

Swiss Administrative Law and Administrative Procedure (Introduction)

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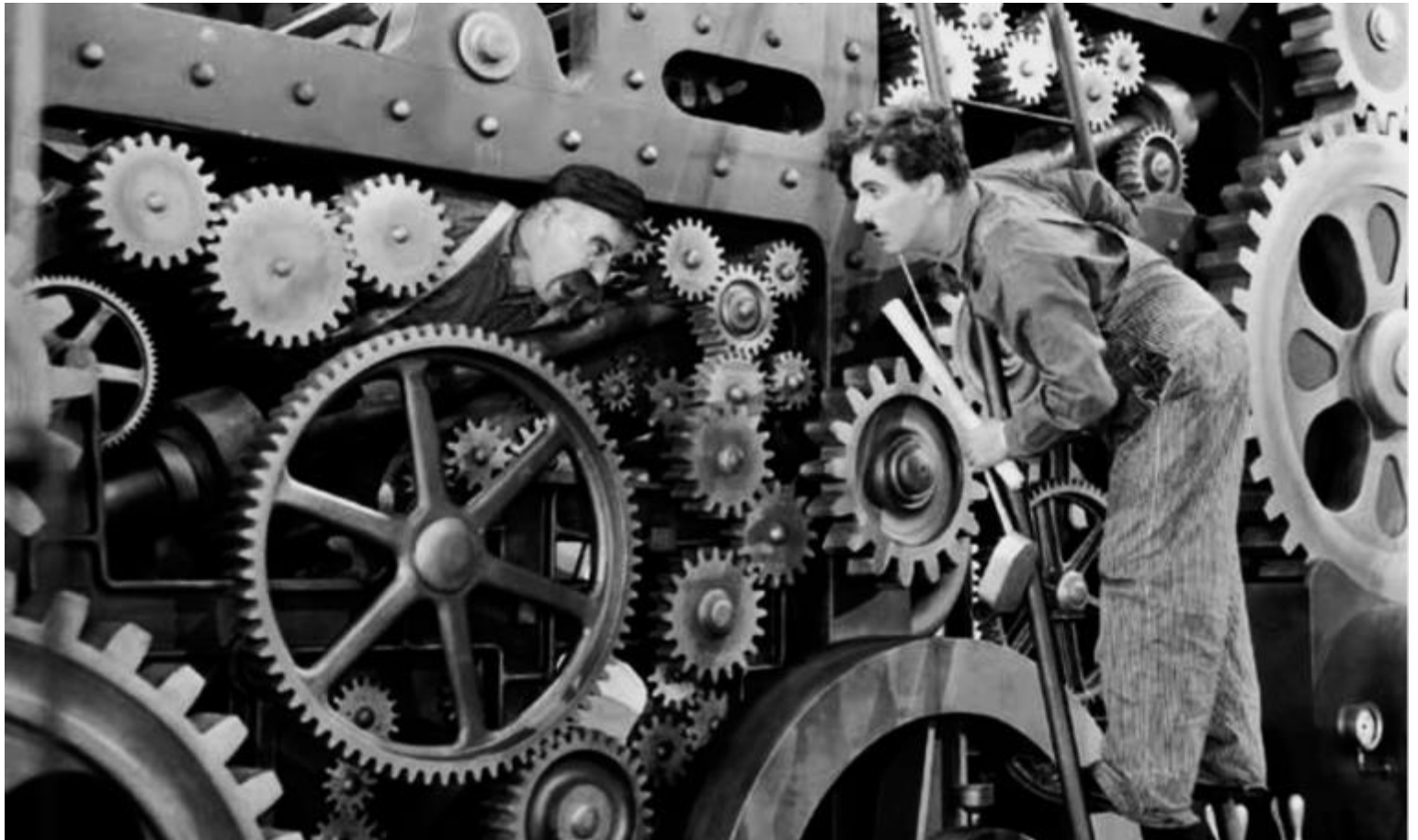
I. The Notion of "Administrative Law"

Definition

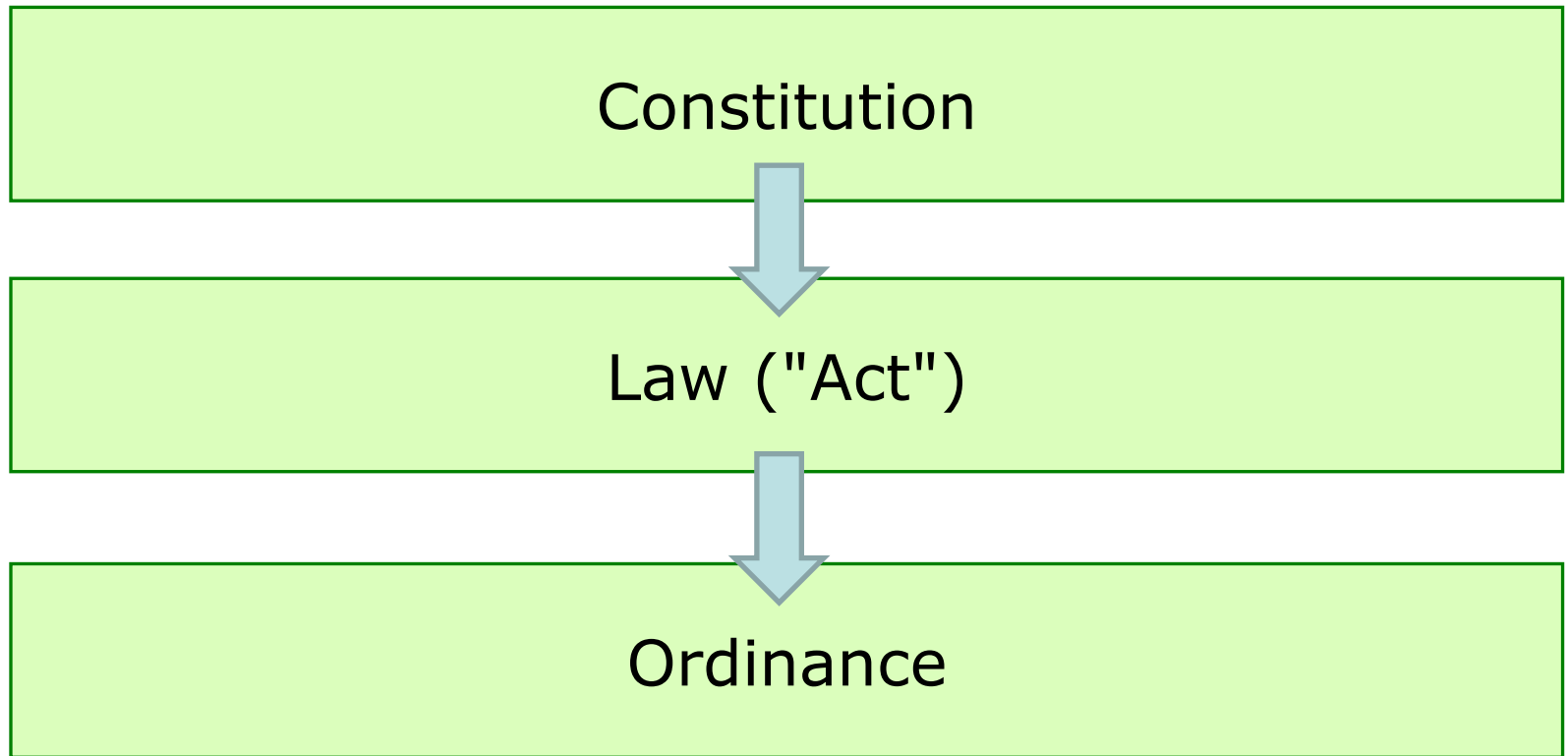
Administrative law is the sum of the legal norms governing the activity, organization and procedure of the administrative authorities as well as the legal position of citizens vis-à-vis these authorities. It is part of public law and includes all legal norms that do not belong to criminal law or private law.



