank. The decision must be published and can be challenged by everybody potentially affected. In contrast to a regular decision which will enter into force if not challenged in due time and which cannot be challenged beyond this point, a person affected by the sign may challenge its validity even after the decision comes into force (*e.g.* an equestrian from another canton that has been fined after riding on the riverbank)[309].

305 BGE 141 II 233 consid. 4.2.1 *et seqq.*

306 WALDMANN, pp. 507 *et seq.*; *see also* Federal Supreme Court decision 2C_272/2012 of 9 July 2012 consid. 4.3.

307 DUBEY/ZUFFEREY, n. 1076 *et seqq.*; HÄFELIN/MÜLLER/UHLMANN, n. 62 *et seqq.*; TSCHANNEN/MÜLLER/KERN, n. 284, 289, 295; *see also* ZEN-RUFFINEN, Vol. 1, n. 57.

308 BGE 101 Ia 73 consid. 3 *et seq.*

309 *See* BGE 101 Ia 73; DUBEY/ZUFFEREY, n. 1208, 1210; HÄFELIN/MÜLLER/UHLMANN, n. 943 *et seqq.*; TANQUEREL/BERNARD, n. 813; TSCHANNEN/MÜLLER/KERN, n. 685 *et seqq.*

e) Administrative Decisions as Unilateral Acts

129 Swiss administrative law unfolds around the idea of the "*sovereignty*" ("*Hoheitlichkeit*") of administrative action. Administrative decisions are *unilateral*. As a matter of fact, administrative action entails the administration's privilege to act unilaterally towards its citizens. Yet, not all state action has to be strictly unilateral. Indeed, the state may wave its prerogative and act in the form of administrative or private law contracts which will be analysed below[310].

130 In theory, to discern a unilateral state action from an action that originated from an administrative or private law contract seems straightforward. However, this is not the case in practice. Administrative decisions of a sovereign state do not simply rain down onto unaware private subjects, not least because these subjects are often substantially involved in the decision-making process. One way through which this interplay between the state and private individuals is demonstrated, is the right to be heard as mentioned above[311]. Admittedly, this right is the channel *par excellence* for allowing an individual to negotiate with the administration. Furthermore, many administrative decisions require an application for the administration to *ex officio* regulate the case.

131 In this respect, the private party's "consent" to administrative action only is a rather elusive criterion for the distinction[312]. Instead, one should examine the *margin of negotiations* on the administration's part. If the administration has nothing to bargain for, it will hardly aim for a contractual relationship. But it will do so in a complex cooperation with a private enterprise, *e.g.* one that is paid for organizing training for the unemployed[313]. Occasionally, the distinction between unilateral acts and contractual administrative actions becomes largely superfluous if the legislator prescribes the form of administrative action. A typical example of this is the employment of civil servants where the administration must bring its action under the umbrella of an administrative decision. Lastly, one should also keep in mind that administrative decisions are the preferred form of action, hence placing on the administration a burden to justify contracts. For instance, for subsidies under federal law, the Federal Subsidies Act (FSA) has explicitly embraced that rule in its Art. 16.

310 Dubey/Zufferey, n. 1203 *et seqq.*; Griffel, Allgemeines Verwaltungsrecht, n. 65 *et seq.*; Häfelin/Müller/Uhlmann, n. 855 *et seq.*; Tschannen/Müller/Kern, n. 659 *et seqq.*

311 Häfelin/Müller/Uhlmann, n. 1001; Tschannen/Müller/Kern, n. 800.

312 Griffel, Allgemeines Verwaltungsrecht, n. 69; Häfelin/Müller/Uhlmann, n. 1288 *et seqq.*; Tschannen/Müller/Kern, n. 968 *et seqq.*

313 Häfelin/Müller/Uhlmann, n. 1314 *et seqq.*; Tschannen/Müller/Kern, n. 988 *et seqq.*; *see also* BGE 128 III 250.

f) Administrative Decisions as Acts under Public Law

Administrative decisions must be based on public law as the definition in Art. 5 APA explicitly states. The prerequisite seems self-evident with no further ramifications. Quite the opposite holds true though when one thinks about the matter of the public-private law divide that the issuance of administrative decisions brings to the forefront. Indeed, laws, entities, forms of action, services, judicial remedies, property, liability, earnings, employment of civil servants etc., all of which can be the object of an administrative decision, may be private or public in nature. Hence, it may well be argued that this divide is manifested in different ways. Yet, caution is required to apply the appropriate theory when establishing the divide. Often, one technique for classification helps with some "objects" but fails with others and is certainly bound to have different legal ramifications (*e.g.* court jurisdiction in case of a dispute, the extent of the duty to respect fundamental rights, determination of liability etc.)[314]. The Swiss Supreme Court typically approaches these cases with all theories available, looking at *sovereignty* ("*Subordinationstheorie*"), *interest* and *mandate* ("*Interessentheorie*" and "*Funktionstheorie*"), and – the only recently reactivated – *sanctions* ("*Modaltheorie*"), choosing the one which seems to fit best[315]. 132

In respect to administrative decisions, it is quite clear that the classification is indispensable for procedural reasons. Among the many theories brought forward to untwine the complexity around the public-private divide, it seems sensible to look at the *interests at stake* from the administration's perspective: it acts under public law while directly fulfilling public interests or a public mandate[316]. On the other hand, its action may qualify as private if it seeks profits or satisfies its own affairs as a private party would do. Again, it may be the legislator that has already determined the nature of the administration's actions. When the Swiss Supreme Court had to decide on the question whether the allocation of domain names is a private or public law action, it approached the issue from a private law perspective. For, although there was substantial public interest or even a public mandate for this activity, the legislator pro- 133

314 Dubey/Zufferey, n. 1206; Häfelin/Müller/Uhlmann, n. 217 *et seqq.*, 1392 *et seq.*; Tschannen/Müller/Kern, n. 367 *et seq.*, 1133 *et seqq.*

315 BGE 149 I 25 consid. 4.4.4 *et seq.*; BGE 147 I 153 consid. 3.3.2; BGE 128 III 250 consid. 2.a; BGE 109 Ib 146 consid. 1.b; Griffel, Allgemeines Verwaltungsrecht, n. 6; Häfelin/Müller/Uhlmann, n. 223 *et seqq.*; Tschannen/Müller/Kern, n. 368 *et seqq.*; this eclectic approach has been criticised but it is not easy to think of a fundamentally better solution.

316 Dubey/Zufferey, n. 1202; Häfelin/Müller/Uhlmann, n. 225; Tschannen/Müller/Kern, n. 368.

vided for a private law setting[317]. Not much simpler was the case of certificates of conformity provided by a private enterprise necessary to label a cheese "*Gruyère* AOC". The Swiss Supreme Court assigned to the action a public law status as the possible sanctions were comparable to restrictions on trade[318]. It is remarkable that in both cases there were actors involved whose nature is not simply private or public, highlighting another difficult point of the divide.

g) Form?

134 The prerequisites of an administrative decision (individual, unilateral act under public law determining rights and obligations) do not describe a certain form but are rather substantive elements. Indeed, the typical form of an administrative decision is rather an implicit consequence of those requirements. An administrative decision must be handed down in writing, be named as such, give reasons for the way it has regulated an issue and inform on possible legal remedies[319]. If the administrative decision was not effectively delivered, it usually is contestable on this ground[320].

h) Quo vadis?

135 The cardinal role of administrative decisions as the guarantor of judicial protection and legal certainty in administrative procedures has recently been put into question. As can be gathered from the above, administrative decisions in their well-proven form concern the execution of legislation by administrative agencies addressed at persons directly and particularly impacted by a specific matter. *Prima facie*, this begs the question on how this relates to the need for judicial protection in cases of legislative deference and global phenomena which abstractly target everyone – like climate change.

136 In the *Klimaseniorinnen* case, which ended up before the *European Court of Human Rights*, a group of elderly Swiss women took action against the Swiss state's failure to implement sufficient measures against climate change[321]. The

317 BGE 138 I 289 consid. 2.7.

318 BGE 134 II 272 consid. 5.4.

319 Arts. 34 et seq. APA; GRIFFEL, Allgemeines Verwaltungsrecht, n. 42 *et seqq.*; HÄFELIN/MÜLLER/UHLMANN, n. 1070 *et seqq.*; TSCHANNEN/MÜLLER/KERN, n. 738 *et seqq.*

320 DUBEY/ZUFFEREY, n. 1378 *et seqq.*; GRIFFEL, Allgemeines Verwaltungsrecht, n. 48 *et seqq.*; HÄFELIN/MÜLLER/UHLMANN, n. 1088; TSCHANNEN/MÜLLER/KERN, n. 754 *et seqq.*

321 European Court of Human Rights decision Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Nr. 53600/20) of 9 April 2024.

procedural question at hand was whether the group possessed victim status in the first place given that – as will be further laid out below – Art. 25a APA foresees that persons applying for the issuance of an administrative decision on prior informal state actions as a starting point of judicial proceedings must present an interest worthy of protection – which inhibits *actiones populares*[322].

The relevant Swiss federal administrative authorities and courts consistently denied the applicants' victim status, claiming that the consequences of (alleged) shortcomings in climate change mitigation are too general and thereby not sufficiently individually targeted[323]. Thus, the applicants were refused administrative decisions on that procedural ground. Before the Strasbourg court, they argued – *inter alia* – that said refusal amounted to a violation of the right to a fair trial according to Art. 6 ECHR. 137

Its *Grand Chamber* reasoned that in order for Art. 6 ECHR to be applicable, there must be a genuine and serious dispute over a right under national law[324], which implies that proceedings must be directly decisive for an applicant's civil right(s) which – in the environmental context – requires a personal danger which is serious, specific and imminent[325]. It inferred that the issuance of administrative decisions is essential for addressing the impact of adverse effects on the enjoyment of *e.g.* the right to respect for private and family life according to Art. 8 ECHR and that, given that the elderly as a demographic are categorically more significantly and critically endangered by a worsened climate than the general public, the notion "directly decisive" is thus to be interpreted more broadly in order to conform to the collective nature of climate change itself, as the protection of rights would otherwise be impossible in that context[326]. Therefore, the court found Art. 6 ECHR applicable and affirmed the existence of victim status for most of the group[327]. It ultimately found a violation 138

322 *See infra section* 153; Federal Supreme Court decision 2C_689/2022 of 17 January 2025 consid. 6.1 *et seqq.*; GRIFFEL, Allgemeines Verwaltungsrecht, n. 64; HÄFELIN/MÜLLER/UHLMANN, n. 1429; TSCHANNEN/MÜLLER/KERN, n. 1087.

323 BGE 146 I 145 consid. 5.5.

324 European Court of Human Rights decision Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Nr. 53600/20) of 9 April 2024, n. 612.

325 European Court of Human Rights decision Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Nr. 53600/20) of 9 April 2024, n. 610–614.

326 European Court of Human Rights decision Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Nr. 53600/20) of 9 April 2024, n. 622.

327 European Court of Human Rights decision Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Nr. 53600/20) of 9 April 2024, n. 623.

of the same Article given the authorities' denial of victim status without due consideration of the arguments of urgency and severity[328].

139 The demands of that interpretation of Art. 6 ECHR represent a stark contrast to the relatively more restrictive protective scope of administrative actions in multiple ways: Be it in terms of the source of proceedings (legislative or executive branch), the object (informal action or omission) or the nature of the complainants (potential *actio popularis*). It remains to be seen how the balance between ensuring collective legal protection in global contexts in cases of legislative deference (as potentially required under Art. 6 ECHR) and the more rigid tool of administrative decisions will be struck in the (near) future.

2. Administrative Law Contracts

a) Legality and Stability of Administrative Law Contracts

140 It has already been pointed out that the administration may act contractually and that these contracts must be distinguished from the administrative decisions, the latter being unilateral[329]. Administrative contracts are much rarer than administrative decisions. Many of their legal implications are disputed and it is not without reason that one scholar has called them the "*liaison dangereuse*" of Swiss administrative law[330].

141 This is not to say that administrative law contracts should be neglected; on the contrary. They have some advantages over the administrative decision that should not be underestimated. First, an administrative law contract may be the only option available in cases an administrative decision is not possible. The Swiss Supreme Court has concluded that the *legal basis* for a contractual action may be less precise than that for an administrative decision[331]. This is justified by the consent of the counterpart which somehow compensates for the lesser protection by the principle of legality.

328 European Court of Human Rights decision Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Nr. 53600/20) of 9 April 2024, n. 635–640.

329 Dubey/Zufferey, n. 1481; Häfelin/Müller/Uhlmann, n. 1288; Tanquerel/Bernard, n. 788 *et seq.*; Tschannen/Müller/Kern, n. 968.

330 Tschannen, Systeme des Allgemeinen Verwaltungsrechts, p. 75.

331 BGE 136 I 142 consid. 4.3; Dubey/Zufferey, n. 1497; Griffel, Allgemeines Verwaltungsrecht, n. 73; Häfelin/Müller/Uhlmann, n. 1309 *et seq.*; Tschannen/Müller/Kern, n. 996.

Another reason for a contract to be appealing is its *stability*. Administrative contracts may grant "*vested rights*" ("*wohlerworbene Rechte*") that enjoy elevated protection under the doctrine of legitimate expectations. In fact, future legislation may not abolish vested rights, at least not without due compensation[332]. Such rights are also protected under the guarantee of ownership in Art. 26 Const., meaning that they cannot be revoked at all or without compensation. It is easy to see that such rights create a tension between state sovereignty and the need of administrative stability given that the enactment of future legislation may be restricted by these rights which are often guaranteed for an indefinite or at least a long period of time. Therefore, making fundamental changes to the legislative landscape is difficult. The Swiss Supreme Court had to decide numerous cases on the extent of such rights[333] which varies depending on the subject of the contract. For instance, many contracts of civil servants do not create such rights at all or at least not unconditional ones[334]. On the other hand, in another famous case which involved the incorporation of a private owner's land into the agricultural zone in exchange for legislation that would increase the value of other pieces of land he owned, the question before the Court was whether the municipality could revoke the favourable legislation without compensating the owner. This case is a good example of the tension caused when contracts afford rights to individuals that restrict differential regulation of the issue by future legislation[335]. 142

The availability of contracts does not imply that the administration can freely choose between them and a decision; it simply cannot. If special legislation does not explicitly provide for the administrative contract, the administration must prove the necessity to conclude a contract. In other words, the contract needs *justification*. The contract may be justified exactly for the motives explained (compensating the legal basis, stability). It may also be that the contract suits better a situation of extensive bargaining or of equal footing of parties[336]. 143

Finally, it should be added that administrative contracts are not found only between the administration and private parties ("*subordinated contracts*" or "*sub-* 144

332 BGE 145 II 140 consid. 4.2 *et seqq.*; Griffel, Allgemeines Verwaltungsrecht, n. 447; Häfelin/Müller/Uhlmann, n. 1315; Tschannen/Müller/Kern, n. 1016, 1286.

333 Häfelin/Müller/Uhlmann, n. 1366 *et seqq.*; Tschannen/Müller/Kern, n. 1014 *et seqq.*

334 BGE 134 I 23 consid. 7.6.1; Federal Supreme Court decision 9C_891/2017 of 14 September 2018 consid. 6.

335 BGE 122 I 328 consid. 7.a *et seqq.*

336 Dubey/Zufferey, n. 1473, 1505; Häfelin/Müller/Uhlmann, n. 1319; Tschannen/Müller/Kern, n. 990; *see e.g.* Art. 16 para. 2 FSA.

ordinationsrechtliche Verträge" – even though the term "subordination" seems to be at odds with the notion of a contract) but also between different state entities ("*coordinated contracts*" or "*koordinationsrechtliche Verträge*")[337]. This is a practice which seems more natural among state bodies, especially if they are equal in the administration hierarchy and may not have the power to decide upon each other, albeit this is not to say that they enjoy some kind of flexibility in concluding contracts since they are not exempted from the necessity to have a legal basis for them.

b) Procedure and Defects of Administrative Law Contracts

145 The open questions on administrative contracts concern procedure, legal protection, enforcement, interpretation and the legal consequences that follow a contract's defect in form or of substance. With respect to legal protection and enforcement, the answers may be found in federal and state acts on administrative procedure, which sometimes provide for procedural steps similar to those envisaged in civil procedure[338]. Yet, unsettled is the question whether procedural guarantees are of any avail during the contract negotiations or what the implications of a contractual base are when special legislation grants the administration the power to issue an administrative decision as it is often the case in laws regulating the employment of civil servants[339].

146 Likewise, it is difficult to articulate general rules on defective administrative contracts. The problem of defective contracts lays in their position between private contract law and public law: should one resort to the theory of administrative law or of private contract law when dealing with a defective contract[340]? To illustrate the level of uncertainty: it is still disputed whether an administrative contract must be concluded in writing, and if not, what the legal consequences of such a defect are[341]. Cases are rare and doctrine has not settled the issue[342] on the most appropriate approach but one may argue that it is maybe best to follow the general doctrine of the protection of legitimate interests.

337 Dubey/Zufferey, n. 1477 *et seqq.*; Griffel, Allgemeines Verwaltungsrecht, n. 70; Häfelin/Müller/Uhlmann, n. 1304 *et seqq.*; Tschannen/Müller/Kern, n. 980 *et seqq.*

338 Häfelin/Müller/Uhlmann, n. 1343, 1371 *et seqq.*; Tanquerel/Bernard, n. 1021; Tschannen/Müller/Kern, n. 1005, 1017.

339 Häfelin/Müller/Uhlmann, n. 1372; Tschannen/Müller/Kern, n. 996.

340 *Ibid.*

341 Dubey/Zufferey, n. 1513; Häfelin/Müller/Uhlmann, n. 1342, 1359; Tschannen/Müller/Kern, n. 997 *et seqq.*

342 *Ibid.*

3. Private Law Contracts

a) "Flucht ins Privatrecht"?

147 It has long been established that the administration may also conclude private law contracts. But as with administrative law contracts the conclusion of which has to be justified, the administration must give grounds for its deviation from the use of administrative law. Doctrine has been largely sceptical about the possibility of the state "*escaping into private law*" ("*Flucht ins Privatrecht*")[343]. It seems indeed tempting for the state to trade in its power to issue unilaterally binding decisions for its duty to honour procedural guarantees, showing in this way a preference to rely on its financial power.

148 Court practice and doctrine basically acknowledge three areas of permissible private action: public procurement, the management of financial assets of the state, and profit-oriented state action[344].

b) Public Procurement

149 For a long time, public procurement was a sector conducive to discrete internal decisions leading to private law contracts with private enterprises. Attempts of rebuffed competitors for judicial protection were unsuccessful[345]. It was only under the Government Procurement Agreement (GPR) and relevant domestic legislation on the federal[346] and cantonal level[347] that things changed. The new process for concluding private contracts comprised two stages pursuant to the "*theory of two steps*" ("*Zweistufentheorie*") that is firmly rooted in Public Procurement legislation: Firstly, a unilateral *administrative* decision regarding the private offer to be selected is now required, consequently opening legal remedies to competitors[348]. Once the matter of choice among the latter

343 Häfelin/Müller/Uhlmann, n. 1379; Tschannen/Müller/Kern, n. 259, 1139 *et seq.*; Vallender/Hettich, n. 622; *see also* BGE 127 I 84 consid. 4.c.

344 Häfelin/Müller/Uhlmann, n. 1384 *et seqq.*; Tschannen/Müller/Kern, n. 1135 *et seqq.*

345 BGE 125 II 86 consid. 1.

346 *See e.g.* the Federal Public Procurement Act (PPA); Biaggini et al., pp. 130 *et seqq.*; Häfelin/Müller/Uhlmann, n. 1397 *et seqq.*; Hänni/Stöckli, n. 711, 713 *et seqq.*

347 *See e.g.* the Intercantonal Agreement on Public Procurement (ICAPP); Biaggini et al., pp. 132 *et seq.*; Häfelin/Müller/Uhlmann, n. 1397 *et seqq.*; Hänni/Stöckli, n. 711, 725 *et seqq.*

348 Art. 51 para. 1 PPA; Biaggini et al., pp. 144 *et seq.*; Häfelin/Müller/Uhlmann, n. 1394; Hänni/Stöckli, n. 798 *et seq.*; Tschannen/Müller/Kern, n. 1336.

has been settled (sometimes even through administrative courts), the government will conclude a private law contract with the winner, in which state privileges do not apply and in case of a dispute, private law courts will decide. However, it should be noted that the application of this theory remains rather controversial outside the area of public procurement[349].

c) Management of Financial Assets

150 The federation and the cantons are the owners of public property. One must distinguish among three types of public property: *Financial assets* ("*Finanzvermögen*"), *administrative property* ("*Verwaltungsvermögen*") and the *public domain* ("*öffentliche Sachen im Gemeingebrauch*") as a special form of administrative property. Roughly speaking, public property in general and administrative property in particular, including the public domain, are subject to public law in practically every aspect. A characteristic example of this would be the regulation of licenses in the public domain, to which the administration should respond not only by taking into account fundamental rights[350] but deciding by way of administrative actions[351]. Public property may not be seized as this may infringe upon the state's mission to serve a public aim[352]. By contrast, private possessions may be expropriated to create administrative property[353].

