



University of  
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Institute of Law

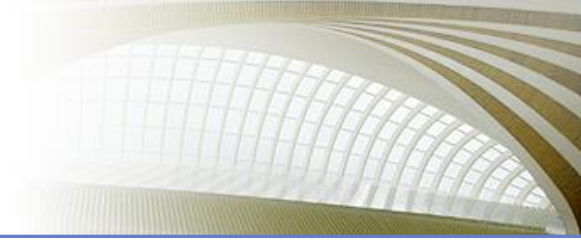


Introduction to Swiss Law

# Swiss Constitutional Law

(incl. Bilateral Relations CH-EU)

**Prof. Dr. Matthias Oesch**



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- Short History
- The Swiss Constitution
- Federal Authorities
- Swiss Federalism
- Fundamental Rights
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- Case Study: Expulsion Initiative (“Ausschaffungsinitiative”)



- 1848 first Constitution, the foundation for Switzerland to become a modern state
- 1874 first *complete* revision of the Constitution; right of referendum for statutes
- 1891 right of initiative for partial revisions of the Constitution
- 1918 proportional election for the members of the National Council
- 1921 right of referendum for international treaties
- 1947 more powers for the Federation in the field of economic law
- 1971 women's right to vote
- 1978 creation of the Canton of Jura
- 1999 second *complete* revision of the Constitution



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**Preamble**

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## Federal Assembly (Legislature)

### National Council (Art. 149 Cst.)

- 200 Members
- Popular election for four years



### Council of States (Art. 150 Cst.)

- 46 Members
- 2 delegates per Canton (in 6 half-Cantons 1 delegate), elected by the Cantons for four years





## Political Parties







## Federal Council (Executive; Art. 175 Cst.)

- 7 Members  
(+ 1 Federal Chancellor)
- Election by the Federal Assembly for four years
- President of the Federal Council is elected for one year only (*primus inter pares*)





## Current Composition of the Federal Council (2016)



**Didier Burkhalter**  
Federal Department of  
Foreign Affairs  
until **October 2017**



**Guy Parmelin**  
Federal Department of  
Defence, Civil Protection  
and Sport



**Alain Berset**  
Federal Department  
of Home Affairs



**Ueli Maurer**  
Federal Department of  
Finance



**Simonetta  
Sommaruga**  
Federal Department of  
Justice and Police



**Doris Leuthard**  
**President 2017**  
Federal Department of  
Transport, Communication  
and Energy



**Johann N. Schneider-  
Ammann**  
Federal Department of  
Economic Affairs,  
Education and Research



## Federal Supreme Court (Judiciary; Art. 188 Cst.)

- Highest Federal Judicial Authority in Switzerland
- 39 Members
- Election by the Federal Assembly for six years
- Located in Lausanne





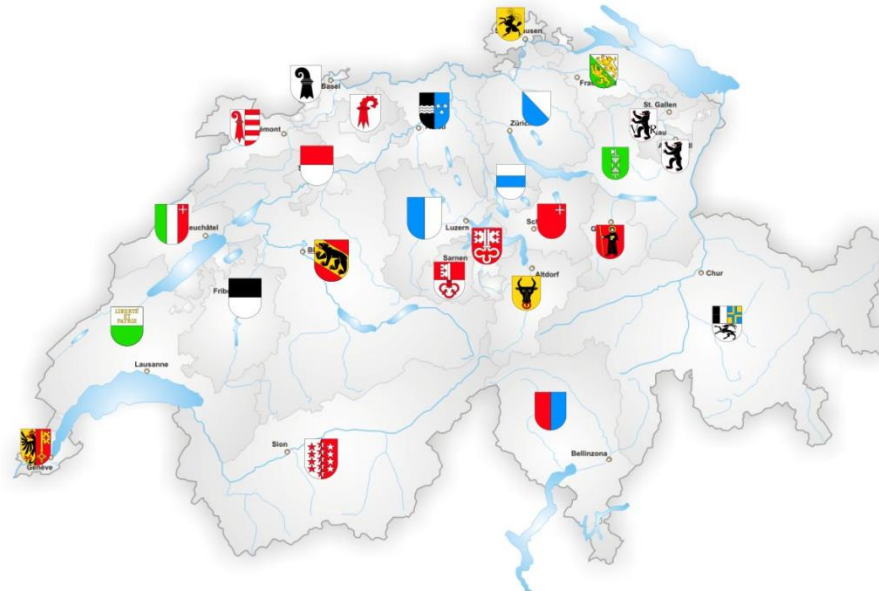
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## Art. 1 Cst. The Swiss Confederation

*The People and the Cantons of 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, Geneva, and Jura form the Swiss Confederation.*





# Competencies

## Federation

- All competencies enumerated in the Constitution (Art. 42, 54-125 Cst.)



## Cantons

- All competencies not conferred to the Federation (Art. 3, 46 Cst.)
- Implementation of federal law (Art. 46 Cst.)



## Communes

- Competencies are determined by cantonal law (Art. 50 Cst.)