II. The Machinery of the Legal Sources



A. Hierarchy of the Legal System



B. Codes in Particular

- No general codification of administrative law
 - Myriad of federal and cantonal codes on specific subjects matters
 - 4,768 codes (over 65,000 pages) on the federal level (2013)
 - 16'788 codes on the cantonal level (2013)
- Distribution of competences (art. 54 *et seq.* Cst.)

Federal level:

Immigration, competition, environmental protection, banks, transportation, communication, energy, employment, social security, etc.

Cantonal level:

Construction, welfare, health, (undergraduate) education etc.

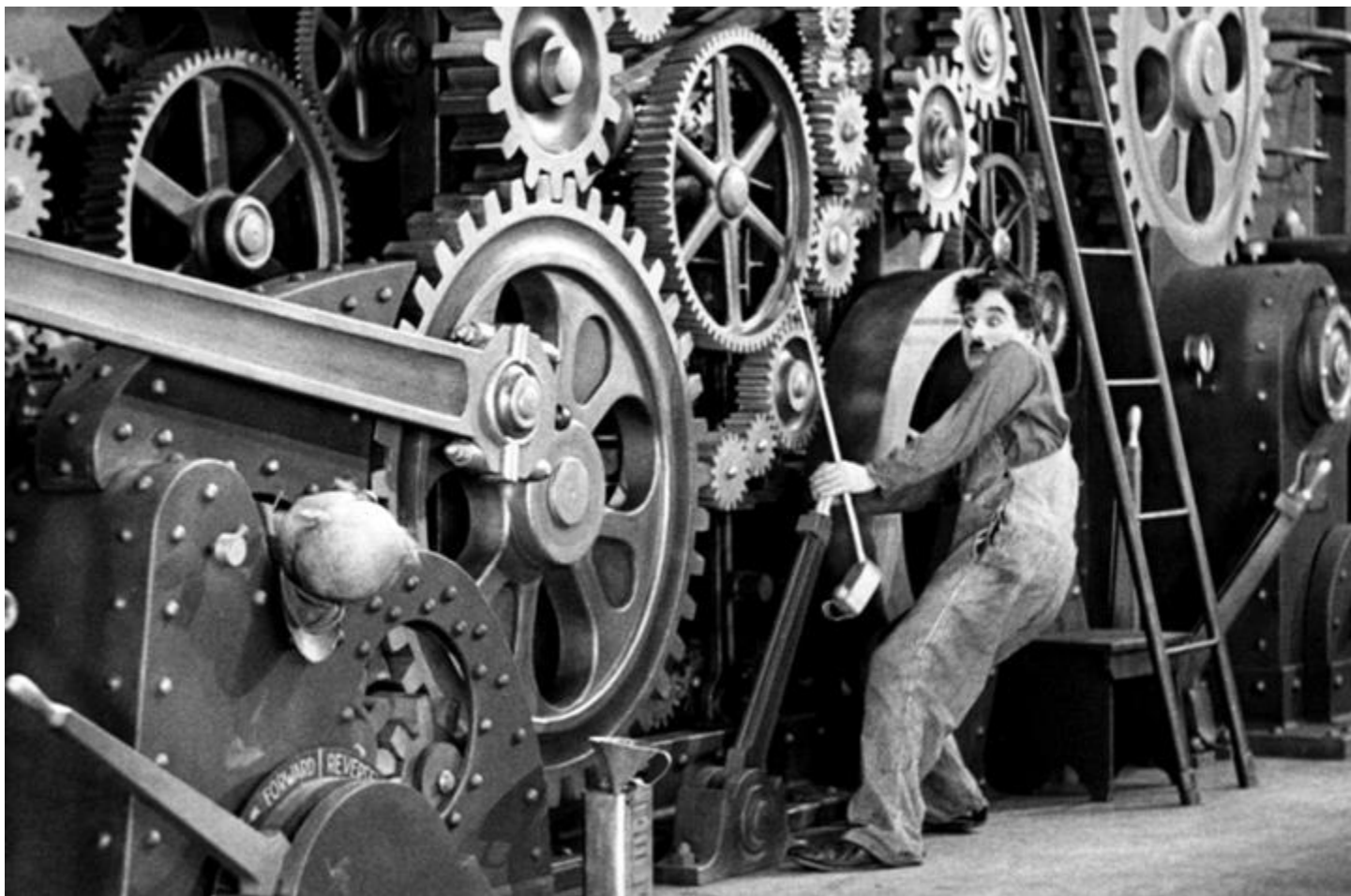
Federal and cantonal level:

Taxation (→ Prof. Simonek), zoning, police, civil servants, public liability, administrative organization, procurement etc.

