Federal Constitution

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COMMENTARY ON

Art. 3 FC

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Art. 3 Cantons

The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation.

CONTENT

I. OVERVIEW

Article 3 FC – often referred to as the “basic norm” or “cornerstone” of Swiss federalism – deals with the **position of the cantons and their relationship to the federal level**. The first sentence states that the cantons are “sovereign” “insofar as their sovereignty is not limited by the Federal Constitution” (sovereignty clause). The second part of the sentence declares that the cantons are responsible for exercising all “rights that are not transferred to the federal government” (distribution of authority clause). 1

Both parts are **closely related to each other in factual and historical terms**, with the “sovereignty clause” serving as the internal justification for the federal distribution of powers: a rule for the distribution of powers between the federal and cantonal levels is necessary because the cantons in a federal state with an independent central power cannot have full and unrestricted legal sovereignty. The fulfillment of federal and member state tasks must therefore be coordinated. By formally and legally defining the scope of cantonal “residual sovereignty” through the distribution of competences, the second part of Article 3 FC has an effect on the first (see N. 26). 2

By stating that the cantons are “sovereign insofar as their sovereignty is not limited by the Federal Constitution”, Art. 3 FC defines the scope of the Federal Constitution (Art. 54–135 FC) – depending on the type of competence (N. 46 f.) – as a latent or current **limitation of** cantonal sovereignty. The same applies to international treaties (Art. 54 in conjunction with 186 FC). At the same time, however, the sovereignty of the cantons is also constituted as a **barrier to federal power**; the decisive concept of sovereignty remains to be defined (see N. 19 ff.). 3

These restrictions on cantonal sovereignty have an **absolute character**. Firstly, because federal law that has been enacted in accordance with the constitution takes precedence over conflicting cantonal law (Art. 49 para. 1 FC), and secondly, because federal law cannot be reviewed in the procedure for the abstract review of a statute (Art. 189 para. 4 sentence 1 FC; Art. 82 let. b BGG *a contrario*). Due to this “binding” to the constitutional and legislative power of the Confederation, Article 3 FC appears at first glance to be more of a structural principle of the federal state than a justiciable limit on federal 4 power. On closer inspection, however, it becomes clear that Article 3 FC also has practical significance (see N. 48 ff.).

II. HISTORY

5 Article 3 FC goes back to the 1803 Act of Mediation, which established Switzerland as a confederation under the supervision of France, the former occupying power (1798–1803). In line with its structure as a confederation, federal power was subject to **strict legal ties**: "The cantons exercise all power that has not been expressly transferred to the federation" (Art. 12, 20th title of the Act of Mediation). The same standard was also included in the draft constitutions of 1832 and 1833, which intended to re-establish Switzerland as a federal state. Even though these efforts were unsuccessful, the drafts were still of lasting importance as a basis for the deliberations of the 1848 Constitutional Commission. Article 3 FC (1848) corresponded almost word for word to the Act of Mediation: "The cantons are sovereign to the extent that their sovereignty is not limited by the Federal Constitution, and as such they exercise all rights that are not transferred to the federal government".

6 It was necessary to retain this provision because the relationship between the "new" central power and the formerly self-governing cantons had to be regulated in 1848. To this end, the state of the mediation constitution was taken as a starting point. The starting point for the "new" order was the view that the Confederation was a **creation of the cantons**. All federal powers (whether at that time or today) originally lay in cantonal hands. The cantons were to remain responsible for all tasks that the constitution itself did not transfer to the federal government. Equally important was the fact that the FC of 1848 introduced the **basic principle of the federal system**, i.e. that, figuratively speaking, the Confederation was established "above" (or, in legal terms, "alongside") the cantons as a centralized, constitutionally independent body. This was endowed with "its own" political organs and entrusted with the fulfillment of tasks that are in the national interest. The contradictions inherent in this construct – the autonomy of constituent states in a federal context – had to be coordinated.

7 The founding generation based this – implicitly – on the **concept of "shared sovereignty"** between the federal government and the cantons (see N. 23 ff.). According to this concept, both the federal government and the cantons are

sovereign, but their sovereignties are mutually limited. Art. 3 FC (1848) was intended to express this. The systematic position of this article in the 1848 FC was no coincidence. Art. 1 FC (1848) stated that the "peoples united by the present alliance" are not subject territories of the alliance, but "sovereign" cantons. Art. 2 FC (1848) listed the purposes for which the cantons had joined together to form a "federation". Art. 5 and 6 FC guaranteed the cantons their own territories, their own peoples, their own political systems and their own constitutions. In this context, Art. 3 FC (1848) defined which **rights the** cantons retained after their "union" to form a federal state and which rights were to be held by the newly established federal bodies (primarily: the federal legislature). The supremacy of the federal state over the cantons was to become relevant where the people *and the* cantons (by a double majority) had voluntarily transferred an area of responsibility to the federal state by amending the FC. The 1999 FC basically adopted this structure. However, Article 1 FC no longer refers to the "peoples united by the present Confederation", but to the "Swiss People and the Cantons [...] forming the Confederation". In particular, the reference to the "Swiss people" indicates that national identity has changed since 1848 in that it is no longer the "cantonal peoples" but the "Swiss people" that constitute the Confederation.

From a historical point of view, it can be seen that Art. 3 FC was intended to 8
structure the **federal balance** between the central power and the member states. Art. 3 FC contains the formula for determining the degree of vertical separation of powers at a given time, without maintaining a certain historical "state of equilibrium". Which competencies *should be* in which hands cannot be inferred from Art. 3 FC. This question is to be decided in the democratic process of constitutional lawmaking at the federal level: every **shift in emphasis in favor of the federal government** is desired under Art. 3 FC if it was preceded by a mandatory referendum with a double majority. The legal scope of federalism as a structural principle for organizing the state is thus tied to constitutional lawmaking at the federal level. The "power of decision" – the power to decide on the distribution of tasks between the federal government and the cantons – lies with the people and the cantons. In contrast, the Federal Assembly decides on the scope of a federal competence within the framework of legislation (see N. 50). These principles still apply today (see N. 9 f., N. 28).

9 The **total revision of the FC in 1874** did not amend Article 3. However, with this total revision**, two new provisions** were introduced that had a lasting impact on the significance of Article 3 FC in practice: The first innovation allowed the Confederation and the cantons to take legal action to the Federal Supreme Court in the event of a conflict of jurisdiction. However, because even then there was only limited constitutional jurisdiction with regard to federal laws and international treaties, the Federal Supreme Court could only repeal *cantonal* decrees that had been issued in violation of its authority. The second innovation was a provision according to which "provisions of federal legislation, concordats, cantonal constitutions and laws that contradict the new Federal Constitution shall cease to be in force upon the adoption of the same, or the enactment of the federal laws envisaged therein" (Art. 2 of the Transitional Provision FC [1874]). The Federal Court reinterpreted this standard, which is in itself purely transitional, as a larger "constitutional principle" that is violated when "cantonal decisions, either explicitly or de facto (by not applying federal law and the principle that federal law takes precedence over cantonal law [...] is effectively denied). This early decision, which was not based on Article 3 FC, is now positive constitutional law with Article 49, para. 1 FC.

10 The **total revision of the Federal Constitution in 1999** did not result in any fundamental changes with regard to Article 3 FC. Thus, from the founding of the Swiss Confederation in 1848 until today, Article 3 FC has exhibited an impressive historical continuity, both formally and substantively. All the changes made to Art. 3 FC in 1999 are of a purely editorial nature. The wording of Art. 3 FC in the preliminary draft of 1995 was literally the same as that in use since 1848. The Federal Council's 1996 draft, on the other hand, sought to divide Art. 3 FC into three paragraphs: The reference to the sovereignty of the cantons in para. 1, the fulfillment of tasks by the federal government and the cantons in para. 2, and the participation of the cantons in the federal government's decision-making process and in the implementation of federal law In the parliamentary process, the councils agreed in the difference settlement to return to the wording from 1874 and 1848 respectively for reasons of tradition.

11 In 2004, a comprehensive **reform of federalism** was undertaken (reorganization of the system of fiscal equalization and the division of tasks between the Confederation and the cantons; NFE), whereby Art. 5*a* FC and Art. 43*a* (see N. 13 f.) were incorporated into the FC. These norms were previously de-

rived (at least in part) from Art. 3 FC. For more information on their content, please refer to the individual commentaries.

III. CONTEXT WITHIN THE FEDERAL CONSTITUTION

Art. 3 FC deals with the position of the cantons and their relationship to the federal level. Art. 3 FC therefore only addresses a small **selection of** the questions that arise in a federal system. This constitutional provision is part of a broader regulatory context that shapes federalism as a legal and political principle. The FC defines the broader contours of Swiss federalism through a number of individual provisions. 12

Article 3 FC, for example, is silent on the specific criteria for the distribution of powers between the Confederation and the cantons **(see Art. 5*a* and 43*a* FC)** and on the way in which the Confederation and the cantons should exercise their respective powers if the catalog of powers of the Confederation does not provide any guidance **(currently Art. 5*a*, 43*a*, 44, 46 and 47 FC).** 13

Article 3 FC is also interrelated with the principle according to which the cantons participate in the federal government's decision-making process **(Article 45 FC)**. Before 1999, this principle was derived from several individually guaranteed participatory rights. The cantons' participation in the federal government's decision-making process has been part of the constitutional text since 1999. The most important institutions of this principle are the majority of the cantons (Art. 142 FC), the cantonal initiative (Art. 160 para. 1 FC), the cantonal referendum (Art. 141 para. 1 FC), the right to participate in the consultation procedure (Art. 147 FC) and the cantons' participatory rights in the decision-making process (Art. 45 FC) and in the preparation of the federal government's foreign policy decisions (Art. 55 FC). 14

Art. 42 and Art. 43 FC have hardly any independent significance compared to Art. 3 FC, but basically only repeat that, firstly, federal competences in the federal state are allocated according to the principle of individual authorization and, secondly, the cantons decide for themselves, within the scope of their responsibilities, which tasks they carry out and how (provided that they do not violate federal law by failing to act). 15

In addition, the cantons are involved not only in enacting but also in enforcing federal law **(Art. 46 FC).** In this context, the cantons are responsible for fleshing out or supplementing federal law through their own legislation (laws and 16 ordinances) and through the application of the law (individual acts of the administration and court rulings), provided that they are competent to do so and do not violate the spirit of federal law or thwart its objectives.

17 The autonomy of the cantons **(Art. 47 FC)** forms a "commitment to cantonal autonomy in terms of responsibilities, finances and organization". According to the view presented here, the term "autonomy" is congruent with the concept of sovereignty in accordance with Art. 3 FC (see N. 23 ff.). Both terms express the idea that the cantons are also "states" in the sense of federalism theory (consisting "under their own law"), even if a federal power still exists "over" them. As shown, the cantons have remained sovereign to the extent that they have their own sovereign rights (see N. 6 f., N. 23 ff.). However, under international law, the cantons are considered to be members of the federal state. In international law, only the federal state itself is considered a state.

18 Finally, cantonal financial autonomy is closely linked to cantonal sovereignty **(Art. 43*a* paras. 2 and 3 FC).** The cantons enact their own tax and duty laws (Art. 127 et seq. FC) and are free to decide how these revenues are used. The Constitution only imposes a few restrictions on this principle. The most important of these are the intercantonal equalization of revenues and expenses (Art. 135 FC) and the federal tax harmonization authority (Art. 129 FC).

IV. REGULATORY CONTENT

A. The sovereignty of the cantons (1st part sentence)

1. Overview of the history of the idea

19 The concept of sovereignty has been interpreted in different ways in state theory. In the Middle Ages, when God was considered the primary source of all power, sovereignty was understood as a **right of dominion received directly from God**. The first recipient of this right was the King of the Franks, Charlemagne, who was "appointed" by the Pope as the supreme protector of Christendom. It was only in the 14th century that the sacred elevation was replaced by an election by the electors. The emperors continued to see themselves as "political and judicial representatives of God". They assumed that they had received their right to rule directly from God and therefore were only responsible to God.

A development from the personal level of the prince to the institutional level of the state began with Jean Bodin (1530–1596), who derived all power from the interest in maintaining the state. The prince was the representative and administrator of this “puissance absolue & perpetuelle” of the state. For Bodin, “sovereignty” meant the **supreme power of the state internally and externally**, i.e. absolute, lasting and self-responsible rule in all main areas of state life. The concept of sovereignty had a different meaning for Jean-Jacques Rousseau (1712-1778), whose philosophy of the state is based on the theory of the social contract. Unlike Thomas Hobbes (1588–1679), Rousseau did not place a person, a “Leviathan”, at the head of the state, but rather the organized will of the people. Because only this will was entitled to determine the laws of a state and its existence as such, state sovereignty for Rousseau ultimately meant **popular sovereignty**. 20

With the emergence of the federalist theory in the 19th and 20th centuries, several **federalism theories** were developed both in Switzerland and abroad. The “sovereignty question” was an integral part of these theories. “Sovereignty” was generally interpreted in the sense of Jean Bodin (N. 20), i.e. as the supreme power of the state internally and externally, the sum of all powers necessary to maintain the state. The concept of sovereignty was considered *inseparable* from the idea of a state; a state could not be imagined without a ‘sovereign’. Opinions as to who was the bearer of sovereignty in the federal state, however, differed widely. 21

In Georg Waitz's **theory of shared sovereignty**, a federal state only exists where 1) “a certain part of state life is common and another equally certain part is left to the individual members,” and 2) “each part is in itself also a state.” From the legal state characteristic, an independence is derived, which Waitz equates with the concept of sovereignty. In the federal state, this sovereignty “is not due to one or the other, but to both, the overall state (the central power) and the individual state (the individual state power),” and this “each within its own sphere”. Waitz bases this idea on a statement by Alexis de Tocqueville about the federal power of the USA: “L'union [...] n'a [...] qu'un sovereignty restreinte [...]; but it was intended that within this circle it should form only one and the same people. Within this circle, it is sovereign”. Numerous contemporary authors were of the opinion that the FC of 1848 was based at least implicitly on this theory (see N. 7). Fritz Fleiner and Zaccaria Giacometti, on the other hand, rejected Waitz's theory as **logically impossi-** 22

ble: if member states were sovereign states, they would have to be independent of federal power, but this in turn would exclude their belonging to the federation. Belonging to the federal state excludes member state sovereignty from the outset. Fritz Fleiner and other authors therefore distinguished between the federal state as a sovereign state and the member states as non-sovereign states: only the federal state is sovereign, but the cantons rule within the scope of their competencies by virtue of their own laws. Zaccaria Giacometti went a step further, stating that the federal state was a "decentralized unitary state". Sovereignty and statehood lie with the federal government; the cantons are "merely self-governing bodies, albeit of a special kind". Hans Nawiasky put forward a mediating view with the theory of the tripartite federal state, according to which the federal government and member states are subsystems of an overall state that are equal to one another. The "overall constitution", the sum of the norms governing the relationship between the federal government and the cantons, arches over these subsystems. In this model, all sovereignty is relative: that of the federation because of its subordination to international law and the "overall constitution", that of the cantons because of their subordination to federal law.

2. The sovereignty concept of Art. 3 FC

23 None of the above theories captures the sovereignty concept of the FC (and thus of Art. 3) in its purest form. The reason for this is that the FC of 1848 did not follow *one single* specific doctrine, but rather combined various philosophical influences and political ideas to create an **innovative overall work**; the only unmistakable influence is Rousseau's concept of popular sovereignty. The "Federalist Project" had to be realized quickly. The deliberations of the Tagsatzung were correspondingly hectic, and the Constitutional Revision Commission had to draft the final constitution in a relatively short time. It was not possible to draft a detailed dogma of sovereignty. However, in view of the realized legal structure (see immediately N. 24 ff.), this was not necessary.

24 By uniting to form a federal state, the cantons created the "competence of the Confederation" (Art. 73 FC [1848]). In this way, the federal power acquired legal personality as a state and received its own purposes (Art. 2 FC [1848]), its own tasks (Art. 13 et seq. FC [1848]) and its own organs to fulfill these tasks (Art. 61 et seq. FC [1848]). Furthermore, direct-democratic processes specifically concerning the federal level were introduced (Art. 62 et seq., 111 et seq.

FC [1848]) and gradually expanded over time. At the same time, the cantons were to remain legally independent political units (self-governing) under the new FC, governed by their own processes. According to Biaggini, this follows from an overall view of several individual provisions. The founding of the federal state meant that from then on **two types of independent, democratically controlled state authority** existed in parallel in Switzerland – the federal authority ("central state") and the individual cantonal authorities ("individual states"), each with its own organization, its own tasks and its own finances.

When Article 1 of the FC (1848) implicitly reaffirmed the continued existence of the "sovereign cantons", it referred to the (limited) **autonomy** that the cantons had already enjoyed under the 1815 federal treaty. The FC of 1848 guaranteed that this pre-existing, limited right of self-determination of the cantons with regard to their internal affairs would continue to apply after the founding of the federal state. In general terms, the constitutional concept of sovereignty can thus be defined as the **ability of a state to practice democratic "self-government"**. This decision reflects the widespread view in the 19th century that sovereignty, however it is defined, can only be possessed by a state because the constitutional legislator has conferred upon it a monopoly on the use of force that is limited to a specific territory, people and certain purposes. However, it is not specified which persons should represent this sovereignty. It could be an individual (monarchy) or the people (democracy) – in a direct or indirect form. In Switzerland, this decision was made in favor of democracy (see Art. 5 FC [1848]). The sovereignty thus defined is initially vested in the cantons (pursuant to Art. 1 and 3 FC). However, after the founding of the federal state, the cantons were no longer the only state authority to fulfill the conditions of this concept of sovereignty, since democratic processes now also existed at the federal level. For this reason, the authors of the FC draft of 1848 also distinguished between federal and cantonal sovereignty in their explanatory report. 25

The scope of cantonal sovereignty was regulated by the founding generation in Art. 3 FC (for the precursor norms, see N. 5). Where the Federal Constitution (or implementing legislation enacted on the basis of it) does not impose any requirements on the cantons, the cantons regulate their own affairs and remain "sovereign". Article 3 FC refers to the **federal distribution of powers** (see N. 30 et seq.). If the cantons are responsible 26 for an area, they have regulatory freedom within these competencies and within other requirements of the Federal Constitution. If, on the other hand, the FC explicitly assigns a competence to the federal government, the cantons (originally reserved for derogatory competences [N. 47]) are only "free" to the extent that the federal government has not exhausted the competence. Max Imboden aptly describes the division of federal tasks as the "formal-constructive means by which this form of state [i.e. the federal state] fulfills its own basic idea" that in a federal state, several communities inevitably share the fulfillment of state tasks. The federal government's legislative powers are based on **specific authorizations**, while those of the cantons are of a **general nature** (see N. 30 et seq.). In the event of a conflict of jurisdiction, the burden of proof lies with the federal government to show whether it actually has the claimed jurisdiction. Thus, the guarantee of cantonal sovereignty also has practical legal implications (see also N. 48 et seq.).

3. Current significance of the "sovereignty clause"

27 Due to the continuity of the historical concept of Article 3 FC (see N. 6 et seq.), the sovereignty concept explained above remains **unchanged today**. Article 3 sentence 1 FC thus still guarantees the cantons to be more than just mere federal members and – like the federal government – to have their own constitutionally guaranteed scope for decision-making and spheres of competence. Within this scope, both communities are considered sovereign with regard to "their" respective democratic processes. Article 3 FC thus constitutes both the Confederation and the cantons as "limited sovereignty" communities.

28 The concept of sovereignty has led to dogmatic disputes several times in history, which have resulted in widely differing views on the content and function of the concept of sovereignty (see N. 22). However, the original function of guaranteeing cantonal sovereignty under Article 3 FC remained unaffected. Nevertheless, the **concept of sovereignty is still disputed today**: The dense international interdependence, a central state that has grown considerably since 1848 and theoretical barriers to the concept of sovereignty raise doubts as to whether the term democratic self-government in the federation and cantons as "sovereignty" still hits the nail on the head. In this regard, suffice it to say that, as shown, the concept of sovereignty is to be interpreted legally as **the ability for democratic self-government**. The term has no ab-

solute content, since the spheres of sovereignty of the Confederation and the cantons are bound to democratic constitutional legislation and to the law that substantiates the constitution (see N. 8). However, because every person entitled to vote is at the same time part of a canton *and of* the Swiss people, the conditions for "sovereign" decisions within the respective spheres of competence at both levels of government are met within the meaning of Article 3 FC. Insofar as and as long as the cantons have their own powers and scope for democratic self-government, they were, are and remain "sovereign" within the meaning of Article 3 FC. Overarching factors such as international law, federal requirements or the *Brussels effect* are consistent with this rule and do not lead to a different result.

However, even in Switzerland, there is **no such thing as "democratic absolutism"**. The power of the electorate is subject to legal limits at both the cantonal and federal level (see N. 57 et seq.). Important constitutional barriers to federal legislation, *according to the current legal situation*, include, for example, fundamental rights (Art. 7-34 FC) and the conditions for their restriction (Art. 36 FC), the principle of the separation of powers, the primacy of federal law (Art. 49 FC), as well as the general principles of the rule of law, , i.e. the principle of legality (Art. 5 para. 1 FC), the principle of public interest (Art. 5 para. 2 FC), the principle of proportionality (Art. 5 para. 3 FC) and the principle according to which the federal government and the cantons must observe international law (Art. 5 para. 4 FC). For the rest, reference is made to the fundamental description by Reich regarding the relationship between the principles of the rule of law and democracy. 29

B. The division of powers in the federal state (2nd part)

1. General

The necessity of a clause on the division of powers follows from the "guarantee" of cantonal sovereignty (see N. 26 f.). A division of sovereignty includes a division of state responsibilities (see N. 24 f.). Accordingly, Art. 3 FC stipulates the principle (alternativity, accumulation, complementarity) according to which the spheres of competence of the Confederation and the cantons are to be coordinated. 30

The decision taken in Art. 3 FC argues in favor of a general original competence in favor of the cantons (so-called subsidiary general competence). How- 31 ever, for tasks that require uniform execution and regulation throughout Switzerland, the federal government should be responsible for regulating the manner in which they are fulfilled (including the modalities of execution). However, this requires explicit authorization by the Federal Constitution itself (and thus by the people and the cantons) **(principle of individual authorization; enumeration principle)**. Taken together, the principle of individual authorization and the subsidiary general authority contain the 'formula' by which, for specific provisions of authority (Art. 54–135 FC), it can be determined through interpretation for which specific issues the Confederation and for which the cantons are responsible (see N. 8, N. 48 et seq.).

32 The primary normative statement of Art. 3 FC consists in this **allocation of competences**. However, the provision does not rule on the hierarchical relationship between the federal and cantonal provisions. It cannot be inferred from Art. 3 FC whether what the Confederation prescribes by virtue of its competence takes precedence over the provisions of the cantons or vice versa. According to the concept of Article 3 FC (see N. 7 f., N. 22, N. 24 et seq.), the provisions of the Confederation and the cantons have the same normative rank because both types of law are based on the same legitimizing basis, the concordant will of the people (see also N. 57 et seq. in the context of conflicts of jurisdiction). From a historical perspective, the fact that federal law takes precedence over conflicting cantonal law is not a postulate of Art. 3 FC, but a case law that was (originally) based on Art. 2 of the Transition Act (1874) (see N. 9).

33 In theory, the system set out in Article 3 FC provides for a seamless division of powers. Initially, state responsibilities are distributed between the federal government and the cantons on an alternative basis: either the cantons or the federal government are responsible for legally regulating an area of responsibility. If only the federal government is responsible, it has exclusive authority. If this is not the case, the original authority of the cantons automatically leads to complementary and cumulative (parallel) responsibilities of the federal government and the cantons in the same area (for a typology of possible competencies, see N. 43 et seq.). However, because the matters to be regulated can **mutually interfere, complement or restrict** each other, the dividing line between jurisdictions is often difficult to determine based on this rule-exception principle. Furthermore, from a practical point of view, this system carries the risk of negative conflicts of jurisdiction when urgent action is re-

quired. This problem became particularly apparent at the beginning of the COVID-19 pandemic. Other examples include the energy shortage in the aftermath of the war in Ukraine, cyber attacks on companies and administrative units, or natural events such as the (recurrent) water shortage in cantons and municipalities during periods of intense heat and prolonged drought.

In this context, we believe the statement that Article 3 FC contains a "presumption of competence in favor of the cantons" is misleading. Determining whether the regulation of a specific issue falls within the jurisdiction of the cantons or the federal government is a **legal question** that must be resolved on a case-by-case basis and through interpretation (see N. 48 et seq.). There is no presumption in favour of the cantons in the case of doubt in Art. 3 FC. On the contrary, in case of doubt, the federal government must be able to prove its alleged regulatory authority (see N. 26). If it fails to do so, regulatory authority remains with the cantons by virtue of subsidiary general competence. 34

2. Constitutional reservation at the expense of the Confederation

The system of individual authorization requires that new tasks be transferred to the federal government by means of a partial revision of the constitution (Art. 192 et seq. FC). Thus, there is a **"constitutional reservation" at the expense of the federal** government for new federal competences. These individual authorizations are, in line with the historical concept, *leges speciales* to the general subsidiary competence of the cantons. 35

The initial allocation of powers between the federal government and the cantons took place in 1848. Strictly speaking, all subsequent changes to this allocation of powers were mere *shifts in* powers. However, this does not mean that the cantons no longer have anything to do with the task after it has been transferred to the federal government. This is because what is "shifted" is only the **responsibility for fulfilling the task**. The authority to legislate on the matter and to regulate the execution of the task passes from the cantonal parliaments to the National Council and the Council of States – the 'dual basis' of federal sovereignty – whereby the Council of States should ensure the participation of the cantons in federal legislation. 36

The powers conferred on the federal government are largely set out in Articles 54-135 FC (see Articles 38-40 FC as exceptions). According to prevailing doctrine, the social objectives (Article 41 FC) do not establish federal powers. 37

Insofar as a task falls within the jurisdiction of the cantons, the cantonal legislature can in principle enact a law **directly based on the subsidiary general authority**. A basis in cantonal constitutional law is not necessary, unless the cantonal constitution *itself* requires it. The subsidiary general authority directly authorizes the cantons to the extent that the canton does not contradict applicable federal law. “New” tasks fall within the jurisdiction of the cantons without further ado. Assignments of authority from the FC to the cantons are of a purely declaratory nature (e.g. Art. 62 para. 1 and 112*c* para. 1 FC).

38 Some legal scholars distinguish between **“competences” and “duties”**. According to Biaggini, a competence includes the authorization to take a measure or enact a regulation, whereas a duty is the corresponding obligation. This view is also held, for example, by Rütsche, whose definition of a 'public task' necessarily presupposes a mandate from the legislature 'in the broad functional sense' (i.e. including mandates at the constitutional or ordinance level). These views are shared here: a power *becomes a* task when it is formulated in a binding manner. For more details, see the differentiated presentation in Biaggini.

39 The establishment of new federal powers must be based primarily on the **principle of subsidiarity** (Art. 5*a*, 43*a*, 46 para. 3 and 47 para. 2 FC). According to the prevailing legal opinion, the principle of subsidiarity does not have a legally “blocking effect”, but it is an appeal to use existing powers sparingly and to create new federal powers only for convincing reasons.

40 Typically, a legislative provision empowers the federal government as a whole, as a constitutional body, and leaves the responsibility of the organs open. If a legislative provision does not empower a specific organ, it is a **so-called association competence**, i.e. a competence that is to be exercised by the federal government as a whole (i.e. as an “association”). The constitutional legislator is primarily responsible (Art. 148 para. 1 in conjunction with 164 FC). The executive ordinance law, on the other hand, which determines the specific enforcement of the law, is to be issued by the Federal Council or the departments and federal offices (Art. 174, 178 para. 1 and 182 para. 1 FC). Which body is specifically responsible for which regulatory matters is decided in the matter primarily on the basis of the substantive legal concept (Art. 164 para. 1 FC).

In **“urgent” or “extraordinary” cases**, the question then arises as to when the Federal Assembly and the Federal Council may disregard the distribution of powers set out in Art. 3 FC. The right to urgent parliamentary action explicitly allows this, in that Art. 165 para. 3 FC stipulates that urgent federal laws that have no constitutional basis must be accepted by the people and the cantons within one year of their enactment in order to have any further validity. This principle also applies without further ado to enactments that do not only partially correspond to the traditional distribution of tasks between the federal government and the cantons or horizontal and vertical provisions on the separation of powers. 41

The legal situation is different for “emergency ordinances” of the Federal Assembly (Art. 173 para. 1 let. c FC) and the Federal Council (Art. 184 para. 3 and 185 para. 3 FC). Whether – and if so, to what extent – the federal bodies may issue measures that override the constitutional allocation of powers under Art. 3 FC is part of the dispute over whether the FC's system of emergency law allows the Federal Council and the Federal Assembly to issue so-called **“constitutionally derogating emergency ordinances”**. According to prevailing doctrine (and rightly so in our opinion), this is not the case. Insofar as “emergency decrees” have the substantive status of laws or the constitution, they are to be treated like ordinary federal laws in view of Art. 3 FC and must uphold the principle of individual authorization (see N. 30 et seq.); other restrictions on the subsidiary general competence of the cantons are unconstitutional. In view of the “cross-cutting nature” of emergency decrees (e.g. the regulation of the economy and the mask, vaccination, testing and certification systems during the COVID-19 pandemic), their legality in the light of Article 3 FC is thus highly dependent on the design of the measures and their legal basis. Because this provision covers the legal aspect of the “right to issue emergency decrees”, the preservation of Art. 3 FC requires a thorough preventive control of planned legal acts, in particular for measures issued “constitutionally immediately”, but also for those based on a federal law (e.g. the EpG). The most important means in this respect is the interpretation of federal powers in conformity with the Constitution (see N. 67). 42

3. Typology of legislative powers

43 Among the **types of powers**, a distinction must be made between legislative powers (or law-making powers) and executive powers (or administrative powers).

44 The legislative powers of the Confederation can be systematized according to their **material scope** or their **effect on cantonal sovereignty**. Whether the cantons have any leeway of their own following measures by the Confederation (in the same area) must be determined by interpretation. The type of federal authority and the degree to which it is exercised are decisive in determining the leeway left to the cantons.

45 In exceptional cases, constitutional interpretation may also result in **implied powers** for the Confederation. According to prevailing doctrine, a distinction is made between powers that arise "by virtue of a material connection" *(implied powers)* and powers that are "inherent" to the Confederation or that it has "by virtue of the federal structure of the state" *(inherent powers)*. A competence by virtue of factual connection follows "from the necessity of being able to exercise a task at all". This also includes powers that are derived from the factual context of several individual powers. One example of this is the Ingress of the Disentangle Act, which lists no fewer than 16 powers as constitutional bases. A power by virtue of the federal structure of the state, on the other hand, is derived from the federal state principle for areas that only the federal government can regulate. This type of competence is more common than one would think: for example, there is still no explicit constitutional basis for the ParlA (Art. 165 para. 1 let. g FC), the GAOA, the BPG (both Art. 173 para. 2 FC) and other enactments.

a. The scope of federal powers

46 Every power establishes a certain scope for legal regulation. This may correspond to the area of life to be regulated or be limited to certain partial aspects of it. From this perspective, a distinction can be made between comprehensive powers, fragmentary powers, and powers to enact framework legislation and to enact legislation on matters of principle:

- **Comprehensive federal powers** authorize the federal government to regulate all legal issues down to the last detail. The matter to be regulated may be a *subject area* (e.g. Art. 74 para. 1 FC [environmental protection]) or a *area of law* (e.g. Art. 122 f. FC [formal and substantive civil and criminal law]). This type of power is the norm.

- **Fragmentary federal powers** relate to certain aspects of a particular area of life or subject. The FC thus imposes specific restrictions on the regulatory *scope of* these areas, but not on the regulatory *intensity* within them. In other words, only certain legal issues may be regulated, but these may be regulated in detail. Important examples are contained in Article 118, para. 2 FC in a (dealing with certain objects and organisms), b (combating certain diseases) and c (protection against ionizing radiation).
- **Principle/framework legislative powers** authorize the federal government to set up framework rules for a subject area. At the same time, they oblige the federal government to leave detailed questions of regulation to the cantons. These powers restrict the permissible level of detail of federal regulation to legal issues of central and national importance. In practice, this form of legislation occurs primarily in "federal minimum requirements" for cantonal enforcement systems. Examples include Art. 64*a* para. 1 FC (continuing education), Art. 66 para. 1 sentence 2 FC (education grants), Art. 67*a* para. 3 FC (music education), Art. 75 para. 2 FC (spatial planning), Art. 76 para. 2 FC (water), Art. 77 para. 2 FC (protection of the forest), Art. 79 (hunting and fishing), Art. 88 para. 1 FC (footpaths, hiking trails and cycle paths), Art. 89 para. 2 FC (energy policy), and Art. 129 para. 1 FC (tax harmonization).

b. Effect on cantonal powers

Federal powers can have different effects on the original cantonal jurisdiction 47
in this area. Compared to the *type of* power, the assessment of the effect on cantonal sovereignty is, so to speak, an **additional dimension for** heuristically identifying federal powers. From this perspective, a distinction can be made between concurrent, exclusive and parallel powers:

- **Competing powers** mean that cantonal law only loses its effect when the federal law comes into force, and only to the extent that the federal legislature has exhausted its powers (so-called retroactive-derogatory effect). As long as and insofar as the federal legislature has not exhausted its authority, the cantons remain responsible for regulating that area of law under the subsidiary general authority. Comprehensive and concurrent authority is the normal case.

- **Exclusive powers** mean that cantonal law is repealed as soon as the federal power is established (so-called original-derogatory effect). This is a rare case. Common examples are Art. 54 FC (foreign affairs), Art. 99 FC (coinage, currency and monetary matters), Art. 133 FC (customs). According to the prevailing interpretation, there is no cantonal counterpart to this, not even in the special case of cantonal rights of monopoly.
- **Parallel powers** are characterized by the fact that they have no effect on cantonal powers in the same area, meaning that federal and cantonal law can coexist. This type of competence exists primarily in areas where the state operates funding systems, such as in the area of culture (Art. 69 para. 1 FC), but also in the area of direct taxation (Art. 128 in conjunction with Art. 134 FC *a contrario*).

c. Interpretation of legislative powers

48 The FC's catalog of powers is a somewhat systematic network of individual tasks that are implemented very differently and **evolutively interpreted** in practice according to contemporary regulatory needs. Behind this is the insight that the regulatory needs of a society can change or develop over time in the face of changing values or new challenges, and that the constitutional legislator has thus granted the federal government regulatory authority in a manner that is "open to the future". The legislature should not be hindered in its activities by historical value judgments, unless clear legal limits are set in the content of a competence norm.

49 However, **federal competences** are often formulated very **openly and concisely**. Apart from the typology (N. 43 et seq.), their substantive limits are rarely apparent and must be determined through careful interpretation. The wording is the starting and finishing point of the interpretation. However, because this is "not always meaningful [...] and not always reliable", the meaning of the chosen words is also based in particular on previous practice. However, there are also limitations here because state practice is not always based on a flawless interpretation of the competence norm. The decisive factor is therefore the interplay of all elements of interpretation.

50 Federal laws, once they have come into force, can no longer be amended or repealed by any other authority than the Federal Assembly itself. The reason for this is that federal laws cannot be reviewed for their constitutionality in the procedure of abstract judicial review (Art. 189 para. 4 sentence 1 FC; Art.

82 let. b BGG *a contrario*). Federal law that was enacted in violation of the principle of conferral is binding on the cantons (Art. 49 para. 1 FC). The same applies to the Federal Supreme Court with regard to federal laws (Art. 190 para. 1 in conjunction with 148 para. 1 FC). In other words, the **federal legislature** ultimately **determines** the **scope of** its own powers. When planning a new law or an amendment to an existing law, the most important means of "protecting" cantonal sovereignty thus appears to be a careful interpretation and correct determination of the scope of a federal competence provision (see N. 42; N. 67).

This setting of the course with regard to the horizontal and vertical separation of powers does not alter the fact that an evolutive interpretation of federal competences is in itself compatible with the dogmatic functioning of Art. 3 FC. However, the **principle of individual authorization** requires that "**new" regulatory needs must be traceable** to applicable competence norms. Otherwise, their regulation requires a new (separate) competence norm – or the regulatory authority remains with the cantons by virtue of subsidiary general competence. Any argument against a (too) flexibly evolutive interpretation of applicable competence norms must thus be derived from the wording, history and purpose of the relevant competences themselves with regard to Art. 3 FC. 51

Article 3 FC thus only has a legal **preclusive effect** if subsuming new regulatory phenomena or needs under applicable competence norms violates the principle of individual authorization. Only in this respect does Article 3 FC prohibit restrictions of cantonal regulatory powers (or their "sovereignty"). This **limiting function** is, however, only a **by-product** of the prohibition, arising from the principle of individual authorization, of the use of federal powers in a way that violates cantonal sovereignty. In any case, it is not an original objective of Art. 3 FC to prevent a centralization (however defined) of legislative powers at the federal level. From the perspective of Art. 3 FC, any centralization at the federal level or any "limitation of sovereignty" of the cantons is permissible in itself, provided it can be based on a sufficient constitutional foundation (see N. 8; on the problem of legal protection, see N. 57 et seq.). 52

In connection with this, it may be asked whether the principle of individual authorization can also be invoked – e.g. in the context of a specific judicial review – **against** an **evolutive concretization of federal laws**. Whether the 53 blocking effect of Article 3 FC also extends to the enactment of concretizing ordinances or general rulings (in particular plans, registers, inventories and lists), contractual agreements (e.g. program agreements [Article 46 para. 2 FC]) or on the enactment of *soft law*, is likely to play a role in practice, especially with regard to Art. 49 para. 1 FC; however, case law on this norm is scarce. In theory, such a spillover effect can be affirmed if new regulatory phenomena are, for the sake of simplicity, "subsumed" under the law, but the underlying statutory provision does not cover these phenomena in a legally sufficient manner (see N. 51). In the event of a dispute, the federal government bears the burden of proof that it is acting in accordance with the constitution from a "competence law" perspective (see N. 26). In view of the (future) openness of competence norms (see N. 48 f.), however, such "sub-statutory concretizations" are likely to be unconstitutional as a rule due to the lack of an adequate statutory basis (Art. 164 para. 2 FC).

4. Execution powers

54 Legislative power includes the power to regulate execution (concretization, application, execution and supervision). The question of which body is responsible to what degree must be considered not only from the perspective of the horizontal, but also of the **vertical separation of powers**. Another rule-exception principle applies here: federal legal regulations are to be enforced by the cantons (Art. 46 FC), unless the constitution or federal law stipulates otherwise. This "enforcement federalism" also has its roots in the 19th century.

55 The guarantee of sovereignty (Art. 3 sentence 1 FC) gives rise to a **cantonal organizational autonomy**, which also applies to the enforcement of federal law (see also 46 para. 3 and Art. 47 para. 2 FC). Accordingly, the cantons may choose the mode of execution of federal law (taking into account local constraints and preferences), insofar as federal law allows them the leeway to do so. A primary barrier to cantonal organizational autonomy (both with regard to the execution of federal law and with regard to the cantonal exercise of legislative powers) is Art. 49 para. 1 FC, according to which cantonal law may not violate the spirit and purpose of federal law, as well as Art. 49 para. 2 FC, according to which the Confederation supervises the execution of federal law by the cantons (so-called federal supervision).

Illustrative **practical examples** regarding cantonal organizational autonomy (or related legislative and enforcement powers) are, in particular, the judgments of the Federal Supreme Court on the relationship between the Covid-19 federal ordinances and the cantonal measures based on the directly applicable Art. 40 EpG and/or cantonal constitutional or statutory law (e.g. cantonal health laws). 56

C. Conflicts of jurisdiction between the Confederation and the cantons

1. Fundamentals

The relationship between federal and cantonal law can lead to conflicts of jurisdiction in a variety of ways. A conflict of jurisdiction **in the broader sense** exists when there is disagreement as to which public entity is responsible for legislating or applying the law (see N. 43 et seq., N. 54 et seq.) and to what extent. If the cause lies not in a mere intention to regulate or act, but in a conflict of norms, there is a conflict of competences **in the narrower, procedurally relevant sense** (N. 65 f.). 57

Art. 3 FC does not provide any guidance for the resolution of conflicts of competences. From this provision, one can deduce the rules according to which the competences of the Confederation are to be delimited from those of the cantons. However, FC art. 3 does not address the question of whether federal provisions should take precedence over cantonal provisions, nor does it address the question of which legal norms the Federal Supreme Court may or may not repeal. On the basis of FC art. 3 alone, the federal government and the cantons thus have a fundamentally **symmetrical "guarantee of competence"**. 58

However, this isolated view cannot be maintained throughout the entire constitutional structure. Where the federal government is responsible for regulating a particular area, the structure of the federal state requires that the cantons comply with its directives. This central policy choice means that the cantons' position is subject to a **material imbalance in favor of the federal government**. This is primarily due to the following constitutional provisions: 59

- Federal law that is in conformity with the constitution takes precedence over conflicting cantonal law (Art. 49 FC).

- Federal law that is in conformity with the constitution takes precedence over cantonal law if a federal decree replaces a cantonal regulation. In this case, the cantonal law loses its independent significance.
- The Federal Supreme Court must enforce federal laws that have been enacted in violation of the division of powers or that are otherwise unconstitutional vis-à-vis cantonal law, as long as the Federal Assembly does not repeal the corresponding federal law (or parts of it) (see in particular Art. 190 FC).

60 These principles are conflict-of-law rules that govern the resolution of conflicts of jurisdiction between the Confederation and the cantons. The Federal Supreme Court may only examine and determine the unconstitutionality of federal laws (Art. 190 FC), but it may not repeal them (Art. 189 para. 4 sentence 1 FC). The same applies to federal ordinances, unless the law provides for exceptions (Art. 189 para. 4 sentence 2 FC). The above shows that the **legal protection of the cantons** against the federal government in Swiss law is rather **weakly developed** (in comparison to the competences of the constitutional courts of Germany or the USA, for example).

61 Conflicts of jurisdiction between the federal government and the cantons can be resolved in Swiss law **in two ways**: either through mediation or “agreement” (N. 62 ff.), or through legal action in which the Federal Supreme Court finds that the federal government has violated Art. 3 FC and leaves it to the Federal Assembly to resolve the issue (N. 64 ff.).

2. Cooperative resolution of conflicts of jurisdiction

62 According to Art. 44 para. 3 FC, “disputes between cantons or between cantons and the Confederation [...] shall as far as possible be settled through negotiation and mediation”. The term “dispute” encompasses both legal conflicts and political differences of opinion.

63 This amicable dispute resolution mechanism is an expression of the “cooperative” federalism in Switzerland (Art. 44 para. 1 FC). The Confederation and the cantons should also find a solution together in conflict situations – insofar as these arise in the first place as a result of the cantons' participation in the Confederation's decision-making process (Art. 45 FC) – taking into account their mutual interests.

Recourse to the Federal Supreme Court (see N. 65 f.) should only be possible if an amicable settlement of the dispute has failed. 64

3. Legal protection of the cantons with regard to Art. 3 FC

The cantons have procedural rights to safeguard their constitutional rights vis-à-vis the Confederation. Art. 89 para. 2 lit. c BGG gives "public bodies" an independent right of appeal within the framework of Art. 82 BGG to "complain about violations of guarantees granted to them by the cantonal or federal constitution" (cf. Art. 189 para. 1 lit. e FC). A **reduction of cantonal sovereignty** by federal law enacted in violation of competences is covered by this without further ado. In addition, cantonal bodies, e.g. the government, may be authorized to take legal action in order to safeguard important public interests in the event of disputes within the canton under Art. 89 para. 1 BGG. 65

Furthermore, conflicts of jurisdiction between the federal government and the cantons or between two or more cantons can be brought directly before the Federal Supreme Court by means of a **legal action** (Art. 189 para. 2 FC; Art. 120 para. 1 lit. a BGG). Unlike the framework of the appeal in public law matters (Art. 82 ff. BGG), an "abstract" challenge of federal law – separate from a specific individual act – is possible here. However, the restrictions on the powers of the Federal Supreme Court explained above also apply in the context of the constitutional action (see N. 50, N. 60). 66

The most effective means by which the cantons can "protect" their sovereignty is **constitutional interpretation**. This applies both when the Federal Supreme Court examines the constitutionality of cantonal law (abstract judicial review) and when it considers the constitutionality of federal law *as a preliminary matter* in the procedure for concrete judicial review. 67

In the case of an **abstract review of a norm** of cantonal law, interpretation in conformity with the Constitution has a **protective function**, because it is the Federal Court's established practice to set aside cantonal enactments only if they cannot be interpreted in conformity with the Constitution. In the case of the **specific review of the constitutionality** of federal law, however, the constitutional interpretation has an **appellate function** with regard to the federal enactment on which the contested individual act is based. By establishing that the federal legislature (or the Federal Council) has exceeded its powers in an unconstitutional manner and by refusing to apply the relevant 68 provision in the individual case, the Federal Supreme Court points out the error to the federal bodies and urges them to amend the law. For more information on the interaction of Articles 49, 189, para. 4 and Article 190 FC, please refer to the respective individual comments.

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COMMENTARY ON

Art. 5a FC

A commentary by Reto Walther

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Art. 5a Subsidiarity

The principle of subsidiarity must be observed in the allocation and performance of state tasks.

CONTENT

I. OVERVIEW

The principle of subsidiarity is sometimes referred to as a "dazzling" - difficult to understand - principle. The reason for this is that there is no such thing as "the" principle of subsidiarity. There is a multitude of conceptions of the principle of subsidiarity. The idea of subsidiarity is used in many different ways and can look back on a long, extremely rich and varied history. Due to the rather modest legal-practical significance of Art. 5a FC (Section IV.), there is sufficient space here to duly appreciate the ideological-historical significance of the principle of subsidiarity not only, but of course also in the context of the Swiss Federal Constitution (especially Section III.). This weighting is in keeping with the character of the subsidiarity principle, which is more a guiding political idea than a legal principle applicable to individual cases. 1

II. HISTORY OF ORIGINS

A. Conceptual and ideological roots of the subsidiarity principle

On the one hand, the concept of subsidiarity goes back to the Latin "subsidium", which stands for help and more specifically for military reserve forces. On the other hand, Catholic theologians translated the Greek term "hypo taxis" into the Latin "sub sedeo". Inspired by subordinate clauses in Greek grammar, they thus described society as pluralistic, as an organisation built on many supporting subordinate and superior communities. This is how the term "subsidiarium", subsidiarity, came into being. This word origin is significant because it emphasises the basic structure of social reality behind the idea of subsidiarity: by its very nature, every social activity across many levels is always subordinate to that of the individuals involved or affected by it or their associations in groups such as families, associations, communities, etc. This is why the multi-level concept of subsidiarity was developed. This is why the multi-level (federal) structure of the state was also called a pre-constitutional principle of order. 2

Thomas Aquinas developed the idea that increasingly complex human societies emerge through many levels of organisation, each with its own purposes (families, villages, etc.). According to Aquinas, the role of the state is merely to ensure the conditions (order, common good) necessary for human associa- 3 tions to prosper below the level of the state. This idea is reflected in the constitutional principle of subsidiarity. In my opinion, the idea can also be applied to multi-level state systems in a slightly modified form: Articles 47 and 50 FC, for example, could be understood in this sense: The former guarantees the autonomy of the cantons in the federal state (para. 1) and ensures them sufficient tasks, sources of funding and organisational autonomy (para. 2); the latter protects the communes at least to a certain extent (see below, n.26).

4 While Aquinas had anticipated today's understanding of subsidiarity as a principle of political order, Johannes Althusius, known as the father of federalism, represented an understanding of the relationship between centre and members that deviated from the order of the federal constitution. Althusius wanted to grant the members a veto right against centralisation steps, as is known from the confederation of states and traditional international treaty law. In contrast, the individual cantons in the federal state do not have a veto right against centralisation steps. Only, but nonetheless, changes in status and territory require the consent of the affected cantons and their population (Art. 53 para. 2-3 FC). Instead of immunity from unwanted centralisation, considerations of effectiveness and efficiency characterise federalism at the federal level (cf. Art. 43a para. 1-2 and 5 FC).

5 In the recent past, it was primarily the Catholic social teaching of Pope Pius XI (1931) that formed the concept of subsidiarity. According to Catholic social teaching, every action of a community presupposes that it serves the next smallest group of people down to the individual: although society organises itself into groups, the individual should remain as much as possible as an individual. By protecting and promoting a diverse (pluralistic) society, the individual's development is also protected. The constitutional principle of subsidiarity is ultimately also based on the insight that "tasks [should] be assigned to the smaller communities as far as is reasonably possible", provided that the "preservation of the smaller community is desired". It is precisely this desire that constitutes the principle of subsidiarity: It expresses a preference for leaving responsibilities to the smaller unit so that it remains as a (partially) autonomous entity.

6 In fact, the popularity that subsidiarity as a principle of political order in multi-level systems has experienced in recent decades is mainly driven by more or less pronounced fears of the creeping expansion of the influence of the higher or central level ("mission creep"). This became clearly visible when the

media and legal scholars reported that the Maastricht Treaty on European Union could only have been "saved" by inserting the principle of subsidiarity into it. The subsidiarity principle was also included in the European Convention on Human Rights (ECHR) (recital 6 of the preamble) to satisfy member states for whom the European Court of Human Rights (ECtHR) had become too influential. As an element of international treaty interpretation, the addition to the ECHR preamble is in principle legally significant. Nevertheless, the political decision to anchor the principle of subsidiarity in the ECHR already sent out an effective signal: It was enough, as empirical legal research shows, to induce the ECtHR to judge more cautiously in anticipation - before the Convention amendment entered into force. The subsidiarity principle under federal constitutional law is basically motivated in a similar way to the subsidiarity principles under European law. Switzerland's possible accession to the EU was one of the reasons for anchoring the subsidiarity principle in the constitution.

This perspective brings the liberal idea of self-determination to the fore. Indi- 7
vidual and common interests can presumably be better pursued in comparatively small, homogeneous communities than by a superordinate central authority. Just as it may seem justified to protect member states from centralisation, however, it may also be justified to establish central mechanisms that protect the individual from violations of fundamental rights by member states; for example, if discriminatory practices persist in individual member states that have already been overcome at the national level. For example, the federal constitutional catalogue of fundamental rights and the federal court have long protected individuals against violations of fundamental rights by cantonal authorities. Admittedly, this is only one legitimate reason for centralisation among others.

These remarks show that the principle of subsidiarity is a complex principle 8
that can manifest itself in different ways. The literal reference to "the principle of subsidiarity" in Art. 5a FC cannot therefore adequately determine the distribution of competences in the Swiss federal state.

B. Incorporation of the principle of subsidiarity into the Federal Constitution

Contrary to what the long roots of the subsidiarity principle in the history of 9
ideas might suggest, Art. 5a FC appears to be relatively insignificant when the

provision is viewed in terms of constitutional history and practice. The principle of subsidiarity was absent from the federal constitutions of 1848 and 1874, and the 1999 constitutional revision did not include the term "subsidiarity" in the constitutional text either. It was not until the 2004 revision of the financial equalisation system and the tasks between the Confederation and the cantons (NFA) that Art. 5a was introduced into the Federal Constitution and with it the explicit reference to the idea of subsidiarity.

10 Before going into detail on this rather recent development, it should be pointed out that the Swiss federal state has always implicitly followed the logic of subsidiarity (see Art. 3 FC 1848/FC 1874: "The cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution, and as such exercise rights which are not vested in the federal power"): The "general competence" never lay with the Confederation, which in the past, as today, was only allowed to act on the basis of an explicit constitutional foundation (cf. Art. 3 and Art. 43a para. 1 FC). Today, as in the past, the Confederation can only act if the constitutional legislator, i.e. a majority not only of the Swiss people but also of the cantons (Art. 142 para. 2 in conjunction with 140 para. 1 let. a FC), considers this to be expedient, useful, desirable or the like (cf. the 2nd chapter of the 3rd title of the current FC and the enumeration of federal competences in the Federal Constitution of 1874). From a historical point of view, the federal state does not serve to unite the cantons as closely as possible, but to preserve their autonomy and independence, so that constitutional federalism is ascribed a "static-defensive" character.

11 These constitutional historical roots of the subsidiarity principle in the idea of enumeration, i.e. the explicit and conclusive naming, of all federal competences (principle of limited or concrete individual authorisation, see Art. 3, 42 FC) raises the question of the relationship between the enumeration and subsidiarity principles. From a perspective that takes into account the fundamental nature of the principle of subsidiarity, this often insufficiently clarified relationship (see, for instance, n.12 below) appears as a means-ends relationship: the enumeration of federal competences places the Confederation within "enumerated limits" vis-à-vis the cantons, which serves to ensure the subsidiarity of the Confederation. This clearly assigns the task of concretising the subsidiarity of the Confederation vis-à-vis the cantons through corresponding allocations of competences (cf. n.30 below) to the federal constitutional legislature and thus to a political actor (cf. n.37 below). Furthermore, ensuring the

subsidiarity of the Confederation by means of "enumerated barriers" allows to establish a certain legal certainty about the competences assigned to the subsidiary level. In view of the great vagueness of the subsidiarity principle (cf. below N.13 f., 34 ff.), this is valuable in terms of the rule of law.

In view of the long constitutional tradition of the subsidiarity of the Confeder- 12
ation (above n.10), it is not surprising that at the beginning of the total revision of the Federal Constitution in the 1960s there was fundamental agreement on the subsidiarity of the Confederation. What was disputed was the extent to which the principle of subsidiarity was capable of acquiring practical legal significance. The draft constitution of the expert commission under Federal Councillor Furgler (1977) included the idea of subsidiarity in Art. 53 para. 1, but without explicitly mentioning the concept of subsidiarity. The model study "What a new Federal Constitution could look like" by the Federal Department of Justice and Police (1985) contained a similar provision in Art. 55 (see also Art. 54 para. 2-3). Finally, the preliminary draft (1995) wanted to anchor the idea of federal subsidiarity at least indirectly in Art. 32 para. 1 ("The cantons are responsible for all tasks that are not assigned to the Confederation by the Federal Constitution."). However, the Conference of Cantonal Governments (KdK) demanded that the principle of subsidiarity be explicitly written down: The KdK demanded that the Confederation only "intervene in the right of the cantons to enforce ... if this is unavoidable". As a result, the draft constitution of 1996 for the first time mentioned the idea of subsidiarity by name (Art. 34 para. 3: "The Confederation shall observe the principle of subsidiarity."). This provision was intended to take the concerns of the cantonal governments into account "to the greatest extent possible".

Interestingly, however, the explicit mention of the principle of subsidiarity 13
was then deleted in the Council of States, i.e. by the cantonal deputies. The rejection by the Council of States of the draft Art. 34 para. 3, which explicitly mentions subsidiarity, is usually attributed to the votes of Rhinow, who was then a member of the Council of States. Rhinow, a member of the Council of States (and professor of constitutional and administrative law), warned against including new unclear and ambiguous terms in the constitutional text and took the view that the idea and philosophy of subsidiarity were too unclear and vague to devote a constitutional provision to the principle of subsidiarity. The National Council only relented in the Unification Commission. The result

was the provision according to which the Confederation "shall assume only those tasks which require uniform regulation" (Art. 42 para. 2 FC 1999).

14 According to Rhinow, the Council of States "expanded" the principle of subsidiarity in the formulation just quoted. In view of the complex and varied history of ideas on subsidiarity on the one hand and the short Art. 42 Para. 2 FC 1999 on the other, this admittedly appears to be an exaggeration; the provision was also criticised for being misleading. Only a few years later, on the occasion of the reorganisation of financial equalisation and the division of tasks between the Confederation and the cantons, it was already supplemented again, namely to the effect that the Confederation not only takes over tasks that require uniform regulation, but also (other) tasks that exceed the power of the cantons. The current Art. 43a para. 1 FC reads: "The Confederation shall assume only those tasks which exceed the power of the cantons or which require uniform regulation by the Confederation."

15 In addition to various provisions on the relationship between the Confederation and the cantons, the NFA constitutional revision thus addressed also included the current "subsidiarity article" (Art. 5a FC, according to the dispatch still Art. 3a) and thus the decision to include the subsidiarity principle as a "state policy maxim" in the Federal Constitution. In contrast to 1999, the Council of States was largely in agreement in 2004 on explicitly anchoring the principle of subsidiarity in the constitutional text. The only point of contention was where the current Art. 5a should be placed in the constitutional system. The majority of the advisory commission voted to include the principle of subsidiarity in the General Provisions at the beginning of the constitutional text, so that it would apply in principle to all three levels of government. The minority, however, complained that the principle of subsidiarity should correctly be included in Art. 42 para. 2, because it only regulates the relationship between the Confederation and the cantons, but not the relationship between a canton and its communes, which is shaped by communal autonomy under cantonal law (see n. 26 below).

16 In the National Council, too, it was undisputed during the deliberations on the NFA that a subsidiarity article should be included in the constitutional text. As in the Council of States, the debate revolved around where the provision should be placed. The committee that prepared the report wanted to place the principle of subsidiarity in Art. 43a, but the majority of the National Council followed that of the Council of States (and the Council's own committee

minority), which meant that Art. 5a FC, which has remained unchanged since then, was a done deal - subject to the obligatory constitutional referendum. In accordance with the systematic affiliation of Art. 5a to the General Provisions of the FC, the principle of subsidiarity is now to be regarded (in contrast to the former Art. 42 para. 2 FC) as a general rule of state organisation that affects all three levels of state (see on this below n. 26 ff.).

III. CONTEXT

The subsidiarity article of the Federal Constitution belongs to the constitutional order of federalism. This can be seen simply from the fact that Art. 5a FC found its way into the Constitution on the occasion of the federalism reform (see II.B. above). In particular, however, Art. 43a para. 1 FC "Principles for the allocation and fulfilment of state tasks" illuminates the meaning of Art. 5a FC (at least a little): According to Art. 43a para. 1 FC, the Confederation "shall assume only those tasks which exceed the power of the Cantons or which require uniform regulation by the Confederation". It is this provision - a kind of hinge between the subsidiarity and enumeration principles (cf. n. 11 above) - that primarily clarifies what Art. 5a FC actually means by "the principle of subsidiarity shall be observed" when tasks are assigned and fulfilled in the federal state. However, conversely, Art. 5a FC also illuminates Art. 43a FC, namely insofar as certain limits for Art. 43a FC follow from the preference of the principle of subsidiarity in favour of the decentralised level of regulation: Neither may the Confederation take action solely because it is of the opinion that there is a need for uniform regulation, nor may it be automatically concluded from the need for uniform regulation that federal regulation must be imposed on the cantons. These two considerations make it possible to further contextualise Art. 5a FC. 17

The first idea, according to which the Confederation may not take action merely because it considers that federal competence is required, leads to Art. 3 FC, according to which the cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution. The second part of this provision states that federal action must always be based on a constitutional norm of competence (cf. II.B. above with reference to the literature). The principle of individual authorisation applies to the Confederation: Each of its competences must have been transferred to it individually in the constitution. This also means that every federal competence is based not only on a popular vote 18 but also on a majority of the cantons and not only on the will of the federal bodies. Conversely, the cantons are responsible in principle - i.e. even without a corresponding constitutional provision - unless a competence has been exclusively transferred to the Confederation. This is sometimes referred to as the "subsidiary" general competence of the cantons. However, this expression is misleading insofar as the Confederation is subsidiary. It is the Confederation that "stands in" for the cantons (cf. the historical roots of the term above n. 2 ff.) if this appears necessary or at least sensible in an area of state action, not vice versa. It would therefore be correct to speak of a residual general competence of the cantons, as in the French-language literature on Swiss constitutional law.

19 It should also be noted that even if regulatory sovereignty lies with the Confederation, the principle of enforcement or implementation federalism applies: normally, the cantons implement federal law, so that they retain a certain influence that allows them to take cantonal peculiarities into account (Art. 46 para. 1 FC). The concept of subsidiarity also encourages the Confederation to respect cantonal particularities and the greatest possible cantonal room for manoeuvre (Art. 46 para. 3 FC). Nevertheless, the Confederation must ensure that the cantons (uniformly) respect federal law, which has priority (Art. 49 para. 1 FC) (Art. 49 para. 2 FC). The tension between diversity and unity that the principle of subsidiarity seeks to navigate is clearly evident here.

20 With regard to the second consideration mentioned in n. 17, according to which the Confederation may not take action merely because a matter requires uniform regulation, the following should be noted: In principle, the cantons can coordinate among themselves independently, even if not always smoothly, if there is a need for uniform regulation. In principle, the Confederation is not needed for this: Art. 48 f. FC explicitly provide for intercantonal agreements. For example, the concordat on measures against violence at sporting events ("Hooligan Concordat") is well known to the general public. Related to intercantonal coordination through such agreements is the instrument of (suspensively) conditional and in this sense subsidiary federal competences, i.e. legislative competences to which the federal government is only entitled under a temporal and factual condition: temporally only when the cantons have not (successfully) acted; factually only insofar as the cantons have not acted (or failed). Illustrative is Art. 62 para. 4 FC concerning the har-

monisation of the school system (see also Art. 63 para. 5 FC concerning coordination in higher education). The Confederation assumes this harmonisation task only on the condition precedent that the cantons achieve no or only partial harmonisation.

Finally, with regard to Art. 43a para. 1 FC, it must be clarified in view of its wording that a task does not exceed the "power of the cantons" merely because the Confederation could perform it more efficiently in an economic sense. The first argument against a comparative efficiency criterion is that this would contradict the spirit of the subsidiarity principle: efficiency criteria threaten to promote centralisation rather than to curb it. As the ineffective subsidiarity principle of EU law shows, this should not be surprising, especially when the central regulatory level is empowered to compare the efficiency of a centralised and a decentralised regulation. Comparative efficiency thinking runs counter to the values of pluralism and self-determination. They are served by the principle of subsidiarity (cf. II.A. above). If these values are underestimated, this can also destroy the supposed efficiency gains of centralisation steps: "Imposed" centralisation steps are likely to fail regularly due to their lack of social acceptance. 21

The subsidiarity principle cannot be applied mechanically. Just as federalism includes "cooperative" forms of cooperation between the levels of government based on goodwill and partnership, "lived" subsidiarity also plays a non-negligible role in the federal state. Examples of this are federal competences that the federal government does not exercise, only exercises partially or only after a certain delay. Furthermore, a (moderate) "recantonalisation", i.e. a strengthening of the cantons' competences, always remains possible in principle, which also happened when Art. 5a FC was included in the Constitution. Conversely, the past has shown that the cantons sometimes like to leave decisions to the federal government that they would otherwise have to make. The resulting oscillation between centralisation and decentralisation helps to find widely accepted solutions; in this respect, subsidiarity is also a mediating mechanism. The downside of this is, for example, unclear responsibilities, regulatory patchwork and a lack of ability to act when time is of the essence. 22

A final consideration of the context of Art. 5a FC must finally ask whether the idea of subsidiarity as such - Art. 5a FC should at most have an analogous effect - could and should not also guide Switzerland's foreign relations. Switzerland gave itself its constitution "in an effort to ... strengthen freedom and 23 democracy, independence and peace in solidarity and openness towards the world". Here, too, the tension between sovereignty or autonomy and integration into central or superordinate structures shines through, so that it must be discussed (politically) under which conditions Switzerland should become involved and integrated internationally and to what extent. The basic ideas of the principle of subsidiarity can probably also be applied to this problem. In fact, Switzerland was a driving force when it came to anchoring the principle of subsidiarity in the ECHR (see n. 6 above). If one realises that the principle of subsidiarity under the Convention mainly regulates the relationship between the international court and the states as politically self-governing commonwealths, this can hardly come as a surprise. The Swiss constitutional tradition traditionally assigns a comparatively strong role to political democracy vis-à-vis constitutional court control. The discussion about the subsidiarity of the European level of the convention system thus suggests the following: In particular, states that traditionally attach great importance to the democratic process will, for the time being, insist on granting only a decidedly subsidiary role - subordinate to the member states - to international organisations to which they accede. For the democratic legitimacy of international legal systems and the political control over them will continue to derive primarily from the states due to the lack of developed supranational democracy.

24 The question is what this means for Switzerland's relationship with the European Union. In any case, the discussion about the appropriate distribution of competences with regard to the relationship with a legal system that sees itself less as inter- than as supra-national and whose law claims primacy of application over national law is intensifying. The UK's Brexit and Switzerland's EU-scepticism indicate that states with a strong tradition of parliamentary supremacy or (indirect) popular democracy attach particular importance to a pronounced and effective EU subsidiarity. On the other hand, the following must be taken into account: The EU's current stage of development makes it a sui generis organisation to which a subsidiarity logic, which seems appropriate for other intergovernmental organisations, can presumably not be meaningfully applied. Mechanisms known from the constitutional law of federal states for the preservation of federal subsidiarity are also unlikely to be suitable for the EU due to its lack of federal character. This shows once again that the principle of subsidiarity can take on different forms in different contexts and is highly susceptible to change. For this reason, it is hardly conceivable that the inclusion of the subsidiarity principle in future treaty provisions on bilat-

eral Swiss-European relations will be able to break through the Gordian knot of domestic and European "red lines": due to its great indeterminacy, both sides are likely to be wary of setting aside controversial points by referring to the subsidiarity principle. However, Switzerland could use the idea of subsidiarity internally to structure the domestic discussion on the relationship with the EU. The principle of subsidiarity could help in interpreting the central arguments for and against further integration into the supranational structures of the European project.

IV. COMMENTARY IN THE NARROW SENSE

A. Scope of application

According to its wording, the scope of application of Art. 5a FC is limited to 25
state tasks. It covers the performance of state tasks in all phases of law-making and law implementation. Foreign affairs" (Art. 54 ff. FC) are also covered, since the Confederation and the cantons must also cooperate here (see Art. 55 FC) and respect their respective competences and interests (see in particular Art. 56 para. 1-2 FC).

As part of the General Provisions of the Federal Constitution, Art. 5a FC is ad- 26
dressed to all three levels of government. At least in principle, it also concerns the communes or the relationship of the cantons to them. The argument that the relations between a canton and its communes cannot fall under the federal constitutional principle of subsidiarity because they are shaped by communal autonomy under cantonal law (see above n. 15 in fine) is not entirely conclusive. The Federal Constitution (Art. 50 para. 1) guarantees communal autonomy as a justiciable constitutional right, the meaning and purpose of which presupposes a tripartite state structure and thus the existence of communes, even if it does not completely clarify the question of whether a canton may completely dispense with the communal level. Admittedly, the communes "only" enjoy autonomy according to cantonal law, but they are nevertheless recognised as a level of state with their own competences (but not individually in their existence) under federal law or, in my opinion, even protected according to the more convincing view. This protection serves a concern, community democracy, the practice of democracy closest to the citizen in the tripartite federal state, which is in line with the general logic of the subsidiarity idea. Accordingly, the view that Art. 50 para. 1 FC (also) implements the principle of

subsidiarity is to be followed. This does not negate the fact that it is up to cantonal law to determine the scope of communal autonomy. The overview of cantonal law in Bellanger confirms this: The subsidiarity principles of the cantonal constitutions largely coincide with the understanding of Art. 5a FC in this context, so that a political obligation to justify cantonal extensions of competence follows from this (cf. below n.35).

27 The individual and society are not addressed by Art. 5a FC. The subsidiarity principle of Art. 5a FC is only applicable to state action (see above N. 25 f.). In distinction to the principle of subsidiarity concerning the state (and supranational) levels of regulation, there is sometimes talk of a "socio-political" principle of subsidiarity, which refers to the relationship of the individual and civil society to the state and provides for the state to intervene only if civil society efforts are insufficient. Insofar as reference is made in this regard to Art. 6 and 41 para. 1 FC, which emphasise the responsibility of each person for themselves and their contribution to the state and society, the legal anchoring of this socio-political principle of subsidiarity is easily recognisable. However, naming other provisions such as equal opportunities (Art. 2 para. 3 FC) as aspects of a constitutional principle of subsidiarity threatens to overstretch it. If one assumes (and this should be indisputable) that the state should ultimately always serve the individual, every state action must be rooted in a broadly understood "need to help" individuals. Thus, practically every constitutional provision can be placed in the context of the idea of subsidiarity, including fundamental rights as principles of the liberal constitutional state that limit the state in favour of individual initiative. This reminds us that the idea of subsidiarity is based on a conception of the basic structure of social reality (see above n. 3). However, the normative benefit of an excessive use of the concept of subsidiarity for all kinds of constitutional arrangements is likely to be small, if not negative.

28 On the other hand, the principle of subsidiarity is relevant to the question of whether and, if so, within what framework the state should become active in an area in the future: It designates, at least in principle, the level of government that is responsible for assessing and deciding whether public action is necessary at all. However, this must not be understood as a preference of the subsidiarity principle enshrined in Art. 5a FC for the promotion of private self-regulation, the delegation of state tasks to private parties or similar strategies of withdrawal by the state: Art. 5a FC does not express itself in this regard

(but cf. Art. 6 FC, on this above n. 27, and, as far as the economy is concerned, Art. 94 FC with its fundamental decision in favour of a free, private, competition-oriented market order).

B. Purpose and functioning

The principle of subsidiarity in general and in Art. 5a FC serves self-determi- 29
nation and pluralism (cf. n. 3 ff. above). In the Swiss constitutional state, it thus aims to protect decentralised democracy and thus political freedom and proximity to citizens, cultural, linguistic and ethnic diversity, as well as the (concomitant) competition of different economic locations, tax systems, etc.

To this end, Art. 5a FC first establishes a rule for the distribution of compe- 30
tences, which serves to allocate tasks to the levels of government. Admittedly, Art. 5a, like Art. 43a FC, was drafted too openly to be able to "fine-tune" the distribution of tasks in the federal state (see below n. 34 ff.).

Contrary to the conceptual roots of subsidiarity (see above n. 2), Art. 5a FC 31
does not stipulate an (auxiliary) duty of the Confederation to take over tasks from the cantons (see below n. 36). In addition to the question of "whether" a federal competence is appropriate, Art. 5a FC also concerns the question of "how" a federal competence should be structured and exercised. The provision is thus also a rule for the exercise of competences that guides discretion and must be observed in the fulfilment of tasks. In particular, the principle of subsidiarity requires the Confederation or its organs to exercise its competences as sparingly as possible: Exclusive federal competences are to be avoided if the Confederation can also perform a task competitively with or in parallel to cantonal competences or if a basic federal competence is sufficient. However, Art. 5a, even in conjunction with Art. 43a FC, is not specific enough to function as a "hard" (prohibition-like) barrier to the exercise of competences (cf. below n. 34 ff.).

Finally, it is important to note what Art. 5a FC is not. The principle of sub- 32
sidiarity is not an independent rule of interpretation that overrides the traditional elements of constitutional interpretation and would generally require a restrictive interpretation of federal competences. Nevertheless, the concept of subsidiarity, as a consequence of the federal structure of the Swiss state, must be taken into account when determining the scope of federal competences. If a norm of competences can be interpreted in different ways, it may

be advisable to give preference to the interpretation that best satisfies Art. 5a FC. Generally speaking, Art. 5a FC must be taken into account as part of the overall context of the Federal Constitution when establishing practical concordance within the constitutional provisions.

33 It should be noted that the principle of subsidiarity addresses both the subsidiary and the primary level: In Switzerland, it is (as much) the responsibility of the cantons (and the municipalities) as of the Confederation (and the cantons) to prevent centralisation. The subsidiarity idea can only succeed if it functions according to both a negative (inhibiting) and a positive (empowering) logic.

C. Normative content

34 The subsidiarity principle of Art. 5a FC is not merely a programmatic principle. Art. 5a FC establishes a legal principle, albeit an open one in terms of content, which is highly open to interpretation and which the political authorities must flesh out (see below n. 35 ff.). This has hardly been done to date; in particular, Art. 43a FC, which concretises Art. 5a FC, is itself too open to be able to provide this service adequately. The questions of when a matter requires uniform regulation by the Confederation or when the power of the cantons is not sufficient to fulfil a state task satisfactorily are questions of value that can ultimately only be answered politically. A general legal concretisation of the subsidiarity principle of Art. 5a FC is therefore hardly to be expected in the future.

35 For this very reason, there is probably agreement that the principle of subsidiarity is a procedural or institutional principle: It does not impose any substantive requirements, but places the bodies addressed by it - primarily the federal legislature and the cantonal constitutional and legislative bodies (cf. n. 26 above) - under an increased "obligation to justify and substantiate". Its main significance therefore lies in the fact that proposals to the authorities within the scope of application of Art. 5a FC (cf. above N. 25 f.) require a special political justification. In addition, decisions to centralise a task or its fulfilment must be periodically examined for their continuing justification.

