

sui generis

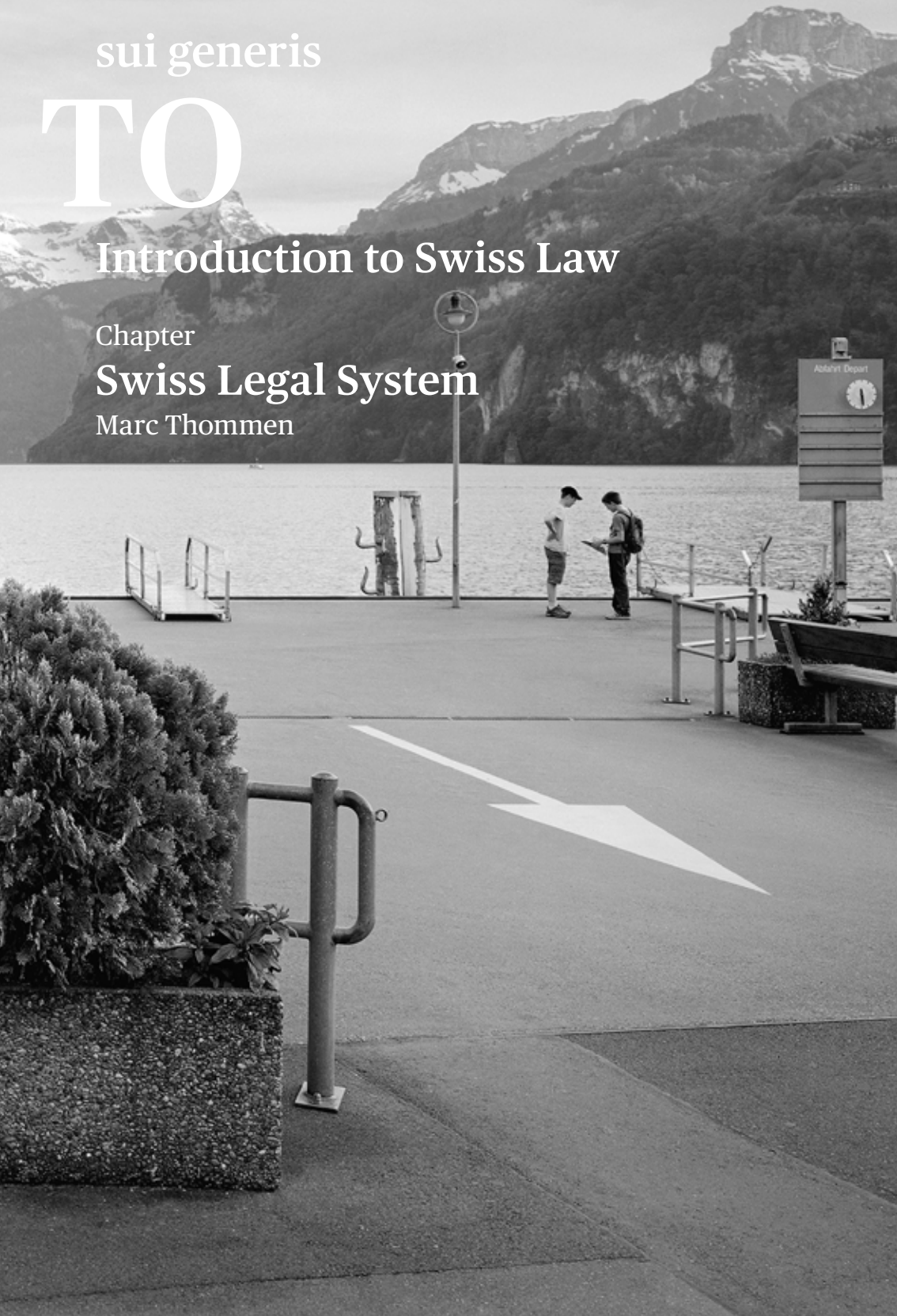
# TO

## Introduction to Swiss Law

Chapter

### Swiss Legal System

Marc Thommen





Marc Thommen

# **Introduction to Swiss Law**

Chapter

## **Swiss Legal System**

Marc Thommen



Marc Thommen

# Swiss Legal System

---

<b>I. Trivia</b> .....	<b>3</b>
------------------------	----------

---

<b>II. History</b> .....	<b>5</b>
--------------------------	----------

---

<b>III. Confederation</b> .....	<b>6</b>
<b>1. Federal Assembly</b> .....	<b>6</b>
<b>2. Federal Council</b> .....	<b>7</b>
<b>3. Federal Supreme Court</b> .....	<b>8</b>