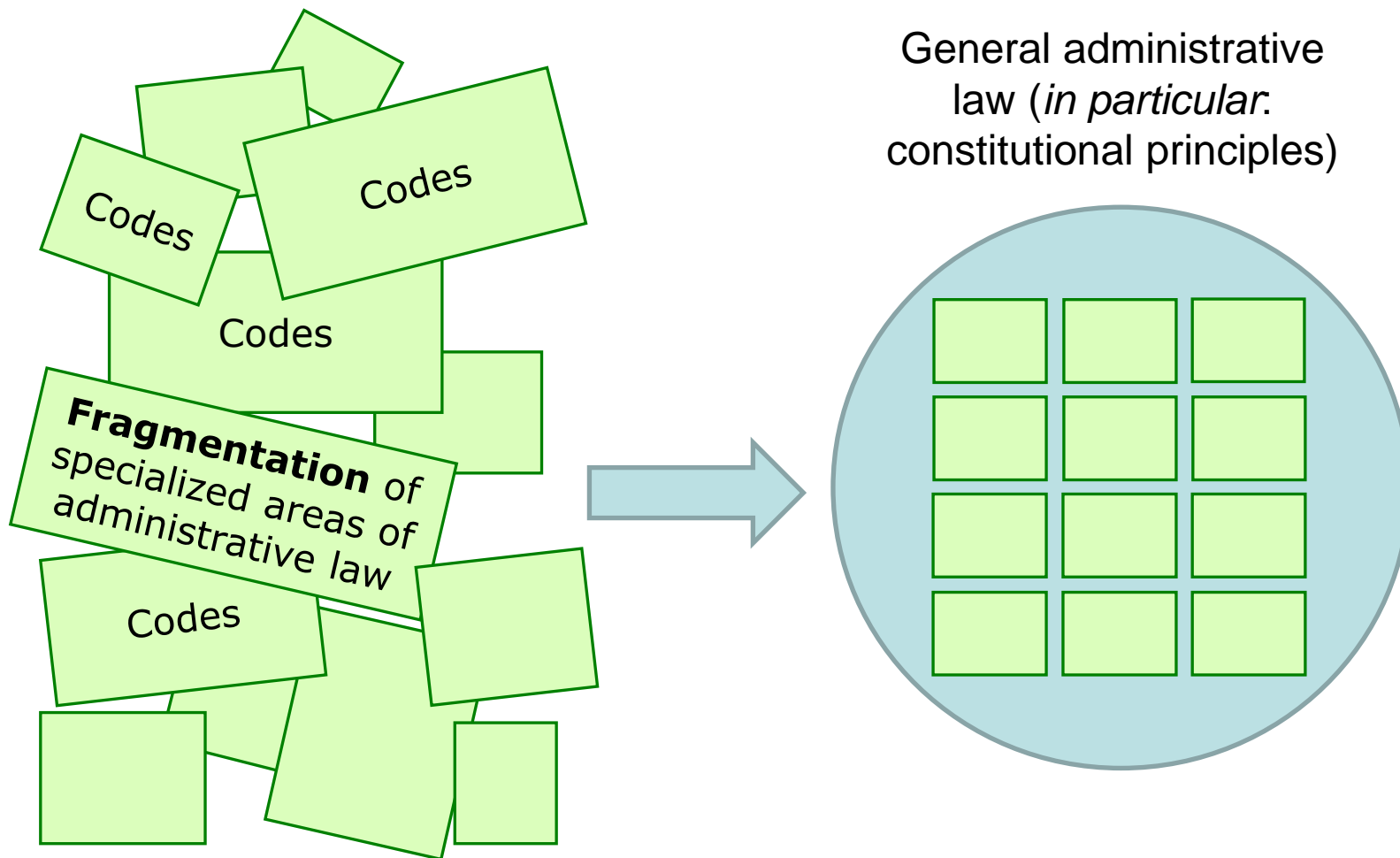
- *Caveat:* Many federal laws are executed, implemented and applied by cantonal authorities



III. General Constitutional Principles



A. "Taming" the Laws



C. Constitutional Provisions

Federal Constitution:

Art. 5 Rule of law

¹ All activities of the state are based on and limited by law.

² State activities must be conducted in the public interest and be proportionate to the ends sought.

³ State institutions and private persons shall act in good faith.

Art. 8 Equality before the law

¹ Every person is equal before the law.

Art. 9 Protection against arbitrary conduct and principle of good faith

Every person has the right to be treated by state authorities in good faith and in a non-arbitrary manner.



D. Overview

**Principle of
Legality**

**Principle of
Public Interest**

**Principle of
Proportionality**

**Principle of
Good Faith**

**Prohibition of
Arbitrariness**

**Equality Before
the Law**



E. Principle of Legality

- Rationale
 - Rule of law
 - Legal certainty
 - Equality before the law
 - Democratic legitimation of administrative action
- **Two-tier test**

Requirement of a **legal provision**

- General and abstract structure
- Sufficiently precise (not unduly vague)

Requirement of **sufficient level of the statute**

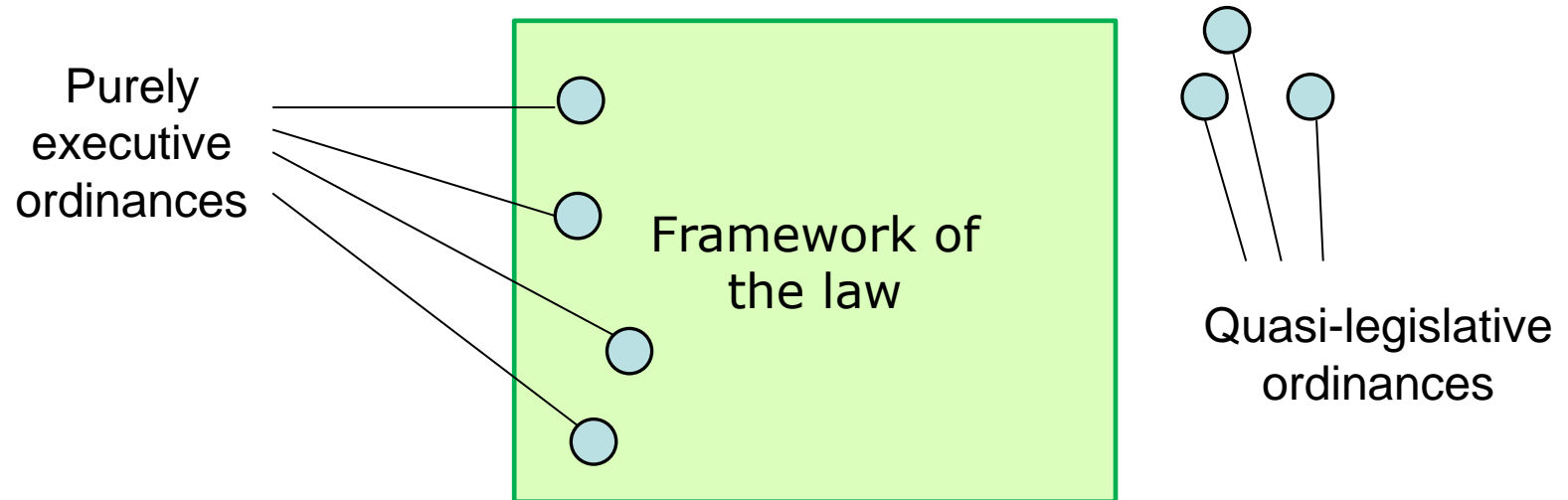
- Important decisions must be taken by the legislator (i.e. the parliament) and be regulated in a law

E. Principle of Legality

Delegated Legislation

- Legislator confers its competence to legislate to the executive branch

→ Executive branch enacts ordinances



E. Principle of Legality

- Purely executive ordinances
 - **No** further requirements → admissible
- Quasi-legislative ordinances
 - Requirement of a **delegation clause**
 - Not excluded by the constitution
 - Delegation clause in the law itself
 - Precisely defined and limited questions
 - Fundamental (important) principles in the law itself
 - Only if requirements are met → provision in an ordinance satisfies principle of legality
- Cantonal Building and Construction Law: „The Government issues regulations on the protection of historic sites.“



Example 1

New Billboard

A request for a new billboard is rejected because the billboard is not – as the law requires – "esthetically satisfying".