36 The federal constitutional legislature, the people and the cantons, are not bound by Article 5a FC in a sense that would make this provision a barrier to permissible constitutional amendments. Nevertheless, the constitution-maker

does well to take the principle of subsidiarity into account as a "state-policy maxim" when striving for a coherent overall constitutional order that equally respects the various structural principles of the constitutional order. The majority of the cantons required for constitutional amendments (Art. 140 para. 1 let. a and Art. 142 para. 2 FC) also prevents additional federal competences from being created against the will of a majority of the cantons and thus steps towards centralisation from being taken.

In individual cases, the application of Art. 5a FC is a political question (cf. below n. 38). The main addressee is the federal legislature, which must transfer constitutional federal competences into federal law in a way that does not encroach on cantonal competences. However, it is only free to do so to the extent that the constitution requires it to exercise and shape federal competences (for example, in the case of basic federal legislative competences or concurrent federal competences). For the federal legislature subordinate to the federal legislature, the same applies in principle. For the federal constitutional legislature, Art. 5a FC cannot represent more than a kind of political declaration: Like any constitutional provision, Art. 5a FC merely acts as a self-binding obligation from the perspective of the constitutional legislator (see above n. 26). At the cantonal level, many authorities are already required by cantonal law to observe the principle of subsidiarity. Many cantonal constitutions have a subsidiarity article (see above n. 26), or they implicitly recognise the core idea of subsidiarity. In the absence of a corresponding provision, this silence is to be understood as a reference to Art. 5a FC. Consequently, every canton must base its relations with its communes on the principle of subsidiarity. 37

D. Lack of justiciability

The subsidiarity principle of Art. 5a FC is generally regarded as non-justiciable. Its content is too vague to lend itself to judicial assessment. The courts cannot control its observance by the federal authorities; Art. 5a FC does not confer any enforceable rights. This corresponds to Switzerland's general constitutional policy decision in favour of parliamentary supremacy. Even if the isolated doctrinal opinions in favour of the justiciability of Art. 5a FC were followed, Art. 190 FC would preclude constitutional court review of the federal legislature; even the Federal Supreme Court is prohibited from not applying federal laws if, in its judgement, they are unconstitutional ("application re- 38 quirement"). At least Art. 190 FC allows the Federal Supreme Court to review federal laws for their constitutionality without legal consequences (no "ban on review"). The question of whether the Federal Supreme Court could find a violation of the principle of subsidiarity in response to an autonomy complaint by a municipality must also be answered in the negative. Art. 5a FC can be understood as the programmatic foundation of communal autonomy of Art. 50 para. 1 FC, but the justiciability of the principle of subsidiarity does not follow from the combination of these two provisions; the concretisation of communal autonomy under the guidance of subsidiarity qua state policy maxim remains the political responsibility of the cantons. Consequently, the Federal Supreme Court could at best make a moral appeal to the political leaders to take sufficient account of the subsidiarity principle of Art. 5a FC. In view of the above, it is not surprising that Art. 5a FC has hardly been taken into account in the practice of the Federal Supreme Court.

39 For the time being, the application of the subsidiarity principle remains a matter for politics. At least the sciences can assist them.

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COMMENTARY ON

Art. 6 FC

A commentary by Johan Rochel

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Art. 6 Individual and collective responsibility

All individuals shall take responsibility for themselves and shall, according to their abilities, contribute to achieving the tasks of the state and society.

CONTENT

I. INTRODUCTION

Art. 6 of the Swiss Federal Constitution (Cst.) is found in the General Provisions of the Constitution (Title 1). It immediately precedes Title 2, which deals with fundamental rights, citizenship and social goals. 1

Article 6 Cst. is considered by the majority of legal scholars to be a programmatic article. It provides information on an important dimension of the concept of the individual (Menschenbild) that underpins the constitutional text. As far as case law is concerned, the Federal Court of Justice and the Federal Administrative Court make sporadic reference to art. 6 Cst. This reference is often used as a reminder of the importance of individual responsibility, particularly in the field of social insurance. 2

This commentary deals in order with the genesis, functions and legal scope of the article, then with its two components in the order in which they appear: individual responsibility, then social responsibility. Generally speaking, art. 6 Cst. contains concepts that are difficult to interpret. For example, the concept of responsibility and its relationship to individual freedom immediately raises philosophical questions. To address them, this commentary adopts a philosophy of law approach, drawing on resources from political philosophy. These resources are intended to highlight the interpretative richness of the concept of responsibility, and to underscore the normative questions it opens up. As pointed out by Häberle (infra, no. 21), the potential of art. 6 Cst. must be realized by the legislator and legal scholars, for example by using, as here, a philosophy of law approach. 3

As a common thread, this commentary attempts to show how the concept of responsibility and the related concept of individual freedom determine the interpretation of the content of art. 6 Cst. The latter appears as a central norm of a liberal constitution, a norm whose interpretation crystallizes reflections on the individual in society, his fundamental rights and society's expectations. Rather than a position for or against liberalism, the interpretation of art. 6 Cst. brings us back to the question of the type of liberalism presupposed in the constitutional order. 4

II. GENESIS

5 Art. 6 Cst. emerged in its present form during parliamentary deliberations on the total revision of the Federal Constitution. Parliamentarians discussed both the idea of individual responsibility for oneself, for others and for society, and the idea of fundamental duties or duties of citizenship. As explained below (infra, N. 12), parliamentarians eventually rejected the idea of fundamental duties organized in the form of a catalog. What remained were the concepts of individual responsibility and contribution to the fulfilment of the tasks of the state and society (social responsibility), which today make up art. 6 Cst.

6 The Federal Constitution of 1874 contained a general article on "civic duty". This article had already given rise to critical debate. At the start of the constitutional revision process, the proposal for a model constitution drawn up by the Federal Department of Justice and Police (FDJP) in 1985 contained a series of fundamental duties. This catalog appears immediately after the catalog of fundamental rights. The Federal Council's first proposal (1996) does not contain equivalent articles. The Federal Council abandoned this catalog of fundamental duties for two main reasons: the difficulty of choosing which duties deserve to be elevated to constitutional status, and the problems associated with sanctions in the event of non-compliance. In its Message, the Federal Council writes that the absence of a catalog of fundamental duties "does not mean, however, that the inhabitants of this country have no duties towards the community" (...). He points out that certain fundamental duties "retain their full meaning" (for example, the obligations to attend school, perform military service and pay taxes), even if they are not listed in a catalog.

7 A reading of the parliamentary debates highlights the shift from fundamental duties to the idea of individual and social responsibility. In the course of these debates, parliamentarians make unsystematic use of the concepts of fundamental duties (Grundpflichten), civic duties (Bürgerpflichten) and individual and social responsibility. An analysis of the parliamentary proceedings reveals three relevant considerations to explain the final wording of art. 6 Cst.

8 Firstly, the appeal to individual responsibility appears in the context of a critical reflection on the contours of the social state. The CN Commission's rapporteur at the time, future Federal Councillor Samuel Schmid (UDC), observed that social benefits were being extended. In his view, the State had neither the vocation nor the means to solve all the problems of the Swiss popula-

tion. The idea of duties and/or individual responsibility is presented as a necessary corrective.

Secondly, the Federal Council's 1996 draft Constitution formalizes the catalog of fundamental rights and formulates a series of social goals. Faced with this development, some members of parliament wondered whether a logic of reciprocity did not require the mention of fundamental duties. The idea seemed to be in the air at the time, as demonstrated by the Interaction Council initiative spearheaded by former German Chancellor Helmut Schmidt. In 1997, together with 25 heads of government, he submitted the Universal Declaration of Human Responsibilities to UN Secretary-General Kofi Annan. As the introductory commentary to this declaration explains, the idea of reciprocity between rights and duties is central: "Recognition of the equal and inalienable rights of all the people requires a foundation of freedom, justice and peace - but this also demands that rights and responsibilities be given equal importance to establish an ethical base so that all men and women can live peacefully together and fulfil their potential". 9

Thirdly, the debate on responsibility deals with the expectations placed on individuals within a social group. The content of art. 6 Cst. and, in particular, the dimension of social responsibility, is presented in parliamentary debates as a response to the reality of an atomized, individualistic society. Responsibility is about caring for other members of society. State Councillor Hans Danioth (CVP), the author of one of the proposals that would become the idea of social responsibility in Art. 6 of the Swiss Constitution, speaks of a civic duty (Bürgerpflicht). He defines it as an ethical standard that serves as a reminder of the obligation to commit oneself to the community. His proposal was initially classified as a political right, before being moved during subsequent debates. 10

During these debates, Federal Councillor Arnold Koller (CVP) became the spokesman for the Federal Council's arguments. In particular, he pointed out that the concept of the human being that underpins the Constitution already includes the idea of responsibility and duties: if the human being has the capacity for autonomy in his choices, then he bears the responsibility that goes with it. According to Koller, this idea underlies the great constitutional projects of the 19th century. He remains open to a more direct evocation of the duties of individuals, as evidenced by his reference to John F. Kennedy's famous appeal, delivered during his inaugural speech in 1961 ("And so, my fel- 11 low Americans: ask not what your country can do for you - ask what you car do for your country."). On a semantic level, Koller's speech evokes the duties of citizens (Bürgerpflichten) and duties in general (Pflichten) in the context of the discussion of an article on individual responsibility.

12 At the end of the parliamentary debates, the concept of individual and social responsibility prevailed over the concept of fundamental or civic duties. The Federal Assembly decided against a catalog of duties because of the difficulties of integrating them into the structure of the new Constitution, but also because of a certain repetition of duties mentioned elsewhere in the constitutional text, such as the obligation to serve or the obligation to attend compulsory school. Nor did the explicit reference to a general duty to respect the legal order find a political majority at the end of the parliamentary proceedings.

13 Beyond the historical dimension of the parliamentary debates, an important conceptual distinction between fundamental duties and individual responsibility runs through the debates. One of the points of debate between these two concepts concerns the ability to translate the constitutional norm into concrete legal obligations. According to constitutional scholar Andreas Kley, a fundamental duty has four constituent elements: 1) a duty of a legal nature, 2) enshrined in a constitution, 3) of fundamental importance to the existence of the state, 4) which a person must fulfill towards the state. According to Kley, while responsibility is primarily programmatic and provides normative guidance of a general scope, fundamental duties must in turn be clearly concretized in the form of legal obligations. We will return to this question when considering the legal scope of art. 6 Cst (infra, n. 21).

14 Academic writers have identified several sources of inspiration for the debates surrounding art. 6 of the new Constitution. The Weimar Constitution and the Italian Constitution are mentioned for their explicit reference to the duties of individuals. Similarly, the preambles to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights clearly mention this idea of responsibility, recalling that "the individual has duties to other individuals and to the community to which he belongs, and is under a duty to strive for the promotion and observance of the rights recognized in the present Covenant". In Switzerland, according to Chatton, the Constitution of the Canton of Berne (1993) has certainly played a decisive role. Its art. 8, placed just before the catalog of fundamental rights, sets out in general terms the duties (Pflichten) of persons residing in the canton.

According to para. 1, everyone is obliged to fulfill the duties incumbent upon them by virtue of the Constitution and the legislation in conformity therewith. Para. 2 states that everyone is responsible for themselves, for other human beings and for ensuring that future generations have the right to determine their own future. The latest fully revised cantonal constitution, that of the canton of Geneva (2012), contains an article entitled "individual responsibility" (art. 13 Cst./GE), para. 1 covers a general duty ("everyone must respect the legal order") and para. 2 defines individual and social responsibility. The draft of the new Valais cantonal constitution also contains a similar article entitled "Individual duties and responsibilities" (art. 10). Paragraph 1 refers to a general duty to fulfill the duties imposed by the Constitution and legislation, while paragraph 2 refers to the responsibilities of all individuals towards themselves, the community and present and future generations. Para. 3 calls on everyone to ensure the appropriate use of public goods, services and natural resources.

III. COMMENTARY

15 As mentioned in the introduction (supra, no. 3), interpreting art. 6 Cst. involves considering questions of legal theory and political philosophy relating to the concepts of responsibility and freedom. This commentary deals in order with the functions and legal scope of the article, as well as with references to art. 6 Cst. in certain decisions of the Federal Court and the Federal Administrative Court (A.), and then with the two components of art. 6 Cst., i.e. individual responsibility and social responsibility (B.).

A. Functions and legal scope

16 Art. 6 Cst. comes at the end of Title 1 on general provisions. It is followed by Title 2 on fundamental rights and social goals. This location indicates that the normative ambition of art. 6 is of a general nature. As a general provision, it is intended to inform the entire constitutional text. Art. 6 Cst. is considered to be primarily programmatic. For the majority of legal scholars, its legal scope is limited to providing an aid to the interpretation of other constitutional norms. For the purposes of further analysis, it is possible to distinguish three general functions of art. 6 Cst.

1. Three functions

17 Firstly, art. 6 Cst. is often used in an attempt to grasp the conception of the individual (Menschenbild) that underlies the constitutional text. This attempt at hermeneutic construction builds on the preamble (notably the awareness of responsibility towards Creation and the duty to assume responsibility towards future generations) and refines this vision by referring to the two components of art. 6 Cst. (individual responsibility and social responsibility). In combination with other, more specific norms, the interpretation of art. 6 Cst. thus contributes to the emergence of as coherent a conception as possible of the individual to whom the Constitution is addressed. This conception of the individual in society can then be used to interpret other constitutional provisions.

18 Secondly, and directly linked to this conception of the individual in society, art. 6 Cst. can be used as a contextual norm for the various duties identifiable in other constitutional provisions. For example, every man of Swiss nationality is subject to a civic duty (military service, civilian service or payment of a tax, art. 59 para. 1 Cst.) and all children must receive basic education (art. 62 para. 2 Cst.). In terms of social responsibility, the Constitution also provides for mechanisms that can be read in the light of art. 6, such as old-age insurance (art. 112 para. 2 Cst.), the principle of occupational pension provision (art. 113 para. 2 Cst.) and unemployment insurance for salaried employees (art. 114 para. 2 Cst.). Häberle and Winistörfer also link art. 6 Cst. to the rules of a liberal market economy, such as the postulate of individual responsibility. In this context, Häberle sees social responsibility as a reminder of the individual's integration into a social group and a rejection of what he calls "Ökonomismus", i.e. an absolutization of the pursuit of individual profit.

19 Thirdly, parliamentary history and the position of art. 6 Cst. in the constitutional architecture remind us of its function as a critical contextualization of fundamental rights and social goals. As in the Constitution of the Canton of Berne, the explicit mention of individual and social responsibility precedes the catalog of fundamental rights. Art. 6 Cst. seems to act as a counterweight to the positive obligations that are increasingly placed on the state. The principle of subsidiarity, which derives from individual responsibility (infra, n. 38), is thus symbolically underlined by the order of the articles. Art. 6 Cst. comes first to underline the responsibility of individuals. Thus, art. 41 para. 1 Cst. concerning social goals clearly states that "The Confederation and the Can-

tons undertake, in addition to individual responsibility and private initiative, to (...)" (italics added).

These three functions shed further light on the question of the addressees of art. 6 Cst. This is the only provision of Title 1 (General Provisions) directly addressed to individuals (using the phrase "any person"). The expression "any person" includes all natural persons, not just Swiss citizens. In addition, following an analysis of the language versions and the preparatory work, Chatton defends the hypothesis that legal entities should, a priori, be included in the circle of addressees of the standard. In his view, the positive and negative impact that legal entities can have on their natural, cultural, social and economic environment justifies applying a duty of responsibility to them by analogy. 20

This question of addressees should not be confused with the legal scope of art. 6 Cst. (see infra, n. 21). By way of example, Biaggini considers natural persons to be the addressees in the foreground (vordergründig) of art. 6 Cst. In his view, however, the main addressee is the legislator. But the reference to the legislator (and more broadly to the public authorities) seems to derive from the need to determine the legal scope, and not directly from the question of the addressees. This distinction makes it clearer that art. 6 Cst. is addressed to everyone, but that it also has legal effects on the legislator and, more broadly, on the public authorities. 21

2. Legal scope

The legal scope of art. 6 Cst. is considered modest by the majority of legal scholars. Generally speaking, the article is described as essentially a moral appeal intended as a symbolic reminder of the community's expectations of individuals, but largely devoid of tangible legal effects. Biaggini reads art. 6 Cst. as a constitutional call to emphasize the ethics of individual responsibility, complementing other norms (e.g. Preamble Cst., art. 41 para. 1 Cst.). Nevertheless, Häberle sees an interesting normative potential to be developed through the interpretation of other constitutional norms or through legislative concretization. In his view, the potential of art. 6 Cst. only needs to be concretized by the legislator and the doctrine, for example by resorting to a comparative approach. 22

Generally speaking, Chatton sees in these cautious interpretations a general difficulty in apprehending programmatic norms. In his view, the moral content 23 of the norm, the absence of sanctions and the absence of rights and obligations that can be deduced from art. 6 Cst. must not transform this norm into an a-legal provision. Art. 6 Cst. has an a minima legal scope as an aid to the interpretation of open-ended provisions. Moreover, according to Chatton, the norm is to be considered when interpreting the conditions for restricting a fundamental right, specifically in the case of a positive obligation, where the question would be how to strike a balance between the state's obligation to help an individual and the individual's expectation of being able to provide for himself by his own means. However, art. 6 Cst. cannot be used to create from scratch conditions that are not provided for by law and/or other constitutional provisions.

3. Case law

24 The Federal Supreme Court (FSC) has only sporadically dealt with art. 6 of the Swiss Constitution. Social insurance law is particularly concerned by the few references to this article. In 2005, in a case concerning compulsory health insurance, the Federal Court ruled that Art. 6 of the Swiss Constitution had "no particular normative scope, but essentially a declamatory and signal value". The TF links the principle of subsidiarity to art. 6 Cst. Taking social assistance as an example, the fundamental principle of subsidiarity is "the expression of the obligation of co-responsibility and solidarity towards the community, an obligation enshrined in art. 6 Cst. The existence of a right to social assistance must be considered in the light of this principle of subsidiarity". This reference to art. 6 Cst. tends to demonstrate that the Federal Court considers this norm to be a constitutional principle that can be invoked by the individual in this context and therefore, according to Chatton, partially justiciable. In another welfare case (support for a Swiss family emigrating to New Zealand with a disabled child), the TAF found that art. 6 Cst. contained a fundamental ethical principle of higher rank. According to this principle, it is obligatory for a person in a situation of distress to try to get out of it on their own, using the means at their disposal.

25 The Federal Court and the Federal Administrative Court refer to art. 6 Cst. in the context of qualifying the efforts that can legitimately be expected of individuals. In a case dealing with the provision of SUVA-related information by means of a notice board on staff premises, the Court interpreted the provisions in force by mobilizing art. 6 Cst. as an expression of expectations in

terms of individual responsibility. On the basis of art. 6 Cst. the Court develops its vision of an individual of legal age (mündig), capable of informing himself/herself about the insurance to be taken out before a stay abroad. In a similar constellation, the Federal Court considers that disability insurance bodies are not obliged to explain how the various branches of social insurance work and how they interact. In the TF's view, this is the responsibility of each individual insured person. According to the hypothesis defended below (infra, N. 35), this level of effort should be integrated into a contextual approach to the skills needed to take responsibility for oneself.

With regard to naturalization, the TAF has used art. 6 Cst. to contextualize 26
certain conditions. In a case concerning the applicant's good tax reputation, the TAF refers to art. 6 Cst. as one of the relevant sources for ensuring that an individual honors his or her obligations to the state. This case also illustrates the combination of specific obligations (e.g. payment of taxes) with art. 6 Cst. Similarly, in the context of a family reunification case, the TAF interpreted the requirement of financial independence with reference to art. 6 Cst. In so doing, the Court qualified what appeared to be exigible by reference to the expectation of individual responsibility formulated in art. 6 Cst.

In criminal matters, art. 6 Cst. was referred to in an appeal concerning the 27
costs of proceedings in a case of cross-border cigarette smuggling. The lower court had argued that the appellant's reprehensible conduct, in particular his alleged breach of his individual duty of responsibility to the State (Art. 6 Cst.), had given rise to additional costs, and that the costs of the proceedings should be borne by the appellant, even though he had been acquitted. In its decision, the Federal Court emphasized that the legislator had not intended this article to be used to establish an offence.

In a case concerning the unauthorized exercise of a financial services activity, 28
the Federal Administrative Court (TAF) considers the individual responsibility of art. 6 Cst. to justify the fact that the person who has exercised his activities illegally must accept (zumutbar) the disclosure of relevant information on these activities, in order to restore the confidence of other players in the industry. Assuming the consequences of freely chosen behavior is at the heart of the TAF's interpretation of this chosen responsibility. Thus, the State does not have to conceal information in order to help this person.

B. First component: individual responsibility

29 The first component of art. 6 Cst. deals with individual responsibility: "Everyone is responsible for himself (...)". This component concerns each person's responsibility towards himself. Liberal thinking is built around the assumption that the individual is free, able to choose and revise his or her life choices in the light of the values and objectives he or she considers relevant. As the above-mentioned cases show, the question of responsibility arises as a correlate of the question of freedom. Interpreting the notion of responsibility in art. 6 Cst. therefore requires an interpretation of the notion of individual freedom. Given the magnitude of this task, the main aim of this commentary is to illustrate the need for coherence between the dimensions of freedom and individual responsibility. When constructing a "Menschenbild", constitutional exegesis must aim for this coherence. With this objective in mind, we focus on two points: the question of the general definition of individual freedom, and the question of the competences required to exercise this freedom. We shall see that these two points have an effect on the notion of responsibility in art. 6 Cst.

1. The definition of freedom

30 Firstly, the way in which individual freedom is defined has important consequences for the concept of individual responsibility. Two conceptions of freedom can be used for illustrative purposes. On the one hand, freedom can be defined as largely independent of the human group in which the individual finds himself. By way of analogy, we can think of the conception of freedom of an individual on a solitary island (e.g. Robinson Crusoe). Robinson is free in a way that disregards other human beings. There are no limits to his freedom of choice. Any limitation (e.g. by law or the state) is a priori perceived as a loss of freedom. This conception inspires a certain vision of the social contract, where several Robinsons come together and decide to delegate part of their freedom to an authority, in order to ensure, for example, their security (see Thomas Hobbes' Leviathan, for example).

31 On the other hand, individual freedom can be defined relationally, by anchoring the person in a human group. The person is free in the context of interactions with other humans and an environment. The individual is never alone; not to see him or her as part of a human group leaves in the shadows a reflection on the conditions and threats to freedom (see infra, N. 42). For propo-

nents of this relational vision, the existence of a legal framework is not a priori a threat to freedom (although it can become one), but rather its primary condition.

Each of these two conceptions of freedom, outlined here in broad strokes, leads to a different concept of individual responsibility. In a first, minimal sense, "every person is responsible for himself" can mean the individual's obligation to assume responsibility for his choices and their consequences. This minimal definition resembles a reflection of imputability, prohibiting above all any attempt to "pass the buck" to others (my free choice => my responsibility). In the case of the unauthorized exercise of a financial services activity mentioned above (supra, N. 27), the person who committed the fault is responsible and must, as such, accept the consequences of his actions. They cannot pass the buck to others. The TAF therefore considers that the person responsible must accept the disclosure of information concerning his or her fault, and that he or she must accept having to rebuild his or her reputation. 32

However, this minimal approach is not enough. Being responsible for oneself goes further than a simple logic of imputability to the free person. In a relational conception of law, the first component of art. 6 Cst. must be interpreted as a requirement for each person to identify the consequences of his or her choices. To impose a constitutional requirement of responsibility towards oneself is tantamount to demanding that each person, at the very least, take account of others. 33

But taking others into account (without any obligation to behave in a specific way) is still not enough. Art. 6 Cst. can therefore be understood as a call to master the negative consequences of one's choices for others. In this sense, being responsible for oneself means above all ensuring that one does not become a source of negative consequences (broadly defined) for one's environment. In this respect, art. 12 Cst. concerning the right to obtain help in situations of distress clearly stipulates that a person may be supported if he or she "is not in a position to provide for his or her own maintenance". This condition reflects the requirement for the person to, first and foremost, seek to avoid recourse to public assistance (a negative consequence on public finances). The above-mentioned case law on naturalization or family reunification raises exactly the same question: given an individual who is free and responsible for himself, what absence of negative effects (e.g. a social cost) or what positive contribution is the community entitled to expect and demand? 34

35 Interpreted in a relational way, the self-responsibility of art. 6 Cst. thus consists in presuming that each individual has the competence to control his or her impact on the environment. However, this presumption immediately raises two major questions: how can we ensure that individuals are competent to be free, and therefore responsible for themselves (infra N. 35)? And what is to be done in situations where, despite attempts to retain control, a person's actions nevertheless have negative effects on others? This question will be addressed in the Social Responsibility component (N. 47).

2. The skills needed to exercise freedom

36 Secondly, the question of the skills needed to exercise freedom, and thus self-responsibility, is central to the concept advocated by art. 6 Cst. Unless we start from the idea that freedom is acquired at birth and develops without intervention (a conception often associated with Robinson Crusoe-style freedom), it has to be said that freedom requires a set of skills. The most paradigmatic example is certainly basic education (art. 19 and 62 Cst.). Without these basic skills, an individual cannot be said to be free in the sense of the relational conception and, consequently, cannot fully exercise his or her responsibility in the sense required by art. 6 Cst.

37 In addition to basic skills, we need to consider other elements of this competence to take responsibility for oneself, such as social, physiological and other contextual factors. If it's easier to be responsible for oneself when one is young, wealthy and healthy, then the demand for responsibility should be accompanied by a commitment to combating the barriers to freedom and the competence to be responsible. This is particularly true of the social determinants that can be modified through public policy. Expressed in the context of a demand for equality and the fight against discrimination, some of these determinants are mentioned in art. 8 al. 2 Cst. Moreover, this reflection should be read in conjunction with the requirement for equality of opportunity (art. 2 para. 3 Cst.).

38 The question is more difficult for the few physiological determinants (e.g. genetic) that cannot be reduced to social determinants (directly at least). In fact, the first component of art. 6 Cst. has no equivalent in the concept of "according to one's strength", which is found in the second component (infra, n. 59). This concept has the merit of reminding us that we are not all equal when it comes to social responsibility. The argument proposed here would be to rec-

ognize the same limit for self-responsibility: we are not equal when it comes to the capacity to be responsible for ourselves. The jurisprudence referred to above (supra, N. 23) can thus be read in the light of this (in)equality with regard to the capacity to be responsible for oneself. This observation should be particularly relevant to questions of enforceability (Zumutbarkeit). When art. 6 Cst. is mentioned in the context of the efforts required of a mother suffering from health problems to provide for her relatives, the requirement of responsibility for oneself must be interpreted contextually. The competences enabling freedom and responsibility in the specific case of the person and his or her situation must be mobilized to interpret the level of exigibility in the light of art. 6 Cst.

3. Relationship with the principle of subsidiarity

Art. 6 Cst. is often used in the context of a discussion on the principle of sub- 39
sidiarity. Even if doctrine seems to be largely in favor of the subsidiarity thesis induced by art. 6 Cst. it is nevertheless important to distinguish two levels of analysis.

A caveat before proceeding: the dimension of subsidiarity deriving from the 40
primacy of responsibility for oneself must not be confused with the institutional subsidiarity of art. 5a Cst. On the relationship between art. 5a Cst. and art. 6 Cst., Gächter and Renold-Burch note that art. 5a Cst. is to be understood as a norm of competences within the federal state, while art. 6 Cst. deals with relations between individuals, state and society. The subsidiarity mentioned in art. 41 para. 1 Cst. is closer to art. 6 Cst.

At a first level of analysis, art. 6 Cst. certainly establishes a general subsidiarity 41
for state action against individuals. Individual responsibility seems to take precedence over state action, which intervenes only in a subsidiary capacity. At a second level, and this is a point often overlooked in commentaries on this constitutional provision, the powers necessary for freedom and responsibility presuppose action by the public authorities. As explained above, one is not born free and responsible, but becomes so through the acquisition of certain skills, on the one hand, and the elimination of certain constraining/limiting factors, on the other.

This second link with subsidiarity then comprises several stages, which it is 42
important to distinguish, as they may be subject to differentiated criticism. A)

The individual's responsibility for himself is primary. B) Not all individuals are equal in their capacity to be responsible. C) A process of equalization of the capacity to be responsible for oneself must be put in place, and a contextual approach must be adopted, capable of apprehending the real capacity of individuals before judging the exigibility of certain behaviors. D) The question arises as to who is responsible for driving this equalization process. Who is responsible for helping individuals become responsible for themselves? The State (public authorities), civil society (associations) or even individuals (e.g. relatives) can be identified as potential responsible parties. E) Assuming that the state bears at least part of this responsibility, it must act through basic education and the prevention of certain social determinants (e.g. by combating discrimination in accordance with art. 8 Cst.) in order to guarantee the greatest possible equality of opportunity (art. 2 para. 3 Cst.).

43 If this argument is accepted, we can then consider that the principle of subsidiarity (first level) requires and presupposes state action on the conditions of freedom and responsibility (second level, conditions of possibility and equalization of the capacity to be responsible for oneself). For example, a new type of normative link can be established between the right to basic education (art. 19 Cst.), compulsory education (art. 62 Cst.) and art. 6 Cst. Implementation of art. 19 Cst. and art. 62 Cst. can be seen as a precondition for recourse to art. 6 Cst. If education is no longer compulsory and free of charge, individuals see their capacity for freedom and responsibility drastically reduced, and the idea of the primacy of individual responsibility becomes more difficult to defend. The same type of conditionality can be seen in the contextual approach to exigibility mentioned above (infra, N. 37). In a particular situation, such as naturalization cases, it is important to judge whether the individual is in a position to be responsible for himself/herself, and this requires taking into account both the personal trajectory and the life context (i.e. social structures) of the individual.

4. The specific case of insurance

44 An interesting question arises in the context of the negative effects that a choice made by one person has on others. The main difficulty is not so much the direct and immediate negative effect and its consequences (e.g. murder), but rather the indirect and diffuse effect through the institutions of solidarity put in place (e.g. the impact of a behavior on the costs of compulsory health

insurance). The relevance of art. 6 Cst. in the case of compulsory social insurance is therefore particularly important. When it comes to healthcare, for example, the free and responsible choices made by individuals can have a negative impact, particularly in financial terms, on the community of solidarity. According to the relational conception outlined above, the state obliges individuals to protect themselves and others from some of the negative externalities their behavior provokes. Two cases can be distinguished, depending on the object of the responsibility.

Firstly, if an individual engages in a particularly dangerous activity (called 45
"reckless undertaking") for himself, such as base-jumping, he may be obliged to take out special insurance to cover his health costs (to avoid the community paying for his choice). Secondly, if an individual threatens to have a negative impact on third parties, he or she can also be forced to take out third-party liability insurance, as is the case for car drivers. Here, insurance fulfils the role of self-responsibility for an individual's ability to cause damage to others. Against the backdrop of the Covid pandemic, Riemer-Kafka calls on the authorities to consider extending compulsory occupational pension, unemployment and accident insurance to the self-employed. In her view, the experience of the pandemic demonstrated the inability of individuals to respond to certain emergencies, and the need for the state to intervene by mobilizing public funds. By analogy with base-jump, this extension of obligation would force independents to protect themselves, and thus guarantee their ability to be responsible for themselves.

One of the open normative questions surrounding art. 6 Cst. therefore con- 46
cerns the qualification of the conditions under which the State must and/or can intervene to establish an obligation for individuals to protect themselves (the example of self-employed people and base-jumpers) and to protect others from their choices (the example of car drivers). From a relational perspective, the state then forces individuals to assume responsibility for themselves; it compels them to "take charge". Art. 6 Cst. cannot be used to answer this question, since it is precisely the qualification of its first part that is at stake.

It is essential not to confuse the societal dimension of individual responsibility 47
(the first component of art. 6 Cst.) with the second component of art. 6 Cst. This second component clearly refers to the expectations placed on all individuals in terms of their contribution to the tasks of the state and society, over and above the requirement to be responsible for oneself.

C. Second component: social responsibility

48 The second component of art. 6 Cst. deals with social responsibility: "Everyone (...) contributes according to his or her strength to the fulfilment of the tasks of the state and society." Generally speaking, the links between the two components of art. 6 Cst. depend largely on the conception of freedom and responsibility defended. From a relational perspective, being responsible for oneself implies preventing a negative impact on others and thus, in a way, already contributing to the tasks of the state. However, the second component of art. 6 Cst. goes further than the prevention by individuals of the negative effects of their actions. It encompasses situations that the individual has not helped to bring about, but in which he or she has a responsibility to act. As explained below, the doctrine treats this dimension of responsibility with the concept of solidarity. We shall also see that the explicit mention of "society" as the place where social responsibility is realized is important, and contributes to the constitutionalization of the notion of (civil) society (infra, N. 56).

1. Areas of contribution arising from social responsibility

49 The general requirement of social responsibility in art. 6 Cst. concerns the individual's contribution to the fulfilment of the tasks of the state and society. This contribution can be defined in more or less demanding terms. At the very least, we can define it as the duty of each individual to respect his or her legal obligations, thus returning to the idea of a fundamental duty of general scope. The contribution of individuals is then limited to respecting the law. As mentioned above in the discussion of the Federal Council's arguments, the argument suffers from a certain circularity (a legal obligation to respect the law) (supra, N. 12). At the other extreme, helping to fulfil the tasks of the state and society can almost become synonymous with fulfilling those very tasks. This kind of maximalist interpretation is hardly compatible with a liberal constitution and a pluralist society.

50 How can we find a practicable path between these two extremes? It seems appropriate to distinguish between the types of tasks where the contribution of the individual can legitimately be expected to support the state and society, and the level of requirement of the contribution. We'll look at the level of demand below, when we discuss the concept of "according to one's strengths" (infra, N. 59).

The identification of types of task can be achieved through an interpretation of other constitutional norms that allow us to apprehend the dimensions of this social responsibility. Chatton identifies four dimensions of this social responsibility, based in particular on a reading of the preamble to the Constitution: a responsibility towards Creation, a spirit of solidarity and openness to the world, a responsibility towards future generations and a responsibility of social solidarity towards the weakest and most deprived. Some of these elements are also to be found in art. 40 para. 2 of the Swiss Constitution, dedicated to the rights and duties of the Swiss abroad. This article mentions (without making a clear distinction between rights and duties) the exercise of political rights at federal level, the performance of military and alternative service, assistance to people in need and social insurance. Taken together, these provisions make it possible to identify the types of tasks in which the social responsibility of individuals is particularly involved. 51

However, the range of possible tasks is still very broad. To refine the analysis, we can attempt a foray into moral theory. From a consequentialist perspective, social responsibility should be particularly marked where A) needs are greatest and most urgent, and B) where, collectively, individuals are in a position to bring about significant change (hence the use of the term "contribute"). In short, we would define the domains of art. 6 Cst. by posing the question of the greatest possible utility of individuals' contributions. 52

The major difficulty remains the risk of the State instrumentalizing its residents. The state would demand a commitment from individuals and, in addition, determine the priority areas in which they should engage. Both dimensions present a tension with the idea of individual freedom and pluralism. It is worth pointing out here that the requirement for contribution formulated in this second component could relate to the conditions of freedom and responsibility of the first component. A possible constellation would be that of encouraging people (either privately or as part of a company) to integrate disadvantaged people into economic activity, thereby strengthening their ability to be free and responsible for themselves. 53

The question of political responsibility arises in this context of setting priorities. Art. 6 Cst. can be read as a call to participate politically (vote/elect), but also as a call to contribute to the tasks of the state and society through politics. In a militia system, it makes sense for people to be called upon to contribute to the smooth running of institutions. The current crisis in communal 54 democracy, in particular the difficulty of finding candidates for elected office, is often approached from the angle of the social responsibility of citizens. Art. 6 Cst. could thus be understood as a call to political commitment, which would then be one of the tasks to which individuals are invited to contribute. It is important to note, however, that the Federal Constitution does not contain an explicit obligation to participate in politics, unlike, for example, the Schaffhausen Constitution with regard to participation in votes and elections.

2. The distinction between state and society

55 The second component of art. 6 Cst. distinguishes between the state and society ("the fulfilment of the tasks of the state and society"). According to the majority doctrine, this distinction does not appear to be central and is intended, above all, to adopt the most inclusive perspective possible. According to Chatton, taken here as an example of the majority doctrine, the "diversification as well as complexification of tasks and interactions" argue in favor of the absence of a clear distinction between state and society in this article. There are, however, two arguments against this reading. Indeed, the explicit mention of
state and society suggests that the constituent wished to make a distinction.

56 Firstly, the idea of social responsibility (the requirement for individuals to contribute to the fulfilment of tasks) does not appear in the same context if we are talking about tasks carried out by the state or by (civil) society. In the context of state action, the social responsibility of individuals is expressed in certain specific ways, for example the idea of compliance with legal, fiscal or military obligations. Individuals are not expected to work alongside members of the cantonal and federal administration to help them carry out their duties. This state-centric reading brings social responsibility closer to the idea of fundamental duties. The above-mentioned case concerning compliance with tax obligations as a condition of naturalization (in the light of art. 6 Cst.) illustrates this rapprochement between social responsibility and the duty to respect obligations laid down by the legal system. The challenge here is to maintain a distinction between social responsibility and obligations that have already been identified (e.g. tax obligations). This is not the case in a corporate context, such as that of associations. In this context, art. 6 Cst. calls on individuals to contribute to the life of society through involvement outside state structures.

Secondly, the explicit mention of society in art. 6 Cst. helps to establish the independent existence of civil society, as opposed to the state. As Besson explains in his analysis of the Fribourg Constitution, civil society is a relational concept, a conveyor belt: "In short, and in very general terms, civil society encompasses all social and voluntary relations that are neither the responsibility of the state or politics, nor of the market or the economy (bourgeois society), nor of the family or the private sphere". The Federal Constitution mentions the word "society" only three times (art. 6, 65 (statistics) and 118b (human research) Cst. - occurrences of the public limited company are not considered here). Art. 6 Cst. gives an explicit constitutional existence to this "society" and its importance as a place of realization and receptacle of social responsibility. 57

In short, the requirement formulated in art. 6 Cst. should be interpreted in a circumscribed way for the contribution to state tasks (type of tasks). It is above all a call to contribute in certain institutionalized ways, for example through civic engagement. In the context of society's tasks, the call to social responsibility can take more inventive forms. 58

In both domains (state and society), the level of demand placed on individuals can vary. In a maximalist reading, each individual appears responsible in the context of the state (institutionalized and minimal obligations, almost similar to fundamental duties) and in that of society (obligations more diverse in their form and more open in the level of requirement). As mentioned above, the danger of an over-demanding state is considerable. For reasons of respect for individual freedom and plurality of opinion, the Constitution should not require individuals to become either suppletives of the State, or serfs of associative life. 59

3. Depending on strengths

Faced with the danger of a potentially over-demanding state in the face of individuals themselves in very different situations, art. 6 Cst. mentions that each person is called upon to assume social responsibility "according to his or her strengths". This notion introduces an essential parameter in determining the extent of individuals' social responsibility. They do not all have to commit themselves in the same way or according to the same requirements, but according to their own strengths. 60

61 Art. 6 Cst. therefore introduces a principle of equity, the main concept of which must be defined, namely that of "strengths" (Kräfte, forze). Generally speaking, the concept of strengths seems to be used here as a synonym for capabilities. The individual is expected to commit according to his or her abilities, which may be physical, psychological, intellectual, financial or related to a phase of life (e.g. retirement).

62 In this context, the capable individual - i.e., the one with strength - is contrasted with the one who cannot contribute to the accomplishment of tasks. Häberle links this concept to the adage "to the impossible, no one is bound". If the individual is incapacitated, there is no justification for expecting him or her to make the commitment provided for in art. 6 Cst. This question of fairness is present in many political debates. For example, the question of flexibilizing the retirement age in relation to the arduousness of occupations could be approached from the angle of the contribution expected from individuals in fulfilling the tasks of the state and society.

63 By analogy with the discussion of the skills needed to take responsibility for oneself (supra, N. 35), determining the relevant "strengths" (i.e. abilities) also raises moral questions. It is important to know what types and extent of abilities are presupposed or, in other words, what abilities are considered "normal". This determination then makes it possible to distinguish between individuals who can't and those who won't (but theoretically could) contribute to task performance.

64 This debate on "normality" is linked to the general discussion on the definition of disability and the societal presuppositions of ableism and validism. As such, defining which strengths (abilities) are considered a default position requires us to clarify the contours of this normality and its relevance when interpreting the social responsibility "according to one's strengths" of art. 6 Cst.

65 This limitation to those in a position of capacity does not, however, resolve the difficult question of how much is expected of them. Art. 6 Cst. seems to be based on a general principle of gradation, whereby the greater an individual's strength (capacity), the more he or she is expected to contribute to common tasks. The lower limit is defined by the existence of capacity. Is there an upper limit to this principle? Should each individual contribute "as much as possible" (no upper limit) or, on the contrary, "up to X" (X being the upper limit)? Defining an upper limit would be a response to the criticisms of exaggerated

demands that may be raised against art. 6 Cst. Generally speaking, this question touches on a complex issue of moral theory, where the aim is to determine the fair share expected of individuals faced with a general challenge (such as climate change). The complexity arises in particular from the fact that what is expected of a certain individual may depend on the behavior of other individuals.

IV. CONCLUSION

This commentary offers a structured approach to the content of art. 6 Cst. 66
whose interpretation requires the mobilization of resources from legal theory and political philosophy. Even if the direct legal scope of art. 6 Cst. is modest according to the majority of doctrine, its function of orientation and integration into the constitutional order relies on a necessary clarification of the concepts of freedom and responsibility (for natural persons, but potentially also for legal persons). As such, the interpretation of art. 6 Cst. crystallizes the presuppositions and expectations formulated with regard to individuals living within a society. Its existence requires constant normative clarification, as in the case of the question of whether certain individual efforts are required. In this respect, the proposed interpretation of art. 6 Cst. brings together and, in a way, recounts essential elements of our vision of an individual and the expectations placed upon him or her in a liberal society.

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COMMENTARY ON

Art. 10 FC

A commentary by Corina Heri

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Art. 10 Right to life and to personal freedom

[1] Every person has the right to life. The death penalty is prohibited.

[2] Every person has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement.

[3] Torture and any other form of cruel, inhuman or degrading treatment or punishment are prohibited.

CONTENT

I. INTRODUCTION AND HISTORY OF ORIGINS

Art. 10 FC protects elementary aspects of the development of personality and physical and mental integrity: the right to life, the right to personal freedom and the prohibition of torture. Fundamental aspects of human existence are affected, which means that this provision is understood as a "basic guarantee for the protection of personality". 1

With Art. 10 FC, the constitutional legislator incorporated international law claims and unwritten constitutional law into the FC 1999. In particular, human rights guarantees and the fundamental rights to life and personal freedom (recognised as unwritten constitutional rights in previous Federal Supreme Court case law) were codified. The fact that these rights were codified in a single constitutional provision (Art. 10 FC) emphasises the interrelationships between the partial rights. Thus, the right to life and the prohibition of torture protect fundamental aspects of bodily integrity and thus personal freedom. The prohibition of the death penalty (Art. 10 para. 1 sentence 2 FC) and the prohibition of torture and any other form of cruel, inhuman or degrading treatment or punishment (Art. 10 para. 3 FC) constitute the core content of the right to personal freedom. 2

In the FC 1848 and 1874 there was no precursor provision to today's Art. 10 FC. However, this provision implicitly continued the previous prohibitions of the offence of debt (Art. 59 para. 2 FC 1874) and corporal punishment (Art. 65 para. 2 FC 1874). Furthermore, the first Federal Constitution already prohibited the death penalty for political offences (Art. 54 FC 1848). 3

Certain elements of the right to personal freedom are not reflected in Art. 10 FC, but in other constitutional provisions. Art. 10 FC accordingly overlaps with these provisions. Children and adolescents, for example, are entitled to special protection of their integrity under Article 11 FC. Further partial content has been codified in the protection of privacy in Art. 13 FC, human dignity in Art. 7 FC and guarantees regarding the deprivation of liberty in Art. 31 FC. 4

II. CONTEXT OF INTERNATIONAL LAW

5 The right to personal freedom is related to various international treaties, in particular to human rights treaties. With its various components, Art. 10 FC combines several independent human rights. For example, the ECHR protects the right to life (Art. 2 ECHR), the prohibitions of torture (Art. 3 ECHR) and of slavery and forced or compulsory labour (Art. 4 ECHR) and the right to liberty and security (Art. 5 ECHR), each separately. Furthermore, Art. 8 ECHR (the right to respect for private and family life) protects various elements of the constitutional right to personal freedom, e.g. physical and mental integrity, self-determination, social relations and the desire to have children or to remain childless.

6 Not covered by the original text of the ECHR is the prohibition of the death penalty. When the ECHR was opened for signature on 4 November 1950, the death penalty was not yet generally considered problematic under international law. With the 6th Additional Protocol to the ECHR, which entered into force in 1985, the signatory states subsequently undertook to abolish the death penalty in peacetime. With the 13th Additional Protocol to the ECHR, which entered into force in 2003, this prohibition was also extended to wartime. Today, the 6th Additional Protocol applies to all 46 member states of the Council of Europe; Switzerland also ratified it in 1987. Apart from Armenia and Azerbaijan, all current Council of Europe member states have ratified the 13th Additional Protocol, including Switzerland. In view of these developments, the prohibition of the death penalty is regarded in doctrine as mandatory regional international law, which would continue to apply, for example, after a denunciation of the ECHR or in the event of an armed conflict.

7 The UN Covenant II also contains various provisions for the protection of personal freedom. Relevant provisions include the right to life (Art. 6), the prohibition of torture (Art. 7), the prohibition of slavery and forced or compulsory labour (Art. 8), the right to personal liberty and security (Art. 9), the right to humane treatment in the event of deprivation of liberty (Art. 10), the prohibition of debtor's imprisonment (Art. 11) and freedom of movement (Art. 12). Although the UN Covenant II does not prohibit the death penalty in its entirety, its possible applications are limited (Art. 6 para. 2-6). In addition, there is also an optional protocol on the abolition of the death penalty within the framework of this convention, which Switzerland ratified in 1994. Furthermore, according to the UN Human Rights Committee, the death penalty is

prohibited from being reintroduced; its abolition cannot therefore be reversed.

Various parts of Art. 10 FC refer to other regional and international agreements. The UN Convention against Torture of 1984, the European Convention against Torture of 1987, the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence of 2011 and the European Prison Rules of the Council of Europe are particularly relevant. 8

III. PERSONAL SCOPE OF PROTECTION

Protection under Article 10 FC is available to all living natural persons, regardless of their nationality. The delimitation of this scope of protection, in particular with regard to the beginning and end of human life, raises various and sometimes controversial questions. 9

The time of the beginning of life is not defined under constitutional and human rights law. The ECtHR has left this decision to state discretion. The Federal Supreme Court has also not yet conclusively answered this question, which leads to divergent doctrinal opinions. There is fundamental acceptance of the idea that the constitutional rights of the future child can already have a certain (pre-)effect before birth and that these apply at the latest from the moment of birth. This is discussed in more detail below under n. 16-17. 10

The personal freedom in Art. 10 para. 2 FC can still have an effect after death. It is not a question of an actual "post-mortem fundamental right", but rather of a protection of self-determination and specifically of the decisions made during one's lifetime about the fate of one's own body, which has a temporal effect beyond death. The protection of these decisions takes precedence over the wishes of the relatives and is related to the protection of human dignity (Art. 7 FC). If there are no express instructions from the deceased person, the wishes of the relatives must be taken into account as a subsidiary measure. Their wishes enjoy the protection of Art. 10 para. 1 FC as well as a certain protection under human rights law through Art. 8 FC (right to private and family life) and Art. 9 ECHR (freedom of thought, conscience and religion). A balancing of interests is required in individual cases. 11

Self-determination over the fate of one's own body also includes decisions regarding possible organ donation. In the referendum of 15 May 2022, an "objection solution" was adopted in this context. In future, the organs and tissues 12 of any person may in principle be removed for transplantation purposes after death, provided the deceased person did not record their objection during their lifetime and the relatives also do not know or suspect that such an objection exists. Express consent to organ removal is therefore no longer required. This "extended" objection solution should continue to provide post-mortem protection of the personal freedom of the deceased person. However, it does not include the relatives' own wishes.

13 Legal persons are in principle not bearers of the fundamental rights enshrined in Art. 10 FC. Baldegger criticises this dismissive attitude of the prevailing doctrine. The Federal Supreme Court has recognised the fundamental rights of legal persons with regard to the protection of good reputation or honour, which at present, however, is rather a case of application of the right to protection of privacy pursuant to Art. 13 FC. Furthermore, associations of persons can also invoke personal freedom.

14 It appears questionable whether animals can also be fundamental rights bearers of personal freedom. Although it is clear today that animals have certain abilities that were once considered exclusively part of being human (e.g. feelings of empathy), animals are not considered to be bearers of fundamental rights under constitutional law. However, the cantons are allowed to go beyond the minimum fundamental and human rights standards of the FC and the ECHR. Thus, they may also grant non-human primates their own right to life and to physical and mental integrity. In contrast, artificial intelligence systems, e.g. humanoid robots, do not qualify for fundamental rights, as they lack - at least at present - the necessary human emotions. The non-existence of human-like vulnerability and mortality may also speak against the fundamental right's applicability here. Thus, applicability to such systems appears to be neither meaningful nor necessary.

IV. PARAGRAPH 1: THE RIGHT TO LIFE AND THE PROHIBITION OF THE DEATH PENALTY

A. Material scope of protection

15 The right to life is the starting point and prerequisite for all other fundamental rights. It is a fundamental right which covers "the totality of the biological and psychological functions which characterise the human being as a living being".

This right is one of the peremptory norms of international law and one of the guarantees of the ECHR that is firm in a state of emergency.

As discussed in n. 10, the FC and the ECHR leave open the point in time at which life begins (and thus the point in time at which the constitutional protection afforded by the right to life begins). The point in time at which the protection of the expectant life under fundamental rights begins is disputed. This point in time can be of great importance, especially with regard to abortions and for questions of reproductive medicine and genetic engineering. The prevailing doctrine today holds that prenatal life is entitled to a certain constitutional protection, although the nature of this protection has not been clarified. In this sense, there is a departure from the private law approach that life or personhood begins with completed birth. According to Biaggini, actual individual rights do not exist until birth, but the state's duties to protect can already take effect before birth and the legislature has considerable leeway here. Hertig Randall/Marquis share this view and note that the expectant life may not be equated with a thing. Tschentscher sees it somewhat differently: according to his view, prenatal life protection "grows steadily from conception to the fully developed scope of protection from birth"; however, there is no entitlement to "the courses of action leading to the state of being alive (procreation, being born)". 16

The idea of a certain advance effect of the rights of the future child on the prenatal phase, without thereby granting the unborn an actual right to life, allows the legislature to take into account the complexity of these issues and the necessary balancing of interests. Thus, in the area of abortion, the pregnant person's right to self-determination, among other things, is complied with by providing for a time limit solution. The Federal Supreme Court is obliged to apply this (criminal law) regulation of abortion. 17

The FC also does not specify the time of the end of life. In this regard, federal court jurisprudence refers to "brain death". As early as the 1970s, the Federal Supreme Court recognised that there is no human life unworthy of life, but that a person must be considered dead as soon as vital bodily functions cease completely and irreversibly. The relevant criteria of demarcation are to be determined by medical science, which is unambiguously based on brain death. A corresponding provision was included in the Transplantation Act in 2004: According to Art. 9 para. 1 of this law, death occurs when human brain functions, including those of the brain stem, have "irreversibly ceased". However, certain 18 aspects of the right to life still have an effect after death. For example, in the case of suspicious deaths, there is a fundamental and human rights entitlement to a state investigation even after death.

19 According to the Dispatch on the Federal Constitution, Art. 10 para. 1 sentence 1 "absolutely" protects against intentional attacks on life. However, this view is questionable. According to Biaggini, for example, this right cannot be understood as absolute - contrary to the Federal Council's view in the Dispatch on the Federal Constitution - since killings are permissible under certain circumstances, e.g. (and under certain conditions) in the context of police operations and war situations. Federal court practice seems to confirm this view. Not every intentional killing constitutes a fundamental or human rights violation. The right to life has exceptions for lawful acts of war, an exception - to be understood narrowly - to the state's monopoly on the use of force for self-defence (Art. 15 StGB), and a provision for exceptionally permissible killing by the police or military in extreme situations. Furthermore, there are intentional killings by private individuals that do not involve any state violation of fundamental or human rights, since the state's duties of protection, investigation and punishment have been complied with.

20 The question of the absolute validity of a right occurs independently of the determination of its factual scope of protection. The right to life does not claim absolute validity insofar as it allows for balancing of interests. However, the position sometimes advocated in doctrine that restrictions on the right to life should be assessed in accordance with Article 36 FC is problematic. An analogous application of this provision is conceivable, whereby the view of Hertig Randall and Marquis is to be agreed that in particular the requirements of the justifying public interest and proportionality cannot be applied without further ado. These requirements must be interpreted restrictively in view of the fundamental importance of the right to life, or particularly high demands must be placed on them. Thus, not every public interest may justify a killing, and the corresponding act must be absolutely necessary.

21 Furthermore, certain elements of the right to life unambiguously claim absolute validity. This applies, for example, to the prohibition of the death penalty. The concept of the death penalty refers to death sentences pronounced as a sanction in the course of criminal proceedings. These are absolutely prohibited within the Council of Europe (cf. n. 6), and their prohibition constitutes part of the core content of the right to life. In Switzerland, the prohibition of

the death penalty also constitutes a material barrier to constitutional revision. The justification for this is the mandatory nature of the prohibition, which is sometimes also referred to in doctrine as "regional" mandatory international law or European ius cogens. It is therefore inadmissible to reintroduce the death penalty by way of constitutional revision. This prohibition would also have prevented the validation of the 2010 initiative (which had already failed at the collection stage) for the introduction of the "death penalty for murder with sexual abuse".

B. Mediated claims

1. Defence claims

The right to life guarantees a defensive claim against lethal state violence. This does not mean that every use of state force resulting in death is a violation of this right. Use of force by the police or military, including the use of firearms, is permissible under strict conditions, even if it involves a risk of death. 22

At federal level, the Use of Force Act (ZAG) sets out the principles of the permissible use of police coercion. Use of coercion is only permissible after special training and only to maintain or restore a lawful state of affairs and must be subject to a strict proportionality test. The use of weapons must always be an ultima ratio, which must meet the requirements of the warning call and shot. The Federal Supreme Court has concretised the applicable principles with reference to fugitives suspected of serious crimes. The use of firearms in these cases must always be appropriate and proportionate to the circumstances. This means that the fleeing person must be particularly dangerous or violent. These requirements are specified in more detail in the cantonal legislation. It follows that firearms may only be used to prevent flight if the fleeing person is armed or if he or she is suspected of a criminal offence that has injured or endangered other people to life, limb or health and if it is feared that this potential for violence will also be realised during the flight. 23

The requirements described in the previous paragraph also follow from Art. 2 ECHR (or from the corresponding case law of the ECtHR). The Convention states are required to have an appropriate (administrative) legal framework that describes the circumstances in which the use of force and especially firearms by law enforcement authorities is permissible. A proportionality test 24 is required in each individual case, which must be based on the nature of the alleged offence and the dangerousness of the person concerned. Furthermore, national law must provide for a system of adequate and effective safeguards against arbitrariness, abuse of force and avoidable accidents in police operations.

25 Unlike the so-called "rescue torture" (see n. 71), the controversial so-called "final rescue shot" or "death shot" is considered permissible under certain circumstances in the case law. The issue here is intentional killing by the security forces. The case of the Chur amok shooter, in which the Cantonal Court of Graubünden acquitted the police commander responsible, is used here as a prime example. However, the criminal acquittal of the person involved does not necessarily mean that no fundamental or human rights violation has taken place. Such violations may have occurred, for example, due to an insufficient investigation or an inadequate legal framework. Requirements also apply to the planning of the operation in question. The security forces must be adequately informed and instructed so that sufficient account can be taken of the right to life of the persons concerned, because this is a serious interference with the right to life, which is only permissible as ultima ratio and in acute danger situations. Hertig Randall and Marquis rule out an abstract definition of when intentional killing by the security forces is permissible. This is not compatible with the philosophical orientation of this provision or its fundamental nature. On the other hand, they consider it permissible to deal abstractly with those situations in which force is permitted that could cause death. This view is convincing: it prevents a normalisation of killings and treats lethal force as ultima ratio.

26 According to Moeckli, the constellation of the rescue shot must be distinguished from the question of whether the provision regarding the use of weapons against aircraft in Art. 92a Military Code would permit the shooting down of a hijacked civilian aircraft (a so-called "renegade" flight). In such a case (so far theoretical in Switzerland), third parties would also be sacrificed, which means that the permissibility must be denied. Tschentscher agrees with this view, since the lives of passengers and crew members would otherwise become part of a "utilitarian calculation" that would not be compatible with human dignity. The Federal Council's message on Art. 92a of the Military Act is noteworthy in this regard. It states: "Such a shooting down of an aircraft not only violates the core content of the right to life (Art. 10 FC). A balancing of

'life against life', in which the state sacrifices people in order to possibly save a larger number of innocent people, at the same time degrades the aircraft passengers to objects of state action and thus also violates human dignity".

2. Positive duties to protect

The right to life also includes state duties to protect. According to these so-called positive obligations, the state must take preventive protective measures if there is a danger to human life. This obligation applies to all sources of danger. It includes, inter alia, threats by individuals (ECtHR, Osman v. United Kingdom, injury to a minor pupil and killing of his father by a former teacher), in the context of the health system (ECtHR, Lopes de Sousa Fernandes v. Portugal, death of a patient as a result of medical negligence following an operation), in institutional settings (ECtHR, Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, death of a severely mentally disabled and HIV-positive young Roma man in state custody) or by natural disasters (ECtHR, Budayeva and others v. Russia, failure of the authorities to implement the necessary protective measures in the face of the foreseeable risk of a deadly mudslide). 27

This obligation has limits: The state is "neither obliged nor able to wholly prevent acts of violence among private persons." This is a state duty to act, i.e. a duty to take action, and not a duty to effectively achieve a certain result. Moreover, not every conceivable danger to life can oblige the state to take action. Furthermore, the authorities have discretion in the choice of concrete measures and the assessment is based on the circumstances of the individual case. Moreover, Art. 10 para. 1 FC does not rule out the possibility that fundamental rights holders who are capable of acting and are fully informed may voluntarily consent to risks to life or health, for example to high-risk medical interventions. 28

The state's duties to protect become applicable as soon as the authorities know or should have known that there is a real and imminent risk to the life of specific (or identified) persons due to criminal acts of third parties. If such a risk exists, the authorities must take those measures within the scope of their powers that can reasonably be expected to lead to the avoidance of the risk. This also means that the state must establish an appropriate regulatory framework and take preventive operational measures to protect the right to life. Art. 2 ECHR also imposes requirements on state risk analyses, requires contextual 29 engagement and sets minimum requirements for the protection of vulnerable persons in particular. Vulnerable persons are, for example, detainees or victims of domestic violence. These preventive protection requirements go hand in hand with state obligations to investigate (see below).

30 Currently, with regard to the effects of climate change, there is increasing reference to the duties to protect contained in the right to life. In the KlimaSeniorinnen case, the Federal Supreme Court found that the complainants' right to life was not yet threatened by the alleged omissions in climate policy to such an extent that it could be said to be sufficiently affected within the meaning of Art. 25a VwVG. The question of the state's duty to protect older women who are particularly at risk from heat waves was brought before the ECtHR. The ECtHR has already applied the duties to protect with regard to the right to life (Art. 2 ECHR) and the right to physical and mental integrity (Art. 8 ECHR) in previous environmental law cases, e.g. with regard to industrial disasters. Complex questions arise here, including causality, attribution to the state, the extraterritorial application of fundamental and human rights, and the evidence regarding the immediacy of the danger. However, there are more and more voices that see the health consequences of climate change and the effects of the resulting natural disasters as a violation of the right to life. This opinion is also held here because of the serious and irreversible risks to human life that arise in this regard. However, the UN Human Rights Committee, which made the first international climate decisions in this context, placed high demands on the immediacy of the danger. For example, this Committee placed a high burden of proof on the complainant in the Teitiota case (which concerned the possible climate-related displacement of the complainant from the Pacific island nation of Kiribati). At the same time, the Committee has recognised in principle that serious environmental damage can affect the right to life. This was confirmed in the 2022 case of Billy v. Australia. Here too, however, the Committee came to the controversial conclusion that there was not yet a sufficiently urgent threat to the complainants' lives. The climate cases pending before the ECtHR may reveal whether the Court will find a violation of the right to life or the lower-level right to private and family life (Art. 8 ECHR); these cases are likely to set the course for subsequent climate cases - and thus for the corresponding interpretation of the right to life.

The right to life is also currently relevant in the context of pandemics and epidemics. In this context, too, state measures to protect life may be necessary. In the context of the COVID-19 pandemic, for example, Kiener and Moeckli argued that the right to life and the right to bodily integrity obligate the state to protect the population - and especially vulnerable persons - from the virus and to prevent the overloading of the health care system. However, the proportionality of the fundamental rights implications of the protective measures taken accordingly is assessed differently in the doctrine. According to Moeckli, this is an "almost textbook example of a fundamental rights collision" between the rights to freedom and the right to life and physical integrity. 31

The right to life does not include a duty to live. The state's duty to protect under Art. 10 para. 1 FC finds its limits in the right to self-determination; the right to personal freedom (Art. 10 para. 2 FC) thus also protects a right to die or to suicide. At the same time, however, the state is obliged to protect vulnerable persons from life-threatening risks emanating from themselves. This means that the authorities are obliged to prevent suicides if the decision to do so was not taken freely and in full knowledge of the consequences. Suicides for which consent has not been given clearly and with the capacity to judge, as well as public suicides that could affect third parties, are to be prevented by the state. 32

Incarcerated persons who are capable of judgement also have the right to self-determined death. Imprisonment establishes a special status relationship in which special duties of protection and care on the part of the state apply. If detainees attempt to take their own lives out of despair over their imprisonment - and not on the basis of autonomous motives for action - the duty to protect applies. This duty to protect is particularly acute in the case of vulnerable detainees. In the case of S.F. v. Switzerland, for example, the ECtHR found a violation of the right to life (Art. 2 ECHR) after a vulnerable detainee had been held in a police cell for forty minutes without supervision and had taken his own life during this time. If, on the other hand, an incarcerated person with the capacity to judge decides to take his or her own life for reasons of self-determination, there are indications in the case law of the Federal Supreme Court that correctional institutions - like any other non-profit, state-subsidised institution - must tolerate assisted suicide on their premises, although they do not have to provide actual euthanasia. Some scholars argue that the right to die could compete with various public interests that could 33 temporarily outweigh the right to self-determination. Urwyler and Noll, for example, warn that assisted suicide could be perceived as a disguised death penalty for prisoners who are tired of being in prison. They advocate a division into two groups of cases. Terminally ill prisoners should have access to assisted suicide under the same conditions as the general population; this view is also held here. On the other hand, in the case of detainees whose wish to die is related to the psychological effects of deprivation of liberty, barring periods, sufficient therapeutic care and strict procedural conditions should come into play. The view here is that the state's special duties to protect vulnerable detainees - but not the idea of atonement or the purpose of punishment - must be decisive in this context.

34 Special questions arise in connection with detainees on hunger strike. In the case of persons incapable of judgement, measures such as force-feeding can be carried out in order to protect their life or health. According to the case law of the Federal Supreme Court, however, force-feeding may also be necessary in the case of convinced hunger strikers who have the capacity to judge. Some scholars are vehemently critical of this case law because it disregards the will of the hunger strikers. However, the ECtHR has deemed the force-feeding of hunger strikers who are capable of judgement to be permissible under certain conditions. It requires that the force-feeding is medically necessary, that the relevant procedural guarantees are respected and that the type of force-feeding does not violate Article 3 of the ECHR. At the same time, according to recent case law, there is no state obligation to force-feed if the persons concerned carry out their hunger strike of their own free will and are sufficiently informed about the risks and the available forms of treatment.

35 Unlike active euthanasia, assisted suicide (or "passive euthanasia") is unpunishable in Switzerland - provided there are no "selfish motives" (Art. 115 StGB). The regulatory gaps in this area, especially for organised assisted suicide by assisted suicide organisations and for those willing to die without terminal illnesses, must be critically assessed. A chamber of the ECtHR criticised this situation as early as 2013 in the Gross case. The corresponding judgement was overturned by the Grand Chamber because the complainant's death in the meantime had been concealed from the Court, which was considered an abuse of the right of individual appeal. In general, the ECtHR has held that the ECHR does not guarantee a right to euthanasia.

3. Obligations to investigate

The right to life obliges the state to ensure the effective investigation and prosecution of homicides. To protect this right, the state must respond to suspicions that an unlawful killing has taken place. In the criminal law context, this duty to investigate means that if there is a suspicion that a violation of the prohibition of killing has occurred, there is an obligation to prosecute. 36

The ECHR places high demands on domestic investigation in this context. Originally formulated for deaths under state violence, these obligations now also apply to other situations where a person suffers life-threatening injuries or dies or disappears in violent or suspicious circumstances. What is required is an ex officio investigation, which must be independent. This investigation must be capable of (a) determining whether the violence in question was justified, (b) identifying those responsible, and (c) leading to punishment, if appropriate. The authorities must take all proportionate steps to secure evidence and their conclusions must be based on a full, objective and impartial analysis of all relevant elements. Furthermore, the investigation must be accessible to the victim's family to the extent necessary to safeguard their interests. If the events in question are wholly or largely within the control of the authorities, e.g. because the person concerned was deprived of liberty at the relevant time, the burden of proof is reversed. In such cases, the authorities are required to provide an explanation for injuries and deaths that occurred in custody. 37

The state's investigative duties generally require action and do not constitute a duty to achieve a certain result or conviction. Furthermore, the duty to prosecute and punish does not apply absolutely. For factual reasons, such as state or criminal policy interests, it can also be waived. For example, amnesty laws may be permissible for special reasons, even if they result in homicides going unpunished. 38

According to the case law of the Federal Supreme Court, in the case of unintentional homicide or negligent endangerment of life by the authorities, it is sufficient if the victims or their relatives do not have a criminal procedure at their disposal, but an administrative procedure. Such proceedings must be able to establish possible state liability and be able to award appropriate compensation. According to the case law of the ECtHR, non-criminal proceedings can also satisfy the investigative obligations under Art. 2 ECHR. This ap- 39 proach is welcome insofar as it creates convincing alternatives to a human rights "sentencing culture" that favours criminal law as a means of human rights protection. In Switzerland, however, this has the unfortunate effect of denying private plaintiffs the legitimacy to appeal in criminal cases in the context of criminal proceedings against public officials, according to the "Star Practice" of the Federal Supreme Court.

4. The prohibition of the death penalty

40 As explained above under n. 6, the prohibition of the death penalty is considered mandatory regional international law.

41 The prohibition of the death penalty also includes a prohibition on extradition or deportation to third countries where there is a possibility that the death penalty could be sought, pronounced or imposed. If there are sufficient indications (according to the Federal Supreme Court, "toute risque" is sufficient; according to the ECHR, there must be a "real risk") that the person concerned could be threatened with the death penalty, e.g. after extradition within the framework of international cooperation in criminal matters, he or she may not be extradited. Extradition or deportation is only possible once an assurance has been obtained that the death penalty will not be requested, pronounced or imposed on the person concerned. A similar regulation applies in the context of the prohibition of torture: the non-refoulement principle prohibits deportation to states where there is a threat of torture or any other kind of cruel and inhuman treatment or punishment. These two prohibitions overlap in that waiting to implement a death sentence may constitute a violation of the prohibition on torture.

V. PARAGRAPH 2: THE RIGHT TO PERSONAL LIBERTY

A. Fundamentals

42 The right to personal liberty constitutes "the fundamental right of freedom" and a "basic guarantee for the protection of personality" even after its codification in Article 10 para. 2 FC and the inclusion of certain partial aspects of this right in other constitutional provisions. This right is intended to guarantee legal entities a minimum of personal development opportunities and thus constitutes "the fundamental right of freedom" according to Federal Supreme

Court case law. This protects the conditions for the effective exercise of other freedoms.

Art. 10 para. 2 FC explicitly names three protected sub-areas of personal freedom: physical integrity, mental integrity and freedom of movement. However, this list is not exhaustive. Art. 10 para. 2 FC, as a catch-all fundamental right, also includes all other elementary freedoms that are necessary for the development of the personality and the protection of human dignity. The scope of protection of personal freedom is delimited on the basis of the circumstances of the individual case and the nature and intensity of the impairment. The Federal Supreme Court thus defines the individual components of personal freedom on a case-by-case basis, applying a de minimis proviso that limits the applicability of this provision to elementary aspects of the development of personality. This means that in Switzerland "not every human choice or activity, no matter how marginal", is protected; Art. 10 para. 2 does not offer fundamental rights protection of a "general freedom of action" that can be invoked against every state act that affects the personal development of life. Nor does personal freedom "protect against any physical or psychological discomfort". In this sense, the Federal Supreme Court has excluded, for example, the bans on windsurfing on Lake Sihl or on navigating a part of Lake Zurich from the scope of protection of personal freedom. 43

Certain elements of the former, unwritten protection of personal freedom were not codified in Art. 10 FC, but in other constitutional provisions. Thus, overlaps may occur between Art. 10 FC and Art. 11 FC (protection of children and adolescents), Art. 13 FC (protection of privacy), Art. 7 FC (human dignity) or Art. 31 FC (procedural guarantees in the case of deprivation of liberty). According to Schweizer, Art. 10 para. 2 FC plays the role of a (subsidiary) catch-all fundamental right. According to Biaggini, however, this should not mean that this provision is completely displaced if there is competition between fundamental rights. In this sense, Baumann disputes the subsidiarity of the partial rights explicitly mentioned in Art. 10 para. 2 FC. With regard to the delimitation of Art. 10 para. 2 and Art. 13 para. 1 FC, the Federal Court has acknowledged that a clear separation of the areas of protection is difficult and that the doctrine "does not strive for a clear delimitation". At the same time, it has emphasised that Art. 10 para. 2 FC "concerns more directly the integrity of the individual in its various manifestations" than does the protection of privacy in Art. 13 para. 1 FC. In recent case law regarding the acquisition and dis- 44 closure of personal data, the Federal Supreme Court has omitted to draw a precise line of demarcation and has instead held that the two areas of protection overlap.

45 The Federal Court left open the demarcation between Art. 10 para. 2 FC and the protection of the integrity of children and adolescents under Art. 11 FC. What is clear is that these two provisions overlap and that the enshrinement in fundamental law of the protection of the integrity of children and adolescents is intended to declare this concern to be of constitutional priority. Accordingly, Art. 11 FC contains a "specification on personal freedom" which places particular emphasis on the best interests of the child and can influence the assessment of the intensity or proportionality of an encroachment on fundamental rights (Art. 36 para. 1 and 3 FC).

46 The system of the ECHR is structured differently. There, Art. 8 ECHR (protection of private and family life), the counterpart to Art. 13 FC, includes the protection of physical and bodily integrity in the protection of private life. In the context of the ECHR, the protection of private and family life plays the role of the catch-all fundamental right vis-à-vis various Convention rights, e.g. Art. 2 ECHR (right to life) and Art. 12 ECHR (right to marriage).

B. Substantive scope of protection

1. Right to bodily integrity

47 The right to bodily integrity (or physical integrity) is a central element of human dignity and fundamentally protects the human body from any interference. In order to be covered by Art. 10 para. 2 FC, physical impacts do not have to reach a minimum level of harm or pain. As Malinverni, Hottelier, Hertig Randall and Flückiger rightly point out, no state action on the body is conceivable that does not affect personal freedom in some way. Even painless or medically justified interventions thus encroach on personal freedom, whereby the consent of the person concerned plays a central role in the assessment of conformity with fundamental rights (see below).

48 According to Hertig Randall and Marquis, the term "body" also includes objects that are attached to the body, such as prostheses. Clothing, on the other hand, does not constitute part of the body and it is disputed in the doctrine whether the palpation of the body is covered by clothing. The view here is

that such touching must also fall within the scope of protection of Art. 10 para. 2 FC, and not only if it concerns the intimate area. The same must apply to contacts with gloves, for example, if the protection of bodily integrity is not to be undermined. Finally, there is no minimum threshold in this context with regard to the nature or intensity of the contact.