151 The situation is more complex with financial assets. By definition, these assets serve purely the financial purposes of the state whereas administrative property fulfils a certain administrative mission[354]. Financial assets of the states can be seized – as it was successfully demonstrated in a case against a state bank in which the view of the Swiss Supreme Court was that the bank had no public mandate (not anymore) but largely served the state through its revenues[355]. There is no possibility of expropriation on behalf of the state to gather financial assets. Finally, if the state concludes contracts concerning these assets, private law will apply[356]. This does not preclude the administration from being

349 *See e.g.* Decision of the High Court of the Canton of Schaffhausen 60/2007/32 of 9 November 2011 consid. 2.b; Federal Supreme Court decision 2C_314/2013 of 19 March 2014 consid. 1.1.

350 Häfelin/Müller/Uhlmann, n. 2244 *et seqq.*; Tschannen/Müller/Kern, n. 1358, 1376, 1379.

351 *Ibid.*

352 Häfelin/Müller/Uhlmann, n. 2234; Tschannen/Müller/Kern, n. 1354.

353 *See e.g.* Art. 5 Federal Expropriation Act (FEA); Häfelin/Müller/Uhlmann, n. 2359 *et seq.*, 2453 *et seq.*; Tschannen/Müller/Kern, n. 1789 *et seqq.*, 1827.

354 Häfelin/Müller/Uhlmann, n. 2211; Tschannen/Müller/Kern, n. 1339.

355 BGE 120 II 321 consid. 2.e *et seq.*

356 Häfelin/Müller/Uhlmann, n. 2240; Tschannen/Müller/Kern, n. 1358.

internally bound by public law for managing its wealth but externally, the assets are invariably subject to private law.

d) Profit-Oriented State Action

A last area governed by private law concerns state activities that are comparable to the engagements of private enterprises. There is disagreement among Swiss scholars whether the state is allowed to act exclusively in a profit-oriented manner[357] but it is generally acknowledged that state action may be quite similar to the one of private enterprises and that its profits are at least a warm-welcomed by-product of a public mandate[358]. Switzerland never had an extensive public sector but there is a considerable number of enterprises that belong to the federation or the cantons, especially in the area of postal services (federation), telecommunication (federation), transport (federation and cantons), water and energy (cantons), banks (cantons) and house insurance (cantons)[359]. Their services are often offered on the basis of private law contracts. The latter holds also true if the administration is acting directly and not through its enterprises, *e.g.* a small municipality in a rural area, selling wine from vineyards in the surrounding region, concludes a contract with buyers. Since the typical form of action is private, all relevant provisions (substantive and procedural) of contract law are applicable. Nevertheless, one might argue that the application of private law does not exclude that state-owned enterprises or the administration itself may be bound by constitutional guarantees and be subject to public law constraints such as those deriving from the obligation to respect and safeguard fundamental rights[360]. Yet, this point constitutes an ongoing debate among Swiss scholars.[361] 152

357 *See* BGE 138 I 378 ("*Glarnersach*"); BIAGGINI ET AL., pp. 53 *et seq.*; HÄFELIN/MÜLLER/UHLMANN, n. 1383, 1400; HÄNNI/STÖCKLI, n. 1713; TSCHANNEN/MÜLLER/KERN, n. 261, 1138; VALLENDER/HETTICH, n. 609.

358 HÄFELIN/MÜLLER/UHLMANN, n. 1400; HÄNNI/STÖCKLI, n. 1734; TSCHANNEN/MÜLLER/KERN, n. 266, 1138.

359 BIAGGINI ET AL., pp. 54 *et seq.*; HÄFELIN/MÜLLER/UHLMANN, n. 1390 *et seq.*; HÄNNI/STÖCKLI, n. 90; TSCHANNEN/MÜLLER/KERN, n. 67, 227 *et seqq.*, 1137.

360 BGE 139 I 306 consid. 3.2.2 *et seqq.*; HÄFELIN/HALLER/KELLER/THURNHERR, n. 263 *et seq.*; HÄFELIN/MÜLLER/UHLMANN, n. 1404 *et seq.*; TSCHANNEN/MÜLLER/KERN, n. 258 *et seq.*, 1139.

361 HÄFELIN/HALLER/KELLER/THURNHERR, n. 265; HÄFELIN/MÜLLER/UHLMANN, n. 1406; TSCHANNEN/MÜLLER/KERN, n. 260, 1140; VALLENDER/HETTICH, n. 621.

4. Informal Acts and State Liability

153 Administrative decisions and contracts share the common denominator that they affect the *legal situation of citizens* whereas informal actions ("*Realakte*" or "*real acts*" according to Art. 25a APA) of administrative bodies do not – at least not deliberately. To name but a few examples, a police car patrolling in a neighbourhood triggers no legal effect nor does the dissemination of governmental information. Furthermore, most actions performed within the framework of school or hospital operation do not amount to legal actions even when sometimes there is a fine line that distinguishes them from the latter as it has been shown by the example of university grades mentioned earlier[362].

154 For a long time, informal actions were typically beyond the scope of judicial review[363] and their classification as private law actions was clearly not an option either. It has been attempted to challenge such acts on the account of supervision or, to put it in another way, by attribution of the action taken (or not) to an administrative authority higher in the hierarchy, but with little success. An illustrative example of this is the case of *Scientology* members, who tried unsuccessfully to foreclose the distribution of a book about sects which was allowed under the school's supervision[364]. A more successful challenge could be achieved by "stretching" the semantic scope of the term 'administrative decision', namely by adopting a broad interpretation of the notion[365]. Alternatively, fundamental rights can also be invoked against informal actions. This possibility has been demonstrated in several cases concerning some forms of police action which were challenged based on Art. 13 ECHR that guarantees the right to an effective remedy for violations of rights and freedoms, notwithstanding that they may have been committed by persons acting in an official capacity[366].

155 More broadly, though, one could resort to *state liability claims*, which are available against both federal and cantonal practices, in order to challenge informal actions. The Federal Liability Act (FLA) covers actions by federal authorities

362 Häfelin/Müller/Uhlmann, n. 873; Tschannen/Müller/Kern, n. 667.

363 Griffel, Allgemeines Verwaltungsrecht, n. 62; Häfelin/Müller/Uhlmann, n. 1425; Zen-Ruffinen, Vol. 2, n. 129.

364 BGE 121 I 87.

365 Griffel, Allgemeines Verwaltungsrecht, n. 36, 40a.

366 European Court of Human Rights decision Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Nr. 53600/20) of 9 April 2024; BGE 128 I 167; Griffel, Allgemeines Verwaltungsrecht, n. 62; Häfelin/Müller/Uhlmann, n. 1427; Tschannen/Müller/Kern, n. 681, 1086 *et seq*.

while similar laws exist in the cantons[367]. The general principles underlying the mechanism of these laws are comparable, albeit some noticeable differences, *e.g.* in the exact procedures followed or the actions covered. To begin with, state liability requires an unlawful act causing damages to a private party (Art. 3 FLA). If the damage is purely financial, the private party must demonstrate which law protecting its assets has been violated by the administration (Arts. 5 *et seq.* FLA *e contrario*). If there were damages to life and property, the illegality of the state action is presumed but may be refuted by special legislation or consent of the private party[368]. A more subtle requirement constitutes the necessity for a "*functional connection*" ("*funktioneller Zusammenhang*") between the illegal act and the state mandate: when a civil servant seizes the opportunity to act illegally, with no connection to their duties, they will be personally responsible for their action, but not the state[369]. In all other circumstances, only the state is liable to third parties but may take regress on the civil servant[370].

Hence, cases stemming from informal action may be resolved by reference to state liability laws, but it is obvious that not every situation will be satisfactorily covered by them. First, it should be noted that state liability has only a retrospective effect: it does not provide for legal coverage to prevent harmful state action as probably the members of scientology had hoped. One may also argue that state liability claims are not necessarily successful, to say the least, especially if the private party sues for compensation over purely financial damages[371]. Moreover, illegality of state action cannot easily be established, especially if the administration has some discretion in the way it acts (which it often has)[372]. A Swiss Supreme Court decision rejecting claims from cheese producers over a governmental warning on listeriosis is quite illustrative of the latter[373]. 156

367 Häfelin/Müller/Uhlmann, n. 2086; Tschannen/Müller/Kern, n. 1704 *et seq.*

368 BGE 148 II 73 consid. 3.2; Häfelin/Müller/Uhlmann, n. 2114 *et seqq.*; Tschannen/Müller/Kern, n. 1722.

369 BGE 130 IV 27 consid. 2.2.3; BGE 115 II 237 consid. 2.d; Häfelin/Müller/Uhlmann, n. 2109; Tschannen/Müller/Kern, n. 1732.

370 Art. 7 FLA; Häfelin/Müller/Uhlmann, n. 2188; Kiener, Staatsrecht, § 18 n. 97; Tschannen/Müller/Kern, n. 1766.

371 Federal Supreme Court decision 2E_6/2021 of 23 March 2023 consid. 5.1; Häfelin/Müller/Uhlmann, n. 2114; Tschannen/Müller/Kern, n. 1741 *et seqq.*

372 Griffel, Allgemeines Verwaltungsrecht, n. 262; Häfelin/Müller/Uhlmann, n. 442; Tschannen/Müller/Kern, n. 599 *et seqq.*

373 BGE 118 Ib 473.

157 It is for these reasons that a new provision was introduced into the Federal Administrative Procedure Act. According to Art. 25a APA, everyone may require an administrative decision on informal acts which will be subject to a possible appeal[374]. The request may target past, current or future administrative action and is directed to the administrative authority responsible for that action[375]. Legal standing for such a request necessitates an interest worthy of protection, which is similar to the formula used in other administrative proceedings[376]. There are some open questions regarding the new provision, *e.g.* its relation to the definition of administrative decision[377] or to claims on state liability[378], but it is beyond doubt that it has enhanced the level of protection against such acts. For precision, it should be noted that Art. 25a APA does not necessarily apply to cantonal actions, but the cantonal legislations have often followed the federal example[379]. Yet, it has not yet been settled whether they must indeed do so in light of Art. 29a Const.[380].

5. Enforcement

158 Administrative decisions may already be considered as a form of law enforcement, or perhaps more accurately, that a bridge for enforcement. As explained before, an administrative decision establishes rights and duties in an individual case. If not challenged, private parties and administrative authorities will often simply comply with it. In these cases, enforcement strictly speaking is not necessary.

159 Obviously, not every situation is regulated by an administrative decision and it may be inevitable that private misconduct is directly sanctioned. Additionally, an administrative decision may not be obeyed. In both these cases, enforcement becomes necessary and is instituted through special legislation which

374 Uhlmann, Codification, p. 280; Zen-Ruffinen, Vol. 2, n. 128 *et seqq.*

375 Art. 25a APA; Federal Supreme Court decision 2C_689/2022 of 17 January 2025 consid. 6.1 *et seqq.*; Griffel, Allgemeines Verwaltungsrecht, n. 64; Häfelin/Müller/Uhlmann, n. 1429; Tschannen/Müller/Kern, n. 1087; Zen-Ruffinen. Vol. 2, n. 131 *et seqq.*

376 *Ibid.*

377 Federal Supreme Court decision 2C_167/2016 of 17 March 2017 consid. 3.3.1 *et seqq.*; Griffel, Allgemeines Verwaltungsrecht, n. 30 *et seq.*; Häfelin/Müller/Uhlmann, n. 849 *et seqq.*; Tschannen/Müller/Kern, n. 639.

378 BGE 128 I 167 consid. 4.5; Griffel, Allgemeines Verwaltungsrecht, n. 555 *et seq.*; Häfelin/Müller/Uhlmann, n. 2124; Tschannen/Müller/Kern, n. 1751 *et seqq.*

379 Griffel, Allgemeines Verwaltungsrecht, n. 63 *et seqq.*; Häfelin/Müller/Uhlmann, n. 1436; Tschannen/Müller/Kern, n. 1088; Zen-Ruffinen, Vol. 2, n. 146.

380 BGE 143 I 336 consid. 4.2; Zen-Ruffinen, Vol. 2, n. 147.

often provides for penal sanctions, subject to a high level of scrutiny under the principle of legality[381].

There are also some general rules supporting administrative enforcement. If an authority must collect money, it may, and it must if no special norms are available, resort to private law enforcement measures. Some special rules and procedures apply but generally, a debt towards government is not treated differently to a debt towards another private person[382]. 160

Frequently, the authority applies Article 292 of the Swiss Criminal Code. If duly warned, a person not complying with an administrative decision may be fined in case of non-compliance[383]. The authority may withdraw privileges, *e.g.* revoke a favourable decision or refrain from providing further governmental services[384]. Such sanctions may require a balancing test, involving the interest of the private party in further privileges or services against the interest of the authority in enforcing administrative law[385]. Finally, the authority may take the initiative to act on behalf of a citizen, sometimes by delegating to a third party its power to execute and then levying from the citizen a fee for such execution by substitution or, under certain circumstances, resort to the use of force, usually through the police[386]. 161

Nevertheless, every administrative sanction must be proportionate. If more than one compulsory measure is available – which is often the case – the authority must carefully choose the mildest sanction expected to be effective[387]. 162

381 Federal Supreme Court decision 2C_694/2021 of 8 September 2023 consid. 5.1 *et seqq.*; Dubey/Zufferey, n. 2901 *et seq.*; Griffel, Allgemeines Verwaltungsrecht, n. 565 *et seq.*; Häfelin/Müller/Uhlmann, n. 1453; Tschannen/Müller/Kern, n. 893.

382 BGE 94 I 248 consid. 2.a; Griffel, Allgemeines Verwaltungsrecht, n. 582; Häfelin/Müller/Uhlmann, n. 1465; Tschannen/Müller/Kern, n. 885, 920.

383 *See e.g.* Federal Supreme Court decision 6B_306/2014 of 29 January 2015; Dubey/Zufferey, n. 2827 et seq.; Griffel, Allgemeines Verwaltungsrecht, n. 592; Häfelin/Müller/Uhlmann, n. 1496; Tschannen/Müller/Kern, n. 946.

384 Griffel, Allgemeines Verwaltungsrecht, n. 595; Häfelin/Müller/Uhlmann, n. 1523 *et seq.*, 1534; Tschannen/Müller/Kern, n. 923 *et seqq.*

385 BGE 147 I 57 consid. 4.2; Griffel, Allgemeines Verwaltungsrecht, n. 595 *et seq.*; Häfelin/Müller/Uhlmann, n. 1525 *et seqq.*; Tschannen/Müller/Kern, n. 923 *et seqq.*

386 *See e.g.* Federal Supreme Court decision 1C_2/2024 of 7 May 2024 consid. 2.3.4; Dubey/Zufferey, n. 2851 *et seqq.*; Griffel, Allgemeines Verwaltungsrecht, n. 569, 578; Häfelin/Müller/Uhlmann, n. 1467, 1478; Tschannen/Müller/Kern, n. 903, 912.

387 Federal Supreme Court decision 2C_92/2019 of 31 January 2020 consid. 6.1; Griffel, Allgemeines Verwaltungsrecht, n. 566; Häfelin/Müller/Uhlmann, n. 1459, 1531; Tschannen/Müller/Kern, n. 895.

6. Administrative Rulemaking

163 It has already been explained that the administration may be politically quite influential both through primary or secondary legislation. It has also been explained that one must distinguish between several forms of secondary or delegated legislation, ranging from (formal) ordinances passed by the Federal or state council to (informal) administrative provisions.

164 The prerequisites and effects of different forms are dissimilar. However, they share the common trait that they typically bypass constitutional procedural rights. Whereas for administrative decisions, the procedure, including the right to be heard and the right to be given reasons, is rather formal, for administrative rulemaking often it is not. Administrative provisions may be published but there is usually no duty to do so nor is there a duty for public participation. Admittedly, such provisions which lack publication have no direct legal effect, but it is undisputed that they strongly influence administrative practice. On the contrary, (formal) ordinances are subject to a certain procedure within the administration and may only enter into force if duly published. It should be noted though that often there is no right to public participation unlike what applies to law-making[388] where participation constitutes an important stage in the process.

165 This is not to say that administrative rulemaking is necessarily secretive. Draft ordinances are open to public participation if deemed important, and access to public records has been improved in recent years as explained earlier[389]. Still, one must note the remarkable distinction between administrative rulemaking, where procedural rights (Arts. 29 *et seq.* Const.) do not apply, and the process leading to the issuance of an administrative decision that involves extensive procedural rights.

388 Art. 3 para. 1 lit. b, d and e CPA (https://www.fedlex.admin.ch/eli/cc/2005/542/en#art_3); GÄCHTER, Staatsrecht, § 23 n. 29 *et seqq.*; HÄFELIN/HALLER/KELLER/THURNHERR, n. 2228; TSCHANNEN, Staatsrecht CH, n. 1630.

389 *Ibid.*

D) Organisation

1. Federal, Cantonal and Communal Entities

a) Federal and Cantonal Entities

As was pointed out before, Switzerland is a federal state. The cantons (states) have substantial powers and are often in charge of implementing federal law. Yet, it is crucial to investigate specific legislation in order to determine and understand the exact competencies of each entity. There is no standard working relationship between the cantons and the federal state for the implementation of federal law in the cantons. It is common though that the cantons run their administration autonomously, yet the federal authorities supervise their action, streamlining it through regulation and guidelines and intervening before court if necessary[390]. It is also possible that cantonal acts or cantonal regulations must be approved by federal authorities before entering into force[391]. More complex forms of cantonal actions involve agreements between the cantons for certain issues[392] or even between the cantons and the federation, which has given rise to a *duty to coordination.* Indeed, Art. 63a Const. establishes a close coordination between the confederation and the cantons on issues relating to the organisation and operation of universities and other tertiary education institutions[393]. 166

More than 30 years ago, in a landmark decision concerning a waste disposal site, the Swiss Supreme Court obliged federal and cantonal authorities to issue one administrative decision that would take into account both federal and cantonal as well as private interests, hence striking a fair balance among them 167

390 Arts. 120 *et seqq.* FSCA provide for the possibility of legal action for the settlement of conflicts between the federal branch and the cantons while Art. 89 para. 2 lit. a FSCA additionally entitles the federal administration to take legal action against decisions involving the application of federal law; HÄFELIN/HALLER/KELLER/THURNHERR, n. 2507, 2551 *et seqq.*; REICH, Staatsrecht, § 15 n. 41; TSCHANNEN, Staatsrecht CH, n. 983 *et seq.*

391 HÄFELIN/HALLER/KELLER/THURNHERR, n. 1472 *et seq.*; REICH, Staatsrecht, § 15 n. 37; TSCHANNEN, Staatsrecht CH, n. 980 *et seq.*

392 Art. 48 Const.; HÄFELIN/HALLER/KELLER/THURNHERR, n. 1521 *et seqq.*; REICH, Staatsrecht, § 14 n. 4; TSCHANNEN, Staatsrecht CH, n. 931.

393 Art. 63a Const.; HÄFELIN/HALLER/KELLER/THURNHERR, n. 1519; REICH, Staatsrecht, § 14 n. 25 *et seqq.*; TSCHANNEN, Staatsrecht CH, n. 767.

by considering all aspects of the case[394]. In light of this, the authorities have an obligation to coordinate their decisions both procedurally (concluding to one decision) and in substance (considering all interest at stake)[395], adopting thus a consistent/integrated approach to the matter in question and allowing for a comprehensive solution. The Supreme Court decision has been superseded by legislative provisions[396] but the general rule still applies.

b) Communes (Municipalities)

168 To add complexity, there are also communes (or municipalities). Communes are subject to the jurisdiction of the cantons, and the Swiss Constitution; federal legislation hardly addresses them[397]. Within this framework, a federal act may designate the canton as responsible for implementing specific legislation but the latter may conceivably delegate this task to the communes if cantonal law provides for this option.

169 While all communes enjoy the same legal status in cantonal legislation, their mandate and the powers granted to them are diverse given that their structural organisation depends on their size (*e.g.* a large commune such as the City of Zurich faces more complex issues than a smaller one in the highlands). Typical tasks of communes involve local matters such as schools, police, the public domain, building permits etc., but often the application of a blend of federal, cantonal and communal law[398].

170 Generally, communes have a legislative organ (either a Parliament or an open council) and an executive organ[399]. They may pass legislation, and if they are truly autonomous in a specific area, communal law may form the only but possibly sufficient basis for administrative action[400]. Notably, though, there are no administrative courts on the communal level.

394 BGE 116 Ib 50 consid. 6.a; *see also* Häfelin/Haller/Keller/Thurnherr, n. 1354 *et seqq.*; Kley, Staatsrecht, § 10 n. 35; Tschannen, Staatsrecht CH, n. 905 *et seqq.*

395 *Ibid.*

396 *Ibid.*

397 Häfelin/Haller/Keller/Thurnherr, n. 1217 *et seqq.*; Kley/Reich, Staatsrecht, § 11 n. 23 *et seqq.*; Tschannen, Staatsrecht CH, n. 636 *et seqq.*

398 Häfelin/Haller/Keller/Thurnherr, n. 1217 *et seqq.*; Kley/Reich, Staatsrecht, § 11 n. 23 *et seqq.*; Tschannen, Staatsrecht CH, n. 638, 641.