---

<b>IV. Cantons</b> .....	<b>11</b>
--------------------------	-----------

---

<b>V. Communes</b> .....	<b>12</b>
--------------------------	-----------

---

<b>VI. Direct Democracy</b> .....	<b>13</b>
<b>1. Federal Level</b> .....	<b>13</b>
<b>2. Cantonal Level</b> .....	<b>15</b>
<b>3. Communal Level</b> .....	<b>16</b>

---

<b>VII. Legislative Process</b> .....	<b>17</b>
---------------------------------------	-----------

---

<b>VIII. Case Citation</b> .....	<b>20</b>
<b>1. Official Compilation</b> .....	<b>20</b>
<b>2. Online Publication</b> .....	<b>22</b>
<b>3. Public Pronouncement</b> .....	<b>24</b>
<b>4. Press Releases</b> .....	<b>24</b>

---

<b>Selected Bibliography</b> .....	<b>25</b>
------------------------------------	-----------

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 legislative process (VII.) and the citation and publication of the case law (VIII.) are examined.

---

1 For an excellent (official) introduction see: The Swiss Confederation—A Brief Guide, 2022 ([perma.cc/KSJ9-TX5S](https://perma.cc/KSJ9-TX5S)).

# I. Trivia

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, 62% of all Swiss inhabitants speak (Swiss) German, 23% French, 8% Italian, and 0.5% Romansh.

Article 4 of the Constitution of the Swiss Confederation states: “*The National Languages are German, French, Italian, and Romansh.*”<sup>2</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>3</sup> Romansh-speaking individuals can address cantonal or federal authorities in Romansh.

The Confederation spreads over 41,000 kilometres squared (km<sup>2</sup>),<sup>4</sup> making it just a little bit bigger than Bhutan (38,000 km<sup>2</sup>) and little smaller than the Netherlands (41,500 km<sup>2</sup>). In 2020, Switzerland reported a GDP of USD 752 Billion, which, according to an International Monetary Fund ranking, placed Switzerland at the 19<sup>th</sup> position worldwide. Further, in terms of its GDP *per capita* of around USD 87,000, Switzerland ranked in second place, closely following Luxembourg.<sup>5</sup>

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. Near Geneva, on the Swiss and French border, is the European Organization

---

2 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution [www.fedlex.admin.ch \(perma.cc/7ARN-UVSH\)](http://www.fedlex.admin.ch/perma.cc/7ARN-UVSH).

3 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.fedlex.admin.ch \(perma.cc/MZZ9-MH77\)](http://www.fedlex.admin.ch/perma.cc/MZZ9-MH77).

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

5 World Bank Data.

for Nuclear Research (CERN),<sup>6</sup> an institution operating the largest particle physics laboratory in the world and famously credited with having invented the internet.<sup>7</sup>

Switzerland 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 26<sup>th</sup> out of 38 OECD countries for gender inequality in salaries, with a difference of around 15%. 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>8</sup>

---

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

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

8 You can find these and more interesting facts about Switzerland on [www.expatica.com](http://www.expatica.com) ([perma.cc/2CWD-2U66](https://perma.cc/2CWD-2U66)); The Swiss Confederation—A Brief Guide, 2022 ([perma.cc/KSJ9-TX5S](https://perma.cc/KSJ9-TX5S)).



## II. History

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*”, a commons near Seelisberg/Uri. This legend also made its way into FRIEDRICH SCHILLER’s drama of William Tell (1804). Today, the date of Switzerland’s national holiday is the 1<sup>st</sup> of August.

