

INTRODUCTION TO SWISS LAW

EDITED BY
F. DESSEMONTET
AND
T. ANSAY

KLUWER

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GENERAL EDITORS OF THE SERIES

Tuğrul Ansay,

Professor of Law, University of Ankara

and

Don Wallace, Jr.

*Professor of Law and Director,
International Law Institute, Georgetown University
of Counsel, Wald, Harkrader & Ross*

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General Introduction

It is the intention that the following work is to be a part of the series of introductory books to the laws of various countries. The whole project is intended to prepare books which follow basically the same plan for each country. The books in the series are not designed to be definitive texts on the law of any country. Rather, they will attempt to provide academics, lawyers, businessmen, administrators, government officials, students and others with the basic knowledge of legal concepts of the country in broader terms, with special emphasis on practical issues, so that the interested persons will be able to understand the system and pursue research on special legal problems by knowing the proper questions to ask and the proper place to find the answer.

We would like to thank all those who have assisted us in this series, particularly George Spina, former executive director, and acting deputy director of the International Law Institute at the Georgetown University Law Center in Washington, D.C.

General Editors:

Tuğrul Ansay, Dr.jur., M.C.L.,
LL.M., Professor of Law, University
of Ankara

Don Wallace, Jr., Professor of Law
and Director, International Law
Institute, Georgetown University, Of
Counsel, Wald, Harkrader & Ross

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Tuğrul Ansay
University of Ankara

François Dessemondet
University of Lausanne

Abbreviations

Am.J.Comp.L.	American Journal of Comparative Law, Berkeley, California
APLA Q.J.	APLA Quarterly Journal, Arlington, Virginia
Art.	Article
AS	} Official compilation of Federal Laws and Decrees
ROLF	
ATF	} Official compilation of Judgments of the Federal Tribunal
JFT	
RO	
BGE	
Austl.Tax Rev.	Australian Tax Review, Sydney, Australia
BB	} <i>Bundesblatt/Feuille Fédérale</i>
FF	
BG	<i>Bundesgesetz</i> (Federal Law)
CC	} Civil Code
ZGB	
CCP	Code of Civil Procedure
CCrP	Code of Criminal Procedure
Cf.	Compare
CO	} Code of Obligations
OR	
Comp.	Compare
Cons.	Constitution
ECHR	European Convention on Human Rights
FC	Federal Constitution
Ind. & Lab.Rel.Rev.	Industrial and Labor Relations Review, Cornell Univ., Ithaca, New-York
Int'l Bus.Law.	International Business Lawyer, Deventer, The Netherlands
Int'l Org.	International Organization, Madison, Wisconsin
JAAC	} Jurisprudence des autorités administratives de la Confédération
VPB	
JT	<i>Journal des tribunaux</i>
J.World Trade L.	Journal of World Trade Law, Twickenham, England
LAMA	Law on Accident and Sickness Insurance
LCA	Law on Insurance Contracts
LCD	Fed. Law on Unfair Competition
LCR	} Law on Road Traffic
SVG	
La.L.Rev.	Louisiana Law Review, Baton Rouge, Louisiana
LEA	Law on Pacific Use of Atomic Energy
NRS	} Systematic compilation of Federal Laws and Decrees
RS	
SR	

ABBREVIATIONS

Par.		Paragraph
RDS	}	<i>Revue de droit suisse</i>
ZSR		
RJB	}	<i>Revue de la Société des juristes bernois</i>
ZBJV		
RSJ	}	<i>Revue suisse de jurisprudence</i>
SJZ		
PC		<i>Schweizerische Juristen-Zeitung</i>
SPC	}	Swiss Penal Code
CPS		
StGB		
ZStrR	}	<i>Schweizerische Zeitschrift für Strafrecht</i>
RPS		
		<i>Revue pénale suisse</i>

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Chapter 1

INTRODUCTION¹

JOSEPH VOYAME*

I. OVERVIEW OF SWISS HISTORY AND POLITICAL INSTITUTIONS

A. BIRTH, GROWING PAINS

The Swiss Confederation dates back to a diplomatic act – the freely negotiated ‘everlasting’ alliance (*Charte fédérale/Bundesbrief*) signed on August 1, 1291, by three small communities: Uri, Schwyz and Nidwalden.