399 Häfelin/Haller/Keller/Thurnherr, n. 1256 *et seq.*; Kley/Reich, Staatsrecht, § 11 n. 18; Tschannen, Staatsrecht CH, n. 672.

400 Häfelin/Haller/Keller/Thurnherr, n. 1218 *et seqq.*; Kley/Reich, Staatsrecht, § 11 n. 25; Tanquerel/Bernard, n. 170 *et seqq.*; Tschannen, Staatsrecht CH, n. 648; Zen-Ruffinen, Vol. 1, n. 730 *et seqq.*

2. Centralised and Decentralised Entities

a) Centralised Entities

Both the confederation and the cantons have central administrative units that are structured along the lines of the executive branch. The Federal Council is the head of the administration and the seven ministries (departments) correspond to the seven Federal Councillors[401]. Each Councillor leads their department and presents its work before the Federal Council[402]. In the Council, each member has the same rights while the presidency rotates annually and consists primarily of representative functions. The structure of the cantons is very similar, depending on the number of members (usually five to seven) forming the executive branch. 171

Within the central administrative units, the system is *hierarchical*. Departments are structured into offices and subdivisions thereof, all of which are accountable to the higher units. Departments are accountable to the leading Federal Councillor and to the Federal Council as a whole. 172

b) Decentralised Entities

It is obvious that a strictly hierarchical structure is not always appropriate. On some occasions the administration may need to be shielded from daily politics, seek advice from external experts and cooperate with private enterprises in order to avoid conflict of interests within the government[403]. Special legislation provides for many forms of organisational autonomy of varying degree. Indeed, there is no *numerus clausus* of cases that restricts the legislator's freedom in decentralising the administration, making it indispensable to consult the legal basis creating the decentralised administrative unit. 173

Typical forms of decentralised entities on both the federal and the cantonal level comprise *public institutions* ("*Anstalten*"), *committees* ("*Kommissionen*"), and *public enterprises* ("*spezialgesetzliche Aktiengesellschaften*"), the latter 174

401 BIAGGINI, Staatsrecht, § 19 n. 67; HÄFELIN/HALLER/KELLER/THURNHERR, n. 2006; TANQUEREL/BERNARD, n. 119; TSCHANNEN, Staatsrecht CH, n. 1352; ZEN-RUFFINEN, Vol. 1, n. 592.

402 *Ibid.*

403 BIAGGINI, Staatsrecht, § 20 n. 15; HÄFELIN/HALLER/KELLER/THURNHERR, n. 2082 *et seq.*; HÄFELIN/MÜLLER/UHLMANN, n. 1603; TANQUEREL/BERNARD, n. 136 *et seqq.*; TSCHANNEN, Staatsrecht CH, n. 1418; TSCHANNEN/MÜLLER/KERN, n. 119 *et seq.*; ZEN-RUFFINEN, vol. 1, n. 623 *et seqq.*

sharing structural elements with private law corporations[404]. These forms are organised through and restrained by administrative law, although they occasionally conclude private law contracts vis-à-vis third parties[405].

3. Public and Private Entities

175 The organisation of the administration– and the legal questions encompassing it – get more complex if one turns to entities that involve *private parties*. It is generally considered permissible that private parties may perform administrative functions. On the federal level, this is quite clearly expressed in Art. 178 para. 3 Const.: "Administrative tasks may by law be delegated to public or private organisations, entities or persons that do not form part of the Federal Administration". Therefore, the legislator has the authority to decide upon delegation[406]. Courts and doctrine, however, require sufficient state supervision over private entities and adequate legal protection. Private parties fulfilling administrative tasks (or "acting on behalf of the state") are "bound by fundamental rights" (Art. 35 para. 2 Const.).[407]

176 Further aspects of the delegation of administrative tasks to private entities are less clear, though. The delegation of an *administrative task* requires an explicit legislative basis and engages fundamental rights. The Swiss Supreme Court had to consider cases about competitive postal services[408], ads in a railway station[409], and cultural events at a community theatre,[410] to name only a few[411]. Moreover, it is not clear either what exactly follows from (derives from) the attachment to fundamental rights, both procedurally and in substance[412]. One is

404 Häfelin/Haller/Keller/Thurnherr, n. 2084 *et seqq.*; Häfelin/Müller/Uhlmann, n. 1609 *et seqq.*; Tschannen, Staatsrecht CH, n. 1418; Tschannen/Müller/Kern, n. 120, 125.

405 *For private law contracts see supra sections 147 et seqq.*

406 Häfelin/Haller/Keller/Thurnherr, n. 2087; Häfelin/Müller/Uhlmann, n. 1630 *et seq.*; Tschannen/Müller/Kern, n. 115.

407 Federal Supreme Court decision 2C_1023/2021 of 29 November 2022 consid. 2.1 *et seqq.*; Häfelin/Haller/Keller/Thurnherr, n. 264; Häfelin/Müller/Uhlmann, n. 1850 *et seq.*; Kiener/Kälin/Wyttenbach, n. 159; Tschannen, Staatsrecht CH, n. 287; Tschannen/Müller/Kern, n. 1139; Vallender/Hettich, n. 622.

408 BGE 129 III 35 consid. 5.2.

409 BGE 138 I 274 consid. 1.4.

410 Federal Supreme Court decision 1C_312/2010 of 8 December 2010 consid. 3.5.

411 Häfelin/Haller/Keller/Thurnherr, n. 264; Häfelin/Müller/Uhlmann, n. 1852 *et seq.*, 1855 *et seqq.*, 1861, 1863; Kiener/Kälin/Wyttenbach, n. 164, 168 *et seqq.*, 180, 182; Tschannen, Staatsrecht CH, n. 315 *et seqq.*

412 Häfelin/Haller/Keller/Thurnherr, n. 265; Häfelin/Müller/Uhlmann, n. 1623, 1851, 1857, 1862, 1866; Kiener/Kälin/Wyttenbach, n. 179, 181, 189.

also prone to stumble over the private – public divide as it may be put into question whether a private enterprise has been indeed mandated by the public or whether it just carries out its private business[413].

Hybrid forms of state-private administration are complex. It has long been established that the administration may found private law companies[414]. The organisation of these entities follows private law although public law ties conceivably still exist[415]. It may also be that representatives from both the administration and the private sector jointly lead such a corporation[416]. If special legislation does not apply, it is often arduous to find out whether the company is subject to state supervision, state accounting rules, rules of public procurement, state tax exemptions, fundamental rights including procedural guarantees, civil servants' employment legislation, state liability etc.[417]. Similar questions may arise with regards to most forms of decentralised administrative entities but are sensibly accentuated in these hybrid forms. 177

4. Civil Servants

Compared to other areas of administrative law, the employment of civil servants is reasonably well covered by federal and cantonal laws and ordinances. The scope of these laws is also rather straightforward given that the *Federal Personnel Act (FPA)* applies to employees working for the federal government whereas the states have their own legislation for their employees. Equally, municipalities apply their laws if not bound by the laws of the canton. That said, civil servants' status is regulated depending on their employment on a federal or cantonal level and there is no interplay between federal and cantonal laws. 178

As a consequence, it can be argued that legislation is quite diverse when one considers the relevant legislative framework of the federation and the cantons. Some similarities between the two may be cautiously observed but are subject to verification under the applicable law. The Federation and the cantons have opted for *public law* solutions. Private law is usually reserved for some special 179

413 *See e.g.* BGE 138 I 289 consid. 2.3.

414 HÄFELIN/HALLER/KELLER/THURNHERR, n. 2087; HÄFELIN/MÜLLER/UHLMANN, n. 1609, 1806 *et seqq.*; TSCHANNEN/MÜLLER/KERN, n. 228.

415 *Ibid.*

416 *Ibid.*

417 HÄFELIN/HALLER/KELLER/THURNHERR, n. 265; HÄFELIN/MÜLLER/UHLMANN, n. 1850 *et seq.*; KIENER/KÄLIN/WYTTENBACH, n. 169; TSCHANNEN/MÜLLER/KERN, n. 258 *et seqq.*

functions or may be found in some communes[418]. Public law entails a somewhat elevated protection against *dismissal* compared to (the rather liberal) private law[419].

180 There are rarely fixed terms in office, at least not anymore for ordinary employees. Instead, the employer and the civil servants usually conclude contracts of indefinite duration[420]. Dismissal by the employer is taken by the form of an administrative decision even when the relationship is based on an administrative contract[421]. Unjustified dismissal may lead to reinstatement although federal and cantonal legislation is moving towards the provision of financial compensation only[422]. Yet, no or little judicial protection is awarded when selecting applicants for a new job, save for anti-discrimination claims[423].

181 The rights and duties of civil servants are comparable to the ones of employees in the private sector[424]. Civil servants must be loyal to their employer, a duty that may come into conflict with fundamental rights, especially the freedom of expression, as numerous cases highlight[425]. Salary is not subject to free bargaining but to locked-step systems. Nevertheless, some margins apply. Finally, pension funds are included as an employment condition and may be somewhat advantageous compared to those in the private sector, even though the latter have reached the same levels in recent years[426].

418 Häfelin/Müller/Uhlmann, n. 2009; Karlen, pp. 346 *et seqq.*; Ladner, Characteristics, pp. 60 *et seqq.*; Tanquerel/Bernard, n. 268.

419 Federal Supreme Court decision 1C_514/2023 of 4 March 2024 consid. 5.2; BGE 138 I 113 consid. 6.4.1.

420 Häfelin/Müller/Uhlmann, n. 2013; Karlen, p. 348.

421 *See e.g.* Art. 13 in conjunction with Arts. 34 para. 1 and 34b para. 1 FPA; BGE 138 I 113 consid. 6.4.1; Häfelin/Müller/Uhlmann, n. 2073.

422 Häfelin/Müller/Uhlmann, n. 2076; Karlen, p. 348.

423 Art. 34 para. 3 FPA; Art. 5 para. 2 in conjunction with Art. 13 para. 2 Federal Gender Equality Act; Häfelin/Müller/Uhlmann, n. 2014.

424 Tanquerel/Bernard, n. 270; *for more on the rights and duties of employees in the private sector see* Arts. 319 *et seqq.* Code of Obligations (CO).

425 Häfelin/Müller/Uhlmann, n. 2037 *et seqq.*; Karlen, 346 *et seqq.*; *see e.g.* Federal Supreme Court decision 2C_546/2018 of 11 March 2019 (on the freedom of religion); BGE 144 I 306 (on strike action); BGE 136 I 332 (on free speech).

426 Häfelin/Müller/Uhlmann, n. 2062 *et seq.*

E) Specific Areas of Administrative Law

1. Citizenship and Immigration

Legal Sources

Abkommen zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit (Freizügigkeitsabkommen, FZA) in Kraft getreten am 1 Juni 2002 (SR 0.142.112.681) = Agreement between the Swiss Confederation, of the one part, and the European Community and its Member States, of the other, on the free movement of persons (Free Movement of Persons Agreement, FMPA) *(text available in English)*

Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Europäischen Gemeinschaft über die Kriterien und Verfahren zur Bestimmung des zuständigen Staates für die Prüfung eines in einem Mitgliedstaat oder in der Schweiz gestellten Asylantrags (Dublin-Assoziierungs-Abkommen, DAA) in Kraft getreten am 1. März 2008 (SR 0.142.392.68) = Agreement between the Swiss Confederation and the European Community concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (Dublin-Association-Agreement, DAA) *(text available in English)*

Verordnung (EU) Nr. 604/2013 des europäischen Parlaments und des Rates vom 26. Juni 2013 zur Festlegung der Kriterien und Verfahren zur Bestimmung des Mitgliedstaats, der für die Prüfung eines von einem Drittstaatsangehörigen oder Staatenlosen in einem Mitgliedstaat gestellten Antrags auf internationalen Schutz zuständig ist (Neufassung) = Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) *(text available in English)*

Bundesgesetz über das Schweizer Bürgerrecht (Bürgerrechtsgesetz, BüG) vom 20. Juni 2014 (SR 141.0) = Federal Act on Swiss Citizenship (Swiss Citizenship Act, SCA) *(text available in English)*

Bundesgesetz über die Ausländerinnen und Ausländer und über die Integration (Ausländer- und Integrationsgesetz, AIG) vom 16. Dezember 2005 (SR 142.20) = Federal Act on Foreign Nationals and Integration (Foreign Nationals and Integration Act, FNIA) *(text available in English)*

Asylgesetz (AsylG) vom 26. Juni 1998 (SR 142.31) = Asylum Act (AsylA) *(text available in English)*

Übereinkommen zur Errichtung der Europäischen Freihandelsassoziation (EFTA), in Kraft getreten am 1. Juni 2002 (SR 0.632.31) = Convention establishing the European Free Trade Association (EFTA) *(text available in English)*

Further Reading

Cesla Amarelle/Minh Son Nguyen (eds.), Code annoté des droits des migrations – Volume V : Loi sur la nationalité (LN), Bern 2014

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Marc Spescha/Peter Bolzli/Fanny de Weck/Valerio Priuli, Handbuch zum Migrationsrecht, 4th edition, Zürich 2020

Peter Uebersax/Beat Rudin/Thomas Hugi Yar/Thomas Geiser/Luzia Vetterli (eds.), Ausländerrecht: Eine umfassende Darstellung der Rechtsstellung von Ausländerinnen und Ausländern in der Schweiz. Von A(syl) bis Z(ivilrecht), 3rd edition, Basel 2022

State Secretariat for Migration (SEM), Homepage, in: <https://www.sem.admin.ch/sem/en/home.html>

a) Citizenship

182 Citizenship is regulated at the federal level by the *Federal Act on Swiss Citizenship* (SCA). Compared to other nations, Switzerland is relatively restrictive regarding the conditions it sets for naturalisation. In summary there are two types of naturalisation (ordinary and simplified naturalisation, Art. 38 Const.).

183 Ordinary (or regular) naturalisation requires residency in Switzerland of a total of ten years, three of which should be in the last five years prior to the submission of the naturalisation application (Art. 9 para. 1 lit. b SCA). The completion of the ten-year period is facilitated in the case of children. For the former the residence time counts double when the applicants have lived in Switzerland between the eighth and eighteenth year of their age completed (Art. 9 para. 2 SCA).

184 It should be noted that Swiss citizenship also requires citizenship of a canton and a commune (municipality) (Art. 37 para. 1 Const.)[427]. Moving around in

427 Egli, p. 83; Haller, n. 183; Häner et al., pp. 489 *et seq.*; Merz/von Rütte, n. 22.16, 22.40; Misic/Töpperwien, n. 477; Oesch, Constitutional Law, pp. 116 *et seqq.*; Sow/Mahon, Art. 13, pp. 39 *et seq.*

Switzerland may lead to the situation that the federal requirements for citizenship are met but that the applicant doesn't fulfil the cantonal or communal ones. Since the cantons govern the naturalisation procedure on the cantonal and communal level (Art. 15 para. 1 SCA), the requirements for naturalisation may differ significantly depending on the respective cantonal and communal regulations[428]. In particular, before 2018, the minimum time period of cantonal residency varied from two (*e.g.* Canton of Bern) to eight years (Canton of St. Gallen)[429]. The revision of the *Swiss Citizenship Act* harmonised the requirements and set new standards for ordinary naturalisation[430]. The minimum length of residence is now two years whereas the required maximum period can be up to five years (Art. 18 para. 1 SCA).

In substance, federal, cantonal and communal laws require that the applicant is suitable for naturalisation, *i.e.* the applicant must be successfully integrated into Swiss society (Art. 11 lit. a and Art. 12 SCA), be familiar with the Swiss way of life (Art. 11 lit. b SCA) and does not pose a risk to Swiss internal or external security (Art. 11 lit. c SCA). The criteria for successful integration are specified in Art. 12 para. 1 SCA. The applicant demonstrates successful integration by showing respect for public security and order (lit. a), respecting the values enshrined in the Federal Constitution (lit. b), communicating in a national language in everyday situations (lit. c), participating in economic life or acquiring an education (lit. d) and finally, encouraging and supporting the integration of other family members (lit. e). Cantons can set higher standards by requiring additional criteria for integration (Art. 12 para. 3 SCA). 185

It is possible to submit the application for naturalisation to the vote of the communal electorate at a communal assembly[431]. In a landmark decision the Federal Supreme Court stipulated that the decision of the communal electorate may not be discriminatory (Art. 8 para. 2 Const.) and must meet procedural standards (Art. 29 para. 2 Const.)[432]. More precisely, a negative decision must be justified in order to allow for judicial review[433]. This practice is now 186

428 *Ibid.*

429 *See e.g.* Art. 8 para. 1 Act on the Cantonal and Communal Citizenship of the Canton of Bern (version in force until 31 December 2017) *and* Art. 9 para. 1 Act on the Cantonal Citizenship of the Canton of St. Gallen (version in force until 31 December 2017).

430 *See* BBl 2011 2825.

431 BGE 130 I 140 consid. 5.3.6; *for further reading see* CARONI/SCHEIBER/PREISIG/PLOZZA, n. 1601 *et seqq.*; MERZ/VON RÜTTE, n. 22.61 *et seqq.*; SOW/MAHON, Art. 14, pp. 48 *et seq.*; SPESCHA/BOLZLI/DE WECK/PRIULI, pp. 467 *et seqq.*

432 BGE 129 I 217 consid. 2. *et seqq.*

433 BGE 130 I 140 consid. 5.3.6; BGE 129 I 232 consid. 3.3; BGE 129 I 217 consid. 3.

explicitly confirmed by Art. 15 para. 2 and Art. 16 SCA, which regulate the procedure in the cantons[434].

187 Simplified (or facilitated) naturalisations are governed by federal law only and may not be hampered by cantonal or communal law. In these cases, the competent federal office to decide on naturalisation applications is the State Secretariat for Migration (SEM)[435]. In particular, the agency determines if the applicant fulfils the requirements for naturalisation (Art. 25 para. 1 SCA). This means that the procedure takes place only on the federal level. The cantons cannot regulate any stage of the process and are not allowed to individually set any (divergent) requirements. Still, an applicant must be successfully integrated (Art. 20 para. 1 in conjunction with Art. 12 paras. 1 and 2 SCA) and does not pose a risk to Switzerland's internal or external security (Art. 20 para. 2 SCA). Nevertheless, the respective canton is heard before the proceedings[436] and has the right (as well as the municipality in question) to appeal the decision of the SEM (Art. 25 para. 1 and Art. 47 para. 2 SCA).

188 The requirements for simplified naturalisation have been substantially loosened. Foreign persons who are married to a Swiss citizen are eligible for simplified naturalisation (Art. 21 SCA)[437]. Stateless children and children of a naturalised parent may also apply (Art. 23 and 24 SCA). If the special requirements for simplified naturalisation are not met, only ordinary naturalisation is open for applicants. Consequently, children with foreign background whose families have lived in Switzerland for generations were only able to become Swiss citizens through the ordinary naturalisation process[438]. A parliamentary initiative[439] adding a new constitutional provision that allows the simplified naturalisation process also for

434 A popular initiative to significantly loosen these standards was rejected, *see* Federal popular Initiative "Für demokratische Einbürgerungen" = "For democratic Naturalisations", BBl 2008 6161, p. 6161 (rejected with 1'415'249 No vs. 804'730 Yes votes).

435 *See also* State Secretariat for Migration, "How do I become a Swiss citizen?", Information page of 31 January 2024, in: How do I become a Swiss citizen?.

436 CARONI/SCHEIBER/PREISIG/PLOZZA, n. 1614; HALLER, n. 198; SPESCHA/BOLZLI/DE WECK/PRIULI, p. 477.

437 Botschaft zur Totalrevision des Bundesgesetzes über das Schweizerische Bürgerrecht (Bürgerrechtsgesetz, BüG) vom 4. März 2011, BBl 2011 2825, pp. 2855 *et seqq.*; CARONI/SCHEIBER/PREISIG/PLOZZA, n. 1621 *et seqq.*; HALLER, n. 198; HÄNER ET AL., p. 491 *et seq.*; MISIC/TÖPPERWIEN, n. 497 *et seq.*; MERZ/VON RÜTTE, n. 22.67 *et seqq.*; SPESCHA/KERLAND/BOLZI, pp. 477 *et seqq.*

438 A proposal to add a provision with the same objective was already intended in the draft of the revised Swiss Constitution but was ultimately rejected, *see* BBl 1992 545, p. 553.