The modern Swiss federal state 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, most of the founding fathers recognised that a centralised political system 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, they drew up a constitution for a Swiss federal state. Its two main features were (and still are) the separation of powers at the federal level (III.) and the sovereignty of the cantons (IV.).<sup>9</sup>

---

9 This topic is discussed in more detail in the chapter on Legal History, pp. 27.

# III. Confederation

As will be explained in greater detail by MATTHIAS OESCH in the chapter on Constitutional Law,<sup>10</sup> the Swiss federal state is defined by its three levels of government: the Confederation, the cantons, and the communes.<sup>11</sup> The Confederation is the top level. Only tasks that the cantons are unable to perform or that need uniform regulation are allocated to the Confederation (Article 43a Constitution). The Confederation is responsible for inter alia 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.

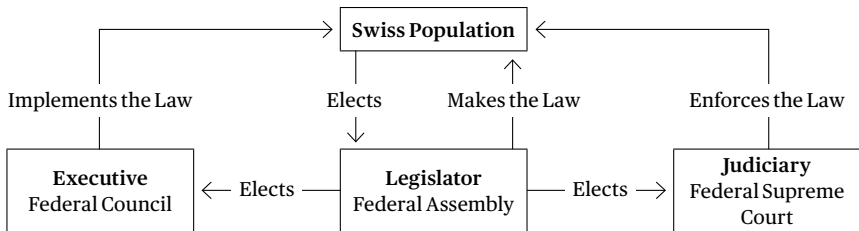


Figure 1: Separation of Powers in Switzerland

## 1. Federal Assembly

Following the example of the Constitution of the United States of America, Switzerland has a bicameral system for the Federal Assembly with the National Council acting as the “House of Representatives” and the Council of States as the “Senate”. The Federal Assembly is the supreme authority of the Confederation. It resides in Bern.<sup>12</sup>

<sup>10</sup> See chapter on Constitutional Law, pp. 113.

<sup>11</sup> See Title 3 of the Constitution (“Confederation, Cantons and Communes”).

<sup>12</sup> Article 32 I of the Federal Act on the Federal Assembly of 13 December 2002 (Parliament Act, ParlA), SR 171.10; see for an English version of the Parliament Act [www.fedlex.admin.ch](http://www.fedlex.admin.ch) (perma.cc/7YDF-CY3T).

The *National Council* is composed of 200 representatives of the people. 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 12 and Glarus sends only one. General elections are held every four years.

In the *Council of States* there are 46 representatives of the cantons (Article 150 I Constitution). 20 cantons get to appoint two delegates, six mostly smaller cantons only have one vote in the Council of States.<sup>13</sup>

Both chambers are of equal standing. 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. It is the head of the Federal Administration and also resides in Bern.<sup>14</sup> The seven members of the Federal Council act as the government of Switzerland. They are elected by the two chambers of the Federal Assembly for a term of four years.<sup>15</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. Federal Councillors cannot be impeached.<sup>16</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, 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 of the Confederation primarily has a representative task.

---

13 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’]”.

14 Article 58 of the Government and Administration Organisation Act of 21 March 1997 (GAOA), SR 172.010; see for an English version of the Organisation Act [www.fedlex.admin.ch/perma.cc/QUS6-GJUR](http://www.fedlex.admin.ch/perma.cc/QUS6-GJUR)

15 See Articles 174 et seqq. Constitution.

16 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).

### 3. Federal Supreme Court

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 six 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. 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 concerns over judicial independence and discrimination against non-party members.<sup>17</sup>

Re-election of Federal Supreme Court Justices is possible and indeed standard. 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. However, in recent years interference with judicial impartiality has increased at re-elections to the bench of the Federal Supreme Court. In 2020 the Swiss People's Party recommended that their own Justice YVES DONZALLAZ should not be re-elected because he did not decide cases in line with the party politics.

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,<sup>18</sup> the two social law divisions reside in Lucerne.

The Federal Supreme Court is the supreme judicial authority of the Confederation (Article 188 I Constitution). Its two main tasks are to supervise the uniform application of the federal law and to protect individual constitutional rights.