It is interesting to speculate on the nature of the society and the legal institutions revealed by this document. There are suggestions of communal democracy: the parties are ‘the men of Uri, the corporate body (*universitas*) of Schwyz, the community or commune (*communitas hominum*) of Nidwalden’. It is a mutual assistance agreement aimed at protecting life and property against internal or external aggression. It contains confederate criminal provisions, the death penalty for murder, banishment and confiscation for other offences, by virtue, we would say today, of federal law to be applied by the local courts of the valleys. It declares that ‘we have unanimously decreed that we will accept no judge in our valleys who shall have obtained his office for a price, or who is not a native and resident among us’.² Respect for the law is the main feature of this treaty. While determined to organize their social order themselves, feuds and vengeance were abandoned in favour of the process of justice.

This alliance was confirmed and somewhat elaborated in 1315 by the Brunnen Alliance (*Pacte de Brunnen/Morgartenbrief*).

The nucleus of allies soon grew from the original three to eight through military, arbitration and mutual assistance treaties with Lucerne (1332), Zurich (1351), Glarus (1352), Zug (1352) and Berne (1353). It was not until

* Director, Federal Office of Justice, Berne, Switzerland.

1. I am indebted to Ms. Arlene Weingart, my assistant at the Federal Office of Justice, for the important part she played in the writing of this introduction.

2. Michel Salamin, *Documents d'histoire suisse 1240–1516*, Sierre 1942, p. 16.

one-and-a-half centuries later that five new members were admitted, one by one, into this Confederation: Fribourg and Solothurn (1481), Basle and Schaffhausen (1501) and Appenzell (1513).

Although the number of cantons remained stable for nearly three centuries, the Confederation continued to grow. There were the 'outside allies' (*Verbündete, Zugewandte*) composed of a variety of adjacent territories. The City of Geneva, that of Biel/Bienne, St. Gallen and Mulhouse for example. There was a third category, the 'subject territories' (*bailliages/Herrschaften*) – today we would call them colonies – that included 'free Bailiwicks'; those having one canton as master, Western Aargau and Vaud for example, belonged to Berne; and 'common Bailiwicks', such as Ticino, administered by several cantons.

The fourteenth and fifteenth centuries saw the development of Switzerland as a great military power. During the first years of the sixteenth century it came very close to becoming a great political power as well, until an important military defeat in 1515. The crisis of the Reformation rendered impossible all joint policy by the cantons and from there on, the Swiss took literally the famous advice of Nicholas von der Flüe: 'Don't meddle in foreign wars'.³ Ulrich Zwingli, following the former's footsteps, preached that the Swiss should stop trying to play a role in Europe, namely by way of mercenary service, and stay at home to lead simple, healthy lives. This doctrine reflects the basis of Swiss neutrality.

The Confederation continued to be attached to the Holy Roman Empire, in law if not in practice, until the peace of Westphalia, in 1648, ending the Thirty Years War. The independence of the Swiss Confederation was thereby finally and formally recognized by the international society.

B. ANCIENT HISTORICAL INSTITUTIONS: THE DIET AND CONFEDERAL ARBITRATION

One of the peculiarities of Switzerland's development before 1848 is that the dealings of the various constituent members with one another must be labelled as foreign relations. The Diet, the principal institution of authority in the old Confederation, was not provided for in either the Alliance of 1291 nor the Brunnen Alliance. It obtained a customary and moral authority from successive situations when the Confederates were called upon to mediate or decide, and in later years, when they came to rule conquered territories in common. The Diet was neither a central government nor a parliament. Similar to the American Congress before 1787, it was a council of ambassadors of the confederated republics, with representatives from each canton casting a single cantonal vote and acting under strict instructions from their respective government.