439 BBl 2015 769.

young, well-integrated, third-generation foreign nationals received approval by 60.4% of the Swiss voters in 2016[440] (now implemented in Art. 24a SCA).

b) Immigration

Immigration is a federal competence (Art. 121 Const.) regulated by the *Federal Act on Foreign Nationals and Integration* (FNIA). The main aspect of Swiss immigration policy is the permit requirement for foreign nationals. Accordingly, a permit is required for any stay longer than three months and for any stay with gainful employment (Art. 10 FNIA). 189

Short stay permits (Art. 32 FNIA) are granted for a specific purpose of stay and are limited to one year (renewable up to two years). A change of job is only possible for good cause. *Residence permits* (Art. 33 FNIA) may be issued for periods of stay of more than a year and are also linked to a specific purpose of stay. *Permanent residence permits* (Art. 34 FNIA) are granted for an unlimited duration and without conditions. They usually require a residence in Switzerland for a minimum of ten years in total without interruption for the last five years. The person must also be integrated in Switzerland and have good knowledge of a national language. Permanent residence permits may be revoked on the grounds that the immigrant has seriously violated public security or has become permanently dependent on social welfare (Art. 63 FNIA). Other permits exist for cross-border commuters (Art. 35 FNIA) and asylum seekers (Arts. 58 and 60 AsylA). Furthermore, spouses and children may join their family members under certain circumstances and have the right to a residence permit. Family reunification is regulated in Arts. 42 *et seq.* FNIA. The permits are issued by cantonal authorities who enjoy a certain degree of discretion whether to grant a permit or not[441]. 190

Swiss immigration policy traditionally relied on quotas to regulate the foreign workforce[442]. The quotas have been essentially abolished towards immigrants from the European Union by bilateral agreements[443], in particular the *Agreement* 191

440 Bundesbeschluss vom 30. September 2016 über die erleichterte Einbürgerung von Personen der dritten Ausländergeneration = Federal Ordinance of 30 September 2016 on the simplified Naturalisation of Persons of the third Generation of Foreigners, BBl 2017 3387, p. 3387 (adopted with 60.2% Yes votes).

441 Häner et al., pp. 460 *et seqq.*; Schmucki/Raveane/Büchler, n. 25.41 *et seqq.*

442 Caroni/Scheiber/Preisig/Plozza, n. 491 *et seqq.*; Häner et al., p. 467; Junghanss, n. 26.74 *et seqq.*; Spescha/Bolzli/de Weck/Priuli, p. 204.

443 Häner et al., p. 467; *for an overview of the bilateral agreements between Switzerland and the EU see* Federal Department of Foreign Affairs, "The most important agreements with

on the Freedom of Movement within the European Union (FMPA) and further, the *Agreement establishing the European Free Trade Association* (EFTA)[444]. Established on the "belief that the freedom of movement within the territory of the contracting parties is a substantial part of the harmonious development of their relationship" (preamble of the FMPA), the agreement implements the principle of free movement of individuals between the EU and Switzerland. Nationals from the contracting parties have the right of entry, residence, access to paid work and establishment on a self-employed basis (Art. 1 FMPA). Any restrictions or quotas set by the host country may violate the non-discriminatory clauses in the FMPA (Arts. 2, 9, and 15 FMPA), which provide protection against discrimination based on nationality[445]. The free movement regulation of FMPA resembles the one in place within the EU but some special rules apply as the FMPA is an original agreement and not a simple reference to EU law[446]. This is particularly evident in the so-called "*safety valve clause*" (in German: "*Ventilklausel*") which may be invoked by the Federal Council if immigration from concerning EU countries during in a year surpasses 10% of the average of the previous three years during a transitional period – entailing the temporary limitation of the issuance of new residence permits (pursuant to Art. 33 FNIA) for those EU citizens[447].

192 Quotas still apply for employees from non-EU and non-EFTA member states[448] ("*third countries*")[449]. The requirements for work in Switzerland are

the EC/EU since 1972", Information page of 21 December 2023, in: <https://www.eda.admin.ch/missions/mission-eu-brussels/en/home/switzerlands-policy/bilateral-agreements.html>.

444 *See* Federal Department of Foreign Affairs, "The European Free Trade Association (EFTA) and the European Economic Area (EEA)", Information page of 8 May 2024, in: <https://www.eda.admin.ch/eda/en/home/foreign-policy/international-organizations/efta-eea.html>.

445 Caroni/Scheiber/Preisig/Plozza, n. 963 *et seq.*; Häner et al., p. 457; Misic/Töpperwien, n. 725; Junghanss, n. 26.21 *et seqq.*

446 Caroni/Scheiber/Preisig/Plozza, n. 937 *et seqq.*; Junghanss, n. 26.17 *et seq.*

447 Art. 10 para. 4 FMPA.

448 Caroni/Scheiber/Preisig/Plozza, n. 491 *et seqq.*; Häner et al., p. 466; more precisely, quotas still apply for immigrants from states that are not contracting parties neither of the FMPA nor the EFTA. The extension of the FMPA on new member states of the EU is usually negotiated in additional protocols – Croatia joined the EU in 2013 whereas the FMPA protocol came into force on 1 January 2017. Special transitory measures still apply, *see* State Secretariat for Migration, "Free Movement of Persons Switzerland – EU/EFTA", Information page of 21 November 2025, in: <https://www.sem.admin.ch/sem/en/home/themen/fza_schweiz-eu-efta.html>.

449 Art. 20 FNIA defines the limitation measures and the responsible authorities to set limitations; *see also* Art. 21 FNIA. For citizens of member states of the European Union and the EFTA the provisions of the international treaties apply (Art. 2 paras. 1 *et seqq.* FNIA).

considerably stricter and have been criticised by some international enterprises[450].

Foreign population in Switzerland rose from 20.9% in 2000 to 25.8% in 2023[451]. In early 2014, the Swiss people and the cantons adopted a popular initiative that requests that "Switzerland shall control the immigration of foreign nationals autonomously", thus explicitly stipulating quotas (Art. 121a Const.)[452]. Obviously, the new constitutional Article is not in line with the FMPA. The freedom of movement is one of the cornerstones of the bilateral agreements with the EU and its member states and shall not be restricted in any form[453]. In the event that this happens, the so-called "*guillotine clause*" is triggered, leading to the termination of all seven bilateral agreements when a contracting party terminates one of them[454]. Thus, the initiative includes a transitional provision stating that conflicting international agreements have to be renegotiated within three years[455]. Against this background, the Swiss parliament adopted in late 2016 compromise measures in order to implement the initiative in accordance with the bilateral agreements.[456] Nonetheless, the tension between the FMPA/EFTA and the constitution obviously remains[457].

Switzerland has also adopted another popular initiative that requires foreign nationals to be expelled if they are convicted of certain crimes or have improperly claimed social insurance or social assistance benefits (Art. 121 paras. 3 *et* 193

450 *See e.g.* Tages Anzeiger, "Novartis-Präsident Vasella kritisiert die Einwanderungspolitik", Article of 27 May 2012, in: <https://perma.cc/QU74-RSCA>.

451 Permanent resident population in Switzerland: 7'314'000 (of which 1'476'966 were foreigners) in 2002 to 8'962'258 (of which 2'313'217 were foreigners) in 2023 (Federal Statistical Office, "Population", Information page, in: <https://www.bfs.admin.ch/bfs/en/home/statistics/population.html>).

452 Federal popular Initiative "Gegen Masseneinwanderung" = "Stop Mass Immigration", BBl 2014 4117, p. 4117 (adopted with 1'463'854 Yes vs. 1'444'552 No votes).

453 Caroni/Scheiber/Preisig/Plozza, n. 963 *et seq.*; Häner et al., pp. 456 *et seqq.*; Oesch, International Relations, pp. 143 *et seqq.*; Spescha/Bolzli/de Weck/Priuli, pp. 64 *et seqq.*

454 Art. 25 para. 4 FMPA: "The seven Agreements referred to in paragraph 1 shall cease to apply six months after receipt of notification of non-renewal referred to in paragraph 2 or termination referred to in paragraph 3.".

455 Art. 197 para. 1 Const.: "International agreements that contradict Article 121a must be renegotiated and amended within three years of its adoption by the People and the Cantons.".

456 State Secretariat for Migration, "Umsetzung des Verfassungsartikels zur Zuwanderung", Information page, in: <https://www.sem.admin.ch/sem/de/home/themen/fza_schweiz-eu-efta/umsetzung_vb_zuwanderung.html>.

457 The discussion about the lawful implementation of the popular initiative and the fulfilment of international obligations also raises questions about the hierarchy of international and national law, *see supra section* 25.

seqq. Const.)[458]. Due to the tension that this provision may cause with the *European Convention of Human Rights*, the Swiss Supreme Court requires a proportional application of the law, notwithstanding the unconditional constitutional language[459]. A more radical initiative abolishing these safeguards was rejected in early 2016[460].

c) Asylum

194 Requirements and procedural rules concerning the granting of asylum and the legal status of refugees in Switzerland are set out in the *Federal Asylum Act* (AsylA). The Act specifies the term *refugee* in Art. 3 AsylA. Switzerland also grants temporary protection (Art. 4 AsylA) and respects the principle of non-refoulement[461] (Art. 25 paras. 2 *et seq.* Const. and Art. 5 AsylA). The competent authority to decide on granting or refusing asylum as well as on removal from Switzerland is the *Secretariat for Migration* (SEM, Art. 6a AsylA). The respective procedures are mainly governed by general administrative law (Art. 6 AsylA).

195 In addressing asylum matters, Switzerland is part of the EU legal framework establishing the criteria and mechanisms for determining member state responsibility in examining an application for international protection by a third-country national or a stateless person. Indeed, on the basis of *Dublin III*[462] asylum applications are coordinated among member states with the state of first entry in which an application is most likely to be filed, bearing the primary responsibility for conducting the asylum procedure. Therefore, the SEM issues a removal order against a person illegally residing in Switzerland back to the state where that person's application was first submitted (Art. 64a FNIA). In the wake of the refugee crisis of 2015, Switzerland voluntarily participated in the EU refugee relocation scheme[463].

458 Federal popular Initiative "Für die Ausschaffung krimineller Ausländer (Ausschaffungsinitiative)" = "For the Deportation of criminal foreign Nationals (Deportation Initiative)", BBl 2011 2771, p. 2271 (adopted with 1'397'923 Yes vs. 1'243'942 No votes).

459 BGE 139 I 16 consid. 5.

460 *See supra section* 20.

461 *See inter alia* international obligations from the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

462 Regulation (EU) No. 604/2013.

463 *See* European Union, "Relocation: EU solidarity in practice", Information page, in: <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management/relocation-eu-solidarity-practice_en>.

In the last decades, Swiss asylum law has undergone significant changes, mostly of a restrictive nature; most notably is the abolition of the possibility of lodging asylum applications through embassies in 2012[464] which effectively removed safe and legal routes to Switzerland – with the exception of humanitarian visa which are however in practice not capable of filling the gap given the high threshold of requirements[465]. 196

Another crucial revision which took place in the same year concerned the restriction of grounds to appeal (formerly Art. 106 para. 1 lit. c AsylA) as well as family asylum (formerly Art. 51 para. 2 AsylA) and from 2018 on, refugees who visit their country of origin lose their protective status (Art. 63 para. 1[bis] AsylA)[466]. 197

In the wake of the Russian invasion on Ukraine, the *Federal Council* invoked Art. 4 in conjunction with Art. 66 para. 1 AsylA, thereby granting temporary protection people fleeing Ukraine[467]. This legal framework allows for blanket protection (*protective status* S) beyond the regular individual application processes[468]. Given that *protective status* S had never been utilised before, this has drawn accusations of racially biased double standards in the treatment of refugees[469]. 198

The *non-refoulement principle*, according to which no one may be expelled to a country in which they are likely to be subjected to torture or other forms of ill-treatment is relatively regularly at the centre of disputes before the *European Court of Human Rights* – in the form of Art. 3 ECHR[470]. For instance, last year, it was ruled that Switzerland violated a homosexual Iranian asylum seeker's right to prohibition of torture and inhuman or degrading treatment according to Art. 3 ECHR by failing to sufficiently take into account the danger to his dignity and life in his home country in the processing of his asylum claim[471]. 199

464 Caroni/Scheiber/Preisig/Plozza, n. 1045.

465 Caroni/Scheiber/Preisig/Plozza, n. 450 *et seqq*.

466 Caroni/Scheiber/Preisig/Plozza, n. 1045.

467 *See State Secretariat for Migration*, "*Questions and answers for refugees from Ukraine*", *Information page, in:* <https://www.sem.admin.ch/sem/en/home/sem/aktuell/ukraine-krieg.html>.

468 Caroni/Scheiber/Preisig/Plozza, n. 1230 *et seqq*.

469 *See e.g.* SRF, "Offenbar spielt die Herkunft der Geflüchteten eine Rolle", Article of 7 April 2022, in: <https://perma.cc/8YDU-B4KJ>.

470 Caroni/Scheiber/Preisig/Plozza, n. 135 *et seqq*.

471 European Court of Human Rights decision M.I. v. Switzerland (Nr. 56390/21) of 12 November 2024, n. 55–56.

200 The importance of the ECHR in Swiss asylum policy can also be highlighted by the Strasbourg court's decision in the *B.F.* case which concerned the Swiss authorities' refusal of family reunification for a certain group of refugees. The court ruled that the authorities thereby violated most applicants' right to respect for private and family life according to Art. 8 ECHR[472].

2. National Security and Police

Legal Sources

Abkommen zwischen der Schweizerischen Eidgenossenschaft, der Europäischen Union und der Europäischen Gemeinschaft über die Assoziierung dieses Staates bei der Umsetzung, Anwendung und Entwicklung des Schengen-Besitzstands (Schengen-Assoziierungs-Abkommen, SAA) in Kraft getreten am 1 März 2008 (SR 0.362.31) = Agreement between the Swiss Confederation, the European Union and the European Community on the association of this state with the implementation, application and development of the Schengen acquis (Schengen-Association-Agreement, SAA) *(text available in English)*

Bundesgesetz über Massnahmen zur Wahrung der inneren Sicherheit (BWIS) vom 21. März 1997 (SR 120) = Federal Act on Measures for Protection of Internal Security (AMPIS)

Bundesgesetz über den Nachrichtendienst (Nachrichtendienstgesetz, NDG) vom 25. September 2015 (SR 121) = Federal Act on the Intelligence Service (Intelligence Service Act, IntelSA) *(text available in English)*

Schweizerisches Strafgesetzbuch (StGB) vom 21. Dezember 1937 (SR 311.0) = Swiss Criminal Code (CC) *(text available in English)*

Verordnung über das Strafregister (VOSTRA-Verordnung) vom 29. September 2006 (SR 331) = Ordinance on the Criminal Registry (VOSTRA Ordinance)

Bundesgesetz über die Anwendung polizeilichen Zwangs und polizeilicher Massnahmen im Zuständigkeitsbereich des Bundes (Zwangsanwendungsgesetz, ZAG) vom 20. März 2008 (SR 364) = Federal Act on the Use of Police Coercion and Police Measures within the Scope of the Confederation (Enforcement Measures Act, EMA)

Bundesgesetz über die Armee und die Militärverwaltung (Militärgesetz, MG) vom 3. Februar 1995 (SR 510.10) = Federal Act on Army and Military Administration (Military Act, MA)

472 European Court of Human Rights decision B.F. and Others v. Switzerland (Nrs. 13258/18; 15500/18; 57303/18; 9078/20) of 4 July 2023, n. 128–132.

Bundesgesetz über die Sicherheitsorgane der Transportunternehmen im öffentlichen Verkehr (BGST) vom 18. Juni 2010 (SR 745.2) = Federal Act on the Security Units of Public Transport Companies (PTSA) *(text available in English)*

Polizeigesetz des Kantons Zürich (PolG ZH) vom 23. April 2007 (LS 550.1) = Police Act of the Canton of Zurich (PolA ZH)

Polizeiorganisationsgesetz des Kantons Zürich (POG) vom 29. November 2004 (LS 551.1) = Police Organisation Act of the Canton of Zurich (POA ZH)

Further Reading

MARKUS H. F. MOHLER, Grundzüge des Polizeirechts in der Schweiz, Basel 2012

MARC THOMMEN, Criminal Law, in: Marc Thommen (ed.), Introduction to Swiss Law, Zürich 2022, pp. 409 et seqq. (cit. THOMMEN, Criminal Law, p. __)

MARC THOMMEN, Criminal Procedure, in: Marc Thommen (ed.), Introduction to Swiss Law, Zürich 2022, pp. 431 et seqq. (cit. THOMMEN, Criminal Procedure, p. __)

PIERRE TSCHANNEN, Thematische Einordnung der sicherheitsbedeutsamen Bundeserlasse, in: Regina Kiener/René Bühler/Benjamin Schindler (eds.), Schweizerisches Bundesverwaltungsrecht, Band III: Sicherheits- und Ordnungsrecht des Bundes, Teil 2: Besonderer Teil, Basel 2018, pp. 17 *et seqq.* (cit. TSCHANNEN, Thematische Einordnung, n. __)

Federal Department of Defence, Civil Protection and Sport, "Federal Intelligence Service", Information page, in: <https://www.vbs.admin.ch/en/intelligence-service>

Federal Department of Justice and Police, Homepage, in: <https://www.ejpd.admin.ch/ejpd/en/home.html>

According to Art. 173 para. 1 lit. a and b of the Swiss Constitution, the Federal Assembly takes measures "to safeguard the internal and external security and the independence and neutrality of Switzerland". These provisions should not lead to the conclusion that security is mainly a federal competence. It is a national duty as far as military and civil defence are concerned[473]. By contrast, the police are first and foremost regulated by the cantons[474]. Therefore, all 201

473 *See e.g.* regulations on the Swiss Military Force are set out in the Federal Military Act.

474 ALTWICKER/STÄHLI, BSK BV, Art. 57, n. 24; HÄNER ET AL., p. 399; MISIC/TÖPPERWIEN, n. 790; MOHLER, n. 57, 194 *et seqq.*; MÜLLER/MOHLER, SG-Komm. BV, Art. 57, n. 32; TSCHANNEN, Thematische Einordnung, n. 12.

cantons have enacted general acts on the police and its organisation[475]. New threats to the public order are to be addressed by the cantons.

202 Nevertheless, the federal influence on police work is growing. The confederation has enacted laws on hooliganism[476], on criminal records[477], on intelligence services[478], on police coercion[479] and on security in public transport (PTSA), expanding thus its competencies. The federal police are also responsible for border control and international cooperation, most importantly on the basis of the *Schengen Agreement*[480]. It is undisputed that modern threats to security such as terrorism and cross-border crime all the more often require a national if not an international approach[481]. Still, there is no single federal act on federal police and federal regulation has been criticised as scattered[482].

203 Being grounded in general administrative law, the principles thereof are – needless to say – relevant in the realm of Swiss policing law as well. Given the delicate nature of the domain, it can be inferred that the principles of legality and proportionality are of utmost importance in the constant balancing of the public interest in the preservation of public order and crime prevention on the one hand and individual fundamental rights on the other[483].

204 A peculiar exception to the regular requirements of the principle of legality arises in cases of serious, imminent and not otherwise avertable danger to the public order[484]. In those cases, policing authorities can rely on the "*general po-*

475 *E.g.* Police Act and Police Organisation Act of the Canton of Zurich.

476 HÄNER ET AL., pp. 514 *et seq.*; *see* Section 5a AMPIS: Measures against Violence on the Occasion of Sport Events (Arts. 24a *et seqq.* AMPIS).

477 *See* VOSTRA Ordinance.

478 HÄNER ET AL., pp. 510 *et seq.*; *see* IntelSA; *for further information about the referendum see* Referendum über das Bundesgesetz vom 25 September 2015 über den Nachrichtendienst (Nachrichtendienstgesetz, NDG) = Refrendum on the Revision of the Federal Act of 25 September 2015 on Intelligence Service (Intelligence Service Act, IntelSA), BBl 2007 371, p. 371 (adopted with 1'459'068 Yes vs. 768'065 No votes).

479 *See* EMA.

480 HÄNER ET AL., pp. 509 *et seq.*; *for detailed information see* Federal Data Protection and Information Commissioner, "Schengen / Dublin", Information page, in: <https://www.edoeb.admin.ch/en/schengen-dublin-3>.

481 THOMMEN, Criminal Procedure, pp. 433 *et seqq.*; *see also* Federal Council, "Counterterrorism strategy for Switzerland", Press release of 18 September 2015, in: <https://www.news.admin.ch/en/nsb?id=58807>; *for further information about measures against terrorism see* HÄNER ET AL., pp. 515 *et seq.*

482 HÄNER ET AL., pp. 506 *et seqq.*; TSCHANNEN, Thematische Einordnung, n. 1.

483 HÄNER ET AL., p. 509.

484 BGE 147 I 161 consid. 5.; HÄFELIN/HALLER/KELLER/THURNHERR, n. 322; TANQUEREL/BERNARD, n. 481; ZEN-RUFFINEN, Vol. 1, n. 1139 *et seqq.*

lice clause" (in German: "*polizeiliche Generalklausel*") codified in Art. 36 para. 1 sentence 3 Const.

