Universität Zürich[UZH]

Rechtswissenschaftliche Fakultät

Swiss Legal History

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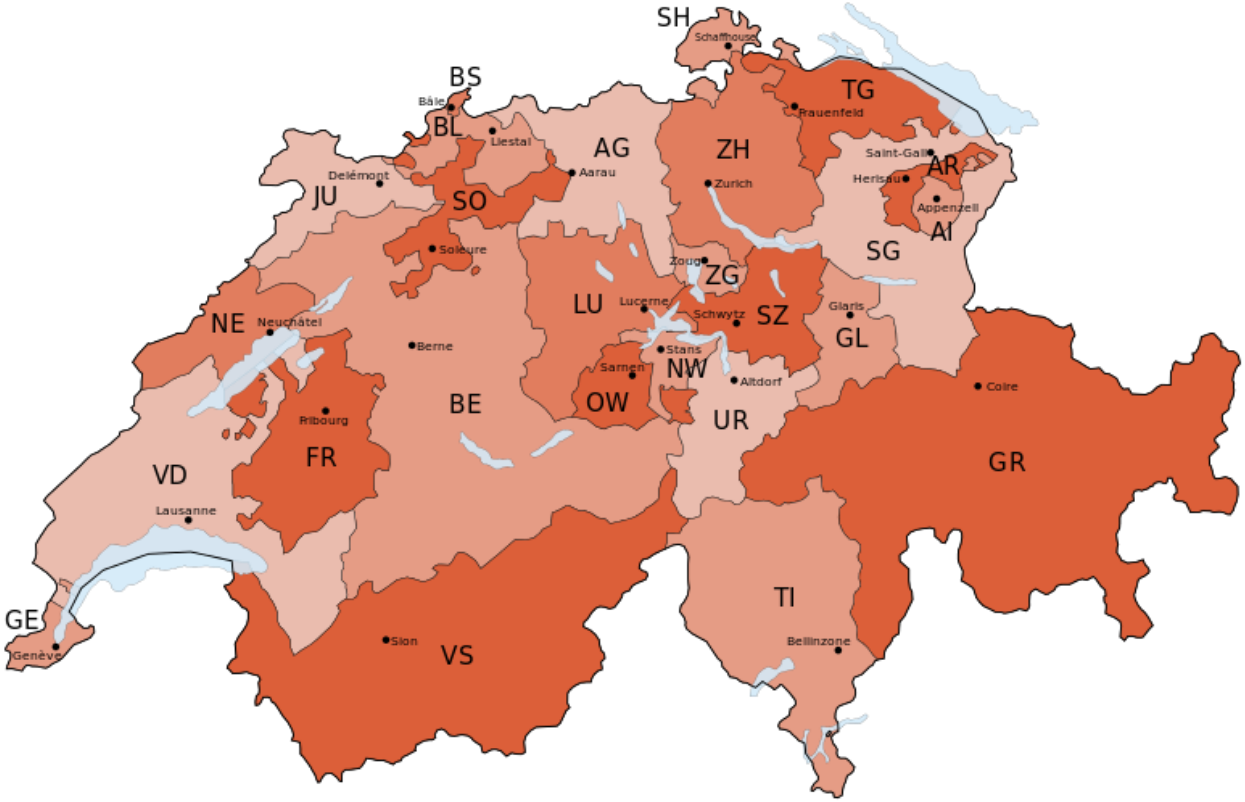
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Old Confederacy (13th/14th century-1798)

The Federal Charter of 1291 (Uri, Schwyz and Nidwalden)

“In the name of God. Amen. Public esteem and welfare presuppose that charters of peace and order be made valid henceforth. Thus, all people of the valley community of Uri, the entirety of the Schwyz valley and the community of people from the lower Unterwalden valley recognise the malice of the times and for their own protection and preservation they have promised to assist each other by every means possible with every counsel and favour, with persons or goods within their valleys and without against any and all who inflict on them or any among them acts of violence or injustice against persons or goods. And each community has solemnly sworn to universally succour the others at its own expense in order to withstand and avenge malicious attacks and wrongdoings.