# Principles

- Subsidiarity  
(Art. 43a Cst.)
- Cooperation  
(Art. 44 Cst.)
- Cantonal Autonomy  
(Art. 47 Cst.)
- Supremacy of Federal Law  
(Art. 46 Cst.)



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## **Human Dignity (Art. 7 Cst.)**

### **Protection against Discrimination and Arbitrariness**

- Equality before the Law (Art. 8 sect. 1 Cst.)
- Non Discrimination (Art. 8 sect. 2 Cst.)
- Equality of men and women (Art. 8 sect. 3 Cst.)
- Protection against Arbitrariness (Art. 9 Cst.)
- Protection of Good Faith (Art. 9 Cst.)

### **Social Rights**

- Right to Assistance when in need (Art. 12 Cst.)
- Right to Basic Education (Art. 19 Cst.)
- Right to Legal Assistance (Art. 29 sect. 3 Cst.)

### **Procedural due Process**

- General Procedural Guarantees (Art. 29 Cst.)
- Access to the Courts (Art. 29a Cst.)
- Guarantees in Judicial Proceedings (Art. 30 Cst.)
- Habeas Corpus (Art. 31 Cst.)
- Criminal Proceedings (Art. 32 Cst.)



## **Civil liberties and freedoms (Art. 10-36 Cst.)**

- Right to Life and Personal Freedom (Art. 10 Cst.)
- Right to Privacy (Art. 13 Cst.)
- Right to Marry and to Have a Family (Art. 14 Cst.)
- Freedom of Religion and Conscience (Art. 15 Cst.)
- Freedom of Expression and of Information (Art. 16 Cst.)
- Freedom of the Media (Art. 17 Cst.)
- Freedom to use any language (Art. 18 Cst.)
- Academic Freedom (Art. 20 Cst.)
- Freedom of Artistic Expression (Art. 21 Cst.)
- Freedom of Assembly (Art. 22 Cst.)
- Freedom of Association (Art. 23 Cst.)
- Protection against expulsion, extradition and deportation (Art. 25 Cst.)
- Guarantee of Ownership (Art. 26 Cst.)
- Economic Freedom (Art. 27 Cst.)



## Art. 36 Cst. Restrictions on Fundamental Rights

<sup>1</sup> Restrictions on fundamental rights must have a *legal basis*. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.

<sup>2</sup> Restrictions on fundamental rights must be *justified* in the public interest or for the protection of the fundamental rights of others.

<sup>3</sup> Any restrictions on fundamental rights must be *proportionate*.

<sup>4</sup> The essence of fundamental rights is sacrosanct.



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### **Initiative** (Art. 139 Cst.)

- Constitutional Amendments
- 100'000 Signatures in 18 Months
- Formulated Draft Article or General Proposition



### **Referendum** (Art. 140, 141 Cst.)

#### Mandatory

- Constitutional Amendments
- Approval by Majorities of the people and Cantons

#### Optional

- Federal Acts and Treaties
- 50'000 Signatures in 100 Days
- Approval by a Majority of People

### **Elections** (Art. 149, 150 Cst.)

- Members of the National Council and of the Council of States



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Federal Supreme Court



Criminal Law Appeal

Public Law Appeal

Civil and Criminal Law Appeal

Subsidiary Constitutional Appeal

Public Law Appeal



Federal Criminal Court

Federal Administrative Court

Civil and Criminal Courts of the Cantons

Administrative Courts of the Cantons

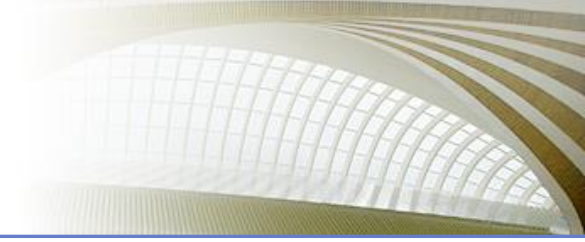


# Constitutional Jurisdiction

## **Art. 190 Cst. Applicable Law**

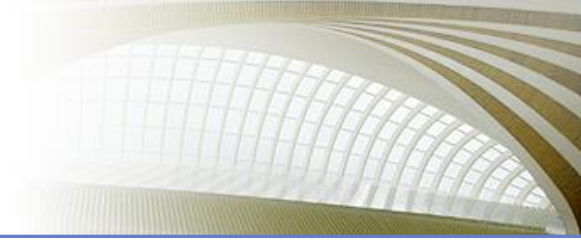
The Federal Supreme Court and the other judicial authorities apply the federal acts and international law.