Example 2

Quasi-legislative ordinances (BGE 128 I 113)

A cantonal act spins off cantonal psychiatric clinics. Its art. 12 states that an administrative commission is authorized to "adopt guidelines on the terms of employment" of the employees. Apart from that, the general personnel ordinance of the canton should apply.



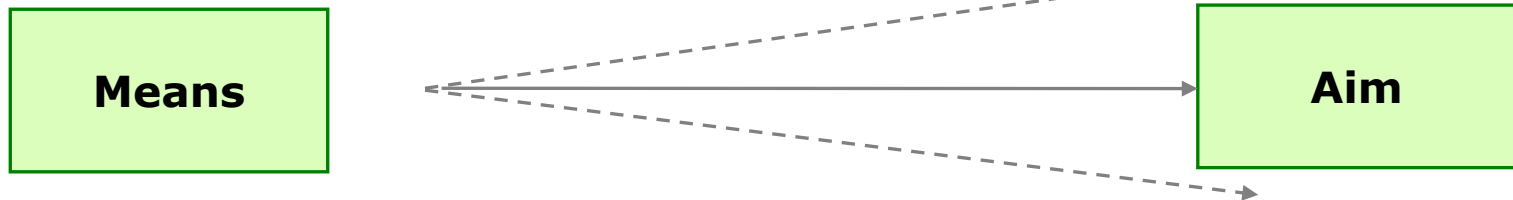
F. Principle of Public Interest

- State activities must be conducted in the public interest
 - Rather comprehensive interpretation
 - Security
 - Public peace
 - Environmental protection
 - Fiscal interests
 - Social policy
 - etc.
 - Usually unproblematic
- *Essentially*: Benchmark for proportionality test

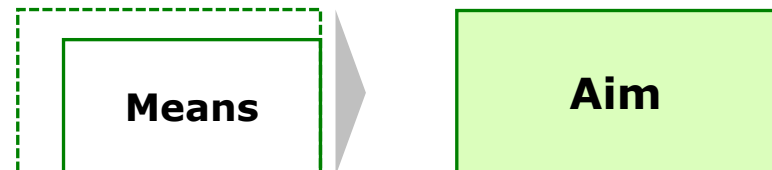


G. Principle of Proportionality

Suitability

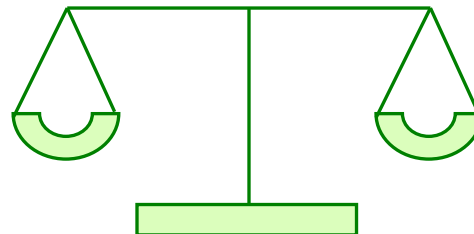


Necessity



Reasonableness

Aim of the means
(public interest)



Effect of the means
(private interest)

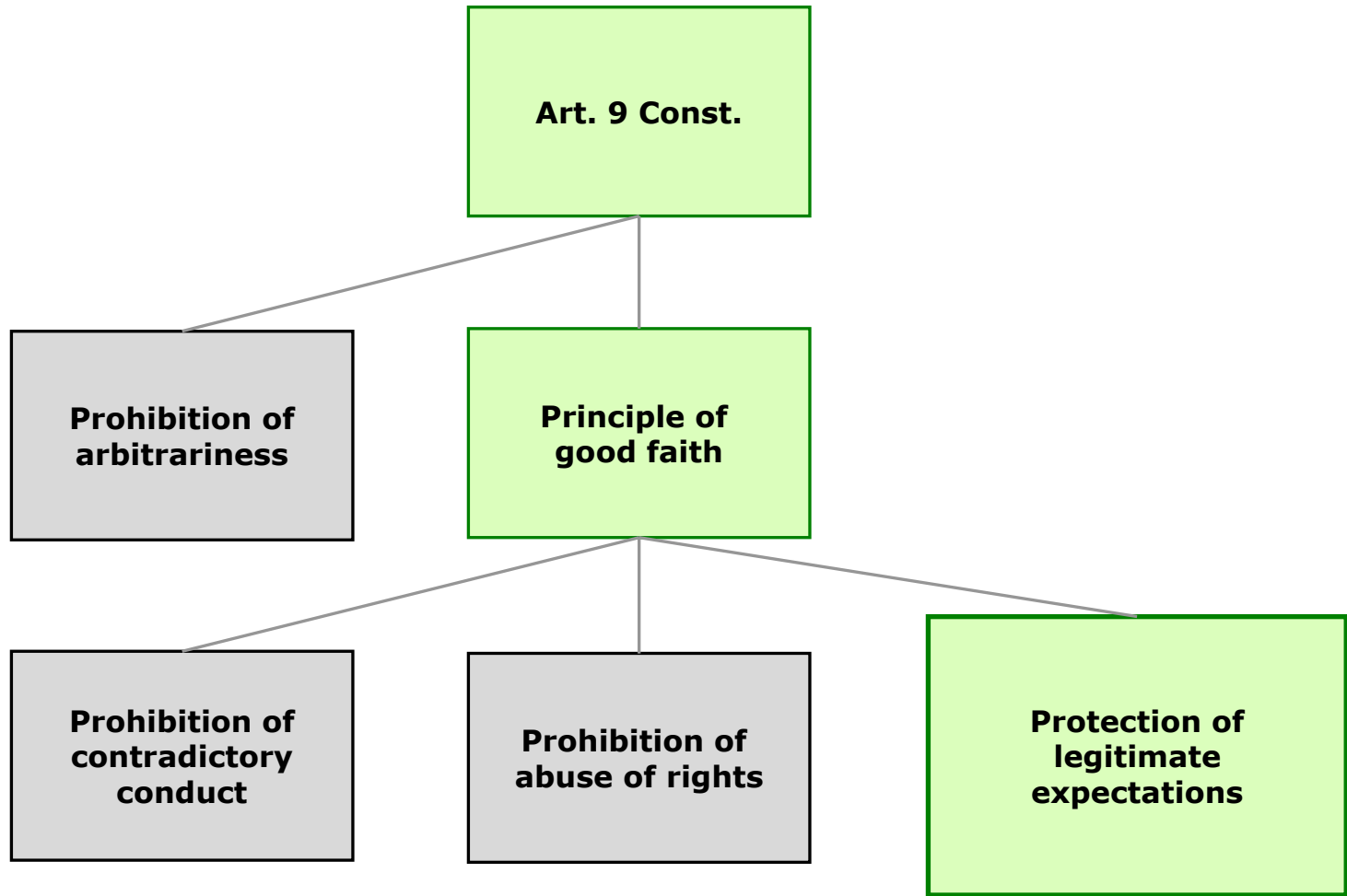
Example 3

"Lemonade clause" (BGE 109 Ia 33)

Based on a respective provision in a cantonal act, a barkeeper was ordered to offer his cheapest non-alcoholic drink less expensive than beer.