Another crucial principle in Swiss policing law is the "*disruptor principle*" (in German: "*Störerprinzip*") according to which policing measures should only be targeted at those responsible for disorder at hand[485]. This is particularly relevant in the context of demonstrations and sportive events which possess a potential to turn violent. Some cantonal legal frameworks even foresee the possibility of transferring expenses to persons giving rise to such events[486]. While this principle, which resembles the "*polluter pays*" *principle* in environmental law, is related to the principle of proportionality, it must itself be utilised proportionally as friction may arise if the threatened consequences create a chilling effect on the freedom of assembly[487]. 205

Cantonal legislation on policing is manifold and seemingly an ever-lasting controversy. For instance, in 2018, the Canton of Bern revised its *Police Act* and added measures such as the coupling of restraining orders with fines based on Art. 292 of the Criminal Code (formerly Art. 84 para. 1), a duty of travelling people to vacate their settlements within 24 hours if asked to do so (formerly Art. 83 para. 1 lit. h and Art. 84 para. 4) as well as the blanket permission to preventively track vehicles (formerly Art. 118 para. 2). The Federal Supreme Court ruled all three measures to be disproportionate and thereby unconstitutional[488]. 206

3. Spatial Planning and Expropriation

Legal Sources

Bundesgesetz über die Raumplanung (Raumplanungsgesetz, RPG) vom 22. Juni 1997 (SR 700) = Federal Act on Spatial Planning (Spatial Planning Act, SPA) (text available in English)

Raumplanungsverordnung (RPV) vom 28. Juni 2008 (SR 700.1) = Spatial Planning Ordinance (SPO)

485 Häfelin/Haller/Keller/Thurnherr, n. 651 *et seq.*; Tanquerel/Bernard, n. 561 *et seqq.*; Zen-Ruffinen, Vol. 1, n. 1151 *et seqq. with further refernces*.

486 *See e.g.* § 58 Police Act of the Canton of Zurich and Art. 137 Police Act of the Canton of Bern.

487 Häfelin/Haller/Keller/Thurnherr, n. 652; Zen-Ruffinen, Vol. 1, n. 1149.

488 BGE 147 I 103 consid. 10.4, 14.4, 17.5.

Bundesgesetz über die Enteignung (Enteignungsgesetz, EntG) vom 20. Juni 1930 (SR 711)
= Federal Act on the Expropriation (Federal Expropriation Act, FEA)

Further Reading

ALAIN GRIFFEL, Raumplanungs- und Baurecht in a nutshell, 5th edition, Zürich/St. Gallen 2025 (cit. GRIFFEL, Raumplanungs- und Baurecht, p. __)

PETER HÄNNI, Planungs–, Bau- und besonderes Umweltschutzrecht, 7th edition, Bern 2022

207 The confederation defines the principles on spatial planning whereas the cantons and the communes concretise them (Art. 75 Const.). Land is a scarce resource in Switzerland and must be used in a purposeful and economical way (Art. 75 para. 1 Const.). Land for settlements must be distinguished from land intended for agricultural and recreational purposes (Arts. 1 and 3 SPA). Traditionally, cantons and communes were responsible for land use and still are for building permits[489] but the federal influence is increasing. This is not only because the *Spatial Planning Act* (SPA) has become more detailed over the years but also because federal regulation influences spatial planning in many other respects too (*e.g.* environmental protection)[490].

208 The typical instruments for spatial planning are – as suggested by the expression – plans. Federal and cantonal laws distinguish between two types of plans. Firstly, more general "*structure plans*" on a larger scale ("*Richtpläne*", Arts. 6 *et seq.* SPA)[491] provide basic information on planned spatial development of a respective area[492]. Such plans might be relevant to individual cases but only when the competent authority enjoys administrative discretion to apply the law. A case of discretionary power may occur when the authority evaluates and balances interests for exceptional use of land. Secondly, detailed "*utilisation plans*" depicting each property in the respective zones ("*Nutzungsplan*", Arts. 14 *et seq.* SPA) define the basic legal qualities of the properties and allow

489 GRIFFEL, Raumplanungs- und Baurecht, pp. 13 *et seqq.*, 40 *et seqq.*; HÄNER ET AL., p. 323; HÄNNI, pp. 11 *et seqq.*

490 GRIFFEL, Raumplanungs- und Baurecht, pp. 21 *et seq.*; *see also* HÄNER ET AL., pp. 338 *et seq.*

491 *For an overview of cantonal structure plans see* Federal Office for Spatial Development, "Kantonale Richtpläne", Information page, in: <https://www.are.admin.ch/de/richtplan>.

492 GRIFFEL, Raumplanungs- und Baurecht, pp. 41 *et seqq.*; *see* HÄNER ET AL., pp. 324 *et seq.*; *for further reading*: HÄNNI, pp. 125 *et seqq.*

decision-making on construction projects before the competent authority (Art. 22 SPA)[493]. The plans are drafted by the cantons and the communes and are supervised by the confederation. Yet, the latter's mandate is not confined to a supervisory role on cantonal spatial planning. It also includes drafting its own plans, in particular with regards to special projects such as airports, national railways and roads (Art. 13 SPA)[494]. Spatial planning requires *coordination*, which is a constitutional duty both of the confederation and the cantons (Art. 75 para. 2 Const.). Yet, it obviously constitutes a major challenge in practice.

The main question – legally and, as far as the value of the immovable asset is concerned, also financially – is often whether land can be used for building and construction or only for agricultural purposes and similar exploitation. Communes used to define rather large zones as building areas, which had to be gradually reduced over the years[495]. There were many cases before the Swiss Supreme Court examining whether the transfer of a real estate from a building zone to a non-building zone amounted to a "restriction of ownership that is equivalent to compulsory purchase" (Art. 26 para. 2 Const.; Art. 5 SPA)[496]. If this is the case, the owner must be fully compensated[497]. This is an example of what is considered as a "*material expropriation*". 209

Generally, three types of governmental restrictions of property in a wider sense, which are part of general administrative law, can be distinguished: 210

The aforementioned "*material expropriation*" ("*materielle Enteignung*"), as inferred above, occurs if governmental actions result in a significant restriction of the enjoyment of property while no transfer of property rights takes place. More concretely, if a hitherto or foreseeable use of property is prohibited or restricted in a manner which is particularly serious because the person con- 211

493 Häner et al., pp. 325 *et seq.*; *for further reading see* Griffel, Raumplanungs- und Baurecht, pp. 52 *et seqq.*; Hänni, pp. 153 *et seqq.*

494 Griffel, Raumplanungs- und Baurecht, pp. 36 *et seqq.*; Häner et al., pp. 323 *et seq.*; Hänni, pp. 109 *et seqq.*

495 Griffel, Raumplanungs- und Baurecht, pp. 55 *et seqq.*; *see also* Häner et al., p. 323; Hänni, pp. 155 *et seqq.*

496 *For differentiation of* "Auszonung (Rückzonung)" *and* "Nichteinzonung" *see* BGE 131 II 728 consid. 2.2 *et seqq.*; *for the compensation of* "Nichteinzonung" *see* BGE 132 II 218 consid. 2.; *for the amount of the compensation see* BGE 127 I 185 consid. 4.; *see also* Griffel, Raumplanungs- und Baurecht, pp. 122 *et seqq.*; Häner et al., pp. 331 *et seq.*; Hänni, pp. 659 *et seqq.*; Tschannen/Müller/Kern, n. 1840 *et seqq.*

497 Egli, pp. 150 *et seq.*; Griffel, Raumplanungs- und Baurecht, pp. 122 *et seq.*; Häfelin/Müller/Uhlmann, n. 2492 *et seqq.*; Häner et al., pp. 331 *et seq.*; Hänni, pp. 53 *et seq.*; Misic/Töpperwien, n. 619 *et seq.*; Tschannen/Müller/Kern, n. 1856 *et seqq.*

cerned is deprived of an essential authority flowing from the property. If this threshold is not met, a "material expropriation" is nevertheless assumed if individual people are affected in such a way that their sacrifice appears unreasonable to the general public and it would be incompatible with legal equality if no compensation were paid[498].

212 If a governmental restriction on property does not meet those requirements, no compensation is due as a literal "*governmental restriction of property without compensation*" ("*entschädigungslose öffentlich-rechtliche Eigentumsbeschränkung*") takes place – by which the public interests involved in planning policy categorically exceeds the private interest in the protection of property rights[499]. The third category, the "*formal expropriation*" ("*formelle Enteignung*") or compulsory purchase, may take place if land is used for public construction. Here, in contrast to a material expropriation, a transfer of ownership of the land takes place. Both the confederation and cantons have enacted legislation regulating the procedure, the forms of compensation etc. Generally, expropriation may only take place if there is a clear legal basis, compelling public interest and if the principle of proportionality is respected. These requirements are guaranteed by the constitutional right to ownership (Art. 26 in conjunction with Art. 36 Const.)[500]. As can be gathered from the foregoing, all three forms can be differentiated on account of the form of administrative action and an analysis based on the competing interests at hand and the proportionality of measures. This underlines the importance and omnipresence of general administrative law in spatial planning law – and in the special parts of Swiss administrative law at large.

213 The Spatial Planning Act, based on earlier decisions of the Federal Supreme Court in this respect[501], also prescribes an important procedural guarantee. Any request for the issuance of a building permit, which involves more than one competent authority, must be *materially and formally coordinated* (Art. 25a SPA). In practice, this means that a request that touches upon questions of spatial planning, environmental protection, transport, and protection of na-

498 BGE 131 II 728 consid. 2.; Griffel, Allgemeines Verwaltungsrecht, n. 440 *et seqq.*; Häfelin/Müller/Uhlmann, n. 2477 *et seqq.*; Tschannen/Müller/Kern, n. 1827 *et seqq*; Vallender/Hettich, n. 433.

499 Griffel, Allgemeines Verwaltungsrecht, n. 464; Häfelin/Müller/Uhlmann, n. 2484 *et seqq.*; Tschannen/Müller/Kern, n. 1852 *et seq.*

500 Egli, pp. 122 *et seqq.*, 143; Häfelin/Müller/Uhlmann, n. 2453 *et seqq.*; Hänni, pp. 36 *et seqq.*; Misic/Töpperwien, n. 618; Tschannen/Müller/Kern, n. 1784 *et seqq.*; Vallender/Hettich, n. 411 *et seq.*

501 BGE 121 II 378 consid. 9.

tional heritage etc. – a typical situation for any larger project – must be handled and decided by one authority taking into account all relevant public and private interests[502]. An appeal may be lodged against such a multifaceted decision, notwithstanding the fact that the expertise on the various matters may come from different authorities, both federal and cantonal[503].

4. Environmental Protection and Climate Change

Legal Sources

Übereinkommen von Paris (Klimaübereinkommen) vom 12. Dezember 2015 (SR 0.814.012) = Paris Agreement *(text available in English)*

Bundesgesetz über den Natur- und Heimatschutz (NHG) vom 1. Juli 1966 (SR 451) = Federal Act on the Protection of Nature and Cultural Heritage (NCHA) *(text available in English)*

Bundesgesetz über die Reduktion der CO_2-Emissionen (CO_2-Gesetz) vom 23. Dezember 2011 (SR 641.71) = Federal Act on the Reduction of CO_2 Emissions (CO_2 Act) *(text available in English)*

Bundesgesetz über den Umweltschutz (Umweltschutzgesetz, USG) vom 7. Oktober 1983 (SR 814.01) = Federal Act on the Protection of the Environment (Environmental Protection Act, EPA) *(text available in English)*

Bundesgesetz über den Schutz der Gewässer (Gewässerschutzgesetz, GSchG) vom 24. Januar 1991 (SR 814.20) = Federal Act on the Protection of Waters (Waters Protection Act, WPA) *(text available in English)*

Bundesgesetz über die Ziele im Klimaschutz, die Innovation und die Stärkung der Energiesicherheit (KIG) vom 30. September 2022 (SR 814.310) = Federal Act on the Targets in Climate Protection, the Innovation and the Strengthening of Energy Security (CPIA)

Bundesgesetz über die Gentechnik im Ausserhumanbereich (Gentechnikgesetz, GTG) vom 21. März 2003 (SR 814.91) = Federal Act on Non-Human Gene Technology (Gene Technology Act, GTA) *(text available in English)*

Bundesgesetz über den Wald (Waldgesetz, WaG) vom 4. Oktober 1991 (SR 921.0) = Federal Act on the Forest (Forest Act, ForA) *(text available in English)*

502 Griffel, Raumplanungs- und Baurecht, pp. 32 *et seqq.*; Häner et al., pp. 330 *et seq.*; *for further reading see* Hänni, pp. 513 *et seqq.*

503 Häner et al., pp. 332 *et seq.*; *for further reading see* Griffel, Raumplanungs- und Baurecht, pp. 277 *et seqq.*; Hänni, pp. 571 *et seqq.*

Bundesgesetz über die Jagd und den Schutz wildlebender Säugetiere und Vögel (Jagdgesetz, JSG) vom 20. Juni 1986 (SR 922.0) = Federal Act on Hunting and the Protection of Feral Mammals and Birds (Hunting Act, HuntA)

Bundesgesetz über die Fischerei (BGF) vom 21. Juni 1991 (SR 923.0) = Federal Act on Fishing (FAF)

Further Reading

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CHRISTOPH JÄGER/ANDREAS BÜHLER, Schweizerisches Umweltrecht, Bern 2016

ANNE PETITPIERRE, Environmental Law in Switzerland, 3rd edition, Alphen aan den Rijn 2015

BEATRICE WAGNER PFEIFER, Umweltrecht: Allgemeine Grundlagen: Handbuch zu Immissionsschutz, UVP, Umwelt-Informationsansprüchen, marktwirtschaftlichen Instrumenten u.a., Zürich/St. Gallen 2017 (cit. WAGNER PFEIFER, Umweltrecht allg. Grundlagen, n. __)

BEATRICE WAGNER PFEIFER, Umweltrecht I, 3rd edition, Zürich/Basel/Genf 2009 (cit. WAGNER PFEIFER, Umweltrecht I, n. __)

Federal Office for the Environment, Swiss Environmental Law, A Brief Guide, Bern 2022, in: <https://www.bafu.admin.ch/en/publication?id=EKOTTCuOdLqw>

214 The Swiss Constitution makes direct reference to sustainable development, not only as a constituent element of environmental protection (Art. 73 Const.) but as one of the state's aims in promoting the common welfare of its people (Art. 2 para. 2 Const.). The main provision on environmental protection is Art. 74 Const. but one should not overlook several specific competencies of the confederation such as water protection (Art. 76 para. 3 Const.), gene technology (Art. 120 Const.) or protection against ionising radiation (Art. 118 para. 2 lit. c Const.) that derive from distinct constitutional provisions. Environmental protection is a typical cross-sectional task and its values must be considered in every governmental activity that may have an impact on the environment[504].

215 The *Federal Act on the Protection of the Environment* (EPA) lays down several principles regarding the management of the environment. The "*polluter pays*"

504 GRIFFEL, Umweltrecht, pp. 12 *et seq.*; HÄNER ET AL., pp. 317 *et seq.*; JÄGER/BÜHLER, n. 17; PETITPIERRE, n. 62 *et seqq.*; WAGNER PFEIFER, Umweltrecht allg. Grundlagen, n. 4 *et seqq.*; WAGNER PFEIFER, Umweltrecht I, n. 4 *et seqq.*

principle, for instance, requires that any person who causes the implementation of measures under the *Environmental Act* must bear the costs thereof (Art. 2 EPA). Furthermore, environmental impacts such as air pollution, noise, vibrations and radiation must be limited by measures taken at the source (Art. 11 para 1 EPA). The act provides for an enhanced framework on limiting emissions by stipulating that "irrespective of the existing environmental pollution, as precautionary measure emissions are limited as much as technology and operating conditions allow, provided that this is economically acceptable" (Art. 11 para. 2 EPA).

A further fundamental principle concerns the necessity of an "*environmental impact assessment*" (*in German:* "*Umweltverträglichkeitsprüfung*", UVP). It is compulsory for all "installations that could cause substantial pollution to environmental areas [...]" (Art. 10a para. 2 EPA). Enforcement lies often with the cantons but, as required by the legislation on spatial planning, the procedure must be formally and materially coordinated[505]. 216

Owing to a growing sensibility in respect to climate change, the federal parliament adopted the CO_2 *Act* which aims to limit the emission of greenhouse gases (Art. 3) by entrusting all branches of government with the responsibility to foresee and implement technical measures to that end and setting sector-specific target values. Particular realms are *e.g.* the energy supply to buildings and their insulation (Art. 9) and emissions of vehicles (Arts. 10 *et seqq.*), Art. 29 establishes a levy on fossil fuels while Arts. 31 *et seqq.* foresee the possibility of refunds for businesses which commit to reducing their greenhouse gas emissions, thereby setting incentives for economic actors. 217

Following the *Paris Agreement* in 2015, parliament amended the CO_2 *Act* in order to tighten the regulations and thereby implement the newly established international obligations. The perhaps most relevant change was a levy on airplane tickets (proposed Arts. 42 *et seqq.*)[506]. The people ultimately rejected the revision[507]. 218

In 2022, parliament adopted the *Federal Act on the Targets in Climate Protection, the Innovation and the Strengthening of Energy Security* (CPIA) which explicitly references the *Paris Agreement* (Art. 1 CPIA) and sets a net-zero target by 2050, be it in terms of the country as a whole (Art. 3 para. 1 CPIA) or each business itself (Art. 5 para. 1 CPIA). A peculiar new approach taken thereby is 219

505 *See supra section* 167.

506 *See the proposed revision at* BBl 2020 7847, pp. 7847 *et seqq.*

507 *See* BBl 2021 2135, p. 1 *et seqq.*

the fostering of the development of CO_2 removal technologies (Art. 6 para. 1 CPIA). This framework was put to popular vote as well – and passed by a majority of 59.1%[508].

220 In the already mentioned landmark *KlimaSeniorinnen* case, in which a group of elderly Swiss women took legal action against the Swiss state for the (alleged) lack of sufficient measures against climate change and the adverse effects thereof, the *European Court of Human Rights* found a violation of – *inter alia* – the right to respect for private and family life according to Art. 8 ECHR by the Swiss state[509]. The decision was based on the legal situation of 2020 and thus prior to the adoption of the *Federal Act on the Targets in Climate Protection, the Innovation and the Strengthening of Energy Security*. The reactions to the decision were (perhaps unsurprisingly) mixed; while politically left-leaning circles welcomed the decision[510], most of the Swiss body politic regard(ed) the decision as a prime example of judicial overreach, arguing that the court interfered with a domain which is reserved to the political branches of the member states. Accordingly, both chambers of parliament as well as the Federal Council publicly criticised the decision in terms of both the justicialisation of climate policy as well as the overlook of post-2020 efforts[511].

508 *See* BBl 2023 2015, p. 1 *et seqq*.

509 European Court of Human Rights decision Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Nr. 53600/20) of 9 April 2024, n. 572-574.

510 *See e.g.* Swiss Social Democratic Party, "Schweiz wegen Untätigkeit im Klimabereich verurteilt: Der EGMR bestätig die Bedenken der SP Schweiz", Public declaration of 9 April 2024, in: <https://perma.cc/H8TB-H85V>.

511 *See* National Council, "Erklärung des Ständerates. Urteil des EGMR 'Verein KlimaSeniorinnen Schweiz u.a. vs Schweiz'", Public declaration (Motion 24.054) adopted on 12 June 2024, in: <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20240054>; Council of States, "Erklärung des Ständerates. Urteil des EGMR 'Verein KlimaSeniorinnen Schweiz u.a. vs Schweiz'", Public declaration (Motion 24.053) adopted on 22 May 2024, in: <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20240053>; Federal Council, "Bundesrat klärt seine Haltung zum EGMR-Urteil über den Klimaschutz", Press release of 28 August 2024, in: <https://www.news.admin.ch/de/nsb?id=102244>.

5. Energy and Water

Legal Sources

Bundesgesetz über die Reduktion der CO_2-Emissionen (CO_2-Gesetz) vom 23. Dezember 2011 (SR 641.71) = Federal Act on the Reduction of CO_2 Emissions (CO_2 Act) (text available in English)

Bundesgesetz über die Nutzbarmachung der Wasserkräfte (Wasserrechtsgesetz, WRG) vom 22. Dezember 1916 (SR 721.80) = Federal Act on the Use of Water Power (Water Right Act, WRA)

Bundesgesetz über den Wasserbau (Wasserbaugesetz, WBG) vom 21. Juni 1991 (SR 721.100) = Federal Act on Hydraulic Engineering (Hydraulic Engineering Act, HEA)

Energiegesetz (EnG) vom 30. September 2016 (SR 730.0) = Energy Act (EA)

Kernenergiegesetz (KEG) vom 21. März 2003 (SR 732.1) = Nuclear Energy Act (NEA) (text available in English)

Bundesgesetz über die Stromversorgung (Stromversorgungsgesetz, StromVG) vom 23. März 2007 (SR 734.7) = Federal Electricity Supply Act (ESA)

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Rolf H. Weber, Energy Law in Switzerland, 2nd edition, Alphen aan den Rijn 2016

Federal Office of Energy, Homepage, in: <https://www.bfe.admin.ch/bfe/en/home.html>

221 The regulation of energy and water consists of an entangled mix of federal and cantonal provisions. Both the confederation and the cantons are called upon to "[...] endeavour to ensure a sufficient, diverse, safe, economic and environmentally sustainable energy supply as well as the economic and efficient use of energy" (Art. 89 para. 1 Const.). The confederation typically has the *competence to "establish [the] principles"* ("*Grundsatzgesetzgebung*") that underlie the management of these resources, leaving room for cantonal legislation to specify the details. Nonetheless, the confederation has full legislative power on the use of energy by installations, vehicles and appliances (Art. 89 para. 3 sentence 1 Const.), on subsidising the development of energy technologies, in particular in the fields of energy saving and renewable energy sources (Art. 89 para. 3 sentence 2 Const.), nuclear energy (Art. 90 Const.), and transport of energy (Art. 91 Const.).