They have thereby renewed the old oath of association, yet in such a manner that every man shall serve his overlord as it behoves him according to his estate. We have further unanimously vowed and established that we in these valleys shall accept no judge who has gained his office for money or for any other price and who is not our resident or native. Should disputes arise among any of the people bound by this oath, the most prudent among the confederates shall settle the conflict between the parties. All other confederates shall defend this verdict against anyone who rejects it. Above all has it been established that anyone who intentionally slays another without provocation shall be sentenced to death unless he can prove his innocence; and those who flee shall never be allowed to return. Those who conceal and protect him shall be banished from the land until they are recalled by the confederates.

Anyone who injures another confederate by fire shall forever forfeit his rights as a fellow countryman and anyone who nourishes and protects such a perpetrator shall be liable for the damages to the one injured. Anyone who steals from a confederate or injures him in any other way shall be held liable for damages to the extent of his possessions in the valleys. No confederate shall seize the goods of another for debts, unless he is recognised as his debtor or surety, and even then only with permission from his judge. Apart from that, every man shall obey his judge and, where necessary, indicate the judge in the valley before whom he must appear. Anyone who disobeys a verdict and thereby injures another confederate as a consequence shall be compelled by all other confederates to give satisfaction. Should war or conflict arise between confederates and should one party refuse to obey the verdict or to give proper satisfaction, all confederates are required to protect the acceding party. God willing, these statues shall endure forever. In witness thereof and at the request of the aforementioned parties, this charter has been created and confirmed with the seals of the three aforementioned communities and valleys. So undertaken at the beginning of the month of August in the year of the Lord 1291”.

1517 Luther's 95 thesis

1521 Excommunication of Luther

Ulrich Zwingli (1484-1531)
John Calvin (1509-1564)

1534 English Reformation (King Henry VIII): the Church of England broke with the authority of the Pope and the Roman Catholic Church

1545 – **1563** Council of Trent and Counter-Reformation

Peace of Westphalia (1648)

The Thirty Years‘ War

WHEN

1618: Austrian Habsburgs tried to impose Roman Catholicism on their Protestant subjects in Bohemia.

WHO

- Protestants against Catholics
- Holy Roman Empire against France
- German princes against the emperor and each other
- France against the Habsburgs of Spain.
- The Swedes, the Danes, the Poles, the Russians, the Dutch and the Swiss were all dragged in or dived in.

WHY

Commercial interests and rivalries played a part, as did religion and power politics.

1798-1803: Helvetic Republic

121 representatives of the territories Aargau, Basel, Berne, Fribourg, Léman (Vaud), Lucerne, Oberland, Schaffhausen, Solothurn and Zurich

met in Aarau on April, 12th 1798

Proclamation of the **Helvetic Republic**

new constitution:

- established a bicameral parliament, an executive (the board of directors), and a supreme court of justice
- “there is no longer any border between the cantons and subjected lands nor between one canton and another.”
- “unity of the home country and of the general public interest”

Centralisation

1803: Napoleons Act of Mediation

- Restored the pre-revolutionary confederate structure
- 19 cantons with constitutions of their own
- Restored Popular assemblies
- Cantons were given wide-ranging powers.

Federal Treaty (1815)

- Bundesvetrag, Pacte Fédéral

International treaty and not domestic law between 22 sovereign cantons

Its purpose was to: defend „their freedom, independency and safety“ and maintain public peace „inside“

Regeneration (1830)

- Liberal cantons vs. Conservative cantons

- 1847, violent conflict (Sonderbund War)

1848: First Federal Constitution

- Federal state with Federal Assembly
- Federal Council
- Federal Court

- cantons: rules on commercial, financial transactions, education

Federal Constitution 1874

- **Total revision of the Federal Constitution in 1874**: The Federal legislative power with regard to obligations-, commercial- and exchange law, civil capacity, copyright law, debt enforcement and bankruptcy law

Art. 64 of the Federal Constitution 1874:

(1) The Confederation is entitled to legislate

- on civil capacity,

- on all legal matters relating to commerce and movable property transactions (law of contracts and tort including commercial law and law of bills of exchange),

- on copyrights in literature and arts,

- on suits for debts and bankruptcy.