According to the case law of the Federal Supreme Court, the scope of protection of the right to bodily integrity includes state measures such as blood sampling, compulsory vaccinations, fluoridation of tap water, compulsory feeding, cheek swabs to record DNA profiles, compulsory shaving, the taking of fingerprints or photographs and also the removal of a few hairs from the head for the purpose of drug or alcohol testing. On the other hand, the Federal Supreme Court left open the question of whether ordering a urine sample falls within the scope of protection of personal freedom, since this measure merely obliges the person concerned to "hand over a small amount of a substance excreted by the body anyway for examination". Some scholars argue that such measures must also fall within the scope of protection of Article 10 para. 2 FC, since they circumvent the self-determined will of the person concerned. This opinion is again supported by the fact that no minimum level of damage or infliction of pain is required for the right to physical integrity to be affected. At the same time, it should be noted that there are overlaps here with the protection of informational self-determination as a partial content of Art. 13 para. 2 FC when it comes to the information obtained by means of the urine sample. 49

According to Schweizer, annoying but non-contacting impacts, such as those caused by noise or smoke, are also covered by the protection of bodily integrity. Actual contact with the human body is not required for this, which means that environmental impairments such as smoke or noise emissions can also fall within the scope of protection of Art. 10 para. 2 FC. Tschentscher makes a slightly different distinction: he argues that any touching already falls within the scope of protection of the right to bodily integrity; in contrast, non-contact measures such as photographs would fall under the protection of privacy under Article 13 FC. 50

According to the case law of the Federal Supreme Court, slight interferences with bodily integrity in which no pain or injury is inflicted (cf. n. 47 - no minimum degree of harm or pain) can at the same time constitute serious interferences with informational self-determination as a partial content of Art. 13 51 para. 2 FC. This applies, for example, to the taking of a cheek swab or the taking of fingerprints. The Federal Supreme Court has recognised this, taking into account the "control potential" of DNA profiles.

52 Important for the assessment of medical interventions such as a blood sample is whether the consent of the person concerned has been obtained. In order for consent to be valid, patients must have received complete and comprehensible information about the decision in question and about their personal situation. If consent is not obtained, there is always a serious interference with personal freedom.

53 In the case of compulsory medical treatment, such as compulsory vaccinations, compulsory dental examinations or compulsory X-rays, physical integrity is always impaired in principle. This also applies if the treatment is intended to restore physical or mental integrity. Patients have a right to be fully informed about medical interventions and must be able to freely decide for themselves whether they wish to undergo treatment. Patients who are incapable of acting also have this right, provided they have the capacity to judge the treatment in question. The will of minors capable of judgement must also be respected in this context.

54 In the context of the COVID-19 pandemic, the admissibility of a general vaccination obligation under fundamental rights was discussed. A distinction must be made between disproportionate compulsory vaccinations enforced by physical coercion, permissible vaccination recommendations and possibly permissible compulsory vaccinations. Since compulsory vaccination constitutes an interference with personal freedom under Article 10 para. 2 FC, it must meet the requirements of Article 36 FC. The ECtHR also takes the view that compulsory vaccination can be justified in order to guarantee the protection of the health of the population and in particular of vulnerable persons; states enjoy a wide margin of discretion in health matters.

55 In the case of incapacitated patients, medical interventions may only be made with the consent of the legal representative and for the "direct benefit" of the person concerned. Thus, with regard to persons with severe mental disorders, interventions may also be carried out without their consent if the treatment is necessary to prevent serious harm to health and sufficient supervisory measures are taken. In the case of certain forms of intervention on patients who lack capacity, however, the question arises as to whether bodily self-determi-

nation constitutes a right that is absolutely supreme and thus hostile to representation. One can think here, for example, of genital operations on intersexual children. In this regard, the argument that such interventions may only take place when the child, in terms of age, could reasonably share responsibility for the decision, is convincing.

The right to self-determination with regard to bodily integrity includes the 56 right to reproductive self-determination (see n. 75) and protects, inter alia, the rights of trans* and non-binary persons. Art. 8 ECHR is violated if the legal recognition of the name and gender of trans* persons requires that the person concerned has undergone certain surgical interventions. The Swiss courts were partly ahead of this relatively recent and welcome development of Strasbourg jurisprudence; however, a corresponding amendment to the Civil Code came later. Art. 8 ECHR is equally violated if gender reassignment surgery is made conditional on the final sterilisation of the person concerned.

The right to bodily self-determination refers not only to medically necessary 57 interventions, but also to voluntary and aesthetic interventions such as tattoos, piercings or blood donations. Accordingly, prohibitions of such interventions constitute restrictions on the right to bodily integrity. Here, too, the importance of the consent of the persons concerned to bodily interventions emerges. Thus, involuntary interventions of this kind are likely to constitute a violation of Article 10(3) FC.

2. Freedom of movement

Also described as the "droit d'aller et de venir", freedom of movement - analo- 58 gous to Art. 31 FC, Art. 5 ECHR, and Art. 9 and 11 UN Covenant II - primarily protects against unjustified restrictions on liberty and deprivations of liberty. This spatial aspect represents the oldest partial content of the right to personal freedom, and its origins can be traced back to the Magna Charta (1215). The distinction between deprivations of liberty and mere restrictions on freedom of movement is crucial in this context, as various procedural rights come into play in the case of deprivations of liberty.

Deprivation of liberty is understood as any state measure "by which someone 59 is detained against or without his will in a specific, limited place for [a] certain duration". Various criteria are taken into account, including the manner in which the measure is carried out, the duration, extent and intensity of the measure and its effects on the person concerned. This definition applies to arrests, the penal system, detention and inpatient therapy measures, administrative detention (under aliens law) and compulsory institutionalisation. Asylum seekers who are detained for days in the transit area of an airport are also deprived of their liberty.

60 Art. 5 ECHR contains an exhaustive list of permissible grounds for deprivation of liberty. In order to prevent arbitrary state action, these grounds are to be interpreted narrowly. The starting point for the independent and gradual distinction between deprivations of liberty and restrictions of liberty under the Convention are the circumstances of the individual case. In order to distinguish deprivation of liberty from restriction of liberty, the ECtHR and the Federal Supreme Court take into account a number of factors, such as the nature, duration, effects and implementation modalities of the measure in question.

61 House arrest under Art. 23o of the Federal Act on Measures to Safeguard Internal Security (BWIS) is the subject of discussion in this context. This provision is applicable to so-called "terrorist threats" according to Art. 23e para. 1 BWIS, i.e. to persons for whom "it must be assumed on the basis of concrete and current indications that he or she [will] engage in terrorist activity". The legislative authorities were at pains to distinguish this provision from preventive detention or deprivation of liberty. Nevertheless, these measures are likely to be a deprivation of liberty and not a mere restriction of liberty. Thus, the corresponding procedural guarantees are also applicable in this context. This view is in line with the case law of the ECtHR, according to which house arrest (considered in terms of its extent and intensity) is considered a deprivation of liberty within the meaning of Art. 5 ECHR. It is also highly questionable whether a corresponding deprivation of liberty could be implemented in conformity with the ECHR. Art. 5 para. 1 lit. c ECHR allows for preventive deprivations of liberty, but according to the ECtHR this "does not permit a general policy of prevention against persons perceived by the authorities as dangerous (...)". The purpose of this provision is to prevent specific offences, and accordingly the deprivation of liberty may not last longer than a few hours.

62 Deprivation of liberty is always a serious interference with personal freedom and requires valid reasons. Accordingly, deprivations of liberty are only permissible as ultima ratio if no milder measure is available. This applies in particular to minors. Furthermore, such a measure must be provided for in a law

in the formal sense pursuant to Art. 36 para. 1 sentence 2 FC. According to the ECtHR, an analogous application of legal provisions cannot close a legal loophole in this context. This applies at least if there is no established case law that can ensure legal certainty and protect against arbitrariness.

The procedural rights from Art. 31 FC, Art. 5 ECHR and Art. 9 UN Covenant II are always applicable to persons deprived of their liberty. Among other things, the reservation of the right to the law and the reservation of the right to a judge from Art. 31 para. 1 and 3 FC apply. Furthermore, the prohibition of torture pursuant to Art. 10 para. 3 FC, Art. 5 ECHR and Art. 7 UN Covenant II also provides protection against inhumane forms of treatment and punishment when deprived of liberty. 63

Restrictions on freedom of movement that do not amount to a deprivation of liberty (as per n. 59) may constitute a restriction of liberty. This term is applicable to restrictions of very short duration. In case law, placement in a cell for four hours is already regarded as a deprivation of liberty, whereas in the criminal law practice of the Federal Supreme Court, a deprivation of liberty requiring compensation can already exist after three hours. Switzerland has not ratified the 4th Additional Protocol to the ECHR, which protects freedom of movement. 64

A restriction of liberty can take different forms. This term includes, for example, measures of expulsion and detention, such as bans on entering a certain area, short-term police detentions or conditions under aliens law not to enter or leave a certain area. Alternatives to detention, such as the withdrawal of identity papers as a substitute measure for pre-trial detention, can also restrict freedom of movement. Questions also arise in the context of the implementation of UN sanctions, whose prohibitions on entry and exit can result in restrictions on freedom of movement. 65

An illustration of the distinction between deprivations of liberty and restrictions of liberty is a Federal Court ruling concerning the two-and-a-half-hour encirclement of May Day demonstrators. The Federal Court did not consider this encirclement alone to be a deprivation of liberty. On the other hand, when looking at it as a whole, together with the subsequent three-and-a-half-hour security police check in the police barracks, the threshold for deprivation of liberty was considered to have been reached. 66

67 For the distinction between a lawful and an unlawful interference with liberty, the consent of the person concerned can play a role. In analogy to consent under Art. 183 SCC, it is assumed that the person concerned has voluntarily consented to the intensity and duration of the measure. This can also be implicit. According to Baumann, anyone who participates in road traffic consents to the possibility of being stuck in a traffic jam. Likewise, a distinction must be made between a voluntarily undertaken flight and a prisoner transport via plane: Although the plane cannot be left during the flight in both cases, only the latter constitutes a deprivation of liberty.

68 In addition to protection against unjustified deprivations of liberty and restrictions of liberty, i.e. the "liberté d'aller et de venir", Art. 10 para. 2 FC also protects a more extensive "liberté de mouvement". Freedom of movement protects the ability to "reach a place accessible to the public on a public road by means of public transport". A minimum intensity threshold applies here. Thus, not every minimal restriction on coming, going or driving constitutes an interference with freedom of movement. Biaggini cites speed controls, for example, as an example of a restriction that does not reach the required intensity. A ban on navigation on certain parts of the lake also does not affect freedom of movement, since personal freedom does not guarantee the right "to navigate any lake at any point". The Federal Supreme Court took a similar view of a ban on staying at Bern railway station, which prohibited certain groups of people from collectively consuming alcohol at this location; here, it was not individual freedom of movement or access to trains that was affected, but the formation of groups, which is why freedom of assembly under Article 22 FC applied.

69 Freedom of movement finds its limits in the freedoms of others, in particular their right to property and to protection of their privacy. Nor does freedom of movement guarantee a right of access to certain public buildings, for example in the sense of a right to visit prisons. If freedom of movement were to guarantee a "right to linger", or a right to "move or linger at any time in any publicly accessible place", it would come too close to a general freedom of action. According to Baumann, however, freedom of movement guarantees a minimum amount of physical movement, which is particularly relevant for detainees. Here, freedom of movement overlaps with Art. 3 ECHR. However, this is not to say that freedom of movement protects a right to prison leave.

Freedom of movement has particular relevance for persons with physical disabilities. According to Kaufmann and Senn, physical, structural, mechanical or medical measures may particularly affect the freedom of movement of these persons. Freedom of movement can thus also include access to assistive devices such as wheelchairs. However, this right is only applicable if the corresponding aid is necessary for the exercise of freedom of movement and does not protect a general right to use certain vehicles and other aids. 70

Freedom of movement also includes various other guarantees. The freedom to choose one's own place of residence and stay is a specific form of freedom of movement, which is concretised in Art. 24 FC (freedom of establishment). The freedom of movement and the guarantee of human dignity in Art. 7 FC give rise to the prohibition of the contract of debt. The effects of life-long detention on the right to personal freedom, which in this context may overlap with the protection of Art. 10 para. 3 FC, are also disputed. 71

3. Right to mental integrity, self-determination and personal development

Personal freedom protects not only physical integrity and freedom of movement, but also mental integrity, which includes the right to self-determination, personal development and individual life. What is protected here is the right to self-organisation of the essential aspects of one's own life or, in other words, individual consciousness and the formation of one's will, i.e. the ability "to appreciate a certain actual occurrence and to act accordingly". 72

According to previous Federal Court jurisprudence, every person had the freedom "to decide on his way of life, in particular to organise his leisure time, to establish relationships with his fellow human beings and to acquire knowledge of what is happening in his immediate and wider environment." As Biaggini rightly points out, this paraphrase threatened to amount to a general freedom of action. Since 1975, the scope of protection of this right has been narrowed. Thus, the Federal Supreme Court specifies that personal freedom does not protect every decision regarding the personal organisation of life, but only "elementary possibilities which are essential for the development of personality and to which every person should be entitled". This right thus does not encompass every incidental choice or activity, nor does it exclude all discomfort. Unlike bodily integrity, Hertig Randall and Marquis apply a minimum intensity threshold in this context. At the same time, Häfelin, Haller, Keller and Thurn- 73 herr take the view that the factual scope of protection of personal freedom should be understood rather broadly, with the severity of the affectedness subsequently having to be included in the proportionality test (Art. 36 para. 3 FC). In view of the role of Art. 10 para. 2 FC as a catch-all fundamental right, this opinion is to be agreed with; according to the view represented here, a minimum threshold of impairment must be reached in the scope of application of Art. 10 para. 3 FC.

74 The delimitation of the scope of protection of this right results from extensive casuistry. It is recognised today that, for example, reproductive self-determination, begging, the right to determine the fate of one's own body during one's lifetime and the right to know one's own parentage fall within the scope of protection of personal freedom. The confiscation of a pet with which the owner has a close emotional relationship may also fall within the scope of protection. The right to personal development, which requires the opportunity to participate in social life and to establish interpersonal relationships, is also protected. Doctrine also includes health needs and sexual development among the fundamental aspects of this right. According to the Federal Supreme Court, "the physical and psychological development appropriate to a child" is also part of Article 10 FC, although in practice problems of demarcation from Article 11 FC (protection of children and young people) are likely to arise here. Furthermore, individuals enjoy the freedom to shape their appearance, e.g. by choosing clothing as they see fit. Whether this also results in a right to be naked in public or to walk naked was left open by the Federal Supreme Court. Both the general obligation to wear a medical mouth mask and the obligation to carry an identity card constitute encroachments on this right. However, these encroachments can be justified according to the requirements of Art. 36 FC, for example to prevent violence at sporting events or to limit the spread of the COVID-19 virus.

75 So-called "racial profiling", in which an identity check is carried out without objective reason and on the basis of external characteristics, such as the ascribed race or ethnicity, violates personal freedom, among other things. Possible racial motivations for identity checks must be adequately investigated.

76 Certain activities are excluded from the scope of protection of personal freedom. Not elementary for the development of personality and thus not protected are the right to play with slot machines for money, the right to consume narcotics or the right to keep dogs of a certain breed. The right to ac-

quire weapons is also not protected. It is also questionable whether smoking in public places falls within the scope of protection of this right; the Federal Supreme Court does not consider it possible to answer this question in the abstract, but has stated that "il est douteux que le fait de fumer ressortisse de la liberté personnelle".

Art. 10 para. 2 FC plays a central role for reproductive self-determination. The 77
desire of every person to decide freely whether they want to have children, and when and how many children they want to have, is protected. It protects a right of access to methods of artificial reproduction as well as to contraception, abortion and voluntary sterilisation. According to the Federal Supreme Court, an obligation to have an abortion would violate the core content of Art. 10 para. 2 FC and in this context pregnant women have the right to "decide themselves - freely - on an abortion". However, in view of the legally provided time limit solution and the punishability of an abortion after this time limit (n. 17), this does not mean that decisions in this area can be made self-determined at any time. Forced sterilisation - e.g. because of a mental disability or as a prerequisite for recognition of the gender identity of trans* persons - cannot be reconciled with the protection of personal freedom either. With regard to artificial procreation, this right is relativised by the fact that the state is not obliged to create corresponding offers and that Art. 119 para. 2 FC prohibits certain techniques - in particular embryo donation and surrogate motherhood.

Art. 10 para. 2 FC is also of central importance for persons willing to die. As 78
explained above (n. 35), assisted suicide (or "passive euthanasia") is unpunished in Switzerland as long as there are no selfish motives. The actual will to end one's own life is an elementary phenomenon of personality and the corresponding decision of a highly personal nature. Accordingly, (attempted) suicide must remain unpunished. At the same time, there is a tension between the right to self-determined dying and the state's duty to protect the right to life pursuant to Art. 10 para. 1 FC. This conflict is resolved on the basis of the principle of self-determination, according to which the state's duty to protect is complied with if certain requirements for the formation of the will of those willing to die are met. To this end, the state must ensure that the person concerned is capable of judgement and has an independent and lasting wish to die that has arisen without pressure from third parties. The ECtHR has also recognised the right to decide on the time and manner of one's own end of

life. However, the Court places the protection of vulnerable persons in particular in the foreground, which can mean that the state forces those who wish to die to continue living.

79 Compulsory medical treatment also constitutes a serious interference with personal freedom. In this regard, a balance must be struck between personal freedom and the state's duty of care, which arises from Article 12 FC (right to assistance in emergencies) and Article 7 FC (protection of human dignity). The boundary between state care and self-determination must be determined in each individual case and on the basis of a comprehensive weighing of interests.

80 Art. 10 para. 2 FC also plays an important role in the use of technical surveillance devices. Identification measures and the storage of the corresponding data can affect the right to informational self-determination. This right arises from Art. 10 para. 2 FC and Art. 13 FC, whose areas of protection overlap in this respect. According to the Federal Supreme Court, Art. 13 para. 2 FC is primarily relevant for the retention of identification data. However, Art. 10 para. 2 FC is also applicable and requires in this context that every person must be able to determine the processing and storage of their personal data by third parties. However, if technical surveillance devices are used in a proportionate manner, under judicial control and in compliance with the obligation to provide subsequent notification, the corresponding encroachment on the protected area of personal freedom can be justified.

81 The situation is different if statements are elicited from a person against his or her will or by circumventing his or her will, or if the formation of his or her will is completely eliminated. Such measures violate the core content of the right to mental integrity, namely "the mental space of the human being". This protection is of particular importance in the context of police custody. State interrogation methods that impair the consciousness of the witness, such as narcoanalysis and truth serums, are excluded, for example. The use of lie detectors also violates the core content of this right. Such methods may not be used even in exceptional cases, e.g. to combat terrorism.

C. Mediated claims

82 According to the constitutional legislator, the right to personal freedom is predominantly a defensive right. Accordingly, claims to state benefits only

arise if there is a special relationship between the person concerned and the state, for example in the context of a deprivation of liberty. The right to personal freedom thus does not establish a general right of access to the necessary means to realise this freedom. For example, individuals have a right to reproductive self-determination; however, the state is not obliged to provide corresponding reproductive medical services. The ECtHR also held in the Haas case that Art. 8 ECHR was not violated if a person willing to die was not provided with over-the-counter access to a lethal dose of the drug sodium pentobarbital.

Like the right to life, the right to personal liberty includes a right to preventive 83 state protection measures in the event of a serious and concrete threat from third parties. This means that the legal system must provide protection against violence between private individuals. The state's obligations to investigate and prosecute under Articles 3 and 8 ECHR are applicable to serious allegations of ill-treatment that may reach the threshold of inhuman or degrading treatment.

D. Restrictions

Like other freedoms, the right to personal liberty may be restricted in accor- 84 dance with the requirements of Art. 36 FC. Severe interference - e.g. in the case of deprivation of liberty or forced medication - must be based on a law in the formal sense (Art. 36 para. 1 FC). Furthermore, interventions in this right must be proportionate, which means, for example, in the context of detention, that restrictions may not go beyond "what is necessary to guarantee the purpose of detention and to maintain the proper operation of an institution".

In previous case law, the right to personal liberty was circumscribed as an "in- 85 alienable and indispensable constitutional right". This description made it possible to sue for the unconstitutionality of decisions that seriously violated fundamental rights at any stage of the proceedings; however, it was only applicable to an exhaustive catalogue of fundamental rights. Today, this is no longer based on an exhaustive list of rights, but on the seriousness of the violations of fundamental rights at issue.

VI. PARAGRAPH 3: THE PROHIBITION OF TORTURE

A. Foundations

86 Art. 10 para. 3 FC contains one of the most fundamental values of a democratic society: the prohibition of torture and cruel, inhuman or degrading treatment or punishment. This prohibition - like Art. 3 ECHR, Art. 7 UN Covenant II and the UN Convention against Torture - offers absolute protection, which may not be relativised even under exceptional circumstances. This provision thus standardises various core elements of physical and mental integrity. It also covers forms of treatment that are often discussed in the context of Art. 10 para. 2 FC, such as forced sterilisation, forced medication, or the use of lie detectors.

87 The prohibition of torture serves to protect human dignity, as set out in Art. 7 FC. This prohibition is part of mandatory international law (ius cogens), which means that it can play a role in the validity of popular initiatives and in the context of constitutional revision. For example, the so-called "enforcement initiative" was declared partially invalid by the Federal Assembly in 2013 because it contained too narrow a definition of mandatory international law. Due to the absolute nature of the prohibition of torture, encroachments on its scope of protection can never be justified. Thus, no one, not even e.g. terrorism suspects, may be subjected to such treatment. Accordingly, so-called "rescue torture" is prohibited for the protection of third parties.

88 The prohibition of torture and cruel, inhuman or degrading treatment or punishment has been codified in various provisions of national and international law. The interpretation of these terms is sometimes controversial; individual states seek to minimise their obligations in this regard. There is a basic convergence between the various regional and international instruments.

B. Scope

89 Article 10 para. 3 FC covers impacts that reach a minimum level of severity and involve intense physical or psychological suffering or physical injury. The situation is different with regard to the protection of bodily integrity pursuant to Art. 10 para. 2 FC, where no such minimum degree is required (n. 47). The threshold of Art. 10 para. 3 FC depends on the entire circumstances of the individual case and relates in particular to the duration of the treatment, its

physical and psychological effects and the characteristics of the person concerned (e.g. his or her sex, age and state of health and other vulnerabilities). The purpose of the treatment and the underlying intention or motivation for it, as well as the context in which it occurs, must also be taken into account. Cruel, inhuman or degrading state action in any form ("treatment or punishment") is prohibited, although not every conceivable unpleasantness falls under this provision. Furthermore, the concepts of treatment and punishment are not always clearly distinguished in practice.

The concept of torture under Art. 10 para. 3 FC is distinguished from "inhuman", "cruel" and "degrading" treatment or punishment. Neither the FC, the ECHR nor the UN Covenant II contain a definition of torture, which is why in practice the four-part definition in Art. 1 para. 1 of the UN Convention against Torture can be used. This includes acts that (i) cause "great bodily or mental pain or suffering"; (ii) are inflicted intentionally; (iii) have a proscribed purpose, e.g. are aimed at obtaining a confession, punishing or discriminating against the person concerned, or intimidating or coercing him or a third party; and (iv) are inflicted or tolerated by a state official. Explicitly excluded from the definition of torture is pain or suffering associated with lawful sanctions. This so-called "lawful sanctions clause" is to be interpreted narrowly; it cannot legitimise corporal punishment or violations of minimum conditions of detention. This clause is intended to preclude detention per se from being described as torture because of the suffering necessarily involved. 90

Forms of treatment that meet the cumulative requirements of Art. 1 para. 1 of the UN Convention against Torture fall under the formal concept of torture (here: torture in the strict sense). This concept needs to be delimited, among other things, because of the tendency to refer to Art. 10 para. 3 FC or Art. 3 ECHR and all forms of action frowned upon therein, i.e. also inhuman and degrading treatment and punishment, as a whole as a "prohibition of torture" (here: torture in the broader sense). 91

The UN Convention against Torture does not define torture in the broad sense, i.e. the terms "inhuman" and "degrading". These terms refer to lower-threshold violations of the prohibition of torture (i.w.S.); Villiger describes these thresholds as a kind of "ladder". The rungs of this ladder - the concepts of torture in the strict sense, inhumanity and degradation - have been fleshed out by the ECtHR in the context of its extensive case law on the existence of Article 3 ECHR as a matter of necessity. Unlike in the FC and the UN Conven- 92 tion against Torture, the category of "cruel" treatment or punishment is not listed separately in Art. 3 ECHR.

93 There is a gradual demarcation between the various types of treatment and punishment that fall under the prohibition of torture in the broad sense. The lowest threshold is that of degrading treatment. This is the case when treatment "causes feelings of fear, anxiety and inferiority and is likely to humiliate, degrade and, if necessary, break physical or psychological resistance or induce someone to act against their will or conscience". Accordingly, even purely psychological suffering can constitute a violation of the prohibition of torture in the broad sense. Especially in the area of police violence, a development towards zero tolerance is emerging. In the case of Bouyid v. Belgium, for example, the ECtHR considered it humiliating that police officers had slapped a young man in the face.

94 Higher is the threshold for cruel and inhuman treatment or punishment. This term covers ill-treatment that causes severe mental or physical suffering. An example is the threat of unspeakable pain to make a suspect reveal the whereabouts of an abducted child. However, a clear demarcation of this category from humiliation does not take place in every case.

95 Compared to degrading or inhuman treatment, torture in the narrower sense is understood as a particularly grave wrong. Consequently, it is linked with a special stigma. In order to distinguish torture from degrading or inhuman treatment, the severity, the underlying intention and the aim of the act in question are taken into account. These criteria are not necessarily applied cumulatively. Thus, torture (in the strict sense) may be present even if the perpetrator did not intend to coerce or punish the victim. Under certain circumstances, no such distinction is made and the type of treatment or punishment is not specified. If such a delimitation nevertheless takes place, reference is often, but not always, made in practice to the severity of the suffering experienced.

96 Especially with regard to the conditions of detention, the prohibition of torture in the broad sense is of particular importance. Art. 10 para. 3 FC protects against inhumane conditions of detention, such as may exist in overcrowded prisons. Furthermore, detainees must be protected from violence. In general, unnecessary humiliation and degradation are inadmissible. For example, accused persons must not be put on display in a cage in the courtroom.

Prolonged incommunicado detention may violate the prohibition of torture in the broad sense. A practical example is the "Brian case", in which a young man was held incommunicado for years. The UN Special Rapporteur on Torture and other competent UN bodies have expressed concerns about compliance with the prohibition of torture in this regard. The UN Special Rapporteur on Torture referred to the so-called "Nelson Mandela Rules" of the UN, which prescribe a maximum duration of 15 days for incommunicado detention. Following this, the Federal Supreme Court also called on the enforcement authorities in this case to "seek alternatives to high-security detention and to order or maintain such detention only for the shortest possible duration". Solitary confinement is highly problematic, especially for young and particularly vulnerable detainees. 97

The contextual application of the prohibition of torture takes into account identity characteristics such as age, gender, state of health, group membership or the particular dependency of the person concerned, as well as various vulnerability grounds depending on the individual case. This contextuality means that the same treatment or punishment that would not constitute a violation of this provision in the case of an adult person would be inadmissible in the case of a child. Not only the age of the child, but also other factors play a role in this assessment. People with mental disorders are also particularly vulnerable in this context. 98

The human rights protection against torture in the broad sense has been developed more progressively over time. This applies in particular to the protection conveyed by Art. 3 ECHR: Like the ECHR as a whole, this "living" provision is interpreted in an evolutionary and dynamic manner. This means that it reflects societal developments, whereby over time, acts that were considered acceptable at an earlier time can be regarded as violating human rights. This evolutionary and dynamic approach was illustrated early on in the Tyrer case concerning a judicially ordered beating. In that case, the Court not only applied the doctrine of the living Convention to Article 3 ECHR, but also held that a certain type of treatment or punishment may violate that provision even if it is socially considered acceptable. 99

A partial content of the prohibition of torture has found expression in Art. 25 para. 3 FC. This is the prohibition of return or non-refoulement as a complementary element to the non-refoulement requirement under refugee law in Art. 25 para. 2 FC. According to this provision, extraditions and deportations 100 to third countries are excluded if the person concerned would be threatened with torture or another kind of cruel and inhuman treatment or punishment there. Before an extradition or deportation can take place, the concrete risk situation of the person concerned must be clarified. Similar requirements arise from Article 3 of the ECHR. If there is a threat, extradition or deportation is generally excluded if no credible diplomatic assurances can be obtained that guarantee treatment in the receiving state that complies with human rights. The suitability of such diplomatic assurances is doubted in some doctrines.

C. Mediated claims

101 Various claims can be derived from the prohibition of torture in the broad sense. In this context, the state has duties to refrain, preventive duties to protect and reactive duties to perform and investigate. The state is not only obliged to refrain from ill-treatment, but must also investigate justifiable allegations of torture effectively and in depth and protect those affected from intimidation.

102 Positive state obligations to protect do not only exist with regard to dangers that emanate directly from members of the authorities. Rather, the state must also ensure that private individuals are effectively deterred from carrying out abuses. These obligations to protect are particularly intense in relation to vulnerable persons, including detainees. Admittedly, these obligations must not overburden the state and not every form of violence, especially between private individuals, can be prevented. However, the authorities are obliged to intervene if they know or should have known about a dangerous situation.

103 If there is a particular dependence on the state, the prohibition of torture in the broad sense can also justify claims for benefits. For example, the dependence of a detained person on the state in the context of the special status relationship gives rise to claims to adequate medical care and sufficient food. The ECtHR justifies these claims on the basis of the vulnerability of the persons concerned.

VII. THE PROHIBITION OF TRAFFICKING IN HUMAN BEINGS, FORCED LABOUR AND SLAVERY

A. Fundamentals

The FC does not contain an explicit prohibition of forced labour equivalent to 104
the human rights entitlement to protection from human trafficking, forced labour, servitude and slavery. According to Schweizer, forced labour falls under the prohibitions of Art. 10 para. 3 FC. This opinion is also held here. This is supported by the particularly serious nature of the impairment of freedom of movement, self-determination and physical and psychological integrity that is present in these contexts. However, this prohibition also overlaps with other fundamental rights, e.g. human dignity (Art. 7 FC) and the right to protection of privacy (Art. 13 FC). Furthermore, Art. 27 FC (economic freedom) protects private autonomy and the free choice of profession.

The human rights foundations of this protection arise in particular from Art. 4 105
ECHR, the Council of Europe Convention on Action against Trafficking in Human Beings and the UN Palermo Protocol. Art. 8 para. 3 UN Covenant II and Art. 2 ILO Convention No. 29 also contain corresponding provisions; Art. 6 Women's Rights Convention (CEDAW) specifically protects against trafficking in women. With the prohibition of "labour exploitation" in Art. 182 StGB, the Swiss legal system knows a protection under criminal law.

The reports of the Council of Europe Group of Experts on Action against 106
Trafficking in Human Beings (GRETA) should also be noted in this context. This body is responsible for monitoring the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings. This group of experts has so far published two country reports on Switzerland. These reports assess national measures to combat trafficking in human beings and make concrete recommendations for better implementation of the Convention.

B. Material scope of protection

Art. 4 ECHR concerns domestic and transnational trafficking in human beings, 107
irrespective of any possible connection with organised crime. The focus here is on the concept of human trafficking ("trafficking"). This concept is interpreted in an evolutionary manner; the Court does not examine whether a

treatment specifically constitutes "slavery", "servitude" or "forced labour". The ECtHR has issued a not particularly extensive but significant jurisprudence on Art. 4 ECHR.

108 The concept of trafficking is interpreted on the basis of Art. 3(a) of the Palermo Protocol and Art. 4(a) of the Convention on Action against Trafficking in Human Beings. This definition describes various forms of behaviour, each of which leads to the exploitation of the victims. Alternatively, sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs are required.

109 According to Meriboute, there is a need for action to address the conceptual ambiguity of the Swiss legal system in this context. It must be ensured that the domestic definition of labour exploitation under Art. 182 SCC is broad enough to meet international standards for the prevention of human trafficking.

C. Mediated claims

110 The prohibition of trafficking, forced labour and slavery involves multi-layered state obligations. In order to meet these obligations, the Swiss legal system must be designed in such a way that it does not promote human trafficking, but protects against it. This dimension of state obligations is of central importance here, as human trafficking is in most cases committed by private individuals. In addition to this legislative dimension, there are three other obligation dimensions regarding trafficking in human beings. In cases of suspicion, among other things, investigations must be carried out ex officio and those responsible must be punished (procedural dimension); furthermore, the states concerned must cooperate (transnational dimension) and protective measures must be taken against persons who are specifically at risk (operational dimension).

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COMMENTARY ON

Art. 13 FC

A commentary by Joel Drittenbass

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Art. 13 Right to privacy

[1] Every person has the right to privacy in their private and family life and in their home, and in relation to their mail and telecommunications.

[2] Every person has the right to be protected against the misuse of their personal data.

CONTENT

I. HISTORY OF ORIGIN

A. Right to privacy (Art. 13 para. 1 FC)

The Federal Constitution has only since 1999 contained an explicit guarantee of the right to privacy as a fundamental right, which is enshrined in Art. 13 FC under the title “Protection of Privacy”. **Art. 13 para. 1 FC** protects – with almost identical wording to Art. 8 para. 1 ECHR – private and family life, home, and correspondence. By contrast, the Federal Constitution of September 12, 1848 (FC 1848) and the Federal Constitution of May 29, 1874 (FC 1874) did not contain a general, integral guarantee of privacy, but only protected certain aspects of privacy. For example, the FC of 1848 protected the confidentiality of communications to a certain extent by stating the inviolability of postal secrecy in Art. 33 para. 3. Postal secrecy was then extended in the FC of 1874 to include telegraph secrecy (Art. 36 para. 4). Numerous cantonal constitutions also enshrined an essential aspect of privacy with the inviolability of the home from 1830. Accordingly, individual aspects of privacy were already guaranteed under constitutional law at both the federal and cantonal level before 1999. 1

Until the creation of Article 13 FC, the constitutional protection of privacy in Switzerland was guaranteed in particular by **personal freedom**, which was recognized by the Federal Court in 1963 as an unwritten fundamental right. In the following years, the Federal Court extended the scope of protection of personal freedom to include mental integrity (1964) and fundamental aspects of personal development (1971). This supreme court case law on personal freedom was significantly influenced by the ECHR and the case law of the European Court of Human Rights (ECtHR). Accordingly, the decisive impetus for the protection of privacy as a fundamental right in Switzerland came – and comes – from the ECHR and the case law on the Convention relating to **Art. 8 para. 1 ECHR**. The Federal Supreme Court therefore strives for a harmonized interpretation of Art. 13 para. 1 FC and Art. 8 para. 1 ECHR. 2

B. Fundamental right to data protection (Art. 13 para. 2 FC)

Art. 13 para. 2 FC protects every person against the misuse of their personal data. Before 1999, the fundamental right to data protection was not explicitly enshrined in the Federal Constitution, unlike certain cantonal constitutions. However, the Federal Supreme Court already recognized data protection 3 rights under the Federal Constitution of 1874, e.g. a right of access and rectification for private individuals with regard to data concerning them that has been registered by an authority.

4 Swiss data protection law has been and continues to be significantly influenced by **international and European data protection law**. The protection of personal data is also guaranteed in international treaties that are binding on Switzerland. Particularly worthy of mention in this regard are Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the ECHR. In addition, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (the "European Data Protection Convention", DSK) has provided a decisive impetus for Swiss data protection law, because Switzerland has incorporated basic data protection concepts (e.g. the concept of particularly sensitive personal data) and basic principles of the DSK (in particular the general principles of data processing) into national data protection law.

5 More recently, Swiss data protection law has been particularly influenced by the EU's **General Data Protection Regulation** (DSGVO), because the federal legislature based the provisions of the FADP on the DSGVO as part of the total revision of the Federal Data Protection Act (DSG). The legislator considered this alignment of the totally revised FADP with the DSGVO to be necessary in order for the European Commission to continue to recognize the level of data protection in Switzerland as adequate with regard to cross-border data traffic between Switzerland and EU member states (so-called adequacy decision).

II. SUBJECT AND CONTENT OF ARTICLE 13 FC

A. Constitutional concept of privacy

6 The Federal Constitution does not define in detail what is meant by the concept of privacy in the sense of Article 13 FC. However, an attempt at a definition can be found in the message of November 20, 1996, on the new FC. This describes the right to privacy as the right of "each person not to be prevented by the state from freely shaping their life and their interaction with other persons, as well as the right to respect for a personal sphere of confidentiality". However, the right to respect and protection of privacy exists primarily in the **private sphere** (material scope of protection). However, Article 13 FC also

protects private activities that take place in public. This is because people who are in public do not implicitly consent to being monitored, filmed, photographed or listened to by state authorities.

A uniform, scientifically generally recognized definition of the concept of privacy according to Article 13, para. 1 FC has not yet been established in the literature, which – to use the words of Oliver Diggelmann – has resulted in a "flight" into practice. In other words, the constitutional concept of privacy has been subject to different interpretations in legal practice because the term is relatively open and vague. In addition, different terms (e.g. privacy, private sphere or private life) are used in the literature. This diversity of terminology naturally carries the risk of misunderstandings and terminological confusion, because the constitutional concept of privacy, for example, is not congruent with the concept of private life as part of Art. 13 FC. In the present case, the **concept of privacy** (as distinct from that of private life) is therefore used as an **umbrella term** for all the circumstances covered by Article 13 FC. According to the understanding of the term used here, the partial content of private life protected under Article 13 para. 1 FC is therefore an essential area of life covered by the constitutional protection of privacy. The distinction can be schematically and simplistically represented as follows: 7

Despite, or perhaps because of, the conceptual difficulty of concisely defining the fundamental right to respect and protection of privacy, legal practice makes do with a list of **typical encroachments** and **relevant areas of protection**. It is therefore hardly surprising that there is a wealth of case law on typical cases of application of Article 13 FC, examples of which are presented in Section III. below (see below, N. 16 et seq.). 8

The ECtHR also determines on a case-by-case basis whether a matter even falls within the scope of protection of Art. 8 ECHR. Art. 8 para. 1 ECHR encompasses the right to respect for private and family life, home and correspondence. Art. 8 ECHR is invoked relatively often in proceedings before the ECtHR, but the number of judgments in which a violation of Art. 8 ECHR has been found is limited. According to the case-law of the Convention, the following, for example, fall within the scope of protection of Art. 8 para. 1 ECHR: 9

- The right to respect for private life under Art. 8 para. 1 ECHR includes personal autonomy and thus the **right of self-determination**. The right of self-determination also includes the right to identity and personal development, which includes the possibility of maintaining relationships with other people, including those of a sexual nature.

- Art. 8 para. 1 ECHR also covers **business and professional activities**.
- According to the case law of the ECtHR, **environmental pollution** (e.g. noise or other emissions) can affect the exercise of the right to respect for private and family life and home under Art. 8 para. 1 ECHR. In its judgment of April 9, 2024 ("KlimaSeniorinnen judgment"), the ECtHR followed up on this case law and derived from Art. 8 ECHR a "human right to effective protection against the adverse consequences of climate change for human health and quality of life". The ECtHR found a violation of Art. 8 ECHR here because Switzerland violated its human rights protection obligation by failing to take sufficient measures to achieve the goals set out in the Paris Agreement. However, the question of *how far* such a state *duty of protection* extends in the context of climate change remained unanswered. This is because the Paris Agreement, on which the ECtHR based its judgment in the KlimaSeniorinnen case, among other things, does not impose any specific emission reduction obligations on the contracting states, and thus on Switzerland, nor does it provide them with specific instruments for achieving the objectives set out in the agreement.
- Art. 8 para. 1 ECHR also protects a person from **telephone surveillance** or the use of other technical surveillance devices by state actors.

10 The right to respect for family life under Art. 8 para. 1 ECHR protects the diverse forms of human coexistence in a family, which also includes respect for a **partnership community** of a same-sex or different-sex couple.

B. Personal scope of protection

11 Both **natural and legal persons** under private law are entitled to the right to respect and protection of privacy. However, the latter can only invoke those parts of Article 13 FC that are not linked to characteristics that are typically inherent to natural persons. For example, legal entities under private law are entitled to respect for their business premises, respect for their correspondence, postal and telecommunications traffic, and protection against the misuse of personal data, but not to protection of their private and family life.

12 Legal entities under public law, such as public corporations or public institutions, cannot in principle invoke Article 13 FC, because they are not generally

entitled to fundamental rights. However, in exceptional cases, legal entities under public law may invoke fundamental rights and thus Article 13 FC "if they are acting under private law and are affected by the contested state act in the same way as a private individual".

C. Individual and objective legal dimensions

According to the generally accepted view, Article 13 FC establishes not only purely defensive claims (the so-called subjective or individual legal dimension of a fundamental right), but also certain **performance** and **protection obligations** (the so-called constitutive-institutional or objective legal dimension of a fundamental right). In case law, positive protection obligations have been recognized in the area of private and family life. For example, in the context of secret video surveillance in the workplace, the ECtHR affirmed a duty of the Convention states to ensure a balance between the interests of employees and those of the employer. Furthermore, the ECtHR recognized, for example, the state's duty to ensure that relationships between members of a family can develop normally and that family life between parents and children is possible. 13

It should be noted that the duty to protect the right to privacy against private threats is in conflict with the private spheres of individuals that are protected by fundamental rights (e.g. Article 10 para. 2 FC, Article 26 FC or Article 27 FC). This raises the question of the standard by which the regulator should strike a balance between the constitutionally protected spheres of freedom of private individuals and the constitutional duty to protect against private threats to the right to privacy. Or, to put it more vividly: What criteria should the legislator use to protect individuals from the **risks of new technologies used by private individuals** without thwarting the opportunities offered by such applications and thus the exercise of constitutional freedoms? This question has recently become significantly more important due to the emergence of innovative technologies – such as the "Internet of Things" (IoT), "big data" or "artificial intelligence" (AI) – because private individuals can also threaten the right to privacy by using such technologies, without, however, being directly bound by Art. At the same time, private individuals can contribute to the realization of opportunities (e.g. the prospect of economic success, new scientific findings or new methods of dealing with diseases) by using innovative technologies, and in doing so make use of constitutional freedoms. The 14

risk-based approach is linked to this area of tension because it ensures the most rational and science-based balance possible between the constitutional duty to protect private individuals from threats to their privacy and the constitutionally protected freedom of the private sphere. One of the objectives of the approach is to shape the legal handling of new technologies in such a way that losses in terms of compatibility with the common good and in terms of options for action are minimized as far as possible.

D. Demarcations

15 The protection of privacy under constitutional law is linked to the right to personal liberty (Art. 10 para. 2 FC) and the right to marriage and family (Art. 14 FC), which is why two questions of demarcation arise:

- According to the case law of the Federal Supreme Court, the right to personal liberty under Article 10 para. 2 FC is a **subsidiary right** to Article 13 FC. The prevailing doctrine follows this case law.
- As for the distinction between the right to privacy and the right to marriage and family under Article 14 FC, the latter protects the **founding of a family**, whereas Article 13 para. 1 FC guarantees family life. The two fundamental rights thus protect different circumstances.

III. PROTECTION OF PRIVACY

A. Para. 1: Right to respect for privacy

1. Preliminary remarks

16 The fundamental right to privacy comprises **five aspects**; four of these are guaranteed in paragraph 1 and one in paragraph 2 of Article 13 FC. Art. 13 para. 1 FC protects private and family life (see below, N. 17 et seq. and N. 21 et seq.), the home (see below, N. 27 et seq.) and the confidentiality of correspondence, post and telecommunications (see below, N. 33 et seq.). In addition, paragraph 2 guarantees protection against the misuse of personal data (see below, N. 43 et seq.). The list of partial guarantees in Article 13 FC seems to be exhaustive. However, according to Biaggini and Diggelmann, paragraph 1 of Article 13 FC does not preclude a “complementary extension” by legal practice.

2. Privacy

a. Scope of protection

Art. 13 para. 1 FC establishes a constitutionally protected right to privacy. According to the Federal Court, this right protects "the identity, social relationships and intimate behavior of each natural person, honor and reputation, as well as, in particular, all information relating to a person that is not accessible to the public". The right to respect for one's private life includes the right to privacy and **intimacy**. In other words, everyone has the right to decide for themselves which personal facts about their life they disclose to whom and when. 17

The right to respect for one's private life also protects the **freedom of** one's **personal relationships**. Therefore, everyone has the right to enter into, maintain or reject personal relationships with other people of their choice. According to the case law of the Federal Supreme Court, the freedom of relationships also includes same-sex relationships. In addition, the decision about gender identity is protected, in that the state may not unduly impede surgical or hormonal measures to adjust gender and must recognize gender identity. However, the right to respect for private life does not give rise to a right to reimbursement of the costs of gender reassignment surgery. Furthermore, according to the case law of the Federal Supreme Court, Art. 13 para. 1 FC does not give rise to a right to the introduction of a third gender or to the deletion of gender in the civil registry. The ECHR had already previously ruled that the requirement to register gender as male or female is compatible with Art. 8 ECHR. The ECHR justified this view by stating that there is insufficient consensus in European societies regarding the introduction of a third gender, which the ECHR uses as a guide for legal policy issues such as this. It is therefore conceivable that in the future the ECHR will qualify the obligation to be registered in the register as either male or female as a violation of the right to recognition of sexual identity and thus of Art. 8 ECHR. 18

Finally, according to the case law of the highest courts, the **respect for** the **name** and the **respect for** the **social reputation** also belong to the scope of protection of private life according to Art. 13 para. 1 FC. The Federal Court, for example, ruled that the state may not publish the name of a debtor in a loss certificate in the official gazette because such a publication is likely to af- 19 fect the public reputation of a person. However, the right to privacy does not generally protect against reputational damage due to one's own misconduct.

b. Restrictions

20 Restrictions on the fundamental right to protection and respect for privacy can be of a **variety of** natures. It is therefore hardly surprising that doctrine and case law have identified various restrictions on the right to respect for privacy. The following restrictions are particularly worthy of mention:

- According to the case law of the Federal Supreme Court, the right to respect for private life is violated in the case of **covert investigative activities** by the police (e.g. surveillance, covert searches or covert preliminary investigations) or by private detectives for the purpose of clarifying the obligation of accident insurance to provide benefits, even if the surveillance takes place in a public space.
- According to the case law of the highest court, a **mandatory test** for staff in health and social institutions without a Covid certificate also constitutes an interference with the right to respect for the private life of the persons concerned, although this can be justified by the protection of public health, provided that the other conditions under Article 36 FC are met. According to the case law of the Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) regarding Article 8, a general statutory **obligation to vaccinate** children against nine diseases long known to medicine constitutes an interference with the right to respect for private life. The Federal Supreme Court also saw the obligation to be vaccinated against COVID-19 and the threat of dismissal in the event of failure to comply as an interference with the fundamental rights of a professional soldier (in particular, the personal freedom guaranteed by Article 10 para. 2 FC), which was, however, justified in this specific case because the vaccination requirement was aimed at ensuring immediate readiness for short-term deployments abroad. This is to be agreed to the extent that, in the *specific context*, no less severe measure was available to ensure immediate readiness for short-term deployments abroad for members of a *special forces* unit of the Swiss army (Special Forces Command). However, the considerations of the highest court indicate that a general obligation for all military personnel to be vaccinated against Covid-19 would hardly be justifiable.

- The ECtHR then found that the refusal of the Swiss authorities to recognize the parent-child relationship established by a US court between the non-genetic father and the child born out of **surrogate motherhood** constituted a disproportionate interference with the child's right to respect for his or her private life under Article 8 ECHR.
- The transfer of **bank client data** abroad also constitutes an interference with the right to privacy.
- Finally, according to the case law of the Federal Supreme Court, **temporary admission** may affect the constitutionally protected right to privacy if it is associated with legal or de facto disadvantages (e.g. obstacles to gradual integration, restrictions on mobility, difficulties in the labor market). The Federal Supreme Court confirmed such an infringement of the right to privacy in a specific case involving a 15-year-old girl from Syria who, together with her family, was provisionally admitted to Switzerland ten years ago. The Federal Supreme Court justified the restriction of the right to privacy in this case mainly on the grounds that, with the end of compulsory schooling soon approaching, obstacles may arise in connection with the search for an apprenticeship or a course of study. In this specific case, temporary admission thus led to specific disadvantages that justified granting a residence permit to the 15-year-old girl as a temporarily admitted person. If, based on the specific circumstances, an impairment of the right to privacy is affirmed, as in the present case, the person concerned may – based on the right to privacy – have a **claim to the granting of a residence permit** according to the case law of the Federal Supreme Court. With regard to the granting of a residence permit to temporarily admitted persons, integration, family circumstances and the reasonableness of a return to the country of origin must be taken into account. In addition, in the case of removals, the length of time spent in Switzerland is of considerable importance when determining whether the right to respect for one's private life within the meaning of Art. 13 para. 1 FC and Art. 8 no. 1 ECHR respectively. In BGE 144 I 266, the Federal Supreme Court ruled that, as a general guideline, where the **duration of lawful residence is around ten years**, social ties in Switzerland are generally so strong that "there must be special reasons for ending the residence". The Federal Supreme Court derived this time threshold from Art. 34 para. 2 FNIA, according to which a settlement permit can generally be granted after a ten-year stay. In individual cases, the constitutionally pro-

tected right to respect for private life may already have been violated at an earlier point in time if a permit is not renewed, e.g. in the case of particularly pronounced integration.

3. Family life

a. Scope of protection

21 Art. 13 para. 1 FC also guarantees a fundamental right to protection of family life. This protects the personal relationships between family members and the way they live together, but also the decision not to live together or to have no contact. The concept of family within the meaning of Art. 13 para. 1 FC includes not only the traditional nuclear family (two-parent family with minor children) but also other forms of relationship (e.g. single-parent family, patchwork family or extended family), provided that the relationship is **actually lived** and has a certain intensity and stability. Under these conditions, cohabitation relationships are also protected. The following, for example, support a family life that is protected under constitutional law in the sense of Article 13, para. 1 FC: living together in a common household, mutual duty of care, financial dependencies and regular contact.

22 According to the established case law of the Federal Supreme Court, **same-sex partnerships** are protected by the right to respect for private life under Article 13 paragraph 1 FC (see above, N. 17 et seq.), but not – in contrast to the case law of the ECtHR – by the right to respect for family life. In line with the more recent case law of the ECtHR and in view of the legalization of same-sex marriage ("marriage for all"), however, this case law appears to be outdated. This must apply all the more since same-sex couples are now also allowed to adopt (step-)children. For these reasons, in view of changes in social values, a dynamic interpretation of the concept of family under Article 13, para. 1 FC is required. Consequently, the view expressed here is that the cohabitation of same-sex couples is protected by the right to privacy and the right to family life, especially since the right to privacy and the right to family life are closely intertwined (see above, N. 17 et seq.).

b. Restrictions

23 Of considerable practical significance are restrictions of the right to family life due to measures taken under **the law on foreign nationals** because under

certain conditions a right to be present in Switzerland or a right to the granting of a permit under the law on foreign nationals arises from Article 13 para. 1 FC. The right to family life under Art. 13 para. 1 FC – analogous to Art. 8 ECHR – thus does not confer an absolute right of presence or an absolute right to family reunification.

In practice, an infringement of the right to protection of family life under Article 13, para. 1 FC is assumed “if a state removal or exclusion measure impairs a close, genuine and actually lived family relationship of a person *entitled to reside in Switzerland with a secure residence permit*, without it being possible or reasonable for the latter to maintain the corresponding family life elsewhere”. According to a judgment of the Federal Court concerning the right to privacy under Article 13, para. 1 FC, the person concerned has a sufficiently stable residence after a **lawful period of residence** of around **ten years**, because it can be assumed “that social relationships in this country have become so close that special reasons are needed to terminate residence” (see above, N. 20). This supreme court case law, according to which special reasons must exist to terminate a residence in Switzerland after a lawful stay of around ten years, can be transferred to the right to family life within the meaning of Art. 13 para. 1 FC, according to the view represented here. Because if a foreign person, based on the right to private life within the meaning of Art. 13 para. 1 FC, then according to the jurisprudence of the highest courts, this person also has a right to family reunification arising from the right to family life (Art. 13 para. 1 FC). However, such a right exists only if the conditions for family reunification laid down by domestic law are met. These domestic requirements must, of course, be compatible with Article 13 FC and Article 8 ECHR. By implication, it can be concluded that a foreign national who has no right of residence in Switzerland is not entitled to family reunification based on the right to family life within the meaning of Article 13 para. 1 FC. 24

In a judgment dated September 17, 2024, the ECtHR also ruled that Switzerland had violated the right to respect for family life as defined in Article 8 of the ECHR when it **ordered the expulsion of** a man from Bosnia and Herzegovina. The man had previously been found guilty of a serious violation of the Narcotics Act (BetmG), which is why he was also expelled from the country for five years on the basis of Art. 66 para. 1 let. o of the Swiss Criminal Code (SCC). This is because a qualified violation of the NarcA is an offence that, under the constitution and the law, leads to the ordering of an expulsion from 25 the country, subject to a personal hardship case. So far, the Federal Supreme Court has taken a particularly strict line on the ordering of an expulsion in the case of such offenses committed by foreign nationals. For this reason, it also upheld the order of expulsion in the present case. In particular, the Federal Supreme Court did not accept the man's objections to an expulsion order, according to which his guilt was minor and only a conditional custodial sentence of 20 months had been imposed.

26 However, a majority of the ECtHR was unable to follow the judgment of the Federal Supreme Court. The Court justified its contrary view by stating that the man's guilt was minor, that only a conditional custodial sentence had been pronounced, that the man had no previous convictions, nor did he pose a threat to public security, and that he had been living in Switzerland for a long time, which is why the five-year expulsion would have a detrimental effect on family life and was therefore incompatible with the right to family life. However, the convincingly argued minority opinion in the context of a dissenting opinion counters that in the present case there are *no valid reasons* for the Court to deviate from the overall assessment of the Swiss courts because the Swiss courts carefully examined the specific circumstances and weighed the public and private interests for and against expulsion in the light of the Convention's case law. In particular, the fact that the man did not come to Switzerland until he was 30 years old and thus spent his formative years in his home country, was moderately integrated into Swiss society while maintaining close ties to his home country, but also the fact that that his wife and young children spoke Serbian and were familiar with the culture of Bosnia and Herzegovina, do not necessarily make moving to his home country unreasonable. In accordance with the Federal Supreme Court and the minority of the Court, the view expressed here is that an expulsion is justifiable in the specific case. Another argument against the man's right to remain in Switzerland and in favor of his expulsion is that the man received and transported 186 grams of pure cocaine to Zurich, thus committing a serious crime, since the line between a minor and a serious case is 18 grams of cocaine.

4. Dwelling

a. Area of protection

27 The right to respect for one's home, as expressly stated in Article 13, para. 1 FC, guarantees the individual a **physical retreat**, where they can be left

alone, but also maintain social contacts outside of the public sphere. In addition to permanently or temporarily occupied homes (homes in the narrower sense), the material scope of protection also includes open spaces that are objectively considered private spaces based on their use. These include, for example, balconies, terraces and gardens. In principle, business premises are also protected, although, according to the case law of the Federal Supreme Court, their protection extends less far than in the case of (purely) private use if they are primarily used for business purposes. It is irrelevant whether the person concerned owns or rents the property.

The ECHR understands the term "home" within the meaning of Art. 8 para. 1 ECHR as a **spatially defined area** in which private and family life takes place. According to the case law of the ECHR, Art. 8 ECHR protects not only second and holiday homes but also commercial premises of legal entities. In individual cases, training centers and hotel rooms may also be protected by Art. 8 ECHR. 28

b. Restrictions

An infringement of the right to respect for one's home occurs, for example, when the state physically enters the home in the course of a search, or when state agents spy on or eavesdrop on the home from outside. In particular, the secret surveillance of state authorities using technical devices has become considerably more important with the advent of **new technologies**, because this creates new threats to the right to respect for one's home, which, in terms of the intensity of the interference, may go further than traditional state surveillance measures. For example, authorities can use **drones** to detect structural changes to properties, enabling insights into bedrooms and living rooms as well as balconies, terraces or gardens. The data protection officer of the Canton of Zurich has therefore stated that this constitutes an infringement of privacy (or, more precisely, of the right to respect for one's home). According to media reports, the French tax authorities have used **AI-based software** to detect undeclared private swimming pools; in the future, this software will also be used to identify other illegally constructed buildings and facilities. 29

The use of **smart meters** – also known as intelligent metering systems or intelligent electricity meters – is another problem area that has so far been little discussed in the context of the right to respect for one's home. This is because intelligent metering systems automatically transmit data on the electricity 30 consumption of end customers to (state-owned) grid operators. These data provide information about which electronic devices are used in a household, when and to what extent. Consequently, smart metering systems can foster the **subjective feeling** of being **constantly monitored** and thus impair the free personal development of people within their own home, for example by causing those affected to adapt certain habits in their own home for fear of (abusive) surveillance.

31 From a fundamental rights perspective, **covert surveillance** of **insured persons by social insurance agencies** within the meaning of Art. 43a and Art. 43b ATSG is also problematic because it is not only permissible in generally accessible places, but also in places that are freely visible from a generally accessible place. The ATSG thus allows insured persons to be filmed by social insurance companies on publicly visible balconies and in garden squares, which can be seen as an infringement of the right to respect for the home of insured persons. It remains to be seen whether these new provisions for surveillance in the social security sector, which the federal legislature enacted in response to the ECtHR's "*Vukota-Bojic*" judgment, will stand up to scrutiny by the ECtHR. This is because, although the legislature has created a formal legal basis in the form of Art. 43a and Art. 43b ATSG, the legislator has created a formal legal basis because the ECtHR had previously criticized the fact that an insured person had been observed by the accident insurer without sufficient legal basis. However, in the aforementioned judgment, the ECtHR left open the question of the extent to which covert surveillance in the social security area is actually necessary to prevent social security fraud. Despite the considerable public interest in combating social security fraud, there may be doubts regarding the necessity of such surveillance, in that the unlawful receipt of social security benefits (social security fraud as defined in SCC Art. 148a) is already pursued by the competent prosecuting authorities in the context of surveillance in accordance with Art. 282 f. CrimPC) and can be sanctioned under criminal law. Or in the words of Pierre Heusser: "[...] the [...] new surveillance options are [...] unnecessary because the necessary investigations can easily be carried out by the law enforcement authorities with the existing legal basis." However, it should be noted that covert surveillance of insured persons by social insurance companies may interfere less intensely with the right to respect for the home than surveillance by law enforcement authorities.

Finally, it is remarkable and problematic with what matter-of-factness the state has recently enacted or is considering enacting regulations that extend into the (highly) private areas of a home as a physical retreat. Examples include the rules on the permissible number of people in living spaces as part of efforts to contain the Covid-19 pandemic or the measures envisaged by the Federal Council in the draft of the Ordinance on Restrictions and Prohibitions on the Use of Electrical Energy in the Event of a Severe Power Shortage, such as temperature regulations for residential and office spaces. Such regulations reveal an increasingly **interventionist understanding of the state** that can hardly be reconciled with a liberal constitutional concept. Such requirements fundamentally restrict the right of individuals to decide for themselves how they live their lives in their own homes. 32

5. Secrecy of correspondence, post and telecommunications

a. Scope of protection

The secrecy of correspondence, post and telecommunications protects **confidential communication** between individuals. In addition to traditional forms of communication (post, telephone and fax), the right also covers modern means of communication such as e-mail, SMS, MMS, pagers, internet telephony and virtual communication platforms with a limited user group. According to the case law of the Federal Supreme Court, by contrast, "websites and publicly accessible newsgroups" are not covered by the secrecy of communications because the confidentiality of the communication cannot be relied upon here. Therefore, with regard to the scope of protection of the secrecy of correspondence, post and telecommunications, the decisive factor is whether the person concerned could reasonably expect *confidential* communication from an objective point of view. 33

The concept of correspondence, postal and telecommunications traffic is – in line with Art. 8 no. 1 ECHR – correctly interpreted by doctrine and case law in an **technically neutral** manner. For this reason, the secrecy of communication also covers new means of communication, which have become considerably more important in practice since Art. 13 para. 1 FC came into force. In this respect, the fact that the wording of the provision is geared more towards traditional forms of communication and therefore appears somewhat outdated is not particularly problematic. However, should FC Art. 13 be revised in the future, consideration should be given to using a more technology-neutral 34 term in FC Art. 13, along the lines of Art. 7 of the Charter of Fundamental Rights of the European Union (CFR), which refers to the concept of communication and protects its confidentiality.

35 In substantive terms, the secrecy of communication protects both the **content of** and **marginal data relating to** the communication. In the case of telephone traffic, information such as the telephone number, location and duration of the telephone conversation is therefore also protected as marginal data, while in the case of internet traffic, e-mail and IP addresses are also protected.

36 The fundamental right to respect for the confidentiality of correspondence, post and telecommunications also applies to persons with a **special status** (e.g. prisoners on remand or serving a sentence or members of the army). However, the confidentiality of correspondence, post and telecommunications applies only to a limited extent to prisoners on remand or serving a sentence.

37 **Private service providers** in the postal and telecommunications sector are not directly bound by the secrecy of communications. However, the legislature is required by Article 35 FC to ensure that appropriate protection is provided.

b. Restrictions

38 In the recent past, in view of the further development of modern communication technologies, but also due to new forms of threat from terrorism and organized crime, the federal legislature has expanded the statutory basis for ordering preventive and repressive **covert surveillance measures**. For example, the surveillance of means of communication can be ordered as part of *criminal proceedings* (surveillance of postal and telecommunications traffic as defined in Art. 269 ff. of the Swiss Criminal Procedure Code, CrimPC), but also for reasons of *state security* on a preventive basis under the Federal Act on the Intelligence Service of the Canton of Bern (NDG). As a rule, such surveillance by state authorities constitutes a *serious* interference with the right to protection of the privacy of correspondence, post and telecommunications, which requires a sufficiently precise formal legal basis.

39 In several recent rulings, the ECtHR has assessed the permissibility of various forms of **state surveillance of communications**. For example, the Court

found that the British system of mass surveillance of communications data and the procurement of such data from communications service providers was not compatible with Article 8 ECHR because there were no effective safeguards against abuses and no independent control mechanisms. In the case of "*Centrum för Rättvisa v. Sweden*", the Grand Chamber – unlike a chamber of the Court in June 2018 – also found a violation of Article 8 ECHR because the Swedish regulations on telecommunications surveillance by the state secret service did not always guarantee effective ex post control. In both judgments, however, the ECtHR emphasised that the contracting states have a *wide margin of appreciation* in the design of state surveillance measures if and as long as the minimum criteria set by the Court are met.

The new NDG allows the Federal Intelligence Service (FIS) to monitor postal 40
and telecommunications traffic (in real time) or to penetrate private computer systems using Trojans in order to, for example, "obtain information available there or transmitted from there". The FIS now also has the option of monitoring electronic communication – including e-mails, search queries or internet telephony – without suspicion or reason (so-called **cable reconnaissance**). This surveillance potentially affects all people in Switzerland who use the internet. The Federal Court recently ruled that surveillance of this kind constitutes an infringement of the secrecy of telecommunications and the right to informational self-determination in accordance with Article 13, para. 2 FC. The court upheld an appeal by the association 'Digitale Gesellschaft' and referred the matter back to the Federal Administrative Court for substantive assessment.

In view of the widespread use of **smartphones**, it is hardly surprising that 41
there are political efforts to allow the police to monitor mobile phones (in real time) as part of their *police work*. This is because smartphones leave data traces in the digital space that allow conclusions to be drawn about a person's communication behavior and whereabouts, which can be used to prevent criminal acts *in a preventive manner*. It is already technically possible to preventively inspect cell phones as part of a police operation or to search the content of communication on hosting or interpersonal communication services (e.g. WhatsApp, TikTok, Instagram, e-mail services, etc.) to curb the distribution of child pornography on the internet (also known as chat control). Despite the legitimate interests (maintaining public order and security) pur-

sued by the police with the covert surveillance of smartphones, it should not be overlooked that such surveillance activities by the police may currently be problematic under constitutional law. This is because in most cantons there is likely to be a lack of a **formal legal basis** in the respective police law, as well as effective guarantees against abuses and independent control mechanisms. It is also questionable whether and to what extent such surveillance activities are necessary.

42 With the use of "**smart home technologies**" (also known as digital assistants), the question will (in the future) probably also arise as to whether and to what extent law enforcement authorities may use information collected by "smart home technologies" to solve crimes. The same question arises if the state wants to use such "smart home applications" for preventive surveillance in the future. Access to smart home technologies by the state as part of criminal proceedings and/or for reasons of national security will lead to **serious infringements** of the constitutionally protected secrecy of communications (as well as the right to privacy of the home). Such access must be regulated by law and limited in terms of duration and purpose. Furthermore, legally effective safeguards against abuse and independent control mechanisms must be provided.

B. Para. 2: Fundamental right to data protection

1. Scope of protection

43 FC enshrines in Art. 13 para. 2 a fundamental right to data protection, which is conceived as a **sub-category** of the right to privacy or secrecy (Art. 13 para. 1 FC). In doctrine and jurisprudence, the fundamental right to data protection as set out in Art. 13 para. 2 FC is also referred to as the "right to informational self-determination" in the terminology of the German Federal Constitutional Court in the census judgment. However, Florent Thouvenin rightly points out that the idea of the right to informational self-determination, "i.e. the right of the data subject to determine in principle whether and for what purposes data about him or her may be processed," hardly stands up to closer scrutiny. On the one hand, he shows, on the basis of the historical development of the fundamental right to informational self-determination, that neither the Federal Supreme Court nor legal doctrine has ever provided a justification for its existence, but has merely referred to the German Federal Constitutional Court's

judgment on the right to a census. For this reason, the fundamental right to informational self-determination is, according to Florent Thouvenin, “on extremely shaky ground” because, in the absence of a proper justification, doctrine and jurisprudence are based only on the intuitive persuasiveness of the concept of informational self-determination, which is not sufficient for the existence of a fundamental right. On the other hand, his analysis of the core provisions of the Federal FADP shows that the idea of a right to informational self-determination has not been implemented at all for data processing by federal bodies and only selectively for data processing by private parties. Consequently, it cannot be said that the federal legislature implicitly recognized such a right when the Federal FADP was enacted. We therefore agree with Florent Thouvenin that the **protection of privacy** guaranteed by fundamental rights under the terms of Article 13 para. 1 FC already provides a meaningful conceptual basis that is suitable for covering all aspects of privacy and thus also the processing of personal data – i.e. data protection law.

According to prevailing doctrine and the case law of the Federal Supreme 44 Court, the scope of protection of Article 13 para. 2 FC is not limited – contrary to its wording – only to protection against the misuse of personal data, but covers all state processing of personal data (e.g. collecting, gathering, storing, and disclosing personal data to third parties, regardless of the means and procedures used). In the age of digitalization, however, the question increasingly arises as to whether and to what extent the scope of protection of Article 13 para. 2 FC is affected at all if state data processing does not pose any danger to the persons concerned, e.g. if state actors process personal data in the exclusive interest of the person concerned. This is because Art. 13 para. 2 FC is primarily intended to **protect the data subject from discrimination** by state data processing.

All information that relates to an identified or identifiable person and “can be 45 assigned to them” is considered to be **personal data** or personal data within the meaning of Art. 13 para. 2 FC, which also includes IP addresses and marginal data from telecommunications. This personal reference points to the person entitled to fundamental rights, which is why data of legal entities are (still) protected under Art. 13 para. 2 FC. The fact that the totally revised FADP dispenses with the protection of data of legal entities (see Art. 1 e contrario FADP) does not change this.

2. Dimensions

a. The fundamental right to data protection as a right of defense

46 The fundamental right to data protection as a **right of defense** (dimension of subjective or individual rights) protects the individual against the processing of personal data by the state. However, in this function, the fundamental right to data protection does not offer protection against private data processing.

b. Fundamental right to protection against private data processing

47 Since the middle of the last century, Swiss legal practice and doctrine – under the influence of German legal theory – has recognized an objective legal dimension to fundamental rights: in addition to their defensive dimension, fundamental rights also establish **state protection obligations** against threats emanating from private third parties. This broader understanding of fundamental rights has been enshrined in law in Article 35 para. 1 FC, which stipulates that fundamental rights must be respected "in the entire legal order". The objective legal dimension of the fundamental right to data protection within the meaning of Article 13 para. 2 FC in conjunction with Art. 35 para. 1 FC thus imposes an obligation on the state to protect individuals from the disadvantages of data processing by **private individuals**.

48 This fundamental right of protection against private data processing is, of course, directed at the democratically legitimate legislator and not at private individuals. The federal legislator has fulfilled this obligation by enacting the Federal FADP. This does not answer the question of the standard according to which a balance between the constitutionally protected freedoms of private data processors and the constitutional duty of protection against private data processing should be struck. At this point, the **risk-based approach** (see above, N. 14) can help to partially resolve this tension because this regulatory approach creates a balance between the legitimate interests in the protection of personal data of private individuals and the legitimate interest in the use of personal data by private data processors. The risk-based approach provides for *stricter* requirements in the case of *high levels of* data protection risks in order to protect the data subjects, while providing for *reduced* requirements in the case of *low levels of* data protection risks in order to safeguard the private sphere of private data processors. The normative content of the risk-based approach is thus to design the scope and intensity of data protection

provisions differently depending on the respective risk. A **risk-based** differentiation of data protection regulations has the advantage that threats to the personal rights of the data subject are minimized in proportion to the risk by appropriate data protection provisions, without thwarting the spheres of freedom of private data processors.

3. Restrictions

With the use of new types of (mass) surveillance systems in public spaces, state authorities have instruments at their disposal that, while serving public security and order and thus the protection of classic police assets, can also (significantly) impair the fundamental right to data protection. Recently, **automatic facial recognition** has been the subject of particularly heated debate. Automatic facial recognition technologies can be used for the preventive surveillance of publicly accessible spaces, for security purposes or for the investigation of criminal offences. Automatic facial recognition is when digital facial images of natural persons are automatically processed to identify or verify the person concerned. According to legal literature, the use of such facial recognition systems constitutes a serious infringement of Article 13, para. 2 FC, whereby the prohibition of discrimination (Article 8, para. 2 FC) and the freedom of expression and assembly (Article 16 and Article 22 FC) may also be affected. In the "*Glukhin v. Russia*" case, the ECtHR ruled for the first time on the use of automatic facial recognition by law enforcement authorities. The Court found that the processing of personal data using facial recognition technology to investigate an *administrative offense* as part of an *administrative procedure* – on the one hand, to identify the person concerned on the basis of the photos and videos published on Telegram, and on the other hand, to locate and arrest them while they were traveling on the Moscow subway – is not compatible with Article 8 of the ECHR. In the ECtHR's view, such data processing using facial recognition technology to investigate a misdemeanor is not necessary in a democratic society. However, the ECtHR did recognize in the judgment the legitimate need of the contracting states to use facial recognition technology to solve crimes, particularly in connection with terrorism and organized crime, which, however, according to the court, requires detailed regulations with regard to the specific forms of application of facial recognition technology and strict safeguards against abuse and arbitrariness. For this reason, too, the ECtHR ruled in the specific case that the use of facial recognition technology was in violation of the convention because such regu- 49 lations are largely absent in Russia. Consequently, the legislator will have the difficult task of finding a balance between the legitimate concern for the protection of constitutionally guaranteed freedoms and the public interest in security, so that the use of automated facial recognition technology is carried out in a manner that is consistent with human and fundamental rights.

50 In the case of **automated vehicle search** and **traffic monitoring** (AFV), mobile or stationary devices are used to systematically capture the license plates of passing vehicles using a camera. In addition to the identity of the vehicle owner, further data may also be collected – for example, the time of the check, location, direction of travel and other vehicle occupants. However, the AFV is not limited to processing such identification information. Rather, the personal data collected using the AFV is merged with other data collections and automatically compared, i.e. the AFV enables "serial and simultaneous processing of large and complex data sets within fractions of a second". The Federal Supreme Court saw this as a serious infringement of the fundamental right to data protection under Art. 13 para. 2 FC, because the AFV does not collect personal data either on an ad hoc basis or on the basis of a specific suspicion, which has a deterrent effect (so-called "chilling effect"), especially since the subsequent (secret) use of such personal data by the authorities can trigger a feeling of being monitored. Furthermore, according to the Federal Supreme Court, there is a risk that data subjects may be wrongly suspected due to an error rate inherent in the system.

51 According to the case law of the Federal Supreme Court, the taking of the body's own reference samples necessary for the DNA analysis (e.g. buccal mucosa swab or blood sample) affects the fundamental right of physical integrity enshrined in Art. 10 para. 2 FC, the subsequent **creation of** a **DNA profile** and its processing by state actors the fundamental right to data protection under Art. 13 para. 2 FC.

52 The use of **database technologies** can give rise to new threats to the fundamental right to data protection as defined in Article 13 para. 2 FC. For example, AI-based analysis or evaluation of social media mass data by state actors (also known as "social media intelligence" [*SOCMINT*]) affects the scope of protection of Article 13 para. 2 FC. Artificial intelligence is also increasingly being used in healthcare, for example to detect blood poisoning (sepsis), pneumonia or cancer at an early stage and to suggest personalized therapies. However, such AI prediction tools require a large amount of patient data so

that the algorithms of such prediction tools can be trained on the basis of patient data. The risks for the constitutionally protected right to data protection under Art. 13 para. 2 FC, which may result from the processing of personal data by state authorities using ChatGPT and comparable AI-supported applications, are still largely unresearched.