H. Principle of Good Faith



H. Principle of Good Faith

Requirements

1. Basis of trust
 - Administrative decisions, administrative contracts etc.
 - In particular: Governmental misinformation and incorrect advice (further requirements)
2. Creation of legitimate expectations
3. Private arrangements
4. Causality
5. Balancing Test

Legal Effects

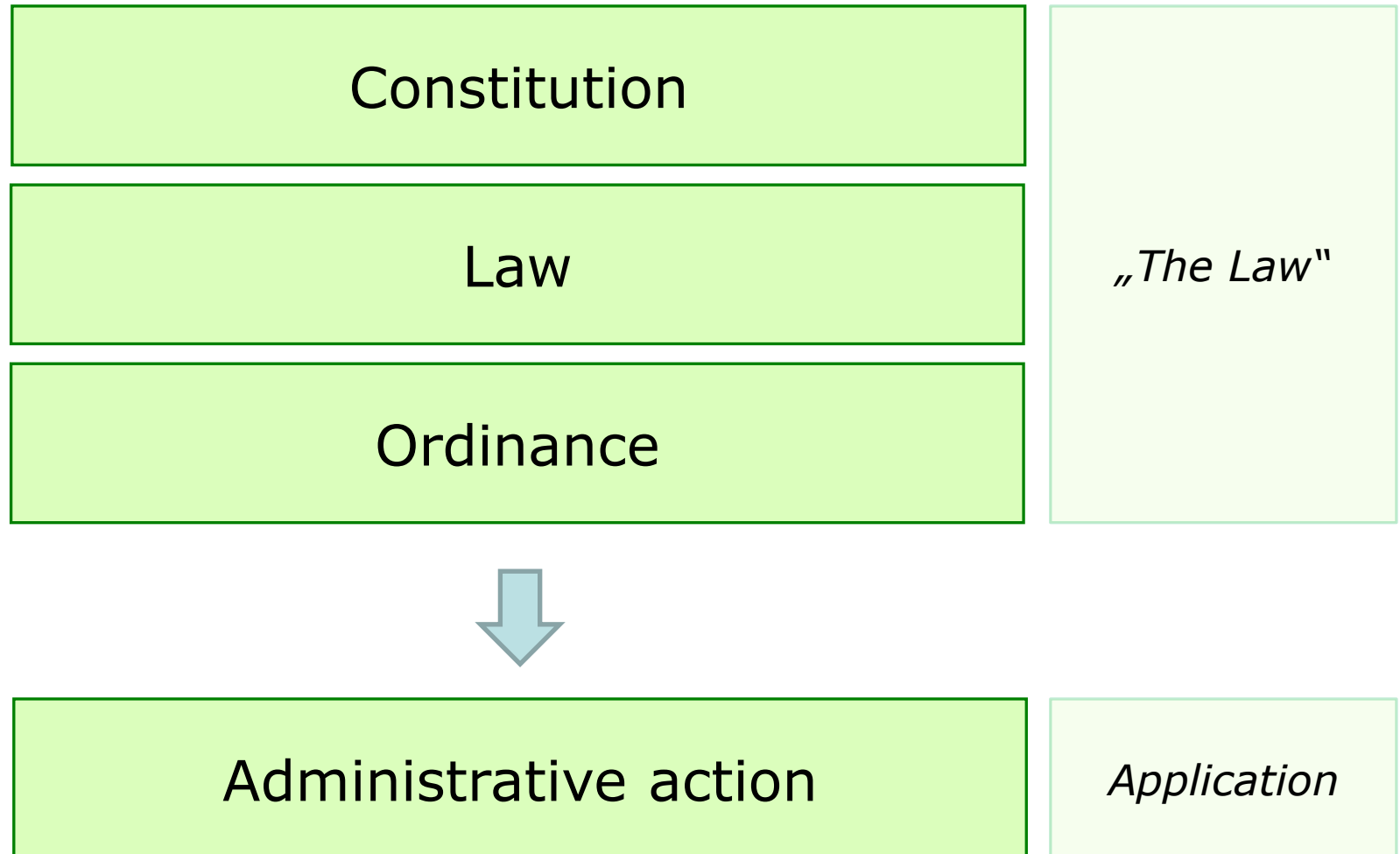
- No revocation of an administrative action
- Extension of deadlines
- Binding effect of incorrect advice: incorrect application of the law
- *Rarely*: Damages

Example 4

Piano Teacher (BGE 137 I 69)

A student failed the final exam in his training as piano teacher in front of an audience. He was allowed to take the repeat exam in camera (without audience) which was *against* the law. He passed the exam. The (public) conservatory informed him that he successfully completed the study program. Later, the competent administrative authority refused to issue the necessary diploma.