- 1891 popular initiative for revision of the Federal Constitution
- 1898: General legislative power on the federal level for civil law matters

Art. 64 of the Federal Constitution 1874:

(2) The Confederation is also entitled to legislate in the other fields of civil law.

Introduction to Swiss Law- Legal History (2 Part - Ideas in Context)

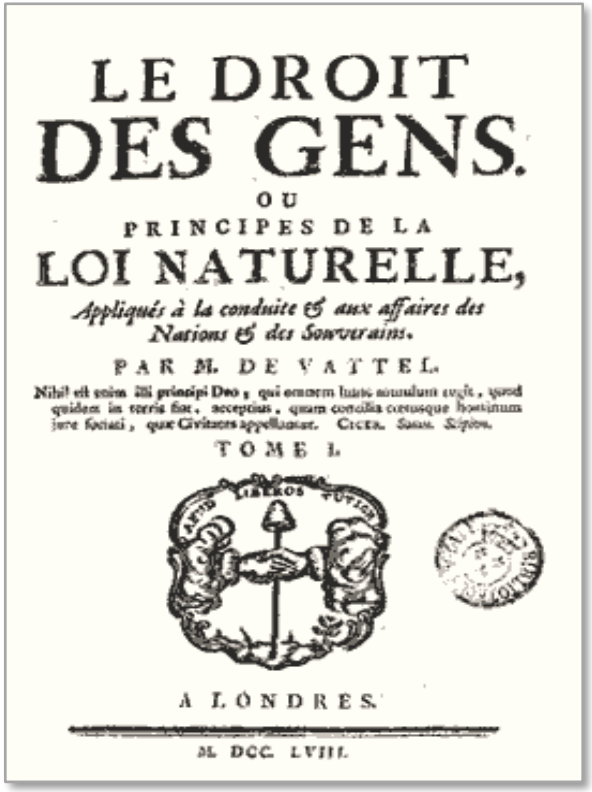
Elisabetta Fiocchi Malaspina

Overview Lecture

- Natural Law and Law of Nations in Switzerland (17th-18 Century)
- Emer de Vattel and his *Le Droit des gens* (1758)
- International humanitarian law and Swiss (19th century)
- Swiss Jurists and the codification of international law (19th century)

Emer de Vattel (1714-1767)

1758, the publication of his masterpiece



LE DROIT
DES GENS.
OU
PRINCIPES DE LA
LOI NATURELLE,
Appliqués à la conduite & aux affaires des Nations & des Souverains.
PAR M. DE VATTEL.
Nihil est enim illi principi Deo, qui omnem hunc mundum regit, quod quidem in terris fiat, acceptius, quam concilia coetusque hominum jure facti, quae Civitates appellantur. CICER. *Somn. Scipion.*
TOME I.
A LONDRES.
M. DCC. LVIII.

Le Droit des gens was published four years before *Le contrat social* of Rousseau and ten years after *Esprit de Lois* of Montesquieu.

“I was born in a country of which liberty is the soul, the treasure, and the fundamental law; and my birth qualifies me to be the friend of all nations”

Central Points of Vattel's Legal Thought

- Law of Nations
- Resolution of disputes between nations
- War in due form
- Ius in bello
- Enemies of mankind

What is the constitution of a State?

“The fundamental regulation that determines the manner in which the public authority is to be executed, is what forms the constitution of the state. In this is seen the form in which the nation acts in quality of a body-politic,—how and by whom the people are to be governed,— and what are the rights and duties of the governors. This constitution is in fact nothing more than the establishment of the order in which a nation proposes to labour in common for obtaining those advantages with a view to which the political society was established.

