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## Swiss Legal System

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

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

# I. Facts and Figures

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

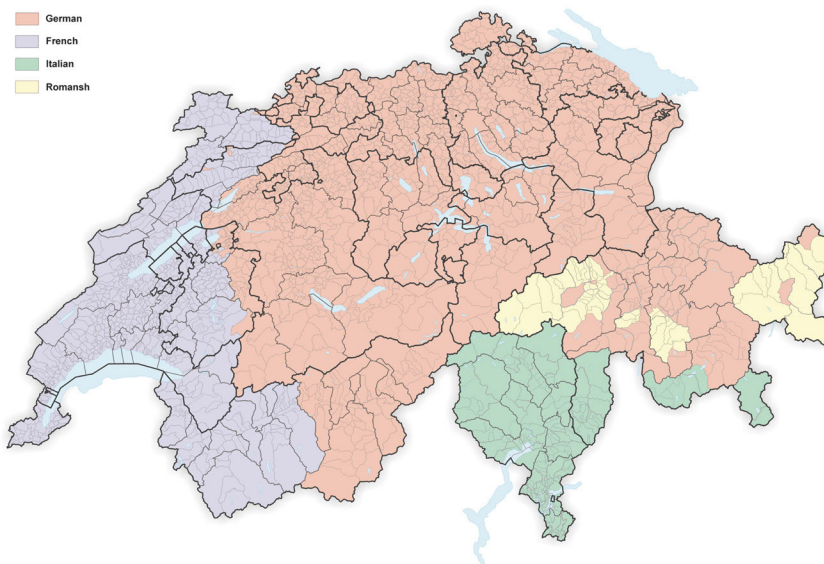


Figure 1: Language Regions<sup>2</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. History



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



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

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

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

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

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

### III. Confederation

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

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

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14 See Chapter Constitutional Law, pp. 145.

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

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

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



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

## 1. FEDERAL ASSEMBLY

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

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

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

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

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

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

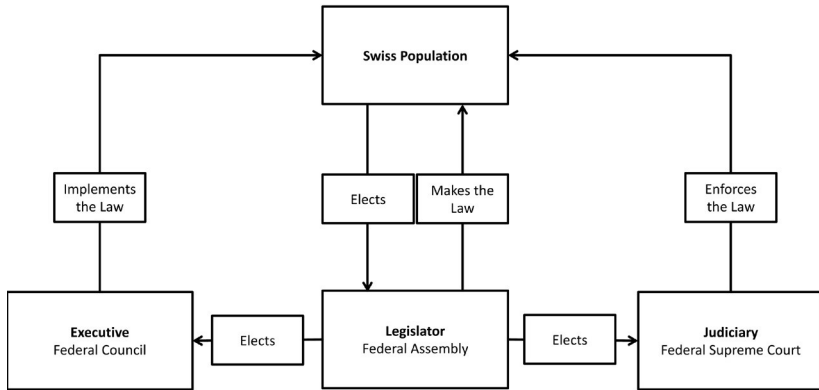


Figure 4: Separation of Powers in Switzerland

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

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

## 2. FEDERAL COUNCIL

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

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

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



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

<sup>23</sup> See Articles 174 et seqq. Constitution.

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

<sup>25</sup> GUY PARMELIN, SIMONETTA SOMMARUGA, UELI MAURER, ALAIN BERSSET (President), DORIS LEUTHARD, JOHANN SCHNEIDER-AMMANN, IGNAZIO CASSIS, WALTER THURNHERR

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

### 3. FEDERAL SUPREME COURT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

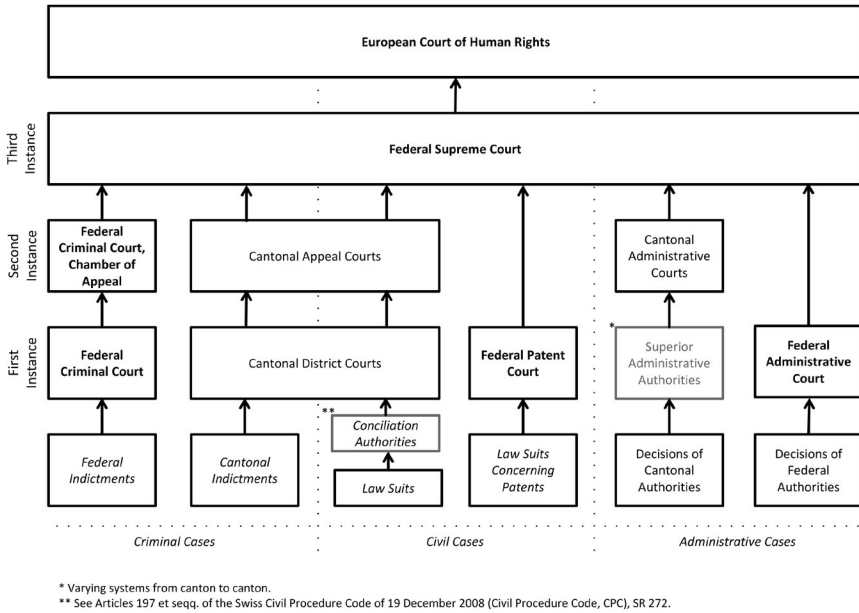


Figure 6: Swiss Court Hierarchy<sup>32</sup>

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

31 BGE 123 I 296.

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

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

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

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

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33 BGE 136 I 87.