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Dr. Joel Drittenbass works as a lawyer in the regulatory team of VISCHER AG in Zurich. He advises and represents parties in public law matters, in particular in water and environmental law, health law and data protection law. His main focus is on advising companies that operate in regulated markets, in particular in the energy and healthcare sectors. He also teaches, researches and publishes in the areas of constitutional and administrative law, with a particular focus on the law of new technologies (e.g. autonomous robots, artificial intelligence). The author represents his personal opinion here.

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COMMENTARY ON

Art. 16 FC

A commentary by Raphaela Cueni

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Art. 16 Freedom of expression and of information

[1] Freedom of expression and of information is guaranteed.

[2] Every person has the right freely to form, express, and impart their opinions.

[3] Every person has the right freely to receive information to gather it from generally accessible sources and to disseminate it.

CONTENT

INTRODUCTORY NOTES ON FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION

A. History of origin

The demand for freedom of speech and expression can be traced back in the history of ideas to antiquity. However, today's guarantees of freedom of expression date back to the **Enlightenment** and are a reaction to the introduction of censorship and licensing systems, with which various governments and, in particular, the Church reacted to the revolution of book printing in the 16th century and the associated possibility of disseminating opinions quickly among many people. 1

Freedom of expression was first enshrined in positive law in the **catalogs of fundamental rights** and declarations of human rights of the late 18th century. For example, freedom of expression was included in the *Virginia Bill of Rights* (1776) (albeit only as freedom of the press) and was also guaranteed a little later in the First Amendment to the United States Constitution (1787), which was added in 1791, and in the French *Déclaration des droits de l'homme et du citoyen* (1789). 2

In Switzerland, freedom of expression was not enshrined either in the text of the **Federal Constitution** of 1848 or in the Constitution of 1874; however, both earlier constitutions guaranteed freedom of the press in Art. 45 *aBV*(1848) and Art. 55 *aBV*(1874) respectively. In cantonal law, on the other hand, freedom of opinion was already partially guaranteed in the 19th century. The concept of freedom of opinion was also already being incorporated into the case law of the Federal Supreme Court in the 1930s. For example, the Federal Supreme Court based its ruling on a cantonal ban on communist propaganda largely on the argument that the principles of democracy oblige citizens to accept the expression of theories that contradict the prevailing order. The tolerance and permissibility of fundamentally different opinions is a central principle of freedom of opinion - however, the Federal Supreme Court did not yet assign the idea to this fundamental right at this time. 3

Freedom of opinion finally achieved its status as a **fundamental right under the Federal Constitution** in the 1960s: In a 1961 decision, the Federal Supreme Court described freedom of expression as a "fundamental principle" 4 of federal and cantonal law and, four years later, finally recognized freedom of expression as an unwritten fundamental right under the Federal Constitution. Subsequently, the court held that the then Art. *55a* of the Federal Constitution, freedom of the press, was part of a comprehensive unwritten fundamental right of freedom of expression, and continued to develop the fundamental right over the next few years. Following Switzerland's ratification of the European Convention on Human Rights (ECHR), the Federal Supreme Court was guided by the case law of the European Court of Human Rights (ECtHR) on Art. 10 ECHR, which was also constantly evolving.

5 In the context of this development of the unwritten fundamental right of freedom of expression, the Federal Supreme Court was faced in 1978 with the question of whether **freedom of information** - as the right of access to information from public authorities - should also be recognized as an unwritten fundamental right under the Federal Constitution. The Federal Supreme Court stated that "freedom of information, as a component of freedom of expression and freedom of the press, guarantees the right to receive news and opinions [...] without interference from the authorities and to obtain information from generally accessible sources". However, freedom of information in this sense does not include the right to be actively informed by the authorities. The court rejected any further recognition as an independent fundamental right due to the lack of recognition as an independent fundamental right in the cantons, among other reasons. This meant that freedom of information as an unwritten fundamental right before 1999 remained limited to protection against state intervention in the procurement of information and to a right of access to "generally accessible sources".

6 With the **total revision of the Federal Constitution** in 1999, freedom of expression and freedom of information were enshrined in Art. 16 FC. In line with the idea of updating, the constitutional legislator limited itself to codifying the case law of the Federal Supreme Court; it therefore refrained from enshrining broader guarantees, such as freedom of information.

B. Comparative law and international law

7 At the level of **international law**, freedom of expression and freedom of information are guaranteed in Art. 10 ECHR and Art. 19 and 20 UN Covenant II, among others. The **cantons** also guarantee - explicitly or by means of an inte-

gral reference to the fundamental rights of the FC - guarantees of freedom of expression and, as a rule, freedom of information in their constitutions.

The case law of the ECHR on **Art. 10 ECHR** is of particular importance for the interpretation and concretization of Art. 16 FC. Since the ratification of the Convention by Switzerland, the case law of the Federal Supreme Court has been largely based on the dynamic case law on Art. 10 ECHR, which therefore plays a decisive role in determining the structure and form of Art. 16 FC today. This can be seen, for example, in the protection of statements that "offend, shock and disturb", or in the particularly intensive protection of statements on topics of social interest. 8

The guarantees of **Art. 19 and 20 of UN Covenant II** also provide parallel protection for expressions of opinion. Although these provisions have a comparatively lesser influence on the case law on freedom of expression and information, they are also decisive for the interpretation of the guarantees in Switzerland. 9

Today, all constitutions with **catalogs of fundamental rights** explicitly guarantee a fundamental right to freedom of expression; freedom of information is often also explicitly guaranteed. A look at Switzerland's neighboring countries shows that the guarantees of freedom of expression and information can take very different forms. For example, the Italian constitution guarantees freedom of expression in Art. 21; freedom of information is not explicitly mentioned and, according to doctrine, is not derived implicitly from the requirements of exercising democratic rights. In Austria, Art. 13 para. 1 of the Basic Law (StGG) guarantees freedom of expression, but also without explicitly enshrining freedom of information. Freedom of information is also not explicitly enshrined in Liechtenstein constitutional law, but is recognized as a necessary part of freedom of opinion in accordance with Art. 40 LV. The Constitution of the Fifth Republic in France does not contain a list of fundamental rights in the written constitutional text of 1958. However, freedom of expression is recognized by case law as part of substantive constitutional law (*bloc de constitutionnalité*). German constitutional law then guarantees both freedom of expression and freedom of information in Art. 5 para. 1 of the Basic Law (Grundgesetz - GG), and the case law of the Federal Constitutional Court has made differentiated statements on various aspects of the fundamental right since 1949. Finally, mention should also be made of the diverse case law and dogmatics in the United States, which - in connection with the special protec- 10 tion of political statements, for example - also influences the case law of the ECHR on Art. 10 ECHR.

C. Relationship to other provisions of the Federal Constitution

11 Freedom of expression is often referred to as a "**subsidiary catch-all fundamental right**" within the framework of fundamental communication rights; however, this only takes limited account of the importance of the guarantee in this context. Freedom of expression is initially a fundamental provision within the framework of fundamental communication rights: the dogmatic structures developed under freedom of expression, considerations on the purposes of protection, intensity of protection and restrictions of the fundamental right therefore also apply in principle to the other fundamental communication rights. However, due to the specific protection requirements in each case, individual aspects and issues are particularly accentuated, while others tend to take a back seat.

12 While freedom of expression as a fundamental provision of the fundamental rights of communication protects expressions of opinion and communication in general, **the specific fundamental rights** of freedom of the media (Art. 17 FC), freedom of speech (Art. 18 FC), freedom of science (Art. 20 FC), freedom of art (Art. 21 FC), freedom of assembly (Art. 22 FC), freedom of association (Art. 23 FC), the right to petition (Art. 33 FC) and political rights (Art. 34 FC) each provide specific protection for communication within a specific framework, via selected means or forms or in a specific context. Accordingly, statements that are subsumed under the freedom of art or the freedom of assembly, for example as art or as part of an assembly, are (primarily) protected under these respective fundamental rights; in this sense, the freedom of expression only applies in a subsidiary manner.

13 **Freedom of information** under Art. 16 para. 1 and 3 FC is similar to claims for access to information under the other, specific fundamental rights of communication. For example, the Federal Supreme Court protects the right of access to official information for media professionals primarily within the framework of freedom of the media pursuant to Art. 17 FC. In doing so, it takes into account the special need for information of media professionals and their role in a democratic society, which is greater than that of other fundamental rights of communication.

With regard to commercial advertising, the Federal Supreme Court and several scholars agree that this type of communication is not protected under freedom of expression pursuant to Art. 16 para. 1 and 2 FC, but rather under **economic freedom** pursuant to Art. 27 FC (for the distinction between commercial and non-material statements, see n. 22 below). According to federal court case law, statements with a religious reference, such as the expression of religious conviction to the outside world or the dissemination of one's own religion, are protected under **freedom of religion** (Art. 15 FC). 14

D. Protective purposes and functions

The guarantee of freedom of expression fulfills a protective function for the individual, but also a social and democratic function. The guarantee is initially characterized by the Federal Supreme Court as "un élément indispensable à l'épanouissement de la personne humaine". The Federal Supreme Court thus recognizes that the expression of thoughts and information of all kinds is an elementary component for the formation and **development of the personality of** every individual. The formation of one's own opinions and thus the development of one's own personality requires knowledge of, and engagement with, different opinions. The importance of exchanging opinions and thoughts with other individuals is central to this. In addition, the possibility of forming and expressing opinions on an equal footing safeguards fundamental aspects of the autonomy and human dignity of the individuals concerned. The fundamental importance of freedom of expression for the development of the individual's personality leads to the conclusion that expressions of opinion are protected even if their social "utility" is low or the expression is not noticed by anyone. 15

In addition to this function of protecting the individual, the protection of freedom of expression and fundamental communication rights is generally based on the fundamental importance of freedom of expression as a **means and prerequisite for social and democratic decision-making**. In this context, the understanding of the free exchange of opinions as a means of confrontation with other opinions and views and the resulting development and, if necessary, falsification of existing views is central. With this focus on debate as an instrument for forming opinions, freedom of expression is characterized, among other things, by the conviction that false and harmful statements should not be countered by prohibitions, but by counter-speech. This 16 approach is particularly pronounced in US case law. This understanding of freedom of opinion and opinion-forming is also based on the recognition of the fallibility of all people (and therefore also state institutions) and the conviction that “truth” cannot be the starting point, but can only ever be the result of debate. The resulting mistrust of (state) scrutiny of opinions according to their “truth content” also shapes today's understanding of freedom of opinion.

17 The characterization of freedom of expression as an “indispensable prerequisite” for **social and democratic opinion-forming processes** refers in particular to the fundamental importance of the free expression of as many opinions and thoughts as possible as a prerequisite for free, democratic opinion-forming processes; in this sense, freedom of expression and the fundamental rights of communication ensure minimum requirements for social and democratic opinion-forming processes at the constitutional level. The ECtHR expresses this aspect of the fundamental right when it states that no democratic society is conceivable without - broadly understood - freedom of expression. It also emphasizes that the confrontation with different opinions allows individuals as part of a society to develop the necessary minimum level of tolerance of other opinions and views, which is necessary for a stable and functioning democratic society. In this respect, the permissibility of the most diverse and even shocking opinions is seen as a necessary prerequisite for life in today's diverse societies.

18 However, the democratic significance of freedom of opinion is not limited to its role as a necessary prerequisite for social debate and democratic decision-making: Freedom of expression also has the important function of **controlling state power** through accompanying criticism and public debate. This “control function” is particularly pronounced in the case of media professionals. However, it is also recognized in the case law of the ECtHR for other groups with a similar social role, such as NGOs.

19 The central importance of freedom of expression as a prerequisite for democratic and social decision-making as well as the personal development of the individual justifies the **special position of freedom of expression** and fundamental communication rights as a whole in the structure of fundamental rights. In particular, the social and democratic functions show that expressions of opinion are not only protected with regard to the interests of the individual holders of fundamental rights, but also due to the possible and some-

times even predominant importance of individual expressions for social and democratic decision-making processes. It follows that the protection of expressions of opinion is particularly intensive where the social or democratic significance of these expressions is particularly pronounced.

II. FREEDOM OF EXPRESSION (ART. 16 PARA. 1 AND 2 FC)

A. Material scope of protection

1. Concept of opinion

Opinions within the meaning of Art. 16 para. 1 and 2 FC are information and ideas of any kind that can be communicated by persons to third parties. "Opinions" in the context of Art. 16 para. 1 and 2 FC thus do not merely refer to opinions in the narrower sense as the expression of a certain subjective position, 'but to the totality of messages of human thought and all possible forms of communication'. This means that statements about facts, such as statistics, information broadcasts or news, are also to be characterized as opinions within the meaning of Art. 16 FC. 20

According to Federal Supreme Court case law, protected opinions are "the entirety of communications of human thought"; accordingly, the question arises to what extent **(partially) automated statements** are also to be covered by the scope of protection of freedom of expression. According to the view expressed here, statements generated partly and probably also entirely by artificial intelligence are to be understood as "opinions" within the meaning of Art. 16 para. 1 and 2 FC and as such are covered by the scope of protection of freedom of expression. Accordingly, both comments written by humans but multiplied by AI and automatically attached to selected Twitter posts and statements generated entirely by AI from chatbots such as ChatGPT or services such as Siri or Amazon Echo would be classified as expressions of opinion. Insofar as the use of AI in automated statements primarily serves to duplicate a human statement, the protection of such semi-automated statements should be undisputed - in this type of use, AI is primarily a means or tool for duplicating a human statement. Much more questions are raised by statements that can no longer be traced back to a single human author, for example as a statement made by a (learning) chatbot or language assistant. The lack of (direct) human authorship could lead to the conclusion that such 21 "statements" are therefore not expressions of opinion to be protected under freedom of expression. Accordingly, statements made by Siri, the feeds generated by the respective algorithms on social media platforms and search engine results lists would not be expressions of opinion. According to the view expressed here, this assessment should at least not be followed without reservation. Non-human statements of this kind are also potentially important for social and democratic debate. In addition, any restrictions on such statements can have a one-sided influence on the public debate or be designed to do so. For these reasons, (fully) automated statements should also tend to be protected under the freedom of expression. However, it should not be concluded from this protection of non-human statements that programs that generate statements of opinion are carriers of freedom of expression (see also n. 40 below). Rather, the question must be asked to what extent the author or owner of the program should still be protected within the scope of freedom of expression or, more appropriately, within the scope of economic freedom.

22 According to the Federal Supreme Court, the scope of protection of freedom of expression under Art. 16 para. 1 and 2 FC is limited to so-called **non-material statements**. Commercial statements, i.e. "statements that are aimed at an economic transaction (in particular advertising) or are made exclusively in connection with such transactions", are, according to established case law, not protected under freedom of expression, but under economic freedom (Art. 27 FC). In my opinion, this view must be endorsed. The different level of protection for commercial statements under Art. 27 FC and for non-material statements under Art. 16 FC takes account of the different protection interests concerned; it thus also corresponds in principle to the differentiated protection that the ECHR grants to non-material and commercial statements respectively under Art. 10 ECHR. The distinction between non-material statements protected under Art. 16 FC and commercial statements protected under Art. 27 FC is relevant when dealing with untrue statements. While a state "truth check" and restrictions based on this in the case of non-material content are regarded as fundamentally inadmissible for the reasons described above in N. 16, the restriction of untrue, because unfair, statements in the case of commercial statements is permissible under the provisions on unfair competition. On the other hand, this distinction plays a role in particular in the context of prior and systematic content controls: While such controls can never be permissible as censorship for non-material statements (cf. on the core content below N. 32 et seq.), prior restrictions of the content (also of a

systematic nature) are not per se contrary to fundamental rights in the case of commercial statements, as completely different protection interests are at issue. Both the prior and systematic controls for information, for example on containers and packaging material for medicinal products, as well as the possibility of network blocks for access to gambling are to be considered permissible. However, where an economic statement also has a non-material component, freedom of expression must be taken into account. This is the case, for example, if topics of social interest are also addressed in the context of an advertising statement (e.g. if a food company renames a type of ice cream in support of the introduction of marriage for all), or if the restriction of commercial statements either has the purpose or effect of influencing a debate on a topic of social interest (e.g. if restrictions are sought on an advertising campaign of a sporting goods manufacturer because it shows a trans athlete, among other things).

The concept of opinion within the meaning of Art. 16 para. 1 and 2 FC covers 23
not only verbal expressions in writing or speech, but also **non-verbal expressions** and communicative acts, provided that the act in question serves the purpose of making a statement and is understood or can be understood as such by the public. For example, the Federal Supreme Court recognizes the protection of hunger strikes as an expression of opinion, while the ECHR has in the past subsumed, among other things, the hanging of dirty laundry in front of parliament as a non-verbal expression under the protection of Art. 10 ECHR. However, according to the case law of the Federal Supreme Court, begging is not protected as a non-verbal expression or communicative act. The question of protection under freedom of expression is also raised in the case of road blockades - for example, if a section of highway is blocked in the area of a construction site in order to draw attention to the demand for flexible retirement in the construction industry or to protest against an exhibition of war material by means of a human carpet under the slogan “Whoever walks over us also walks over corpses”. In such cases, it should be determined whether the blockade has an inherent connection to the intended statement; if such a connection exists, it can be assumed that the communicative act is protected under the freedom of expression.

The constitutional concept of opinion is also to be understood broadly in re- 24
lation to the **protected content** and protects it regardless of its quality or social value. False, nonsensical, morally reprehensible or impulsive statements

are also protected. Extremist, racist, discriminatory, pornographic and similar statements are also covered by the freedom of expression as opinions. Thus, freedom of expression also protects in particular those statements that “hurt, shock or disturb” (see N. 8 above).

25 In this respect, the concept of opinion under Art. 16 para. 1 and 2 FC is broader than, for example, that in German constitutional law, which, according to the prevailing view, excludes deliberately or proven false factual assertions as well as so-called “abusive criticism” from the scope of protection of Art. 5 para. 1 GG. The scope of protection of freedom of expression in Swiss constitutional law is probably also broader than that in the case law of the ECHR: In application of Art. 17 ECHR, this excludes revisionist and Holocaust-denying statements as well as other forms of extreme or totalitarian hate speech to a large extent from the protection of Art. 10 ECHR. However, the case law on Art. 17 in conjunction with Art. In particular, Art. 17 ECHR is used both as an element of the limitation of the scope of protection of Art. 10 ECHR and as an element of the assessment of the necessity of the restriction of this provision, without the two approaches being able to be stringently differentiated dogmatically.

2. Protected elements and claims

26 According to Art. 16 para. 2 FC, freedom of expression protects the holders of fundamental rights “to **form**their **opinions freely and to express and disseminate them without hindrance**”. Individuals are thus protected in their right to form their opinion freely, to have an opinion and to express it to the outside world.

27 The right of every individual to **form** an opinion presupposes in particular that the holders of fundamental rights have access to the information and opinions of others. For this reason, this aspect of freedom of expression is closely linked to the fundamental right to freedom of information (Art. 16 para. 3 FC) and the guarantees specifically protected in Art. 34 para. 2 FC in the run-up to elections and votes.

28 The right to **have** an opinion is “the basis of the freedom to express an opinion”. This “freedom of inner opinion” is an elementary part of human nature and is therefore also understood as the core content of freedom of opinion.

The mere holding of an opinion can therefore never be the basis for a legal sanction.

As freedom of *expression*, Art. 16 para. 1 and 2 FC also guarantees the holder of a fundamental right the right to express their own opinion, i.e. to communicate it to the outside world and **disseminate** it to others. The protected right to express an opinion also includes, in particular, the right not to express an opinion or to remain silent. It also protects the holders of fundamental rights from being forced to disclose information or opinions. In principle, the right to express an opinion also protects the free choice of **means** and **forms** of expression. 29

In its subjective-legal dimension, freedom of expression provides the protected holders of fundamental rights with various justiciable claims. As a **defensive right**, the guarantee protects against direct, indirect, prior, subsequent, legal and de facto encroachments on the fundamental right. In addition, freedom of expression also gives the protected holders of fundamental rights specific **claims to protection and performance**. For example, authorities are obliged to protect participants in public demonstrations from violence or attempts at disruption by third parties and thus to guarantee that these events (and thus the exercise of protected fundamental rights) can "actually take place". The ECHR also recognizes such a (justiciable) duty to protect under Art. 10 ECHR to the effect that authorities are obliged to protect the media professionals working there in the event of repeated, massive attacks on a newspaper editorial office. Case law also recognizes a "conditional right" in the sense of a right to benefits under Art. 16 in conjunction with Art. 22 BV. Art. 22 FC also recognizes a "conditional right" to the use of public land for the purpose of expressing opinions, i.e. "[t]he fundamental rights in question require, within limits, that public land be made available for demonstrations". A comparable "conditional" right of access in the sense of a state service is generally also assumed for the use of administrative property for communicative purposes, although case law tends to be more cautious, at least if - unlike in the case of public property - alternative communication forums exist. 30

State performance obligations are then also concretized in the guarantee of claims to organization and **procedures**. For example, if the Federal Supreme Court guarantees individuals legal recourse via the Independent Complaints Authority for Radio and Television (UBI) for the deletion of their comments on online forums and in the SRG's social media channels, the court guaran- 31 tees the individual holders of fundamental rights access to legal proceedings in which they can assert suspected restrictions on their freedom of expression. It should also be noted that Art. 12 FC (right to assistance in emergencies) is also used to argue for a minimum right to information and participation in social discourse. This aspect of freedom of expression is also currently being discussed in connection with issues such as the regulation of communication via online platforms.

3. Core content

32 The core content of freedom of expression - i.e. content that is particularly worthy of protection and in need of protection, which may not be restricted under any circumstances - is initially the **prohibition of censorship** explicitly enshrined in Art. 17 para. 2 FC. The systematic classification as part of the freedom of the media is explained by the historical development of the fundamental right; however, according to federal court rulings and a majority of voices in the doctrine, the prohibition of censorship also represents an absolute barrier to the restriction of all fundamental communication rights and, in particular, freedom of expression, over and above the freedom of the media.

33 The concept of (absolutely prohibited) censorship within the meaning of Art. 17 para. 2 FC is understood primarily as the **systematic and prior content control** of expressions of opinion. However, prior restrictions based on the content in individual cases, as well as subsequent systematic content controls, are not covered as a priori impermissible measures that violate the core content.

34 The absolute prohibition of censorship in this sense can be derived from the **importance of freedom of expression** for the formation of social opinion: Censorship within the meaning of Art. 17 para. 2 FC has the effect of preemptively restricting the opinions permitted in public discussion and thus determining the spectrum of opinions permitted in terms of content. Such a prior restriction of the spectrum of permissible statements contradicts the idea that the free formation of social will presupposes the permissibility of all opinions in principle and that truth or correctness does not take precedence over public discourse, but can only ever be the result of this discourse. The restriction of the permissible range of opinions through censorship also results in a reduction in the diversity of opinions expressed and thus an impairment of the role of freedom of opinion as a means for society to deal with this diversity of

opinions. By restricting the available spectrum of opinions, censorship also impairs the function of freedom of expression as a means of forming the identity of each individual. As a result, censorship - as a prior and systematic control of content - runs counter to several core protections of the fundamental right and is therefore never permissible.

In addition to the prohibition of censorship, the so-called **forum internum** is 35
also protected as core content. This absolute protection of the "holding" of an opinion is justified by the fact that it would violate the dignity of a person as an independently thinking and acting individual to prohibit him or her from holding an opinion and thus from merely "thinking", or to force a person to hold an opinion in the sense of endorsing certain opinions or expressing innermost views.

B. Personal scope of protection

The protection of freedom of expression applies to all **natural and legal** 36
persons, regardless of their nationality. Children and young people are also protected by freedom of expression, regardless of their age.

In particular, the fundamental right also protects persons **with a special sta-** 37
tus (public employees, prisoners, military personnel, etc.). In specific cases, however, the respective special status relationship may give rise to further restrictions on freedom of expression.

State bodies and **authorities** are not subject to freedom of expression - they 38
are, however, subject to fundamental rights. However, questions of demarcation arise in the case of statements made by representatives of the authorities or the state: if they speak on behalf of an authority - for example, a Federal Councillor at a media conference on the decisions of the Federal Council - this constitutes a statement by an organ of the state. If the same persons make statements as private individuals, they are covered by the personal scope of protection of freedom of expression as natural persons. However, it may not always be possible to clearly determine whether a person is expressing themselves as a representative of a public authority or as a private individual - as shown, for example, by judgments of the Federal Supreme Court on interventions by members of public authorities (presumably as private individuals) in voting campaigns. The relevant criterion for the distinction must be whether the addressees or the public of the statement could understand it as a state-

ment by a private individual or as a statement by a public official or state representative.

39 With regard to the fundamental rights of **legal persons with special proximity to the state**, the Federal Supreme Court now considers the SRG to be a holder of fundamental rights within the framework of Art. 17 FC - and no longer only protected by the program autonomy enshrined in Art. 93 para. 3 FC. It seems unclear whether religious communities recognized under public law are subject to fundamental rights under Art. 16 FC; the Federal Supreme Court generally treats complaints from these as questions of ecclesiastical autonomy and not as questions of religious freedom, for example.

40 In principle, **(partially) automated statements** are also to be protected as expressions of opinion (see above n. 21). However, this does not mean that programs that generate expressions of opinion are subject to freedom of expression. Where AI merely serves to disseminate and reproduce statements, i.e. to bring a human statement to a larger audience in the sense of an instrument of dissemination, the person behind the statement is itself a holder of fundamental rights. Where statements are partly or entirely generated by artificial intelligence, these statements should be protected as opinions, as explained in N. 21. This raises the question of the extent to which the protection of such statements is mirrored by the protection of a fundamental right holder in the sense of an author of the statement in question. According to the view expressed here, a distinction must be made between the authors or owners of the programs and their users. Protection of the authors or owners of the respective programs within the scope of freedom of expression is to be rejected insofar as they do not directly influence the content of the statement or make a statement. However, the users of the application are protected under freedom of expression - for example, the user of Amazon Echo who gives verbal instructions to the “machine” or the user of an application such as ChatGPT in the generation and adaptation of prompts and outputs. However, since the various AI applications are part of the functionality of the corresponding programs and platforms, the owners or authors are not protected under freedom of expression, but they are protected under economic freedom. In concrete terms, this means that a state obligation to unilaterally design the feed of a search engine in a certain way would have to be analyzed as a fundamentally problematic interference with freedom of expression from the user and ad-

dressee side with regard to the potential impact on the social debate - however, the owner or operator of the search engine is not restricted in its freedom of expression but rather in its economic freedom - namely to design the feed and the algorithm used in a certain way.

C. Restrictions on freedom of expression

1. Intensity of protection

Freedom of expression protects statements regardless of their content and social value. However, not all statements are protected to the same extent. It follows from the functions of freedom of expression that individual statements are at the core of the concerns of freedom of expression due to their content, while others are also protected, but their protection is less intensive due to a less close connection to the functions of the fundamental right. 41

These different **intensities of protection** are expressed, on the one hand, by increased material requirements for the restrictions of more intensively protected expressions and, on the other hand - particularly in the case law of the ECtHR - by increased requirements for the density of justification of such restrictions. 42

Expressions of opinion on topics of social interest, so-called "**political communication**", are considered particularly worthy of protection. As set out in N. 16 et seq., the social significance of freedom of expression lies in particular in ensuring the free exchange of as many opinions as possible, thereby creating the conditions for broad social debates and thus also for free democratic decision-making. Accordingly, opinions that are particularly central to the political debate and the formation of opinions on politically and socially relevant topics are particularly well protected. The Federal Supreme Court - taking up the case law of the ECtHR - accordingly states that freedom of expression is of particular importance when it comes to statements on political issues and problems of public life and that criticism "must be permissible in a certain breadth and sometimes also in an exaggerated form". The concept of political statements is defined broadly: As statements on topics of social interest, meaning not only statements on politics in the narrow sense, but all statements on topics of public life. These can be of a political, social, economic, cultural, religious or, under certain circumstances, commercial nature. Satiri- 43 cal statements are also to be classified as political communication and are therefore particularly well protected under freedom of expression.

44 **Art** is also particularly protected due to its importance in a democratic society. Of practical importance in the case law on art is, for example, the protection of statements that offend, shock or disturb, as well as an awareness of the need to interpret unclear or ambiguous statements. However, at least in the past, the ECtHR has provided comparatively less intensive protection for art in relation to political communication, for example by granting (and granting) states a wider margin of appreciation when assessing a restriction for the protection of religion or public morality.

45 The protection afforded by freedom of expression is less intensive for racist, revisionist, incitement to violence, pornographic or other **expressions of opinion with qualified reprehensible content -** expressions that are now regularly summarized under the term **"hate speech"**. With Art. 261bis SCC, Switzerland has a legal basis to prohibit particularly reprehensible and dangerous forms of discrimination and incitement to hatred; it thus (partially) complies with the obligations under international law arising from Art. 4 of the Convention on the Elimination of All Forms of Racial Discrimination. Similarly, Art. 258 f. SCC and Art. 197 SCC make it possible to restrict statements inciting violence or pornographic statements based on the respective content of the statement. However, since even "qualified reprehensible" statements often concern topics of social interest, the above categories must be interpreted narrowly as exceptions.

2. Concept and types of interference

46 Restrictions on freedom of expression must generally be assessed in accordance with the requirements of **Art. 36 FC**. The encroachments are defined in different ways and must be assessed differently depending on the type and timing of the encroachment.

47 Prior or **preventive restrictions** on freedom of expression prevent the information in question from being disseminated in the first place and thus have the effect of preventing the opinions in question from entering the public debate in the first place. Such measures, for example in the form of precautionary measures in civil proceedings pursuant to Art. 261 et seq. CPC, therefore represent particularly intensive encroachments on freedom of expression.

The case law of the ECHR on Art. 10 ECHR therefore stipulates that the conditions for preventive restrictions on the expression of opinions must be clearly defined in law and pursue an important public interest.

In contrast**, retrospective restrictions** such as criminal or civil sanctions, loss of license or disciplinary measures are not considered serious per se. In terms of their severity, they are to be assessed primarily according to the consequences for the holders of fundamental rights affected. 48

In turn, **content-related restrictions** tend to be problematic, in contrast to interventions which, as restrictions on statements at a certain place or time, are fundamentally neutral in terms of content. Since content-related restrictions keep the statements concerned out of public discourse or at least limit their presence in the formation of public opinion, such interventions tarnish the model of free social debate in which individuals can form their opinions in a free exchange of arguments and counter-arguments, regardless of the quality and social value of these. 49

Not only legal, but also **de facto restrictions** on the expression of an opinion, such as the confiscation of documents, eavesdropping on conversations, keeping people away from a rally and similar measures, constitute interference with freedom of expression. 50

In the context of freedom of expression, indirect restrictions through a so-called *chilling effect* take on particular significance. A *chilling effect* (or deterrent effect) is when holders of fundamental rights refrain from expressing opinions that are in principle permissible (and therefore desirable in social discourse) for fear of sanctions or due to an unclear legal situation, i.e. they are deterred from exercising their fundamental rights. Such a deterrent effect can be caused by vague legal provisions, unclear case law, but also particularly severe sanctions for the expression of opinions. For example, the Federal Supreme Court has tended to affirm the possible *chilling effect* of DNA profiling and identification during a peaceful demonstration. The chilling *effect* is also of particular importance in connection with the protection of journalistic sources. Since the *chilling effect* by definition affects and deters opinions that are permissible and desirable as part of the social debate, this type of restriction indirectly affects the social or political debate beyond the individual case; interference through *chilling effect*, even if indirect, can therefore be particularly problematic from a fundamental rights perspective in individual cases. 51

3. Assessment of restrictions under Art. 36 FC

a. Legal basis (Art. 36 para. 1 FC)

52 Pursuant to Art. 36 para. 1 FC, restrictions on freedom of expression require a **legal basis**, i.e. a basis in the form of a general abstract norm.

53 The more serious the encroachment in a specific case, the higher the requirements for the **level** and **density of** the respective basis for encroachment. In Art. 36 para. 1 sentence 2 FC, for example, the Federal Constitution stipulates that serious restrictions must be provided for in the law itself. With regard to the density of norms, the ECtHR states in its case law that the legal basis in question must be formulated so precisely that those affected by the law can act accordingly and foresee the consequences of certain behavior with a certain degree of certainty. The more serious the interference, the higher the requirements for the precision of the legal basis.

54 In many cases, restrictions on freedom of expression are based **on various legal bases** in civil law (in particular Art. 28 et seq. CC) and above all in criminal law (such as Art. 135 SCC, Art. 173 et seq. SCC, Art. 197 SCC, Art. 259 et seq. and in particular Art. 261bis SCC, Art. 296 et seq. SCC). However, Art. 3 para. 1 lit. a UCA, other federal and various cantonal legal norms are also relevant. In view of the requirements mentioned above in N. 53, in particular the necessary density of legal norms, individual provisions of simple law are probably not sufficiently precise: Some doctrine criticizes, for example, the insufficiently precise wording of Art. 261bis SCC (discrimination and incitement to hatred), which falls “far” short of the requirements of the principle of legality.

55 Case law and doctrine state that the requirements for the legal basis may be less strict in **special status relationships**. This applies primarily to standards that regulate the specific form of the special status relationship; here, both the requirements for the level of the standard and the density of the standard are to be applied less strictly. In contrast, the requirements for the legal basis are not lowered with regard to the standards establishing the respective legal relationship.

56 The statutory provisions that serve as the basis for restricting the expression of opinions must be interpreted and applied **in accordance with fundamental rights** in light of Art. 16 FC (see also N. 76 f. below on the indirect third-party effect and interpretation in accordance with fundamental rights).

Exceptionally - in the event of a serious, immediate and otherwise unavoidable danger to high-ranking legal interests - the **general police clause** (Art. 36 para. 1 sentence 3 FC) permits a restriction of freedom of expression without an explicit basis in the law. However, caution is required when applying this exception: For example, the de facto restriction of freedom of expression (and media freedom) by preventing a journalist from continuing his journey to the WEF in Davos is not covered by the general police clause according to the ECtHR due to the foreseeability of the danger. 57

b. Public interest and protection of fundamental rights of third parties (Art. 36 para. 2 FC)

According to Art. 36 para. 2 FC, restrictions on freedom of expression must be justified by an overriding public interest or the protection of fundamental rights of third parties. 58

Art. 36 para. 2 FC **does not** provide **an exhaustive list** of possible public interests for restricting the fundamental right. In practice, the list of possible public interests in Art. 10 para. 2 ECHR provides guidance: the provision mentions, for example, the protection of public security or the maintenance of public order, the protection of public health or public morals, the protection of (fundamental) rights of third parties, the prevention of the dissemination of confidential information or the safeguarding of the integrity and impartiality of the judiciary. 59

Restrictions to protect interests that **run counter to the core of the protection of the fundamental right** are not permissible. It would therefore be inadmissible to restrict freedom of expression solely for the purpose of preventing criticism of the government or to ban "peripheral" opinions held only by a minority in order to protect the majority of the population from being confronted with such opinions, which may be unpopular or "shocking". 60

c. Proportionality (Art. 36 para. 3 FC)

According to Art. 36 para. 3 FC, restrictions on freedom of expression must be **proportionate**. A restriction is deemed to be proportionate if it is suitable and necessary to achieve the desired state objective and if the measure is reasonable for the person(s) affected by the fundamental right. When assessing the proportionality of restrictions on fundamental rights, the specific circum- 61 stances of each individual case must be taken into account. This raises questions of both the intensity and the precision of the interference in the specific case.

62 When reviewing the proportionality and, in particular, the reasonableness of restrictions on freedom of expression, the ECtHR regularly refers to the importance of the fundamental right for a democratic society. Following on from the particular intensity of protection for statements on **topics of social interest**, the Court recognizes that the Convention leaves little room for restricting so-called political statements and that such restrictions must therefore be subject to particularly strict scrutiny.

63 The status of the **person affected** by a statement, particularly in the context of defamatory statements, is also relevant when assessing the proportionality of a restriction on freedom of expression. According to the established case law of the ECtHR - and also the Federal Supreme Court - politicians and other public figures must endure a particularly high level of public criticism and must therefore also show a high degree of tolerance towards verbally offensive statements. However, public persons also enjoy a right to privacy, which is why the broad permissibility of statements is primarily given in the public sphere of the persons concerned. However, where parts of the private life of a public person are of social relevance or interest, the restriction of such statements concerning private life is only permissible under restrictive conditions. In the case of private individuals, the assessment of the proportionality of a restriction must primarily be based on whether and to what extent the statements in question are part of a public debate.

64 Next, doctrine and case law also take into account the status of the **person(s) making the statements** when assessing the proportionality of restrictions on freedom of expression. As mentioned in n. 37, further restrictions on freedom of expression may be justified for persons **with a special status**. The ECtHR and the Federal Supreme Court recognize that the status and duty of loyalty of public employees, teachers, civil servants and judges may give rise to a certain duty of restraint or a reason to restrict freedom of expression. At the same time, however, the Court of Justice and the Federal Supreme Court have stated that, particularly in the case of topics of interest to social debate, such restrictions are only permissible in a restrictive manner and their necessity must be convincingly demonstrated. Based on these considerations, the Federal Supreme Court classified disciplinary measures against a lecturer at a state

university for a leaflet campaign (with a cautiously worded leaflet) on a topic of public interest as an unlawful interference with freedom of expression.

Pupils and **students** also have a special status in the context of (higher) education. However, the Federal Supreme Court already emphasizes in its earlier case law that pupils and students are protected by freedom of expression and may not be sanctioned for legally permissible statements that are compatible with the obligations arising from the special status relationship. In my opinion, in view of the relevance of freedom of expression for the formation of the personality and the ability of pupils and students to express themselves, it is also necessary to demand that restrictions resulting from the special status relationship - for example, for didactic considerations to maintain teaching operations - are applied restrictively and precisely justified. 65

The freedom of expression of **female doctors** and **lawyers** is also specifically assessed in case law: While professional ethics permit restrictions on freedom of expression in the case of doctors, restrictions on statements critical of the judiciary are more justifiable in the case of lawyers due to their function in the administration of justice than would be the case for media professionals, for example. 66

The ECtHR has developed special criteria for assessing proportionality in the assessment of sanctions imposed on employees for **whistleblowing**, regardless of whether they are employed under public or private law. In this context, the Court states that the protection of Art. 10 ECHR also extends to relationships under private law and that the legislator has a duty to protect individuals from, among other things, restrictions on their freedom of expression by private individuals. The Court also derives a minimum duty to protect whistleblowers from this principle: In assessing the proportionality of sanctions for such persons, the ECtHR takes into account the so-called Guja criteria, i.e. whether alternative means of disclosing information were available, what the public interest in the disclosed information is, whether the information is authentic, what the disadvantages are for the employer and whether the person acted in good faith. As in many other cases (N. 74), the severity of the sanction is also taken into account here. 67

As mentioned in N. 36, the personal scope of protection of freedom of expression also extends to the same extent to **persons without Swiss nationality**. Art. 16 ECHR does provide for the possibility of (additional) restrictions 68 of, inter alia, Art. 10 ECHR for the "political activity of foreign persons". A corresponding attitude also influenced the understanding of freedom of expression and assembly in Switzerland for a long time: for example, the "Federal Council Decree on Political Speech by Foreigners" made the participation of foreign speakers in assemblies subject to a permit requirement until 1998 (!). However, an additional possibility of restriction or a more generous assumption of the reasonableness of restrictions on freedom of expression solely on the basis of nationality is rightly considered outdated today.

69 The relevant, concrete circumstances that must be taken into account in individual cases when assessing the proportionality of a restriction on freedom of expression also include the **intensity of the infringement of the legal interest**. In order to assess this, the context, the chosen means, the form or the effects of the statement in the specific case are taken into account: As an element of **context**, for example, when assessing an allegedly offensive statement, the preceding events, for example in the context of a heated political debate, are included. The chosen **form** or **means** of the statement are taken into account in particular with regard to their **impact** on the opposing interests concerned. In connection with the protection of privacy or personal rights in general, for example, certain means and forms of expression have a particularly strong impact on the fundamental rights of those affected. The impact of statements with a wide reach, and in particular image reporting, is taken into account by case law, which generally assumes that the personality rights of the person concerned are more intensively affected.

70 The assessment of defamatory statements and the proportionality of their restrictions play an important role in practice. In addition to the considerations regarding the need for protection (N. 62), the persons affected and expressing themselves (N. 63 et seq.) and the context (N. 69), the distinction between **factual assertions** and **evaluative statements** is regularly relevant to the question of the reasonableness of restricting defamatory statements. The admissibility of statements about facts is primarily determined by whether they are true or untrue. While the provision of proof of the truth is a central element for the admissibility of a statement (affecting honor) in the case of factual allegations, the ECtHR's case law does not consider it reasonable to demand proof of the truth for evaluative statements. It should be noted that the concept of value judgments is broadly defined in the case law of the Court and also includes exaggerated sweeping judgments. The reasonableness of

pure value judgments, on the other hand, is assessed, among other things, according to whether they can be supported by a sufficient factual basis.

In case law, it is also relevant to assess the proportionality of restrictions on freedom of expression to protect **the interests of the general public**, such as public health, the protection of state secrets, the protection of the integrity of the judiciary or public order and security. The latter interest often plays a role in restrictions on freedom of expression in the context of the use of public land for communicative purposes. The case law of the Federal Supreme Court considers an authorization requirement for communicative use of public land that goes beyond public use to be fundamentally proportionate for the purpose of coordinating different usage interests (and thus public order). When reviewing the approval or non-approval of demonstrations for the protection of public safety and order, case law regularly has to assess whether milder measures, for example in the form of conditions, protective measures or local or temporal postponements, would have been possible. 71

The question of **responsibility for statements made by third parties**, particularly on social media platforms, is also addressed in the case law of the ECtHR as a question of the proportionality of the restriction of freedom of expression. In recent years, both the Federal Supreme Court and the ECtHR have addressed the question of whether and under what criteria politicians and other public figures can be held liable for comments made under their (public) postings. While the Federal Supreme Court addressed this question of criminal liability without explicit reference to the guarantee of freedom of expression, the Court in *Sanchez v. France* dealt in detail with the question of how such liability should be assessed under Art. 10 ECHR. Referring to its case law on liability for third-party comments online, the ECtHR identified the context of the statements, the measures taken by the complainant, the possibility of holding the actual author liable and the consequences of the proceedings for the complainant as relevant criteria in the proportionality assessment. Of particular importance in this context is the question of the extent to which the person who makes a posting is obliged to monitor the comments and, based on this, to delete them if necessary. 72

There is also a question of responsibility - albeit for one's own statements and not for statements made by third parties - when it comes to restricting the expression of opinions by selected public officials: Art. 162 para. 1 FC guarantees selected public officials at federal level **immunity** for statements made in the 73

Councils and their bodies and creates the possibility of other forms of immunity in para. 2. Thus, in addition to the absolute protection for statements made in the Councils (see Art. 16 ParlA), members of Parliament also enjoy relative immunity for statements made in direct connection with their parliamentary activities on the basis of Art. 17 f. ParlA. Similar guarantees of immunity can also be found in cantonal law. This means that the respective persons cannot be held accountable for statements that are fundamentally unlawful and therefore lawfully restricted in the contexts described.

74 The **type and level of** any **sanctions** are also taken into account when assessing the proportionality of an interference.74 The ECtHR considers criminal sanctions for allegedly defamatory statements against politicians to be particularly serious and therefore generally unreasonable. It therefore examines such restrictions with particular precision. In the context of sanctions for expressions of opinion, any *chilling effect* of a restriction must also be taken into account. In the case of severe sanctions, for example, it is not only the impact of the sanction on the sanctioned person in the individual case that is relevant, but also the fact that such a sanction may deter other people from making similar statements in the future.

D. Objective-legal dimension of freedom of expression

1. Realization of freedom of expression

75 According to Art. 35 para. 1 FC, fundamental rights are to apply as objective fundamental norms throughout the legal system. Freedom of expression thus not only acts as a subjective-legal content that gives the individual claims to defence, protection or performance, but in its **objective-legal dimension** it also obliges the authorities to take the necessary measures for its realization.

76 Thus, freedom of expression is concretized on the one hand as a guideline for the interpretation and application of simple legal provisions. In case law, this often concerns the **interpretation of** the statutory provisions for the protection of statements in civil and criminal law that violate personality rights or defamation, and regularly concerns corresponding statements in the media.

77 In its **programmatic dimension**, freedom of expression obliges the legislator, in application of Art. 35 para. 1 FC, to enact legislation that complies with fundamental rights and realizes fundamental rights, which ensures a commu-

nication framework in which the fundamental right can perform the individual and social functions assigned to it. At the forefront of the discussion here is the guarantee of a minimum of communicative equality of opportunity, for example through the provision of the necessary technical infrastructure or the granting of access to the relevant communication channels or also by taking the necessary protective measures. In the area of radio and television, there are also questions of safeguarding “pluralistic diversity”.

2. Objective-legal dimension of Internet communication in particular

Currently, **internet communication** in particular and the threats to public communication and relevant communication structures that arise in this context raise questions about the realization of fundamental communication rights. For example, scholars argue that specific threats to social communication posed by new communication structures and phenomena could oblige the authorities to take specific measures and intervene in a regulatory manner to protect the relevant fundamental communication rights processes and structures. 78

Initial **regulations** in this regard - such as the German NetzDG and later the EU's Digital Services Act (DSA) - focus on providers of large platforms (primarily social networks and search engines) and formulate requirements for them regarding the enforcement of (already applicable) legal norms. In addition to requirements for the deletion of illegal content and transparency regulations, the relevant provisions of the DSA (and the standards it replaces in the NetzDG) also include an obligation for the respective providers to define contact persons and specific procedures in which affected persons can take action against deleted (or non-deleted) content on a platform. The latter measures can be seen as an attempt to safeguard the content of freedom of expression by creating procedures. 79

For expressions of opinion in the run-up to **elections**, the corresponding French provisions oblige the operators of online platforms to create transparency in the three months before the elections with regard to the originators of information, the flow of funds and the use of users' personal data in connection with the political decision-making process. It also provides for the possibility of taking legal action against incomplete, false or misleading information on these platforms. With these provisions, France is attempting to protect social communication in preparation for specific democratic decisions 80

- and thus particularly sensitive content that is at the heart of the fundamental rights of communication - against manipulative influences.

81 The **informal agreements** between the EU (Commission) and providers of major platforms, which have been in place since 2016 (revised in 2022) and 2018 respectively, are in a legally diffuse area. In two codes of conduct, the signatory providers undertake to take action against illegal *hate speech* and misinformation. Due to their unclear legal nature, their relatively broad applicability to only vaguely defined content and the unanswered questions regarding the accessibility of deletion procedures, for example, these agreements tend to be problematic from the perspective of freedom of expression.

82 The question of the extent to which the legal framework for large platforms regarding the **deletion or blocking of content and accounts** for “legal” statements based on their own “house rules” is necessary to protect basic communication law structures has not yet been legally clarified. In the literature, it is generally assumed that such deletions or blocks are generally permissible based on the economic freedom of the operators, but that the operators must guarantee requirements for procedures and fundamentally equal and non-discriminatory access due to their market power. In the United States, provisions have recently been enacted in various states that severely restrict any deletion, sorting or labeling of (legally permissible) posts by platform operators based on the content of the statement. This is based on the argument that the deletion (but also, for example, the marking as “false” or sorting) of legally permissible statements due to their content violates the freedom of speech enshrined in the First Amendment to the United States Constitution. While the corresponding Texas law was deemed permissible by the Court of Appeals for the 5th Circuit in September 2022, the Court of Appeals for the 11th Circuit deemed a similar provision from Florida unconstitutional in May 2022. Under these circumstances, a clarifying ruling by the US Supreme Court seems likely in the near future.

83 In the summer of 2023, the U.S. Supreme Court did not provide a conclusive answer to questions relating to the algorithmic sorting and recommendation of posts based on search and view history on social media platforms. In two cases, the complainants accused various social media platforms of suggesting content to their users based on past searches via the **algorithm** used, thereby promoting and supporting terrorism. In this regard, the court in *Twitter, Inc. v. Taamneh* held that the acts of recommending and sorting by the major plat-

forms did not have the quality and intensity of favoritism required by law and therefore the platforms could not be held liable in the present case. In the absence of substantive reasoning, the matter in *Gonzalez* was remanded to the lower court with instructions to apply the reasoning from *Twitter, Inc. v. Taamneh* to the case. Accordingly, the intriguing question raised in *Gonzalez v. Google* remained open as to whether the providers of the platforms have to comply with certain obligations in the design of the feeds and algorithmized recommendations, and - linked to this - whether the creation of a feed “only” constitutes an offer of third-party content or whether an act of expression is itself linked to it.

It is also still largely unclear whether - and if so, how - the close link between 84 the **economic power** of the few large platform operators and their equally significant power or sovereignty over communication spaces and thus communication content should be dealt with legally from the perspective of basic communication law. The same applies to the question of the imperative or possible necessity of state regulation in dealing with the algorithmic sorting of communication content or the question of the extent to which labeling obligations or upper limits for contributions to machine-generated statements can be sensible measures.

When dealing with these unresolved issues, it generally seems important that 85 the purpose of any (future) regulatory models is not forgotten. Appropriate approaches should safeguard relevant communication processes and structures and thus guarantee the individual and social functions of freedom of expression. This regulatory purpose can also be used to formulate **requirements** as to how these **regulatory approaches** should or should not be designed.

In my opinion, it would be inadmissible to oblige platform providers to delete 86 or otherwise moderate “**false information**”. Such an obligation to take action against “false” statements would contradict one of the central ideas of freedom of expression, according to which the means against false and harmful statements are not prohibitions, but counter-speech and, accordingly, a state “truth police” is met with great mistrust. For these reasons, such a labeling obligation may be justifiable in specific situations - for example in the sensitive environment in the run-up to elections and votes - but it would not be permissible as a general obligation.

87 Based on similar considerations, a **clear name requirement** for interactions on social networks, for example, may initially seem sensible as a measure against (often anonymous) inflammatory, defamatory or similar “harmful” statements. However, such an obligation would (before the issue of implementation and enforcement is even addressed) contradict the idea that freedom of expression also protects the right to make anonymous statements.

III. FREEDOM OF INFORMATION (ART. 16 PARA. 1 AND 3 FC)

A. Active and passive freedom of information

88 In addition to freedom of expression, Art. 16 para. 1 FC protects **freedom of information** and guarantees - specified in para. 3 of the same provision - every person the right to receive information freely and to obtain and disseminate it from generally accessible sources.

89 Freedom of information formulated in this way guarantees, on the one hand, **passive freedom of information** (also known as freedom of reception) and thus protects the right of the individual to receive information without interference by the state.

90 On the other hand, Art. 16 para. 1 and 3 FC also protects the **active freedom of information** and thus a right of access to state information. However, according to para. 3 of the provision, this active side of the fundamental right is limited to information “from generally accessible sources”. The wording of the Constitution thus confirms the old case law of the Federal Supreme Court, according to which freedom of information does not establish a state obligation “that the authorities must provide information about their activities” and therefore limits the right of access to “generally accessible sources”. The Federal Supreme Court has upheld this principle to this day.

91 Which sources are considered generally accessible is primarily determined by simple **statutory law**. For example, certain registers, parliamentary hearings (in principle) or public court hearings are considered generally accessible, but not, for example, the co-reporting procedure or deliberations of parliamentary committees. The Constitution therefore (continues to) leave the specification of this aspect of active freedom of information to the legislator.

B. Principle of the public nature of the administration

In fact, the restriction to generally accessible sources at federal level has been greatly relativized since 2006 by the **Federal Public Information Act** (FoIA): With the entry into force of the Act in 2006, the change from the principle of secrecy to the principle of publicity of the administration was completed at federal legislative level. For example, Art. 6 para. 1 FoIA now guarantees every person the right to inspect official documents and to obtain information from the authorities about the content of official documents. This right of access is not dependent on the existence of specific interests in inspection, but is guaranteed "unconditionally". While the right is not absolute, but can be restricted in individual cases where there are conflicting private or public interests in confidentiality, the FoIA enshrines the principle that information from all authorities covered by the scope of the Act is in principle publicly accessible. 92

While access to official documents was previously "generally subject to a **fee** ' in accordance with Art. 17 para. 1 FoIA, the revised provision has stipulated since November 2023 that 'in proceedings for access to official documents [...] no fees shall be charged". This change from the principle of mandatory fees to the principle of no fees is to be welcomed. 93

At **cantonal level**, too, there has been a steady development in recent years towards establishing a principle of public administration. Today, the vast majority of cantons guarantee the principle of public access and thus a right of access to official administrative information without any preconditions in the cantonal constitution or enshrine such a right in law. 94

A development towards the fundamental public nature of official information as part of the freedom of information can also be observed in **international law**: In particular, the ECHR in recent case law also recognizes a fundamental right of access to official information as part of Art. 10 ECHR. According to the ECtHR, the prerequisite for a right of access to official information is that access to information is a necessary condition for the exercise of freedom of expression or freedom of the press. In particular, a right of access must be assumed if the information requested serves a public interest or concerns a topic of social interest, the applicant has a social control function and the information sought already exists as such and is easily available. 95

C. Further development of active freedom of information?

96 In view of the developments of recent years and decades described in Nos. 92 to 95, it is questionable whether limiting active freedom of information to access to “generally accessible sources” is still tenable today. Rather, a **further development of the freedom of information** under Art. 16 para. 1 and 3 FC is called for. Recent developments suggest an understanding of freedom of information according to which the wording of Art. 16 para. 3 FC only expresses one aspect of freedom of information, but the right today - derived from Art. 16 para. 1 FC - would have to be understood more broadly in the sense of a fundamental right of access to official information, regardless of whether it is considered generally accessible or not. In concrete terms, this would mean that the constitutionally protected right of access to official information would in principle extend to all official information and would no longer be limited to information that is classified as publicly accessible by the legislator - this would apply in particular to those cantons that do not currently apply the principle of public access. Furthermore, restrictions on the right of access at a statutory level or in specific individual cases would have to be justified by an overriding interest and be proportionate. It remains to be seen whether and to what extent the Federal Supreme Court will undertake a corresponding further development of the freedom of information and the legal entitlement under the Freedom of Information Act and the relevant cantonal provisions in the coming years.

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COMMENTARY ON

Art. 17 FC

A commentary by Marina Piolino / Raphaela Cueni

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Art. 17 Freedom of the media

[1] Freedom of the press, radio and television and of other forms of dissemination of features and information by means of public telecommunications is guaranteed.

[2] Censorship is prohibited.

[3] The protection of sources is guaranteed.

CONTENT

I. GENERAL INFORMATION

A. History (of origin)

Media freedom arose as a reaction to the forms of censorship of communication content (cf. on the prohibition of censorship N. 76 ff.). After the invention of printing, these were practised by both the church and the state from the 16th to the 19th century. The ancestor of media freedom is freedom of the press, as for centuries there was no other means of mass communication than printed matter. In Switzerland, freedom of the press was first guaranteed in the Helvetic Constitution of April 12, 1798. After censorship was reintroduced a few months later by the Helvetic government due to critical reporting on the French state, the cantons only began to abolish censorship and guarantee the freedom of the press in their constitutions again during the period of regeneration (1830-1848). 1

Due to the distrust of the conservative cantons, freedom of the press was enshrined in the newly created Federal Constitution in 1848 as a "fundamental federal right of the first hour". The protection of other types of media and other expressions of opinion were not originally provided for in the Federal Constitution. The guarantee of freedom of the press applied for over 150 years until the total revision of the Federal Constitution at the end of the 20th century, when it was transformed into the freedom of the media that applies today. 2

The 1996 draft constitution still listed the "freedom of the press, radio and television" as an aspect of freedom of opinion, information and the media (Art. 14 VE 1996). The explicit inclusion of radio and television in the freedom of the media was made with reference to the case law on Art. 10 ECHR, according to which radio and television also fall within the scope of protection of Art. 10 ECHR and therefore enjoy fundamental rights protection. Against the background of the social importance of the media (cf. n. 8), Parliament finally created a separate provision for media freedom in Art. 17 FC and extended it, like Art. 93 FC (radio and television), to "other forms of public dissemination of performances and information by means of telecommunications" (cf. also n. 14 on this term). This was intended to keep the scope of Art. 17 FC open for future developments of new forms of media. Parliament also added the ban on censorship and editorial secrecy. The new Federal Consti- 3 tution, which came into force in 2000, thus incorporated Art. 17 FC, which remains unchanged today.

4 Art. 17 FC is closely related to Art. 93 FC, which was incorporated into the Federal Constitution in 1984 as the constitutional basis for the radio and television licensing regime that had existed since the 1920s. In contrast to the press, broadcasting was for a long time characterized by limited distribution channels (scarcity of frequencies) and high financial requirements. For this reason, radio and television broadcasting was designed exclusively as a state monopoly on basic services in order to guarantee a wide range of services for the entire population until the market was liberalized in 2006 (cf. n. 29 and 73). In contrast, the press sector was long characterized by a competitive situation of a multitude of different offerings, as a result of which the adoption of state measures to ensure diversity took a back seat compared to the broadcasting sector (see, however, n. 31 on the current structural change of the entire media landscape).

B. International law guarantees and comparative law references

5 Guarantees under international law are also binding for the understanding and interpretation of media freedom pursuant to Art. 17 FC and must therefore be taken into account. For example, Art. 10 ECHR and Art. 19 et seq. of UN Covenant II protect statements in the media and media activities. Unlike the Federal Constitution, however, these do not enshrine media freedom as an independent standardized guarantee, but rather ensure it as part of comprehensive guarantees of fundamental communication rights.

6 In Swiss case law on media freedom, Art. 10 ECHR is particularly important. Due to the essential importance of free media activity for democracy, the European Court of Human Rights (ECtHR) recognizes particularly stringent protection for media statements and media professionals: Thus, it has consistently held that while the media may not exceed certain limits, it is their duty to disseminate information and ideas of public interest. In this context, it is emphasized that the states' margin of appreciation regarding the restriction of (such) statements of public interest is fundamentally reduced. The Court also recognizes that Art. 10 ECHR does not merely oblige states to refrain from interfering with fundamental rights, but also establishes positive obligations to protect the guarantees (see below n. 18, 22 et seq.). With its differentiated case law and the high level of protection developed for media expressions, the case

law on Art. 10 ECHR is therefore also extremely relevant in practice for the interpretation of Art. 17 FC.

A comparative legal analysis reveals that specific fundamental rights of media freedom or freedom of the press are also enshrined in other constitutions: Reference should be made, for example, to the freedom of the press and broadcasting guaranteed in Art. 5 para. 1 sentence 2 GG (Germany) as well as the prohibition of censorship stipulated in Art. 5 para. 3 GG. An explicit guarantee of freedom of the press can also be found, for example, in the First Amendment to the US Constitution. In addition to the constitutions with various explicit guarantees of media and press freedom, other constitutions recognize media freedom through case law as part of more general guarantees for the protection of fundamental communication rights. 7

C. Meaning and function of media freedom

Freedom of the media provides special protection for statements made by or through the (mass) media compared to freedom of expression (Art. 16 FC). This specific protection is an expression of the special importance of the media and media-based communication in a democratic society. By processing and communicating information of various kinds, the media should enable the public to form an opinion freely on various topics of public interest (opinion-forming function). By ensuring an unimpeded flow of news and a free exchange of opinions, media freedom thus plays a key role in the formation of public opinion and has an important social and political significance. With this understanding of the mass media as a link in communication between the population and the state, media freedom also has a particular function as an instrument for controlling political and social power. Thus, the ECtHR and (following its case law) the Federal Supreme Court recognize the role of the media as "watchdogs" in a democratic society (see in more detail below n. 9 et seq. on the concept of the media). 8

II. FREEDOM OF THE MEDIA (PARA. 1)

A. Material scope of protection

1. Concept of the media in the context of media freedom

9 In its case law on Art. 10 ECHR, the ECHR bases its definition of the media on their function as public watchdogs (cf. on the meaning and function of media freedom n. 8). Within the framework of this functional approach, it grants enhanced protection in particular to those contributions that are directed at the public and deal with topics of public interest. For a long time, the Court had only granted the higher standard of protection to contributions that were prepared in accordance with professional journalistic due diligence criteria. In the wake of the growing importance of the internet, the ECHR is increasingly allowing non-journalistic contributions to benefit from the enhanced protection under Art. 10 ECHR, provided that they contribute to a debate in the public interest and have been prepared with reasonable care - such as information from an NGO on a website or statements made by a blogger on an internet forum. In the context of the right of access to official information, the Court also ruled that popular social media users also perform functions as public watchdogs and can therefore benefit from enhanced protection. Nevertheless, the ECtHR continues to emphasize the importance of observing professional ethical journalistic due diligence, particularly in view of the flood of information available on the internet.

10 The Federal Supreme Court understands the term "media" within the meaning of Art. 17 FC to mean public, technically disseminated expressions of opinion with non-material content. Accordingly, the statement must be directed at an undefined group of addressees. In addition, the public statement must be stored and transmitted by technical means. This means that, in principle, publicly disseminated information on the internet is also protected by media freedom. With regard to communication via social media, it is sometimes necessary to ask whether the expression of opinion is directed at an indeterminate group of addressees. In view of the various motives of social media users, this question must always be assessed on a case-by-case basis. Furthermore, the public information must contain opinion-forming or idealistic content. In contrast, according to federal court practice (in contrast to the case law of the ECtHR), the fundamental rights of communication are not relevant for pri-

marily commercial content, but rather economic freedom, which offers less protection (Art. 27 FC).

It is questionable to what extent the protection afforded by Art. 17 FC presupposes the observance of professional ethical journalistic duties of care. In the context of the accreditation of media professionals, the Federal Supreme Court has declared the legal limitation of the term "media" to journalistic media to be constitutional and referred to the application of the professional ethical duties of care adopted by the Swiss Press Council - the self-regulatory body for media ethics issues. In its more recent practice, the Federal Supreme Court has attempted to define media freedom more clearly in view of digitalization. For example, it does not grant non-journalists any protection under media freedom with regard to access to official information or the justification of violations of personality rights. Parts of the doctrine are also in favor of restricting media freedom to journalistic contributions. If topics in the public interest are dealt with in the context of non-journalistic statements - e.g. by NGOs - Zeller/Kiener, for example, advocate the selective granting of comparably enhanced protection in the context of freedom of expression and information. In our opinion, this view should be endorsed. 11

Finally, certain authors take the view that only journalistic activities of a certain continuity should be protected by media freedom. This is justified by the fact that media require a minimal organizational structure designed for the long term and requiring the corresponding resources in order to effectively perform their special functions. In our opinion, it is questionable whether this criterion, due to its relatively high hurdle, constitutes a constitutive element of the concept of media pursuant to Art. 17 FC or whether it should not rather be regarded as a guiding principle for the classification of a media contribution under media freedom. 12

In summary, it can be stated that Swiss constitutional law also has a functional understanding of the media within the framework of freedom of communication that comes close to the case law of the ECtHR. Greater protection, whether in the context of media freedom or freedom of opinion and information, must be granted to public communication on opinion-forming content that fulfills an opinion-forming and control function that is essential to democracy. This is particularly the case with journalistically prepared contributions that are disseminated within the framework of a certain organizational structure. 13

2. Protected claims and partial content

a. Protection of media content and protection of institutional aspects

14 Media freedom includes both a content-related and an institutional or organizational aspect. The content side is geared towards the more intensive protection of media content (cf. n. 9 ff. on the concept of media, cf. n. 45 ff. on the effects of special protection in the context of the proportionality test). This special protection is guaranteed regardless of the form or type of media used to distribute the media content; in other words, Art. 17 FC is technologically neutral. While the press includes all forms of printed matter, radio and television are understood to mean the temporal or linear distribution of audio or audiovisual content. Through the catch-all and development clause of "other forms", Art. 17 FC equally protects all current and future forms of public communication distributed by means of telecommunications (cf. n. 4 above).

15 The institutional or organizational aspect protects the media as institutions or organizations and, in this sense, the organizational framework conditions that are inextricably linked to the publication of media content and are necessary for the effective performance of the essential democratic functions of the media (cf. n. 8 on the significance and function of media freedom). This includes the entire process of producing media content, from research and editing to dissemination and storage activities, for example in the form of the explicit guarantee of editorial secrecy (Art. 17 para. 3 FC, cf. n. 88 et seq.). Institutional media freedom also includes the requirement that the media be independent of the state. Art. 10 ECHR also guarantees the organizational conditions on which the media depend in order to fulfil their functions, such as media operations, technical conditions and the state-independent organization of the media. The institutional side of media freedom typically protects against indirect state influence on media content (cf. n. 37).

b. Individual claims and partial content (subjective-legal dimension)

16 In its subjective-legal dimension, media freedom protects specific legal positions of the affected holders of fundamental rights and provides them with justiciable claims. The focus here is on protecting media professionals from encroachments on media freedom, for example by banning an upcoming publication as part of an interim measure pursuant to Art. 261 et seq. CPC or the criminal sanction for a statement that violates a person's honor or privacy.

However, media freedom also protects media professionals from being hindered in their research activities, for example by keeping them away from certain places.

Of particular practical relevance is also the editorial secrecy specifically guaranteed in Art. 17 para. 3 FC, which in particular guarantees media professionals protection against disclosure of their sources of information (cf. in detail below n. 88 et seq.). 17

Freedom of the media further protects media professionals in their research activities. In this context, freedom of the media also gives media professionals concerned a right to adequate protection by the competent authorities against any (imminent) acts of violence by third parties. 18

Based on Art. 17 FC, media professionals also have a right to disseminate information. This means that all activities relating to the transportation, sale and distribution of media content or products are protected. 19

An obligation of prior notification, authorization or licensing of media products is only permissible under very restrictive conditions. Such a practice represents a serious encroachment on media freedom, which can be tantamount to censorship. For the more strictly regulated radio and television broadcasters, on the other hand, notification, authorization and licensing obligations are considered permissible within the framework of Art. 17 FC and Art. 10 ECHR (see in detail n. 72 f.; see already n. 4 on the more strictly regulated broadcasting sector). 20

Freedom of the media also guarantees media professionals the right not to have to "transport" information from third parties, whereby considerations in this regard are particularly relevant in practice in the more strictly regulated broadcasting sector. According to established case law, there is in principle no so-called "right to an antenna", i.e. no right of third parties or the state to demand that broadcasters disseminate certain information (see also N. 63 et seq. for more details on the exceptions). 21

Traditionally, media freedom has primarily been understood as a fundamental defensive right, which in principle does not confer any entitlement to benefits and, in particular, no right to media promotion measures. Nevertheless, case law and doctrine also recognize specific performance and participation rights in the context of media freedom, be it with regard to access to state informa- 22 tion (see n. 23 et seq. below) or with regard to access to (existing) infrastructure. In this context, specific access rights of media professionals to relevant information should be emphasized.

23 For example, freedom of the media confers a right of access to state sources which, according to current Federal Supreme Court case law, (arguably) goes beyond the access rights guaranteed under freedom of information pursuant to Art. 16 FC. The needs of media professionals are also taken into account in the structure of the Federal Freedom of Information Act. For example, Art. 10 para. 4 lit. a FoIA and Art. 9 FoIO oblige the authorities to take the media into consideration when requesting access to official documents based on the aforementioned law. Since 2014, Art. 15 para. 4 FoIO has generally provided for a 50 percent reduction in the fees charged to media professionals.

24 Based on Art. 70 para. 3 CrimPC, media professionals also have more extensive access rights for court reporting on main criminal proceedings than those arising for the general public from Art. 30 para. 3 FC and Art. 69 et seq. CrimPC (see also n. 26, 56, 67 et seq. below). This corresponds to the importance of media professionals as a supervisory body of state action and their role as watchdogs and mediators in these proceedings.

25 Freedom of the media does not have a direct horizontal or third-party effect between private parties. This means that media professionals cannot directly invoke media freedom against influence exerted by the publisher, for example (so-called "internal or in-house media freedom"). Rather, tensions between the media freedom of editorial staff on the one hand and media freedom and the economic freedom of the publisher as an employer on the other hand are not to be resolved directly under the title of constitutional law, but under that of labor law (to be interpreted in accordance with the constitution). Thus, the media freedom of media professionals must be sufficiently taken into account when applying the relevant labor law (cf. Art. 35 para. 3 FC; cf. n. 27 below).

c. Objective-legal dimension of media freedom

26 In its objective-legal dimension, media freedom obliges the state to take the necessary measures for its realization. This follows explicitly from Art. 35 para. 1 FC, according to which fundamental rights must be applied as objective fundamental norms in the entire legal system. On the one hand, the state is therefore obliged to legislate in accordance with fundamental rights, within

the framework of which the fulfillment of the essential functions of the media is actually made possible and is not undermined by developments in constitutional reality. Examples include the so-called media criminal law, which provides privileged protection for media statements by limiting the circle of criminally responsible persons (Art. 28 SCC, Art. 322 SCC, Art. 322bis SCC), Art. 266 CPC (cf. n. 57 below), or the aforementioned provisions of Art. 10 para. 4 lit. a FoIA, Art. 9 SCC and Art. 15 para. 4 FoIO (cf. also n. 23 above) as well as Art. 70 para. 3 CrimPC (cf. also n. 23 above).

On the other hand, media freedom also applies to the application of the law and requires that the authorities applying the law interpret legal provisions in accordance with fundamental rights. With regard to the scope of application of media freedom, this applies in particular to the application of provisions restricting media freedom, such as those of civil and criminal law, fair trading law or copyright law, in conformity with fundamental rights (cf. n. 53 et seq.). 27

A typical example of the objective-legal dimension of media freedom is the diversity requirement. Although this has gained significance primarily for the broadcasting sector due to historical circumstances (cf. n. 4 above), it applies to the entire media sector. This is because the media must be able to convey as many different topics and opinions as possible to the public in order to guarantee their opinion-forming and control function. The state must therefore guarantee a media order that strives for media diversity reflecting the diversity of opinion. In a democracy, there are numerous different interests and opinions that are fundamentally of equal value. A distinction is made between different dimensions of diversity. The focus is on striving for a diversity of opinions and information on matters of public interest (diversity of content). This diversity of content can be ensured by a large number of different media providers with individual offerings (external pluralism). In addition, diversity of content can also exist within a single media provider (internal pluralism). 28

In the area of radio and television, ensuring diversity is explicitly laid down in the universal service or public service mandate in accordance with Art. 93 para. 2 FC, in addition to other requirements (cf. n. 74 on the concept of universal service or public service). Accordingly, the Confederation has a guarantee responsibility to organize the broadcasting sector in such a way that freedom of opinion and diversity of opinion are optimally guaranteed for the public. This is guaranteed by the federal legislator by transferring the public service mandate of Art. 93 para. 2 FC to the Swiss Broadcasting Corporation 29

(SRG) and also by providing for the granting of so-called licenses with a performance mandate to local-regional broadcasters. These public service broadcasters are obliged to ensure diversity of content in accordance with the diversity requirement under broadcasting law (internal pluralism). This system can be explained historically by the fact that the broadcasting sector was characterized for years by the existence of a small number of radio and television broadcasters (cf. n. 4 above).

30 In contrast to the broadcasting sector, the press sector was long characterized by competition between different providers with individual offerings. The right of each publisher to determine the content tendency of its offering - the so-called freedom of tendency - forms an important component of press freedom as the counterpart of the diversity requirement under broadcasting law and ensures external pluralism in the press sector. Until now, this external pluralism has been considered a sufficient guarantee of diversity of content in this area (cf. n. 4). Attempts to introduce constitutional provisions that would have granted the Confederation the power to ensure diversity and media policy across all media genres have already failed several times. This means that the Confederation must rely on other competence norms to promote press diversity, such as the competence in the postal sector to reduce postal rates for the press.

31 The entire media landscape is undergoing structural change as a result of digitalization. Due to the high reach of so-called information intermediaries such as social media and search engines, advertising revenue is increasingly moving to players such as Google and Meta in particular (until 2021: Facebook). In addition, the public's willingness to pay for journalistic information in Switzerland is consistently low. As a result, the entire field of journalistic media is increasingly characterized by a lack of resources, which makes it more difficult to perform their essential democratic functions. Regardless of the type of media, the competitive situation is thus approaching the previous situation in the broadcasting sector (cf. N. 4 and N. 29) to the extent that the diversity of content is being ensured the longer, the less by a large number of different media providers. In line with these changes in the realm of fundamental rights, we believe that the state's responsibility to take cross-media measures to ensure diversity is likely to be updated. In view of the lack of resources, the focus here is particularly on financial support measures (cf. on state media support N. 74).