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, as it did, for example, in the case of the surveillance measures of the Police

---

17 See for example: GRECO—Group of States against Corruption / Council of Europe, Second Compliance Report of Fourth Evaluation Round, Corruption prevention in respect of Members of Parliament, Judges and Prosecutors, Evaluation Report, Switzerland, adopted by GRECO at its 87<sup>th</sup> Plenary Meeting, Strasbourg, 22-25 March 2021 ([perma.cc/8X6N-WQAU](https://perma.cc/8X6N-WQAU)), p. 8.

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

Act of the Canton of Zurich.<sup>19</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 as well as the checks and balances operating between the branches of government, this restriction on 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.

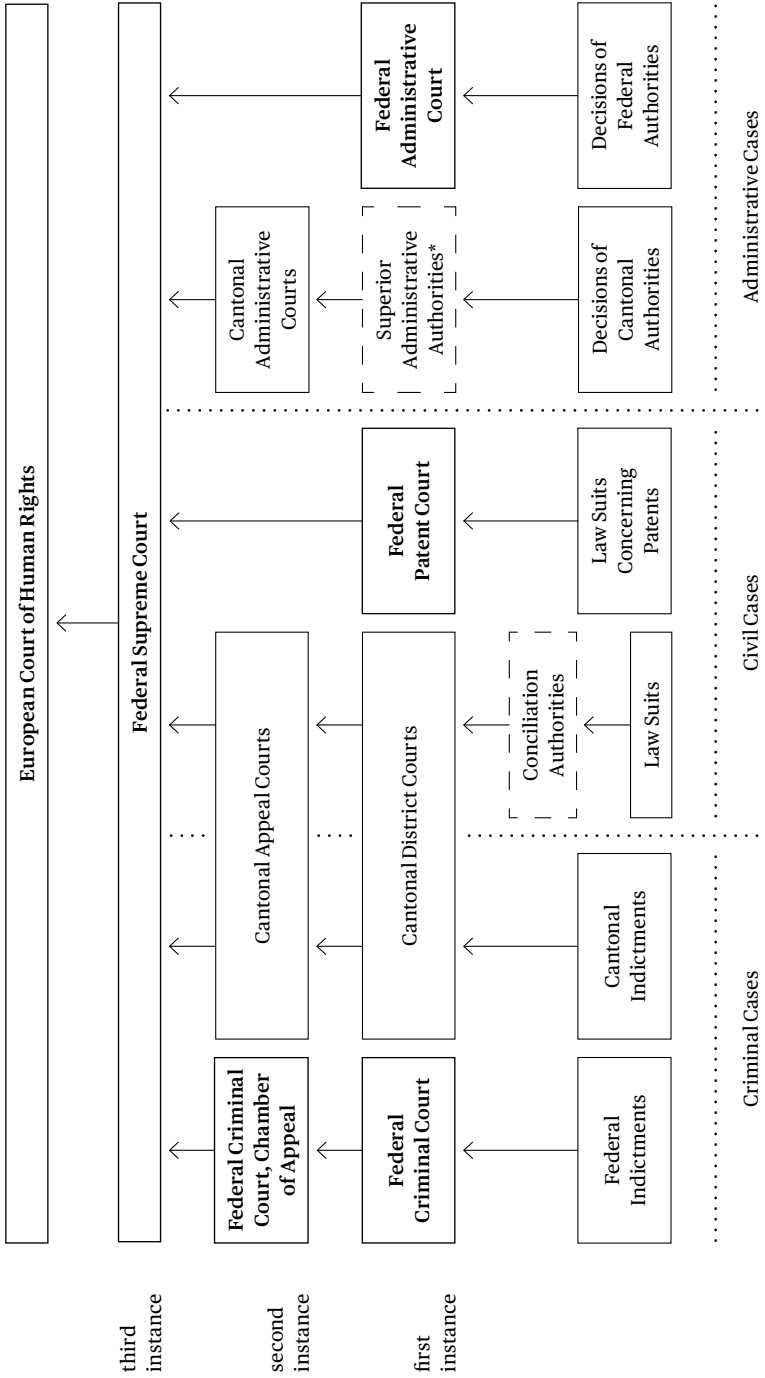
In 2021, the Federal Supreme Court decided 7,509 cases. Most of these cases (4,199) were decided by a panel of three Justices. In 549 important cases a panel of five Justices sat on the case. 2,761 cases, which were clearly inadmissible or manifestly ill-founded, were decided by one Justice. In every case, one Justice is charged with drawing up the judgment. Thus, on average each one of the 38 Justices is responsible for drafting 197 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 in which 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. Although the law allows for a hearing, the parties de facto never get to plead their case orally at the Court. The Court decides most cases by way of circulation. This means that the draft judgment 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 deliberation on the case. Thus, the “public hearings” that take place at the Supreme Court are not actual hearings, but public deliberations. 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 deliberation presents an alternative opportunity for them to utter such opinions.<sup>20</sup> Such public sessions are very rare in practice (less than 1% of the cases in 2021).