The cantons realized at the earliest stages of their association the benefits of negotiated peaceful solutions, and one of the great institutions that

3. William Martin, *Switzerland from Roman Times to the Present*, London, 1971, p. 74.

followed the early alliances was confederal arbitration. Although arbitration failed to completely eliminate internal or external conflicts, it did become one of the main forces that saved the Confederation from disruption. In most conflicts there were some cantons that were not directly involved and could thus offer their services as mediators to their quarrelling brethren.

This early period in history tells us of important occasions when Swiss citizens acted as arbitrators in international disputes which had nothing to do with them, but where experience in such matters and the permanently neutral status of Switzerland made them mediators of unrivalled moral authority. To cite only a few recent examples, Switzerland collaborated in the Armistice Commission in Korea, and played a role in the settlement of the Algerian War.

C. MODERN TIMES

The History of Switzerland from the late eighteenth century to the present of interest to jurists is essentially the history of the birth and development of the Federal Constitution and of contemporary political institutions. Although this subject is treated in detail in a later chapter by Professor Aubert, we deem it useful to make some introductory remarks.

1. Federal Political Institutions

a. *The Legislative Branch*

The Federal Assembly (*Assemblée fédérale/Bundesversammlung*) was created along the lines of the American bi-cameral Congress. It is composed of the National Council and the Council of States (*Conseil des Etats/Ständerat*). The 200 members of the National Council represent the Swiss population. The Council of States, which has 46 members, consists of two representatives from each canton and one representative from each of the six half-cantons.

The Swiss parliament is often referred to as a 'militia parliament'. It is to this day an assembly whose members exercise an ordinary occupation.

The Federal Assembly elects the Federal Council⁴ the members of which it cannot vote out before the end of their term. It also elects the justices that serve on the Federal Tribunal.⁵

b. *The Executive Branch*

The Federal Council (*Conseil fédéral/Bundesrat*) is a collegial body of government consisting of seven members, each elected for a period of four years and eligible for re-election for an unlimited number of terms. Each member of this governmental body is at the same time a head administrator of one of the seven administrative departments. This second function may well be compared to that of Minister in other countries. Switzerland's

4. See below, b.

5. See below, c.

multi-party system is well reflected in the political profile of this governing body: its members represent four different political parties. Its decisions emanate from the body as a whole, and it is considered bad form if an individual member of the Federal Council voices his dissenting opinion publicly.

There is no Prime Minister. The President of the Swiss Confederation, chosen each year from among the members of the Federal Council, serves as chairman of this collegial body. The same Federal Councillor may not serve as President during two consecutive years.

c. The Judiciary

In contrast to the dual system of parallel federal and state courts practised in the U.S., the Swiss court system may best be imagined as a pyramid. The civil, criminal or administrative courts of first and second instance are cantonal, with the Federal Tribunal (*Tribunal fédéral/Bundesgericht*) as a court of last instance at top of the pyramid. The cantons, responsible for the execution and implementation of federal legislation, also organize the courts that apply federal law on the cantonal level. In order to guarantee a certain degree of uniformity in the application of federal law, the Federal Tribunal has the power to decide on appeals from cantonal courts. The High Court also rules on appeals lodged against decisions emanating from federal agencies. The Federal Tribunal may not however declare a federal law unconstitutional. Article 113, par. 3 of the Federal Constitution precludes the judicial control of the constitutionality of federal laws and international treaties ratified by the Federal Assembly.

d. The Electorate

The direct democracy first developed within the Swiss governmental system during the latter part of the nineteenth century. The compulsory constitutional referendum, whereby the adoption of a constitutional measure requires a majority of cantons and a majority of the popular vote, and the optional referendum, whereby the adoption of a federal law may be put to the vote of the electorate upon the demand of 50,000 eligible voters, were introduced in 1874 when the Federal Constitution of 1848 underwent a total revision. The legislative initiative does not exist on the federal level. The constitutional initiative was introduced at the federal level in 1891. It presently requires a petition of at least 100,000 eligible voters.