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

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

## IV. Cantons

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



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

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

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

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

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

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

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

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

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

## V. Communes

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

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

# VI. Direct Democracy

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

## 1. FEDERAL LEVEL

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

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

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

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

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

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

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

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

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

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

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

45 See p. 5.

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

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

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

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

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



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

## 2. CANTONAL LEVEL

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

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

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

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

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

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

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

### 3. COMMUNAL LEVEL

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

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

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

## VII. Legislative Process

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

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

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

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

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

55 Article 4 Consultation Procedure Act.

56 Article 7 III Consultation Procedure Act.

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

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

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

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

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

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

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

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

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

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

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



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

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

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

## VIII. Publication of Federal Laws

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

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

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

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



# IX. Case Citation

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

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

## 1. OFFICIAL COMPILATION (BGE)

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

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

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

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

66 See pp. 31.

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

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

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

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

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

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

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68 See p. 12.

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

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

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

## 2. PUBLICATION ONLINE

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

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

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

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

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

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

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

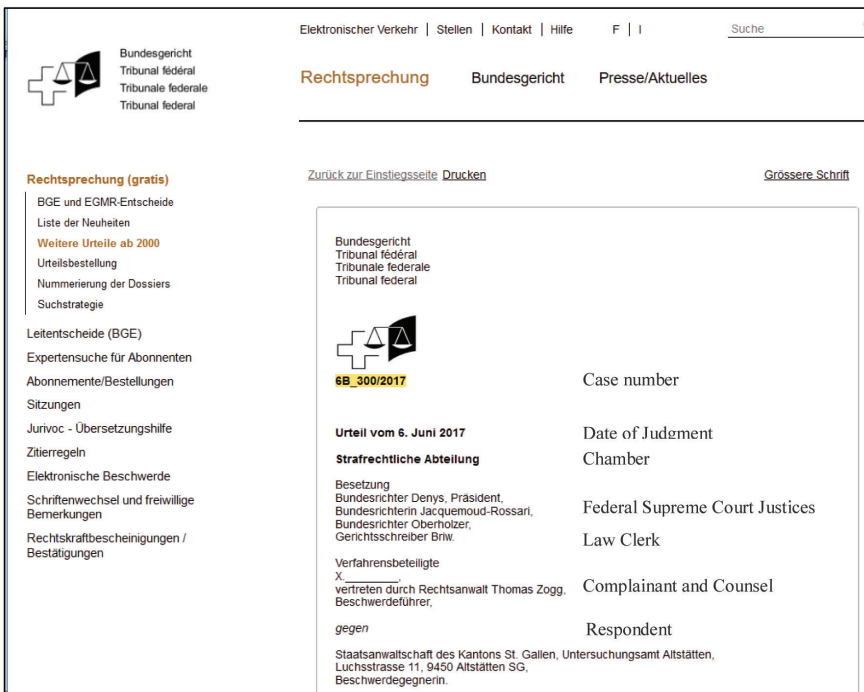


Figure 10: Modified Screenshot of a Decision of the Federal Supreme Court (with Labels)<sup>76</sup>

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

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

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

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

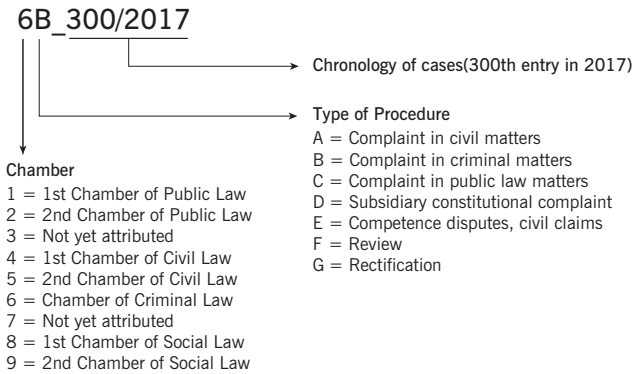


Figure 11: Explanation of the Case Number of a Federal Supreme Court Decision

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

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

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

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

### 3. PUBLIC PRONOUNCEMENT

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

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

### 4. PRESS RELEASES

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

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

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