---

19 DFC 136 I 87.

20 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.



\*Varying systems from canton to canton.

Figure 2: Swiss Court Hierarchy<sup>21</sup>

## IV. Cantons

Understanding the role of the cantons is key in being able to understand the Swiss federal system. The Constitution of 1848—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). Traditionally, there were only a limited number of tasks vested in the Confederation. In recent years, however, the Confederation has assumed greater responsibility for example in civil and criminal procedural law.

Each canton must provide for a democratic system of government (Article 51 Constitution). 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. 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. For example, a cantonal government (executive) issues permits to build houses. If such a permit is refused 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.

## V. Communes

At the third layer of the Swiss federal landscape are the communes, i.e. cities and villages. In 2021, there were 2,172 communes in Switzerland. The City of Zurich is the largest commune (ca. 415,000 inhabitants) and the village of Kammersrohr is the smallest (28 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 and the local police. 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 acts as the legislative body. They decide on the statute (“constitution”) of the commune and elect the local government or mayor.<sup>22</sup>

---

22 The Swiss Confederation—A Brief Guide, 2022 (perma.cc/KSJ9-TX5S), 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 then be examined separately. A more thorough examination of direct democracy within Switzerland will be undertaken in MATTHIAS OESCH's chapter on Constitutional Law.<sup>23</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 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>24</sup>

The importance of the *coniuratio* in the narrative of the Swiss nation 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 must be also of legal age, i.e. 18 years, and must not “*lack legal capacity due to mental illness or mental incapacity*” (Article 136I Constitution).<sup>25</sup> Dual citizens are allowed to vote, as are Swiss citizens who live abroad. In contrast, as already mentioned, foreigners who live, work, and

---

23 See chapter on Constitutional Law, pp. 113.

24 See chapter on Legal History p. 32.

25 See also Article 2 of the Federal Act on Political Rights of 17 December 1976 (PRA), SR 161.1; see for an English version of the PRA [www.fedlex.admin.ch \(perma.cc/BT37-GZJU\)](http://www.fedlex.admin.ch/perma.cc/BT37-GZJU).

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>26</sup> this total exclusion of foreigners (25% of population) from political participation is questionable. However, the darkest chapter in the history of political rights in Switzerland remains women's suffrage. On the federal level, women only obtained the right to vote in 1971.

Direct democracy is commonly defined as a political system in which 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 Constitution). Only when the majority of the Swiss cantons and people approve the amendment does it gain legal force. For example, on 30 September 2016, the Federal Assembly decided to simplify regulations on the naturalisation of third generation immigrants and stateless children. To fulfil this, the legislator had to change Article 38 of the Constitution and submit it 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>27</sup>

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. 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 had gathered over 113,000 signatures in support of the initiative. The Federal Council and the Federal Assembly recommended that the people 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 20 cantons

---

26 See the article "Becoming a citizen" on: [www.swissinfo.ch](http://www.swissinfo.ch/perma.cc/Y6QP-URFS) (perma.cc/Y6QP-URFS).