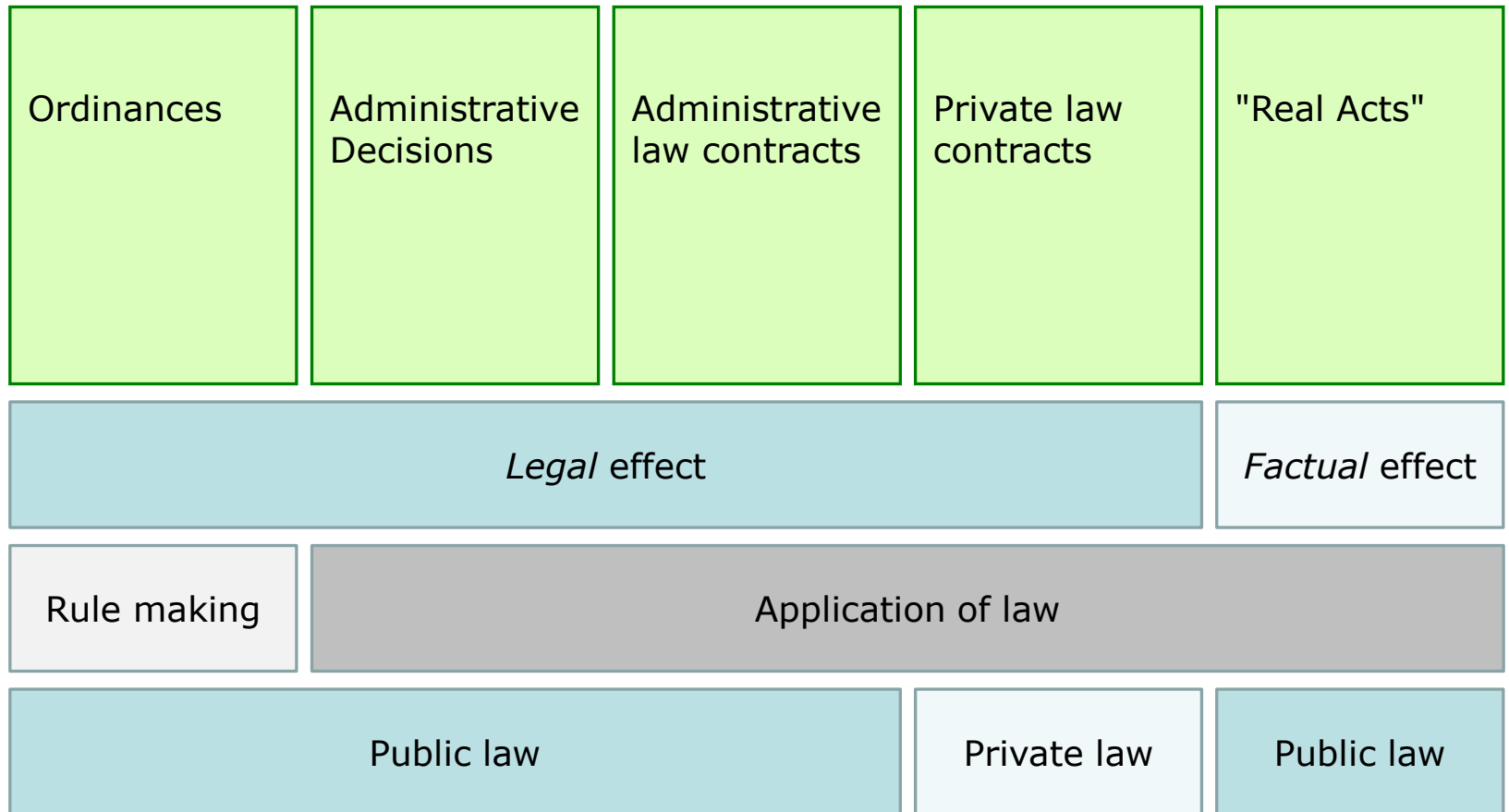
IV. Forms of Administrative Action



A. "Forms" as Means of the Administration



B. Overview



C. Administrative Decisions

Art. 5 of the Federal Act on Administrative Procedure (APA)

Art. 5

B. Definitions
I. Rulings

¹ 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.

² Rulings are also enforcement measures (Art. 41 para. 1 let. *a* and *b*), interim orders (Art. 45), decisions on objections (Art. 30 para. 2 let. *b*, 46 let. *b*, and 74 let. *b*), appeal decisions (Art. 61 and 70), decisions in a review (Art. 68) and on explanatory statements (Art. 69).²³

³ Declarations made by authorities on the rejection or raising of claims that must be pursued by taking legal proceedings do not constitute rulings.



C. Administrative Decisions

- Administrative decision as **archetype** of administration action
 - "The power to administer includes the power to issue administrative decisions."
 - Bridge and *traditionally* prerequisite for legal remedies: "No legal protection without administrative decision."

- **Elements**
 - Establishment, amendment, withdrawal of rights or obligations or finding of their (non-)existence
 - Unilateral
 - Binding and enforceable
 - Individual-concrete
 - Rooted in public law

- Consequence → Form requirements



C. Administrative Decisions

Example

Building Department
of the Canton Y
(...)

Registered Mail
X
Example street 10
(...)

Administrative Decision

Operative part

1. X must, within thirty days of this administrative decision to enter into legal force, remove the advertising sign showing (...) on the northern facade of the building on Example street 10.
2. Costs: CHF 300.-.

Merits

When the cantonal building inspector visited (...).

Instructions on the right to appeal

Against this administrative, an appeal can be lodged within ten days of receipt to the Construction Complaints Court.



D. Administrative Law Contracts

- Negotiating administrative action?
 - Administrative law contracts as the „liaison dangereuse“ of Swiss administrative law
 - Sometimes due to „psychological“ rather than legal considerations
- Stability by creation of mutual rights and obligations

Admissibility

- Law leaves room or at least does not exclude contractual regulation
- Objective reasons, i.e. contract appears as more suitable
- Consent
- Formal requirements (?)

E. Private Law Contracts

- No evasion of state obligations by „escaping into private law“
- *Still*: Acting based on private law may be **admissible** if
 - No subordination; and
 - No *immediate* fulfillment of public tasks
- Traditionally in the following areas:
 - Public procurement
 - Management of financial assets
 - Profit-oriented state action
- Demarcation from public law
 - Sovereignty/subordination? (*Subordinationstheorie*)
 - Public interest and mandate? (*Interessen- und Funktionstheorie*)
 - Consequences? (*Modaltheorie*)



F. Informal Acts (Real Acts)

- Informal acts are not *aimed* at affecting the legal situation of citizens:
 - Actions within a public school taken by teachers
 - Actions within a public hospital (surgeries etc.)
 - Police actions (patrolling, roadside checks etc.)
 - Governmental information activities
- They *can*, however, affect their legal situation nevertheless.
- Legal remedies against real acts?
 - State liability (*very difficult*)
 - New provision in the Federal Act on Administrative Procedure:
Art. 25a APA



F. Informal Acts (Real Acts)

Federal Act on Administrative Procedure, APA:

Art. 44

A. Principle⁷⁵ Any ruling shall be subject to an appeal.

Art. 25a⁵⁹

Fbis. Ruling on
real acts

¹ Any person who has an interest that is worthy of protection may request from the authority that is responsible for acts that are based on federal public law and which affect rights or obligations that it:

- a. refrains from, discontinues or revokes unlawful acts;
- b. rectifies the consequences of unlawful acts;
- c. confirms the illegality of such acts.

² The authority shall decide by way of a ruling.



Example 5

LOVE LIFE – regret nothing (BGE 144 II 233)

Yearly “LOVE LIFE”-campaign by the Federal Office of Public Health. Based on art. 25a APA, several children request the issuance of an administrative decision. They argue that their special right to be protected as children and young people (art. 11 Cst.) is affected by the campaign.