222 The most important federal acts include the *Federal Energy Act* (EA), *the Federal Act on the Reduction of* CO_2 *Emissions* (CO_2 *Act*), the *Federal Electricity Supply Act* (ESA) and the *Nuclear Energy Act* (NEA). In 2011, Switzerland adopted a programme to abandon nuclear energy after the nuclear catastrophe in Fukushima, Japan. Specifically, the programme ("*Energy Strategy 2050*") sets out a structural reform that aims to increase energy efficiency as well as renewable energy on a larger scale. It is planned that this step-by-step strategy will consequently lead to the withdrawal from the use of nuclear energy until 2050[512]. More radical initiatives to abandon nuclear energy before that date have been repeatedly defeated in popular votes, the latest in November 2016[513]. As stated in the previous chapter, a revision of the CO_2 Act (which would have entailed additional "*steering levies*" ("*Lenkungsabgaben*"))[514] was rejected by the public in a referendum in 2021[515].

223 Water is a typical domain of cantonal powers and traditionally a substantial source of energy in Switzerland[516]. Again, the federal competence is limited to

512 Federal Office of Energy, "Energy Strategy 2025", Information page of 5 December 2023, in: <https://www.bfe.admin.ch/bfe/en/home/policy/energy-strategy-2050.html/>.

513 Federal popular initiative "Für den geordneten Ausstieg aus der Atomenergie" (Atomausstiegsinitiative) = Popular Initiative "For an orderly withdrawal from the nuclear energy programme" (Nuclear Withdrawal Initiative), BBl 2017 1525, p. 1525 (rejected with 1'300'860 No vs. 1'099'409 No votes).

514 ADEMI, p. 155; *see e.g.* the proposed levy on flight tickets in Arts. 42 *et seqq.* of the revised CO_2 Act at BBl 2020 7847, p. 7864 *et seqq.*

515 *See the result at* BBl 2021 2135, p. 1 *et seqq.*

516 In 2024, 59% of Switzerland's electricity stemmed from hydropower. (Federal Office of Energy, "Wasserkraft Schweiz: Statistik 2024", Press release of 5 May 2025, in: <https://www.news.admin.ch/de/newnsb/wHJXz4MmYQ2I0bhGm4edS>); *for an*

establishing the principles that govern the exploitation of water resources – extending more on water protection and similar issues – which the confederation has incorporated in the *Federal Act on the Use of Water Power* (WRA). The cantons either grant licenses to private companies against due compensation or exploit water power themselves, either directly or through state-owned enterprises[517]. Participation of communes and mixed schemes of public private partnerships are also common[518].

The granting of licenses for the exploitation of water normally takes the form of administrative law contracts[519] which create vested rights therein (Art. 43 para. 1 WRA). Based on Arts. 40 *et seqq.* WRA and according cantonal (and municipal) legislation, the competent authorities may confer a license to the applicant who is best suited to serving the collective interests involved in the exploitation and use of the water (Art. 41 WRA). The licensing is contingent on conditions such as the delivery and distribution of water or energy, energy prices or profit sharing (Art. 48 para. 1 WRA) or the payment of certain water rates (Arts. 49 *et seqq.* WRA). 224

6. Transportation

Legal Sources

Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Europäischen Gemeinschaft über den Luftverkehr in Kraft getreten am 1. Juni 2002 (SR 0.748.127.192.68) = Agreement between the Swiss Confederation and the European Community on Air Transport *(text available in English)*

Bundesgesetz über die Schweizerischen Bundesbahnen (SBBG) vom 20. März 1998 (SR 742.31) = Federal Act on the Swiss Federal Railways (SFRA)

Bundesgesetz über die Personenbeförderung (Personenbeförderungsgesetz, PBG) vom 20. März 2009 (SR 745.1) = Federal Act on Public Transportation (Public Transportation Act, PTA)

overview of Switzerland's main hydropower plants see Federal Office of Energy, "Water", Information page (with geodata), in: <https://www.bfe.admin.ch/bfe/en/home/supply/digitalization-and-geoinformation/geoinformation/geodata/water.html>.

517 *See supra section* 174.

518 Häner et al., pp. 257 *et seqq.*; Vallender/Hettich, n. 322; Weber, n. 128 *et seqq.*

519 *See sections* 140 *et seqq.*

Bundesgesetz über die Luftfahrt (Luftfahrtgesetz, LFG) vom 21. Dezember 1948 (SR 748.0)
= Federal Act on the Aviation (Aviation Act, AA)

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Matthias Oesch, Switzerland and the European Union: General Framework, Bilateral Agreements, Autonomous Adaptation, Zürich/St. Gallen 2018, pp. 15 et seqq. (cit. Oesch, Switzerland and the European Union, p. __)

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Federal Office of Transport (FOT), Homepage, in: <https://www.bav.admin.ch/en>

Swiss Federal Railways, Homepage, in: <https://www.sbb.ch/en>

225 Public Transport in Switzerland is a joint task of the confederation and the cantons (Art. 81a Const.) but legislation on roads (Arts. 82 *et seq.* Const.), railways (Arts. 87 and 87a Const.) and aviation (Art. 87 Const.) is mostly federal. Cantons are responsible for the construction and maintenance of cantonal roads. They are also active in local public transport whereas the *Swiss Federal Railways* is owned by the confederation[520]. The local, regional and national companies build a complex system of public transportation that requires a substantial effort of coordination. The transport companies must ensure that within Switzerland, a single ticket is available for the use of more than one transportation company ("direct traffic", Art. 16 Federal Act on Public Transportation (PTA)). All companies must be licensed by the Federal Office of Transport (FOT) (Arts. 6 *et seqq.* PTA). Competition is limited and only the license for national railroad transportation creates revenue whereas regional

520 Häner et al., pp. 175 *et seq.*; Stückelberger/Haldimann, n. 107; Vogel, SG-Komm. BV, Art. 82, n. 9, Art. 83, n. 9 *et seqq.*

public transportation is subsidised by public funds (Arts. 4 *et seqq.* PTA). Licensees must demonstrate that they are able to (Art. 9 para. 2 PTA) provide transportation services according to certain standards. Owing to consumer interests as well as the logistical difficulties and risks inherent to the mass transportation of people, the licenses are linked to according duties such as the duty to perform every service as offered (Art. 12 PTA), a duty to provide for and adhere to a timetable (Arts. 13 *et seq.* PTA) a duty to compensate customers in instances of delays (Arts. 21a *et seq.* PTA) and compliance with hygienic and security standards (Art. 18 PTA). The issue of licensing has been at the centre of a year-long dispute between the Swiss Federal Railways and the Bernese regional railway company BLS; it particularly concerned the operation of multiple long-distance transportation lines and was finally settled in 2019[521].

Road traffic and aviation are part of the bilateral agreements between Switzerland and the EU. In substance, the agreement on aviation implements EU legislation[522]. Joint committees may declare newer EU legislation applicable. This happens on a regular basis, especially in the field of aviation[523]. 226

Airlines in Switzerland do not enjoy the same freedoms as European airlines within the European Union do but are treated alike in many aspects[524]. The former national airline *Swissair* went bankrupt in 2001[525]. After the restructuring of a remaining sub-company and the incorporation of a new airline, the shares of the newly formed national airline company Swiss were gradually sold to the German airline company Lufthansa Group[526]. 227

According to Art. 84 para. 2 Const., Switzerland's transalpine transport of goods should be channelled via the rail network. Yet, the capacity of transit routes in the Alpine area may not be increased – which is one of the reasons why Switzerland has heavily invested in transalpine railroad tunnels (*Lötschberg* and *Gotthard*)[527]. 228

521 *See* SRF, "Streit um Fernverkehrslinien beigelegt", Article of 22 August 2019, in: <https://perma.cc/TYD6-GVZD>.

522 Botschaft zur Genehmigung der sektoriellen Abkommen zwischen der Schweiz und der EG vom 23. Juni 1999, BBl 1999 6128, pp. 6158 *et seq.*; HÄNER ET AL., pp. 130, 164; TSCHANNEN/MÜLLER/KERN, n. 360.

523 DETTLING-OTT/HALDIMANN, n. 39 *et seqq.*; HÄNER ET AL., p. 164.

524 MÜLLER/SCHMID, pp. 30 *et seq.*; OESCH, Switzerland and the European Union, n. 209 *et seqq.*

525 Die Rolle von Bundesrat und Bundesverwaltung im Zusammenhang mit der Swissair-Krise, Bericht der Geschäftsprüfungskommission des Ständerates, BBl 2003 5403 (Report on the role of the Federal Council and Federal Administration relating to the Swissair crisis).

526 Swiss International Air Lines Ltd., "SWISS takes off into a new future with Lufthansa", Press release of 22 March 2005, in: <https://www.swiss.com/corporate/en/media/press-releases-archive/press-release-20050322>.

527 HÄNER ET AL., pp. 136, 153 *et seqq.*

7. Postal Services, Telecommunication, Radio and Television

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Bundesgesetz über die Organisation der Schweizerischen Post (Postorganisationsgesetz, POG) vom 17. Dezember 2010 (SR 783.1) = Federal Act on the Organisation of Swiss Post (Post Organisation Act, POA) *(text available in English)*

Fernmeldegesetz (FMG) vom 30. April 1997 (SR 784.10) = Telecommunications Act (TCA) *(text available in English)*

Bundesgesetz über die Organisation der Telekommunikationsunternehmung des Bundes (Telekommunikationsunternehmungsgesetz, TUG) vom 30. April 1997 (SR 784.11) = Federal Act on the Organisation of the Federal Telecommunications Agency (Telecommunications Agency Act, TAA)

Bundesgesetz über Radio und Fernsehen (RTVG) vom 24. März 2006 (SR 784.40) = Federal Act on Radio and Television (RTVA) *(text available in English)*

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Federal Communications Commission (ComCom), Homepage, in: <https://www.comcom.admin.ch/en>

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Swisscom, Homepage, in: <https://www.swisscom.ch/en/residential.html>

Swiss Post, Homepage, in: <https://www.post.ch/en>

a) Postal Services

The Swiss Constitution sets out that postal and telecommunications services are federal competences (Art. 92 para. 1 Const.). Since the confederation guarantees basic service and supply to all regions within Switzerland, it enjoys a monopoly over all postal services (Art. 92 para. 2 Const.)[528]. Another important constitutional guarantee in relation to postal services is the right to privacy (Art. 13 Const.), which also includes privacy of personal mail and telecommunications. 229

The *Swiss Postal Telegraph and Telephone Agency* (PTT) was a public-law entity until 1997. It was gradually transformed into a public limited company incorporated under special public law according to Arts. 2 and 13 of the Federal Act on the Organisation of the Swiss Post (POA)[529]. The federation is the main shareholder (Art. 6 POA). The Federal Postal Services Commission (PostCom) is the independent federal commission to oversee postal service providers (Arts. 4 and 20 *et seq.* PA). 230

The primary goal of the PTT's reorganisation was to liberalise postal (as well as telecommunication[530]) services and turn them into competitive business fields but maintain a high-quality service and basic supply in conformity with the constitutional obligation. The *Federal Post Act* (PA) implements the constitutional guarantee of basic service and supply and regulates commercial postal service (Art. 1 PA). The exclusive rights of the Swiss Post however have been substantially reduced. The remaining exclusive service only provided by the Swiss Post is the delivery of letters with a max. weight of 50 grams (Art. 18 para. 1 PA). Popular initiatives to establish an extended universal service have 231

528 HÄNER ET AL., pp. 185 *et seq.*, 194 *et seq.*; HETTICH/STEINER, SG-Komm. BV, Art. 92, n. 20 *et seqq.*; JODER, p. 27; KERN, BSK BV, Art. 92, n. 9, 19 *et seqq.*, 28.

529 HÄNER ET AL., pp. 187 *et seq.*; JODER, pp. 21 *et seq.*; KERN, BSK BV, Art. 92, n. 12.

530 *See infra section* 234.

been rejected[531] but the closedown of many post offices in rural communities has been the subject of constant discussion. In light of changing customer preferences, the Federal Council adopted parameters for a revision of postal legislation in August 2025[532]. The aim is the modernisation of the universal service through more flexible approaches to the provision thereof based on changing demand due to future technical innovations. A draft is being composed and will estimatedly enter the consultation period in June 2026[533].

232 Generally, the material scope of the notion of *postal services* is rather broad in that it not only encompasses traditional postal services but also the transportation of small goods more broadly[534]. The lack of differentiation and concretisation has been a source of legal uncertainty for private courier services[535]. In the course of increasing demand for food delivery services, *PostCom* held that Uber Eats and Just Eat had a reporting obligation under Art. 4 para. 1 PA, arguing that the operations constitute a form of postal services. A relevant scholarly opinion is that the notion is to be interpreted narrowly and therefore with deference to the economic freedom of such providers[536]. Ultimately, the Federal Administrative Court sided with the two private service providers in question, thus affirming the narrower interpretation of the notion[537].

b) Telecommunication

233 Telecommunication is regulated by the (federal) *Telecommunications* Act (TCA). The main objective of this Act is to provide for "[…] cost-effective, high-quality […] competitive telecommunications services […]" that are "[…] available to private individuals and the business community" (Art. 1 para. 1 TCA). To achieve this goal, the responsible commission selectively issues licences. The Act differentiates between a universal service licence (Arts. 14 *et seq.* TCA) which is

531 Federal popular Initiative "Postdienste für alle" = "Postal service for everyone", BBl 2004 6641, p. 6642 (rejected with 1'259'114 No vs. 1'247'771 Yes votes); Federal popular Initiative "Für eine starke Post" = "For a strong post", BBl 2012 8083 (withdrawn by the Initiative Committee); *see also* Kern, BSK BV, Art. 92, n. 21.

532 Federal Council, Post: "Modernisierung der Grundversorgung", Press release of 13 August 2025, in: <https://www.news.admin.ch/de/newnsb/TdzPTMEDEK6TlKtz4tbAe>.

533 *Ibid.*

534 Uhlmann/Knöpfli, n. 1 *et seq.*

535 Uhlmann/Knöpfli, n. 30, 34.

536 Uhlmann/Knöpfli, n. 16, 53, 61 *et seqq.*

537 Federal Administrative Court decision A-4721/2021 of 3 January 2024 consid. 7.11; Federal Administrative Court decision A-4350/2022 of 3 January 2024 consid. 7.10.

granted following a call for tenders (Art. 14 para. 3 TCA), and licences for radio communications that should be obtained by anyone who wishes to use a radio communications frequency spectrum on the condition that they have the necessary technical capacity and undertake to comply with all relevant legislation (Arts. 22 *et seq.* TCA).

The company Swisscom holds a universal service licence for the period ending 2031[538]. It was founded after the split-up of *the Swiss Postal Telegraph and Telephone Agency* (PTT) due to the liberalisation of the market sector (Art. 21 TAA). The confederation owns the majority of the telecommunications corporation's shares (Art. 6 para. 1 TAA).[539] Swisscom is legally obliged to provide services to all sectors of the population within the area covered by the company's universal service licence (Art. 16 TCA). Quality of service is defined and prices – which may not discriminate on distance – are limited by the federal government (Art. 17 TCA). The government is also obliged to compensate Swisscom for potential losses (Art. 19 TCA)[540]. Swisscom holds a market-dominating position but must give access to its facilities and services to third parties on a fair and non-discriminatory basis (Art. 11 TCA)[541]. This has relatively regularly been the cause for legal challenges from the Competition Commission (COMCO)[542] and fellow competitors, the latest concerning the access to televised sportive transmissions which Swisscom lost[543]. 234

Licences for radio communications are limited and only granted on the basis of a public invitation to tender (Arts. 23 para. 3 and 24 TCA). The Federal Communications Commission (ComCom, Arts. 56 *et seq.* TCA) administrates the awarding of licences and other regulations[544]. 235

538 *See* Federal Office of Communications, "The universal service for telecommunications", Information page of 11 March 2024, in: <https://www.bakom.admin.ch/en/the-universal-service-for-telecommunications> *as well as* Federal Office of Communications, "Swisscom to retain universal service obligation", Press release of 16 May 2023, in: <https://www.news.admin.ch/en/nsb?id=95118>.

539 HÄNER ET AL., pp. 206 *et seq.*

540 AMGWERD/SCHLAURI, n. 6.170 *et seqq.*; HÄNER ET AL., pp. 196 *et seq.*; SCHLAURI, pp. 116 *et seq.*

541 Botschaft zur Änderung des Fernmeldegesetzes (FMG) vom 12. November 2003, BBl 2003 7951, pp. 7952, 7969 *et seq.*; HÄNER ET AL., pp. 199 *et seqq.*; *see generally* VON ZEDTZWITZ, pp. 77 *et seqq.*, 180 *et seq.*

542 *See infra section* 246.

543 Federal Supreme Court decision 2C_561/2022 of 23 April 2024.

544 HÄNER ET AL. p. 205; KLAUS, n. 1586.

c) Radio and Television

236 Radio broadcast and television are federal competences. They "[…] shall contribute to education and cultural development, to the free shaping of opinion and to entertainment" (Art. 93 para. 2 sentence 1 Const.). Autonomy and independence of radio and television are guaranteed by Art. 3a of the Federal Act on Radio and Television (RTVA).

237 Broadcasting must be notified to the Federal Office of Communications (OFCOM) (Art. 3 lit. a RTVA). A licence is required if the company wants to take advantage of the federal reception fees. In this case, the programme must contain a variety of events and opinions and should appropriately cover local events or special topics (Art. 4 para. 4 RTVA). All radio or television programmes "[…] must respect human dignity, must be neither discriminatory nor contribute to racial hatred, nor endanger public morals nor glorify or trivialise violence" (Art. 4 para. 1 sentence 2 RTVA) and "[…] must not jeopardise the internal or external security of the confederation or cantons, their constitutional order or the observance of Switzerland's obligations under international law" (Art. 4 para. 3 RTVA). Complaints about the content of editorial programmes (Art. 94 RTVA) may be brought before the Independent Complaints Authority for Radio and Television (ICA, Arts. 82 *et seq.* RTVA).

238 A special position is granted to the Swiss Broadcasting Corporation (SRG SSR). In fulfilling the above-mentioned constitutional mandate, it covers all language areas including at least one radio programme service for the Romansh-speaking population (Art. 24 paras. 1 *et seq.* RTVA). SRG SSR is a non-profit organisation mainly financed by reception fees and advertisement (Arts. 23 *et seq.* RTVA). Its dominant position and its service expansions by providing online content have given rise to a critical debate on the role of SRG SSR in general[545]. A (relatively harmless) revision on reception fees has only narrowly passed a referendum in 2015[546]. An initiative to abolish mandatory fees and consequently curtail SRG SSR was rejected in 2018[547].

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545 Saxer, pp. 693 *et seqq.*; Saxer/Brunner, n. 7.14 *et seq.*

546 Referendum über die Änderung vom 26. September 2014 des Bundesgesetzes über Radio und Fernsehen (RTVG) = Referendum on the Revision of 26 September 2014 of the Federal Act on Radio and Television (RTVA), BBl 2015 6313, p. 6313 (adopted with 1'128'522 Yes vs. 1'124'873 No votes).

547 Federal popular Initiative "Ja zur Abschaffung der Radio- und Fernsehgebühren (Abschaffung der Billag-Gebühren)" = "Yes to the abolition of Billag-fees" (Abolition of Billag fees), BBl 2018 2761, p. 2761 (rejected with 2'098'302 No vs. 833'837 Yes votes).

8. Banking and Financial Market Law

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Bundesgesetz über die Schweizerische Nationalbank (Nationalbankgesetz, NBG) vom 3. Oktober 2003 (SR 951.11) = Federal Act on the Swiss National Bank (National Bank Act, NBA) *(text available in English)*

Bundesgesetz über die Banken und Sparkassen (Bankengesetz, BankG) vom 8. November 1934 (SR 952.0) = Federal Act on Banks and Saving Banks (Bank Act, BankA)

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Bundesgesetz über die Finanzmarktinfrastrukturen und das Marktverhalten im Effekten- und Derivatehandel (Finanzmarktinfrastrukturgesetz, FinfraG) vom 19. Juni 2015 (SR 958.1) = Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act, FinMIA) *(text available in English)*

Bundesgesetz betreffend die Aufsicht über Versicherungsunternehmen (Versicherungsaufsichtsgesetz, VAG) vom 17. Dezember 2004 (SR 961.01) = Federal Act on the Supervision of Insurance Companies (Insurance Supervision Act, ISA)

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Swiss Financial Market Supervisory Authority (FINMA), Homepage, in: <https://www.finma.ch/en/>

239 The *Swiss Financial Market Supervisory Authority* (FINMA) supervises banks and other financial institutions[548]. The goals, powers and instruments of FINMA are laid down in the *Federal Financial Market Supervision Act* (FINMASA). FINMA is not only responsible for banks but for all "persons and entities that under the financial market acts require to be licensed, recognised, or registered by the Financial Market Supervisory Authority" and for collective capital investments (Art. 3 FINMASA). This includes Swiss regulation on insurances, stock markets and anti-money laundering[549].