27 Federal Gazette No. 17 of 2 May 2017, pp. 3387 (BBl 2017 3387).

approved the initiative. Since 1893, a total of 227 popular initiatives have been put to the vote, but only 25 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 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 (i.e. it is not top-down in the manner set out above). 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.<sup>28</sup> Since 1875, 84 of the 203 “referenda” have been successful, thus bringing down laws passed by the legislator.<sup>29</sup>

## 2. Cantonal Level

At the cantonal level women’s suffrage was an even darker chapter: 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>30</sup>

Article 51 I of the Federal Constitution obliges the cantons to provide a democratic constitution which must be subject to the approval of the people through a mandatory referendum, and which the people must be able to revise via a popular initiative. The specific requirements concerning 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 (Articles 23 and 24 Constitution/ZH).<sup>31</sup>

---

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

---

29 The Swiss Confederation – A Brief Guide, 2022 ([perma.cc/KSJ9-TX5S](https://perma.cc/KSJ9-TX5S)), p. 22.

---

30 For an in-depth discussion of DFC 116 Ia 359, see chapter on Constitutional Law, pp. 133.

---

31 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

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. In the Canton of Zurich, 3,000 eligible people can request that cantonal acts be submitted to a vote of the people (“*optional referendum*”). In Zurich any 6,000 eligible people can also 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: new large public investments are submitted to the public for approval.<sup>32</sup> In the Canton of Zurich, the financial referendum can be held on an optional basis against new one-time investments of more than 4 Million Francs as well as against new recurring investments of more than 400,000 Francs annually.

Furthermore, one of the oldest forms of direct democracy in Switzerland is the “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, notably, conflicts with the constitutional right to submit a secret vote. Today, the Cantons of Appenzell Innerrhoden and Glarus are the only remaining cantons using this form of direct democracy.

### 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 that there shall be an initiative, a referendum, and a right to make requests on communal level. As explained above (V.), in most Swiss villages it is the communal assembly, a personal reunion of all citizens, that is the legislative body.<sup>33</sup> Thus, the citizens of these communes directly decide on the statute of the commune and elect their local government or president.

---

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).

---

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

33 These communal assemblies must not be confused with the “cantonal assemblies” of Glarus and Appenzell Innerrhoden discussed in VI.2.

## VII. Legislative Process

How are laws made in Switzerland?<sup>34</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 full-fledged marriage for same-sex partners. The proposals were submitted to a first national consultation procedure.<sup>35</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>36</sup>

Most participants of the consultation favoured the introduction of registered partnerships 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.

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 to the Federal Assembly.<sup>37</sup>

At the Federal Assembly, the draft on registered partnerships 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 whether 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, then handed the amended draft to the Council of States.

---

34 See also: The Swiss Confederation – A Brief Guide, 2022 ([perma.cc/KSJ9-TX5S](https://perma.cc/KSJ9-TX5S)), pp. 32.

35 Article 21 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.fedlex.admin.ch](http://www.fedlex.admin.ch) ([perma.cc/N2ER-4CCH](https://perma.cc/N2ER-4CCH)).

36 Article 4 Consultation Procedure Act.

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

The Council of States then 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 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>38</sup> The two issues that were fiercely contested during the parliamentary debate were whether to allow same-sex couples to adopt children and whether to grant them access to in-vitro fertilization (IVF). Both questions were answered in the negative.

Following the Federal Assembly's decision, the act had to be published in the Federal Gazette.<sup>39</sup> The Federal Gazette is the official journal of the Confederation. Preliminary drafts and drafts of federal acts, as well as explanatory reports and the Federal Council's dispatches, must all be published in the Federal Gazette. With the act's official publication, the 100-day period for any 50,000 Swiss citizens to demand an optional "referendum" commenced. At this stage, the Evangelical People's Party of Switzerland led the opposition against the 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 act would end the discrimination that same-sex couples faced on matters like inheritance and social security benefits. On 5 June 2005, the national poll was held. 58% of the Swiss electorate voted in favour of registered partnerships.<sup>40</sup> The voter turnout was 56.5%. The Federal Council set the act's date of entry into force as 1 January 2007.

The movement to improve the legal status of same-sex couples did not stop in 2007. On 18 December 2020 Parliament passed the "marriage for all" Act. This act allows lesbian and gay couples to marry and adopt children. Conservative parties tried to fight this act in a referendum. However, on 26 September 2021 64% of Swiss voters accepted the "marriage for all" Act. This act will enter into force on 1 July 2022.