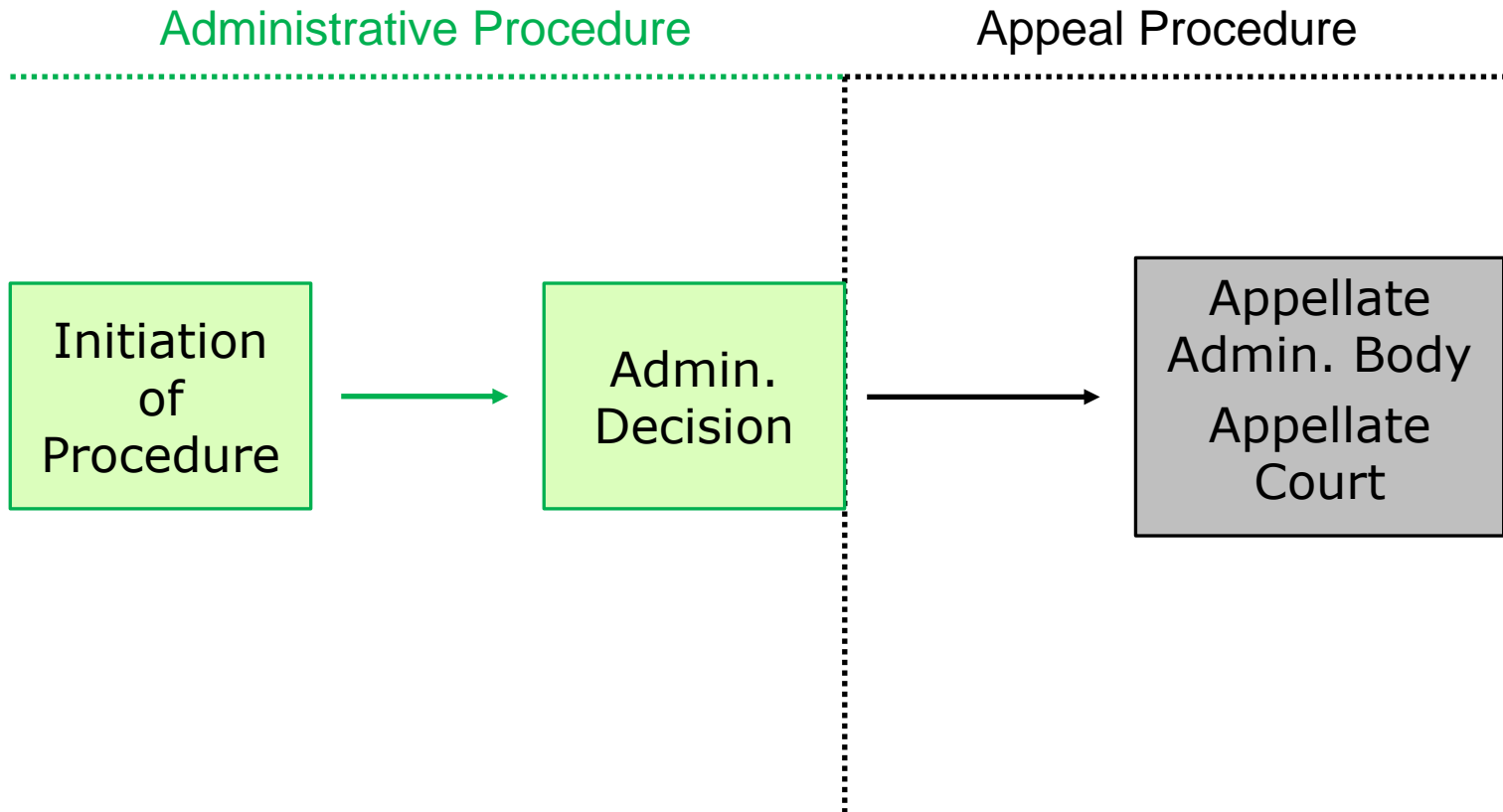
Must the Office of Public Health issue an administrative decision?



V. Administrative Procedure



A. Hinge Function of Admin. Decisions



B. Procedural Rights

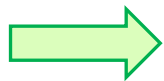
Art. 29 Cst. applies in **all proceedings** (cantonal, federal or municipal / before courts or admin. bodies)

Art. 29 General procedural guarantees

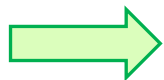
¹ Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.

² Each party to a case has the right to be heard.

³ Any person who does not have sufficient means has the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is necessary in order to safeguard their rights, they also have the right to free legal representation in court.



Right to be heard



Right to fair treatment and a decision within reasonable time



Right to legal aid and counsel

C. Right to Be Heard

Transparency

- Announcement of the content of the administrative decision
- Right to receive information on the proceedings
- Right to access the relevant documents
 - May be restricted
 - Balancing test: Preponderant public or private interests?

Right to present one's case

- Right to present one's case and be heard with one's arguments *before* issuance of administrative decision

Right to participate in the adducing of evidence

- Right to propose witnesses and other means of evidence
- Right of reply to the standpoint and filings of opposing parties (*Replikrecht*)
- etc.

Example 6

Naturalization (BGE 140 I 99)

A, B, C and D applied for citizenship in the municipality of Weiningen. The municipal naturalization committee invited them for a conversation to "get to know the applicants and their motivation for naturalization". In reality, the commission examined the suitability of the applicants and later rejected their application.

The applicants appealed against the decision and claimed that their right to fair treatment was violated by unexpectedly being examined.



D. Further Constitutional Guarantees

- Art. 30 Cst.: Additional requirements in *judicial* proceedings

Art. 30 Judicial proceedings

¹ Any person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited.

² Unless otherwise provided by law, any person against whom civil proceedings have been raised has the right to have their case decided by a court within the jurisdiction in which they reside.

³ Unless the law provides otherwise, court hearings and the delivery of judgments shall be in public.