240 The *Financial Market Infrastructure Act* (*FinMIA*) "[…] governs the organisation and operation of financial market infrastructures […]. It aims to ensure the proper functioning and transparency of securities and derivatives markets, the stability of the financial system, the protection of financial market participants and equal treatment of investors" (Art. 1 paras. 1 *et seq.* FinMIA)[550]. Following a restructuring of Swiss financial market law, parliament additionally adopted the *Financial Services Act* (*FinSA*) as well as the *Financial Institutions Act* (*FinIA*) in 2018. Both acts aim to fill existing gaps in the field of customer protection revealed by the financial market crisis in 2008, not merely to boost customer protection by itself, but also in order to ensure market access for Swiss financial service providers abroad[551]. More specifically, the FinSA regulates the conditions for the provision of financial services and allows for a more accessible and convenient enforcement of customer claims against providers, while the FinIA replaces the (former) *Stock Exchange Act* (SEA) and

548 BIAGGINI ET AL., pp. 295 *et seqq.*
549 BIAGGINI ET AL., pp. 296 *et seqq.*, 315 *et seqq.*
550 *See also* BIAGGINI ET AL., pp. 301 *et seqq.*
551 BIAGGINI ET AL., p. 302.

consists of a uniform legal basis for the oversight of providers of financial services of any form[552].

In respect to the European Union, there are no bilateral agreements regulating the financial sector. The EU requires comparability (equivalence) of the key aspects of financial regulation in order to allow for access to the EU financial market[553]. Switzerland has made numerous adjustments to fulfill this requirement and has extensive market access. Nevertheless, due to political tensions, the European Commission declined to further grant stock market equivalence in 2019[554]. The Federal Council has activated measures to protect Swiss stock exchange infrastructure[555]. Consequently, EU trading platforms are no longer allowed to offer or facilitate the trade of certain shares of Swiss companies[556]. 241

Banking is regulated at the federal level by the *Federal Banking Act (Bank*A).[557] FINMA authorises banks by granting banking licenses.[558] A bank cannot be registered on the Commercial Register and start business before the license is issued.[559] The requirements for a banking license are set out in Art. 3 para. 2 BankA; one of these requirements includes the principle that "the persons entrusted with the administration and management of the Bank have a good reputation and can *guarantee impeccable business activities*" ("*Gewähr für eine einwandfreie Geschäftsführung*", Art. 3 para. 2 lit. c BankA). The Swiss Supreme Court has decided repeatedly on what constitutes "good reputation" of the leading managers of a bank[560]. Managers may be sanctioned for misbehaviour, including the prohibition from practicing the profession in case of a serious violation of supervisory provisions (Art. 33 FINMASA). 242

The Swiss National Bank (SNB, Art. 1 NBA) traditionally has no supervisory function towards private banks. Still, the SNB played an active role during the 243

552 BIAGINI ET AL., pp. 303, 337, 341 *et seq*.

553 *See* SETHE, p. 358.

554 *See for reference* DARBELLAY, p. 81.

555 *See* State Secretariat for International Finance, "Measure to protect Swiss stock exchange infrastructure", Information page of 1 May 2025, in: <https://www.sif.admin.ch/en/protect-swiss-stock-exchange-infrastructure>.

556 *Ibid.*

557 BIAGGINI ET AL., p. 314.

558 BIAGGINI ET AL., pp. 314 *et seq*; NOBEL, § 10 n. 300 *et seqq*.

559 *Ibid.*

560 BGE 111 Ib 126 consid. 2.a; BGE 108 Ib 196 consid. 2.b.a.a *et seq*.; BGE 108 Ib 186 consid. 3.a; BGE 106 Ib 145 consid. 2.

bailout of UBS in 2008[561]. To prevent such failure of big and systemically important institutions, the SNB oversees systemically important financial market infrastructures and is now responsible to judge – after consulting FINMA – whether a bank is considered "too big to fail" (Arts. 19 *et seq.* NBA, Art. 8 para. 3 BankA)[562]. If that is the case, the respective institutions have special duties and are subject to stronger regulation (Arts. 22 *et seqq.* FinMIA). By granting loans totalling up to CHF 50 billion, the SNB also played a significant role during the bailout of *Credit Suisse* in 2023[563]. In this context, it will be of particular interest how the write-down of *A1 bonds* by FINMA will be evaluated by the Supreme Court after the measure was previously ruled unlawful by the Federal Administrative Court[564].

9. Competition

Legal Sources

Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG) vom 6. Oktober 1995 (SR 251) = Federal Act on Cartels and other Restraints of Competition (Cartel Act, CartA) *(text available in English)*

Schweizerische Zivilprozessordnung (Zivilprozessordnung, ZPO) vom 19. Dezember 2008 (SR 272) = Swiss Civil Procedure Code (Civil Procedure Code, CPC) *(text available in English)*

Further Reading

Marc Amstutz/Mani Reinert (eds.), Kartellgesetz, Basler Kommentar, 2nd edition, Basel 2022

561 Biaggini et al., pp. 329, 380; Nobel, § 4 n. 220 *et seqq.*; *see also* Swiss National Bank, "Steps to strengthen the Swiss financial system", Press release of 16 October 2008, in: <https://www.snb.ch/en/publications/communication/speeches/2008/ref_20081016_jpr>; Botschaft zu einem Massnahmenpaket zur Stärkung des schweizerischen Finanzsystems vom 5. November 2008, BBl 2008 8943, pp. 8944 *et seqq.*, 8954 *et seqq.*, 8959 *et seqq.*

562 Biaggini et al., pp. 329 *et seq.*

563 CNN, "Credit Suisse borrows more than $ 50 billion from Swiss National Bank after shares crash 30%", Article of 15 March 2023, in: <https://perma.cc/UX96-YR27>.

564 *See* Federal Administrative Court decision of 1 October 2025 B-2334/2023.

ANDREAS HEINEMANN/ANDREAS KELLERHALS, Wettbewerbsrecht in a nutshell, 3rd edition, Zürich/St. Gallen 2023

RETO JACOBS/MONIQUE STURNY, Competition Law, in: Urs P. Gnos/Theodor Härtsch (eds.), Doing Business in Switzerland – A Practical Guide, 2nd edition, Zürich 2023, Zürich 2023, pp. 33 et seqq., <https://perma.cc/PK6H-E2EB>

ROLF H. WEBER/STEPHANIE VOLZ, Fachhandbuch Wettbewerbsrecht: Expertenwissen für die Praxis, 2nd edition, Zürich/Basel/Genf 2023

Competition Commission (COMCO), Homepage, in: <https://www.weko.admin.ch/weko/en/home.html>

Competition is regulated at the federal level by the *Federal Act on Cartels and other Restraints of Competition* (*CartA*)[565]. The act prohibits horizontal cartels, *i.e.* agreements between competitors to directly or indirectly fix prices, to limit the quantities of goods or services to be produced, purchased or supplied or to allocate markets geographically or according to trading partners (Art. 5 para 3 CartA). More precisely, the law presumes that such agreements eliminate effective competition (which is in line with the Swiss Constitution attributing legislative power to the confederation only "against the damaging effects [...] of cartels" in Art. 96 para. 1 Const.) but in practice the difference is insignificant[566]. Swiss competition law used to be toothless for decades but has been substantially tightened in 2003 converging more and more with European standards[567], although the latest proposition for revision was rejected by the Parliament in 2014[568]. 244

The tightening of competition law is especially visible in the direct sanctions to companies for unlawful restraints of competition (Art. 49a CartA). The sanction regime has also put into question the traditional approach to enforcement based on administrative procedure (Art. 39 CartA)[569]. Sanctions are often penal in nature and trigger procedural guarantees under the ECHR (*e.g.* Art. 6 ECHR) and under Art. 32 Const. Jurisprudence and administrative practice have yet to sort out the hybrid form and content of procedural norms. Civil actions are 245

565 BIAGGINI ET AL., pp. 154 *et seq.*; JACOBS/STURNY, p. 33.

566 BIAGGINI ET AL., pp. 159 *et seq.*; KRAUSKOPF/SCHALLER, BSK KG, Art. 5, n. 31 *et seqq.*; WEBER/VOLZ, n. 1.11.

567 BIAGGINI ET AL., pp. 154 *et seq.*; HEINEMANN/KELLERHALS, pp. 4 *et seq.*; WEBER/VOLZ, n. 1.12 *et seqq.*; JACOBS/STURNY, p. 33.

568 BIAGGINI ET AL., pp. 156 *et seq.*; *see also* BBl 2012 3905, p. 3905 *et seqq.*

569 *See supra sections* 158 *et seqq.*

also possible but are open only to private entities (Art. 12 para. 1 CartA)[570]. Such actions are relatively rare, mainly due to the risk of costs they entail[571].

246 The *Federal Act on Cartels* also regulates vertical cartels (Art. 5 paras. 3 *et seq.* CartA), unlawful practices by dominant undertakings (Art. 7 CartA) and concentrations of undertakings (Art. 9. CartA). These subjects are detailed in ordinances and guidelines[572] issued by the *Competition Commission* (*COMCO*, Art. 18 CartA)[573]. The Commission is also responsible for enforcement[574]. Its members (Arts. 11 *et seqq.* CartA), the majority of whom are independent experts, are appointed by the Federal Council (Art. 18 paras. 1 *et seq.* CartA). The Commission is also supported by a secretariat staffed by civil servants (Arts. 23 *et seq.* CartA).

10. Taxes

Legal Sources

Bundesgesetz über die Mehrwertsteuer (Mehrwertsteuergesetz, MWSTG) vom 12. Juni 2009 (SR 641.20) = Federal Act on the Value Added Tax (Value Added Tax Act, VAT Act) *(text available in English)*

Bundesgesetz über die direkte Bundessteuer (DBG) vom 14. Dezember 1990 (SR 642.11) = Federal Act on Direct Federal Taxes (DFTA)

Bundesgesetz über die Harmonisierung der direkten Steuern der Kantone und Gemeinden (StHG) vom 14. Dezember 1990 (SR 642.14) = Federal Act on the Harmonisation of Direct Taxes of the Cantons and Communes (THA)

570 Biaggini et al., p. 184; Jacobs/Giger, BSK KG, Art. 12, n. 12 *et seqq.*

571 Arts. 95 *et seq.* and 106 *et seq.* CPC; Biaggini et al., p. 184; Jacobs/Sturny, p. 39; *see also* Heinemann/Kellerhals, pp. 109 *et seqq.*, 118 *et seq.*; Weber/Volz, n. 4.79 *et seqq.*

572 Biaggini et al., pp. 165, 170 *et seqq.*, 179 *et seq.*; Jacobs/Sturny, pp. 34 *et seqq.*; *see also* Competition Commission, "Legislation", Information page, in: <https://www.weko.admin.ch/weko/en/home/rechtliches_dokumentation/legislation.html> *as well as* Competition Commission, "Notices / Explanatory notes", Information page, in: <https://www.weko.admin.ch/weko/en/home/rechtliches_dokumentation/communications.html>.

573 Biaggini et al., pp. 178 *et seqq.*

574 Biaggini et al., pp. 175, 179 *et seq.*

Verordnung über die Mindestbesteuerung grosser Unternehmensgruppen (Mindestbesteuerungsverordnung, MindStV) vom 22. Dezember 2023 (SR 642.161) = Ordinance on the Minimum Taxation of Large Corporate Groups (Minimum Taxation Ordinance, MinTO)

Further Reading

ERNST BLUMENSTEIN/PETER LOCHER, System des schweizerischen Steuerrechts, 8th edition, Zürich 2023

MARKUS REICH, Steuerrecht, 3rd edition, Zürich 2020 (cit. REICH, Steuerrecht, § __ n. __)

MADELEINE SIMONEK/MARTINA BECKER, Tax Law, in: Marc Thommen (ed.), Introduction to Swiss Law, Zürich 2022, pp. 205 et seqq.

Federal Tax Administration, The Swiss Tax System, 5th edition, Bern 2025, in: <https://www.estv.admin.ch/estv/en/home/fta/swiss-tax-system/swiss-tax-system.html>

The confederation and the cantons both levy income taxes. The federal tax is limited to 11.5% for natural persons (Art. 128 para 1 lit. a Const.). Cantonal taxes are usually higher. Both federal and cantonal income tax must respect the "principle of taxation according to ability to pay" (Art. 127 para. 2 Const.), entailing that a tax rate is predominantly progressive on increasing income[575]. Income taxes (but not tax rates) must be harmonised throughout Switzerland (Art. 129 Const.). The implementation of the constitutional objective is set out in the *Federal Act on Harmonisation of Direct Taxes of the Cantons and Communes* (THA). Federal income tax is administered by the cantons und supervised by the confederation on the basis of the *Federal Law on Direct Federal Taxes* (DFTA). Inter-cantonal double taxation is prohibited (Art. 127 para. 3 Const.). 247

Apart from income tax, the confederation may levy a value added tax on the supply of goods and on services, which is another main source of financing the federal budget (VAT Act). The value added tax precludes similar cantonal taxations, but the cantons may and have introduced various other taxes such as inheritance tax and taxes on the gain of real estate sales[576]. All such taxes are subject to a strict application of the *principle of legality*: "The main structural 248

575 *See* BGE 133 I 206 consid. 8.3, 9.3; BGE 114 Ia 221 consid. 2.c *which forbid degressive taxation.*

576 MISIC/TÖPPERWIEN, n. 822; SIMONEK/BECKER, p. 218 *et seqq.*; *for an overview of cantonal taxes see* BLUMENSTEIN/LOCHER, pp. 17 *et seqq.*, 60 *et seq.*, 197 *et seq.*, 216 *et seq.*, 225 *et seqq.*, 242 *et seqq.*, 264 *et seqq.*

features of any tax, in particular those liable to pay tax, the object of the tax and its assessment, are regulated by law" (Art. 127 para. 1 Const.)[577].

249 Originally, Swiss tax law has offered some privileges to holding companies which the Organisation for Economic Co-operation and Development (OECD) has declared inadmissible, urging its member states to abolish such preferential treatment[578]. After years of debate and failed attempts[579], parliament triggered an obligatory referendum on the implementation of the proposed OECD minimum base corporate tax rate of 15%[580] in a constitutional amendment – which was passed with 78.5% of the popular vote[581] and now takes the form of Art. 129a Const. as well as the *Minimum Taxation Ordinance (MinTO)*[582].

11. Social Security

Legal Sources

Bundesgesetz über den Allgemeinen Teil des Sozialversicherungsrechts (ATSG) vom 6. Oktober 2000 (SR 830.1) = Federal Act on the General Part of Social Security Law (GPSSL Act)

577 Blumenstein/Locher, pp. 13 *et seqq.*; Häfelin/Müller/Uhlmann, n. 2795 *et seqq.*, 2850; Misic/Töpperwien, n. 816; Reich, Steuerrecht, § 4 n. 84 *et seqq.*; Simonek/Becker, p. 209; Tschannen/Müller/Kern, n. 1650 *et seqq.*

578 OECD, "Base erosion and profit shifting (BEPS)", Information page, in: <https://www.oecd.org/en/topics/base-erosion-and-profit-shifting-beps.html>.

579 *See e.g.* Referendum über das Bundesgesetz vom 17. Juni 2016 über steuerliche Massnahmen zur Stärkung der Wettbewerbsfähigkeit des Unternehmensstandorts Schweiz (Unternehmenssteuerreformgesetz III) = Referednum on the Federal Act of 17 June 2016 on tax measures to strengthen the competitiveness of Switzerland as a business location (Corporate Tax Reform Act III), BBl 2017 3387, p. 3388 (rejected with 1'428'162 No vs. 989'311 Yes votes).

580 *See* OECD, "Global Anti-Base Erosion Model Rules (Pillar Two)", Information page, in: <https://www.oecd.org/en/topics/sub-issues/global-minimum-tax/global-anti-base-erosion-model-rules-pillar-two.html>.

581 Volksabstimmung über den Bundesbeschluss vom 16.12.2022 über eine besondere Besteuerung grosser Unternehmensgruppen (Umsetzung des OECD/G20-Projekts zur Besteuerung grosser Unternehmensgruppen) = Referendum on the Federal Decree of 16 December 2022 on a special tax regime for large corporate groups (Implementation of the OECD/G20 project on the special tax regime for large corporate groups), BBl 2023 2015, p. 3 (passed with 1'803'309 Yes vs. 495'239 No votes).

582 *See also* Uhlmann/Meier, p. 847.

Bundesgesetz über die Alters- und Hinterlassenenversicherung (AHVG) vom 20. Dezember 1946 (SR 831.10) = Federal Act on the Old Age and Survivors Insurance (OASI Act)

Bundesgesetz über die berufliche Alters–, Hinterlassenen- und Invalidenvorsorge (BVG) vom 25. Juni 1982 (SR 831.40) = Federal Act on Occupational Old Age, Survivors and Disability Insurance (OIA)

Bundesgesetz über die Krankenversicherung (KVG) vom 18. März 1994 (SR 832.10) = Federal Act on Health Insurance (HIA)

Bundesgesetz über die obligatorische Arbeitslosenversicherung und die Insolvenzentschädigung (AVIG) vom 25. Juni 1982 (SR 837.0) = Federal Act on the Obligatory Unemployment Insurance and Insolvency Compensation (UIICA)

Further Reading

GERY AESCHLIMANN, Personen- und Sozialversicherung – Grundlagen, 4th edition, Zürich 2011

UELI KIESER, Schweizerisches Sozialversicherungsrecht, 2nd edition, Zürich/St. Gallen 2017 (cit. KIESER, CH Sozialversicherungsrecht, Chap. __ n. __)

UELI KIESER/MIRIAM LENDFERS, Sozialversicherungsrecht in a nutshell, 5th edition, Zürich/St. Gallen 2021

THOMAS LOCHER/THOMAS GÄCHTER, Grundriss des Sozialversicherungsrechts, 4th edition, Bern 2014

GUSTAVO SCARTAZZINI/MARC HÜRZELER, Bundessozialversicherungsrecht, 4th edition, Basel 2012

IRÈNE SUTER-SIEBER/VALENTINA EICHIN, Social Security and Pension, in: Urs P. Gnos/Theodor Härtsch (eds.), Doing Business in Switzerland – A Practical Guide, 2nd edition, Zürich 2023, pp. 167 et seqq., <https://perma.cc/PK6H-E2EB>

DIETER WIDMER, Die Sozialversicherung in der Schweiz, 14th edition, Zürich/Basel/Genf 2023

Information Centre OASI/DI, Homepage, in: <https://www.ahv-iv.ch/en/>

Joint Institution under the Federal Act on Health Insurance, Homepage, in: <https://www.kvg.org/en/>

The confederation has important competencies in the realm of social security. 250
It has the power to legislate on the financial provision for the elderly, surviving spouses and children and disability pensions (Arts. 111 *et seq.* Const.), on occupational pension scheme (Art. 113 Const.), on unemployment insurance (Art. 114

Const.), child allowances and maternity insurance (Art. 116 Const.), and health and accident insurance (Art. 117 Const.).

251 The Swiss system relies on *three pillars* for serious social risks (*e.g.* health and retirement). The first pillar consists of national insurances ("Old Age and Survivors Insurance" ["AHV"] and "Disability Insurance" ["IV"]) that guarantee an allowance for basic needs[583]. The second pillar based on occupational pension schemes covers the same risks but should assure a standard of living for the insured persons and their families that is comparable with the standard they had during their employment period[584]. Private savings form the third pillar and are tax-privileged to some extent[585].

252 These three pillars are typically linked to the employment status of the insured person. Still, it is possible, for example, that a person remains unemployed for a longer period than that for which the unemployment insurance would actually cover the financial loss[586]. It is also possible that a person is not allowed to work at all (*e.g.* particular groups of immigrants)[587] or that for people relying exclusively or mainly on the first pillar, the allowances do not cover the necessary living expenses. In the latter case, there may be supplementary benefits (Art. 112a Const.) from the confederation, but if not and if the person is simply out of work, the safety net of the federal social security system may not ensure the fulfilment of basic needs. In such situations, it is the duty of the cantons, which may as well delegate this responsibility to the communes, to support the persons in need by providing social welfare benefits (Art. 115 Const.)[588]. Indeed, the Swiss Constitution explicitly acknowledges a right to state assistance when in need: "Persons in need and unable to provide for themselves have the right to assistance and care, and to the financial means required for a decent standard of living" (Art. 12 Const.).

583 *For the first pillar see* SUTER-SIEBER/EICHIN, pp. 188 *et seq.*; WIDMER, pp. 9 *et seq.*; for the three-pillar system in general see AESCHLIMANN, pp. 26 *et seqq.*; EGLI, pp. 87 *et seq.*; KIESER, CH Sozialversicherungsrecht, Chap. 2 n. 2 *et seq.*; KIESER/LENDFERS, pp. 2 *et seq.*; LOCHER/GÄCHTER, § 1 n. 32 *et seqq.*; MISIC/TÖPPERWIEN, n. 40; SCARTAZZINI/HÜRZELER, § 3 n. 7.