For a federal law to be properly enacted, it must be published in the official compilation of federal legislation. It is through this publication that federal acts acquire binding legal force.<sup>41</sup> The official compilation is a chronological

---

38 Federal Act on the Registered Partnership for Same-Sex Couples of 18 June 2004 (Partnership Act), SR 211.231 ([perma.cc/B65A-LPZ8](https://perma.cc/B65A-LPZ8)).

39 Federal Gazette No. 25 of 29 June 2004, p. 3137 (BBl 2004 3137).

40 Federal Gazette No. 34 of 30 August 2005, p. 5183 (BBl 2005 5183).

41 In Switzerland, it is now the digital version (as opposed to the paper version) which is the legally binding version.

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. This compilation lists all federal laws according to their content. The numeration starts with 1, constitutional law: the Swiss Federal Constitution is classified with the code 101. Private law acts are all assigned numbers starting with 2: the civil code is classified with the number 210. Family Laws are enumerated starting at 211. As the Act on Registered Partnerships mainly concerns the family law status of same-sex partners, it was allocated the number 211.231. Giving an act its own unique number allows for the unequivocal identification of all federal acts. Numbers starting with “0.” 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 0.101, for example.

## VIII. 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>42</sup>

The Federal Supreme Court has a statutory duty to ensure the public are informed as to its jurisprudence. According to the Supreme Court's own rules of procedure,<sup>43</sup> this information can be provided in four different ways: in the official compilation (1.), on the internet (2.), by making judgments physically accessible to the public (3.), and through press releases (4.).

### 1. Official Compilation

The Federal Supreme Court publishes landmark cases in its *official compilation* of decisions. 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>44</sup> By virtue of their publication in the official compilation, decisions are regarded as binding precedents. The decisions included in the official compilation are edited, printed, and published in yearly volumes. They are cited as DFC, e.g. "DFC 113 IV 58".<sup>45</sup> "DFC" stands for Decision of the Federal [Supreme] Court.<sup>46</sup>

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. Thus, using the example of DFC 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:

---

42 For the citation of cases by the European Court of Human Rights see their guidelines ([perma.cc/XWF2-5PLD](https://perma.cc/XWF2-5PLD)).

---

43 Article 57 Regulations for the Federal Supreme Court of 20 November 2006, SR 173.110.131.

---

44 See pp. 18.

---

45 For a discussion of the merits of this "rolling stones" case see chapter on Criminal Law, p. 425.

---

46 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 (DTE).



- 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>47</sup>

Thus, for example, DFC 113 IV 58 is a case regarding criminal law (in this particular case, co-offending in negligent homicide). The last group of digits designates the relevant page(s) within the volume, so in this example, p. 58. Sometimes more specific citations can be found, for example: DFC 113 IV 58 c. 2 (60). Here, the citation only refers to consideration No. 2 of the judgment on page 60.

As previously mentioned, it is only the landmark cases that are published in the official compilation. In 2021, the Swiss Federal Supreme Court handled 7,509 cases: only 233 (3%) 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; 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>48</sup> The language used in the proceedings at the Federal Supreme Court is usually determined by the language used in the cantonal proceedings. There are no official translations of the Supreme Court decisions.<sup>49</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 have deemed most relevant in the case. To get access to the full judgment, one needs to know the case number which—from volume DFC 128 (2005) onwards—can be found on the

---

47 In the volumes DFC 98 to DFC 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.

---

48 Federal Supreme Court decisions in Romansh are extremely rare. See for example: DFC 122 193.

---

49 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.

header of the officially published decisions (see below 2.). The full versions of the pre-2005 decisions are much harder to find.

## 2. Online Publication

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 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>50</sup> are accessible at the Court’s (still) not very user-friendly homepage.<sup>51</sup> Up to this day the Court only publishes its final judgements; not its interim ones. Further, there are several thousand decisions from the 1990s that the Court possesses in electronic form but, for no obvious reason, refuses to make publicly available.

Nowadays the final decisions can be found on the homepage in their complete version, 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).

---

50 Listed under the enigmatic header of “further decisions from 2000 onwards” (“weitere Urteile ab 2000”; [perma.cc/Y2PW-BNV9](https://perma.cc/Y2PW-BNV9)).