2. The Cantons

The 26 Swiss cantons, and half-cantons although equally autonomous in law, vary considerably in size, population, and *per capita* income. Each one has a republican form of government with separate legislative, executive, and judicial branches.

Cantonal parliaments are uni-cameral and count between 50 and 200 members. In a few cantons, they take second place to the still existing

People's Assemblies (*Landsgemeinden*), where the voters meet to decide on various questions and for elections. The voters play an even greater role in the cantons than in the Confederation, because all laws may be submitted to them, even appropriation bills. The legislative initiative is extensively used in the cantons.

The executive branch is headed by a collegial government, and as at the federal level, coalitions and annual change of presidency are the rule.

As mentioned earlier each canton has a complete judicial system. The cantonal courts have jurisdiction over both federal and cantonal law. Judges are elected by either the Parliament or the people and must stand periodically for re-election.

Federal laws and programs are as a rule administered by the cantons, federal authorities being responsible for supervision. An obvious advantage of this system is better coordination by delivery agencies.

Each village, town, and city is organized as a 'commune' (*Gemeinde*). The 'communes' differ greatly in size and in autonomy according to the canton; they all have their own executive and legislative authorities.

One of the most important criteria of a Confederation is the financial autonomy of its member states. In Switzerland, the cantons and communes have the right to levy their own income tax, corporation and wealth taxes. The Federal Government may only levy a tax provided for expressly by the Constitution.

II. SOURCES OF LAW

A. ENACTED LAW

In Switzerland as in other romano-germanic legal systems, enacted or written law is by far the most important source of law. Different forms of enacted law have different values; in order of priority they are the Federal Constitution, codes and other federal statutes, administrative regulations. The order of priority between the different forms of enacted law is largely governed by the following rules:

- (a) federal law takes precedence over cantonal law,⁶
- (b) constitutional rules prevail over ordinary statutes,⁷ and
- (c) legislative statutes take priority over regulations promulgated by the government or administrative authorities.

The scope of federal legislative authority is subject to well-defined limitations; namely, the Federal Constitution leaves all law-making power to the cantons except as expressly delegated to the federal authorities by the Constitution itself.⁸ In addition, even where the federal authorities have the

6. Art. 6, par. 2, Federal Constitution, Art. 2, Transitory Provisions.

7. With the qualification that federal laws are not subject to judicial control of their constitutionality (see IC1c).

8. Art. 3, Federal Constitution.

power to enact a law, this power may be limited to the enactment of guiding principles, leaving the detailed regulation to the cantons or the communes.⁹ Although constitutional provisions take precedence over ordinary statutes, the supremacy of federal law requires that all forms of federal statutes prevail over cantonal constitutions.

The priority of statutory law over administrative regulations results from the subordinate position of the administrative agencies in respect to the parliament. The Executive may enact legal rules only on the basis of a formal statutory delegation of power which specifies the content, purpose, and scope of the authority so granted.

Two basic rules govern the relationship between two legal rules otherwise having the same priority:

- recent law prevails over prior law,
- specific provisions or statutes prevail over general ones.

As for international treaties, as soon as they are approved by the parliament and the instruments of ratification have been deposited, they become, by that very fact, an integral part of the federal legal order. They have the force of federal law.

Federal statutes are published in two official collections, the ‘Official Collection of Federal Laws’ (*Recueil officiel des lois et ordonnances de la Confédération Suisse*, RO/*Amtliche Sammlung der eidgenössischen Gesetze*, AS) in chronological order of their entry into force, and in the ‘Systematic Collection of Federal Law’ (*Recueil systématique du droit fédéral*, RS/*Systematische Sammlung des Bundesrechts*, SR) classed according to content. The ‘Official Newsletter’ (*Feuille fédérale*, FF/*Bundesblatt*, BB) contains, among other texts, minor federal enactments that are not included in the ‘Official Collection’ cited above. Each canton has a similar system of publication for its legislation.