The perfection of a state, and its aptitude to attain the ends of society, must then depend on its constitution: consequently the most important concern of a nation that forms a political society, and its first and most essential duty towards itself, is to chuse the best constitution possible, and that most suitable to its circumstances. When it makes this choice, it lays the foundation of its own preservation, safety, perfection, and happiness:—it cannot take too much care in placing these on a solid basis”.

What is the Law of Nations?

“The Law of Nations, though so noble and important a subject, has not hitherto been treated of with all the care it deserves. The greater part of mankind have therefore only a vague, a very incomplete, and often even a false notion of it. The generality of writers, and even celebrated authors, almost exclusively confine the name of the Law of Nations to certain maxims and customs which have been adopted by different nations, and which the mutual consent of the parties has alone rendered obligatory on them. This is confining within very narrow bounds a law so extensive in its own nature, and in which the whole human race are so intimately concerned; it is at the same time a degradation of that law, in consequence of a misconception of its real origin”.

“The law of nations is the law of sovereigns. It is principally for them and for their ministers that it ought to be written. All mankind are indeed interested in it; and, in a free country, the study of its maxims is a proper employment for every citizen: but it would be of little consequence to impart the knowledge of it only to private individuals, who are not called to the councils of nations, and who have no influence in directing the public measures. If the conductors of states, if all those who are employed in public affairs, condescended to apply seriously to the study of a science which ought to be their law, and, as it were, the compass by which to steer their course, what happy effects might we not expect from a good treatise on the law of nations! We every day feel the advantages of a good body of laws in civil society:—the law of nations is, in point of importance, as much superior to the civil law, as the proceedings of nations and sovereigns are more momentous in their consequences than those of private persons”

Nations: free, independent and equal

“Since nations are free, independent, and equal,—and since each possesses the right of judging, according to the dictates of her conscience, what conduct she is to pursue in order to fulfil her duties,—the effect of the whole is, to produce, at least externally and in the eyes of mankind, a perfect equality of rights between nations, in the administration of their affairs and the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment; so that whatever may be done by any one nation, may be done by any other; and they ought, in human society, to be considered as possessing equal rights”

Independence

"Nations being free and independent of each other, in the same manner as men are naturally free and independent, the *second* general law of their society is, *that each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature*. The natural society of nations cannot subsist, unless the natural rights of each be duly respected"

Equality

"Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature – *Nations composed of men, and considered as so many free persons living together in a State of nature, are naturally equal, and inherit from nature the same obligations and rights*. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign State than the most powerful kingdom"

Henry Dunant (1828-1910)

From his *A Memory of Solferino*

"*Oh, how valuable it would have been [… to have had a hundred experienced and qualified voluntary orderlies and nurses! Such a group would have formed a nucleus around which could have been rallied the scanty help and dispersed efforts which needed competent guidance".*

Creation of the International Red Cross (1863)

First Geneva Convention, 22 August 1864

- relief to the wounded without any distinction as to nationality;
- neutrality (inviolability) of medical personnel and medical establishments and units;
- the distinctive sign of the red cross on a white ground

So called*: Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*

Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864

Art. 1. Ambulances and military hospitals shall be recognized as neutral, and as such, protected and respected by the belligerents as long as they accommodate wounded and sick. Neutrality shall end if the said ambulances or hospitals should be held by a military force.

Art. 2. Hospital and ambulance personnel, including the quarter-master's staff, the medical, administrative and transport services, and the chaplains, shall have the benefit of the same neutrality when on duty, and while there remain any wounded to be brought in or assisted.

Art. 3. The persons designated in the preceding Article may, even after enemy occupation, continue to discharge their functions in the hospital or ambulance with which they serve, or may withdraw to rejoin the units to which they belong. When in these circumstances they cease from their functions, such persons shall be delivered to the enemy outposts by the occupying forces.

Art. 4. The material of military hospitals being subject to the laws of war, the persons attached to such hospitals may take with them, on withdrawing, only the articles which are their own personal property. Ambulances, on the contrary, under similar circumstances, shall retain their equipment.