B. Personal scope of protection

All natural and legal persons involved in the research, production and distribution of media content can invoke media freedom, regardless of their nationality. This means that both media professionals and media companies are protected by media freedom. Auxiliaries of media professionals, such as cameramen, are also covered. In our opinion, media professionals must at least follow journalistic professional rules and demonstrate a certain degree of professionalism in this respect (see n. 9 ff. on the term "media"). Accordingly, the view that writing letters to the editor or comments in blogs or discussion forums, for example, is not a "media-creating" activity whose authors are covered by the personal scope of protection of Art. 17 FC is to be shared. 32

The protection of fundamental rights of legal entities in the context of the fulfilment of a public task is affirmed by the prevailing case law if the legal entity directly and specifically serves the realization of fundamental rights in a specific function. For a long time, the Federal Supreme Court (similar to the municipalities) only granted the SRG a (program) autonomy guaranteed by Art. 93 para. 3 FC within the legally defined performance mandate and thus no protection under fundamental rights. In contrast, a part of the doctrine has always demanded the protection of the SRG under fundamental rights in the fulfilment of its public mandate on the grounds that the SRG "has to fulfill an essential function for the freedom of expression and information [...] precisely because of its programming mandate". In the meantime, the Federal Supreme Court has also affirmed the protection of the SRG under Art. 17 FC in the fulfillment of its performance mandate. 33

The extent to which media users and the public are also protected by media freedom has not been fully clarified in the doctrine. In any case, the public can invoke the freedom of information functionally assigned to media freedom pursuant to Art. 16 para. 3 FC, which sometimes guarantees state-independent access to media information. However, it remains questionable whether interference with media freedom - e.g. state influence on a local newspaper - always also constitutes interference with the freedom of information of media users (e.g. the newspaper readership in question) due to this functional relationship. In any case, the individual would have to meet the requirement of standing to lodge a complaint in order to assert violations of fundamental rights in court. According to the ECHR's practice on Art. 10 ECHR, the fact that a person regularly reads a newspaper does not in itself 34 entitle him or her to complain about a violation of his or her freedom of information by a state ban on this newspaper, as long as a sufficiently diverse media offering continues to exist. Accordingly, in our opinion, it is at least conceivable to invoke freedom of the media or freedom of information if the individual would no longer have access to a sufficiently diverse media offering as a result of a restrictive state measure, whereby the local-regional circumstances must be taken into account.

35 The scope of protection of media freedom is also likely to cover statements that are generated (partially) automatically; in particular, statements made by "journalism bots" should be considered. Journalism bots or artificial intelligence technologies can be used at various stages of the production and dissemination of media statements. Such technologies are currently used as "generators" of media statements, for example in the creation of texts, the editing of images or videos or as chatbots - for example to interact with users for the purpose of personalizing the content. These statements are to be protected as media statements regardless of how they were created; the fact that they were generated (partially) automatically does not exclude them from the substantive scope of protection of media freedom. However, it cannot be concluded from this that corresponding AI applications are themselves subject to fundamental rights.

C. Restrictions

36 Interference with media freedom takes the form of direct legal restrictions such as preventive bans, negative access orders or subsequent sanctions.

37 Another type of interference is indirect restrictions on journalistic activity (also known as indirect interference). Unlike direct interference, indirect interference is not linked to specific media content, meaning that it only has an indirect and less predictable influence on the selection and design of media content. Whether state influence is to be considered direct or indirect depends on the controllability of the influence on the design of media content. The state typically has such means of indirect influence in the context of organizational measures, for example in the organization of the universal service or the public service in the media sector (see n. 72 et seq. on the organizational restrictions on media freedom; see also n. 84).

In addition to these legal restrictions, factual restrictions must also be taken into account. These include, for example, physically keeping media professionals away from the location of a demonstration by preventing them from continuing their journey or targeted, public criticism of individual media professionals or media companies by the authorities. 38

Indirect restrictions on media freedom through a so-called chilling effect are not insignificant: the ECtHR in particular emphasizes in its case law that harsh sanctions against media professionals or inadequate protection of sources can lead to media professionals generally refraining from permissible and desirable reporting on certain topics or in selected areas for fear of sanctions. 39

Restrictions on media freedom of the kind described above must in principle be measured against the requirements of Art. 36 FC (see n. 42 et seq. below). Since restrictions - be they of a legal, factual or indirect nature - affect different aspects of media activity and organization, special questions may arise. Accordingly, specific groups of cases have emerged in case law. Therefore, following the general explanations, these different relevant groups of cases will be discussed (n. 52 et seq.). 40

1. Assessment under Art. 36 FC

Restrictions on media freedom must in principle be measured against the requirements of Art. 36 FC. The more serious the interference, the higher the requirements for justification, and the more serious the restriction, the more precisely it must be reviewed by the courts. 41

a. Legal basis (Art. 36 para. 1 FC)

Pursuant to Art. 36 para. 1 FC, restrictions on media freedom require a legal basis, whereby the more serious the restriction is to be classified, the higher the requirements for the level and density of norms. Restrictions are based on various norms of federal law (see in more detail below n. 53 ff.) or cantonal law. For statements on radio and television, the relevant provisions of the RTVA are particularly relevant (see in more detail below n. 60). 42

By way of exception - in the event of a serious, immediate and otherwise unavoidable danger to high-ranking legal interests - the general police clause (Art. 36 para. 1 sentence 3 FC) permits a restriction of media freedom without an explicit basis in the law. However, caution is required when applying this 43 exception: For example, the de facto restriction of media freedom by preventing a journalist from continuing his journey to the WEF in Davos is not covered by the general police clause according to the ECtHR due to the lack of unforeseeability of the danger.

b. Public interest (Art. 36 para. 2 FC)

44 Restrictions on media freedom pursue various public interests; from the protection of public safety and order, the protection of the authority and integrity of the administration of justice, the protection of public health, public morality, confidential information to the protection of fundamental rights of third parties. Art. 36 para. 2 FC does not contain an exhaustive list of possible public interests for restricting media freedom. However, restrictions that pursue a public interest that essentially runs counter to the protection of the fundamental right are inadmissible. Restrictions for the purpose of preventing criticism of the state are therefore never permissible.

c. Proportionality (Art. 36 para. 3 FC)

45 Restrictions on media freedom must be proportionate (Art. 36 para. 3 FC). A restriction is deemed to be proportionate if it is suitable and necessary to achieve the state objective pursued by the restrictive measure and the measure is reasonable for the person(s) affected by the fundamental rights. When assessing proportionality, case law and doctrine focus on the specific circumstances of the individual case.

46 When examining the proportionality of restrictions on media freedom, the ECtHR regularly points out that the exercise of press freedom is also associated with duties and responsibilities. Accordingly, media professionals must act in good faith and must report reliably and accurately in accordance with the relevant media ethics principles (see n. 11 on the observance of journalistic due diligence as part of the concept of the media). According to the case law of the Court of Justice, media professionals are obliged to provide correct and truthful information. With regard to the journalistic duty to clarify the truthfulness of information, the ECtHR states that the scope of this duty depends in particular on the nature of the accusation or criticism and the seriousness of the possible damage to the good reputation of the person concerned. Media professionals also have a duty to carry out independent research and to verify the information used. However, the requirements for this verification

obligation are less stringent when taking information from official documents: Here, media professionals may generally assume that the information contained therein is truthful.

According to the case law of the ECtHR, a custodial sentence for journalists based on their journalistic activities is only permissible in exceptional cases for reasons of proportionality, for example if the work of the media professionals concerned seriously impairs other fundamental rights. Furthermore, the ECtHR is generally critical of criminal sanctions against media professionals and emphasizes that it is not only the severity of the punishment, but the very fact of being punished that can have a deterrent effect on journalistic activity. 47

With regard to media criticism of the judiciary, the ECtHR states that there is a particular public interest in access to information on court reporting. Therefore, restrictions or the withholding of information for the purpose of protecting the integrity of the administration of justice are only permissible if there is an "absolute certainty of danger to the reputation of the administration of justice". 48

According to the established case law of the ECtHR and the Federal Supreme Court, media criticism of politicians and other public figures is permissible to a particularly wide extent. However, a distinction must be made here too: Compared to statements concerning the public sphere of these individuals, restrictions on media statements relating to the private lives of public figures are more permissible. When reporting on private individuals, the scope of permissible statements is much more limited; when weighing up the media's interest in information on the one hand and the protection of the privacy or personal rights of private individuals on the other, the latter regularly take precedence, whereby the extent to which the private individual is part of a public debate must be taken into account. 49

In the context of journalistic reporting, media professionals are in principle also permitted to use exaggerated and polemical statements. However, the ECtHR also states in its case law that media professionals may not abuse their rights to make gratuitous personal attacks. It should be noted that, according to the case law of the ECtHR, exaggerated and polemical sweeping judgments are regularly to be classified as evaluations and not as statements of fact. De- 50 manding proof of the truth for the expression of opinions (as opposed to statements of fact) is generally considered inadmissible.

51 Image reporting, which is protected by media freedom, must regularly be weighed against the personal rights of the persons concerned in individual cases. Criteria that are taken into account when weighing up the proportionality of a restriction include the prominence or nature of the person depicted, the contribution of the publication to a debate of social interest, the subject matter of the reporting, the prior conduct of the person, the content, form and consequences of the publication and the circumstances surrounding the production of the image.

2. Restrictions on the content of media freedom

52 Restrictions on media freedom regularly affect the content of planned or made statements or these restrictions are linked to the content of a media statement.

53 Of great practical importance in substantive law is the case law on defamatory media statements, the restriction of which is based on Art. 28 et seq. CC or Art. 173 SCC. The case law states that the relevant standards must be interpreted in accordance with the constitution, but that the information mandate of the press is not a general justification for the violation of personal rights. In addition, it is stated on various occasions that the aforementioned norms themselves represent a concretization of interests protected by fundamental rights and that it is therefore necessary to weigh up the protection of personal rights and the interest in informing the public in specific cases. In political discussions, for example, the defamatory quality of a statement should only be assumed with caution. When assessing the question of whether a statement is defamatory or offensive, case law is based on the so-called "average reader". In its long-standing practice, the Federal Supreme Court defines the information mandate of the press broadly and includes not only information in the narrow sense, but also the provocation of an exchange of ideas and, in principle, (pure) entertainment. In this respect, however, case law specifies that the satisfaction of curiosity or sensationalism is not covered by the media's duty to inform and therefore cannot justify a violation of personality rights.

54 Other relevant criminal law provisions in the context of media freedom include the provisions on the protection of privacy (in particular Art. 179bis ff.

SCC, Art. 321ter SCC) and secrets (Art. 293 SCC, Art. 320 ff. SCC) or Art. 261bis SCC, which permits restrictions on specific discriminatory statements and incitement to hatred.

In addition, direct and indirect restrictions on content arise from a large number of other provisions. An exemplary list includes restrictions on media statements under competition law, which are imposed in particular to protect the economic reputation of a person based on Art. 3 para. 1 lit. a UCA. The provisions on copyright protection also apply. Art. 47 para. 1 lit. c. is also currently under discussion. BankG, according to which anyone who "discloses a secret disclosed to him [...] to other persons or exploits it for himself or another" is liable to prosecution. This provision constitutes both a direct and an indirect restriction of media freedom. 55

Restrictions arising from the relevant provisions of civil and criminal procedural law must also be taken into account. For example, Art. 261 et seq. CPC allow bans on planned statements and Art. 69 et seq. CrimPC provide for restrictions on court reporting to protect parties to proceedings or third parties. 56

While many of these provisions permit subsequent restrictions on media freedom (in the form of a penalty or the obligation to pay damages or satisfaction, for example), preventive restrictions such as the imposition of a penalty or the obligation to pay damages or satisfaction are also possible, particularly on the basis of Art. 261 et seq. CPC, preventive restrictions such as a ban on a planned media statement are also possible. Due to the importance of media freedom for social and democratic decision-making and the control of political power (see n. 8 above), preventive restrictions tend to be rather severe and can - depending on the type and context - come close to forms of censorship in terms of the severity of the interference. According to the ECtHR, the proportionality of such preventive measures against media statements is assessed according to their scope, their duration, the existence of a justification and the possibility of challenging the ban. The legislator takes this into account by limiting preventive measures against periodically appearing media to situations in which a particularly serious disadvantage threatens and there is obviously no justification via Art. 266 CPC. In view of the severity of preventive restrictions, the adopted amendment to Art. 266 CPC is therefore also problematic: in the new version of the provision, an expected "serious" disadvantage for those affected will suffice in future. The amendment, which is explicitly intended, among other things, as a means of improving the handling of 57 media reports that (presumably) violate personal rights, has also been the subject of controversial debate among academics and the public.

58 When applying the aforementioned standards, the competent authorities and courts are required to take into account the content of media freedom in the respective proceedings by interpreting the restrictive provisions in accordance with the constitution (see also n. 27 above). This includes taking into account the freedom of the media when subsuming a possible offense - for example by narrowly interpreting the concept of defamation in the case of political and other public figures - as well as taking into account the concerns of media freedom as possible grounds for justification. For example, the Federal Supreme Court dealt with the question of whether the recording of a consultation with an insurance advisor for the purpose of uncovering irregularities in this consultation was justified by the interests of media freedom. While the court did not rule out the possibility of justification for the conduct that constituted an offense under Art. 179bis para. 1 and 2 SCC or Art. 179ter para. 1 SCC, it concluded in the specific case that milder means - in particular the transcription of the conversation - would also have been available, which is why the criminal conviction was confirmed. However, the ECHR then assessed the situation in the specific case differently and came to the conclusion that, in view of the contribution to a public debate and the not very serious intrusion into the privacy of the insurance advisor, there was a disproportionate restriction of Art. 10 ECHR.

59 The obligation to interpret and apply the restrictive legal provisions in conformity with fundamental rights also applies to the special case of the reproduction of statements relevant under criminal law as part of journalistic reporting, for example if racially discriminatory statements are reproduced for the purpose of documentation: The reproduction of statements made by third parties is important in the context of media activity; the function of the media is, among other things, precisely to reproduce statements made by third parties. Art. 28 para. 4 SCC explicitly stipulates that truthful reporting of public hearings and official communications by a public authority is exempt from punishment. The earlier judgment in Jersild v. Denmark, in which the Court held that the reproduction of punishable racist statements by third parties in the context of reporting on racism may be permissible, provided that the statements are embedded in a recognizable context and their reproduction

clearly serves a public interest, is groundbreaking from the case law of the ECtHR.

For statements on radio and television, the content requirements for programming pursuant to Art. 4 et seq. of the RTVA must also be observed. The minimum requirements for program content - such as the obligation to respect fundamental rights (Art. 4 para. 1 RTVA), the requirement of appropriateness (Art. 4 para. 2 RTVA) or - for licensed programs - the requirement of diversity (Art. 4 para. 4 RTVA) (see in detail above n. 29) - are already laid down in Art. 93 para. 2 RTVA. These standards, with their content requirements for the design of radio and television programs, provide the basis for restrictions on media freedom pursuant to Art. 17 para. 1 FC. 60

According to established doctrine and case law, the ban on political and religious advertising on radio and television pursuant to Art. 10 para. 1 lit. d and e RTVA is deemed permissible. The (now more narrowly defined) restriction of this type of non-material advertising serves the interests of the independence of radio and television in relation to political advertising, but also of equal opportunities in the political decision-making process. The ban on religious advertising aims to protect religious peace and denominational neutrality. 61

In general, restrictions on the content of media freedom - if the interference concerns information of social interest and is therefore to be classified as rather serious - must be reviewed with particular precision. In the case of a conviction of media professionals for satirically aggressive criticism of a politician, the ECHR accordingly points out that the Member States' margin of appreciation in such a matter is reduced and concludes that the conviction is not proportionate due to the character of the criticized person as a political person and the role of the convicted person as a media professional and that Art. 10 ECHR is therefore violated. The Federal Supreme Court has taken this case law into account in various rulings, but regularly finds it difficult to meet the requirements of media freedom in the interpretation and application of Art. 173 et seq. SCC or Art. 28 ff. CC consistently and convincingly. 62

3. Dissemination obligations as a special case of content restrictions

The obligation of media to disseminate certain content represents a fundamentally serious interference with media freedom and must therefore be based on a sufficiently specific formal legal basis, be of significant public in- 63 terest and withstand a strict proportionality test. Accordingly, media distribution obligations must be limited to exceptional cases explicitly provided for in a formal law. Dissemination obligations may take the form of rights of the state or of third parties to make statements or expressions.

64 State statements must be clearly identified as such in view of the principle of state independence and must be disseminated under the exclusive responsibility of the commissioning authority so that the media are not used as a mouthpiece for the authorities (see also N. 87). At federal level, proportionate state rights to make announcements that are limited to certain exceptional situations are provided for, for example, in Art. 8 para. 1 RTVA, according to which licensed radio and television broadcasters can be obliged to broadcast urgent police announcements (free of charge), among other things. In our opinion, however, the official rights of rectification and counterstatement provided for in certain cantonal legal provisions are problematic. These provide for a generally applicable and therefore very extensive right of the authorities to correct misleading or incorrect information relating to the exercise of official authority at will.

65 Third-party rights of disclosure include the right of reply under civil law in the event of violations of personality rights pursuant to Art. 28g et seq. CC (cf. n. 21 above) and, for the broadcasting sector, the so-called "right to antenna". It should be noted that, in accordance with the programming autonomy already guaranteed by Art. 93 para. 3 FC, no one can demand that a broadcaster broadcast certain performances and information (Art. 6 para. 3 RTVA). This means that third parties do not have an independent "right to an antenna". However, such a right exists by way of exception on an accessory basis if the refusal of access is unlawful. The focus here is on the unequal or discriminatory treatment of a third party in its expression of opinion. This is the case if certain third parties, such as political parties, are granted access to the program, but comparable third parties are denied such access without objective reason. For such exceptional cases, the legislator has introduced the access appeal to the Independent Complaints Authority for Radio and Television (UBI) (cf. Art. 93 para. 3 lit. b and Art. 97 para. 2 lit. b RTVA).

66 Until now, an unlawful refusal of access was only affirmed in practice for the special case of the SRG advertising sector in relation to non-material advertising. According to the Federal Supreme Court, the SRG could not justify the refusal of access to the advertising area solely on the grounds that there was a

fear that the (non-material) advertising might damage the SRG's reputation. SRG cannot rely on its programming autonomy in the advertising sector in the same way as in editorial programming, but must take into account the freedom of expression of third parties in view of its fundamental rights as a privileged licensee of the Confederation. Therefore, according to the Federal Court, SRG is not only bound by the principle of legal equality and the prohibition of discrimination in the area of advertising, but must also take into account the ideal content of freedom rights and be able to justify corresponding encroachments on fundamental rights in accordance with Art. 36 FC. As the SRG could not rely on a legal basis and did not put forward an overriding public interest, the refusal of access was qualified as unlawful. In our opinion, this balancing decision should be approved. The ECtHR also considered this decision to be admissible.

4. Restrictions on research activities and form of presentation

In addition to interference with media freedom in terms of content, restrictions on research activities or the form of presentation must also be taken into account. One example of such a restriction on the chosen form of presentation is the prohibition of video and audio recordings for court reporting in criminal proceedings set out in Art. 70 para. 1 CrimPC. According to ECtHR case law, when assessing the admissibility of image reporting in criminal investigations, court proceedings and of convicted persons, the health condition of the person, the nature of the crime or any connection between the image and the text play a role in addition to the degree of recognition of the person. 67

If media professionals are denied access to a prison in order to protect public safety and order, this also constitutes a restriction of media freedom. The same applies if restrictions are imposed on media professionals' access to public hearings of courts or parliaments in order to protect public health, or if court reporters are excluded from a main hearing for reasons of victim protection. With these access restrictions, it must be taken into account that they can also restrict the chosen form of presentation: If, for example, an interview cannot be conducted due to a lack of access to a place or person, the interview as a form of representation no longer applies. 68

Insofar as these restrictions on research activities and the form of presentation are neutral in terms of content, their application is legally equal and no substantial (one-sided) effects on reporting on topics of social interest are to 69 be expected, they are - in comparison to content-related restrictions - fundamentally less problematic, which is why the requirements for their justification and judicial review are practically less strict. However, they are also only lawful if they are based on a legal basis, pursue a public interest and are proportionate in the specific case.

5. Restrictions on the distribution and dissemination of media products

70 Restrictions on media freedom can also affect the distribution and dissemination of media products. The doctrine points out, for example, that it would be inadmissible if the state were to discriminate against the distribution of certain media products through a (possible) monopoly position in the postal sector. Interventions at the distribution and dissemination stage are also possible on the basis of Art. 2 para. 2 lit. c BWIS. This provision stipulates that the federal government can seize, confiscate or confiscate propaganda material with content inciting violence as a "preventive police measure". Due to this wording, it cannot be ruled out that media products could also be subsumed under the provision as "propaganda material" and could therefore be seized, confiscated or confiscated. Insofar as these are preventive and content-related measures, they are to be regarded as serious encroachments on media freedom. Any restrictions on the distribution of media products are also problematic for the same reason. The ECtHR states that the ban on the sale, distribution and storage of a daily newspaper to protect public safety and order - specifically the fight against terrorism - does pursue a public interest. However, the precise legal basis required for a preventive restriction was lacking. Therefore, the ban is not necessary in a democratic society, i.e. not necessary and therefore not proportionate.

6. Restrictions through structural and organizational measures

71 Interventions through structural or organizational measures usually have an indirect rather than a direct impact on media creation (see above n. 37). These include, in particular, restrictions on market access for media in the form of licensing or concession requirements for media production as well as measures for the basic provision of media services (public service) and forms of state media funding.

a. Restrictions on market access in the form of authorization or licensing obligations

In the area of radio and television, the so-called broadcasting clause in Art. 10 no. 1 sentence 3 ECHR provides that Art. 10 ECHR does not prevent states from requiring radio and television broadcasters to obtain a license. Originally, this was intended to allow states to take technical aspects into account so that the use of scarce frequencies could be made subject to a licensing requirement. Following the abolition of frequency scarcity, the content-oriented safeguarding of diversity was also qualified as a legitimate intervention objective and the public interest in ensuring the quality and balance of broadcasting programmes by means of a licensing requirement was recognized. The broadcasting clause thus extends the circle of legitimate aims of interference beyond the aims listed in Art. 10 no. 2 ECHR. In general, the ECtHR grants the states a wide margin of discretion in the selection of the offerings to be approved or licensed. The extent to which the safeguarding of diversity may also be taken into account as a legitimate interest within the meaning of the broadcasting clause outside the traditional broadcasting sector is a matter of debate among scholars. In any case, in our opinion, the broadcasting clause is not formulated in such a way that authorizations outside the broadcasting sector are inadmissible per se. However, as more serious encroachments on fundamental rights, such encroachments are only possible under very restrictive conditions. The question is topical insofar as media diversity is increasingly decreasing in all media genres and state measures to ensure diversity in the media sector, such as media promotion measures, are likely to be updated as a result (see N. 31 on the structural change of the entire media landscape). 72

With regard to Switzerland, the ECtHR held that Switzerland was entitled to require all radio and television broadcasters to contribute to the fulfillment of the universal service or public service mandate pursuant to Art. 93 para. 2 FC by means of a concession obligation and to prescribe general and diverse information for the public. This system, which established broadcasting as a public service monopoly, applied until the market liberalization through the total revision of the RTVA in 2006. Since then, broadcasting has been subject to a mere obligation to register and, in addition to the licensed broadcasters, there are now registered broadcasters who enjoy freedom of tendency (dual system, cf. n. 4). The dual system combines both internal and external plural- 73 ism through the admission of providers not obliged to diversity of content (cf. n. 28 f.).

b. Basic provision of media services (public service) and forms of state media funding

74 A further structural or organizational measure to be mentioned is the legally defined basic provision of media offerings, which should be available to the entire population and for all regions of the country according to the same principles (public service). To ensure this basic service, the state issues performance mandates, the fulfillment of which it supervises and finances (cf. n. 4 and 29 for broadcasting). In this way, the state has subtle means of indirect influence on journalistic activity (cf. n. 37 above). The same applies to various forms of state media subsidies such as the reduced postal rates at federal level (cf. already n. 30). In these areas, the state finds itself in a difficult dual role in that it can guarantee media diversity through the organization of the universal service or funding instruments, but at the same time potentially endangers media freedom. Such measures therefore always require a sufficient legal basis and must be in the public interest and proportionate. The organization of a basic service or state funding instruments for media is therefore not inadmissible as such, but media freedom can be violated due to the way in which such measures are structured (see in particular the requirement of state independence as part of the prohibition of censorship in detail N. 84 et seq.).

75 The awarding of advertising contracts by the state can also be considered a special form of state media promotion. As Austria's advertising scandal in 2021 has shown, the state has considerable potential to exert influence in this way. As the state is also fundamentally bound by fundamental rights when acting under private law (see Art. 35 para. 1 FC), it must take the fundamental rights interests of the media into account when awarding advertising contracts. In particular, the principle of equal treatment is central to this. The state must treat all media organizations equally and must therefore always provide objective reasons when selecting or excluding certain media, such as the rapid provision of information to a specific region or circulation. With regard to the requirement of independence from the state, advertising or advertisements originating from the state must also be clearly recognizable as such (cf. n. 87).

III. PROHIBITION OF CENSORSHIP (PARA. 2 FC)

A. Concept of censorship

Pursuant to Art. 17 para. 2 FC, censorship is prohibited. The prohibition of censorship represents the core content of media freedom. "Censorship" is sometimes used as a generic term for state control of content. However, according to established case law and doctrine, censorship within the meaning of Art. 17 para. 2 FC only stands for preventive and systematic content control (systematic pre-censorship). The purpose of the prohibition of censorship is to prevent the risk of the state controlling or directing the formation of opinion. It is not necessary to prove that a paralysis of opinion-forming has actually occurred in a specific individual case, as the prohibition of censorship is aimed at protecting against threats to media freedom. Furthermore, it is irrelevant that the systematic review only concerns certain forms or content of communication. It is therefore absolutely forbidden to establish state procedures for pre-control of content, such as requirements that systematically subject all publications of a certain media organization, by specific authors or on a certain topic to the approval of an authority or even prohibit them altogether. 76

Preliminary content controls in individual cases are to be distinguished from systematic pre-censorship. According to case law and prevailing doctrine, such preventive interventions do not affect the core content of the fundamental rights of communication, but according to the view expressed here, they always represent serious encroachments on fundamental rights. Such restrictions must therefore be provided for in a formal law and are only permissible in exceptional cases to protect against a concrete, demonstrable, imminent danger to fundamental legal interests such as human life or the maintenance of military security. A not unproblematic example of a preventive intervention in individual cases is the preventive intervention provided for in Art. 28a para. 1 no. 1 CC in conjunction with Art. 261 et seq. Art. 261 ff. CPC to have the judge prohibit the publication of an expression of opinion as a precautionary measure in the event of an imminent violation of personality rights (see n. 57 for more details). 77

Against the backdrop of digitalization, some scholars would also like to see systematic post-publication censorship as absolutely prohibited censorship. This is convincingly justified by the fact that today it is technically possible to 78 block a homepage immediately after the publication of content. Since such procedures are equivalent to pre-censorship in their effect, the time of institutionalized control can no longer play a role in such cases. Against this background, the active searches of the internet for websites with content that is criminally relevant or endangers domestic security, combined with the possibility of blocking Swiss domains, must be described as constitutionally problematic at the very least.

79 Another problem that has arisen with digitalization is the systematic and content-related control of content by private providers of communication services, either on their own initiative or motivated by government measures. As communication services such as Facebook, Instagram, Tiktok or YouTube have high usage figures and are only controlled by a few providers (power of opinion), such monitoring can have a similar effect to traditional censorship, especially if the state gives rise to systematic controls. This applies regardless of whether the state directly obliges the platform operators to monitor or whether they are indirectly induced to do so by the state - e.g. through strict liability rules in relation to illegal content. In addition, such service providers are more likely to restrict content in order to avoid state sanctions, which can result in a kind of "collateral censorship". The state must take such effects into account when regulating communication services so as not to contravene the ban on censorship. At the same time, those content controls that are carried out by opinionated service providers on their own initiative also pose risks to fundamental communication rights. This is particularly the case if the content restrictions are based on imprecise and rapidly changing terms of use, are carried out arbitrarily or without objective reason or even in a discriminatory manner, without those affected being able to effectively defend themselves against deletions. Unlike the state, private service providers are not fundamentally bound by fundamental rights. However, the state must ensure that fundamental rights are also effective among private individuals, depending on their suitability (Art. 35 para. 2 FC). This applies in particular in cases where the effective exercise of fundamental rights by a large number of people is threatened by powerful private individuals.

80 Unlike the Federal Constitution, Art. 10 ECHR does not contain an explicit prohibition of censorship. However, the ECtHR generally applies a strict standard when examining the legal basis and proportionality of preventive interventions. In this context, while the Court declares preventive measures in the

form of licensing or authorization procedures in the broadcasting sector to be permissible under certain conditions in light of Art. 10 ECHR (see n. 72 f.), it has classified interventions in the form of publication bans on the future publication of entire newspapers and not just certain types of articles as disproportionate. In the "Manole decision", the ECtHR qualified the preventive control of the news disseminated by the Moldovan public service broadcaster by the broadcaster's governing body, which was loyal to the government, as a disproportionate interference with the freedom of communication of the complaining journalists.

B. Critical examples

The following are examples of preventive content control that should be viewed critically with regard to the prohibition of censorship. Firstly, there is the prior official film control for reasons of the protection of minors. This has now largely disappeared in Switzerland, as it has been reduced to defining the minimum age for the admission of viewers for each cinema film. The Federal Act on the Protection of Minors in the Film and Video Games Sectors (JSFVG), which will be adopted in 2022, only contains standardized requirements for age labelling and age control, which means that it is not constitutionally objectionable in this respect. In contrast, in the Canton of Zurich, for example, the age rating of films is linked to the possibility of a screening ban, which does not appear to be unproblematic from a constitutional point of view. 81

On the other hand, the systematic pre-screening of correspondence from prisoners and pre-trial detainees must be viewed critically. It is true that doctrine and case law, with reference to the differentiated application of the ban on censorship for correspondence as individual communication, do not qualify this as absolutely prohibited without further ado. However, individual communication is also protected by the fundamental rights of communication, which means that systematic prior checking of correspondence can only be permitted under very restrictive conditions. 82

C. State of emergency

Under Swiss constitutional law, the core content of fundamental rights also applies in certain situations of state emergency, such as the enactment of federal laws declared urgent without a constitutional basis of their own in accor- 83 dance with Art. 165 para. 3 FC. The prohibition of systematic prior censorship must therefore also be observed in such times. War situations, on the other hand, are an exceptional situation that is also legally unresolved and requires its own rules. In contrast, Art. 10 ECHR is not subject to emergency law in accordance with Art. 15 ECHR, which means that it can be derogated from both in times of war and in other public emergencies. However, this requires that the situation absolutely necessitates such a derogation (principle of proportionality). Systematic prior censorship is therefore not permitted without further ado because there is war or another public emergency. In this context, the decision of the EU Council on March 1, 2022 to ban the Russian broadcasters Russia Today and Sputnik due to their propaganda for the Russian Federation must be viewed critically. In contrast, the Swiss Federal Council's decision not to adopt the EU sanctions against the two broadcasters on the grounds that it is more effective to counter untrue and harmful statements with facts rather than banning them is, in our opinion, to be welcomed. This is because state restrictions on propaganda are not legitimate per se, but only in the cases provided for by law. The decision by Swisscom AG - a public company and therefore fundamentally bound by fundamental rights - to no longer broadcast the Russia Today and Sputnik channels is therefore difficult to reconcile with media freedom in our opinion.

D. The principle of state independence

84 Systematic pre-censorship can be implemented not only through state procedures of pre-control of specific media content, but also through the control of media activity by means of state organizational measures. This risk exists in particular in the area of the universal service or public service, in which the state issues performance mandates and supervises and finances their fulfillment, as well as in the area of state media promotion (cf. already n. 74 and n. 86 below). In contrast to state procedures of pre-censorship, state organizational measures do not primarily allow for a direct or precise control of content, but rather an indirect and thus merely rough or guiding control of content. This so-called "general censorship" by means of organizational control of media activity by the state is sometimes referred to as institutionalized censorship (cf. already on the requirement of state independence as part of the organizational or institutional side of media freedom n. 15). The prohibition of the control of media activity through state organizational measures is at the same time the core content of the principle of state independence. If the me-

dia are to be able to perform their opinion-forming and control function effectively (cf. n. 8), they must not be dominated by the state, but must be independent of it. Since the prohibition of censorship also protects against threats (cf. n. 76), the possibility or the appearance of a dominant influence of the state on the production of media content is sufficient.

The minimum requirements of the prohibition of state independence are 85
geared towards ensuring that the state may not carry out media activities itself (cf. n. 87 on the permissibility of state public relations work). This prohibition of functions or activities, which applies to the state in the media sector in contrast to other economic sectors such as telecommunications or postal services, is directed at all three state powers as well as state-controlled companies. In general, this means that state organizational measures leave media organizations considerable leeway in their journalistic activities. In detail, this is guaranteed by various minimum requirements at the normative, institutional and financial levels. For example, the state may not, within the framework of performance mandates or media funding, set such specific requirements for media activities that this is tantamount to actual state intervention. In this context, the greater the proximity to the content, the lower the regulatory density of state requirements must be. When supervising compliance with the established requirements, the state may not exercise any expediency control or technical supervision over the journalistic activity. This requires the outsourcing of media activities to independent or autonomous organizations in this respect. Since the state could also determine the direction of content production by making personnel decisions, the state may not have any influence on the recruitment of operational staff. State representatives, on the other hand, are permitted in strategic management bodies of media as long as they do not hold a strong minority position (principle of the one-third limit). Media organizations may therefore not be structured as public or state-controlled companies, but must be private players. If the state finances media activities, it must allow the media considerable discretion in the use of financial resources. This is ensured, among other things, by the global allocation of state funds to the media (global budgets). In our opinion, financing from the state budget is all the more delicate the greater the state's discretion in making financing decisions and the greater the dependence of media activities on state funding. In this context, the determination of state funding over a longer period of time, for example in a law, can guarantee media organizations a certain degree of financial planning security.

86 Dangers of violations of the state independence requirement exist in particular where the state organizes the basic supply or public service. Similar dangers exist in the context of state funding instruments in the media sector (cf. n. 74). For example, with regard to the state supervision of SRG, Art. 33 para. 1 RTVA provides that the Federal Council may appoint a quarter of the members of the Board of Directors. Although the representatives of the Federal Council enable influence to be exerted on the strategic direction of SRG, this means that the Confederation cannot influence SRG's journalistic activities directly, but at least indirectly. However, as the number of members of the Board of Directors appointed by the Confederation does not exceed the one-third limit (see above n. 85), in our opinion there is no impermissible state control of SRG. Rather, in our view, the statutory right of election can be justified in accordance with Art. 36 FC in that it enables the Federal Council to work towards a politically and federally balanced composition of the SRG Board of Directors in accordance with the principle of diversity and thus towards the fulfillment of the public service mandate.

87 Finally, there is a risk of state media activity in the area of state communication or state public relations. In order for there to be no such activity, the state communication to be carried out by the state must be strictly different in content from the media activity prohibited to the state: While the media activity represents a constitutionally protected and thus thematically unlimited dissemination of information, the state may only disseminate information from its own area of responsibility within the scope of its duty to provide information in accordance with its competencies and thus limited to specific topics. In formal terms, government public relations work must also avoid the appearance of media content and must therefore be clearly recognizable as such (transparency requirement). Within this framework, official information may, in our opinion, be editorially designed and disseminated to the mass media via its own information channels such as printed publications, websites, social media or radio and television - e.g. explanatory videos on upcoming votes, parliamentary debates or media conferences that are clearly marked as governmental - provided that the other principles of government communication, in particular the principles of objectivity and proportionality, are also observed. The same applies to state communication that is disseminated in the form of state advertising, e.g. by media organizations (see already n. 75).

IV. EDITORIAL SECRECY (PARA. 3)

A. Meaning and origin

Art. 17 para. 3 FC guarantees editorial secrecy as part of media freedom. The guarantee protects internal editorial processes and information and, in particular, offers protection against the obligation to disclose journalistic sources. The Constitution thus recognizes the importance of this element of media freedom as an indispensable prerequisite for ensuring that the flow of information from private whistleblowers on topics of social interest to media professionals remains guaranteed. If whistleblowers cannot trust that their identity (or anonymity) will be protected and that media professionals can assert a corresponding right to refuse to testify in proceedings, they will be particularly reluctant to disclose information on politically, socially or personally controversial topics. This deterrent effect in the event of insufficient or non-existent guarantees of editorial secrecy would therefore make it much more difficult to report on grievances within public authorities or other fundamentally non-public organizations (such as private companies). In this respect, the protection of editorial secrecy also serves to safeguard the function of the media as watchdogs in a democratic state (cf. n. 8 on this function). 88

Despite the currently recognized importance of editorial secrecy, the Federal Supreme Court denied protection of sources as part of freedom of information for many years. It was only as a reaction to the case law of the ECtHR that editorial secrecy was recognized in 1996 as part of the freedom of the press enshrined in Art. 55 aBV at the time. 89

B. Material scope of protection

As mentioned at the outset, editorial secrecy protects internal editorial processes and information and offers media professionals protection against the disclosure of their sources of information. 90

Editorial secrecy focuses on the protection of journalistic sources. Art. 17 para. 3 FC thus enshrines the right of media professionals to refuse to testify and disclose journalistic sources in proceedings (so-called right to refuse to testify and refuse to disclose). In addition to this actual "protection of sources", Art. 17 para. 3 FC guarantees the confidentiality of internal editorial processes in general and also protects against procedural coercive measures such as 91 house searches or seizures. Editorial secrecy also offers protection against "attempts at circumvention"; if, for example, criminal proceedings are opened against a media professional with the aim of revealing the identity of an informant, the ECHR considers this to be an unlawful deliberate circumvention of the protection of sources and a serious infringement of Art. 10 ECHR. The Federal Supreme Court also agrees with this assessment. The guarantee also offers protection against measures that merely consist of the threat of an obligation to disclose or that could indirectly serve to identify (suspected) criminal acts.

92 From a factual or geographical perspective, Art. 17 para. 3 FC protects all information related to editorial activities and is not limited to information "in the editorial office" or to journalistic sources in the sense of third-party information. Accordingly, media professionals are also protected in particular from the obligation to publish their own research material.

93 For criminal proceedings, Art. 28a SCC and Art. 172 CrimPC specify editorial secrecy and define the scope of protection more narrowly than Art. 17 para. 3 FC: Protection in criminal proceedings is limited to the professional publication of information in the editorial section of a periodically published medium. However, it should be noted that editorial secrecy under Art. 17 para. 3 FC is not limited to criminal proceedings, but also applies in the context of preliminary police investigations, civil proceedings and administrative proceedings. Accordingly, it would be incorrect to limit the material scope of protection of constitutionally guaranteed editorial secrecy in general to the content defined more narrowly by Art. 28a SCC and Art. 172 CrimPC.

C. Personal scope of protection

94 From a personal point of view, editorial secrecy protects all natural and legal persons who create media content (cf. on the personal scope of protection of media freedom n. 32 et seq.). Thus, the scope of protection also goes further in personal terms than the protection under Art. 172 CrimPC in criminal proceedings, which is limited to persons who deal professionally with the publication of information in the editorial section of a periodically published medium (cf. n. 93 above).

D. Restrictions on editorial secrecy

Editorial secrecy is not absolute; restrictions are possible provided they are based on a legal basis, there is a legitimate interest in interference and the interference must be considered proportionate (Art. 36 FC). However, due to the importance of editorial secrecy for journalistic activity (cf. n. 88) and the threat of a deterrent effect of legal provisions or an interpretation of these that permits interference too broadly, restrictions on editorial secrecy are only permissible for the protection of high-ranking legal interests and require a careful proportionality test. This means that even in cases in which the right to refuse to testify does not apply in accordance with Art. 28a para. 2 SCC, it must be examined on a case-by-case basis whether or not editorial secrecy can be restricted. 95

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COMMENTARY ON

Art. 20 FC

A commentary by Raffaela Kunz

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Art. 20 Academic freedom

Freedom of research and teaching is guaranteed.

CONTENT

I. HISTORY OF ORIGIN

Freedom of science was only introduced into the FC as an **independent fundamental right** with the 1999 revision. Prior to this, the Federal Court considered the content of the right, without clarifying the question of whether it was an unwritten fundamental right, to be covered by other fundamental rights, in particular personal freedom and freedom of expression. In the context of the total revision, however, the inclusion of the fundamental right was undisputed from the outset. As early as 1973, a working group set up by the Federal Council (the so-called Wahlen-Kommission), whose task was to collect proposals for a future federal constitution, recommended the inclusion of freedom of science as an independent fundamental right, based on German constitutional law. As part of the revision process, freedom of science was initially mentioned as a further "cultural fundamental right", together with freedom of art; in the 1996 draft constitution, it was given its current wording as an independent guarantee. Discussions during the deliberations concerned, among other things, the call for a stronger emphasis on the responsibility of researchers towards people and the environment; however, a corresponding proposal was rejected. 1

Freedom of science is considered a **"German contribution"** to the transnational catalog of fundamental rights and has also "significantly influenced" Swiss law. In order to understand the fundamental right, it is therefore worth taking a look at the German legal situation. This is justified by the extremely differentiated case law and doctrine. Despite the "revolutionary alliance" between science, enlightenment and political order, freedom of science is not explicitly included in the classic human rights declarations such as the American *Bill of Rights* (1789/1791) or the French *Déclaration des Droits de l'Homme et du Citoyen* (1789). In Germany, on the other hand, the first precursors go back to the time of the Vormärz; the fundamental right was mentioned for the first time in the draft of the so-called Siebzehnerausschuss for a new federal constitution (1848) and later adopted in the Weimar Constitution and finally in the Basic Law. The German debate on academic freedom was not without controversy, however; one central point concerned the fear of the state being undermined under the guise of freedom, which is echoed in the addition that freedom finds its limits in the duty to remain loyal to the constitution. The ex- 2 periences during the Nazi regime, on the other hand, played a surprisingly minor role.

3 In the history of ideas, academic freedom is a child of the **Enlightenment** and older than the modern idea of the constitution. Spinoza's call for a *libertas philosophandi* analogous to the freedom of religious conscience from state coercion is considered to be one of the first examples*:* the freedom not to submit to any lawgiver other than the law of thought in matters of intellectual knowledge. This formulated the basic idea that still applies today, according to which the scientific search for truth is beyond the reach of state and political determination.

II. CONTEXT

A. Relevance of science

4 Science plays a central role in the **information or knowledge society**. Scientific findings form the basis for official and personal decisions in all areas of life. The relevance of scientific policy advice has become apparent during the coronavirus pandemic to an extent never seen before, and has reignited discussions about expertocracy that have been going on for some time. At the same time, science is under enormous pressure today. This includes calls for stronger regulation, democratization ("citizen science") and better communication of science ("science communication") in the face of scientific scandals and possible dangers associated with new findings. In addition, science research has identified an increasing pressure that – especially publicly funded – science must deliver more concrete, usable and socially useful results. On the other hand, and here too the COVID pandemic is a paradigmatic example, science also faces fundamental criticism in times of "fake news", conspiracy theories and a skepticism of science that is further fueled by populists.

5 This **ambivalence** – on the one hand increasing relevance, on the other growing pressure – is already partly reflected in the FC: on the one hand, Article 64 FC of the last 50 years has created the basis for state research funding; on the other hand, the FC also provides a basis for the regulation of research, namely in the area of research on humans (Art. 118b FC), of reproductive medicine and gene technology in the human area (Art. 119 FC) as well as in the context of animal protection (Art. 80 FC). Tensions can also arise within

the fundamental right itself, for example between its individual and institutional sponsorship (see N. 27).

B. Functions of academic freedom

6 The FC assumes that academic freedom requires **special protection** and does not merge with other fundamental rights such as the general freedom of expression. What is the reason for this special protection? The philosophy of science distinguishes between three different justifications, which are also similarly found in many legal treatises: protection for reasons of individual autonomy, for epistemological reasons and for reasons of democratic theory. The first justification focuses on understanding the world as the basis of human freedom and thus on elements of individual personal development; the other justifications are more concerned with collective interests.

7 The **epistemological justification** assumes that freedom stimulates creativity and is thus conducive to the efficient production of knowledge ("third-party benefit immanent in fundamental rights"). In the words of Karl Jaspers, "the freedom of the individual scholar is a condition of his or her productive spirituality, to the point of arbitrariness." Following this idea, research agencies in numerous Western countries rely on the idea of disciplinary self-management instead of central organization. This is also clearly expressed in the case law of the German Federal Constitutional Court, which emphasizes that "a science that is free of social utility and political expediency ideas ultimately serves the state and society best". The Swiss Federal Court did not make such a clear statement at the outset; however, the history of the FC shows that similar considerations also played a role when freedom of science was included in the FC. Thus, even *prima facie* "useless" research is protected – not only because of the intrinsic value of knowledge, but also because of the assumption that "all great insights are usually intuitions that are proven in retrospect". Research successes and technological innovation from industrial research with clearly externally prescribed goals – recent examples include research in connection with the COVID vaccine by the company BioNTech – but also from unfree science systems such as the former Soviet Union or even present-day China, seem to empirically challenge this justification, particularly for natural science research. This makes it clear that additional justifications are needed (see N. 8).

8 In the **democratic theory justification**, the focus is on safeguarding the independence of knowledge and freedom from political influence. A core concern of freedom of science, which it shares with freedom of religion, is the secular state's distancing itself from “any and all timeless truths”. Scientific truth is removed from political determination and judgment. The reason for this is the need for independent knowledge as a basis for decisions in the democratic process. In addition, there is the “protection of rational counter-publicity” to secure liberal structures.

9 Overall, it is clear that **none of the justifications has absolute validity** – neither the argument that knowledge gain is only possible under free conditions can be maintained, nor does democracy automatically go hand in hand with academic freedom. Rather, the different lines of justification complement each other. While the autonomy-related arguments show proximity to the right to personal freedom (“scientific personality right”), the political-democratic arguments show proximity to freedom of expression. It is therefore true that academic freedom combines elements of the right of personality, communication law, and politics and democracy. However, the representation of academic freedom as a fundamental right of communication, which is often found in teaching, is an oversimplification.

C. Priority conception as a right of defense

10 In Switzerland, academic freedom is first and foremost a **subjective right of defense** against unjustified state restrictions of freedom. It protects “the intellectual and methodological independence of the researcher from state interference.” The message of the FC 1999 already states that the right does not convey “any claim to state performance”; nor have doctrine and practice so far derived any justiciable performance claims from Art. 20 FC. Beyond the right to equal and non-arbitrary treatment (Art. 8 and 9 FC), there is thus no right to access to higher education or to research funding. In contrast to Germany, there is also no individual right to basic funding in Switzerland. This refers to the right of scientists “to be provided with the basic and minimum resources necessary to fulfill their teaching and research tasks”. Some scholars of constitutional law argue that Art. 20 FC also gives rise to justiciable duties of protection, such as the right to security measures that ensure the safe conduct of scientific events on controversial topics. Especially in view of the current threat situation (see III. E.), the conceptualization as a primary right of

defense seems outdated and a stronger examination of possible positive duties to act is indicated. On access to information, see below N. 26.

In addition to the subjective right, the doctrine today also unanimously recognizes an **objective dimension** of academic freedom. This is generally understood to mean the dimension of fundamental rights as *guiding principles* or "objective legal requirements" that require the state to implement fundamental rights even beyond the scope of individually enforceable claims. As targets and program requirements, they are primarily aimed at the legislature. In connection with Article 20 FC, the high financial, infrastructure and organizational needs of science are regularly cited as justification, which in Switzerland is the responsibility of the state and "existentially dependent on state support" for its realization. Science thus finds itself in a certain tension between the need for autonomy and state support. However, the specific content of the objective-legal dimension remains little contoured in the literature. This is probably also due to the fact that two areas in which the question could become relevant are usually discussed in the context of the "constitution on education" rather than in terms of academic freedom. This concerns, first of all, the autonomy of the university, which is now explicitly mentioned in Art. 63a FC, and the obligation to promote research, which is laid down in Art. 64 FC. Nevertheless, the objective-legal dimension of academic freedom remains relevant in both areas as a *guideline and limit* for state action, with the legislature having a wide margin of appreciation. For example, Art. 20 FC requires that procedures for the allocation of funds be designed in a scientifically adequate manner. The objective-legal dimension can also be mobilized in favor of public basic funding, which is often more science-friendly than third-party funding awarded in competition. Furthermore, the duties of action and protection arising from the objective-legal dimension to maintain free science *as such* are likely to be significant today. These remain below the threshold of direct endangerment of fundamental rights and thus differ from individual justiciable claims for protection. 11

This objective-legal dimension is particularly emphasized in **Germany**, where the Federal Constitutional Court already emphasized in its 1973 university ruling that, in addition to the subjective right to freedom, freedom of science contains "an objective, value-deciding principle that regulates the relationship between science, research and teaching and the state (...)." Accordingly, academic freedom requires not only respect for individual freedom but 12 also the “state's commitment to the idea of free science and its participation in its realization”. Academic freedom thus not only protects an individual's freedom of action, but also – albeit as a prerequisite for individual freedom – the autonomy of science and thus the “functioning of the institution of ‘free science’ as such”. Freedom of science has therefore also been referred to as a “functional fundamental right” and science, to whose autonomous functioning the fundamental right contributes, as a prime example of an emerging civil sub-constitution or *science constitution*. The fundamental right thus gives rise to the duty to “[...] enable and promote science by providing human, financial and organizational resources”. Unlike in Switzerland, the dimension of legal guarantees is “resubjectivized” and, under certain circumstances, holders of fundamental rights have legally enforceable claims, for example to a “science-adequate university organization”. To date, the majority of the case law of the Federal Constitutional Court concerns the so-called organizational right and thus the objective dimension of the fundamental right.

13 In Switzerland, too, the discussions today mainly concern restrictions of freedom that affect the organization of university and research in the broadest sense, for example with regard to so-called research sponsoring or excessive administrative tasks for the teaching staff. Today, the threats to academic freedom are different from those at the time of the emergence of the fundamental right, when it was primarily about protecting free science from interference by the state and the church (see I. above). Nevertheless, they can still have an impact on the institute of free research and teaching; a stronger contouring of the objective-legal dimension would therefore also be desirable for Switzerland (see E below). Furthermore, a certain “**resubjectivization**” of the objective dimension would also strengthen the protection of fundamental rights in Switzerland. This would mean that, under certain circumstances, holders of fundamental rights would be able to take legal action to challenge measures that are inadequate for science, for example with regard to research funding or university organization. This would mean that the question of the compatibility of legislative measures with academic freedom would not be left solely to the legislator, and that, under certain circumstances, legislative action to protect free science could be more strongly demanded.

D. International protection

At the international level, freedom of science is implicitly protected by the human right of freedom of expression under the ECHR and the ICCPR (Art. 10 ECHR; Art. 19 para. 2 ICCPR). Freedom of science is also explicitly guaranteed in Art. 15 para. 3 of the International Covenant on Civil and Political Rights (ICCPR). While the Federal Supreme Court does not recognize the justiciability of many of the rights in this Covenant, this is different for this provision because of its clear content in terms of the right to legal recourse. Freedom of science is also explicitly enshrined in Art. 13 of the EU Charter of Fundamental Rights. 14

III. COMMENTARY IN THE NARROWER SENSE

A. The concept of science

Freedom of science under Article 20 FC indisputably includes the sub-areas of freedom of research and freedom of teaching, each of which has its own areas of protection. What these aspects have in common is that only activities that are *scientific in nature* are covered in order to benefit from the protection of fundamental rights under Article 20 FC. The FC thus assumes certain scientific rationalities that differ from other fundamental rights, in particular freedom of expression, and thus justify a special need for protection. This initially requires a **definition of terms**, which, however, encounters difficulties. 15

Science studies also assumes that scientific knowledge is a *particular* form of knowledge. However, it does not provide a single, unified concept of science. While the philosophy of science focuses more on the properties of knowledge itself, the sociology of science is interested in the practices of scientists and how scientific knowledge comes about. The idea of science as a body of objective, verifiable and universally true knowledge, often associated with *Karl Popper*'s critical rationalism as a further development of the logical positivism of the 20th century, has, however, come under severe pressure in recent decades, initially from the field of philosophy of science itself. Researchers such as *Thomas S. Kuhn* have helped to question the image of a science based purely on facts and logic and to show the influence of other values, for example in the choice of method. In doing so, they provided “a gateway, so to speak, for sociological explanations”. Since then, social science ap- 16 proaches have highlighted the social construction or "co-production" of society and knowledge. Feminist science research, for example, has undermined the image of an impartial science; empirical studies such as those by *Bruno Latour* show in detail the "construction" of knowledge in the laboratory. Paul Feyerabend, a radical relativist/social constructivist voice who is now considered part of postmodernism, even questioned the very idea of rationality and methodological stringency and concluded: "anything goes".

17 From a constitutional perspective, and regardless of these debates, the FC assumes the possibility of science. The **limits to** academic freedom are therefore not to be determined according to epistemic-philosophical criteria**, but** rather **constitutionally**. In other words, it is not the task of constitutional law to put an end to the debate on the definition of science; rather, the law should create the framework for these debates to take place as freely as possible within the scientific community. The law must therefore define the underlying concept of science itself. However, neither the FC nor the materials substantiate the term; even the Federal Supreme Court has only made rudimentary statements on the subject. The description of academic *freedom as* a "guarantee of an inviolable creative core of scientific knowledge and teaching, as well as the preservation of the intellectual and methodological independence of research" in turn only refers to the requirement of the scientific nature of knowledge and is therefore not a definition.

18 **Attempts at definition**, as they have been undertaken many times in the literature, run up against the difficulty that, on the one hand, the state is prohibited from adopting a particular understanding of science, since the fundamental right to scientific knowledge is precisely intended to elude state determination (prohibition of identification). Relying solely on the self-declaration of scientific work is not enough to distinguish science from non-science; it must be possible to make a meaningful distinction from other, subjective forms of communication and from pseudoscience. In teaching, there seems to be a consensus, as a middle way, that it makes sense to feed back the constitutional concept of science to the *scientific community* and to specific scientific practices. However, relying on recognition by the *scientific community* entails new risks of a restriction of freedom, since the fundamental right is specifically intended to enable free science and thus also to protect minority opinions and new, innovative or even unexpected approaches.

In view of the protective purpose of the standard, it seems appropriate overall to take a **broad concept** of scientific nature, which is shaped by existing practices of the scientific community but is not limited to them. Central to this is a systematic and method-driven approach, which implies the *verifiability and* intersubjective traceability of the results. 19

For a long time, a special debate in the philosophy of science revolved around the question of whether **legal studies** can also claim the label of scientificity. This is connected to the changing subject of jurisprudence, which cannot be studied like a “law of nature”, but also to the practical nature of the subject and the often blurred boundaries between research and practical activity. Another point concerned the methodology of jurisprudence, or rather its absence: for a long time, it only played a subordinate role alongside hermeneutics and comparative law. This has since changed, probably also due to internationalization and the increasing relevance of the application process for the Swiss National Science Foundation, which is characterized by the natural sciences. What remains is that jurisprudence is shaped by norms, values and interpretations and that legal questions cannot be answered with the same precision as mathematical tasks. Nevertheless, there are limits to what can be considered a convincing argument when legal rules of interpretation are systematically applied. In any case, a concept of science that insists on empirical verifiability can now be considered outdated. Today, there is broad consensus that the systematic development and understanding of meaningful connections beyond “hard” causal relationships, as practiced in the humanities and social sciences, can also be considered science. Instead of empirical verifiability, the term *intersubjective comprehensibility* is often used today. Applied to jurisprudence, this means that a legal answer is reached and justified in such a way that a third person can understand it and, using the same methods, may come to the same conclusion. 20

An important question is whether **scientific misconduct** such as falsification of data and plagiarism leads to the loss of scientific character. The schools of thought on this diverge. In order not to undermine the protection of freedom, the view that high demands must be placed on the elimination of misconduct is preferable. This means that not every case of misconduct automatically leads to a loss, but only in cases of *systematic* misconduct. When assessing allegations, it makes sense to include self-regulation standards; examples include the Code of Scientific Integrity of the Swiss Academies of Arts and Sci- 21 ences, the Rules for Safeguarding Good Scientific Practice of the Max Planck Society or the standards of the *Committee on Publication Ethics* (COPE).

22 Difficult questions of demarcation can also arise in the **commercialization of** science. While the prevailing opinion in Switzerland denies that research that is geared towards results and bound by instructions can be considered scientific, a more differentiated view is also preferable here. After all, science should not be idealized. While *disinterestedness* – understood as the absence of primarily self-serving interests – is one of the basic norms of scientific ethics in the research process, it is undisputed in the philosophy of science today that the postulate of disinterestedness and independence cannot be maintained in its absoluteness. In times when industrial research plays an eminently important role and a clear distinction cannot be made between basic and applied research, the decisive factor for the protection of fundamental rights is that commercial interests do not constitute the main motivation and that the underlying research observes methods and standards of scientific knowledge acquisition.

B. Material scope of protection

1. Freedom of research

a. General

23 The case law on freedom of science is limited and the scope of protection has thus remained unclear. The Federal Supreme Court has consistently defined research as the "gathering and sharing of human knowledge through the free choice of research questions, methods and implementation". It emphasizes that both natural science approaches and "those in the humanities, social sciences and history" are protected. In view of the still prevailing understanding in everyday use, according to which scientific research is equated with the natural sciences, this clarification is still not superfluous. The type of research funding (private or public), the location of the research (university, university of applied sciences, industry) and the type of research (basic or applied research) are also irrelevant for the protection of research. The limit is reached, however, where research is not carried out under conditions of scientific rigour (see above, N. 22). When it comes to the question of when **instruction-dependent or result-oriented research** leads to a loss of protectability, the doctrine remains unspecific. According to the differentiated considera-

tion in the German literature, the degree of autonomy or the existence of sufficient leeway for researchers to make their own assessments should be decisive. Although difficulties in demarcation are inevitable, this differentiated consideration should be preferred if only to avoid excluding industrial research, which by definition operates in a results-oriented manner, from the scope of protection from the outset.

In order to describe the protected activities in more detail, the doctrine dif- 24
ferentiates between the **work and the effect** of research freedom, following the various phases of the research cycle. The work area refers to the research activity and also includes the phase that precedes the actual research (e.g. determining the research question; selecting the method; selecting the personnel). In contrast, the effect area describes the freedom with regard to the dissemination of research. On the one hand, this includes the decision as to whether research results should be made available to the public at all. On the other hand, the decision regarding the time, place and modalities of publication is also protected. In German literature, this is referred to as the (positive and negative) freedom of publication. This dimension illustrates the proximity of academic freedom to fundamental rights of communication. However, scientific authorship in the sense of intellectual authorship and thus an aspect of personal rights is also protected.

Recently, the question has arisen, which has hardly been discussed in Swiss 25
academia, of whether the **communication of researchers outside of strictly scientific formats** falls within the scope of the law. This includes, for example, writing blog posts, but also social media activities or appearances in the media. In view of the fact that active communication of one's own research is increasingly being called for to bridge the alleged gap between science and society, for example by the SNF (keyword "science communication"), and in view of the active use of these possibilities by the *scientific community*, an understanding limited to scientific formats in the narrower sense no longer seems appropriate. Social media such as X (formerly Twitter) now play an important role in the context of gathering information and knowledge. However, they follow a media logic rather than a purely scientific one and can tempt people to make exaggerated statements, which can raise difficult questions regarding the limits of freedom of expression. A certain potential for abuse is seen in the fact that scientists enjoy a "bonus of authority" in society. To put it bluntly, the question arises: is *every* statement by a constitutional law

expert on current constitutional debates automatically covered by academic freedom and thus enjoys increased protection? Despite the difficulties in defining the boundaries, the *content of* the statements and not their *place of distribution* is likely to be decisive for the opening of the area of protection of Art. 20 FC. In case of doubt, a *broadly* defined concept of scientific nature should be applied, although constitutional law also has limits (see below N. 47 for examples).

b. Specific issues

26 One question that has arisen repeatedly in practice is whether the freedom of science gives rise to a right of **access to information** that goes beyond the general right to information. Article 16 para. 3 FC limits the right to receive information to publicly accessible sources, with legislation determining what information is considered public. The Federal Court rejected in principle a claim arising from non-public information from the freedom of science and came to the conclusion that an infringement of the constitutional right of access to information by Art. 20 FC could not be assumed lightly. At the same time, it recognized that the possibility could nevertheless arise in the case of "a specific research approach and a resulting research-related necessity (...)". In a more recent decision, it also stated that the interest in inspecting archive material before the end of the protection period is reinforced by academic freedom.

27 The question of the extent to which the **autonomy of the university** guarantees this freedom in shaping its research and teaching profile before it is determined by the state has been little discussed in the literature. It seems clear that a complete state determination, which does not leave universities any leeway in their design, would be inadmissible. One limit to the exercise of autonomy arises from the individual freedom of research, which is to a certain extent in tension with the autonomy of the university.

c. Freedom of research and "Open Science"

28 In the digital age, is there a fundamental right to free access to (publicly funded) research via the internet? This question has become increasingly important since the UN Committee of Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights, in a much-publicized "General Comment" on the "right to science" under Art. 15 para. 2 let. b)

of the UN Covenant, called on states to promote “open science”. “Open science” is a collective term for various research practices along the entire research cycle based on the idea of sharing and collaboration. Particularly relevant to everyday scientific work are open access to data (open data) and to scientific publications (open access). Although numerous questions and problems arise today (see N. 30), open science is generally considered to be **science-friendly,** which is due to the fact that publishing and *accessibility* are key concepts for the entire science system. The internet, with its unprecedented communication potential, was therefore seen at the beginning of the new millennium as an opportunity to realize fundamental scientific values such as *Merton's* norm of communalism. As part of the “normative structure” of science described by the sociologist of science Robert K. Merton, this norm states that scientists should share their findings freely in order to promote the progress of science as a whole, rather than withholding them for personal gain. The concept of communalism thus emphasizes the importance of openness, collaboration and collective engagement in science. These ideas are echoed in early documents of the 'open access' movement such as the *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities* and the *Budapest Open Access Initiative.*

This raises the question of whether the state's duty to create the conditions 29
for a functioning science could result in an “open science” imperative. The Swiss Open Access Strategy also aims to make all publicly funded research publicly available in the sense of “open access”. Others argue that, due to the fact that the public is virtually a functional condition of science, individual protection through academic freedom should be made dependent on the **actual publication of results**. In the digital age, this would mean making one's own research publicly accessible in the sense of “open access”. However, the prevailing doctrine generally rejects a publication requirement as a precondition for the protection of fundamental rights due to the negative freedom of publication. Although keeping research secret for commercial reasons is scientifically problematic, it should not automatically lead to exclusion from the scope of protection.

Overall, “open access” obligations are **in tension with negative freedom of** 30
publication. Some scholars also see a violation of negative freedom of publication in the “open access” strategy of the Swiss National Science Foundation. In Germany, members of a university have even gone to the Federal Constitu-

tional Court because of a university statute that obliges them to deposit their published research in publicly accessible Internet repositories after the statutory one-year period has expired. According to the view presented here, "open access" publication obligations should not be problematic under constitutional law, despite unintended side effects (see N. 31). Since publication modalities are affected, this is an infringement of fundamental rights; however, particularly in the case of only a slight infringement of fundamental rights by the obligation of "secondary publication", i.e. depositing the publication in a publicly accessible repository such as ZORA of the University of Zurich, the infringement is likely to be justified by the public's and third parties' interest in access and in a functioning scientific system.

31 Conversely, the question arises as to whether the state has a duty to take measures to **protect a functioning publication system** based on the objective dimension of academic freedom. For example, competition-distorting forms of market concentration have long been known to exist among major international academic publishers. The trend away from the so-called subscription model and towards open access may have even exacerbated this problem. One important criticism of the SNSF's funding policy is that the open access requirement leads to a further strengthening of large publishers – at the expense of smaller providers. Another problem is the potential decline in quality, because publication fees create incentives for publishers to publish as many contributions as possible, rather than focusing on high quality. This is not only problematic because of the high price burden on the public sector, but also because of the influence of large publishers on science. In recent years, for example, publishers' interference in editorial work has repeatedly led to resignation on the part of journal editors. The problem has become even more acute in recent times because large international publishers are increasingly turning to the data business and using the tools developed by Google and others to analyze user behavior, giving them unprecedented opportunities to exert influence. This proves that threats to the independence of science and academia – which are relevant to fundamental rights – today come not only from state actors, but also from powerful private actors. Since the latter are not directly bound by fundamental rights, the question arises as to what protective measures the state could take, for example, measures under competition law. It also seems necessary under fundamental rights to promote alternatives to the problematic "golden" "open access" model, in which

high fees are charged for publications and which primarily serves large publishers.

2. Freedom of teaching

The partial content of freedom of teaching protects the freedom of teaching. 32
The protected activities include **freedom with regard to teaching methods and the selection of** material. In other words, freedom of teaching is a "freedom of opinion specifically adapted to scientific teaching." Parallel to freedom of research, not only university teaching but teaching in the entire higher education context is covered; it also makes sense to cover the imparting of knowledge to a broader audience outside the lecture hall. As with research freedom, it is also necessary that the criterion of the *scientific nature* of teaching is fulfilled, which requires the teaching of the respective subject-specific rationales within the scope of the students' abilities and the ability to critically examine scientific positions. However, it does not have to be about teaching one's own research, which realistically would not be possible today. Pure vocational training and education at general education schools are not included. Online teaching and newer formats such as podcasts or YouTube channels also fall under the scope of protection. The primary focus is on teaching activities for which the lecturer is personally responsible; teaching activities that are subject to directives, such as tutorial support for lectures, which are carried out by assistants but for which professors are responsible, fall outside the scope of protection according to prevailing doctrine. This is too categorical in this clarity, especially since many assistants bring their own teaching style to the table and should also not be allowed to help shape courses for which they are not personally responsible, which argues in favor of extending protection.

3. Freedom to learn?

The inclusion of freedom to learn as a **third independent part of the content** was rejected in the parliamentary deliberations. Nevertheless, a large 33
proportion of the teaching community now demands the recognition of freedom to learn, either as an independent part of the content or as a sub-category of freedom of teaching. Ultimately, this reflects Humboldt's idea of a community of teachers and learners and of exchange in mutual respect. According to this view, freedom of learning includes the right of students to be able to organize their studies free of disproportionate regulations. Students' own cog-

nitive processes are also protected, free from constraints to adopt the ideological or political values of the teaching staff. However, it is questionable whether such suppression by the "authority of the teaching staff" would be covered by freedom of teaching at all. This is particularly relevant when writing seminar papers and theses; as soon as students have the appropriate scientific tools and work independently, they are in any case protected by freedom of research, which is likely to be particularly relevant in advanced studies.

34 In practice, questions have arisen in connection with higher education, in particular regarding possible positive legal obligations or **subjective claims**. However, the Federal Supreme Court deals with these primarily under the heading of freedom of occupation under Art. 27 para. 2 FC and personal freedom under Art. 10 para. 2 FC. In this context, it has emphasized in connection with admission restrictions (numerus clausus) that there is no constitutional right of access to university studies; this applies *a fortiori* to special courses of study. Article 19 FC merely guarantees the right to sufficient and free primary education, while vocational education and training is a social objective to be specified by the legislature (Article 41 FC). However, Art. 8 and 9 FC do have a certain "indirect fundamental rights effect" and guarantee a "right to a non-arbitrary and equal-rights regulation for admission to the available study places". This right already arises from Art. 8 FC and 9 FC. Some scholars derive from Art. 8 FC a right to scholarships in case of financial need as well as fee reductions. There is no entitlement to not having to take exams. In a not yet published decision, the Federal Court recently upheld the complaint of a candidate for a degree in veterinary medicine who had not been given additional time to take the admission test by the University of Bern due to a reading disorder (dyslexia). Such subjective claims, for example for adapting exams for people with disabilities, would be timely and welcome.

C. Personal scope of protection

35 Initially, natural persons, regardless of their age or nationality, are **entitled to fundamental rights**. Analogous to the material scope of protection, the context of the scientific activity is irrelevant, i.e. whether it takes place within or outside of a university or even privately, as long as the criterion of scientific nature is fulfilled. In this context, formal qualifications are also irrelevant; in this respect, any person can invoke academic freedom. "The scientific com-

munity is constituted by a concrete discourse, the coherence of which is established by qualitative criteria of rationality, but not by formal membership." This also applies to students, provided that they carry out independent scientific research. Legal entities under private law can also invoke scientific freedom if the corresponding research activities take place under conditions of scientific nature (for the term, see III. A. above).

State universities have a "hybrid" or "**dual role**"· On the one hand, they are directly subject to fundamental rights (Art. 35 para. 2 FC); on the other hand, they may also be entitled to fundamental rights under certain circumstances. This is initially the case if they take action against violations on behalf of the researchers concerned. In addition, universities can also invoke violations of their own autonomy. The Federal Supreme Court derives the autonomy of universities – at both the federal and cantonal level – from Art. 63a FC and not from academic freedom. 36

D. Restrictions

1. Interference

The concept of the guarantee of Article 20 FC as a right of defense means that the **state must in principle refrain from measures that** interfere with academic freedom. Interference may come from any public authority, i.e. from state bodies at all levels in central and decentralized administration, as well as from private individuals in the performance of public duties (Article 35 para. 1 FC). This also includes the cantonal universities and the ETH, as well as the Swiss National Science Foundation. It should be noted that research and teaching are already restricted from the outset due to their need for state organization, for example through study and examination regulations, available infrastructure, resources, etc. This organization of academic freedom may, but does not have to, imply a restriction in the constitutionally relevant sense and must be examined on a case-by-case basis. The transfer of competencies from the cantons to the federal government in the area of the regulation of science (see below) has reduced the Federal Court's ability to monitor the legislature's compliance with scientific freedom (Art. 190 FC). 37

Adverse effects can occur **both directly and indirectly**. Justifiable direct adverse effects arise, for example, from regulations regarding or even banning research subjects and methods. One example is the Stem Cell Research Act 38

(StRA), which implements Art. 119 FC and prohibits, among other things, the creation of embryos for research purposes, changes to the genetic material of a germ cell or the extraction of embryonic stem cells from it, as well as the creation of clones, chimeras or hybrids (Art. 3 para. 1 lit. a-c StRA). The Human Research Act (HRA) regulates research on humans and defines in Art. 5 when a scientifically relevant question is posed. In principle, guidelines issued by universities regarding research and teaching, for example as part of their profile development, such as setting priorities, also require justification. Furthermore, licensing and reporting requirements, such as those for clinical trials on humans under the Therapeutic Products Act (TPA) or experiments on animals under the Animal Welfare Act (TschG), are to be seen as impairments. Further examples are civil or criminal proceedings against individuals protected by academic freedom due to scientific statements, entry or exit restrictions, disciplinary proceedings, and, more recently, requirements regarding language rules or trigger warnings. Trigger warnings in university teaching are notes or advance warnings that alert students to the fact that certain content in the upcoming lessons could potentially be distressing or emotionally disturbing. Publication requirements and prohibitions, or regulations regarding publication modalities, also initially represent an infringement of academic freedom. This applies, for example, to open access obligations as well as to guidelines regarding the use of social media channels by researchers. Excessive teaching, examination or administrative duties can indirectly impair academic freedom; the same applies to evaluations of individual research performance. These can cause researchers to favor certain research topics – such as those that are more promising – and thus have a “chilling effect”. The same applies to the growing pressure to raise third-party funds.

2. Justification

39 All encroachments on Art. 20 FC are subject to the **general requirements** of Art. 36 FC. The legal situation is different in Germany, where academic freedom is an unconditional fundamental right. This does not mean that it is granted without restriction; rather, the restrictions are determined by the constitution itself, i.e. they arise from the protection of other legally protected interests that are guaranteed under constitutional law. Nevertheless, this means a higher level of protection compared to fundamental rights that are not unconditionally guaranteed.

However important science is for today's society, historical experience has also 40
clearly shown the potential for abuse as well as the particular dangers and **risks** that may emanate from it, of which the invention of the atomic bomb is a prime example. Research with viruses, for example, can provide important new insights for combating diseases, but on the other hand it can also be used to produce biological weapons ("dual-use dilemma"). Recently, this issue has been discussed in particular in the context of artificial intelligence. This ambivalence is reflected in various constitutional provisions that both enshrine and limit scientific freedom. For example, Art. 21 para. 2 of the Bernese cantonal constitution states: "People working in science, research and teaching shall take responsibility for the integrity of the lives of humans, animals, plants and their livelihoods." Similar rules apply to "civil clauses", according to which research and teaching may only serve peaceful purposes, but also to constitutional clauses, according to which freedom of science does not release from loyalty to the constitution.