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- **European Free Trade Association (EFTA)**
  - 1960
- **Free Trade Agreement (FTA)**
  - 1972 (72.5% Yes)
- **Insurance Agreement**
  - 1989
- **Rejection to join the European Economic Area (EEA)**
  - 1992 (50.3% No und 16 Cantons)
- **Bilateral Agreements I** (incl. a “Guillotine” clause)
  - 1999 (67.2% Yes)
- **Bilateral Agreements II**
  - 2004 (Schengen/Dublin 54.6% Yes)



– **Bilateral Agreements I**

- free movement of persons, technical obstacles to trade, public procurement market, agriculture, research, civil aviation, overland transport
- => mainly economic focus (market access)

– **Bilateral Agreements II**

- Schengen/Dublin, taxation of savings, fight against fraud, processed agricultural products, MEDIA, environment, statistics, pensions, education/vocational training/youth
- ⇒ political cooperation, improved economic framework conditions

– **further**

- cooperation with EU agencies and participation in EU programs
- enlargement contribution (“cohesion billion”)



- approval of the “mass immigration initiative” (Article 121a of the Constitution; s. handout, delivered in class)
  - obligation to set up a system of quotas and priority for Swiss workers and to re-negotiate the Agreement on the Free Movement of Persons)
  - February 9, 2014 (50.3% Yes and 12 5/2 Cantons)
- => securing the current set of bilateral agreements, by
  - re-negotiate the Agreement on the Free Movement of Persons
  - or to “correct” the Peoples’ and the Cantons’ verdict of February 9, 2014 (“RASA” pending)
  - or – problematic! – to implement Article 121a in an AFMP-compatible way => implementation legislation put into force by Parliament in 2016
- renewal/modernisation of the institutional framework and negotiations on further agreements (on market access), e.g. electricity, financial services



## Policy of autonomous adaptation

- Federal Council 1988/1993

*„Unser Ziel muss sein, **in Bereichen von grenzüberschreitender Bedeutung (und nur dort)** eine grösstmögliche Vereinbarkeit unserer Rechtsvorschriften mit denjenigen unserer europäischen Partner zu sichern. (...) Es geht bei diesem Streben nach Parallelität nicht darum, das europäische Recht automatisch nachzuvollziehen, wohl aber darum, zu verhindern, dass ungewollt und unnötigerweise neue Rechtsunterschiede geschaffen werden, welche die grundsätzlich angestrebte gegenseitige Anerkennung der Rechtsvorschriften auf europäischer Ebene behindern.“ (Integrationsbericht 1988)*

- twofold purpose
- examination by the administrative bodies («Europakapitel», cf. Art. 141 Abs. 1 ParlG)
- *spill over*-effect



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## Chronology

28.11.2010	Approval by a majority of the people (52.9 %) and the Cantons (17 ½)
2013-2015	Governmental proposal for the implementation of the initiative; debate and approval of the implementing legislation by the Parliament

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### Art. 121 sect. 3-6 Cst.

(...)

<sup>3</sup> Irrespective of their status under the law on foreign nationals, foreign nationals shall lose their right of residence and all other legal rights to remain in Switzerland if they:

- a. are convicted with legal binding effect of an offence of intentional homicide, rape or any other serious sexual offence, any other violent offence such as robbery, the offences of trafficking in human beings or in drugs, or a burglary offence; or
- b. have improperly claimed social insurance or social assistance benefits.

(...)



## Compatibility with the BV and International Law?

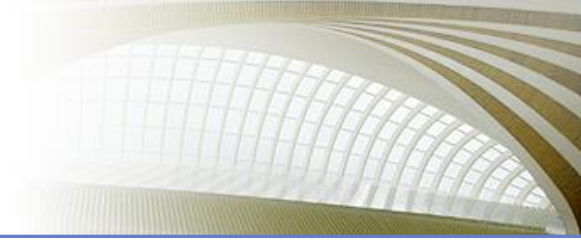
- Conflict with the **Constitution**? e.g.:
  - fundamental rights
  - principle of proportionality (Article 5 BV)
- Conflict with the **European Convention on Human Rights**? e.g.:
  - principle of non-refoulement
  - right to respect private and family life
  - principle of proportionality
- Conflict with the **Agreement on the Free Movement of Persons with the EU**? e.g.:
  - principle of proportionality (prohibition of “automatism”)
- Federal Supreme Court (BGE 139 I 16; 12 October 2012)
  - no direct applicability of Art. 121 sect. 3-6 Cst.
  - relevance of Article 5 BV (principle of proportionality)
  - in principle: primacy of ECHR (obiter dictum!)





## Governmental Proposal and Implementing Law

- Governmental proposal
  - Expulsion only in serious cases (minimum custodial sentence: 6 months)
  - No “automatic” expulsion when fundamental rights are affected
  - Possibility of conflicts in individual cases remains
- Implementing legislation adopted – after controversial debates – by Parliament (11 March 2015)
  - Minimal consideration of the principle of proportionality (Article 5 BV) (“Härtefallklausel”; Article 66a(2) of the Penal Law)



## «Durchsetzungsinitiative»

- see handout (delivered in class)
- declaration of validity by the Parliament, but not with respect to the sentence defining *ius cogens* (Article 197 Ziff. 9(1) IV 2nd sentence BV), based on Article 139(3) BV
- the People and the Cantons rejected this initiative on 28 February, 2016



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**Thank you for your attention!**