Art. 5. Inhabitants of the country who bring help to the wounded shall be respected and shall remain free. Generals of the belligerent Powers shall make it their duty to notify the inhabitants of the appeal made to their humanity, and of the neutrality which humane conduct will confer. The presence of any wounded combatant receiving shelter and care in a house shall ensure its protection. An inhabitant who has given shelter to the wounded shall be exempted from billeting and from a portion of such war contributions as may be levied.

Art. 6. Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for. Commanders-in-Chief may hand over immediately to the enemy outposts enemy combatants wounded during an engagement, when circumstances allow and subject to the agreement of both parties. Those who, after their recovery, are recognized as being unfit for further service, shall be repatriated. The others may likewise be sent back, on condition that they shall not again, for the duration of hostilities, take up arms. Evacuation parties, and the personnel conducting them, shall be considered as being absolutely neutral.

Art. 7. A distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuation parties. It should in all circumstances be accompanied by the national flag. An armlet may also be worn by personnel enjoying neutrality but its issue shall be left to the military authorities. Both flag and armlet shall bear a red cross on a white ground.

Art. 8. The implementing of the present Convention shall be arranged by the Commanders-in-Chief of the belligerent armies following the instructions of their respective Governments and in accordance with the general principles set forth in this Convention.

Swiss Jurists and the codification of international law (19th century)

Ghent, 8 September 1873:

Institut de Droit International

The main objective of the Institute expressed in its *Statute* is to contribute to the progress of international law, its codification and its progressive development

Article 1

1. The Institute of International Law is an exclusively learned society, without any official nature.

2. Its purpose is to promote the progress of international law:

a) by striving to formulate the general principles of the subject, in such a way as to correspond to the legal conscience of the civilized world;

b) by lending its co-operation in any serious endeavour for the gradual and progressive codification of international law;

c) by seeking official endorsement of the principles recognized as in harmony with the needs of modern societies;

d) by contributing, within the limits of its competence, either to the maintenance of peace, or to the observance of the laws of war;

e) by studying the difficulties which may arise in the interpretation or application of the law, and where necessary issuing reasoned legal opinions in doubtful or controversial cases;

f) by affording its co-operation, through publications, public teaching and all other means, in ensuring that those principles of justice and humanity which should govern the mutual relations of peoples shall prevail.

Founders

- Pascal Mancini (from Rome)
- Emile de Laveleye (from Liege)
- Tobie Michel Charles Asser (from Amsterdam)
- James Lorimer (from Edinburgh)
- Wladimir Besobrassof (from Saint-Petersburg)
- Gustave Moynier (from Geneva)
- Johann Caspar Bluntschli (from Heidelberg)
- Augusto Pierantoni (from Naples)
- Charles Calvo (from Buenos Aires)
- Gustave Rolin-Jaequemyns (from Ghent)
- David Dudley Field (from New York)

Gustave Moynier (1826-1910)

Gustave Moynier (1826-1910)

Moynier took a very active role in shaping the Red Cross

He proposed the creation of an international tribunal to sanction breaches of the Geneva Convention (for the Amelioration of the Condition of the Wounded in Armies in the Field)

[idea of a permanent international criminal court]

Johann Caspar Bluntschli (1808-1881)

«*It is substantially the same work as that which I early attempted with success at Zürich […] with reference to private law. The principles of that work were now only transferred to the broader field of civilised states in general, and were applied to the moving stream of international relations and legal opinions*».

Johann Caspar Bluntschli (1808-1881)

Important work:

- *Das moderne Kriegsrecht* (1866)- *The modern law of war*

The modern law of war influenced the Hague conferences of 1899 and 1907.

- *Das moderne Völkerrecht der zivilisierten Staaten* (1868)- *The Modern International Law of Civilized States*

presented a comprehensive code that was translated into several languages and became a widely used reference book for diplomatists

Bluntschli's code consisted in 862 articles:

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

Conclusion

- Ideas in the Swiss Context
- Influence of Swiss Legal Thoughts
- Central Role of Switzerland for the History of International Law