584 SUTER-SIEBER/EICHIN, pp. 169 *et seq.*; WIDMER, pp. 9 *et seqq.*

585 *Ibid.*

586 As a general rule, unemployment insurance is provided for merely 2 years (Art. 9 para. 1 UIICA).

587 Art. 43 para. 1 AsylA: "For the first three months after filing an application for asylum, asylum seekers may not engage in any gainful employment. If asylum is denied at the first instance within this period, the canton may refuse the authorisation to engage in gainful employment for a further three months.".

588 EGLI, pp. 88 *et seq.*

Finally, health insurance (that will be discussed in the next chapter) is compulsory for every person residing in Switzerland (Art. 3 para. 1 Federal Act on Health Insurance (HIA)). It has been under financial strain for several years. 253

12. Health Care and Pharmaceutical Products

Legal Sources

Bundesgesetz über Arzneimittel und Medizinprodukte (Heilmittelgesetz, HMG) vom 15. Dezember 2000 (SR 812.21) = Federal Act on Medicinal Products and Medical Devices (Therapeutic Products Act, TPA) *(text available in English)*

Bundesgesetz über die Krankenversicherung (KVG) vom 18. März 1994 (SR 832.10) = Federal Act on Health Insurance (HIA)

Further Reading

Boris Etter, Stämpflis Handkommentar (SHK), Medizinalberufegesetz: Bundesgesetz vom 23. Juni 2006 über die universitären Medizinalberufe (MedBG), Bern 2006 (cit. Etter, Art. __, n. __)

Gebhard Eugster, Krankenversicherung, in: Ulrich Meyer (ed.), Schweizerisches Bundesverwaltungsrecht, Band XIV: Soziale Sicherheit – Sécurité sociale, 3rd edition, Basel 2016, pp. 385 *et seqq.*

Thomas Gächter/Bernhard Rütsche, Gesundheitsrecht: Ein Grundriss für Studium und Praxis, 5th edition, Basel 2023

Ueli Kieser, Art. 65 KVG, in: Ueli Kieser/Kaspar Gehring/Susanne Bollinger (eds.), Orell Füssli Kommentar (OFK): KVG, UVG Kommentar: Bundesgesetze über die Krankenversicherung, die Unfallversicherung und über den Allgemeinen Teil des Sozialversicherungsrechts (ATSG) mit weiteren Erlassen, Zürich 2018, pp. 178 *et seqq.* (cit. Kieser, OFK KVG/UVG, Art. 65 KVG, n. __)

Swissmedic, Homepage, in: <https://www.swissmedic.ch/swissmedic/en/home.html>

a) Health Care

Health care is a traditional domain of the Swiss cantons[589]. The federal competencies are limited to the regulation of foodstuffs, therapeutic products, 254

589 Biaggini et al., p. 283.

narcotics, organisms, chemicals and other items that may be dangerous to health (Art. 118 para 2 lit. a Const.), to the combating of communicable, widespread or particularly dangerous human and animal diseases (Art. 118 para 2 lit. b Const.), and to the protection against ionising radiation (Art. 118 para 2 lit. c Const.)[590]. Still, one should not overlook the federal power to legislate on health and accident insurance (Art. 117 para. 1 Const.). In recent years, the soaring costs of the Swiss health care system have led to multiple attempts by the federal legislator to trim the system to a more efficient regime. In theory, private health insurance companies should compete among each other to offer affordable basic health insurance (that is compulsory for everyone and a more or less interchangeable product)[591]. The private health insurance companies should limit unnecessary costs from doctors, hospitals etc. Still, it seems that companies are more interested to attract customers that pose the least medical risk. As a consequence, parliament and the government have introduced further regulations such as the temporary limitation of the numbers of doctors (Art. 55a HIA).

255 The cantons remain responsible for the education (via universities and hospitals) and the licensing of doctors and other medical personnel, including pharmacies[592]. The cantons and communes are also important players by their active involvement in public hospitals. Cantons cover costs that are not fully reimbursed by private health insurance companies[593] and subsidise private individuals that may not afford to buy health insurance[594].

b) Pharmaceutical products

256 Pharmaceutical products are regulated by the *Federal Act on Medicinal Products and Medical Devices* (TPA). The law distinguishes between medicinal products and medical devices. The former are "[…] products of chemical or biological origin which are intended to have or are presented as having a medicinal effect on the human or animal organism, in particular in the diagnosis, prevention or treatment of diseases, injuries and handicaps; blood and blood products are also considered to be medicinal products." (Art. 4 para. 1 lit. a TPA)[595].

590 Biaggini et al., pp. 283, 287 *et seq.*
591 Eugster, n. 211; Gächter/Rütsche, n. 1012.
592 Etter, SHK MedBG, Art. 34, n. 3 *et seqq.*
593 *E.g.* the cantons cover 55% of hospital costs (Art. 49a HIA).
594 Eugster, n. 1389 *et seqq.*; Gächter/Rütsche, n. 1064 *et seqq.*; Kieser, OFK KVG/UVG, Art. 65 KVG, n. 1, 4.
595 Biaggini et al., p. 283.

The latter are "[...] products, including instruments, apparatus, in vitro diagnostics, software and other goods or substances which are intended to have or are presented as having a medical use and whose principal effect is not obtained with a medicinal product" (Art. 4 para. 1 lit. b TPA)[596]. Medicinal products require a marketing authorisation (Art. 9 TPA) whereas the use of medical devices must only be notified to the Swiss Agency for Therapeutic Products (Swissmedic)[597]. *Swissmedic* (Arts. 68 *et seq.* TPA) defines the standards for medicinal products and medical devices, hereby heavily relying on European standards[598]. Still, the law clearly states that it is first and foremost the duty of the private enterprises to safeguard the safety of their products: "Any person handling therapeutic products must take all measures necessary according to the state of the art to ensure that human or animal health is not endangered" (Art. 3 TPA)[599].

13. Education

Legal Sources

Bundesgesetz über die Berufsbildung (Berufsbildungsgesetz, BBG) vom 13. Dezember 2002 (SR 412.10) = Federal Act on Vocational and Professional Education and Training (Vocational and Professional Education and Training Act, VPETA) *(text available in English)*

Bundesgesetz über die Förderung der Hochschulen und die Koordination im schweizerischen Hochschulbereich (Hochschulförderungs- und -koordinationsgesetz, HFKG) vom 30. September 2011 (SR 414.20) = Federal Act on Funding and Coordination of the Swiss Higher Education Sector (Higher Education Act, HEdA) *(text available in English)*

Bundesgesetz über die Eidgenössischen Technischen Hochschulen (ETH-Gesetz) vom 4. Oktober 1991 (SR 414.110) = Federal Act on the Federal Institutes of Technology (ETH Act) *(text available in English)*

Further Reading

BERNHARD EHRENZELLER (ed.), Schweizerisches Bundesverwaltungsrecht, Band IX: Bildungs–, Kultur- und Sprachenrecht, Basel 2018

596 *Ibid.*
597 BIAGGINI ET AL., pp. 284 *et seq.*
598 BIAGGINI ET AL., p. 285.
599 BIAGGINI ET AL., p. 284.

257 Education is a traditional cantonal domain. The Swiss Constitution explicitly states so (Art. 62 para. 1 Const.), although technically the attribution of competencies to the cantons is superfluous as the federal powers must be enumerated in the Constitution and the cantons only exercise those that are not vested in the confederation (Art. 3 Const.). Still, the clarification seems sensitive as federal norms exercise a growing influence. After all, the Swiss Constitutions also states that the confederation and the cantons ensure jointly the "high quality and accessibility" of the *Swiss educational area* (Art. 61a para. 1 Const.). Such efforts may require coordination and cooperation of joint administrative bodies (Art. 61a para. 2 Const.).

258 Also, on the constitutional level, Art. 19 Const. prescribes the right to an adequate and free basic education. Education must also be religiously neutral (Art. 62 in conjunction with Art. 15 para. 4 Const.). These provisions trigger obligations of the cantons (Art. 62 para. 2 Const.) and may be enforced by federal authorities of last instance, namely by the Swiss Supreme Court nowadays and by the Federal Council in the past[600]. The cantons also undertake the duty to harmonise education in order to facilitate free movement within Switzerland. If the harmonisation fails, the federal legislator may intervene and regulate appropriately (Arts. 62 para 4 and 63a para 4 Const.)[601].

259 The confederation also has the power to regulate vocational and professional education (Art. 63 Const.) and to subsidise musical education (Art. 67a Const.), sports (Art. 68 Const.), continuing education and training (Art. 64a Const.) and education grants (Art. 66 Const.). The confederation may also establish federal universities as it has done in the case of the *Swiss Federal Institutes of Technology* in Zurich and Lausanne (Art. 63a para. 1 Const.)[602]. All other Swiss universities are cantonal. The cantons and the federal institutes are supposed to coordinate their efforts to guarantee the quality of Swiss higher education (Art. 63a para. 3 Const.). Again, the confederation may intervene if voluntary efforts fail (Art. 63a para. 5 Const.). Finally, it subsidises cantonal universities (Art. 63a para. 2 Const.) and research (Art. 64 Const.), the latter being done

600 Egli, p. 162; Ehrenzeller, Bildungsraum, n. 14, 17; Häner et al., pp. 383, 385; Hänni/Epiney, BSK BV, Art. 62, n. 12, 14, 16 *et seq.*, 21; Misic/Töpperwien, n. 637; *for further information about the enforcement system change see* Botschaft über die Inkraftsetzung der neuen Bundesverfassung und die notwendige Anpassung der Gesetzgebung vom 11. August 1999, BBl 1999 7922, pp. 7936 *et seq.*

601 Ehrenzeller, Bildungsraum, n. 5 *et seqq.*; Ehrenzeller/Bernet, SG-Komm. BV, Art. 62, n. 47 *et seqq.*; Häner et al., pp. 375 *et seq.*, 382 *et seq.*; Hänni/Epiney, BSK BV, Art. 62, n. 39 *et seqq.*

602 Ehrenzeller/Sahlfeld, SG-Komm. BV, Art. 63a, n. 27 *et seqq.*; Häner et al., pp. 392 *et seq.*; Epiney/Hunziker/Hänni, BSK BV, Art. 63a, n. 11 *et seqq.*; Stöckli/Weber, n. 27 *et seq.*

through the Swiss National Science Foundation[603]. Such financial aid, although undoubtedly beneficial, extends considerable federal influence on cantonal universities[604].

In order to account for the need for coordination between federal and cantonal universities, the federal parliament passed the *Higher Education Act* (*HedA*) in 2011. It aims to harmonise joint efforts and standards in the interest of ensuring mobility, efficiency and the quality of the Swiss higher education sector at large (Art. 3 HEdA). The confederation is entrusted with the authority to lead joint efforts (Art. 4 para. 1 HEdA) and the confederation as well as the cantons are obliged to enter into a cooperation agreement (Art. 6 HEdA) in the pursuit of the formation of bodies such as the Swiss Conference of Rectors of Higher Education Institutions and the Accreditation Agency (Art. 7 HEdA). This development is not least relevant regarding the fact that the admission requirements to universities are uniformly laid out in order to guarantee the aptitude and equal treatment of candidates (Arts. 23 *et seqq.* HEdA). 260

14. Data Protection and AI Regulation

Legal Sources

Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (CETS No. 225)

Schweizerisches Zivilgesetzbuch (ZGB) vom 10. Dezember 1907 (SR 210) = Swiss Civil Code (CC) *(text available in English)*

Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht) (OR) vom 30. März 1911 (SR 220) = Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) (CO) *(text available in English)*

Bundesgesetz über den Datenschutz (Datenschutzgesetz, DSG) vom 25. September 2020 (SR 235.1) = Federal Act on Data Protection (Data Protection Act, FADP) *(text available in English)*

Further Reading

Adrian Bieri/Julian Powell (eds.), Orell Füssli Kommentar (OFK): Datenschutzgesetz (DSG), Zürich 2023, pp. 73 *et seqq.*

603 Häner et al., pp. 394 *et seqq.*
604 *Ibid.*

Hugh Reeves/Jürg Schneider/David Vasella, Switzerland, in: Christian Schröder (ed.), Chambers Global Practice Guides: Data Protection & Privacy 2025, London 2025, pp. 415 et seqq., <https://practiceguides.chambers.com/practice-guides/data-protection-privacy-2025>

David Vasella/Davide Cerutti/Marco Galli, Consumer and Data Protection, in: Urs P. Gnos/Theodor Härtsch (eds.), Doing Business in Switzerland – A Practical Guide, 2nd edition, Zürich 2023 pp. 19 et seqq., <https://perma.cc/PK6H-E2EB>

Federal Data Protection and Information Commissioner, Homepage, in: <https://www.edoeb.admin.ch/en>

261 The Swiss Constitution protects the privacy of individuals (Art. 13 Const.). Data protection is regulated both at the federal and at the cantonal level[605]. *The Federal Act on Data Protection* (FADP) applies to private entities gathering data as well as federal authorities (Art. 2 para. 1 FADP). Cantonal acts apply to cantonal authorities (often combining questions of data protection and access to public records and active governmental information in one single act)[606].

262 Interestingly, the basic principles for the use of data are similar for private individuals and (federal) authorities: Processing of personal data must be carried out in good faith and proportionately (Art. 6 para. 2 FADP). The collection of personal data and in particular the purpose of its processing must be evident to the subject of the data (Art. 6 para. 3 and Art. 19 paras. 1 *et seqq.* FADP). Data must be as accurate as possible (Art. 6 para. 5 FADP) and must be protected against third-party misuse through adequate technical and organisational measures (Art. 7 FADP). The main difference between data gathering by private individuals and by the (federal) authorities is that the latter need a legal basis for their action (Art. 34 FADP).

263 Special problems arise in case of cross-border disclosure of data[607]. In principle, data may not be transferred to a country lacking legislation that guarantees adequate data protection (Art. 16 FADP). Transfer to such countries may however still be permissible – *inter alia* – by individual consent of the data subject (including the protection by contractual clauses) (Art. 17 para. 1 lit. a FADP) or if the disclosure is directly connected with the conclusion or performance of a contract (Art. 17 para. 1 lit. b FADP).

605 Vasella/Cerutti/Galli, pp. 21 *et seq.*; Häner et al., pp. 420 *et seq.*

606 Häner et al., p. 421; *for cantonal law and the relation to federal law see* Epiney/Zlătescu, OFK DSG, Art. 1, n. 3.

607 Vasella/Cerutti/Galli, p. 23; Häner et al., p. 431.

With countries of the EU, cross-border disclosure of data usually needs no further protection measures since EU standards of data protection are high and meet the standards required in Art. 16 FADP. By contrast, data transfers to the US are more problematic. US enterprises receiving data from Switzerland must guarantee the protection of data contractually to the sender of the data[608]. They may also unilaterally certify a sufficient level of data protection[609]. Still, such an arrangement has was found insufficient by the European Court of Justice in the *Schrems I* case in 2015 because the US government accessed personal data notwithstanding the certification[610]. In the *Schrems II* case, the subsequent legal framework, the *EU-US Privacy Shield*, was found insufficient as well[611], following which the EU-US Data Privacy Framework has been enacted[612]. Switzerland has mirrored this development and enacted the Swiss-US Data Privacy Framework on 15 September 2024[613]. 264

The FADP and cantonal acts on data protection offer a wide array of legal actions against the misuse of data.[614] Private individuals have a right to information (Art. 25 paras. 1 *et seq.* FADP) and this entitlement may not be waived in advance (Art. 25 para. 5 FADP). Individuals may request that the data processing is stopped (Art. 32 para. 2 lit. a and Art. 41 para. 1 lit. a FADP), that the data is not disclosed to third parties (Art. 32 para. 2 lit. b and Art. 37 para. 1 FADP) and that the personal data is corrected (Art. 32 para. 1 and Art. 41 para. 2 lit. a FADP) or destroyed (Art. 32 para. 2 lit. c and Art. 41 para. 2 lit. a FADP)[615]. The procedure for claims for damages is of a civil law nature if targeted against other private individuals or enterprises (...) and of an administrative law nature if targeted against public authorities[616]. Against private individuals, claims for damages (Art. 28a para. 3 CC in conjunction with Arts. 41 *et seq.* CO and with Art. 32 para. 2 FADP) and satisfaction (Art. 28a para. 3 CC in conjunction with Arts. 49 *et seq.* CO and with Art. 32 para. 2 FADP) and for handing over profits 265

608 Kunz, OFK DSG, Art. 16, n. 22 *et seqq*; Reeves/Schneider/Vasella, pp. 431 *et seq.*

609 *Ibid.*

610 ECJ Judgment of 6 October 2015, Schrems v Data Protection Commissioner, C-362/14, EU:C:2015:650, n. 71-75, 85-90, 96-98, 104-106.

611 ECJ Judgment of 14 July 2020, Data Protection Commissioner v Facebook Ireland Limited and Schrems, C-311/18, ECLI:EU:C:2020:559, n. 163-199.

612 EU Commission Implementing Decision EU 2023/1795 of 10 July 2023 (in English).

613 Federal Council, "Swiss-US Data Privacy Framework: Certified US companies offer adequate protection for personal data", Press release of 14 August 2024, in: <https://www.news.admin.ch/en/nsb?id=102054>.

614 Häner et al., pp. 433 *et seqq*.

615 Häner et al., pp. 436 *et seq*.

616 Vasella/Cerutti/Galli, p. 24; Häner et al., p. 437.

are also possible (Art. 28a para. 3 CC in conjunction with Art. 423 CO and with Art. 32 para. 2 FADP)[617]. Against public authorities on the federal level, claims for damages and satisfaction are possible as well and must be based on Art. 3 para. 1 FLA[618].

266 The *Federal Data Protection and Information Commissioner* (Arts. 43 *et seqq.* FADP) may also intervene. The Commissioner supervises federal authorities (Art. 49 para. 1 FADP) and may institute proceedings against private individuals, particularly if the methods of data processing are capable of breaching the privacy of a larger number of persons (Art. 49 para. 1 *et seq.* FADP)[619]. Such a case was brought by the Commissioner against Google concerning the processed and published data of individuals on *Google Street View* and was decided by the Swiss Supreme Court in 2012. The Court allowed *Google*'s practices but required several preventive measures to protect personal data. Namely, *Google* must improve its instruments to anonymise faces and other characteristics that can be assigned to individuals. If such characteristics are still recognisable, individuals must have straightforward access to the possibility of objection[620]. Furthermore, sensitive facilities such as women's shelters or prisons must be unidentifiable[621]. Finally, pictures of private fenced-in gardens, balconies and courtyards may only be published if the shot was taken with a camera from a maximum height of two meters[622]. The court acknowledges that *Google* cannot be obliged to guarantee total anonymisation of all personal data in *Google Street View*. An error rate of 1% is acceptable if *Google* complies with the requirements set by the court[623].

267 The regulation of Artificial Intelligence which famously gained traction through the EU AI Act is currently ongoing in Switzerland. By signing the *Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law*, Switzerland pledged to make the necessary legislative changes in order to implement said treaty[624]. As part of that

617 Häner et al., p. 437; Reeves/Schneider/Vasella, p. 421.

618 Josuran-Binder, OFK DSG, Art. 40, n. 6 *et seqq. e contrario*.

619 Häner et al., pp. 437 *et seqq.*

620 BGE 138 II 346 consid. 10.6.3, 10.6.5 (the court suggested putting up a visible direct link on the website); *for a short summary of this decision see also* Misic/Töpperwien, n. 595.

621 BGE 138 II 346 consid. 10.6.4.

622 BGE 138 II 346 consid. 10.7; it is considered that this view is equivalent to the view of a passer-by who may have a look into private areas.

623 BGE 138 II 346 consid. 14.

624 Federal Office of Communications, "Switzerland signs Council of Europe Convention on Artificial Intelligence", Press release of 26 March 2025, in: <https://www.news.admin.ch/en/nsb?id=104646>.

undertaking, there is an ongoing consultation procedure on a proposed act which seeks to regulate communication platforms and search engines[625].

625 Federal Council, "New law on communication platforms and search engines: Start of consultation proceedings", Press release of 29 October 2025, in: <https://www.news.admin.ch/en/newnsb/6TmEAde4htulaWG9CWYtK>.

This book provides a concise overview of Swiss Administrative Law. It is intended to give foreign scholars, students, and practitioners access to this challenging field of law. It embeds administrative law in the Swiss constitutional framework and explains its substantive principles, its procedures, and its organisational structures. Special areas such as Citizenship and Immigration, Asylum, National Security and Police, Spatial Planning and Expropriation, Environmental Protection and Climate Change, Energy and Water, Transportation, Postal Services, Telecommunication, Radio and Television, Banking and Financial Market Law, Competition, Taxes, Social Security, Health Care and Pharmaceutical Products, Education as well as Data Protection and AI Regulation are briefly introduced. The book contains references to all legal literature and materials available in English as well as to the most relevant sources in German and French.