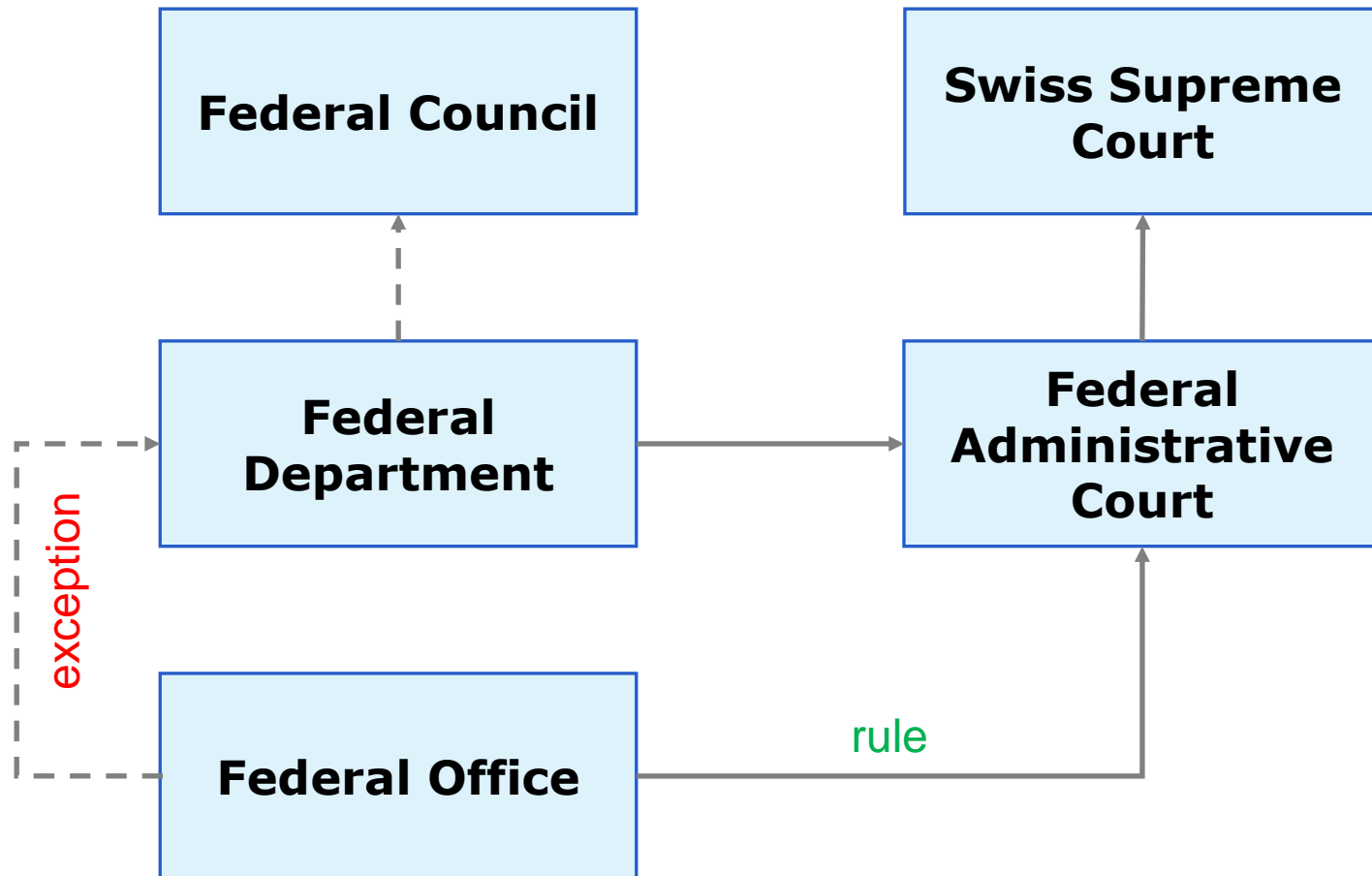
- Cf. also art. 31 Cst. (deprivation of liberty) and art. 32 Cst. (criminal proceedings)



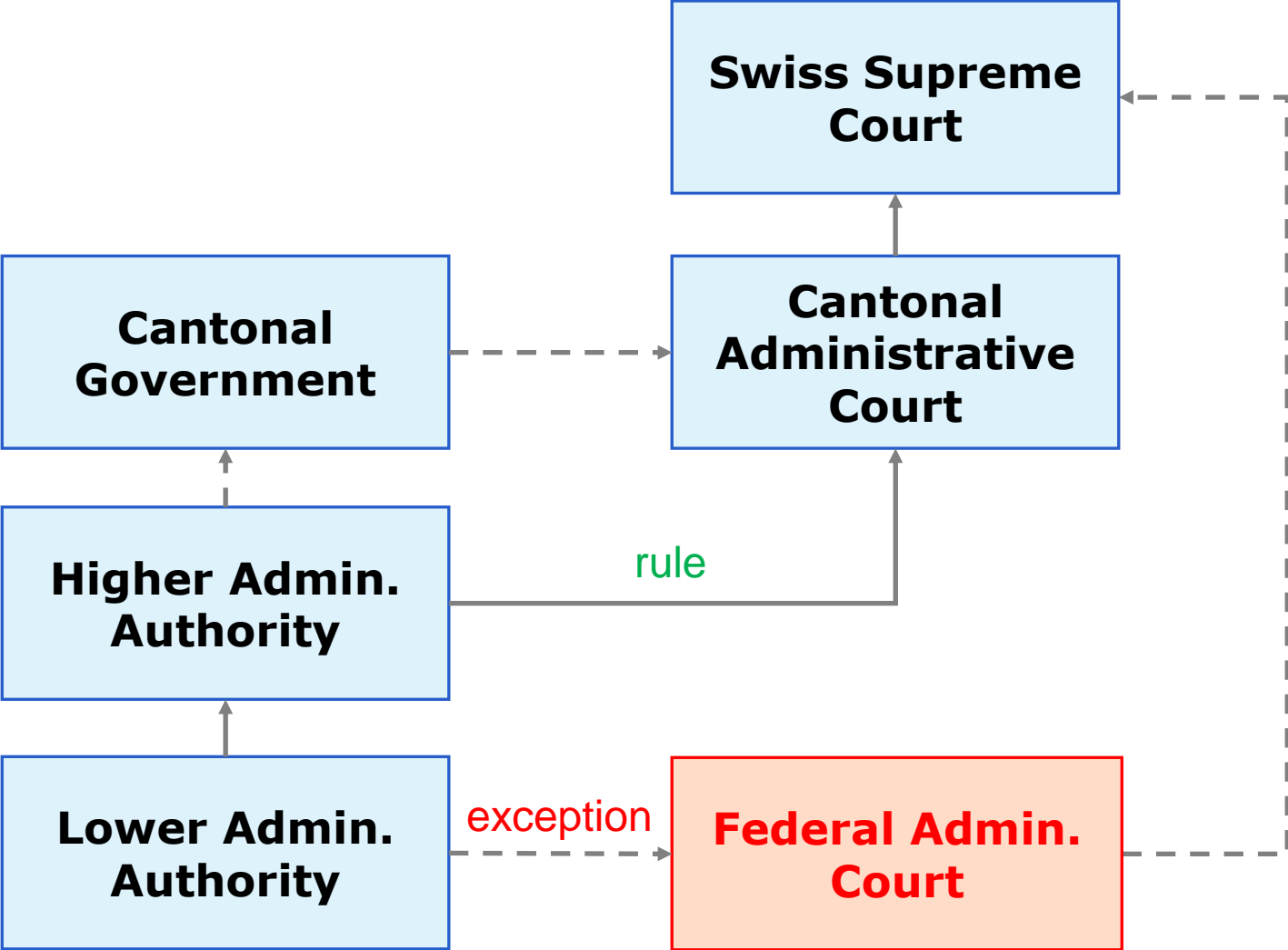
VI. Appeal Procedure



A. Appeal System before Federal Authorities



B. App' System before Cantonal Authorities



C. The Swiss Federal Supreme Court

- Situated in Lausanne and Lucerne
- 38 judges