Article 20 FC contains no such restriction. Nevertheless, scientific research in 41
Switzerland is subject to a **dense network of regulations** that set limits to freedom. This applies to research on humans (Art. 118b FC), reproductive medicine and gene technology in the human field (Art. 119 FC) and gene technology in non-human fields (Art. 120 FC). These constitutional requirements are specified in various laws, in particular the RDA, the HRA and the TPA. The Anima Protection Act (TSchG) is also relevant, as are data protection regulations (Art. 13 para. 2 FC and cantonal and federal laws).

The first **justification** within the meaning of Article 36 para. 2 FC is the pro- 42
tection of the fundamental rights of third parties. These include, in particular, human dignity (Article 7 FC), personal liberty (Article 10 para. 2 FC) and informational self-determination (Article 13 para. 2 FC). Other fundamental constitutional objectives, such as the dignity of creation (Art. 120 para. 2 FC), environmental protection (Art. 74 FC) and the protection of public health (Art. 118 FC) are also legitimate interests. Measures to protect a functioning scientific system, such as quality assurance in research and teaching, can also constitute a public interest that serves as justification within the framework of proportionality. With regard to the weighing of interests, the Federal Court has emphasized in connection with animal protection (Art. 80 FC) that freedom of research does not enjoy general priority over other constitutionally protected

values; rather, the interests in question are of equal rank and must be weighed against each other in each individual case. The expected gain in knowledge plays a role in this. The Federal Supreme Court ruled that an absolute ban on research on germ cells on the grounds of human dignity was unconstitutional, whereas a ban on research on living embryos or foetuses was constitutional.

43 The Federal Court has not yet ruled on the **core content** of freedom of science as defined in Article 36, para. 4 FC. The prevailing doctrine seems to be that the prohibition of systematic pre-publication content censorship as set out in Article 17, para. 2 FC applies to all fundamental rights of communication and thus also to the dissemination of research results as the communicative content of freedom of science. A minority opinion argues that it would be contradictory not to qualify research bans in the area of dual-use research as violations of the core area, although they are serious encroachments on fundamental rights, whereas publication bans are. Thurnherr points out that some legal scholars do not classify forms of systematic prior content control, such as the pre-screening of pharmaceutical advertising, as an interference with the core area. It is clear that preventive controls are serious interventions in fundamental rights of communication, which, in the context of justification, lead to high demands in terms of the level and density of norms.

E. Current challenges and discussions

1. Traditional threats are re-emerging

44 Internationally, academic freedom is increasingly considered to be **at risk**. In times when the rule of law is coming under increasing pressure in Europe, reprisals against researchers are on the rise. In Hungary, for example, the closure of the Central European University in 2019 caused an uproar; in Turkey, the mass dismissals at universities in the wake of the failed *coup d'état* in 2016. Technical possibilities and digital tools can also lead to new types of threats. In recent years, there have been increasing warnings about the potential for abuse of the systematic collection of metadata when using digital infrastructure and the associated surveillance possibilities in science. But threats to academic freedom are not limited to illiberal states and new technologies. The *Academic Freedom Index* concludes that academic freedom has declined globally since 2006. In Switzerland, the value has remained stable over the last ten years: in 2023, it reached a value of 0.85 on a scale of 0 to 1.

2. New threats

a. 'Cancel culture'

In Western democracies, including Switzerland, possible new threats have been discussed in recent years. These include, first of all, the widespread concern that the space for scientific discussion is increasingly narrowing due to excessive *political correctness* and that there is a **moralization and politicization** of science, particularly by 'woke' (alert) left-wing circles. There is often talk of a dictatorship of political correctness imported from the USA, tyranny of the minority or even enlightened totalitarianism. This leads to a "cancel culture" or "discourse control" at the university, which means the "muzzling of representatives of socially unpopular scientific perspectives". Examples cited – often with great media impact – are cases in which professors are "denounced" for statements made on social networks or students protest against or even prevent certain events from being held at universities in order to avoid providing a platform for the speakers ("no platforming"). Student demands for "safe spaces" or "trigger warnings" are also cited as examples of excessive *political correctness* or *wokeness* and as a threat to academic freedom, in this case in particular in the form of freedom of teaching. However, studies suggest that individual cases are often greatly exaggerated by the media and that talk of "cancel culture" is often instrumentalized by conservative or sometimes even illiberal forces to reverse the situation. In other words, the accusation of "canceling" is often used to shield existing privileges from justified criticism and to defend them. One example is to dismiss student criticism of exams or teaching materials that reproduce stereotypical social conditions – for example, depicting women as housewives or people with a migration background as criminals – simply as the sensitivities of the "snowflake" generation. While the fight against cancel culture is presented as the "spearhead of a defensive liberalism", in reality it is "part of the backlash that is threatening liberal democracy in the first place." 45

From a **constitutional law perspective**, it can be said that academic freedom probably does not confer an entitlement to university safe spaces and language rules, nor do student demands for such spaces violate the freedom of higher education faculty to teach. On the other hand, the fundamental right may give rise to a claim for protection against violent disruption of scientific events. Such a claim may also arise if scientists find themselves exposed to at- 46 tacks on *social media* because of scientific statements; in such cases, Article 20, in its protective dimension, may require the university to protect its researchers, for example by making a public statement. Overall, especially in view of the central epistemic and democratic function of academic freedom in an open society, confrontations with content that may be uncomfortable and that may deviate from one's own position appear to be important. Both students and teaching staff have to endure this. 'Cancel culture' thus appears to pose a particular threat to academic freedom in that it fuels an anti-intellectual mood and thus endangers free research as an institution in the longer term.

47 *State-sponsored* **measures to regulate academic discourse**, which appear to be on the rise in Western European countries in particular, can be classified as classic infringements of academic freedom. Accordingly, it may constitute an unjustifiable infringement of academic freedom if, for example, university management introduces binding language rules, regulates the use of *social media* by professors, cancels guest speakers already invited because of the threat of protests, or even dismisses members of the teaching staff because of statements made, for example in the lecture hall. When assessing whether there has been an infringement of academic freedom, difficult questions may arise regarding the demarcation between academic freedom and freedom of expression and between “objective facts” and subjective expressions of opinion. However, these questions are unavoidable if one wants to maintain an independent area of protection for academic freedom. You don't have to take a radically social-constructivist position to recognize that science is never completely apolitical and neutral, and that it is not “outside of society”. Nevertheless, from a constitutional perspective, there are limits to what can still be considered science. Exaggerations and even slightly tendentious communication of content in the lecture hall or on social networks should be covered by the freedom of science; hate speech, racist statements and polemics, on the other hand, should not even meet the minimum requirements of rationality to fall within the scope of protection of Art. 20. On the other hand, it would be an unjustifiable infringement if entire research areas such as *gender studies* or postcolonial and critical theories were to be cut off from funding by politicians because they are considered “pseudoscience” and “woke” activism under the guise of science. It is precisely within science that it must be decided what counts as science and what does not; Art. 20 FC prohibits the state from deciding these discussions politically.

b. “Politicization” and “economization” of science

Less media attention is paid to **subtler threats to freedom in times of “economization” and “politicization”** of science, although, for example, according to surveys, far more researchers feel constrained by the pressure to publish quickly than by “political correctness”. The buzzword “economization” refers to the general convergence of science and business and the resulting stronger orientation of research towards economic utility; “politicization” refers to the tightening coupling between science and politics, or knowledge and power. Both phenomena are closely related to the increase in the importance of science and thus the “increase in the value of the currency ‘knowledge’” in today's society. There is a great demand for the resource of knowledge in both the economy and politics, for different reasons in each case; science, in turn, depends on both systems for its financing needs. 48

Paradoxically, it is precisely this important position of science that leads to **new vulnerabilities and opportunities for influence**. The influence of economic actors weakens the disinterestedness of research and even carries the risk of manipulation of research processes for profit. This damages the integrity and credibility of science, which is already facing increased pressure in times of populism. In Switzerland, private “sponsorship” in particular has been critically analyzed from a fundamental rights perspective. The increased recourse to scientific knowledge in politics, in turn, means that experts are increasingly drawn into political conflicts and, intensified by the “mediatization of the expert role”, can come under fire from the public. *Hirschi* describes how recent crises, from the euro crisis to the corona and climate crises, have intensified these processes and contributed to the polarization of democratic discourse. The call for more efficiency in science and for accountability to the public, which is closely linked to the described tendencies and goes hand in hand with the use of economic control mechanisms (“New Public Management”) in the higher education sector, also has repercussions on scientific processes – and often unintended side effects. The instruments used include measuring the “impact” of research on the basis of bibliometric data in the context of evaluations or the “projectification” of research funding, which refers to the allocation of research funds in a competitive process. Although not as pronounced as in other countries, state research funding in Switzerland has also developed more in the direction of performance- and competition-oriented principles in recent years. The project-based allocation of funds cre- 49 ates incentives to align with “fashionable topics” that can be used to attract third-party funding; measuring research in terms of numbers fuels the dynamics of “publish or perish” and causes researchers to split their results into as many publications as possible (“salami slicing”).

50 Although these attempts at control can have a chilling effect in individual cases, they often remain **below the threshold for intervention** in actual violations of fundamental rights. Rather than posing a direct threat to individual fundamental rights, they affect the autonomy of science as such and thus the framework conditions for free research. These subtle threats are difficult to grasp on the basis of the dominant defensive legal conception of academic freedom and instead draw attention to the protection of the institution of free science as the basis for the exercise of individual freedoms.

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COMMENTARY ON

Art. 22 FC

A commentary by Patrice Martin Zumsteg

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Art. 22 Freedom of assembly

[1] Freedom of assembly is guaranteed.

[2] Every person has the right to organise meetings and to participate or not to participate in meetings.

CONTENT

I. HISTORY OF ORIGINS

Freedom of assembly was not one of the few fundamental rights explicitly enshrined in the federal constitutions of 1848 and 1874. On the other hand, freedom of worship for the recognized Christian denominations - and accordingly the protection of their meetings - had been affirmed since 1848. Likewise, the Federal Court ruling of 1889, in which the highest court for the first time protected freedom of assembly as an element of freedom of association, had a religious background. It was not until 1970 that freedom of assembly was recognized as an independent, unwritten fundamental right by federal court jurisprudence. 1

According to the practice of the highest court, assemblies with the purpose of expressing an idealistic concern to the public are not protected by an independent guarantee of freedom of demonstration. The decision not to explicitly address demonstrations as a special form of assembly is reflected in the history of the last total revision of the Federal Constitution. The paragraph proposed by the Federal Council as late as 1996 on the obligation to obtain a permit for demonstrations on public property did not find a majority in the Federal Assembly. The two remaining paragraphs - in the form of the draft mentioned above - have been in force unchanged as Art. 22 BV since 2000. 2

II. CONTEXT

A. Concept of an Assembly

By definition, an assembly comprises more than one person. The coming together of these two or more persons need not be legally organized. Only random gatherings of individuals are excluded. Furthermore, the number of persons gathering is not relevant. 3

In terms of time, the gathering is limited, although the exact duration is irrelevant. Figuratively speaking, both a flash mob of a few minutes and a protest camp that extends over several days qualify as an assembly. Fundamental rights protection begins with the preparations and ends after the complete dissolution of the assembly. 4

5 Equally flexible is the spatial extent-assemblies may occur on private or public property and may be static or in motion.

6 In substance, an assembly serves "a broadly understood mutually opinion-forming or opinion-expressing purpose." Such an idealistic purpose may also consist in a loose gathering with friendly or entertaining intent.

B. Freedom of Assembly as a Basic Right of Communication

7 According to what has been said, assemblies can serve very different purposes, whereby freedom of assembly as a fundamental right of communication is primarily directed at the collective formation and expression of opinion. This appeal function is especially typical for a demonstration, understood as an assembly with political expression of opinion in public.

8 For minorities in particular, an assembly can be one of the few means of drawing the attention of the majority society to their concerns, either directly or through media coverage. Assemblies and especially demonstrations thus make an important contribution to free discourse in society, which is one of the core concerns of fundamental rights of communication.

III. GUARANTEE OF FREEDOM OF ASSEMBLY

A. Anchoring

9 According to what has been said, Art. 22 BV guarantees the freedom of assembly in a general way (para. 1), while explicitly mentioning individual aspects of this freedom (para. 2).

10 Since the second paragraph mentions the right to "stay away from assemblies" as well as the right to participate in assemblies, it is already clear from the wording that the fundamental right from Art. 22 BV includes a positive freedom and a negative freedom. Insofar as the assembly takes the form of a demonstration, it is under the joint protection of freedom of assembly and freedom of expression (Art. 22 and Art. 16 BV).

11 This shows a parallel to the anchoring of freedom of assembly in international law. This is also guaranteed by Art. 11 ECHR and Art. 21 UN Covenant II. In principle, these guarantees, as more specific fundamental rights, take precedence over freedom of expression as enshrined in Art. 10 ECHR and Art. 19

UN Covenant II. However, the case law of the ECtHR applies to rallies, according to which Art. 11 must be understood in light of Art. 10 ECHR. The Federal Supreme Court has ruled that these international human rights guarantees do not establish more extensive protection than the BV. At the same time, when interpreting the guarantees of the ECHR, it regularly relies on the case law of the ECtHR.

In practice, less attention has been paid so far to the specific guarantees of freedom of association in Art. 5 lit. d item ix of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and Art. 15 of the Convention on the Rights of the Child (CRC). This is despite the fact that Switzerland recognizes the respective individual complaints mechanism for both the RDÜ and the CRC. In this context, the student protests in the context of climate change in particular have shown that there is certainly potential here for the further development of freedom of assembly. Indeed, the CRC recognizes, on the one hand, children as independent legal subjects whose (political) concerns are to be heard and, on the other hand, the special need for protection of minors. This need for protection must be taken into account in various respects: Children are to be supported in any authorization procedure, direct coercion at meetings may only be used with extreme restraint, and likewise, consequences in terms of costs should be refrained from as far as possible. 12

B. Fundamental Rights

1. Persons entitled to fundamental rights

All natural persons, regardless of their nationality and any existing special status relationship, may invoke the freedom of assembly. 13

The same applies to spontaneous organizing committees and legal entities if they are organizers of an assembly. 14

The authorities may not invoke the freedom of assembly, in particular foreign state organs that wish to hold an event in Switzerland in front of their foreign citizens. 15

2. Factual scope of protection in general

16 Meetings serve a broadly understood opinion-forming or opinion-expressing purpose. The quality of the content expressed is irrelevant; even untrue, provocative and shocking opinions are protected by fundamental rights. Without the necessary tolerance and openness, there can be no democratic society, as the ECtHR rightly emphasizes.

17 On the other hand, the exercise of violence must not be the purpose of a fundamentally protected assembly, as expressed in Article 11 ECHR and Article 21 UN Covenant II, in that they only protect the right to assemble "peacefully." However, the requirement of peacefulness must not lead to a restrictive understanding of the scope of protection of Art. 22 BV. Therefore, neither the abstract danger that it could come to an unpeaceful course, nor violent actions by individual participants and certainly not by outside disruptors, are sufficient to make the fundamental rights protection void. Unlawfulness is not to be equated with unpeacefulness; for example, the absence of a permit does not imply a non-peaceful assembly. Only if violent activities can be attributed to the assembly as a whole, or if their exercise was even the purpose pursued from the beginning, is it justified to exclude such gatherings from the factual scope of protection of Art. 22 BV. Other acts of violence, on the other hand, must be assessed at the level of justification of a restriction of fundamental rights.

18 The scope of protection of freedom of assembly may also be contoured by Art. 17 ECHR and Art. 5 UN Covenant II. According to these provisions, anyone who wishes to destroy the rights and freedoms guaranteed in international treaties through their actions cannot invoke these rights in order to do so. Such an abuse, according to the margin of Art. 17 ECHR, can only be assumed in exceptional cases according to the case law of the ECtHR. The Court affirms this above all in the case of glorification or trivialization of National Socialism. The BV knows no such constitutionally inherent limitation of the areas of protection of Art. 22 or 16 BV. The question of a prohibition of such statements must be answered under Swiss constitutional law at the level of the restriction of these fundamental rights. The ECtHR also decided in favor of this approach in the Vona case: The dissolution of an association which called for the defense of the "Hungarian race" against "Gypsy criminality" and carried out corresponding demonstrations was a justified interference with Art. 11 ECHR by the Hungarian authorities. Accordingly, it must generally be

examined on a case-by-case basis whether dissolutions of meetings and bans on events against neo-Nazi groups can be justified in order to protect public safety and order as well as the fundamental rights of third parties.

Finally, cases of fundamental rights competition can influence the applicability of Article 22 BV. A genuine competition of fundamental rights, an accumulation of fundamental rights, is regularly present in the case of demonstrations, which are also protected by freedom of expression. Furthermore, such a cumulation is conceivable in particular with the prohibition of discrimination (Art. 8 para. 2 BV; Art. 11 in conjunction with Art. 14 ECHR), since assemblies can represent an attractive form of communication, especially for minorities. For example, a mayor's stance on homosexuality may not play a role in assessing the permissibility of a demonstration. For the proscribed connecting factor of race, the already mentioned Art. 5 lit. d item ix RDÜ exists. 19

There is unreal competition between fundamental rights, in particular with economic freedom within the meaning of Art. 27 BV. Assemblies that do not pursue an idealistic but a commercial purpose are protected under Swiss law solely by economic freedom and not by Art. 22 BV. This is different at the level of international law: the ECHR and the UN Covenant II do not recognize economic freedom. Assemblies with a commercial purpose are covered by Art. 11 ECHR and Art. 21 UN Covenant II. 20

3. Defense claims against the state in particular

Freedom of assembly is a right of liberty and therefore conveys primarily defensive claims to those entitled to fundamental rights. As a matter of principle, the state must refrain from imposing restrictions on the convening, organization, holding of and participation in assemblies. This positive freedom is contrasted with the negative freedom not to participate in assemblies, not to have to organize them or to be able to cancel them again - in this respect, too, state restrictions must in principle be refrained from. 21

The participants in an assembly are free to choose the forms and means of their communication: It is possible to express oneself verbally, in writing, visually or purely symbolically - for example in a sit-in or a silent march - but also through the use of loudspeaker systems. Finally, the assembly is in itself an expression of opinion. The case law of the Federal Supreme Court, according to which only all permissible means are covered by the scope of pro- 22 tection, must be viewed critically. As in the case of the peacefulness of the assembly, it must be demanded that any violation of the law in the use of the chosen means be taken into account not in the scope of protection, but in the context of justification.

23 The contents communicated by an assembly can meet with resistance and in turn provoke a second assembly directed against it - such as a counter-demonstration. In principle, the state must also tolerate the holding of such a counter-demonstration, since freedom of assembly is also about enabling discourse.

4. Claims to State Action in Particular

24 In addition to its negative function, the freedom of assembly also gives rise to positive state obligations to act.

a. Place of Assembly

25 Under the positive obligations, the doctrine subsumes in particular that the public space may be used for the purpose of assemblies, even if this regularly constitutes increased public use, i.e., restricts the similar use by third parties. Public space means an unenclosed area that is accessible to an indefinite number of people at any time and without preconditions. Community halls shall be treated as public space to the extent that they may be used for meetings. For the qualification as public, it should not matter in whose civil law ownership the space in question is. This is understandable in the case of spaces that are freely accessible at all times, even if they are privately owned (such as the arcades in Bern's old town). As soon as this free accessibility ceases to apply or applies only to a limited extent (for example, in the customer area of a bank), it becomes obvious that there is a tension here with the authority of a property owner under civil law to prohibit assemblies on his property out of his right of ownership. The resolution of this tension does not have to take place via a direct horizontal effect of the freedom of assembly, as Errass rightly states; rather, it is up to the community in question to provide the necessary infrastructure and thus sufficient public space. As long as sufficient alternatives are available, no sufficient reasons are apparent to enforce a claim to use under fundamental rights against the will of the owner under civil law, which is also protected by fundamental rights (Art. 26 BV).

In any case, however, it must be taken into account that the available location takes into account "the publicity needs of the organizers". Figuratively speaking: An intended appeal function cannot be performed by an assembly if it is to take place on a less busy edge of a place. At the same time, however, there is no right to hold an assembly at a certain place, at a certain time and under boundary conditions determined by the holders of fundamental rights. It would be inadmissible, however, if the authorities required a special relationship to a place in order to be able to hold an assembly. On the other hand, a fundamental right holder can assert such a relationship in order to justify the use of a very specific place - if necessary also on a specific date. 26

The presented fundamental right claim is commonly referred to as a conditional right to the use of public ground. Moeckli, however, rightly points out that the mere making available of public space does not constitute a state service, but corresponds to a state duty to refrain. According to the view expressed here, however, in the vast majority of cases the granting of use is not a mere omission. Rather, other interests directed at the public space must be taken into account by the authorities at the same time. The coordination of these claims and the creation of an order of priorities as well as the individual concrete allocation of public space - usually by means of a permit - constitute state services, which is why the characterization is accurate after all. 27

According to the practice of the supreme courts, the conditionality of this entitlement to benefits results from three elements: First, the claim under fundamental rights refers only to existing infrastructure. There is no entitlement for the state to create new facilities. Second, there is in principle no right to use a particular place at a particular time. Finally, thirdly, a comprehensive balancing of interests must be carried out when public space is used in an increased form. In this regard, Moeckli is basically to be agreed that the formulation of "conditionality" hardly yields any insight. An unconditional claim to assemblies, which represent simple public use or take place in private, does not exist. Rather, these assemblies are also subject to the constitutional regulation of limits, on the basis of which a weighing of interests must be carried out in individual cases. However, since the three aforementioned elements of case law can be summarized under this term, it makes sense to adhere to this terminology as well. 28

b. Participants in an assembly

29 Furthermore, the state is obligated to "ensure by appropriate measures, such as the granting of sufficient police protection, that public rallies can actually take place and are not disturbed or prevented by opposing circles." The same follows from the police law principle of "Störerprinzip". This task can be "certainly burdensome", but it is of great importance. Otherwise, violent groups could decide who can actually hold meetings and who cannot - an untenable state of affairs in a constitutional state. This fact had to be pointed out to the city council of Zurich recently. It wanted to take into account, to the detriment of a peaceful demonstration, that it might have triggered a violent counter-demonstration. The Administrative Court corrected this and held: "Rather, such rallies are to be authorized as far as possible, and the danger of disturbances is to be counteracted, for example, with sufficient police protection and a careful choice of route, regardless of how unpopular and controversial their views are".

30 Confrontation with other views - possibly provocative and outlandish for the vast majority of society - can thus be burdensome not only for the authorities but also for private third parties. The vehement rejection of an expressed opinion does not, of course, justify resorting to violence or otherwise behaving as "discourse police". It is very alarming, for example, when events at universities are prevented or disrupted to such an extent that they have to be broken off.

31 Where violence against an assembly occurs despite state protection, the authorities are obliged to investigate it and, if necessary, to punish those responsible. This also applies if the authorities themselves have exercised excessive coercion.

32 Additional claims for protection may arise if participants in an assembly can invoke other fundamental rights in addition to freedom of assembly. This applies, for example, to persons who are particularly vulnerable due to a physical disability (Art. 8 para. 4 BV; Art. 1 Convention on the Rights of Persons with Disabilities [BehiK]).

C. Limitability of freedom of assembly

33 The fundamental rights of communication have in common that they have not only an individual-legal, but also a democratic-functional significance. Free-

dom of assembly therefore carries particular weight. This is especially true when the collective expression of opinion concerns issues of social interest, as is the case with demonstrations.

Nevertheless, freedom of assembly can be restricted as a classic right of freedom under Article 36 BV. The restriction regulation in Art. 11 para. 2 ECHR is largely identical to this, which is why it is presented together. 34

1. Direct restriction of the freedom of assembly

The extensive case law on freedom of assembly shows that its restriction can take very different forms. In particular, it can take the form of an injunction, a rule of law or a real act. For a better overview, possible restrictions can be divided temporally into measures before, during and after an assembly. Abridgements of the freedom of assembly can be seen, for example, in the imposition of a general-abstract permit requirement for assemblies in public spaces, the individual-specific granting of permits subject to conditions and requirements, police expulsion and detention, and the imposition of costs and sanctions at the expense of participants. 35

It must be assessed in each individual case whether these restrictions are to be qualified as serious. However, in case law and doctrine, rules of thumb have emerged for individual direct restrictions on freedom of assembly with regard to their intensity: 36

Preventive prohibition and repressive dissolution of an assembly are particularly severe restrictions, as these measures completely prohibit or end the exercise of fundamental rights. In particular, as a rule, the mere announcement or holding of a counter-demonstration may not lead to the original rally being banned. Even in the case of an unauthorized demonstration, dissolution is only permissible after careful consideration of all interests. If direct coercion is used, this must be announced in advance. 37

However, it is not only assemblies aimed at the public that are specially protected. This also applies to private assemblies; they can only be restricted for serious reasons. For example, in the Corona pandemic, private events and gatherings of more than five people were temporarily prohibited in order to protect public health and the fundamental rights of third parties. 38

39 In my opinion, a general ban on gatherings by establishing a "ban mile" also qualifies as a serious restriction. It is not inadmissible from the outset to deprive certain public places of general use. However, such an approach is problematic: First, because an absolute ban leaves no room for exceptions, even if this would be appropriate. Second, because public space serves the purpose of communication; its use for the exercise of basic communication rights is precisely in accordance with its purpose. Third, the exclusion of certain uses is regularly based on their content, which, however, should not play a role.

40 Furthermore, in a whole series of judgments that have been included in the official collection, the Federal Supreme Court has described restrictions on the number of people at meetings during the Corona pandemic as serious restrictions on fundamental rights. In particular, it stated: "In connection with demonstrations, the Federal Supreme Court has always emphasized the great importance attached to the freedom of assembly due to its central significance for the formation of opinion in a free democratic state governed by the rule of law, especially in times of political unrest. The highest court subsequently judged a general restriction of rallies to 15 people to be too far-reaching. Moreover, due to Art. 189 para. 4 of the Federal Constitution, the measures that the Federal Council enshrined in its ordinances were exempt from abstract review. It was precisely this lack of reviewability that led one chamber of the ECtHR to find a violation of Art. 11 ECHR in the absolute ban on events between March 17, 2020 and May 30, 2020. At Switzerland's request, the Grand Chamber of the Court will make a final decision on the matter - the relevant judgment is still pending.

41 Finally, sanctions in the aftermath of an assembly are generally to be regarded as a serious restriction of freedom of assembly. It is inadmissible to punish mere participation in an assembly that has not been prohibited, even if violence occurs. What is required is individually reproachable behavior.

2. Indirect restriction of the freedom of assembly

42 In addition to the aforementioned measures directly restricting fundamental rights, indirect impairments of fundamental rights are also possible. One such indirect consequence of state action can be the deterrent effect, also known as the chilling effect. In this case, a measure by the state has such an effect via a psychological chain of motivation that the exercise of fundamental rights is

refrained from in the future, which makes the figure difficult to grasp. However, such a deterrent effect has been stipulated for freedom of assembly in a number of constellations:

The doctrine advocates this in particular for the area-wide observation and registration of the participants of an assembly. However, it must be taken into account that video surveillance can also be in the interest of an assembly; for example, if it is necessary to ensure crowd management in a large crowd. 43

In addition, the Federal Supreme Court has recognized that the passing on of costs incurred as a result of a police operation triggered by the assembly may have a chilling effect. "The cost claims must consequently be moderately structured so that the effective exercise of fundamental rights actually remains possible." However, in the opinion of the highest court, it is permissible to pass on police costs of up to CHF 30,000.00 to organizers who have acted in breach of duty. 44

In a similar way as the costs, a criminal prosecution in the aftermath of an assembly can have a chilling effect, as the ECtHR has repeatedly stated. 45

Finally, it should be mentioned that a lack of protection of demonstrations can also create a fear of disturbance for future rallies and thus have a chilling effect. 46

3. Justification of Restrictions

a. Legal Basis

According to Art. 36 para. 1 sentences 1 and 2 BV, serious restrictions require a basis in a law in the formal sense, while less far-reaching restrictions can also be anchored at a lower normative level. It is therefore insufficient, in particular, if the possibility of using water cannons and adding irritants to the water are only anchored at the level of an ordinance and not in the law in the formal sense. 47

According to Art. 36 Para. 1 Sentence 3 BV, in cases of serious, immediate danger that cannot be averted in any other way, the general police clause can be used instead of a legal basis. However, this is excluded if the legislature would have had the opportunity to legislate - for example, due to regularly recurring threats to public safety and order. The criterion of foreseeability is examined in the context of proportionality. 48

49 Furthermore, in the case of assemblies, it is relevant that, according to federal court case law, the requirements for the definiteness of the legal basis in police law are lowered. This has rightly met with criticism in the doctrine, because it is very well possible to regulate the typical situations of police activity and the means of coercion that are permissible in this context; otherwise, no internal directives could exist in this regard.

50 Similarly, lowered requirements apply to the legal basis in the special status relationship, which is reflected in Art. 11 Para. 2 Sentence 2 ECHR. According to the view expressed here, however, a lower normative level is only permissible insofar as it concerns restrictions that clearly result from the purpose of the special status relationship. In contrast, a particular density of norms is required if the bases in question are applied by legal laypersons, as is likely to be the rule in the case of prison regulations, for example.

51 According to the applicable case law of the Federal Supreme Court, a community may also introduce a permit requirement for increased public use as a consequence of its material dominion over the public space without a special legal basis. In this case, the rule of fact is to take the place of the legal basis. The - as far as can be seen - unanimous doctrine rejects this with good reasons: First, neither Art. 36 para. 1 BV nor Art. 5 para. 1 BV give any indication that such an exception to the principle of legality would be permissible in this area. Rather, secondly, legal certainty and equality of rights speak in favor of creating a sufficient legal norm here as well. Thirdly, as far as fundamental rights are concerned, it must be emphasized that the introduction of a licensing requirement already constitutes a restriction of these fundamental rights, which must be justified under Article 36 of the Federal Constitution. Fourthly, the case law of the Federal Supreme Court is based on the misunderstanding that the state can dispose of "its" land like a private person. Correctly, however, its position is to be understood as a fiduciary one: The authorities coordinate the scarce resource of land so that all those subject to the law can realize their interests and claims there in the best possible way. Despite this criticism, the Federal Supreme Court has not yet revoked its corresponding practice.

b. Justifying interest

52 In the case of restrictions on the freedom of assembly, the classical police interests and the orderly use of public space are in the foreground as public in-

terests. In this regard, the weighty interest of public health was given a prominent role in the Corona pandemic.

It is confusing to find the formulation in federal court jurisprudence that more far-reaching restrictions are permissible in the case of assemblies in public space. The only correct thing to say about this is that, as a rule, there are more interests and claims in the public sphere that have to be taken into account than is the case in the private sphere. However, it must be emphasized once again that the public space serves precisely as a forum for the exchange of opinions. 53

Another frequent intervention interest in assemblies is the protection of the fundamental rights of third parties. At least this is true in the public sphere, where assemblies typically involve various (fundamental rights) claims. Then one also speaks of multipolar fundamental rights relationships. If the interests involved are contrary, the realization of one fundamental right inevitably leads to a restriction for another fundamental right holder. The state, as the addressee of fundamental rights, must mediate between these poles. However, freedom of assembly does not have a direct effect between private individuals, a direct horizontal effect. 54

Finally, the ECtHR flatly denied the existence of a justifiable interest in restricting freedom of assembly in various incidents involving the Russian opposition activist Aleksey Navalnyy. On the contrary, the ECtHR exceptionally relied on Art. 18 ECHR and held that the state restrictions of Art. 11 ECHR pursued an inadmissible purpose. The authorities were in fact concerned with suppressing political pluralism, which is an indispensable component of a democratic state governed by the rule of law. 55

c. Proportionality

The proportionality test required by Article 36(3) BV is based on the interest that the state invokes as justification for the restriction of fundamental rights and is composed of the elements of suitability, necessity and reasonableness. 56

Of the above-mentioned typical restrictions on the freedom of assembly, part of the doctrine argues that a permit requirement is not necessary, but that a milder means would be available in the form of the notification requirement. At first glance, this is understandable, because the obligation to register does not trigger an administrative procedure that is concluded with the granting of 57 a permit. The legality of private action depends solely on prior notification to the authorities. However, a notification requirement is not as suitable as a permit requirement for striking a balance between the interests involved: First, in the case of assemblies, a balance must regularly be found between numerous private and public interests. The actual situation is complex. Therefore, it cannot be said that there is no need for intensive state monitoring and that mere spot checks would suffice, as would be typical for a notification requirement. Second, the state must make its weighing of interests transparent in the justification for the permit (or its refusal), which leads to a comprehensible and verifiable practice. Thirdly, the authorization signals to all other affected persons that the authorized assembly has the necessary legal legitimacy and will be protected by the state if necessary. Fourth, the requirement of prior authorization must not be applied in an absolute manner. Spontaneous assemblies must continue to be permissible. A sudden event, such as the result of a referendum, can lead to a justified desire for an immediate reaction in the form of a demonstration, in which case there is no time to comply with the relevant deadlines of the authorization procedure.

58 Finally, it should be noted that the balance in multipolar fundamental rights relationships is also described as the establishment of practical concordance. This means that all the fundamental rights interests involved are realized as optimally as possible. Unlike a violent disturbance, from which an assembly must be protected, a peaceful counter-demonstration, for example, is permissible in principle. If a request is made to hold such a counter-demonstration, the focus is on spatial and temporal restrictions in order to allow both assemblies to take place. A complete ban on both assemblies must remain ultima ratio.

d. Core Content

59 What belongs to the inviolable core content of freedom of assembly according to Art. 36 para. 4 BV has hardly been clarified by federal court jurisprudence so far. The highest court has merely stated that a ban on mummery, from which exceptions can be granted, does not affect the core content of freedom of expression and assembly. From this, Errass rightly concludes that an absolute ban on masking would be contrary to the core content - it is conceivable that assemblies could be held at which disguising oneself is precisely

the decisive part of the expression of opinion and for which exceptions must therefore be possible.

Likewise, according to the opinion represented here, it is part of the core content of Art. 22 BV that a permit requirement for assemblies in private or for spontaneous demonstrations would be inadmissible. The former would de facto deprive the private sphere of its content. The latter would make spontaneous demonstrations virtually impossible. Assemblies in response to a sudden event, however, must remain possible. 60

An indefinite and complete ban on assemblies per se would also be contrary to core content. 61

The prohibition of censorship within the meaning of Article 17 (2) BV is, according to the predominant opinion in the doctrine, a core content of all fundamental rights of communication. This can be followed for the freedom of assembly insofar as the preventive and systematic control of the content of opinions expressed at meetings is prohibited. However, it is permissible to inquire about the topic of an assembly, especially a demonstration, so that the authorities can conduct a risk analysis. In order to distinguish this from precise information on the content, the legislature must define the scope of the information to be provided in advance. 62

Core content guarantees are alien to the ECHR system, but the ius cogens under international law and the emergency-proof guarantees of the ECHR have parallels with core content. With regard to freedom of assembly, however, it should be noted that this is not part of ius cogens and that Article 11 of the ECHR can be derogated by states in a state of emergency (Article 15 ECHR). 63

D. Realization of Freedom of Assembly

Irrespective of individual-legally enforceable claims, the state is obliged to contribute to the realization of fundamental rights and thus also freedom of assembly (Art. 35 BV). The comprehensive effect of the fundamental rights of communication in the legal order is intended to secure the foundations for the democratic formation of wills - and thus democratically legitimate decisions. 64

This objective-legal dimension binds all state powers, but is primarily directed at the legislature. 65

66 With regard to the regulation of the use of public space, it is mainly the cantons and municipalities that are responsible; they must ensure that all concerns directed at public space are taken into account.

67 In addition, the federal legislature can also take action to realize freedom of assembly. For example, when it stipulates in Art. 336 para. 1 lit. b CO that a dismissal is abusive if one party issues it because the other party is exercising a constitutional right, unless this violates an obligation arising from the employment relationship or significantly impairs cooperation within the company. Employees therefore have the fundamental right to demonstrate against conditions in the employer's area of responsibility. Finally, the draft of nArt. 332a para. 2 lit. g StGB (violation of the ban on covering the face) must also be viewed positively from a fundamental rights perspective. In it, the Federal Council proposes that criminal liability be waived in the case of an "assembly in a public space if the covering of the face is necessary for the exercise of the fundamental rights of freedom of expression or freedom of assembly or if it is a pictorial expression of opinion that does not impair public safety and order".

68 In addition, there is the interpretation of legal norms by the executive and judiciary in conformity with fundamental rights. In the context of freedom of assembly and expression, the focus is particularly on Art. 260 SCC (breach of the peace), Art. 181 SCC (coercion) and Art. 261bis SCC (discrimination and incitement to hatred).

E. New technologies and freedom of assembly

69 Digitalization is changing many areas of life and, above all, the way we communicate with each other. Accordingly, fundamental rights of communication must also respond to this phenomenon. However, the question of whether virtual assemblies - e.g., via videoconferencing - also fall under the concept of assembly is already unresolved in case law and disputed in doctrine. According to the view expressed here, it is to be answered in the affirmative for the following reasons: First, virtual gatherings can also serve "a broadly understood mutually opinion-forming or opinion-expressing purpose." Second, the traditionally understood fundamental right protects gatherings in private as well as public gatherings that take place on private property. Therefore, it must be fundamentally irrelevant that the Internet and especially social media are essentially made available by private parties. Finally, thirdly, preparations for an assembly are already protected by fundamental rights. This protection

must not lapse just because, for example, a meeting for the purpose of organizing a demonstration takes place online.

A question that must be separated from the applicability of freedom of assembly is whether and how the Internet and social media can and should be subject to state regulation. From the perspective of freedom of assembly, the following problems arise: At first glance, the range of digital information sources and exchange possibilities is very large. This leads to a real battle for the attention of users. The crowding-out process that goes hand in hand with this battle in turn means that the digital forums of our time are controlled by a few private individuals. For their part, these are primarily entitled to fundamental rights and, unlike the state, are not bound by fundamental rights to grant all persons indiscriminate access to their infrastructure. Moreover, any regulation faces the challenge that the digital space has become unbounded - as the smartphone impressively demonstrates. A set of regulations limited to a single state will therefore hardly have any effect. 70

Finally, the technology available today means that the state can intervene in freedom of assembly in new ways. Particularly worthy of mention are the use of facial image matching software and drones. Projects are already underway in Switzerland: the Federal Office of Police would like to automate the manual matching of facial images and cites pedocrime and ATM burglaries as areas of application. However, this technology can also be used to continuously or retrospectively identify people taking part in a gathering. This is associated with a considerable deterrent effect, since today no standard checks of persons are carried out at gatherings - not even at demonstrations in public spaces - but now potentially all participants in a gathering can be identified. This technology can therefore only be used on the basis of a formal legal foundation and a strict proportionality test in each individual case. The same applies to the reconnaissance drone system (ADS 15) of the Swiss Air Force. This device can fly at an altitude of more than 7 kilometers while providing better images than can be taken today by helicopter. The Ordinance on the Support of Civilian or Off-Duty Activities with Military Means (VUM) is therefore not sufficient as a basis if a canton or municipality wishes to use this means of the armed forces at meetings. There must be a separate - and sufficient - legal basis for this. 71

IV. FUTURE OF FREEDOM OF ASSEMBLY

72 Given what has been said, will the freedom to assemble in the real world be relevant at all in the future? Or will people finally retreat into digital filter bubbles, in which they will at most exchange ideas with like-minded people? - According to the view expressed here, freedom of assembly will continue to be of great importance in the future. Technological development simplifies the organization of gatherings, but digital presence cannot replace a real gathering. On the one hand, this applies to the people gathering, who experience a real community and solidarity - and with all their senses. On the other hand, this also applies to the outside: When people visibly and audibly express a common concern, this is of a different quality than a "like" on social media. In the words of the Federal Supreme Court: "The significance of physical demonstrations as a means of democratic expression of opinion is thereby reduced, but not eliminated, since online actions generally meet with less resonance than events on public ground by name."

73 Even and especially in a digital world, not only virtual but also physical assemblies can be an effective means - especially for minorities - to draw the attention of the general public to their concerns. Technological possibilities may be expanding at a great pace, but what Jörg Paul Müller noted decades ago remains true: "There is no objective evidence that any one person or group knows better than any other what is good for everyone. In a democratic context, the equal worth of all forms the normative core of equality. It is therefore essential to the design of a legal order in which there is no fundamental primacy of individuals or groups that the concerns of all be mediated with one another."

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COMMENTARY ON

Art. 26 FC

A commentary by Stefan Schlegel

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Art. 26 Guarantee of ownership

[1] The right to own property is guaranteed.

[2] The compulsory purchase of property and any restriction on ownership that is equivalent to compulsory purchase shall be compensated in full.

CONTENT

I. HISTORY

1 Given the importance that the guarantee of property has historically had in constitutional struggles and in the philosophy of fundamental rights, its absence from the constitutional documents of the modern federal state is striking. Neither the Federal Constitution of 1848 nor that of 1874 contained a guarantee of property. However, this does not mean that property was not protected by fundamental rights before the guarantee of property was incorporated into the Constitution (see n. 2). Property was protected in all **cantonal constitutions**. Although the wording of these guarantees differed, the Federal Supreme Court ruled in 1948 that their respective scope of protection was identical. In addition, Article 23 of the Federal Constitution of 1874 provided implicit protection of property. It provided for the possibility of expropriation in the event of an overriding public interest, but only in return for full compensation.

2 From 1961, the Federal Supreme Court recognized the guarantee of property as an unwritten fundamental right. Finally, in 1969, the guarantee of property was incorporated into the Federal Constitution (Art. 22^{ter} aBV). The same revision also granted the federal government fundamental competence for spatial planning (Art. 22^{quater} aBV). The guarantee of property rights, as explicitly stated in the Constitution for the first time, is therefore a counterpart and counterbalance to the rapidly growing role of the public authorities at that time with regard to the use, and in particular the developability, of land. The Federal Council considered it sensible to precede the fundamental competence for spatial planning with an explicit guarantee of property rights in order to "allay fears that private property would be fundamentally undermined or unduly restricted by the new federal powers." This did not, however, alter the fact that environmental and spatial planning administration was most likely to result in encroachments on the guarantee of property rights.

3 The Federal Constitution of 1999 incorporated the resulting guarantee of property with only editorial revisions in Art. 26 FC. During parliamentary deliberations, there were calls for Switzerland to also provide for the **"social obligation"** of property, as does the guarantee of property in the German Basic Law. However, the National Council rejected this. The significance of an explicit mention of social responsibility should not be overestimated. The question is not whether property can be subject to social obligations, but

whether these obligations arise from the fundamental right itself, i.e. whether they are inherent in the fundamental right, or whether they can be derived from
the context of the fundamental right (see the theories of property below, n. 37). This context includes the tasks and objectives of the Constitution, which can be specified by the legislature in the public interest and which can impose obligations on property. The councils also discussed replacing full compensation in the event of expropriation with "appropriate" compensation. This amendment was also rejected. There was also discussion of a proposal to compensate expropriations in full, but to compensate "appropriately" for encroachments on property that do not reach the expropriation threshold. This proposal initially gained a majority in the National Council. However, it was rejected by the Council of States because it would go beyond the "implementation mandate" for the new Federal Constitution.

The regulatory content of the guarantee of property rights has therefore **not changed** with the total revision of the Federal Constitution; the old case law and doctrine remain authoritative. 4

II. CONTEXT

As a normative concept, property is "complexly interwoven with principles of justice, freedom, and dignity." Like sovereignty for states, the ownership of individuals has **the supposed quality of the absolute**, the exclusive, the complete control over goods. It is therefore suitable as a state of desired perfection and clarity about material circumstances. The position of individuals and the distribution of goods in society are strongly predetermined by the decisions that a society makes regarding the institution of property. 5

A. Strong institutional component

The guarantee of property has a **distinct institutional component**. It protects not only individual rights, but also the social institution of private property. It thus represents a fundamental social decision in favor of the decentralized distribution of rights of action (or at least against their concentration in the hands of the public authorities). The guarantee of property shares its strong institutional component with economic freedom, which complements the institution of private property with that of competition. These two institutions, which form the foundation of a market economy, are supplemented by 6 the principles of the economic order (Art. 94 FC), which in turn impose a restrained relationship between the state and the market economy.

7 As important as property is for shaping society, many consider it even more central to the development of personality. Property and the guarantee of property have (in the best case) a **liberating function**. They are intended to protect a “piece of the world” (primarily against the state) in which secure, individual development is possible. This implies in particular that it is not only what is considered valuable by society or the market in an economic sense that can be protected as property. However, the image of a “piece of the world of one's own” has a fatal affinity with the idea of property as a “sphere free from state authority.” This idea obscures the central role of the public sector in the creation, recognition, and protection of property and thus also the proactive role that the public sector must play in enabling such a sphere of freedom.

8 A common way of dealing with the complexity of property as a concept and legal institution is to first reduce property to its **partial aspect of ownership of things** and to formulate this in absolute terms, namely as the unrestricted power over a thing to the exclusion of all others. Central to this partial aspect is that the rights arising from ownership of things apply to all others (“erga omnes”). In a second step, compromises are introduced that every society must make when dealing with control over goods. It remains unclear how far these compromises can be taken before it no longer makes sense to speak of ownership. This is the technique used in Art. 641 para. 1 CC, which defines ownership under property law. It defines the “owner” (it does not mention female owners) as a subject who can dispose of an object “at will.” At the same time, however, this paragraph also makes it clear that this only applies “within the limits of the legal system.” This tension between the owner's freedom of disposal and the interests and rules of the general public is the fundamental problem of the legal institution of property and one of the central problems of the guarantee of property.

B. Relationship to other provisions

9 All fundamental rights can only be fully understood when viewed **in conjunction with all other fundamental rights** and with the provisions on tasks set out in the Constitution. This applies to an even greater extent to the guarantee of property rights. An important reason for this interdependence is the

protective function that property rights have for other fundamental rights. This applies in particular to economic freedom. The guarantee of property protects the existence and value of factors of production whose *use* for the purpose of earning an income is protected by economic freedom. A minimum level of material security and autonomy is also necessary for a person to be able to engage in political activity. Georg Müller therefore describes property as a "complementary and promoting element of political freedom." Procedural fundamental rights, for their part, provide important preliminary and flanking protection for the guarantee of property. Only where effective and fair procedures are available can property, however defined, be effectively protected.

Even more than the objects protected by other fundamental rights (such as art, science, and religion, whose existence is also conceivable outside a legal system), property is a **social construct**; an object of protection that cannot exist outside the legal system or precede the legal system, but is created by it. A central problem of the guarantee of property is therefore that it must protect from the reach of the law that which can only come into being through the legal order (see below, n. 40). 10

Furthermore, the guarantee of property stands in a **reciprocal relationship** with a number of **other constitutional provisions**: 11

- Section 4, "Environment and Spatial Planning" (Art. 73-80 FC), is particularly relevant in practice. This section establishes a number of powers for the federal government and the cantons. These mainly concern conflicts over the scarcity of natural resources and geographical space and may therefore significantly interfere with property rights.
- The same applies to the federal government's power to regulate energy transport (Art. 91 FC).
- Art. 108 FC (promotion of housing construction and home ownership) has a two-edged effect on property. On the one hand, it can form a basis for restricting property.
- On the other hand, it raises the question of whether there is a mandate for an actual property policy, i.e., state intervention to enable broad sections of the population to acquire residential property (see below, n. 12).
- From an economic perspective, a central element of the guarantee of property is the protection of rights of action (for the term, see n. 47) in

connection with real property. Art. 109 FC (rental) is also important as a framework for the basis for intervention. It gives the federal government the possibility to restrict owners in how they rent out real estate.

- Art. 8 para. 4 FC, which provides for measures to eliminate disadvantages for people with disabilities, creates potential conflicts with the guarantee of ownership. The legislature balanced this area of conflict with the enactment of the Federal Act on the Elimination of Discrimination against People with Disabilities (DDA) in 2002.

12 The guarantee of property rights, together with Articles 108 (promotion of housing and home ownership) and 109 FC (rental housing), lay the foundations for enabling as many people as possible in Switzerland to have adequate housing. The phrase "The Confederation shall promote (...) the acquisition of home ownership" in Art. 108 para. 1 FC initially suggests that the Constitution expresses a preference for home ownership over renting. However, this is the only reference in the Constitution to an actual **policy of promoting property ownership**; such a policy is more pronounced in other legal systems. The preliminary draft for the total revision of 1977 still contained an explicit mandate to promote property ownership (Art. 30 lit. d, g, and h). The Federal Constitution of 1999, on the other hand, contains only this allusion to a property policy. This suggests that the Swiss constitutional order has hardly developed the idea that the state has a duty to facilitate the acquisition of property in addition to guaranteeing existing property rights. According to this understanding, the state is not required to pursue a "property policy."

13 The federal government and the cantons have **specific expropriation laws**. These usually form the legal basis for the formal expropriation of land. However, other laws may also form the basis for formal expropriation.

14 Unlike most other civil liberties, **international law** plays a subordinate role in the protection afforded by the guarantee of property rights. An important reason for this is that Switzerland has not ratified the First Protocol to the ECHR, which contains a guarantee of property rights in Article 1. However, it is generally accepted that this guarantee does not go as far as Article 26 FC. Nevertheless, the ECHR does have a certain effect on the protection of property, for example through the right to a fair trial in Article 6 ECHR. This guarantees every person "in the determination of their civil rights and obligations or of any criminal charge against them" a "fair trial" before "an independent

and impartial tribunal established by law." Where property is interfered with or deprived, the ECHR thus guarantees access to a court where this may not be provided for under national procedural law. The ECHR can provide further protection for property through its accessory prohibition of discrimination (Art. 14 ECHR), for example where entitlement to benefits is discriminatory, as was the case in Switzerland with regard to widowers.

III. CONTENT OF THE GUARANTEE OF PROPERTY (PARA. 1)

A. Bearer of the guarantee of property

Unlike other fundamental rights, which are guaranteed to "every person" (Art. 9 FC) or "every human being" (Art. 10 FC), the guarantee of property rights merely states that they are "guaranteed." It applies **in principle to all natural and legal persons**. 15

1. Exclusion of certain natural persons from legal capacity?

In the literature, there are two different views as to whether exclusion from the acquisition of property constitutes a restriction of the guarantee of property or a partial exclusion from the guarantee of property. This question is relevant in connection with real property, the acquisition of which may be subject to authorisation for certain groups of persons. The most important example in practice can be found in Art. 2 of the **Federal Act on the Acquisition of Real Estate by Persons Abroad** (ANRA), also known as the "Lex Koller." Another example is the requirement for a permit to acquire an agricultural business by persons who are not considered to be self-employed farmers (Art. 6 in conjunction with Art. 61 para. 1 and Art. 63 para. 1 lit. a of the Federal Act on Rural Land Law, BGBB). 16

However, there are two reasons why these persons should **not be excluded from the personal scope of protection of the guarantee of property**, but rather why the corresponding obstacles should be treated as restrictions on the guarantee of property. The first is that this is only a partial curtailment of the protection of fundamental rights. In this respect, it is misleading to say that these persons are not holders of the fundamental right. The second reason is the obligation of justification imposed on the state in the event of restrictions on fundamental rights: if the curtailment of the fundamental right is 17 treated not as a restriction of a fundamental right but as an exclusion from it, the state is problematically exempt from this obligation of justification.

2. The community as a holder of fundamental rights

18 The Federal Supreme Court has consistently held that a **community** may also invoke a right that is tailored to private individuals if it is affected in the same way as a private individual. This applies in particular if the community's property interests are affected. In legal theory, this is understood to mean that communities can also invoke the guarantee of property rights if they are affected in the same way as private individuals. When this is the case is less clear. It is certainly the case where a community is affected in its financial assets (i.e., in the assets it owns for their monetary value) and not in its administrative assets (i.e., in the assets it owns for their use value). However, there are also voices in legal doctrine that consider the community to have fundamental rights even for assets in administrative assets and in public use (those assets that can be used by private individuals for their intended purpose); the prerequisite for this is that the community is not affected in the exercise of its public function, but as the owner. This view deserves approval. It is not clear why the community as owner should be less protected than private individuals. Where communities are in a special situation or have a special responsibility (for example, toward public tasks performed by another community or toward the fundamental rights of private individuals), this circumstance can be better taken into account by giving it appropriate consideration when examining the conditions for intervention than by completely excluding the public authorities from fundamental rights.

19 Based on these considerations, it therefore makes sense that **public companies in private law** can also invoke the guarantee of property rights, even if the Federal Supreme Court has left this question open to date. The special position of public companies in competition can also be better addressed if this is taken into account in the context of a weighing of interests than if these companies are denied fundamental rights.

B. Dimensions of the guarantee of property

20 More than other civil liberties, the guarantee of property is usually divided into different dimensions of its scope of protection, typically into the **guarantee of existence, value and institution**. The guarantee of existence protects

the scope or existence of property (n. 21 f.). Unique to the guarantee of property is the guarantee of value (or “guarantee of asset value”), which is added to the guarantee of existence and, under certain circumstances, replaces it (n. 23 ff.). The institutional guarantee secures the institution of property in society and the fundamental decision in favor of a property-based economic order (n. 27 ff.). The three components support and complement each other. It is therefore artificial to assume that all aspects of the guarantee of property must be assigned exclusively to one of these three dimensions.

1. Guarantee of existence

The guarantee of existence **protects** the **existence of the property** of a legal entity, i.e. the existence of the sum of a person's property rights (see below, n. 48 ff.) against unjustified interference. This protection is not absolute. Interference is permissible under the conditions of Art. 36 FC and additionally under the conditions of the value guarantee in Art. 26 para. 2 FC. The protective effect of the guarantee of existing rights therefore consists in raising the threshold for interference and linking it to certain justification mechanisms. 21

A distinction must be made between the guarantee of existing rights and the **guarantee of vested rights**. The guarantee of vested rights plays an important role in construction and spatial planning law and ensures that buildings constructed under the old law can continue to be used or extended or converted despite changes in the legal situation. Its protective effect is primarily directed against the legislature, which must introduce new law in a “lenient” manner and provide for transition periods and exceptions. Originally developed in case law, the guarantee of vested rights has also found its way into law (see Art. 24c and Art. 37a RPG). In contrast to the guarantee of existing rights, it does not protect the existence of property rights, but rather the continued existence of rights that no longer exist under the new legal situation for a certain period of time or under certain circumstances. Its relationship to the guarantee of ownership is not entirely clear. In any case, it does not arise exclusively from the guarantee of ownership, but also from the protection of legitimate expectations (Art. 9 FC). However, since the guarantee of vested rights protects property rights, namely the possibility of carrying out economically interesting acts that would no longer be possible under the new law, it is in any case also a component of the guarantee of ownership (see below, n. 47 ff.). 22

2. Value guarantee

23 If there is a lawful interference with the existence of property and if, in addition, the conditions for formal or material expropriation are met (for these terms, see below, n. 77), **the guarantee of existence "transforms"** ("se transforme") **into a guarantee of value**, or it "melts" into a guarantee of value.

24 Contrary to the impression given by the wording of Art. 26 para. 2 FC, the value guarantee applies **only to a fraction of the encroachments** on constitutionally protected property. The prerequisite for this is either formal expropriation or a restriction of ownership that is so severe that it amounts to formal expropriation (see n. 126 below). The vast majority of restrictions on ownership, whether they originate from legislation or from the application of law, must be accepted without compensation. This makes the guarantee of existing rights and the conditions for interference arising from it all the more important.

25 In addition to Art. 26 para. 2 FC, the value guarantee is **also enshrined** in various federal and cantonal laws, such as Art. 16 EntG and Art. 5 para. 2 of the Spatial Planning Act (RPG).

26 Does the guarantee of value **strengthen or weaken the guarantee of property?** It could be argued that the guarantee of value weakens the protection afforded by other civil liberties because the state can interfere with the fundamental right if it is prepared to pay for the interference, which is not the case with other civil liberties. However, this argument overlooks the fact that the value guarantee only comes into play when it is lawful to interfere with the existence of property protected by fundamental rights, i.e. when the conditions that must also be met for interference with other civil liberties have already been met. The value guarantee therefore applies in addition to, and not in place of, the conditions normally required for civil liberties (see Art. 36 FC), and in this respect affords property a higher level of protection than other goods protected by fundamental rights. However, it would be wrong to conclude from this that the constitutional legislator accords property a higher normative value than other goods protected by fundamental rights. The increased protection can be explained by the function of the guarantee of property, in particular its internalization function (see n. 111). This special position is of practical relevance in distinguishing between areas of fundamental rights

protection: if a good falls within the scope of the guarantee of property (rather than within the scope of another fundamental right), it may also enjoy the increased protection of the guarantee of value.

3. Institutional guarantee

The institutional guarantee does not primarily protect individual holders of fundamental rights. Its protected interest is a **fundamental societal decision in favor of a property-based order**. Like other fundamental rights, the guarantee of property goes beyond the protection of mere subjective rights in its institutional aspect. The institutional guarantee is not based on a fundamental social decision in favor of a restrained state or minimal social equality. Rather, it is based on a fundamental decision to decentralize the factors of production in society or, conversely, to prevent the concentration of the factors of production in the hands of a few. This is the most central "regulatory function" of the guarantee of property rights; decentralization ensures that misallocations of resources in society remain manageable and can be corrected. The institutional guarantee provides protection against political measures that would gradually or immediately centralize control over factors of production. The most plausible candidate for such centralization is the state, which seeks control over more and more factors of production in its efforts to establish a planned economy. However, the public sector is not the only conceivable driver of centralization. According to this view of the guarantee of institutions, the concentration of virtually all factors of production in the hands of a private monopolist would also be contrary to the guarantee. A redistribution of factors of production in society by the public sector may well interfere with the guarantee of existence (because it must take from some in order to give to others). However, it is compatible with the guarantee of institutions as long as this redistribution does not undermine property as an institution and serves to decentralize rather than concentrate factors of production. Essential to this decentralization function is that factors of production remain distributed in society not only formally but also substantively, i.e., that property does not increasingly become an empty shell, but retains its actual economic value and must encompass actual material freedom of action. In this respect, this decentralization function also includes the prohibition formulated by the Federal Supreme Court of depriving property of its "substance" or "essential core." 27

28 Despite this high degree of compatibility with a redistributive state, the guarantee of institutions is a fundamental decision in favor of the **market as a "coordination principle,"** even if this may be a socially embedded market. The guarantee of property rights is not the only provision in the Constitution that reflects this fundamental decision. It is also expressed in Art. 5a FC (subsidiarity), Art. 27 FC (economic freedom) and Art. 94 FC (principles of the economic order). However, the decentralization of production factors is a prerequisite for this fundamental decision and also anticipates it. The reason for this is the decentralized discovery and information process, i.e., the ability to generate information and allocate it meaningfully, even if the system is far too complex to be overviewed from a central vantage point. Only a market can provide this process (even if it is strongly embedded). The alternative would be a central actor who controls all production factors but cannot allocate them sensibly because he does not have this discovery process at his disposal. The decentralization of the allocation and transaction of production factors and a reasonably functioning discovery and information process are therefore mutually dependent. If, in the words of the Federal Supreme Court, economic freedom is the "guardian of a private economic order," then the guarantee of property is a prerequisite for this.

29 The **institutional guarantee is regularly equated with the core content** of the guarantee of property rights (or with the essential content, the German equivalent of core content) (see below on core content, n. 33 ff.). The two legal concepts do indeed have certain parallels. For example, both exist independently of the weight of the public interest. No matter how significant this is, it cannot justify an encroachment on either the institutional guarantee or the core content. Nevertheless, equating the institutional guarantee with the core content makes little sense and is misleading. The core content of a freedom right protects the innermost, most fundamental sphere of an individual's protected interest and has a strong connection to the dignity of the person concerned. It gives concrete form to human dignity in a specific context. However, the guarantee of institutions does not primarily concern the dignity of the individual, but rather a fundamental decision of society. It is "not merely the 'last bastion' for the protection of the property rights of individuals," but fulfills a preliminary function in this regard.

The following measures are considered **incompatible with the guarantee of institutions**: 30

- The main case in which protection under the guarantee of institutions applies is so-called **confiscatory taxation**. Taxation is considered confiscatory if it reaches such an extent that the assets would be gradually depleted by taxation alone or that the accumulation of new assets or an independent lifestyle would become illusory solely due to the tax burden. Case law on confiscatory taxation is restrictive. There is no published Federal Supreme Court decision in which confiscatory taxation has been recognized. An older, unpublished decision in which the capital value of a life annuity was taxed in such a way that the recipient of the annuity would have had to take on high levels of debt in order to pay the tax, thereby jeopardizing the purpose of the annuity – to secure a livelihood – may serve as a guide. Together with the income tax payable on the annuities, the tax burden would have been 55% of the capital value of the life annuity (for the relationship between this case law and the guarantee of core content, see n. 34).
- An unrestricted right of first refusal on the part of the community with regard to a **public land monopoly** to be gradually established, or an attempt to concentrate all land ownership in the hands of the state and to grant private individuals only building rights or similar rights.
- The possibility for the public authorities to **freeze land prices and compulsorily rent out** apartments without this being subject to any conditions other than the general objective of guaranteeing the right to housing.

However, the following are considered **compatible with the guarantee of institutions**: 31

- **Wealth taxes that are higher than income**. Wealth taxes encroach on the substance of wealth. That alone does not make them contrary to fundamental rights. Therefore, if a tax burden resulting primarily from a wealth tax amounts to 200% of a taxpayer's income for a short period of time, this does not constitute confiscatory taxation.
- In general, **a certain percentage** of income or wealth accounted for by taxes is not in itself sufficient to constitute confiscatory taxation. What is relevant is rather the tax burden over a relatively long period. If special circumstances arise in certain years, these must be disregarded. The cumula-

tive effect of different taxes and the possibility of passing taxes on to others are also decisive.

- Situations in which a taxpayer **deliberately foregoes** an achievable return on their assets (for example, because they hold precious metals or speculate on the zoning of land) and the tax burden is therefore higher than the return on the assets.
- A **wealth tax** that would amount to up to 46% of income for very high incomes, but would not prevent the creation of new wealth.
- Even relatively **far-reaching interventions in the land, housing, and rental markets** are compatible with the guarantee of institutions. For example:
  - the expropriation of abusively vacant apartments (however, a violation of the guarantee of institutions would be assumed if the use cannot be withdrawn under any conditions other than to secure the right to housing);
  - the obligation to create at least one-third of the residential use as affordable housing in the case of rezoning and new zoning and to rent it out permanently at cost;
  - the possibility for the city administration to determine 15% of the tenants in buildings whose construction or renovation it has subsidized;
  - a ban on the demolition, conversion, or change of use of apartments that are not dilapidated or in need of renovation (however, this plan violated the guarantee of existing rights);
  - a requirement for approval for the sale of apartments for which there is a shortage on the housing market (however, the way in which the approval requirement was designed, which made it impossible to take private interests into account, was in this case a violation of the principle of proportionality and the guarantee of existing rights).

32 So is the institutional guarantee necessary at all, or does it **merely have "declaratory significance"?** The fact that there are only a few examples in which the institutional guarantee has had a concrete protective effect in case law should not lead to the conclusion that it plays no role in legal practice. The decision in favor of a property-based order and the decentralization of factors of production is one of the most fundamental decisions a political

community can make. It is therefore logical that the institutional guarantee shapes political decisions more than legal ones and that it can and must serve as a protective function against political decisions rather than against administrative actions. The decentralization of factors of production remains a permanent task even if the political forces that want to communitize the factors of production lose momentum. This is not least because an increasing concentration of factors of production cannot occur exclusively at the state level.

4. Core content

33 Separating the institutional guarantee from the core content allows those aspects that are directly relevant to the protection of human dignity to be considered the core content of the guarantee of property rights. The guarantee of property is less often associated with the protection of dignity than other fundamental rights – unjustly so. Eugen Huber's formulation may seem drastic when he writes in the explanatory notes to the draft of the Swiss Civil Code that "a personality without the right to dispose of property (...) would be a concept without content." Nevertheless, the ability to exercise control over property is a fundamental expression of personality; permanently preventing a person from exercising this control is therefore an attack on their dignity. In cases where a person is "deprived of their place in the world and exposed to the struggle for bare existence" through the denial of property, this threshold is crossed. Weighing private and public interests can no longer achieve justifiable results in such drastic interventions. The balance must be tipped in favor of the interests and dignity of the individual. This anticipation of the outcome of the balancing exercise is precisely the essence of the understanding of the core content of fundamental rights as advocated here.

34 One reason for the often problematic equation of core content and institutional guarantee is likely to be that there is no case law on the violation of core content, except with regard to the question of confiscatory taxation, which may fall within the intersection of core content and institutional guarantee. However, it is also true of other fundamental rights that there are hardly any cases in which a violation of the core content has been alleged. As a reference point, which fortunately hardly ever occurs, it may nevertheless be useful to draft such cases. One could think, for example, of cases in which a person is deliberately deprived of their "last shirt" in order to exclude them from society.

35 In the literature, the **guarantee of value as a component** of the guarantee of property is sometimes considered to be part of its **core content**. This is unconvincing for several reasons. It is true that the guarantee of value is formulated in absolute terms for those cases in which it applies (formal expropriations and expropriation-like restrictions on property) and does not allow for any deviations by the legislature. However, firstly, these constellations only account for a small proportion of property interventions and, secondly, case law has developed various techniques to prevent the value guarantee from being triggered (see n. 126 below).

36 The core content of the guarantee of property rights is in **tension with the theory of immanence** (see below, n. 40). If this theory is applied unfiltered, the objective scope of protection of the guarantee of property rights is at the discretion of the legislature. In theory, the legislature could therefore also dispose of the innermost core content. This shows that the legislature must be bound by fundamental rights in one form or another with regard to the scope of protection of the guarantee of property rights, and that the immanence theory cannot therefore be applied without restriction (see n. 43). Even if it is true that the concept of property cannot precede a legal system, it can nevertheless precede the legislature (at least in its basic features) insofar as it derives from the constitution. The legislature's obligation to uphold the core content of the guarantee of property rights, which is based on the dignity of the individual, is therefore relatively unproblematic to achieve, because the protection of such core content does not derive exclusively from the guarantee of property rights itself, but also from Art. 36 para. 4 FC and Art. 8 FC. The obligation to protect the dignity of the individual even where very weighty public interests argue in favor of a legal redefinition of property cannot therefore be waived by the legislature.

C. Material scope of protection

1. Theories of property

37 In line with the great complexity of property as a concept and as a social and legal construct, the **objective scope of protection** of the guarantee of property is also **complex** and subject to considerable uncertainty. The object of protection of the guarantee of property is “not a human activity or characteristic, but an institution created by the legal system.” However, this formulation

already anticipates what is controversial in legal doctrine and unclear in case law, both with regard to private property and with regard to the object of protection of the guarantee of property rights: Namely, the question of whether property exists prior to the law and is then restricted by the law (**restriction theory**), or whether property is an institution of the legal system that can only come into existence with the legal system and is therefore inherently subject to the limits of property as defined by the law (**immanence theory**). The two theories are mutually exclusive and have significant weaknesses.

a. Weaknesses of property theories

One way of dealing with the problem of the two inadequate theories is to point out the **limited practical relevance** of this debate and relegate it to the ivory tower. Nevertheless, the shortcomings of both theories mean that not only are the contours of the substantive scope of protection of the guarantee of property rights vague, but also the question of whether the protected right is originally a fixed quantity from which deductions are made or a social construct that changes with changing political, economic, and technological conditions. 38

First, let us consider the problems of the barrier theory: **property cannot precede the law**, but is only created by the legal system. This is because the rights of action associated with a particular good are not natural or evident, but can only result from some kind of minimal social consensus. Even if one were to assume such a pre-state existence of property, it would be impossible for there to be a natural or original scope of property (which would be a prerequisite for the barrier theory to work). This is because every conceivable form of property use creates interference with other legal participants and their property. Before a legal framework and a conflict resolution mechanism exist, there is no way of classifying one interference as a naturally permissible component of property and another as excessive interference. 39

The immanence theory, on the other hand, has the weakness that it can only protect property within the framework of existing law and therefore, in principle, **cannot protect it against legislation**. It protects property whose substance can be arbitrarily diluted, as long as this is done through legislation rather than through the application of law. To avert this problem, a criterion would be needed to determine when legal norms shape property and when they restrict it. So far, it has not been possible to identify such criteria. For 40 logical reasons, this cannot be achieved; it would presuppose a pre-legal substance of property, which cannot exist. It is therefore notoriously unclear whether property is being interfered with or whether the scope of protection of property is being restructured. This is problematic because the relationship between the extent to which the scope of protection is affected and the permissibility of the interference, which is not always clear with regard to other fundamental rights, is particularly important in the context of the guarantee of property. It determines whether the guarantee of value applies.

41 The fragility of property under the theory of immanence is demonstrated by the fact that the constitution itself provides for **selective exceptions to the guarantee of property**. In these cases, according to a general assessment, interests other than those of the owner take precedence. There is therefore no weighing of interests. Examples include construction work in moors and moorland areas of national importance (Art. 78 para. 5 FC), the construction of minarets (Art. 72 para. 3 FC) or the construction of second homes under certain circumstances (Art. 75b in conjunction with Art. 197 no. 9 para. 2). It is therefore clear that the scope of property can be determined by the legal system and could, in theory, also be rendered meaningless by constitutional law itself.

b. Compromise in practice

42 The **Federal Supreme Court** originally based its decisions on the **immanence theory**. Its case law on interference with property remained limited to individual, specific interventions by the administration, whereby it was considered fundamentally undisputed that legislation could reorganize the scope of protection of the guarantee of property, i.e., that the limits of property are inherent in the law. In the course of the 20th century, however, the Federal Supreme Court gradually moved away from the immanence theory without fully embracing the barrier theory. A complete shift to the barrier theory would mean that restrictions on property rights imposed by legislation would also be treated as interference with the scope of protection, which it only does in very exceptional cases (see below, N. 119). The result is an unclear and often contradictory situation.

43 In the **absence of a third theory** that could overcome the weaknesses of the barrier theory and the immanence theory, we are left with a fragile (and ultimately contradictory) compromise between these two theories. This corre-

sponds to Swiss practice. On the one hand, the fiction of property as something that precedes the legislature is often invoked, or at least it is insisted that the substance of property cannot be arbitrarily stripped away by legislation and that property must therefore have a pre-legal substance. On the other hand, case law leaves no doubt that the concept of property can be redefined by the legislature in order to make it compatible with public interests and the interests of third parties, although the legislature remains bound to a certain extent by the guarantee of property. In this respect, it is not unreasonable to point out that the concept of property derives from the constitution and is therefore not pre-state but pre-legal. However, this only applies to the cornerstones of property, to its inner sphere. Many important aspects of property, which also enjoy fundamental rights protection, arise only from the law. The concern that the legislature could completely undermine property is therefore exaggerated, at least on the assumption that the legislature respects the Constitution.

Nevertheless, the compromise that emerges is fragile and is strained by the 44
fact that the Federal Court only recognizes infringements of fundamental rights through changes in the law in exceptional circumstances, thereby giving the **legislature considerable freedom** over the substance of property. As a rule, it assumes without further ado that new law redefines the scope of protection of the guarantee of property.

c. Functional understanding of property as a navigational aid

This fragile compromise is probably best navigated by using a **functional un-** 45
derstanding of property as a guiding principle. This asks which goods and aspects of goods are most crucial for the purposes for which property is protected by fundamental rights. Attributing certain functions to a fundamental right is always risky. It is an interpretative exercise that can also lead to a problematic reduction of functions. However, without having to reduce the purpose of the guarantee of property exclusively to these functions, it is necessary to grant it, in particular, a decentralization function (see above, n. 27) and a function to protect the dignity and autonomy of the individual (see above, n. 33). In our view, these fundamental functions alone are sufficient to stabilize the fragile compromise between pre-existing property and property that can be shaped by legislation, because these two functions limit the extent to which property can be stripped of its substance, regardless of the specific

theory of property. These functions are expressed in two dimensions of protection of the guarantee of property, namely in the institutional guarantee (for the decentralization function) and in the guarantee of core content (for the dignity function).

46 The function of the guarantee of property would be undermined, for example, if the public authorities were to intervene in property to such an extent that this would result in a (gradual) concentration of production factors in the hands of the public authorities. In this respect, property cannot be circumscribed other than by legislation, but the **legislator's freedom of design is not unlimited**; it too is bound by the guarantee of property. It must exercise its discretion in such a way that the decentralization function, the autonomy function, and the dignity preservation function of property are guaranteed.

47 However, this compromise is based on a concept of property according to which property cannot be qualitatively distinguished from other forms of entitlement to goods other than by the fact that it is protected by the guarantee of property. In this respect, property is a **bundle of rights of action** to permissibly interfere with others, which can be distinguished from other rights of action by the fact that it is specially protected by fundamental rights and, in particular, is reinforced by a guarantee of value.