The most important federal laws are:

- The Federal Constitution (*Constitution fédérale de la Confédération suisse/Bundesverfassung der schweizerischen Eidgenossenschaft*), of May 29, 1874,¹⁰
- The Civil Code (*Code civil suisse*, CCS/*Zivilgesetzbuch*, ZGB), of December 10, 1907,
- The Code of Obligations (*Code des obligations*, CO/*Obligationenrecht*, OR), of March 30, 1911,
- The Code of Seizure and Bankruptcy (*Loi fédérale sur la poursuite pour dettes et la faillite/Bundesgesetz über Schuldbetreibung und Konkurs*), of April 11, 1889,
- The Penal Code (*Code pénal suisse*, CPS/*Schweizerisches Strafgesetzbuch*, StGB), of December 21, 1937,
- Organization of the Federal Courts (*Loi fédérale d’organisation judiciaire/Bundesgesetz über die Organisation der Bundesrechtspflege*), of December 16, 1943.

9. Examples: Art. 24, 24 bis, 25, 44, par. 2, Federal Constitution.

10. See Chapter 2 on the Swiss Federal Constitution.

B. CUSTOMARY LAW

Custom constitutes a source of legal rules only in the limited areas of non-codified law. But, like enacted law, custom is considered a primary source of law in the Swiss legal system.

Article 1 of the Swiss Civil Code opens the door to custom as a source of law in that it instructs the judge to apply customary law (*le droit coutumier/ Gewohnheitsrecht*), if an applicable legislative provision is not to be found: 'In the absence of an applicable legal provision, the judge decides according to customary law.' The custom that applies must be recognized as valuable in all parts of Switzerland. A rule that starts out as customary law may be integrated into the legislation. This was the case for example of the 'banking secret', which is now protected by the Federal Banking Law.¹¹

C. JUDICIAL DECISIONS

Unlike precedents in Common Law systems, judicial decisions – even those of the Federal Tribunal – are only binding upon the court whose decision has been attacked. They are not binding upon other courts, even those at the trial or lower cantonal appellate levels. Although intentional deviations from a constant line of decisions are not infrequent, judicial precedents play a very significant role despite their nonbinding nature. The judge must examine a provision, often expressed in extremely general terms, or a general principle of law in order to give it a content and apply it to a particular case. Confronted with a new set of circumstances which the legislator could not have foreseen, the judge may indulge in the kind of free scientific research recommended by Article 1, par. 3 of the Civil Code. This Article recognizes the creative role of the judge, in that it instructs him to decide 'as if he were himself acting as legislator' when both legal rule and custom are lacking. This was the case, for example, when the Federal Tribunal declared that public corporations are subject to Civil Code provisions on owner's liability as owners of the public domain.

Since 1874, the most important decisions of the Swiss Federal Tribunal are published in the 'Official collection of the Decisions of the Federal Tribunal' (*Recueil officiel des arrêts du Tribunal fédéral Suisse, ATF/Amtliche Sammlung der Entscheidungen des schweizerischen Bundesgerichts, BGE*). One volume divided into five parts is published each year: I. Public and Administrative Law; II. Private Law; III. Seizure and Bankruptcy; IV. Criminal Law; V. Social Insurance.¹²

11. Claude Du Pasquier, *Introduction à la théorie générale et à la philosophie du droit*, 4th edition, Neuchâtel/Paris, 1967, p. 52.

12. Judicial opinions are cited by reference to the title, volume, section and page of the collection, e.g. ATF 101 II 25 indicates the decision appearing on p. 25 of the section 'Private Law, 101st volume of the Decisions of the Federal Tribunal'. See III, below, for a discussion of the meaning of these divisions.