51 See the official site of the Federal Supreme Court [www.bger.ch](http://www.bger.ch) ([perma.cc/NRA3-CL7T](https://perma.cc/NRA3-CL7T)), or, for a significantly more user-friendly version, this privately run site: [www.bger.li](http://www.bger.li) ([perma.cc/52DF-9KY4](https://perma.cc/52DF-9KY4)).

Every case is assigned a specific case number (such as 6B\_266/2021).<sup>52</sup> The first digit indicates by which chamber the case was decided:

- 1 = 1<sup>st</sup> Chamber of Public Law
- 2 = 2<sup>nd</sup> Chamber of Public Law
- 3 = not yet attributed
- 4 = 1<sup>st</sup> Chamber of Civil Law
- 5 = 2<sup>nd</sup> Chamber of Civil Law
- 6 = Chamber of Criminal Law
- 7 = not yet attributed
- 8 = 1<sup>st</sup> Chamber of Social Law
- 9 = 2<sup>nd</sup> Chamber of Social Law

The following capital letter relates to the type of procedure:

- A = Complaint in civil matters
- B = Complaint in criminal matters
- C = Complaint in public law matters
- D = Subsidiary constitutional complaint
- E = Competence dispute, civil claims
- F = Review
- G = Rectifications

Lastly, the digits after the underscore are linked to the chronology of the decision. Hence, the case number 6B\_266/2021 indicates that this case was the 266<sup>th</sup> complaint, relating to a criminal matter, in 2021 and which was assigned to the criminal law chamber of the Federal Supreme Court. The case was decided on 21 October 2021 by the Federal Justices Christian Denys (at the time president of the Criminal Law Chamber), Giuseppe Muschietti and Sonja Koch. Andreas Traub was the law clerk on this case. “A” was the defendant. The responding party was the public prosecutor of the Canton of Schwyz. According to the citation guidelines of the Federal Supreme Court, this “ordinary” case is to be cited as follows: Judgment of the Federal Supreme Court 6B\_266/2021 of 21 October 2021.

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

---

52 This numeration only applies to cases that were decided after the enactment of the Federal Supreme Court Act on 1 January 2007.

is not true for the remaining 97% 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.

### 3. Public Pronouncement

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 publications are anonymised:<sup>53</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 public to find out whether a judgment had been rendered against a specific person. Only on the very rare occasion of a public deliberation, i.e. in less than 1% of all cases, were the names of the parties publicised. Thus, acknowledging the problem, the Court found a compromise. For four weeks after a decision is taken, the judgments of the Federal Supreme Court are put at public disposal, without any anonymisation. 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. Anyone 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).

---

<sup>53</sup> 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. DFC 87 IV 13, OERTLY v. PUBLIC PROSECUTOR OF THE CANTON OF ZURICH), in recent years the Court has increasingly anonymised its written judgments.

## **Selected Bibliography**

The Swiss Confederation, Federal Chancellery—A Brief Guide, 2022 ([perma.cc/KSJ9-TX5S](https://perma.cc/KSJ9-TX5S))

FRANCOIS DESSEMONTET / TUGRUL ANSAY, *Introduction to Swiss Law*, 3<sup>rd</sup> edition, The Hague 2004

ANDREAS LADNER, *Switzerland: Subsidiarity, Power-Sharing, and Direct Democracy*, in: Frank Hendriks / Anders Lidstrom / John Loughlin (eds.), *The Oxford Handbook of Local and Regional Democracy in Europe*, Oxford 2010

026

# INTRODUCT SWISS LAW



Authors: Kern Alexander, Ruth Arnet, Martina Becker, Elisabetta Fiocchi Malaspina, Christoph Beat Graber, Tina Huber-Purtschert, Caroline Kopp, Luisa Lichtenberger, Matthias Mahlmann, Sophie-Katharina Matjaz, Matthias Oesch, Peter Georg Picht, Giulia Rossi, David Roth, Madeleine Simonek, Goran Studen, Andreas Thier, Marc Thommen and Felix Uhlmann

sui generis

ISBN 978-3-907297-26-1

DOI 10.38107/026