2. Autonomy of the constitutional concept of property

48 The **constitutional concept of property** is **autonomous** from that of private law. This means that although private property under property law is part of the scope of protection of the guarantee of property, it must be defined separately from the concept of private law and, in particular, must be broader than the latter. There is a tendency in the literature to regard private property in rem as a relatively secure foundation for the scope of protection of the guarantee of property and to build the more unclear and complex aspects on this foundation. However, this view is not without problems because it suggests a supposed clarity regarding the scope and content of property in rem. However, a typical situation in which the guarantee of property comes into play is when property is affected by public law regulation or an administrative act. In this case, the scope of property is determined (among other things) by the regulatory framework of public law. Its scope therefore cannot be readily determined from property law alone.

Among the institutions of private law, the autonomous concept of property in the guarantee of property rights also protects, beyond property under property law, **possession**, **limited rights in rem**, **intellectual property rights**, and **obligatory claims**, such as those arising from lease or rental agreements. 49

It remains an open and fundamental question how autonomously the constitutional concept of property can be shaped by property law without becoming vague. This question is likely to become more important as more and more goods are **no longer tied to a physical object** but exist as legal conventions and/or technical innovations (such as rights of use to data; see below, n. 71 f.). 50

3. Important aspects in which the scope of protection of the guarantee of property rights is unclear

For the sake of **clarity**, it is worth first pointing out the areas in which the contours of the material scope of protection of the guarantee of property rights are particularly diffuse before going into these points in detail: 51

- First, it is unclear whether property rights or property *per se* are the subject of the protection afforded by the guarantee of property (n. 52 ff.).
- A particularly important component of property whose relationship to the scope of protection of the guarantee of property rights is unclear is claims under public law (n. 58 ff.).
- A term that causes ongoing uncertainty in the context of the guarantee of property rights is that of acquired rights and various alternative terms that have been developed for it (n. 60 ff.).
- The question of taxation, which is not in itself regarded as an interference with the guarantee of property, poses difficulties. It is unclear when it is so intensive that it must be regarded as confiscatory (which in turn raises the question of whether confiscatory taxation constitutes a violation of the core content, n. 66 f.).
- It is also unclear how and to what extent factual interests are protected by the guarantee of property (n. 68 f.).
- Finally, it is largely unclear how the guarantee of property relates to the increasingly important asset of data and the economically interesting rights of use of data (n. 71 f.).

a. Property as such

52 For the purposes of the present discussion, assets can be defined as the sum of all economic goods to which a person is entitled. The question of whether **assets as such are protected by the guarantee of property** can be described as the central ambiguity of the material scope of the guarantee of property. Many other ambiguities depend on this question, such as whether taxation constitutes an infringement of fundamental rights, to what extent factual interests are protected, to what extent interests and rights vis-à-vis the public sector fall within the scope of protection, and whether pure financial losses constitute an infringement of the guarantee of property rights. The doctrine is divided. Biaggini considers it "undesirable" to structure the guarantee of property as a general protection of assets. Even according to Dubey, assets themselves are clearly not part of the scope of protection. Waldmann objects that, in view of the purpose of the guarantee of property, those assets that serve to secure livelihoods must in any case be included in the scope of protection of the guarantee of property. He describes the content of the guarantee of property as a "bundle of enforceable rights," a concept that makes it difficult to exclude assets from this, as a person's assets are the totality of their valuable rights. Tschumi and Riva consequently place assets defined in this way within the scope of protection of the guarantee of property rights (which shifts the problem to the question of what should be considered valuable rights).

53 The **Federal Supreme Court** has remained **unclear** on this issue. On the one hand, it leaves no doubt that the freezing of individuals' assets (as part of sanctions against persons accused of being close to a problematic regime) constitutes an interference with the guarantee of property. The effect of this sanction is not to block individual specific assets, but rather all assets (including potential assets) located in Switzerland, either now or in the future. On the other hand, the Federal Supreme Court has consistently held that only individual property rights are protected, but not property as such. The problem with this position is that it means that interference with parts of the whole is considered interference with a fundamental right, but interference with the whole is not. This does not make much sense because it is not possible to interfere with the whole without interfering with some of its components. If one were to argue that there is a difference between the specific individual rights arising from ownership and assets as a mere general capacity, it could be

countered that assets are characterized precisely by their flexible usability. Certain subsets of assets can be used for specific powers (such as the acquisition of goods). Any interference with assets as such is therefore an interference with specific property rights, even if it is not clear which ones. The Federal Supreme Court also assumes that interference with property only exists if this interference also results in a loss of assets. This (problematic) view suggests that ultimately the assets (the sum of the property rights) must constitute the object of protection behind the guarantee of ownership.

Some authors argue that an interference only exists if it affects **specific claims** of the person concerned, but not if it affects the assets themselves. This view can be based on older case law. It seems like a relic from a time when the guarantee of property rights could still import the principle of specificity of property law into the protection of fundamental rights because the property of fundamental rights holders was still essentially tied to physical objects. However, this position no longer corresponds to economic reality and the economic needs that the guarantee of property rights is intended to protect. 54
This can be seen in the invocation of the guarantee of institutions (above, n. 27 ff.). With its formulation on the institutional guarantee, namely that the "institution of private property" must not be "emptied of its substance," the Federal Supreme Court intends the institutional guarantee to overcome a legalistic view by adding a dose of economic realism. It focuses on the economic substance of property and does not limit itself to its legal shell.

Since the Federal Supreme Court has attributed **certain factual interests** to the guarantee of property (see below, n. 68 ff.), the objection that a particular course of action must correspond to an explicit, legally protected interest in order to fall within the scope of the guarantee of property is no longer valid. 55

Another source of uncertainty is the prohibition of confiscatory taxation. This prohibition states that property may not be taxed to such an extent that it would be confiscated (see n. 30). Above this threshold, the property is therefore part of the scope of protection in any case. However, this means that the scope of protection changes with increasing intensity of intervention. To explain this, some scholars postulate **different areas of protection** for the different dimensions of the guarantee of property rights. According to this approach, the guarantee of existence and the guarantee of value protect only individual property rights, while the guarantee of the institution (which protects 56 against confiscatory taxation, among other things) also protects property itself. However, the different dimensions of the guarantee of property rights do not protect different legal interests, but rather different aspects of the same legal interest. This ad hoc adaptation of doctrine to established practice seems to be motivated more by considerations of practicality and the protection of fiscal interests of the public sector than by the pursuit of coherence and legal certainty.

57 Overall, the exclusion of property as such from the scope of protection of the guarantee of property raises more questions than it answers. From a dogmatic point of view, it therefore makes sense to regard the **totality of the economic assets** of a legal entity as its constitutionally protected property. Any state action that diminishes these assets must then, as a matter of principle, be required to meet the requirements of a restriction of fundamental rights. The decisive question then shifts to where the line is drawn between a restriction of property that must be accepted without compensation and a restriction that amounts to expropriation and must therefore be fully compensated (see below, n. 104 ff.). This question can then be answered in a more meaningful, coherent, and clear-cut manner than the question of the boundary between property and assets, which makes no sense either economically or legally.

b. Public law claims

58 The question of the extent to which assets as such fall within the scope of protection of the guarantee of property rights is also linked to the second major area of uncertainty regarding the scope of protection, namely the question of the extent to which **public law claims** are part of the scope of protection. Here, too, there is a conflict. On the one hand, there is a teleological argument, and on the other, the objection of practicability. The teleological argument emphasizes that public law claims constitute a large part of the real assets of individuals in a modern state. If autonomy and security are central purposes of the guarantee of property rights, then such claims must also be included in principle, because an increasing part of this autonomy and security depends on them in practice. They are “functional equivalents” of private ownership of property. This does not mean that public law claims have the full range of qualities that property rights have. It is sufficient that they are comparable (not identical) in terms of the functions that the guarantee of property is intended to protect. A pension claim, for example, fulfills a similar

function for autonomy and security as real property. This also applies if real property fulfills other functions. Insofar as it is a mandatory provision, a claim arising from it is also a compulsory substitute for conventional private property, as it ties up assets that would otherwise have been freely available. On the other hand, there is the objection that this publicly produced real wealth is so omnipresent and so complexly and inextricably interwoven with privately produced or acquired goods (every good contains privately and socially produced components) that fundamental rights protection of these goods quickly reaches the limits of practicability and jeopardizes the ability of the public authorities to act.

The most common approach to dealing with this problem is to look for criteria for the legal concretization of claims, criteria for determining when mere interests vis-à-vis the public sector have "condensed" into legally protected claims. The criteria for this consolidation and the terminology used to describe it are inconsistent and contradictory. In order to clarify this terminology, it is particularly necessary to distinguish between the concepts of acquired rights, subjective rights under public law, and claims under public law. 59

c. In particular: acquired rights

The category of **acquired rights** is unclear, and the reasoning behind what counts as such regularly takes on "circular characteristics." The only thing that is clear is that acquired rights are those that claim a special dignity, a particularly outstanding permanence. According to the understanding represented here, this is to be seen in the fact that well-established rights are **resistant to legal change**, i.e., they remain in force even if the relevant legal framework changes. In contrast, the term "subjective rights under public law" is used below to refer to claims against the public authorities that are justiciable but do not otherwise have a particularly prominent status. The term "vested rights" is therefore used here in a narrow sense, while the term "subjective rights under public law" is used in a broad sense. 60

Different groups of vested rights have **different lines of reasoning**. In some cases, the protection of legitimate expectations is identified as their basis, in others their immutable character, i.e., their existence since time immemorial, before a modern constitutional order existed. In some cases, they are justified on the grounds that they are remnants of an order shaped by private law, but are now considered to be part of public law. 61

62 Is the special protection of acquired rights based on the guarantee of property or on good faith (Art. 5 para. 3 FC)? According to recent Federal Supreme Court case law, the **protection of good faith is "paramount,"** which, however, does little to clarify the matter. The advantage of good faith as a legal basis is that it offers better protection against changes in the law, since the guarantee of property rights only protects property within the framework of the applicable law. However, the question is of secondary importance as long as both legal bases protect the same thing, namely the value of investments once made, even against subsequent changes in the law. On the other hand, the unique feature of the guarantee of ownership, namely the guarantee of value (see above, n. 23 ff.), remains important in these cases and precisely with regard to this protective purpose. Wherever rights are nevertheless to be interfered with, their value must be compensated. Since it is not possible to draw a line between changes in the law that redefine property and those that interfere with property (see above, n. 40), the guarantee of property alone is not sufficient as a legal basis for rights that are resistant to changes in the law. On the one hand, good faith is required for the stability of legal changes and, on the other hand, the guarantee of property is required to secure the value in the event of deprivation.

63 An example of (supposedly) acquired rights that are a **remnant of private law** is the use of water power, which was originally granted to riparian owners as a right in rem but is now regarded as a public good. It is initially unclear why rights that were originally assigned to private law cannot also be modified by changes in the law. The idea behind such a private law relic is that it is attached to the property like an easement and therefore survives changes in the law. However, the Federal Supreme Court has since clarified that the assumption of such remnants conflicts with the principle of the inalienability of state sovereignty because, according to today's understanding, these are goods that belong to the public sphere and are therefore an aspect of state sovereignty. Such marital rights must therefore now be replaced by concessions that may not be granted for an indefinite period.

64 The replacement of such relics therefore takes place in two steps. First, control over these assets is classified as an aspect of public authority and the transfer of this control is therefore treated as a concession. Second, the transferability of such authority is limited in time. Once again, the Federal Supreme Court applies a **strongly economic perspective** by disregarding

formal legal differences (is it a personal servitude or a special use concession?) and identifying the economic necessity of adequate investment protection as the (economic) rationale in both cases, thereby treating them as comparable in terms of content. Only within the framework of the protection of these investments does the Federal Supreme Court consider the special permanence of these rights to be justified. This two-stage transfer – from marital rights to concessions, which are then limited in time – is generally without compensation.

However, the narrow category of **vested rights** cannot be the only form of claims against the public authorities that fall within the scope of protection of the guarantee of property rights. It therefore seems reasonable to assign the relatively marginal subcategory of rights that are resistant to legal changes to the scope of protection of the guarantee of property, to designate them as well-established rights and thus to distinguish them clearly in terms of terminology, and to continue to search for the necessary "density" that property interests vis-à-vis the public authorities must have in order to be protected by fundamental rights. 65

d. In particular: property interests vis-à-vis the state

The question of the extent to which **property interests vis-à-vis the state** should be protected against state interference must be answered in the same way as the question of the extent to which property interests *per se* should be protected. Where these are assigned to the scope of protection (see above, n. 57), this must also apply to property rights vis-à-vis the public authorities. The state is omnipresent in our lives, and the property claims we have against it are central to the autonomy, provision, and dignity functions of property. The practicality of the very broad scope of protection that this creates can be ensured by not imposing excessive restrictions. An example of this approach can be found in BGE 140 I 176, in which the introduction of a municipal tax on second homes led to a certain de facto pressure to use them for tourism. The Federal Supreme Court readily assumed that the guarantee of property was affected, but protected the municipality's action as a legitimate intervention to reduce demand for second homes and increase the utilization of existing homes. 66

Assets Claims against the state therefore fall within the scope of protection of the guarantee of property once they exist. Conversely, the guarantee of prop- 67 erty does not **in principle confer any claim to positive state benefits**, in contrast to the right to emergency assistance (Art. 12 FC). On the other hand, the guarantee of property rights does – like all civil liberties – confer an indirect duty to protect, i.e. a duty to intervene where property is endangered by private individuals. However, case law on intervention – for example in cases of squatting – shows that such a duty to protect is only assumed on a subsidiary basis and with great restraint.

e. De facto interests

68 The last ambiguity discussed in depth here, which also goes back to the question of whether property is protected per se, concerns **de facto interests**, such as the interest in allowing traffic on the street where a gas station is located. Such interests are part of property, because where they are diminished, the person concerned is effectively poorer. However, factual interests are not protected by a specific legal title or a specific right of ownership. They are protected by law, if at all, by their attribution to the scope of protection of the guarantee of property rights. In this respect, the debate on the protection of factual interests has a circular aspect, because their attribution to the guarantee of property makes them more than merely factual interests, namely interests that are protected by fundamental rights – and in this respect also rights. Conversely, an interest cannot be part of the scope of protection of a fundamental right as long as it is only protected in fact and not also in law. For a long time, there was a conflict between case law and the majority of legal scholarship on this issue. Legal scholars argued that it was not so important whether an interest was legally protected or merely factual; what was more important was how essential the "freedom position" was for those affected by the interference. The Federal Supreme Court finally conceded that factual interests also fall within the scope of protection of the guarantee of property under certain circumstances. Once again, it rejected a legal distinction in favor of an economic approach. It therefore asks whether owners are "ultimately" affected in the same way as if their legal powers were restricted. Where this is the case, even an otherwise purely factual interest counts as property protected by fundamental rights. According to the Federal Supreme Court, however, this only applies to "certain" factual interests, namely those whose restriction has the effect of depriving someone of legal powers. The Federal Supreme Court thus adopts the requirement of legal doctrine: the decisive factor is how important a position of freedom is in practical terms. The problem here re-

mains a mixing of the scope of protection and the conditions for intervention. The severity of the impact should be assessed in accordance with Art. 36 FC, not in the question of whether the scope of protection of the fundamental right is affected.

The fundamental right protection of factual interests primarily has the effect 69 that, **in terms of procedural law**, it is possible to invoke the guarantee of property in cases where this would not have been possible previously. In the landmark decision that led to the recognition of factual interests as part of the scope of protection, this improves the procedural position of those seeking justice, but not the protection of their material interests. The same applies to a subsequent decision in which the Federal Court again confuses the question of interference with the intensity of the interference and considers the fundamental right not to be affected because it lacks the necessary intensity. There are currently no examples from case law to suggest that factual interests are also better protected under substantive law against interference by the state.

f. Terminology

The broad interpretation of the scope of protection advocated here also helps 70 to greatly simplify the terminology used in the literature to define the scope of protection: it is sufficient to refer to the **sum of a person's assets** in order to describe the material scope of protection afforded by the guarantee of property rights. In particular, it is unnecessary to distinguish between rights of disposal and rights of use on the one hand, or between rights and legal positions on the other, and finally between legal and (mere) factual interests that fall within the scope of protection of the guarantee of property. The concept of subjective rights also loses its importance (in the context of the scope of protection of the guarantee of property), because the quality of goods can only have something that is protected by subjective rights vis-à-vis third parties; since these rights themselves have economic value, i.e., are themselves goods, they also fall within the scope of protection of the guarantee of property.

g. Data

Does data fall within the scope of protection of the guarantee of property 71 rights? Data is a clear example of the limitations of a guarantee of property rights, which remains closely linked to ownership of property. As economically important as data is, it is difficult to draw convincing analogies with property law. It is **intangible** and **non-rival** (use by A does not diminish the possibilities of use by B). Both characteristics make it relatively difficult to exclude someone from sharing data. They also make it much more difficult to assign data to a person as the economic owner than other goods. Several people may have overlapping rights of use. Finally, data is becoming less and less tied to a specific data carrier. The protection of the data carrier as a surrogate for the data that is actually to be protected under property law is therefore becoming increasingly impractical. The proposal to protect data in a manner as analogous as possible to property has therefore been largely criticized in the literature. The proposal to create an exclusion right for data vis-à-vis all other legal participants (*erga omnes*) and thus a right of control over data comparable to intellectual property law, a kind of data ownership *sui generis*, has also failed to gain acceptance. The literature remains correspondingly skeptical about the approach of assigning data to the scope of protection of the guarantee of property rights. A parliamentary initiative sought to enshrine the following in Article 13 FC (protection of privacy): "[...] Data are the property of the person concerned; they must be protected against misuse." The initiative was referred to the relevant committees but was rejected by the National Council. The completely revised Data Protection Act, which came into force on September 1, 2023, strengthens in some respects the rights of the persons to whom the data relate. However, it expressly refrains from introducing data ownership, among other things because such a provision would deviate too far from the rules in the EU and its member states, whose data protection legal framework has a major influence on Swiss law.

72 The example of data illustrates the sense of including assets within the scope of protection of the guarantee of property (see above, n. 52 ff.). This makes it possible to assign not the data itself, but **property rights *in* data** to the scope of protection of the guarantee of property. Where these exploitation rights arise from a contract, they are in any case subject to the guarantee of property rights, like other contractual claims. It is also possible for different persons to have different (but not mutually exclusive) rights in relation to the same data, all of which are subject to the guarantee of property rights. Data is therefore an instructive example of the extent to which economic goods are a product of the legal system. The goods that are economically relevant are not the data themselves, but the *rights* to use data in one form or another. Data is often referred to as the "oil of the 21st century." But unlike oil, data is not an occupiable thing that provides energy regardless of the legal framework in which it is

consumed; rather, the exploitation rights to data are a product of a specific legal system. Such assets, which can only come into existence through a legal system, are becoming increasingly important in a post-industrial, increasingly digitalized society. The scope of protection of the guarantee of property rights must take this development into account.

4. Animals

Although animals are no longer considered property (Art. 641a CC), they are still covered by the guarantee of property rights. Or more precisely: **the property rights relating to animals** fall within the material scope of the guarantee of property. In the case of pets, with which there is also an emotional relationship, the right to personal freedom (Art. 10 para. 2 FC) is likely to offer more effective protection against their removal and placement with third parties than the guarantee of property. 73

IV. INTERFERENCE WITH THE GUARANTEE OF PROPERTY (ART. 26 PARA. 2 FC)

The **most fundamental distinction** in the case of interference with constitutionally protected property is that **between formal and material interference**. In the case of formal expropriation, title to property or limited rights in rem are transferred (for example, a piece of land is expropriated or an easement is compulsorily established on it). In the case of substantive restrictions on property, however, *no formal* transaction takes place; instead, the bundle of rights associated with the property is reduced (for example, by restricting the buildability of a piece of land). Formal encroachments on property always constitute expropriation and must therefore always be fully compensated. In the case of material encroachments, however, this is only the case under specific qualifying conditions in which such an encroachment is equivalent to expropriation. The terms “expropriation-like interference” with property and “material expropriation” can therefore be used synonymously. If an interference remains below the “expropriation-like” threshold, it is a material interference but not yet a material expropriation. 74

A. Relationship between formal and material expropriation

75 The constitutional protection of property would benefit if the **importance of the distinction** between substantive and formal interference with property were greatly **relativized** and it were recognized that, from an economic point of view, substantive and formal interference with property have much more comparable effects than may appear to be the case from a legal perspective. This presupposes the observation that in both cases the public authorities appropriate factors of production that they need to achieve their objectives.

76 The Federal Court took some of the edge off this distinction by developing the concept of **expropriation-like interference with property** (or **material expropriation**) in creative case law. This is considered one of the most significant achievements of case law in the area of property rights. This innovation was adopted by the constitutional legislator when property rights were first enshrined in the Federal Constitution. It is now found in Art. 26 para. 2 FC, according to which "restrictions on property rights that are equivalent to expropriation shall be fully compensated."

1. Transaction of rights

77 Despite all the possible criticism, the distinction between formal and material expropriation remains **important in practice**. This is **due to the value guarantee** that applies in principle in the case of formal expropriation, but only in exceptional cases in the case of material interference with property. This special status of formal expropriation has not been without criticism. This special position is due, among other things, to the widespread implicit notion that formal expropriation involves a transfer of rights between a private individual and the state, whereas this is not the case with material interference with property. Karlen, for example, expressly refers to restrictions on property without deprivation of rights in the case of material interference with property. However, in our view, this is a misleading idea. This criticism can be illustrated by a concept of property that understands property as a bundle of subjective rights, sees the value of property in the sum of these rights of action, and regards these rights of action as factors of production. Factors of production are rights of action in the sense that they are a necessary prerequisite for a range of economically interesting activities. According to this concept of property, a transaction also takes place in the case of a material interference with property. A partial aspect is removed from the bundle

of rights of the private individual and a partial aspect is added to the bundle of rights of the public authority.

The difference between a formal and a material intervention therefore does not lie in the fact that a transaction takes place in one case and not in the other, but in the fact that the transaction is more complex in the case of a material intervention. In this case, a partial right is not simply transferred from A to B, but B **B acquires the possibility of preventing what A was previously allowed to do**. The partial right is thus transformed into its correlate in the transaction. Where, for example, there was previously a right to cause a certain emission, after the transaction the state has the power to prevent it, etc. However, the subjective rights and their aspect as factors of production have not simply vanished into thin air. What was previously a prerequisite for a certain type of private economic activity (for example, the right to cause an emission) is now a competence of the public authorities to prevent activities of that type and thus pursue a public interest (for example, the protection of the environment). Production factors are also needed to produce this (public) good. The rights newly acquired by the public authorities through their intervention in property constitute these production factors. Without the transfer of these rights of action, the public authorities would lack this prerequisite for satisfying a public good. 78

2. Special case of state liability?

In isolated cases, the literature argues that material expropriation should be regarded as a **special case of state liability** rather than a special case of expropriation. This is primarily because compensation is a constitutive element of formal expropriation, i.e., a prerequisite for it to be lawful; the lawfulness of material expropriation, on the other hand, is assessed independently of compensation, which is its consequence, not its prerequisite. However, this position cannot ignore the fact that the constituent elements of substantive expropriation are much more closely aligned with formal expropriation than with state liability. It has clearly been modeled by the Federal Supreme Court on formal expropriation and not on state liability. The above considerations also show that the reason for substantive expropriation (as in the case of formal expropriation) is the acquisition by the public authorities of goods they need to fulfill their tasks, and not compensation for damage (as in the case of state liability). 79

3. The role of the legal basis and democratic legitimacy

80 Expropriation laws also play an important role in distinguishing between substantive and formal interference with property. At the federal level, Art. 5 EntG specifies the type of property that may be subject to expropriation. In the example of expropriation of defensive rights under neighbor law (see below, n. 87 ff.), it is decisive that the property of the defensive rights is explicitly mentioned in Art. 5 EntG. The boundary between a formal and a material restriction of ownership can therefore also be drawn by **explicitly mentioning** certain aspects of ownership (as opposed to others) **in the law**. The Federal Supreme Court states on this point:

“Whether an encroachment on property is to be regarded and treated as formal or material expropriation is therefore determined primarily by whether the expropriation law applies and whether the rights claimed for a work in the public interest must be acquired in formal expropriation proceedings (...).”

81 This distinction gives the distinction between formal and material expropriation a component of **democratic legitimacy**. The degree of democratic legitimacy results in the following cascade order:

- Where a law redefines property, no interference with it is assumed.
- Where a law or plan creates a basis for a specific interference with property, a substantive restriction of property is assumed.
- Where only an expropriation law serves as the basis for the interference, only the formal expropriation of corresponding valuable rights can be considered.

The less concrete or direct the democratic legitimacy for a restriction of property is, the greater the protection of the owners in principle, in the sense that formal expropriation is assumed and thus the value guarantee and the other protective mechanisms of the expropriation procedure apply.

82 The strong orientation of formal expropriation towards the categories of the Expropriation Act also means that various situations in which property is taken away by the state do not constitute formal expropriation. This applies, for example, to **requisitioning** (Art. 80 para. 3 of the Military Act, MG, and Art. 58 of the Civil Protection Act, BZG), **confiscation**, and **land redistribution**. Although they may give rise to claims for compensation, they are treated, if at

all, only as material interference with property. In these cases, the payment of compensation is a consequence, not a prerequisite for an interference with property.

B. Formal expropriation

Formal expropriation is **a qualified restriction of property**. However, it is not primarily the intensity of the interference that qualifies it as such, but rather formal elements that lead to additional constitutive conditions for the interference. The following elements are mentioned in legal doctrine: 83

- Deprivation of a property right;
- By unilateral sovereign act;
- In a special procedure;
- To fulfill a specific public task.

This results in the additional condition of full compensation, which is constitutive for formal expropriation. According to the bundle of rights approach outlined above (n. 77 f.), the difference between a formal and a material restriction of ownership is not the transfer of a property right from private individuals to the public sector. Nor does the difference lie in the purpose of fulfilling a public task. Both are also the case in the context of a material restriction of ownership. At most, the public task to be fulfilled is more specific in the case of formal intervention (it concerns the construction of precisely this section of a road, etc.), but this is only a gradual distinction. The difference therefore lies primarily in the fact that formal expropriation involves a **special procedure** in which property must be acquired, and that this procedure may be based on an expropriation law or other specific **expropriation provision**.

Formal expropriation can **not only** be used to deprive someone of ownership of property and other (limited) **rights in rem**, but also of legal positions, mandatory rights and acquired rights under public law that derive from ownership of property. There are therefore certain material interests that are so formalized that they are considered components of constitutionally protected property and must be withdrawn in a special procedure in return for full compensation, while others can be removed without compensation up to the intensity limit of expropriation-like restrictions on property (see n. 104 ff. below), provided that the requirements of Art. 36 FC are met. The gradual dif- 84 ference between interests that are considered so entrenched that they can only be withdrawn through formal expropriation and those whose withdrawal is only considered a material interference shows that there is no qualitative difference between formal and material interference with property, but only a gradual one.

85 Insofar as it does not concern rights but rather property, formal expropriation serves primarily to acquire land. Accordingly, federal law – unlike the law of individual cantons – does not provide for the expropriation of movable property.

86 In the case of formal expropriation, full **compensation** is a **constitutive prerequisite** for expropriation. In the case of material expropriation, however, it is the consequence of an intervention.

1. Practically important constellation of formal expropriation I: neighbors' rights of defense

87 In the case of expropriation of neighbors' rights of defense, the neighbors of a public work that causes excessive emissions (e.g., an airport or a road) are deprived of the **possibility of bringing an action under private law to have the disturbance stopped** (Art. 679 and 684 CC). This is considered a variant of formal expropriation. It is mainly used for traffic noise caused by public works, but can in principle be applied to all impacts, including intangible ones. Neighbors are defined as anyone affected by an immission, even if the affected properties are several kilometers away from the public work. It is sufficient that the immission is a consequence of the use of the public work. A change in the technological framework and thus in the group of people affected by immissions therefore also means a change in the group of "neighbors" and the updating of defensive rights that did not previously exist because there was no interference between the two properties in question.

88 As is typical for formal expropriation, a previously existing defensive right against the state is replaced by a right to compensation. The guarantee of continued existence is replaced by a guarantee of value. However, the withdrawal of neighbors' rights of defense is only compensated if additional, high, and flexible requirements are met. These criteria are the **lack of predictability** of the excessive impact, **its specificity**, and **the severity** of the **damage** caused by it (see below for these criteria).

In the case of immissions caused by **construction work** on public works, the conditions for compensation applicable under civil law are applied analogously. In the case of construction work, civil law also only provides for a claim for compensation and not for injunctive relief (see Art. 679a CC). This means that the criteria of specificity and severity of the damage do not apply in this case. 89

a. Predictability, specificity, and severity

Where a person acquired a piece of land at a time when it was already **foreseeable** that a public work would be carried out in the future that would impair the value of the land, the Federal Supreme Court does not consider this to be an interference with property rights that gives rise to compensation. For neighbors of national airports, the criterion of unpredictability is only met if they acquired their property before 1961 (or if the property has only passed into their possession since then by inheritance). 90

The requirement of **specificity** of the impact is met if the emissions reach an intensity that exceeds what is customary and reasonable. The "emission limits set out in federal environmental protection legislation" regularly serve as a reference point for this specificity. 91

The criterion of the **severity of the damage** asks what impairment is actually and causally caused by the specific nature of the emission on the property in question. It is only fulfilled if the damage affects a certain percentage of the total value of the property. Where, for example, a property can only be used for commercial or agricultural purposes, even a specific impact may not cause significant damage. The Federal Supreme Court has rejected the idea of setting a fixed percentage limit for damage in relation to the total value as impracticable. 92

The point at which these three criteria are deemed to be met (and encroachments are therefore to be regarded as expropriation subject to full compensation) must necessarily be determined by drawing a **more or less arbitrary line**. From this point downwards (a fixed altitude for overflights, a decibel limit, etc.), the restriction of property changes from "formal" to 'material' and from "fully compensable" to "to be accepted without compensation." Expropriating authorities have occasionally pointed to the "proximity and similarity" between material encroachments on property and the formal expropriation of neighbors' defensive rights in order to set the threshold for the severity 93 of the damage relatively high. The Federal Supreme Court, on the other hand, has upheld the difference between these constellations and thus also the principle of full compensation for the expropriation of defensive rights. At the same time, however, it also upheld the criterion that these are only decisive once the damage reaches a certain level of severity. In doing so, it set the threshold for compensation lower than in the case of material expropriation, but nevertheless consolidated the proximity and similarity to expropriation-like restrictions on property.

94 This compromise solution, which seems strange at first glance, can be explained from an economic perspective. The expropriation of neighbors' defensive rights involves replacing a claim to injunctive relief with a claim to compensation, thereby overcoming a veto position against the fulfillment of public tasks and replacing it with a claim to compensation. In other words, it is a matter of significantly **reducing the transaction costs** for the transfer of production factors from private individuals to the public sector, and thus reducing the costs of fulfilling public tasks.

b. Compulsory easement?

95 The Federal Supreme Court is of the opinion that the expropriation of neighboring rights constitutes the **compulsory establishment of an easement**, i.e., the formal withdrawal of a right in rem. This easement takes two forms:

96 The first form concerns special cases in which aircraft fly so low and so directly over a property that physical intrusion into the property itself (into the air column belonging to the property) is assumed. This is the case, for example, when overflights not only cause noise but also other emissions such as air turbulence that tears off roof tiles, falling chunks of ice, the smell of kerosene, or vibrations. In such cases, the easement is based on tolerance of physical intrusion into the property. Accordingly, the criteria of foreseeability, specificity, and severity are not required in this constellation.

97 In the second form, the overflight is less low or direct, so that noise is the significant immission. In such cases, the easement is based on a waiver of the neighbor's rights of defense. Some legal scholars believe that this second form of a compulsory easement is a **problematic fiction**. Civil law claims for defense cannot be asserted against the sovereign community (the situation is different in the case of a work that is part of the financial assets of the public

sector). In essence, this is a material expropriation. This is supported by the fact that compensation is not paid for the full value of the expropriated right, but rather for the difference between the value before and after the harmful effect arose, and that compensation in this context is a consequence, not a prerequisite, for the withdrawal of rights. Another thing that's not typical of formal expropriation is that it happens through a real act, not through a legal act like it usually does. Finally, there's no transfer of rights to the expropriator, the public sector.

As the above explanations (n. 77 f.) have shown, this last point is not convinc- 98
ing. By expropriating a defensive right, the public authority has **acquired a right to interfere and thus a factor of production** to fulfill a public task. However, this view also leads to a blurring of the boundaries between formal and material interference with property. In any case, the Federal Supreme Court has adhered to its “dogmatically not entirely uncontroversial” construction of the compulsory establishment of an easement. It can base this on Art. 5 EntG, which explicitly mentions neighbors' defensive rights (albeit in addition to rights in rem) as a possible object of expropriation.

c. Scope of the value guarantee

As in other contexts of expropriation law, there is a tendency in the expropri- 99
ation of defensive rights under neighbor law to refrain from compensating for the interference because the public authorities would **otherwise only be able to perform a public task with difficulty**. For example, it was argued early on that the constant increase in motor vehicles required the construction or widening of roads. If the public authorities had to compensate residents for the damage caused, they would in most cases be financially unable to provide this infrastructure service.

The argument that the public authorities would no longer be able to perform 100
a task if they had to compensate for the associated negative external effects is problematic. An important aspect of the guarantee of value as a special component of the guarantee of property rights is precisely that it requires the public authorities to **price in** the **external effects** of their activities or infrastructure (see n. 111). If it is pointed out that the public sector would no longer be able to perform a task if it had to internalize the external effects, this indicates that the overall social benefit of the activity in question is questionable

and that it is therefore an activity of the public sector which, if effectively internalized, would have to be discontinued.

101 **Real replacement benefits** in the form of construction measures (e.g., noise protection measures) can both reduce the damage and protect the residents of the affected property. Where possible, such measures must also be ordered in expropriation proceedings even if they have not been requested. More recently, the Federal Supreme Court has explicitly established the principle that scarce public funds should be used to prevent emissions at source or, secondarily, for passive protection at the point of immission (e.g. through noise protection measures). Distributing money to individual landowners is not an effective means of dealing with the widespread emissions of public works.

2. Practically important constellation of formal expropriation II: vested rights

102 Vested rights – despite all the uncertainty surrounding them (see above, n. 60) – are characterized by the fact that they can in principle **only be withdrawn in a formal expropriation**. This means that full compensation is owed if their "substance" is interfered with. This understanding is reflected in the law, for example in Art. 43 para. 2 of the Water Rights Act (WRG), which provides that "once granted, the right of use [...] may only be withdrawn or reduced for reasons of public welfare and in return for full compensation."

103 Recently, an important group of acquired rights – **marital rights** to environmental resources such as water – have been deprived of a large part of their protective effect because they are treated in the same way as concessions (see n. 63 f. for details). As a result, this case law represents a shift from formal expropriation to material restriction of ownership. What were previously well-established rights are now special rights of use granted for a limited period. This rolls back the protective effect of the value guarantee.

C. Material expropriation

104 Material expropriation differs from formal expropriation in that the acquisition of a property right is not the aim of the state action, but rather a **secondary consequence** of a public action aimed at a different goal. According

to the concept advocated here, however, a right of value is nevertheless transferred to the public sector (see above, n. 77).

For encroachments on property that are considered material, the **principle applies that they must be accepted without compensation**. The value guarantee therefore plays no role in this constellation. The prerequisites and consequences of an encroachment are comparable to those for other civil liberties (see below, n. 127 ff.). 105

Case law has developed **two exceptions** to this principle of no compensation, which are referred to as expropriation-like encroachments on property or material expropriation. According to the established case law of the Federal Supreme Court, these constellations exist 106

"if an owner is prohibited from using his real property in the manner he has used it in the past or in a manner he can reasonably expect to use it in the future, or if such use is particularly severely restricted because he is deprived of an essential right arising from ownership (first variant of material expropriation). If the interference is less far-reaching, a restriction of ownership may, in exceptional cases, be equivalent to expropriation if a single or a few property owners are affected to such an extent that their sacrifice appears unreasonable in relation to the general public and would be incompatible with the principle of equality before the law if no compensation were paid (...)."

This passage from the Federal Supreme Court is known as the **"Barret formula."** This formula was developed from the Barret decision of 1965. Following a period of fluctuating case law on material expropriation, this formula has remained unchanged since its establishment in the 1970s.

According to Dubey, this formula and subsequent case law give rise to **two positive and two negative criteria** that must be cumulatively fulfilled for material expropriation to exist. The positive criteria (related to the criteria for formal expropriation of neighbors' defensive rights, see above, n. 87 ff.) are the severity of the restriction and the actual damage incurred. The two negative criteria are that the intervention is not motivated by police considerations (such interventions are generally acceptable without compensation) and that it does not constitute a legal concretization or redefinition of property. In the latter case, the material scope of protection of property is redefined. In this respect, there is not even an interference with the scope of protection. 107

1. Positive criteria

108 The necessary **severity of** the damage can be achieved in **two different constellations**, either through the particularly severe restriction of a property right or through the special sacrifice (for this term, see immediately below, n. 111), i.e. by the severity of the interference in relation to other owners in a comparable situation, in other words, when a component of legal equality is added to the restriction of property.

109 However, there is no material expropriation if owners are only theoretically affected in their future possible rights of use. A restriction must be imposed on **actual use that is currently exercised or likely to occur in the near future**. The typical case for this last constellation is the withdrawal of the possibility of building on land that is already ready for development.

110 The threshold for material expropriation is set high. According to the Federal Supreme Court, it is only reached when the essential possibilities of use flowing from ownership are removed. This is typically the case when building on the land is made completely impossible. On the other hand, even serious restrictions on the possibilities of use are not treated as expropriation if an economically reasonable use of the property in question remains possible. The decisive factor is not the difference between the potential return without the restriction in question and the actual return, but whether economically viable use remains possible at all. Rezoning and even zoning out therefore do not generally constitute expropriation, provided that economically viable use remains possible.

111 The function of the second constellation, that of the **special sacrifice**, is not easy to grasp. On the one hand, there are hardly any cases in practice in which the existence of a special sacrifice has been recognized. The legal construct therefore primarily has a dogmatic function. However, it is not entirely clear *what* dogmatic function it fulfills. The mixing of the value guarantee, which is a unique feature of the guarantee of ownership (see above, n. 26), with elements of legal equality does little to contribute to dogmatic clarity. In isolated cases, the literature argues that the lower threshold for the value guarantee to apply fulfills a pricing function for external effects caused by state action. Because individual affected parties, unlike large interest groups, are unable to organize politically and achieve internalization through political channels (e.g., through subsidies that could offset the burden), they must be compensat-

ed as expropriated parties so that the public sector must price in the costs of its actions. The concept of special sacrifice is therefore primarily a guiding principle. It is a warning that the compensation threshold is reached more quickly, at least in theory, when those affected are treated unequally.

One of the rare cases in which the Federal Supreme Court has actually recognized a special sacrifice constellation is the construction of flood protection measures, for which the canton acquired private land, among other things with the aim of improving the usability of other private land. Another situation that is repeatedly mentioned as a possibility for special sacrifice is **monument protection**, where a particularly worthy object is placed under protection as an example and the owners of this object must therefore make a sacrifice for the general public. 112

2. Negative criteria

Even where these positive criteria are met, a restriction of property rights must be **accepted without compensation** if a) the intervention is carried out for police reasons and b) it is not treated as an intervention but as a rewriting of the scope of ownership. 113

a. No compensation for police interventions

The first negative criterion for the existence of material expropriation is the police motivation for an intervention. Legal doctrine has repeatedly criticized this principle, which is why the Federal Supreme Court has severely restricted it in the further development of its case law. Thus, only those restrictions that are necessary within the meaning of the principle of proportionality to avert an imminent danger are acceptable without compensation, but not orders that go further. Finally, case law has 114

"reserved three possible exceptions to the principle of no compensation for restrictions on property rights of a police nature in the narrow sense. These are: cases of a building ban imposed not only for police reasons but also for reasons of spatial planning, the case of a ban on an existing use, and the case in which the creation of a protection zone results in the rezoning of land ready for development or roughly developed land or is equivalent to such rezoning."

115 The question of compensation for police interventions may also arise in the context of **confiscation** (see Art. 69ff. SCC; Art. 376ff. CrimPC or Art. 31 para. 1 Weapons Act), which is considered a material interference with property. This question arises in any case if the confiscation is not intended to have an additional punitive character. Here, the principle of proportionality requires that the mildest possible means be chosen. This means that where confiscated items can in principle be sold, they must be sold and the proceeds handed over to the original owner. This may be the case, for example, with illegally acquired weapons that can, under certain circumstances, be sold legally.

116 One problem with not compensating for police-motivated interventions is that it is often unclear how **police purposes can be distinguished from other purposes**, and that a police purpose is often only one of several purposes, for example in the case of forest clearances or water protection regulations. If the restriction on use primarily serves to protect the property owners themselves (e.g., a building ban in an avalanche zone or in forest buffer zones), no material restriction on property is assumed. This also applies if the danger comes from third parties. In this case, claims for damages against them are possible. Where, on the other hand, the police-motivated restriction serves to protect a public work (e.g., the water supply of a municipality), it is to be treated as any other material interference with property, even if it is directed against the disturber.

117 This differentiated practice has also been criticized in legal scholarship. Some suggest abandoning the distinction between police and non-police purposes and instead asking whether the interference serves to protect the affected owners themselves or third parties. Others want to prevent compensation in the first instance when it comes to protection against natural hazards or hazards emanating from the property itself. Here, too, the question arises as to whether it would not be more sensible and simpler to treat state action that serves to avert an immediate and serious danger as a concretization rather than a restriction of property. This is because actions that pose a serious threat to public property – whether to the owners or to third parties – have never been part of the bundle of rights protected as property. In this respect, state action merely clarifies what was already the case. It would then be working with a **fiction** that the corresponding rights of action were, strictly speaking, never part of the bundle of rights known as "property." This fiction would

then be comparable to that applied when zone regulations compliant with federal law were first created (see n. 121).

b. No redefinition of the content of ownership

Material restrictions on property can take a variety of forms of state action: 118
through individual, concrete acts of law enforcement, through real acts or through a zoning and land use plan, and finally through legislation. The Federal Supreme Court has a strong tendency (and in this respect follows the theory of immanence) to treat restrictions on property through legislation **not as encroachments but as redefinitions** of the content of property. It thus expresses the view that restrictions on the rights of action arising from property (and even more so interventions tantamount to expropriation) through legislation are only recognized as encroachments on the guarantee of property in exceptional cases. These exceptions again concern particularly unequally distributed effects of regulations that hit individual owners particularly hard.

Cases in which the powers of owners are restricted by general abstract state 119
action to such an extent that a restriction equivalent to expropriation would have to be assumed are usually mitigated by **transitional periods, exemptions, and similar measures**. The Federal Supreme Court recognizes these as compensatory measures to mitigate the severity of a restriction on property rights. The protection of investments already made (which can be derived from both the guarantee of property rights and the protection of good faith) is also relevant in such cases and may justify placing those who already carry out a certain activity in a better position than those who only wish to do so. In particular, generally binding restrictions on property that are based on the Federal Constitution or federal laws are predominantly regarded as a redefinition of the content of property and must therefore be accepted without compensation insofar as they do not constitute an encroachment on the scope of protection. However, it is not entirely clear (and also logically impossible to clarify, see above, n. 40) in which cases a change in the legal situation is treated as an encroachment on property and in which cases as a rewriting of property. For example, the Federal Supreme Court appears to treat a ban on slot machines, a limitation on livestock numbers (and thus the operational futility of larger livestock buildings) and, most recently, a ban on electric heating as encroachments on property (to be accepted without compensation), but the ban on second homes as a rewriting of property.

120 A special and practically important form of rewriting property has recently been introduced by case law in relation to **water rights**, which play a particularly important role in the context of hydroelectric power generation. Due to the otherwise unpredictable size of compensation claims against the public sector, a special feature applies here in that the renovation of existing power plants only had to be carried out to the extent that the public sector did not yet have to pay compensation for material expropriation (so-called renovation up to the compensation limit in accordance with Art. 80 para. 1 of the Water Protection Act, GschG). In addition, until recently, there was the legal concept of marital and therefore well-established water rights. If these were withdrawn, this was only possible as formal expropriation and therefore with full compensation. In BGE 145 II 140, the Federal Supreme Court has now largely abolished the protective effect of marital water rights (see above, n. 113).

121 **Interference through planning:** Between material interference with property through legislation and interference through individual, specific application of the law or real acts lies material interference through a land use or zoning plan. In practice, this is an important distinction because almost the entire value of a property depends on whether it can be built on. The entry into force of the Spatial Planning Act (RPG) in 1980 forced municipalities to significantly reduce their building zones and thus to rezone many properties. In this situation, the fiction was used that the creation of a new zoning plan that complied with federal law meant non-zoning if it did not allocate land to a building zone, even if the land could have been built on under the old zoning plan. However, if a plot of land is no longer designated as building land in a subsequent revision of the zoning regulations, this is generally considered to be a **rezoning** and may therefore be subject to compensation. This also applies if this (renewed) adjustment of the zoning regulations is determined by federal land use regulations and is the reason why a further reduction of building zones is necessary, for example because the population has not developed as predicted in demographic terms or because the building zone capacity has been increased through densification. Rezoning also occurs if a property is located in a building zone that complies with the new land law but is subject to a building ban due to a planning measure. A partial restriction of the possibility of development is referred to as **downgrading**.

Non-zoning: Non-zoning is regarded as a concretization of ownership and not as an encroachment on ownership. This is only deviated from in very special cases, for example if the owner 122

"owns buildable or roughly developed land that is covered by a [general sewerage project] GKP that complies with water protection law, and if he has already incurred considerable costs for the development and construction of his land, whereby these conditions must generally be met cumulatively. Furthermore, other special considerations relating to the protection of legitimate expectations may be so significant that a property would have had to be zoned under certain circumstances. A zoning requirement may also be affirmed if the property in question is located in a largely built-up area (Art. 15 lit. a RPG). Such circumstances could possibly have necessitated zoning, so that the owner could have expected with a high degree of probability on the relevant date that he would be able to develop his land on his own (...)."

Cases in which non-zoning constitutes an encroachment on property usually concern plots of land in a special location which, although largely built-up or located in a built-up area, are to be kept free for one or other public interest, such as wedges between a traffic axis and a body of water. Non-zoning may also include classification in a zone where any development is effectively impossible (e.g., in a zone for buildings in the municipal interest).

In the case of both the curtailment of property rights by legislation and by planning, material expropriation is therefore only recognized in practice in cases where it affects individual owners in a particularly significant way and where legal equality also plays a role. It is in the nature of legislation that it rarely, or at least much less typically than a land use or zoning plan, creates such special sacrifices because it is more general and abstract (the land use or zoning plan lies between the general-abstract and individual-concrete forms of administrative action) and therefore tends to affect all those concerned equally. It is therefore **difficult to find cases** in which a **restriction of ownership equivalent to expropriation through legislation** has been recognized. An older example may illustrate the exceptional nature of such constellations: a private archaeological collection, which was practically unique in its kind, was subject to restrictions on disposal under the cantonal cultural property law. The Federal Supreme Court considered that this constituted material expropriation (based on special sacrifice, among other things). Apart from such rare cases, compensation for restrictions on property rights equivalent to 123 expropriation has hardly played a role in practice outside of spatial planning law.

124 **Value capture:** The counterpart to material expropriation is value capture by the community. This comes into consideration when land has increased significantly in value as a result of planning measures. A large part of the value of land ownership is socially produced, i.e., it would not exist if the community had not taken action, made plans, and established infrastructure and a legal system. While this applies to all forms of property, the effect is particularly striking (and particularly easy to measure) in the case of changes in value resulting from spatial planning on land.

125 It is therefore also in this context that the federal government has established a **set of instruments for capturing** added value created by planning measures (Art. 5 para. 1 RPG). With the revision of the Spatial Planning Act in 2012, these requirements were specified and tightened (Art. 5 para. 1^{bis}-1^{sexies} Spatial Planning Act). The added value of significant planning advantages must be skimmed off with a levy of at least 20%. The levy is not payable immediately, but only when the land is developed or sold (Art. 5 para. 1^{bis} RPG). The proceeds from the value capture are to be used primarily to compensate for material expropriations resulting from spatial planning (Art. 5 para. 1^{ter} RPG). A cantonal regulation that prohibits municipalities from skimming off the added value of further planning measures (such as rezoning and reclassification) is contrary to federal law, as it prevents municipalities from skimming off added value in a legally equitable manner. Exemptions of CHF 50,000 also violate the principle of equality before the law (the Federal Supreme Court assumes a guideline value of CHF 30,000 for the admissibility of such exemptions). As long as the canton does not exercise its power to skim off added value, it cannot prevent the municipalities from exercising this power themselves.

3. Summary

126 In all important conflicts of use in which the public authorities have restricted property rights in order to moderate these conflicts, the **courts** have responded by **developing concepts** that allow the scope of the value guarantee to be severely restricted. This applies in particular to land and water. Examples of such innovations in case law include the fiction that land has never been zoned, the rewriting of ownership, the replacement of perpetual rights with

temporary rights, and the principle of no compensation for police interventions. However, this flexibility of a principle of full compensation that is laid down in the constitution is not unique to restrictions on material property. In conflicts of use that are primarily resolved by means of formal expropriation (such as dealing with traffic noise, see above, n. 87), similar techniques have been developed (for example, the predictability of the impairment of property) that greatly restrict the range of constellations in which compensation is payable. What is striking in this respect is the variety of instruments that have been developed to limit the scope of the **value guarantee**.

D. Conditions for intervention

In principle, the guarantee of property is a classic freedom right that can be restricted in accordance with the general conditions set out in Art. 36 FC. The following remarks are limited to those aspects in which the conditions for intervention in the guarantee of property differ from the general conditions set out in Art. 36 FC. 127

1. Legal basis

The **difference between a serious and a minor interference** with property is primarily relevant because only in the former case is a legal basis in the formal sense required. Otherwise, a legal basis in the material sense is sufficient, i.e., a general abstract basis which, in turn, may be based on a delegation norm in a law in the formal sense. It should be noted that the requirements for a serious interference and for an obligation to pay compensation are not identical. 128

Whether a sufficient legal basis exists is a question of federal law and, as such, a question that the Federal Supreme Court examines with **unrestricted jurisdiction** (as it does the question of proportionality and the permissible public interest). 129

A typical scenario involving interference with the guarantee of property rights is interference based on **building and zoning regulations**. These are considered a legal basis in the formal sense if they have been adopted by the voters and are themselves based on a cantonal law. 130

131 The Federal Supreme Court has recognized a **serious interference** with the guarantee of property in the following situations:

- when real property is compulsorily expropriated, or
- when the previous use is made impossible or severely restricted.
- The transfer of a small part of the property (e.g., for a riverside path) also constitutes a serious encroachment, but not the clearing of a stream that runs across the property, which, although it leads to construction work and a change in vegetation, does not alter the buildability of the property.
- The exercise of a right of first refusal also constitutes a serious encroachment.

These case groups were developed on the basis of questions relating to real property, but can also be applied analogously to other property rights that fall within the scope of protection of the guarantee of ownership.

132 As a rule of thumb, interference is only **minor** if a plan, legal provision, or act of law does not prohibit the development of a property per se, but rather defines the type of development that is possible, such as prohibiting development right up to the property line, and in general also when a building line is specified. If the distance regulation restricts the use of the property more severely, for example by making it impossible to fully utilize the floor area ratio, this may also constitute a serious interference. A minor interference also exists if the community can determine 15% of the tenants for properties it subsidizes, or if a certain proportion of a property must be reserved for a specific purpose (e.g., residential use).

133 The guarantee of ownership places a special requirement on the legal basis: it must also specify **which community is competent for expropriation**. The legal basis must specify, for example, whether only the canton or also the municipalities are authorized to expropriate. Which public authority expropriates may also have an impact on the severity of the interference, because this may determine, for example, whether real compensation or monetary compensation is possible.

2. Public interest

134 The Federal Supreme Court assumes that, in principle, **any public interest** may be considered grounds for interference with property, provided that it is

not purely fiscal in nature. This practice is criticized in legal literature from two different perspectives. On the one hand, it is considered too generous, such that the guarantee of property loses its limiting function vis-à-vis the legislature. On the other hand, the fundamental exclusion of fiscal interests is criticized as no longer appropriate.

135 What constitutes **fiscal interests** in the case of interference with property cannot be answered in isolation from the scope of protection of the guarantee of property rights. If the assets themselves or the sum of the property rights constitute the scope of protection of the guarantee of property rights, then it follows that taxation also constitutes an interference with property rights. Insofar as taxation is primarily carried out for fiscal reasons and must be carried out for such reasons, it would be unrealistic not to include it among the permissible public interests. This argument already applies because the Federal Supreme Court treats confiscatory taxation as an interference with property. The above (n. 52 ff.) has shown how weighty the reasons are for including assets within the scope of protection of the guarantee of property. However, this also means that a more differentiated solution must be found than simply declaring fiscal interests to be inadmissible in principle. It would therefore make more sense to exclude fiscal interests from those measures of intervention that serve to secure fiscal interests and comply with the principles of taxation. Typically, a fiscal interest will only be relevant for interventions in property as such, not for interventions in specific assets (e.g., a particular piece of land). Fiscal interests are therefore inadmissible in any case for expropriations (in the formal sense).

136 Furthermore, it is unclear according to which criteria **permissible and impermissible public interests could be distinguished**. This applies in any case where the public interest is not aimed at abolishing the institution of property and the decentralization of production factors (guarantee of institutions, above, n. 27 ff.). Where courts substitute their judgment on the appropriateness of public interests for that of the legislature, they must in any case do so with the utmost restraint. Greater protection for property than that afforded by the public interest is therefore to be expected from the principle of proportionality (see below, n. 139 ff.). The more doubtful the public interest in an intervention, the more likely it is that its proportionality will be called into question. The same applies to the guarantee of institutions (see above, n. 27 ff.): the more a public interest leads not only to an intervention in, but to an

actual undermining of the institution of private property, the more likely it is that the guarantee of institutions will apply.

137 It is undisputed that with the increase in public interests due to new scarcity relations (e.g., with regard to resources used to protect the climate), the **basis for an interference** with property **also increases**.

138 At the **time** of the interference with property, a public interest must still exist. It must still be possible to pursue this interest in a meaningful way through the interference with property.

3. Proportionality

139 Although the Federal Supreme Court freely reviews proportionality, it imposes a certain degree of restraint on itself where the intervening authority has its own discretion or where local circumstances are decisive for assessing proportionality.

140 The Federal Supreme Court does not impose **excessively high requirements** on proportionality. Cases in which it has rejected an encroachment on property on grounds of disproportion are relatively rare.

141 The **balancing of** public and private interests is **restricted** to the extent that a federal law or the Constitution itself anticipates the outcome of such a balancing. An example of this is the protection of moors of particular beauty and national importance (Art. 78 para. 5 FC). Once a plot of land has been included in the inventory of these moors, there is no longer any possibility of weighing up the interests of protection against private interests in use.

E. Consequences of interference with property

142 As shown above (n. 106 ff.), at least in the context of material interference with property, the line between interference without compensation and expropriation with full compensation can only be drawn by means of casuistry, and can probably only be drawn in this way. The fact that “reasonable” or partial compensation for interference with property is not permissible leads, in the context of material expropriation, to a very rough **“pricing”** of the price for interference. The price is 0% up to a certain intensity limit and then 100% of the value to be expropriated. In the case of formal expropriation, it is always 100%, even for minor interventions. However, reference has been made

above to various techniques developed in case law (n. 126) to reduce the scope of the value guarantee. The prerequisite or legal consequence of expropriation, namely that full compensation must be paid, must be seen in the light of this restriction.

1. The concept of full compensation

Full compensation means that the expropriation must not result in **either** 143
an advantage or a disadvantage for the expropriated person. They must be placed in the same financial position as if the intervention had never taken place. The expropriated person is obliged to take reasonable steps to reduce the damage caused by the expropriation. The Federal Supreme Court has unlimited jurisdiction to determine whether the compensation paid corresponds to the full value of the expropriated property. If only part of a property or several economically related properties are expropriated, compensation must also be paid for the **reduction** in the market value of the remaining part (for proceedings under federal law: Art. 19 lit. b EntG). The **inconvenience**, i.e. the additional expenses arising from the expropriation (moving costs and the like), are also part of the full compensation. If a company is expropriated, the question of compensation for **lost profits** also arises, and in particular the question of how long this compensation must be paid before it is possible to engage in another profitable activity. The Federal Supreme Court therefore generally limits compensation for profits to a certain period of time, unless, in exceptional cases, it is not permissible to take up a new gainful activity or it is foreseeable that the same profits cannot be achieved in the future.

In expropriation proceedings based on the Expropriation Act, the full value 144
must be compensated, but no more than the full value. Federal law does not provide for an **"involuntary surcharge"**; such a surcharge may therefore not be paid in proceedings governed by federal law. This does not prevent the cantons from paying a higher amount than the actual damage under their own expropriation law in certain circumstances. However, such additional payments must be compatible with the other guarantees of the Constitution, in particular the principle of equality before the law, with which they may conflict. Federal law also does not preclude the cantons from providing compensation for material interference with property that does not yet amount to expropriation.

2. Form and assessment of compensation

145 As a rule, **compensation is paid in cash**. Art. 26 para. 2 FC only grants a claim to cash payments. However, the law may provide for compensation in kind or benefits in kind (see, for example, Art. 18 EntG). Under certain circumstances, it may be appropriate and possible to supplement cash payments with benefits in kind (e.g. in the case of noise abatement measures). In the case of formal expropriations, the appraisal commission must decide on the form of compensation.

146 The **assessment of compensation** can in principle be carried out using an objective or a subjective method. The objective method determines the market value of an item, while the subjective method determines the (economic) value that a deprived asset has for the expropriated person (income value). The method that is more favorable to the affected party must be chosen; a combination of the two methods is generally not permitted. The subjective method is particularly appropriate in cases where the value of the continued use of an asset for the expropriated person (viewed objectively) is higher than the sum of money that could be obtained by selling the property, or in other words, if the income from continued use is greater than what could be obtained by selling it on the market. This is the case, for example, when non-relocatable businesses are closed down. The term “subjective damage” is criticized by some legal scholars as misleading, because it could be understood to include the emotional attachment of those affected or mere expectations or hopes. However, this is not the case. The subjective method (like the objective method) merely asks for the monetary value of an item, even if this is determined differently, namely according to the value of its continued use rather than its value upon sale.

147 There are various methods for **estimating the value** of the expropriated item. The expropriating authority has considerable flexibility in applying these methods and combining them. The combination of different methods serves to validate the respective appraisal results. Priority is given to the **comparison method**, in which the value of a property is determined on the basis of market prices for comparable properties. The comparison method is used to determine the market value to be paid in compensation according to the objective method. The market value is the hypothetical proceeds that could have been obtained for the expropriated property in a sale on the open market. Other methods may be necessary in special situations, particularly if it is

not possible to determine comparable prices. For example, the **income approach** is primarily suitable for properties that are held to generate income, while the **real value approach** is primarily suitable for owner-occupied residential property. The **location class method** “is based on the finding, obtained through systematic evaluation of numerous estimates, that the value of land is related to both the total value of a property and the annual rental income in a specific ratio that is the same for all properties in the same location.” It is based on the “consideration that land *as a whole* ultimately only has as much value as it allows for economic use.” The Federal Supreme Court urges greater caution with the location class method than with other methods because the profitability considerations on which it is based are partly outdated and even small differences in the initial parameters lead to widely scattered results. Particularly in the case of more complex works that affect a large number of people, have very different effects, and generate added value in addition to reduced value, the value of the expropriated property can be determined using a **statistical-empirical method** developed specifically for this problem. For example, the Federal Supreme Court has protected complex models based on large amounts of data for calculating the reduction in value caused by aircraft noise, which were developed for the area surrounding Zurich Airport, as a valuation method.

Even if these methods cannot be transferred *telles quelles* to the context of 148
material expropriation, they are also applied mutatis mutandis in this case.

With regard to the **time of assessment**, a distinction must be made between 149
formal and material expropriation. In the first case, compensation is a constitutive element of expropriation, in the second case it is its consequence (see above, n. 83). In this respect, case law assumes that, in the case of formal expropriation, the right to full compensation is only taken into account if the valuation date is close to the date on which the right was actually withdrawn. In the case of material expropriation, the decisive date is generally the date on which the measure restricting ownership takes effect. However, intertemporal issues may also arise in the case of material expropriation, particularly in protracted proceedings in the course of which the value of land, for example, may change significantly.

V. OUTLOOK

150 Property is "the framework that society erects to structure conflicts over the things we all want." Seen in this light, property has no compelling connection to physical objects, but rather concerns all economically valuable and scarce goods, including intangible goods and those provided by the public sector. Conflicts over these goods change as scarcity conditions change. If the guarantee of property is to retain its function and create new creative power for the future, it must develop a protective function for new, increasingly important goods, even if these can hardly be treated in the same way as tangible property. It must also be able to provide an **answer** to **newly emerging conflicts over scarcity**.

151 In practice, the guarantee of property rights has proven to be extremely flexible when it comes to restricting the scope of action associated with property in favor of public interests, especially in distribution conflicts over environmental resources. On this front, the guarantee of property rights seems well equipped to deal with **upcoming distribution conflicts**, especially those related to climate protection. The guarantee of property rights has proven to be much less flexible in the opposite direction, namely where it is not a matter of taking into account newly emerging public needs, but rather newly emerging private protection needs, in particular protecting functional equivalents to property rights and, in particular, land ownership. This primarily concerns participation rights in public institutions, which are often a prerequisite for material autonomy and security and which are granted and withdrawn, for example, through migration law or social security law. It is on this front that innovation and new creative courage seem necessary if the guarantee of property is to retain its function of mediating autonomy and security under changed technological and economic conditions. A central element of this progress would be a skeptical reassessment of the sharp distinction between formal and material interference with property. This distinction, which originates in the world of property law, is becoming increasingly implausible in a situation where property is playing an increasingly smaller role relative to other goods.

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FURTHER RECOMMENDED READING

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COMMENTARY ON

Art. 29a FC

A commentary by Matthias Kradolfer

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Art. 29a Guarantee of access to the courts

In a legal dispute, every person has the right to have their case determined by a judicial authority. The Confederation and the Cantons may by law preclude the determination by the courts of certain exceptional categories of case.

CONTENT

I. CHARACTERISTICS OF THE LEGAL PROCESS GUARANTEE

In its scope of application, the guarantee of legal recourse opens access to justice and includes the constitutional right to submit the factual and legal questions associated with a "legal dispute" to a court with full power of review. Thus, Art. 29a FC guarantees qualified legal protection in two respects. On the one hand, an independent court must examine the matter. On the other, judicial review is to cover all relevant aspects of a "legal dispute". However, the guarantee of legal recourse leaves open what constitutes a "legal dispute" (cf. n. 15 ff.), just as it is silent on the concrete form of judicial legal protection (cf. n. 32 ff.). It is the task of the legislature (cf. n. 2), but also of case law and academia, to clarify these open aspects of the guarantee of legal recourse. The present commentary attempts to draw elements for accomplishing this task from four contexts of Art. 29a FC (historical context [cf. n. 5 ff.], human rights context [cf. n. 9 f.], comparative law context [cf. n. 11 f.], constitutional theory context [cf. n. 13]). 1

Systematically, the guarantee of legal recourse is one of the fundamental procedural rights. However, it differs from other procedural guarantees in that it does not guarantee rights in proceedings, but the right to (judicial) proceedings. This right takes concrete form at the level of laws and ordinances, i.e. through provisions on the organisation of the court, the course of proceedings and the requirements for appeal. In this sense, the guarantee of legal recourse needs to be shaped and remains dependent on legislation in order to become effective in everyday legal life. It is true that the legislature enjoys considerable leeway in shaping the system of legal protection (cf. n. 32 ff.). However, Article 29a FC provides a binding constitutional framework for this: Judicial legal protection must be effective. Any concretisation of the guarantee of legal recourse by law or ordinance must be measured against whether and to what extent it contributes to effective judicial legal protection. 2

As a fundamental procedural right, the guarantee of legal recourse has two dimensions. On the one hand, it grants persons entitled to fundamental rights a justiciable right to qualified and effective legal protection (cf. n. 1 f.). On the other hand, in an objective-legal dimension, it obliges all state organs to work towards efficient and effective legal protection that is accessible to all per- 3 sons. In this objective dimension, it is a directive for legislation and guides the future design of the legal protection system (cf. n. 11 f.). Furthermore, it forms a point of reference for the authorities applying the law when it comes to the interpretation of indeterminate legal concepts and the concretisation of general clauses. One can think of precautionary legal protection, which must be handled in such a way that Art. 29a FC is not undermined (cf. n. 43), or the principle of good faith in procedural law.

4 According to the concept of judicial reform (cf. n. 6), the lower courts of the Federal Supreme Court implement the guarantee of legal recourse. Article 29a FC is therefore embedded in a complex network of federal law requirements for legal protection by cantonal courts and federal courts of first instance. These requirements are "authoritative" for the authorities applying the law in the sense of Art. 190 FC. The guarantee of legal recourse cannot have any direct legal effects to the extent that it is formulated under federal law, because the authorities applying the law are bound by the specifications of the federal legislature under Article 190 FC. This is why the doctrine calls it a "limping fundamental right". Where the national guarantee of legal recourse overlaps with Article 6 para. 1 of the European Convention on Human Rights (ECHR), the supremacy of the ECHR over federal law must be observed. A violation of Art. 6 para. 1 ECHR can be established and remedied here by the judiciary despite Art. 190 FC.

II. CONTEXTS OF ART. 29A FC

A. Historical background

5 Neither the first Federal Constitution of 1848 nor that of 1874 contained a fundamental right comparable to Art. 29a FC. Art. 113 para. 1 no. 3 FC 1874 did guarantee access to the Federal Supreme Court in the event of constitutional violations. However, this did not guarantee judicial protection in general, but only in specific legal disputes. Switzerland's ratification of the ECHR in 1974 fundamentally changed this situation. The case law of the European Court of Human Rights (ECHR), influenced by the Anglo-American idea of "due process", derived numerous procedural guarantees from Art. 6 para. 1 ECHR, including the right to judicial protection in criminal charges and disputes over civil claims. The concept of a civil right is defined autonomously and broadly by the ECtHR. Numerous public law matters fall under it, for example expro-

priation cases and social security disputes. This broad scope of application of Art. 6 para. 1 ECHR created the basis for an actual "procedural convention administrative law". This was a challenge for the Swiss legal system. By no means all legal disputes that had to be adjudicated by a court under international law could be submitted to a court under national law (cf. n. 7). In order to eliminate such contradictions with higher-level law, the Federal Council proposed the introduction of a general guarantee of legal recourse in the 1990s. It used Article 6 para. 1 ECHR and the guarantee of legal recourse in the German Basic Law (Article 19 para. 4 GG) as models.

The Federal Council's proposal was part of the reform of the judiciary, which 6
in turn was embedded in the project of a total revision of the Federal Constitution. The judicial reform pursued two main goals: the improvement of legal protection and the relief of the Federal Supreme Court. These priorities, which were in themselves contradictory, were to be achieved by expanding the lower courts of the Federal Supreme Court – namely by establishing a new Federal Criminal Court and Federal Administrative Court. The corresponding organisational foundations were the subject of the total revision of the administration of federal justice. The interconnections between the reform of the judiciary and the total revision of the administration of federal justice led to a remarkable state of limbo with regard to the guarantee of legal recourse. Both the electorate and the cantons clearly approved the judicial reform (and with it the guarantee of legal recourse) in the referendum of 12 March 2000. However, its effectiveness was postponed until the completion of the total revision of the federal administration of justice. Art. 29a FC did not enter into force until 1 January 2007, together with the Federal Supreme Court Act (FCA) and the Federal Administrative Court Act (FAC). Beyond this date, a transitional provision of the Federal Supreme Court Act additionally relativised the guarantee of legal recourse. Only after a two-year grace period (Art. 130 para. 3 FSCA), which was intended to give the cantons time to adapt their court organisation, did Art. 29a FC become a justiciable fundamental procedural right. In retrospect, the characterisation of the guarantee of legal recourse as a "fundamental right in instalments" thus proves to be extremely accurate.

In civil and criminal law, judicial protection was already largely guaranteed 7
before the guarantee of legal recourse came into force. The most important effects of Article 29a FC were in public law. The implementation of the guar-

antee of legal recourse completed a development process that entailed the change from the model of a judicial system primarily exercised within the administration to the model of administrative jurisdiction. Roughly speaking, three stages can be identified in this development:

- At the beginning of the 20th century, the administration of justice within the administration was the "dominant form" of legal protection in public law disputes. At the cantonal level, legal recourse usually led to the government council (executive), if necessary via an internal administrative complaint or appeal procedure. At the federal level, since the enactment of the Administrative and Disciplinary Justice Act (VDG, which entered into force on 1 March 1929), access to the Federal Supreme Court was limited to a few matters. In many matters of federal public law, the Federal Council remained the final instance of appeal.

- Part of the German-speaking administrative law doctrine was critical of this legal situation. Fritz Fleiner (1867–1937) stated clearly: "The citizen who wants to complain about maladministration and arbitrariness on the part of the administrative authorities (...) currently finds only very imperfect legal protection". The unease articulated by Fleiner about the administration of justice within the administration is in the tradition of a polemical debate about the "correct" control of administrative activity that already took place in the 19th century. While the administration of justice within the administration was suspected of not being independent, the administrative judiciary was considered the "crowning glory of the rule of law" or the "keystone" in its "vault". After the Second World War, this discussion gradually became more objective and there was a growing awareness of the importance of the administration of justice within the administration for the rule of law. At the Swiss Jurists' Conference in 1947, Max Imboden (1915–1969) and Henri Zwahlen (1911–1974) pointed out the connection between the democratic structure of the Swiss state and the model of the administration of justice within the administration.

- Initially in the cantons, then from the 1960s also at the federal level, legal protection by courts in administrative disputes gradually became established. The jurisdiction of the administrative courts was based either on a general clause with a list of exceptions or on an enumerative list of contestable disputes. Where the broad scope of application of the guarantees of the ECHR (cf. n. 5) overlapped these jurisdictions, gaps in legal protection in Swiss law became visible and noticeable. Only the implementation of Art. 29a FC (cf. n. 6) alleviated these problems of legal protection by means of practically comprehensive judicial review.

The fact that judicial control of administrative activity largely prevailed with the guarantee of legal recourse may tempt one to equate legal protection with judicial legal protection. However, especially in administrative law, the practical implementation of judicial legal protection has its limits. In very technical matters, the lower courts of the administrative courts have a knowledge advantage that makes full judicial review difficult (cf. n. 41 f.). The tradition of the administration of justice within the administration in Switzerland makes it clear that comprehensively understood legal protection must already begin at the stages preceding court proceedings. The administrative procedure, any internal administrative appeal procedure and the subsequent judicial review should each be considered as an element of a holistically understood system of legal protection. Accordingly, the effectiveness of the judicial review required by Article 29a FC must be assessed with regard to the entire chain of instances and not in isolation for the judicial proceedings (cf. n. 41 f.). 8

B. International guarantees of legal process, appeal and legal protection

Effective legal protection is a fundamental concern of international human rights protection. Several international treaties ratified by Switzerland enshrine a corresponding right in one form or another. Guarantees of legal recourse comparable to Art. 29a FC are found in Art. 14 para. 1 UN Covenant II and Art. 6 para. 1 ECHR. The appeal guarantees of Art. 5 para. 4 ECHR and Art. 9 para. 4 UN Covenant II go further, guaranteeing an arrested person the right to have the arrest reviewed by a court within a short period of time. Outside the material scope of application of these guarantees of legal recourse and remedies under international law, the general guarantee of legal protection of Art. 13 ECHR must be observed. This obliges the Convention states to provide for a possibility of appeal against encroachments on Convention rights. It is sufficient if an administrative authority ensures this legal protection. 9

If the material scope of application of one of these international guarantees coincides with that of Art. 29a FC, both fundamental procedural rights are applicable and the legal protection must meet the requirements of both national 10 and international law. The most significant overlap in practice is with Art. 6 para. 1 ECHR (cf. n. 4 on the hierarchy). As a rule, a criminal charge or a civil dispute within the meaning of Article 6 para. 1 ECHR should also constitute a "legal dispute" under Article 29a FC (cf. n. 18 ff.). The connection between the two guarantees of legal recourse can be explained by the history of their development: The case-law of the ECtHR on Art. 6 para. 1 ECHR was, on the one hand, an essential innovation factor for Swiss procedural law, and, on the other hand, the national guarantee of legal recourse is modelled on Art. 6 para. 1 ECHR (cf. n. 5). This historical connection suggests a harmonised interpretation of Article 29a FC and Article 6 no. ECHR. Where the national guarantee of legal recourse raises a question of interpretation, the case law of the ECtHR on Article 6 para. 1 ECHR should be consulted.

C. Basic concepts of effective judicial remedy

11 The design of judicial legal protection moves between different objectives. In a nutshell, the judiciary should protect an individual legal position quickly, with little effort and fairly, as well as realise objective law. Hardly any court can meet all these requirements in every case, especially since there are conflicts between them. For example, a speedy trial carries the risk of wrongful convictions, and an outcome that is fair from the parties' point of view is not necessarily objectively correct. Such conflicts of goals make it clear that the establishment of a legal protection system must be understood as an "optimisation and distribution problem". From a comparative law perspective, two typical basic orientations can be discerned: legal protection can focus on the protection of individual legal positions or on the enforcement of objective law. German law, for example, is based on a fundamental decision in favour of the protection of individual rights. According to Article 19 para. 4 of the Basic Law, legal action is open against the violation of subjective rights. French law, on the other hand, attaches great importance to the realisation of objective rights and, with the "recours pour excès de pouvoir", also allows a legal act to be challenged for disregard of the principle of legality. The Swiss legal system does not show a clear system decision for or against one of the two basic types. It presents itself as a "mixed system" that combines subjectivised and objectivised legal protection. Against this background, it seems more fruitful not to compare national peculiarities, but preliminary or basic understandings of effective legal protection. In the international discussion, two of these can

be discerned, the comparison of which provides a more precise idea of what characterises effective legal protection in Swiss constitutional law.

According to the basic continental European understanding, the effectiveness of (judicial) legal protection depends on a number of organisational factors: Which authority grants it? How are the requirements for action and appeal structured? What objections can be raised? How intensive is the control by the body called upon to hear the case? There is also the time factor: legal protection is only effective if it can be obtained within a reasonable period of time. The guarantee of legal recourse in Art. 29a FC and the case-law on it are tacitly based on this comparative formal understanding, which is also apparent in the practice of the ECtHR (see n. 32 ff). In contrast, the Anglo-American basic understanding does not only include "technical" aspects of legal protection. Rather, it should guarantee equality of results. The judiciary is called upon to even out economic power imbalances, to prevent structural disadvantages of vulnerable groups and to ensure social justice. For Swiss constitutional law, this substantive understanding of the problem is probably too broad insofar as no subjective claim to equality of outcome in judicial proceedings can be derived from Art. 29a FC. The problem facets associated with the Anglo-American understanding are instead to be assigned to the objective dimension of the legal process guarantee (cf. n. 3). Art. 29a FC requires the legislature to work towards effective and efficient legal protection that is easily accessible to every person. Material barriers to access, which can manifest themselves in formal requirements, linguistic communication difficulties and information deficits, are to be eliminated in the short and medium term through appropriate legislative measures. 12

D. Guarantee of legal recourse and the rule of law

Art. 29a FC marks a crystallisation point of the Swiss principle of the rule of law, because judicial protection of the law and the rule of law are mutually dependent. In the rule of law, access to an independent court forms the flip side of the state's monopoly on the use of force and the making of law. Accessibility, independence and effectiveness of judicial review are therefore important indicators of the rule of law. In this context, the guarantee of legal recourse is first and foremost in the service of the protection of individual rights. In addition, under Swiss constitutional law, courts fulfil three functions of the rule of law that extend beyond the resolution of bilateral legal disputes (cf. on the 13

Swiss "mixed system" already n. 11). Firstly, the judiciary ensures the realisation of objective law. In contrast to the executive and the legislature, it must base its decisions exclusively on the applicable law and therefore guarantees the neutral implementation of constitutional, statutory and ordinance law. Secondly, the courts have the task of further developing the applicable law and adapting it to the needs of everyday legal practice. In court practice, this creates an actual "law of application", which makes the legal system more flexible. Thirdly, thanks to its constitutionally guaranteed independence, the judiciary ensures "checks and balances" in relation to other state organs. Through its decisions, it is able to correct developments that are problematic in terms of the rule of law within the framework of the applicable law and to take "catch-up consideration of interests" where legislation has not balanced a conflict of interests or has done so too generally. These three functions of the judiciary under the rule of law should guide the interpretation of Article 29a FC just as much as the protection of individual rights. The guarantee of legal recourse must be concretised in such a way that the judiciary can also perform its functions in a democratic constitutional state. An understanding of fundamental rights that focuses exclusively on the protection of individual rights would be too narrow (cf. n. 14, n. 16, n. 55).

III. SCOPE OF APPLICATION OF THE LEGAL REMEDIES GUARANTEE

A. Personal scope of application: "Every person

14 Natural and legal persons under private law can invoke Article 29a FC without further ado. Moreover, holders of state functions benefit from the guarantee of recourse to the courts if they do not act in a sovereign capacity, operate on the basis of private law and are affected by the contested act in the same way as a private person. It has not been clarified by supreme court rulings and is disputed in the doctrine whether legal persons under public law, state authorities and municipalities can invoke the guarantee of legal recourse in the sovereign area. Some doctrine wants to limit the personal scope of application to private individuals and does not consider holders of state tasks in the sovereign area to be entitled to fundamental rights, insofar as they are not themselves affected like a private individual. In view of the constitutional functions of the judiciary (cf. n. 13), this interpretation proves to be too restrictive. In or-

der to enforce objective law, legal persons under public law, state authorities and municipalities should also be able to invoke Article 29a FC in the area of sovereign acts.

B. Substantive scope of application: "legal dispute

1. Conceptual elements

a. Constitutionally autonomous definition

The material scope of application of the guarantee of legal recourse is linked 15 to the concept of "legal dispute" ("cause", "controversie giuridiche"). What is to be understood by this? A vote by the rapporteur of the Committee of States in Parliament and a working paper of the Subcommittee on the Total Revision of the Federal Judiciary indicate that this indeterminate constitutional term is to be interpreted on the basis of the procedural laws. Accordingly, Art. 29a FC would refer to state acts that are also contestable under the respective procedural law. In other words, the "legal dispute" would have to be concretised based on the object of challenge, which is advocated by some of the doctrine. However, the case law of the Federal Supreme Court and, following it, another part of the doctrine understand the term "legal dispute" in a constitutionally autonomous way. According to the practice of the highest courts, the procedural qualification of the object of challenge remains irrelevant for the factual scope of application of Art. 29a FC.

This constitutionally autonomous understanding of "legal dispute" is prefer- 16 able to an interpretation oriented towards procedural law for three reasons. Firstly, Art. 29a FC and Art. 6 para. 1 ECHR are linked to each other historically. In case of doubt about the guarantee of legal recourse, it is therefore advisable to consult the practice of the ECtHR (cf. n. 10). The ECtHR interprets Article 6 para. 1 FC in isolation from the legal systems of the Member States (cf. n. 5), which argues for an autonomous interpretation of Article 29a FC in this sense. Secondly, access to justice in a democratic constitutional state creates an important counterweight to other state organs (cf. n. 13). Against this background, a constitutionally autonomous understanding is also to be preferred from the point of view of the powers. This allows the judiciary to influence the scope of the guarantee of legal recourse, thus enabling it to "think against" the legislature and contributes to the moderation of the powers in the sense of time-honoured state-theoretical wisdom. A third argument, based on the theory of fundamental rights, follows on from this. Fundamental rights selectively remove particularly important areas of life from the unconditional access of state organs. This also applies to the guarantee of legal recourse, which provides a constitutional framework for access to justice (cf. n. 2). Legislation must also respect this framework. If the legislature could definitively determine the scope of judicial review by defining the object of challenge, Article 29a FC would ultimately be at its disposal.

17 A constitutionally autonomous understanding of "legal dispute" does not mean that a court must always fully exhaust its power of review (cf. n. 41 f.), nor that every state act is amenable to judicial review. Only those matters that have certain characteristics fall within the material scope of Art. 29a FC. According to the case law of the Federal Supreme Court, the guarantee of legal recourse covers every dispute in connection with an individual legal position worthy of protection. Three conceptual elements, which must be fulfilled cumulatively, thus characterise the material scope of application: (1) the person seeking legal redress must be able to invoke a legal position to which he or she is entitled (cf. n. 18 ff.); (2) this legal position must be the subject of an individual dispute (cf. n. 21 ff.); (3) the legal position must prove to be worthy of protection (cf. n. 25 ff.).

b. Conceptual element (1): Legal position

18 The legal position that opens up the factual scope of application of Art. 29a FC is not derived from the guarantee of legal recourse itself. On the contrary, the constitutional right to judicial protection presupposes a pre-existing position in the applicable law. This can arise from the entire legal order: from constitutional, statutory and ordinance law. It is also irrelevant which area of law (e.g. criminal law, civil law or public law) it originates from. Thus, if the assignment of the legal position to a normative level or a subject area remains without significance under constitutional law, it must, in return, have a specific nature: It must be sufficiently concrete. At the constitutional level, it is above all the fundamental rights that guarantee sufficiently concrete legal positions, be it in the form of a defensive claim against state action, be it in the form of a state guarantee or duty to protect. At the level of laws and ordinances, a legal position within the material scope of application of the legal remedy guarantee is to be assumed if the person concerned is expressly grant-

ed a claim or if the applicable regulatory concept has condensed into a justiciable position.

According to the case law of the Federal Supreme Court, for example, the right to freedom of expression vis-à-vis the Swiss Broadcasting Corporation (SRG), the obligation to dispose of municipal waste under Art. 31b para. 3 of the Environmental Protection Act (EPA), the right to adequate (sports) education, the principle of non-discrimination under public procurement law pursuant to Art. 2 para. 7 of the Federal Act on the Internal Market (FC) and the principle of transparency pursuant to Art. 3a of the Electricity Supply Act (StromVG) constitute legal positions within the material scope of Art. 29a FC. However, according to the practice of the highest courts, no sufficiently concrete legal position exists if individuals wish to take action against the effects of global warming. 19

Contractual legal positions in civil and public law are also subject to Art. 29a FC. However, since the theoretical penetration of the contractual form in public law is less advanced than in private law, legal protection in the environment of the public law contract proves to be problematic. It is indisputable that after the successful conclusion of a contract, the fundamental right of good faith (Art. 9 FC) provides the private individual with a legal position within the scope of Art. 29a FC. If the conclusion of the contract has already failed, the private party whose trust has been disappointed can in principle take legal action on the basis of pre-contractual liability ("culpa in contrahendo"). However, this principle suffers setbacks where the public authority has not yet limited the contract negotiations to a specific private person or enjoys actual "freedom of choice", such as in public personnel law. The rejected job applicant cannot challenge her non-inclusion. It is unclear whether a third party can also defend itself against an unlawful offer by the administration in the run-up to the conclusion of the contract. 20

c. Conceptual element (2): Individual dispute

The legal position thus described must be the subject of an individual dispute. 21
A substantive understanding of the dispute is to be assumed. A dispute within the meaning of Art. 29a FC exists if the scope or the modalities of a legal position are disputed. The conceptual element of a dispute excludes in particular administrative clarification and approval procedures, which precede an individual concrete act of application of the law, from the scope of application of

Art. 29a FC. Thus, the initiation of the preliminary investigation procedure pursuant to Art. 32 of the Cartel Act (KG) is not contestable, and the approval of a partial liquidation regulation by the supervisory authority of a pension foundation does not directly affect the legal position of the beneficiaries. In both cases, acts of application of the law vis-à-vis private individuals will take place at a later date, if necessary, and on the basis of the results of the clarification or the approval decision. The same applies to the legislative procedure. Being virtually affected by a decree does not yet constitute a (current) dispute. Accordingly, the guarantee of legal recourse does not require either the Confederation or the cantons to provide for an abstract review of norms.

22 The individual character of the dispute results from its specific proximity to the legal sphere of the person concerned. It is true that individual disputes can typically be mapped into pre-existing legal relationships. However, the material scope of application of Art. 29a FC does not necessarily require a legal relationship that already exists at the time of the dispute. For example, it is sufficient if a private individual's legal position is only accidentally affected by a real act (on real acts, cf. n. 28 f.).

23 Until now, constitutional practice has approached the individual character of the legal dispute negatively and in distinction to the popular complaint. The criterion used is that the person seeking justice is affected. This person's legal position must be affected at least minimally. An actual encroachment is not necessary to open the scope of application of Art. 29a FC. Thus, residents living in the vicinity of a waste collection point were able to challenge its abolition on the basis of the guarantee of legal recourse and have it reviewed by the courts. Legal protection was also available to vocational school students who challenged the cancellation of sports lessons. Finally, the Federal Supreme Court affirmed that the Roman Catholic Church was sufficiently affected when it defended itself against the financial support of the organisation "adebar" with Fr. 15,000.00 by the Catholic National Church of the Grisons.

24 Especially acts with a general-abstract or general-concrete regulatory structure cause delimitation problems. The more persons are affected by them, the more difficult it is to speak of an individual dispute. Only if the legal position of the person seeking justice is more affected by the act in question than that of the general public can the guarantee of legal recourse be invoked. This applies, for example, to a state information campaign. Numerous organisational orders with an open circle of addressees do not give rise to an individual dis-

pute, either because they cannot be classified as a dispute or because they do not affect the legal position of a person with sufficient intensity. Thus, no individual dispute arises from the reallocation of a house address, the change in the routing of a postbus route and the drawing up of train timetables. The closure of a post office is controversial.

d. Conceptual element (3): Worthy of protection

The last conceptual element of "litigation" ("worthy of protection") requires that the court decision affects the legal position of the person concerned. The latter must have a current and practical interest in judicial legal protection. Doctrine and case law are oriented towards the current and practical interest in legal protection according to Art. 48 para. 1 of the Federal Act on Administrative Procedure (VwVG). However, because the scope of application of Art. 29a FC is defined in a constitutionally autonomous manner, it is not possible to fall back unquestioningly on the appeal requirements of the administrative appeal procedure. The third conceptual element of "legal dispute" must rather be interpreted with a view to Art. 6 para. 1 ECHR. 25

In this context, the practical interest hardly poses any problems. This is always to be affirmed if a court decision has a legal or factual impact on the legal position of the person concerned. The circumscription of the actual interest is more problematic. According to the case law on Art. 48 para. 1 VwVG, the actuality of the interest in legal protection ceases to exist as soon as the disadvantage can no longer be remedied if the appeal is upheld. However, a constitutional and convention law claim to legal protection may also exist if the disadvantage is irreversible and only the illegality of a state act can be established. Particularly in the case of real acts, the impairment has usually already ended at the time of legal protection (cf. n. 28 f.). In such constellations, there is nevertheless an interest in legal protection under Article 29a FC, which is at least directed towards establishing an infringement of rights. Thus, a rejected job applicant should have the possibility to have the arbitrary or legally unequal consideration of another person by the appointing authority determined by the courts, even if the disputed position has been filled in the meantime. 26

Based on the requirement of current and practical interest, interim decisions are excluded from the factual scope of application of Art. 29a FC if they can still be challenged with the final decision without disadvantage. At least for 27 the time being, the current and practical interest is lacking in such cases. This corresponds in principle to the practice of the ECtHR, which does not subject interim measures to Article 6 para. 1 ECHR. However, in the Micallef judgment, the Court changed and extended its case law. If an administrative order already affects a "civil right" in the run-up to a decision on the merits, the guarantees of Art. 6 para. 1 ECHR must be observed. In exceptional cases, the ECtHR accepts that not all elements of Article 6 para. 1 ECHR can be realised at an early stage of the proceedings. According to Swiss court practice, superprovisional decisions in child and adult protection law as well as orders restoring or withdrawing the suspensive effect of an appeal fall under this exception. The Micallef jurisprudence does not apply to the provisional determination of a value added tax amount by the Federal Tax Administration; the corresponding ruling cannot be appealed to a court that is independent of the administration.

2. Real acts

28 Public procedural law is order-centred: Only the order opens the way to legal protection. The guarantee of legal recourse breaks this iron rule. Whether a legal position worthy of protection is affected depends neither on the form of the act in question nor on the regulatory intention of the state organ. The material scope of application of Art. 29a FC extends to every official act or omission that affects legal positions defined by the legal order (cf. n. 18 ff.). Therefore, actual action in the form of a real act can also give rise to a "legal dispute".

29 At federal level, legal protection against real acts is based on Art. 25a VwVG. Accordingly, a person may request a ruling on a real act if he or she is personally affected by it and can prove an interest worthy of protection. Federal law thus guarantees legal protection for real acts via the "diversions" of an order on demand. This solution is compatible with Article 29a FC, because the guarantee of legal recourse does not require the direct contestability of real acts. Insofar as cantonal law does not provide for comparable legal protection, the cantons are obliged directly on the basis of Art. 29a FC to guarantee legal protection by the courts where real acts affect legal positions that are worthy of protection. Art. 29a FC does not specify how the cantons fulfil their legal protection mandate. They can adopt the solution of Art. 25a VwVG, raise the

real act itself to the object of challenge (as the canton of Graubünden does) or provide for an upstream obligation to issue an order.

3. Internal administrative orders

Internal administrative orders ("actes internes") are among the non-appealable forms of action under general administrative law. According to the traditional understanding, they are addressed exclusively to the administration, therefore do not affect the legal status of persons outside the administration and are limited in the internal relationship to organisational orders without actual legal effects. Since the term "legal dispute" in Art. 29a FC is to be defined autonomously (cf. n. 16), an internal administrative order that cannot be challenged in itself can also constitute a "legal dispute". In particular, service orders in a public-law employment relationship are likely to affect legal positions that are worthy of protection. If the order affects the fundamental rights of the addressee, legal protection must be available in court. The case law of the highest courts affirms the applicability of Art. 29a FC, e.g. in the case of transfer decisions with significant effects on private life and orders on the visible wearing of religious symbols. 30

Comparable legal protection problems are posed by general-abstract service orders (so-called enforcement-directing administrative orders). These summarise an administrative practice and are intended to ensure the uniform and equal enforcement of substantive law. If the administrative order affects a legal position of a person outside the administration that is worthy of protection, that person must be able to take legal action against it. In many cases, it is possible in the context of administrative ordinances to obtain a concrete act of application of the law, which can then in turn be challenged. The direct contestability of the administrative order only comes into question if the private individual cannot obtain an order from the outset. This restriction is compatible with Art. 29a FC. The legal protection of addressees of the administrative order within an authority must be assessed analogously. They must be able to defend themselves in court against a specific official order that affects a legal position worthy of protection. On the other hand, the possibility of abstract challengeability of the administrative order cannot be derived from Article 29a FC (on abstract review of norms, cf. also n. 21). 31

IV. PARTIAL CONTENT OF THE GUARANTEE OF LEGAL RECOURSE

32 The requirements for judicial protection flowing from Art. 29a FC can be divided into three parts. Firstly, the adjudicating body – the court within the meaning of Art. 29a FC – must guarantee effective legal protection (organisational content, cf. n. 33 ff.). Secondly, the legislation must not obstruct the way to this court by technical legal hurdles (procedural content, cf. n. 37 ff.). Thirdly, effective legal protection is defined by a certain finality: the court seised must be in a position to actually improve the legal situation of the person seeking justice (final content, cf. n. 40 ff.).

A. Organisational partial content: legal protection by a court

33 Within its scope of application, Art. 29a FC gives persons entitled to fundamental rights a right to a single judicial assessment of their "legal dispute". The minimum constitutional requirements for the organisation of a court are primarily derived from Art. 29 FC to 32 FC, Art. 191 FC, Art. 191c FC and Art. 6 para. 1 ECHR. A court within the meaning of Art. 29a FC must be independent of other state organs, decide without being influenced by the parties and base its judgement on the standard of law. The name of the court is irrelevant; special judicial authorities (e.g. cantonal appeal commissions) can also be courts within the meaning of the Federal Constitution. The Federal Supreme Court Act, which entered into force at the same time as the guarantee of legal recourse, concretises Art. 29a FC in this context: the cantons are obliged to set up courts with comprehensive cognition as (direct) lower courts of the Federal Supreme Court.

34 These cantonal lower courts implement the guarantee of legal recourse where no federal court of first instance (federal criminal court, federal administrative court, federal patent court) has jurisdiction. In intercantonal relations, the cantons must ensure the requirements of the guarantee of legal recourse by means of a concordat or designation of a cantonal court. The legal protection by the Federal Supreme Court in itself does not meet the requirements of Art. 29a FC, because the Federal Supreme Court does not have comprehensive cognition of the facts and only examines the application of cantonal law for arbitrariness. If the applicable procedural law does not provide for a judicial

body, the person concerned must be given a constitutionally compliant legal remedy directly on the basis of Art. 29a FC.

The effectiveness of judicial protection depends in its practical implementation on the material and human resources available to the judiciary. Without a needs-based infrastructure, a court cannot effectively fulfil its legal protection mandate. Accordingly, the financial resources of the judiciary must be aligned with the constitutional requirements. In terms of personnel, too, it must be endowed in such a way that a "legal dispute" is decided within a reasonable period of time. In this context, the lay judgeship, which is still widespread in the cantons, poses problems. At least the person presiding over a court should therefore have legal training and, if necessary, further qualifications. 35

The broad scope for legislative action (cf. n. 2) means that Art. 29a FC can hardly be used to elicit more far-reaching requirements for the organisation of the legal protection system. Thus, according to the case law of the Federal Supreme Court, it is irrelevant for the effectiveness of legal protection whether the legislature provides for civil or public law legal recourse. It is also compatible with the guarantee of legal recourse if access to the Federal Supreme Court is not open, especially since according to the basic concept of Art. 29a FC the judicial lower courts of the Federal Supreme Court ensure legal protection (cf. n. 4). Finally, the guarantee of legal recourse does not require any possibility of challenge within the administration, no specific instance of appeal and also no abstract review of norms (cf. n. 21). 36

B. Procedural partial content: access to a court of law

Even within the scope of application of Art. 29a FC, access to justice remains linked to procedural requirements. The guarantee of legal recourse does not provide the entitled person with a procedural "passe-partout". The person must prove the usual entry and process requirements, pay an advance on costs if necessary and conduct the proceedings in accordance with the applicable procedural law. In the doctrine, it is disputed whether these procedural provisos are restrictions of the guarantee of legal recourse or a permissible legislative arrangement. The discussion is largely theoretical, since it is undisputed that at least the usual entry and process requirements do not lead to a disproportionate restriction of Art. 29a FC (n. 53). However, a restriction requiring justification would have to be assumed if the legislation creates new formal requirements or combines existing formal hurdles in such a way that access to 37 the court exists only on paper (cf. n. 2). Less tangible than these procedural framework conditions of access to justice, but equally relevant under constitutional law, are factual barriers on the way to court. These include information deficits on the part of those seeking justice, linguistic communication difficulties and legal costs. The latter can - in the form of procedural costs - directly impede access to the court or - in the form of non-procedural and procedural party costs - indirectly impede the enforcement of a claim. Prohibitive legal costs in any case violate Art. 29a FC. However, the financial consequences of legal enforcement can only be weakly controlled by constitutional principles. The guarantee of legal recourse at least requires the legislature to carefully assess the interests affected by court costs (cf. n. 54 f.). In contrast, a person seeking justice cannot derive an unconditional right to free administration of justice from Art. 29a FC.

38 Within the scope of application of the Federal Code of Criminal and Civil Procedure, practically all procedural acts can be referred to a court by law. Isolated gaps in legal protection can still be found in the cantonally regulated correctional system. In addition, the criminal summons procedure raises some legal protection problems related to its basic conception. The penalty order procedure places a great deal of procedural responsibility on the accused. Unlike in ordinary criminal proceedings, the facts of the case and the application of the law are largely at their disposal. The public prosecutor's office has the option of submitting a proposal for a verdict, which the accused can accept or reject by means of an objection. If the accused does not object to the penalty order within 10 days, it becomes formally binding. This procedural order is problematic from the point of view of the rule of law if the addressee of the penalty order is not aware of the decision issued against him or does not understand it. The case law of the Federal Supreme Court rightly shows itself to be strict with regard to the service of a penalty order. The fiction of service is in principle not applicable in penalty order proceedings. Otherwise, there could be an accumulation of two fictions - the fiction of service and the fiction of waiver of objection - which would be incompatible with the guarantee of legal recourse. Furthermore, it is questionable whether the penalty order procedure of the Code of Criminal Procedure is compatible with the ECHR if the public prosecutor imposes a custodial sentence. As far as can be seen, the ECtHR has not yet ruled on the issue, but the legal situation in Switzerland contradicts the recommendations of the Council of Europe. Moreover, doctrine points to the questionable transfer of procedural responsibility to the ac-

cused person, which leads to an idling of the guarantee of legal recourse and the constitutional functions of the judiciary associated with it.

In the area of public law, the cantons are obliged, based on Art. 29a FC, to provide for judicial review in "legal disputes" in connection with administrative action that is not subject to an injunction (cf. n. 28 f.). The same applies to internal administrative orders with effects on a legal position worthy of protection (cf. n. 30 f.). If the applicable procedural and organisational law does not provide access to a court that meets the requirements of Article 29a FC, the entitled person must be given the opportunity to challenge the order directly on the basis of the guarantee of legal recourse in accordance with fundamental rights. The person entitled to fundamental rights may not be referred to supervisory appeal proceedings. This does not meet the constitutional requirements because the person reporting the case does not enjoy party status and the proceedings are not aimed at restoring the lawful situation. 39

C. Final partial content: Effective legal protection

Art. 29a FC requires the judiciary to comprehensively review the "legal dispute" in fact and in law. If a court limits its review density to arbitrariness without factual justification, it violates the guarantee of legal recourse. In criminal and civil law, where the court usually decides as the first instance within the meaning of Art. 29a FC, this partial content of the guarantee of legal recourse can be realised comparatively easily. The situation is different in public law. 40

In public law, courts generally rule as second or third instances and review a pre-existing decision. Where the lower administrative courts have a knowledge advantage, the question arises as to how far judicial review should extend. According to the clear case law of the Federal Supreme Court in this respect, the review required by Article 29a FC does not extend to the reasonableness of an administrative decision; discretionary powers are thus excluded from judicial review. This practice has two main consequences. First, it is constitutionally permissible for legislation itself to reduce the density of judicial review by a provision.... Second, the withdrawal formulas widespread in the practice of the administrative courts in connection with various discretionary facts are at least compatible with Art. 29a FC as long as they are factually justifiable and do not amount to a mere arbitrary control (cf. n. 41). On the 41 one hand, the judiciary typically holds back when the lower court has technical expertise that the court lacks. Here, the so-called expert discretion of the administration is at issue. This aims at making specialized expertise fruitful in the implementation of the legislative normative program. On the other hand, the administrative courts grant the lower courts discretion in the assessment of distinctly local circumstances. This so-called adaptation discretion ensures that (full) legal control is exercised by a body that is particularly close to the subject matter of the regulation.

42 From the perspective of the protection of individual rights, discretionary decisions by the administration represent an intrusion into the constitutionally required level of judicial control. However, the tradition of administration-internal administration of justice in Switzerland (cf. n. 6) makes it clear that legal protection should not be understood exclusively as judicial protection. The demand for "more" judicial control runs the risk of "judicializing" the factually justifiable decision-making scope of lower instances. Also, the expertise of the administration would remain largely unused if a court were to substitute itself for the lower instance in the expert and adjustment discretion. The effectiveness of the legal remedy guarantee should instead be assessed with a view to the entire proceedings (cf. n. 8). A factually justifiable reduction of the control density is therefore constitutionally permissible, provided that the legal protection is still effective over the entire range of instances. In practice, compensation mechanisms can be found in this context, which start with the lower instances of the administrative courts and compensate for the reduced density of review. First and foremost, there are internal administrative appeal and recourse options. Both allow for expert review at a distance from the deciding authority. Where such an internal administrative review is not available, the Federal Supreme Court requires a particularly carefully conducted administrative procedure in certain disputes. A third way is through organizational law. Effective legal protection can be ensured through intra-court specialization. Thanks to specialization, a court can meet the lower courts on an equal footing in terms of expertise and carry out more intensive review than non-specialized courts.

43 Effective legal protection has to start where a legal position has been violated. From the point of view of those affected, it is a matter of restoring the lawful state of affairs. This partial content of the guarantee of legal recourse can initially be impaired by the time factor. Short limitation periods, for example,

entail the risk that a claim can no longer be enforced due to the passage of time before those affected become aware of it. This violates the guarantee of legal recourse. In the run-up to a court decision, the parties must also have the possibility to bring about a situation through official intervention that is at all still accessible to effective judicial review at a later point in time. Under certain circumstances, the guarantee of legal recourse requires the suspensive effect of an appeal or the issuing of precautionary measures. In addition to the time factor, the powers of the court seised also play a role in the effectiveness of legal protection. Only a court that can reverse a contested decision and remedy an unlawful situation meets the constitutional requirements. The applicable procedural and substantive law determines in advance what powers a court is entitled to (e.g. determination of a violation of the law, payment of compensation, restoration of the previous legal status). If the judiciary is not given effective instruments, or is given insufficient instruments, a court may directly rely on Art. 29a FC to effectively restore the lawful state of affairs. However, the "authoritativeness" of federal law must be taken into account. The judiciary cannot correct a preliminary decision of the federal legislature on the basis of Art. 29a FC (cf. n. 4).

V. EXCEPTIONS, LIMITATIONS AND WAIVER

44 The guarantee of legal recourse is not absolute. First of all, acts of the Federal Assembly and the Federal Council are in principle not subject to appeal (cf. n. 45 ff.). Moreover, Art. 29a sentence 2 FC allows the legislature to deviate from the guarantee of legal recourse. Such area-specific exceptions require special justification (cf. n. 48 ff.). Restrictions of Art. 29a FC are to be distinguished from this. While area-specific exceptions concern the organisational content of Art. 29a FC, restrictions relate to its procedural and final content (cf. n. 52 ff.).

A. Acts of the Federal Assembly and the Federal Council

45 According to Art. 189 para. 4 sentence 1 FC, acts of the Federal Assembly and the Federal Council cannot be challenged before the Federal Supreme Court. This provision links the exclusion of contestability to the deciding body. It is based on the French theory of "actes de gouvernement", which postulates that all acts of the government and parliament are political and therefore non-justiciable. Against this background, Art. 189 para. 4 sentence 1 FC excludes not

only – as the wording would suggest – contestability in the Federal Supreme Court, but in all courts.

46 The theory of "actes de gouvernement" is hardly tenable in the generality as realised in Art. 189 para. 4 sentence 1 FC. Decisions of the Federal Council and the Federal Assembly that affect individual legal positions can certainly be subject to judicial review, even if only with regard to how they were reached under procedural law. Furthermore, Switzerland is obliged to ensure judicial protection against those decisions of the Federal Council and the Federal Assembly that fall within the scope of the international guarantees of legal recourse (Art. 6 para. 1 ECHR; Art. 14 para. 1 UN Covenant II). This circumstance, as well as the content of Art. 29a FC, must be taken into account when drafting counter-exceptions to Art. 189 para. 4 sentence 1 FC based on sentence 2 of this provision. The review of acts of parliament and government with effects on individual legal positions worthy of protection (cf. n. 18 ff.) should be entrusted to the judiciary.

47 The examples of application of Art. 189 para. 4 sentence 1 FC present a colourful picture: The Federal Council's explanatory memoranda on voting, the Federal Council's decision to approve a tariff structure for service providers of compulsory health insurance, Federal Council decisions in the field of the internal and external security of the country, acts of major administration and the guarantee of a cantonal constitution by the Federal Assembly cannot be challenged. In the area of political rights, Art. 189 para. 4 sentence 1 FC precludes direct challenges to acts of the Federal Council; however, by way of exception, the Federal Supreme Court grants direct judicial protection on the basis of Art. 29a FC if irregularities are subsequently discovered in federal votes or elections which were likely to distort the formation of the will. Federal court review is directed at the "information situation in the run-up to a referendum". Because in this specific constellation the legal question is in the foreground as to whether the freedom of election and voting has been violated, it seems justifiable, at least in the result, for the Federal Supreme Court to ensure legal protection as the sole judicial instance, even if the Federal Supreme Court's cognition does not in itself meet the requirements of Art. 29a FC. Measured against constitutional criteria, however, this legal situation remains unsatisfactory and should be adapted to the requirements of the guarantee of legal recourse. One possible solution is to open the jurisdiction

of the Federal Supreme Court in certain cases, i.e. in federal voting rights cases.

B. Statutory exceptions (Art. 29a sentence 2 FC)

According to Art. 29a sentence 2 FC, the Confederation and the cantons may exclude judicial assessment by law in exceptional cases. This exception clause only applies within the factual scope of Art. 29a FC. A dispute that does not fulfil the conceptual elements of a "legal dispute" does not fall under the guarantee of legal recourse from the outset. The doctrine speaks here of non-genuine exceptions to Art. 29a FC. A genuine exception in the sense of Art. 29a sentence 2 FC excludes judicial assessment, although this would be required in principle. To be admissible, a genuine exception must be based on a clear legal foundation. The exclusion must be in the form of a law in the formal sense (aspect of norm level) and sufficiently clear (aspect of norm definiteness). As a substantive requirement, a qualified public interest is presupposed that justifies the exclusion of judicial review. 48

The exception clause in Art. 29a sentence 2 FC must be applied restrictively. Genuine exceptions are mainly considered in matters with a strong political character. The political character of a dispute must be clearly in the foreground and must clearly override any private interests that may be affected. A discretionary power granted to the deciding authority does not yet establish a political dispute. At least the limits of the exercise of discretion (abuse, exceeding or falling short of the discretion) are justiciable. Whether the political coloration of a matter can ultimately justify the exclusion of judicial review must be decided in an overall assessment of the constitutional interests affected. In this context, the legislature must deal specifically with individual "legal disputes." A general exclusion of certain categories of cases on the basis of abstract criteria - e.g. the deciding body - would not be compatible with Art. 29a FC. 49

At the federal level, Art. 29a sentence 2 FC has limited independent significance for two reasons. Firstly, Art. 189 para. 4 sentence 1 FC removes acts of the Federal Council and the Federal Assembly from judicial review (cf. n. 45). Secondly, federal law provisions are "authoritative" for the courts under Art. 190 FC. Thus, Art. 32 VGG excludes judicial protection in individual factual matters. Although the provision is too restrictive according to some doctrine, 50 it remains binding on the basis of Article 190 FC, unless a dispute also falls under Article 6 para. 1 FC (cf. n. 4).

51 In the area of jurisdiction of the cantons, the exception clause of Art. 29a sentence 2 FC is concretised by Art. 86 para. 3 BGG. The cantons may provide for non-judicial authorities as direct lower courts of the Federal Supreme Court for "decisions of a predominantly political character". The predominantly political character may result from the content of the decision or from its political environment; in any case, it must be obvious and allow private interests to recede into the background. Decisions of a predominantly political character include, for example, the election of a cantonal administrative judge, the exercise of parliamentary superintendence, a pardon, the refusal to authorise the prosecution of a magistrate, the decision to merge communes and school districts; by contrast, the decision of the cantonal government of Geneva to exempt a foundation from the so-called single-registration and inheritance tax, and the award of a water rights concession, if the rights and obligations of the concessionaire are regulated in detail, do not.

C. Restrictions

52 Procedural fundamental rights establish procedural "minimum guarantees" that may neither be restricted nor undercut. However, this does not apply to all of their elements. On closer inspection, the guarantee of legal recourse is also at least partially restrictable. Such restrictions must be distinguished from genuine exceptions under Article 29a sentence 2 FC. If the requirements for a genuine exception (cf. n. 48) are fulfilled, legislation can completely remove a "legal dispute" from judicial review. The organisational content of Art. 29a FC is affected. Restrictions, on the other hand, affect the procedural and final content of Art. 29a FC. Access to the court is made more difficult, but not excluded.

53 Restrictions of Art. 29a FC are subject to less stringent requirements than genuine exceptions under Art. 29a sentence 2 FC. Although they must also be based on a legal foundation, the need for flexibility in lawmaking must be taken into account in the level and definiteness of the norm. Furthermore, restrictions on the guarantee of legal recourse must serve a public interest and be proportionate. Legitimate public interests exist in particular in an efficient course of proceedings and the prevention of unnecessary court proceedings. Both are so important that they can justify a restriction of the procedural and

final content of Art. 29a FC. A number of procedural institutes that serve to streamline proceedings are therefore also considered unobjectionable under constitutional law (such as the "usual" entry and process requirements, provisions on form and time limits, and the obligation to advance costs). In the medium and long term, the digitalisation of the judiciary will raise the question of the extent to which exclusively computer-based communication with and through the courts will restrict access to justice. For persons without the corresponding technical and linguistic skills, the switch to digital communication can in fact undermine the guarantee of legal recourse. In this context, digitalised access to the courts is subject to the same constitutional criteria as analogue access. In addition to the requirement of general accessibility, the prohibition of excessive formalism must be observed.

Court costs represent a practically very significant restriction of Art. 29a FC. 54
According to a study published in 2021, the court fee for enforcing a civil law claim of CHF 100,000.00 amounts to an average of CHF 8,189.00 throughout Switzerland. In addition, there are further legal costs (own lawyer's fees, costs of an evidentiary procedure, possibly opposing lawyer's fees). The cost risk is likely to be around CHF 34,330.00. These legal costs are considerable, make it difficult to enforce the claim and are problematic in the light of Art. 29a FC. The court costs are the cost factor that the state can directly influence. Their collection is in the public interest for two main reasons. Firstly, court costs represent the remuneration for the activities of the judiciary and are therefore of fiscal importance. Secondly, court costs can prevent unnecessary court proceedings as a preventive measure, because a party does not lightly risk costly proceedings. As constitutional criteria for the amount of court costs, the aspect of effective protection of individual rights and the functions of the judiciary under the rule of law (cf. n. 13) are to be taken into account. In addition, the principles of cost recovery and equivalence must be considered. While the principle of cost recovery is of little importance in the case of court fees, because experience has shown that the judiciary cannot cover its costs through its own revenue, the principle of equivalence requires a reasonable relationship between the value of the state service rendered and the fee charged for it.

The functions of the judiciary under the rule of law (n. 13) play a stronger role 55
in public procedural law than in civil law. Such proceedings may, for example, be about the protection of future generations. The public interest in the out-

come of proceedings speaks for low-threshold – and that also means: low-cost – legal protection. Against this background, legislation should distinguish more strongly than hitherto between different types of proceedings and base the court costs on the extent to which a proceeding also serves the realisation of public interests.

D. Waiver

56 The person entitled to fundamental rights may waive judicial protection and submit to private arbitration. According to the practice of the highest courts, the fact that there is no entitlement to free legal assistance in arbitration proceedings is compatible with Art. 29a FC. The case-law of the ECtHR further differentiates according to whether the person concerned voluntarily submitted to arbitration or was forced ("forcé[e]") to do so. A forced arbitration clause in the sense of the case law can be assumed, for example, in the case of non-negotiable arbitration provisions in the statutes of a sports association. The voluntarily accepted arbitration clause is in principle unproblematic in the light of Art. 6 para. 1 ECHR. Enforced arbitration must meet the procedural standard of Art. 6 para. 1 ECHR.

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COMMENTARY ON

Art. 30 FC

A commentary by Reto Walther

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Art. 30 Judicial proceedings

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

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

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

CONTENT

I. HISTORY OF ORIGIN

The guarantees of Art. 30 FC confer directly enforceable rights to a fair, equal and just trial on those entitled to fundamental rights (for the personal scope of protection, see N. 10 et seq.) within the framework of judicial proceedings (for the material scope, see N. 13 et seq.). Art. 30 FC is based partly on the Federal Constitutions of 1848 and 1874 (Art. 50 and 53 and Art. 58 and 59 respectively), partly on international law (Art. 6 no. 1 ECHR, Art. 14 no. 1 UN Covenant II) and partly on cantonal law. The earlier federal constitutions already guaranteed the right to a court established by law ("guarantee of the constitutional judge"; today Art. 30 para. 1 FC). They also guaranteed the right to a court of domicile (now Art. 30 para. 2 FC). The principle of judicial publicity, on the other hand, was absent from the Federal Constitutions of 1848 and 1874. It was guaranteed under cantonal law and via the most important international human rights conventions before the Federal Constitution of 1999 came into force. The constitutional revision of 1999 brought these elements together in Art. 30 FC. The case law that the Federal Supreme Court had developed on the old federal constitutional law should be able to retain its validity. 1

The abolition of ecclesiastical jurisdiction was not transferred to Art. 30 of the 1999 Federal Constitution. A corresponding provision is considered obsolete. Today, the prohibition of debt bondage is guaranteed by Art. 7 ("Human dignity") and Art. 10 para. 2 ("Personal freedom") FC. 2

II. CONTEXT

Art. 30 FC represents a central procedural characteristic of the liberal-democratic constitutional state. The judicial process and its special mode of operation are intended to ensure - and at the same time derive their legitimacy from - that the democratically established law is applied fairly and equally to similar cases in a procedure that is comprehensible and acceptable to both the parties and the general public. This is associated with a rejection of cabinet justice, i.e. the control of judicial proceedings from the political backrooms ("cabinets"). 3

In institutional terms, the Federal Constitution expresses the concern just described in Art. 143 et seq. ("Federal authorities") and Art. 191c ("Judicial independence"). These provisions provide for a power-inhibiting functional sepa- 4 ration of the federal authorities into the legislative, executive and judicial branches (separation of powers). They thus guarantee the independence of the judiciary (see N. 25 et seq.) from the legislature and the application of the law. In their activities, the courts are "bound only by the law" (Art. 191c FC).

5 In substantive terms, the binding nature of all state action to constitutional, democratically enacted law is expressed in Art. 5 para. 1 FC and the equality of all before the law in Art. 8 para. 1 FC. Fundamental procedural rights can be explained more fundamentally by a liberal understanding of human dignity (Art. 7 FC). The individual should never be degraded to a mere object, but should be allowed to participate appropriately in state decisions that affect his or her person. By deciding on individual legal positions in a comprehensibly correct manner, the legal consequences of personal actions are foreseeable and the possibility of personal self-determination is respected.

6 In addition to Art. 30 FC, the liberal-democratic constitutional state is realized through further fundamental procedural rights. First of all, Art. 29 FC contains further "general" constitutional guarantees. These are not limited to court proceedings, but also apply to administrative proceedings. Art. 29a FC guarantees the right to the adjudication of every legal dispute by at least one judicial authority, i.e. in a procedure that meets the strict requirements of Art. 30 FC. Art. 30 FC does not itself grant access to courts. Additional fundamental procedural protection is afforded to persons against whom the state resorts to its harshest means: deprivation of liberty and criminal law (Art. 31 and 32 FC).

7 Furthermore, Art. 30 FC is part of the broader context of international human rights protection (see n. 1). The European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) on the ECHR are of primary importance. The Swiss courts are required to take this so-called Convention law into account. However, there is a difference with regard to the scope of application of Art. 30 FC and Art. 6 no. 1 ECHR (right to a fair trial). While the national law provision covers all judicial proceedings, the Convention standard only applies to civil and criminal proceedings. This is relevant, among other things, for the scope of Art. 30 para. 3 FC (see N. 58, N. 62).

8 The implementation of the guarantees of Art. 30 FC is initially a matter for the legislature. The claims flowing from the constitutional provision find their

concrete implementation above all in the various federal and cantonal laws on court organization and procedure. The case law practice on fundamental rights guarantees only becomes really significant if the legislator falls short of the minimum standards of Art. 30 FC or fails to address an issue within the scope of Art. 30 FC. At the federal level, however, case law can only enforce the guarantees of Art. 30 FC within the limits of Art. 190 FC anyway. Art. 190 FC declares federal law to be "authoritative", i.e. the courts must apply federal laws regardless of their (presumed) unconstitutionality. Some compensation for this gap in the protection of fundamental rights under federal constitutional law is provided by the protection of human rights under international law, in particular the ECHR. Art. 190 FC declares international law to be equally "authoritative" as federal laws, and according to the case law of the Federal Supreme Court, the ECHR takes precedence over conflicting federal laws.

III. COMMENTARY IN THE NARROW SENSE

Art. 30 FC is divided into three paragraphs. Para. 1 guarantees a constitutional court. Para. 2 guarantees the right of civil law defendants to have their case judged in their canton of residence. Para. 3 deals with the publicity of court hearings and the pronouncement of judgments. Sections B. - E. discuss these three parts of Art. 30 FC individually. 9

A. Personal scope of protection

In principle, the three elements of Art. 30 FC have the personal scope of protection in common. They are available to all natural and legal persons who participate in court proceedings as a party, similar to a party or as another party to the proceedings. They therefore protect a person regardless of their nationality, domicile, legal form and the like. Protection is also afforded to persons who have been denied party status. 10

In principle, the state is not a party to fundamental rights. Only in exceptional cases can authorities entitled to appeal, municipalities and other legal entities organized under public law invoke Art. 30 FC. The prerequisite is that they are affected by a sovereign act in the same way as private individuals, act as private individuals under civil law, complain about violations of their (municipal) autonomy or guarantee of existence, exercise their right to complain to the authorities or otherwise represent public interests in court (e.g. as a public prosecutor). 11

12 The personal scope of protection of Art. 30 FC is differentiated in two ways with regard to its subsections. Para. 2 specifically protects the defendant (see n. 51); para. 3 can also protect persons not directly involved in proceedings (see n. 64).

B. Competent, independent and impartial court established by law (para. 1)

1. Material scope of application

13 Art. 30 para. 1 FC guarantees that any judicial assessment of a legal dispute shall take place before a court that is established by law, has jurisdiction, is independent and impartial in person and in institution. The material scope of application of Art. 30 para. 1 FC is broad in two respects. Firstly, the concept of a court in this provision is a functional one, and secondly, it covers all areas of law (see n. 15). The former means that the guarantees of Art. 30 para. 1 FC apply in all proceedings in which a body that is independent and impartial in terms of personnel and organization from the parties to the dispute and other authorities makes a binding decision on a third-party dispute in a judicial, fair procedure on a legal-normative basis, stating reasons. Central to the concept of a court are, on the one hand, its core task of administering justice and, on the other, its organizational and institutional independence. A judicial authority does not necessarily have to be integrated into the state court structure, nor does it necessarily have to have the term "court" in its nominal name. The legal basis of judicial proceedings is also irrelevant. The wording of Art. 30 para. 1 FC is somewhat ambiguous ("Any person whose case must be judged in judicial proceedings shall be entitled..."). It should not be understood to mean that Art. 30 para. 1 FC only applies to the one judicial procedure required by the guarantee of legal recourse (Art. 29a FC). Court proceedings before all instances (even those provided for by simple law) are equally covered by Art. 30 para. 1 FC. Finally, a further criterion sometimes mentioned by the Federal Supreme Court, which links the functional concept of a court to the independent establishment of legal facts, should be read with caution. The Federal Supreme Court in particular, whose qualification as a court is beyond question, does not generally fulfill this criterion. This criterion, which is strongly developed in the context of the individual case, was therefore formulated too generally in the case law of the Federal Supreme Court.

The institutional breadth of application of the concept of a court under Art. 30 para. 1 FC is reflected in the case law of the Federal Supreme Court. For example, public prosecutors and investigating judges can also fall under Art. 30 para. 1 FC, for example when issuing summary penalty orders. Furthermore, mediation proceedings under reconciliation and civil procedure law must meet the requirements of Art. 30 para. 1 FC, as do various cantonal institutions such as the Child and Adult Protection Authority (KESB, TG), the Tax Appeals Commission (VS), the District Council (ZH) in certain matters or the Appeals Commission of the Protestant Reformed Church (AG). Finally, private arbitration tribunals whose decisions are equivalent to state court judgments in terms of their legal force and enforceability, including those of the Tribunal Arbitral du Sport (TAS), are also considered courts within the meaning of Art. 30 para. 1 FC. Because Art. 30 para. 1 in conjunction with Art. 29a BV. Art. 29a FC guarantees a court established by law, the existence of an arbitration agreement that justifies the waiver of the statutory court cannot be assumed lightly. The Federal Supreme Court has denied the quality of a court for commissions of authorities (administrative units of the federal government that are not subject to directives), namely the Independent Complaints Authority for Radio and Television (UBI) and the Competition Commission (WEKO), as well as for the Supervisory Commission for Lawyers (ZH). 14

The material scope of application of Art. 30 para. 1 FC must encompass all areas of law in view of the general guarantee of legal recourse under Art. 29a FC. Art. 30 para. 1 FC must therefore apply to judicial proceedings in all areas of law, and not only to civil and/or criminal proceedings. 15

2. Legality of the court

Subject to valid arbitration agreements, Art. 30 para. 1 FC deals with proceedings before courts established by a formal law. It is not permissible to regulate by ordinance "in which form the judge may be called upon, which judge in which proceedings shall conduct the examination from a functional and local point of view ... how the costs are to be allocated" and how the appeal process is structured. The essentials of court organization must therefore be regulated in a constitutional law in the formal sense, such as the jurisdiction, competences and procedures of a court. Detailed questions may be regulated by ordinance. 16

17 Of practical importance is the entitlement to a panel of judges duly appointed and composed in accordance with the law. It goes without saying that this right must be upheld throughout the proceedings. The right to a correctly composed panel according to generally abstract criteria is intended to prevent a panel from being composed of court members who are inclined towards a certain result: "The administration of justice should ... not be influenced by a targeted selection of judges in individual cases". The formation of a panel of judges clearly violates Art. 30 para. 1 FC if it serves to "manipulatively establish a very specific panel of judges for a specific case in order to bring about the desired result" and is therefore not based on objective criteria that strive for the correct and expeditious handling of cases.

18 The formation of a panel of judges does not have to be regulated in formal law. It is sufficient that it is carried out according to abstract and objective criteria that are defined in advance and made transparent; according to the case law of the Federal Supreme Court, this can also be guaranteed by established practice. For example, the allocation of cases according to alphabetical order or by means of an IT application, such as the Federal Supreme Court's "CompCour" or the Federal Administrative Court's "Bandlimat", are conceivable. However, constraints such as workload, language skills, particularly high levels of individual expertise in complex matters or, conversely, particularly inexperienced court members require a certain degree of discretion. However, the doctrine rightly demands that criteria should be decisive for this exercise of discretion, which a publicly accessible decree (e.g. a court ordinance) defines in a general and abstract manner. The provision of the military criminal proceedings, according to which the president of the court "designates" extraordinary substitute judges - i.e. selects them at his discretion - if the court cannot be formed from its ordinary (substitute) members, appears incompatible with Art. 30 para. 1 FC. In any case, the influence of non-judicial authorities must be prevented. The formation of a panel of judges must always remain an act of judicial self-administration.

19 In the case law of the Federal Supreme Court on the formation of panels, two groups of cases can be roughly distinguished. One group comprises cases in which the panel of judges included "wrong" persons, i.e. persons who were not authorized to make decisions under the relevant provisions. The other group consists of cases in which the adjudicating body was faulty, although its members were in principle authorized to decide.

In recent federal court practice, the following examples can be found of panels that were judged to be unconstitutional for reasons relating to one of their members: 20

- Participation of a judge who was unlawfully elected due to the absence or lapse of eligibility requirements (residence in the canton);
- Involvement of a judge who had already left office;
- Assumption of a position by a court clerk who was no longer working at the court at the time of the judgment.

On the other hand, Art. 30 para. 1 FC is not violated if a court member has "only" gained knowledge of the parties' submissions and the evidentiary proceedings by studying the files. Lay judges are also constitutionally permissible; Art. 30 para. 1 FC does not give rise to any entitlement to a specific professional training of court members (see also n. 27).

In recent Federal Supreme Court practice, the following examples can be found of faulty panels whose faultiness was not due to the person of a member: 21

- Lack of a legal basis for a single judge's decision to revoke an inpatient therapeutic measure (incorrect interpretation of the law by the cantonal authorities);
- Unjustified change of judge before a judgment was issued, which made it impossible to substantively contest the relevance of the change of the adjudicating body;
- systematic and general appointment of court secretaries to relieve single judges, with the result that the former were granted autonomous judicial power without a legally sufficient basis in law;
- unlawful number of members of a panel (in various constellations): Under- or overstaffing, disregard of the requirement of the presence of a certain quorum of court members, lack of a legally prescribed standard number of members of the panel, disregard of the jurisdiction of the full court in the absence of any other regulation, absence of a court clerk with an advisory vote.

3. Jurisdiction of the court

22 Art. 30 para. 1 FC enshrines the right to have a legal dispute decided by the competent court, i.e. the court that actually has jurisdiction under the law. In the words of the Federal Supreme Court: "In order to prevent abuse and manipulation or to exclude any appearance or suspicion of such, courts and their jurisdiction (in personal, temporal, local and substantive terms) should be determined in advance by general abstract procedural law".

23 Courts of exception are explicitly prohibited (Art. 30 para. 2 FC). However, courts that are created to judge a specific case (ad hoc) or a specific person (ad personam) are not a problem in Swiss practice. There are no relevant federal court rulings. The origins of this provision go back a long way, namely to the political unrest of the 19th century. Special procedural guarantees were required to ensure transitory justice. This history confirms that this provision (at least according to its original meaning and purpose) has long since become obsolete. Nevertheless, and contrary to the Federal Council's draft constitution, the Councils retained the provision during the total revision of the Federal Constitution.

24 Specialist courts created by law, such as labor, tenancy, commercial, juvenile criminal or military courts, are to be distinguished from exceptional courts. They are permissible if there are objective reasons for their establishment, such as the need for certain specialist knowledge or the requirement for a court to be made up of equal numbers of representatives of affected interest groups. The Federal Supreme Court ruled that the assignment of the power to review certain measures under the Federal Act on Measures to Safeguard Internal Security to the detention judge (Canton of Zurich) and the assignment of independent jurisdiction to court clerks in civil law (Ticino) were inadmissible.

4. Independence and impartiality of the court

25 All members of a court must be independent and impartial (Art. 30 para. 1 sentence 1 FC). If they are not, Art. 30 para. 1 FC confers the right to demand that the member of the court concerned recuse himself or herself. What independence and impartiality mean exactly is explained in detail after some preliminary remarks. These requirements apply not only to judges, but also to all other court members and auxiliary persons involved in the proceedings (for

the latter by analogy, but according to the prevailing doctrine based on Art. 29 FC). In other words, the requirements of independence and impartiality apply to all persons involved in the rendering of a judgment, but not to administrative law firm personnel. The requirement of independence and impartiality therefore extends not only to the members of the court, including party arbitrators, but also to court clerks, auditors and the like, experts who prepare expert opinions and the like for the court, as well as interpreters and translators. In view of the great influence that these persons can have on the outcome of court proceedings, this seems undisputed. In my opinion, however, it is unclear why the view is predominantly held that the independence and impartiality of these persons is governed by Art. 30 FC by analogy, but is formally derived from Art. 29 FC. Since Art. 30 FC speaks of "court" (not of judges), judicial assistants or decision-makers can also be subsumed under this term. As far as can be seen, there is no conclusive justification for the former view in either doctrine or case law. The direct application of Art. 30 FC to all court personnel, including court assistants and decision-makers, should therefore be preferred for reasons of simplicity and the legal system alone.

The right to independent and impartial court personnel presupposes knowledge of these persons. 26 It therefore follows from Art. 30 para. 1 FC that there is a right to know, or at least to be able to know, who is involved in the decision. If it is said in practice that this information does not necessarily have to be contained in the court's rubric, but that it is even sufficient if it can be taken from generally accessible sources, such as a state calendar, this is problematic in several respects. On the one hand, this demands a great deal from the legal layperson in particular. On the other hand, the naming of the members of a court does not usually indicate the composition of a specific panel. The court authorities are required to inform the parties of any changes to the panel of judges on their own initiative, stating the reasons. In addition, court personnel are in any case responsible for observing any reasons for recusal of which they are aware.

The lay judiciary practiced in Switzerland (as elsewhere) is not per se a problem 27 with regard to judicial independence and impartiality (see n. 20 above). However, the practice whereby, for example, only legally trained persons are elected to the Federal Supreme Court indicates that legal training of court members of all instances would at least be desirable with regard to the desideratum of a professional judiciary (which is not limited to judicial independence and impartiality). For reasons of procedural economy alone, it is important to prevent lower instances from deciding inadequately in a way that leads to a fundamental right of the parties to the proceedings to be allowed to submit their case to a further instance. The Federal Supreme Court must therefore be followed in principle when it emphasizes that court members without a law degree must essentially "be able to grasp the details of the case, form an opinion on it and apply the law to it". The fact that lay judges presumably increasingly rely on the support of legally trained court personnel does not pose a problem, as the latter must also meet the requirements of judicial independence and impartiality (see n. 25). Rather than lay judges per se, problems may arise from the fact that lay judges may have other (possibly full-time) activities in addition to their judicial mandate. However, this problem also exists in the case of legally trained court members who work part-time as judges (see N. 34). According to Kiener, the same applies to the question of whether lay court members are more likely to be influenced by public pressure than legally trained judges. What is primarily important is experience and routine, i.e. regular (preferably full-time) work as a court member. This is particularly lacking in the case-by-case jury courts, which must be distinguished from Swiss lay judges.

a. Independence

28 The right to an independent court includes the right to a court that is institutionally and organizationally independent within the meaning of Art. 191c FC (see n. 13). According to Art. 191c FC, the courts are "bound only by the law". They may not accept instructions or orders from non-judicial persons and institutions. This includes, in particular, other state bodies, but also the litigants themselves and intermediary powers such as parties, associations, the media, etc., whose campaigns and reporting may be capable of interfering with court proceedings. A judicial body must also remain independent of other judicial authorities and their members, including those of the same court. Art. 30 para. 1 FC guarantees an individual fundamental right to respect for judicial independence, as provided for institutionally in Art. 191c FC. This right is of course not violated by the amendment or annulment of a judgment by an appellate court. The purpose of an appeal is precisely to have the lower-instance decision reviewed and, if necessary, corrected.

In the case of private arbitration tribunals, a particular problem of independence can sometimes arise. If a private arbitration tribunal is supported by one or more associations, the arbitration tribunal may lack the independence required by fundamental rights vis-à-vis a party in proceedings if the latter is not a member of the association or is not on the association's side (and nevertheless had to agree to an arbitration clause due to the market power of the association, for example). 29

b. Impartiality

The case law of the Federal Supreme Court is not primarily concerned with independence, but with the impartiality of the courts. The requirement of judicial impartiality is initially a subjective criterion relating to the inner state of a person, which cannot be determined objectively or established by means of evidence. In the words of the Federal Supreme Court, this requirement entitles every person in court proceedings to have their case decided by "impartial, unbiased and unprejudiced" members of the court "without the influence of extraneous circumstances". Until now, the doctrine has not been able to recognize any clear boundaries in the federal court's use of these three adjectives. Although impartiality is likely to play the role of the (comprehensive) generic term, nothing of practical legal significance seems to be attached to these different terms. 30

Because partiality does not (necessarily) manifest itself in an objectively ascertainable manner, it is sufficient for a violation of this claim that external circumstances exist that give the appearance of a lack of impartiality. In the words of the ECtHR: "dans des cas où il peut être difficile de fournir des preuves permettant de réfuter la présomption d'impartialité subjective du juge, la condition d'impartialité objective fournit une garantie importante de plus". The decisive factor is an objectified standard, i.e. not the subjective view of the person concerned, but the effect of the circumstances on an average third party; in other words, objective reasons must be sought which make the insufficient impartiality of a court person appear doubtful in a justified manner. 31

In principle, the impartiality of a person is presumed. The exceptional lack of subjective impartiality or its objective appearance may then result from reasons that lie in the person and their conduct and/or from reasons of an institutional and functional nature that are inherent in the court organization. 32

33 The Federal Supreme Court has summarized its case law practice on the impartiality requirement under Art. 30 para. 1 FC in the recently issued BGE 147 I 173. An inadmissible appearance of partiality does not regularly exist if the relationship in question is merely one of professional collegiality. The situation is different if there are private or professional relationships of closeness or dependence that go beyond what is socially customary. The latter is the case, for example, with the substitute judge who assessed claims for damages and compensation against the university at which she was also a titular professor; with the senior judge whose husband and brother-in-law had a close relationship with a person who was closely connected to one of the parties to the proceedings; and with the judge who reviewed decisions by the authorities that his wife had initiated in a leading position.

34 The Federal Supreme Court also ruled that various constellations involving lawyers acting as court members were inadmissible. This accumulation of roles, which jeopardizes judicial impartiality, results from the widespread practice of part-time court members in this country. For example, a lawyer acting as a judge who has an ongoing or permanent client relationship with a party to the proceedings cannot be considered impartial. It is sufficient for the appearance of partiality that the attorney-client relationship in question only exists with a person closely associated with the party to the proceedings. Kiener/Medici come to the conclusion, after a convincing weighing of interests taking into account various case constellations, that a separation between the roles of lawyer and judge is appropriate. Federal law is moving in the same direction: the federal legislator has now prohibited (most) members of the federal courts from professionally representing third parties (before most courts).

35 Journalistic work in a broad sense, which is itself protected by fundamental rights, can also be in conflict with activities as a court member. Nevertheless, court members are generally permitted to express themselves publicly as private individuals on legal and socio-political issues. Articles in the (specialist) press, expert opinions, discussions of judgments that are not final (including in lecture halls) and the like threaten to impair the impartiality of the authorship if they express themselves in detail and clearly on issues that are still open in the context of proceedings. However, it is also quite possible that more general publications and presentations may give rise to doubts that a court member has not already decided on a judgment before the end of the proceedings.

This would be conceivable, for example, if a court member expresses a firm, apparently irreversible opinion on a (potential) leading judgment while similar judgments are pending before the court. In order to answer the question of when journalistic activities by members of the court violate their impartiality in a way that is contrary to fundamental rights, two criteria are decisive: In terms of timing, a publication becomes problematic in particular if it contains references to cases that are already pending or of which it is foreseeable that they will become pending. Foresighted restraint is advisable here in order to prevent possible grounds for recusal. However, a public reference to a position further in the past can also call into question the impartiality of a court member, meaning that the person concerned must recuse themselves. In terms of content, a publication by a court member is problematic if it can at least appear to give rise to justified doubts that the outcome of the proceedings in question is still open to the publishing court member. The Zurich district judge clearly disregarded these limits when he held out the prospect of impunity for the climate activists (see N. 47). Conversely, the value of journalistic activities by court members should not be forgotten. On the one hand, the public can benefit from valuable contributions to the discourse based on specialist knowledge and practical experience. On the other hand, parties to proceedings can gain valuable information from them, for example on key legal issues, important lines of argumentation and the like. Overall, therefore, an overly strict standard should not be applied. In my opinion, the Federal Supreme Court goes too far when it expects its members (even if only) "not to comment on political issues as a matter of principle" and to "refrain from criticizing other opinions".

Finally, there is extensive case law on the problem of prior and multiple referrals, i.e. role cumulation. Here, the problem of (presumed) bias lies in the fact that the court member in question has already dealt with the dispute before the current stage of the proceedings, possibly in a different judicial role. "In such a case ... the question arises as to whether a court member, through his or her involvement in earlier decisions, has already committed himself or herself on individual points to such an extent that he or she no longer appears to be impartial and, accordingly, the proceedings are no longer open." As the added emphasis in the Federal Supreme Court's description of the problem makes clear, prior involvement does not automatically imply insufficient impartiality. There is only room for a judicial assessment of disputed impartiality in the absence of codified regulations. If a court has to assess the admissibility 36 of a prior or multiple referral, three considerations are paramount: firstly, which questions the disputed court member has to decide in his two roles and how closely connected these questions are, in particular whether they are very similar or even identical; secondly, how much leeway the court member has in assessing these questions; thirdly, how decidedly the court member has already expressed his opinion on the questions to be answered again in his first referral.

c. (Party) political appointment of the courts

37 The traditional election and, above all, re-election procedures of court members by political electoral bodies (parliament, electorate) probably pose the greatest systemic challenge to the independence and impartiality of the courts in Switzerland. For example, federal judges are elected by the United Federal Assembly (National Council and Council of States) for a term of office of six years. They can then be re-elected without restriction until retirement age. This combination of a relatively nutshell term of office with the possibility of political re-election is widespread in Switzerland. Its problem lies in the fact that it harbors the danger of tempting court members who are worried about their re-election to make "politically convenient" rulings. The Federal Supreme Court also recognizes this problem. In fact, past elections to the Federal Supreme Court have shown that there can at least be attempts to exert political influence.

38 The problem could be mitigated by a recent development in the case law of the Federal Supreme Court, although it does not directly affect judicial independence. The Federal Supreme Court has indicated that it sees a need for legal protection in the case of non-re-election of court members. It bases this need for legal protection on the fundamental rights of the non-re-elected court member, not on the right of the parties to the proceedings to an independent court. Nevertheless, the Federal Supreme Court thus restricts the freedom of the competent bodies (usually parliament or the people of the cantons) not to re-elect court members. Conversely, this strengthens the institutional independence of the courts. If the Federal Supreme Court restricts the ability of the electoral bodies to deny court members re-election for political reasons, it naturally also restricts their ability to exert pressure on court members to be re-elected.

The willingness in Switzerland to accept the risks associated with court members having to face periodic re-election by political bodies can be explained by the Swiss constitutional culture and its understanding of the separation of powers. In this country, there is traditionally a certain skepticism towards "elite" bodies that are not subject to political, i.e. majority-democratic, control, or only to a limited extent. The legislative powers (parliament as well as the people and the cantons), which are supposed to have the "last word", are regarded as sovereign. In an international comparison, political accountability (the potential to be held accountable) and the democratic legitimacy of the courts are therefore weighted heavily, while the independence of the judiciary from the legislature is given comparatively little weight. As constitutional counterparts to majority democracy and its political actors, the Swiss courts are therefore in a comparatively weak position. 39

The ability of the political electoral bodies to influence the courts via their re-election competence presupposes knowledge of the individual decision-making behavior of the court members. For this reason, the comparatively low level of transparency of the individual decision-making behavior of judges in Switzerland mitigates the problem. Firstly, the individual voting behavior within a panel of judges is usually not clearly visible. Secondly, the vast majority of Swiss courts do not publish so-called special votes in which the individual court members explain their individual legal opinion. As a result, the political electoral authorities are likely to regularly lack the knowledge necessary to make it difficult or even impossible to re-elect individual judges they do not like. 40

Conversely, it is argued that the problem under discussion is exacerbated by the fact that members of the judiciary are de facto required to belong to a political party and to pay an "obolus" (i.e. a mandate fee as a percentage of salary, which is at least not entirely voluntary). Because in Switzerland, in particular, the judgeships at the highest courts are filled according to parliamentary party proportional representation, the party membership associated with a mandate contribution constitutes a de facto eligibility requirement. 41

The party affiliation of court members, which is subject to a contribution requirement, is mainly a problem of the appearance of a lack of openness in the decision-making process rather than one of judicial independence. Financial support and party affiliation give the appearance of a certain ideological, political and ideological bias. The system is justified by the fact that it ensures 42 the balanced representation of different world views (social pluralism) in the courts. Of course, this justification loses its plausibility to the extent that the internal court divisions that make up the adjudicating bodies lack party-political heterogeneity.

43 The political-ideological bias of court members at issue here is a subjective phenomenon inherent in the person of the court member. Irrespective of the electoral system and the (lack of) party affiliation of court members, they have personal convictions and world views. In my opinion, it is therefore appropriate to try to reflect these different attitudes as broadly as possible in the judiciary. The current system is no guarantee that this will succeed, but there is an obvious lack of alternatives superior to party affiliation to reflect the different political and ideological worldviews represented in the political community in the judiciary.

44 However, the ideological plurality of the courts could also be ignored or left to chance. For example, the "Justice Initiative" wanted to appoint the members of the Federal Supreme Court by drawing lots after a pre-selection by an expert commission (rejected in the referendum). As Ammann points out, the "arational" drawing of lots, i.e. without any human influence, would be suitable for strengthening judicial independence. However, there are also weighty arguments against the appointment of courts by drawing lots. Firstly, a lottery procedure carries the risk of a one-sided selection of candidates, regardless of statistical probabilities. The initiative committee was well aware of this. The text of the initiative stated that the lottery procedure should be designed in such a way "that the official languages [but only the official languages and not other criteria such as gender, parts of the country, political views, etc.] are adequately represented in the Federal Supreme Court". are adequately represented in the Federal Supreme Court". Secondly, the attempt to guarantee chance and diversity together poses the following problem: if a pre-selection were to be made for an office at the highest Swiss court, for which there are a priori only a few qualified candidates, on the basis of various personal characteristics such as language, gender, origin, etc., the lack of remaining names would mean that the decision would be made less by lot and more by the pre-selection of the expert commission. In addition to new risks regarding judicial independence, this would also reduce the democratic legitimacy of the pre-selection committee. A middle way between the current system and the responsibility of a panel of experts could be desirable. An idea from the Council

of States' Legal Affairs Committee went in this direction. An "expert advisory board" was to advise the Judicial Committee of the Federal Assembly in the preparation of the Federal Supreme Court elections. However, the Council of States Legal Affairs Committee shelved the matter, although it admitted that the current election procedure could be improved.

Finally, the problem of internal court organizational and power structures must be considered in the present context. If the ideological views of individual court members are known, there is a risk that leading court members will attempt to fill panels "appropriately" or make promotions and appointments in their interests. It is questionable whether the legislator could prevent this problem. It could ensure party proportionality (perhaps the best of all inadequate options for ensuring politically plural courts) not only in the appointment of judges, but also within the framework of the statutory court organization. However, this would entail other significant disadvantages, for example with regard to the professionally and linguistically adequate appointment of judges and the self-organization of the judiciary as an expression of its independence from politics. 45

In summary, it can be said that it is complex to assess the independence and impartiality of courts, which are difficult to separate. Ensuring judicial independence and impartiality is as challenging as it is difficult and potentially controversial to assess. As Kiener writes, it would be "naïve" to believe "that there are 'political' and 'apolitical' electoral bodies", or that electoral bodies and procedures exist that are free of problems. A conclusive assessment can only be made on a case-by-case basis and depends on various criteria, including the election procedure, the term of office and the (non-)recallability of court members, as well as measures to protect against attempts to influence the court externally and the appearance of its independence. It would therefore be wrong to draw the general conclusion that the Swiss courts do not meet the requirements of political independence and impartiality due to their (party) political appointment. In practice, the Swiss rule of law, including the functioning of its courts, is in good shape. This is also shown by the (seemingly) paradoxical assessment of the Groupe d'Etats contre la corruption (GRECO), which states that although Swiss election procedures hardly meet international standards, "judges of the federal courts do not appear to be subjected to direct political pressure in the performance of their duties". 46

47 Nevertheless, the systemic problem of the undeniable appearance of a political coloration of local court members must not be negated. In order to mitigate it, some changes to the system of elections to the Swiss courts would be welcome. As GRECO recommends, the practice of all parties levying mandate fees should be discontinued and long, fixed terms of office (ideally while maintaining a retirement age) should be introduced. Although the accusation of non-material or political bias could still be made in principle, this type of bias alone seems too abstract to call into question judicial impartiality in individual cases, at least as long as no other circumstances arise. The latter was evidently the case recently with a district judge in Zurich, who not only openly sympathized with climate activists in the courtroom, but also announced that he would consistently acquit them in future unless they became violent. However, these relatively modest changes would put an end to the (apparent) existence of quasi-mandate relationships and political influence via re-election requirements. This would strengthen confidence in the judiciary while maintaining its high level of democratic legitimacy.

48 Finally, the following should be noted: The current system only works - and is therefore only tenable - as long as Switzerland's political order is based on a concordant multi-party system in which the risk of political monopolization of judgeships remains theoretical.

5. Lack of restrictability

49 Art. 30 para. 1 FC provides a minimum guarantee as a fundamental procedural right. The rights flowing from Art. 30 para. 1 FC may not be restricted. Art. 36 FC is therefore not applicable to this provision. They are "resistant to interference" in the sense that any restriction constitutes an impermissible violation of Art. 30 para. 1 FC (cf. n. 50). This does not mean, however, that these claims apply without preconditions, nor that their protective content does not allow any scope for implementation, nor that conflicting interests would be meaningless in their concretization. A valid arbitration agreement and the submission to arbitration is considered a permissible waiver of the constitutionally guaranteed procedure before the legally competent court (see n. 16).

6. Legal consequences

50 Art. 30 para. 1 FC confers a claim of a formal nature. Its violation leads "irrespective of the substantive merits of the appeal, to the upholding of the ap-

peal and the annulment of the contested decision". To ensure that this claim is not forfeited, procedural defects must be asserted at the earliest possible time, whether before, during or after the proceedings, i.e. without waiting as soon as knowledge of them exists or should exist (requirement to act in good faith, Art. 5 para. 3 FC). However, it should not be lightly assumed that a party to the proceedings has become aware of a procedural defect and has waived its objection or has insufficiently substantiated it. In the case of serious procedural defects, the claims arising from Art. 30 para. 1 FC should not be forfeited even if they were not asserted in good time. In particularly serious cases, the decision concerned is null and void, for example if a member of the court has pursued personal interests.

C. Claim to the place of residence of the civil defendant

Art. 30 para. 2 FC basically guarantees a civil defendant that he or she will be sued in the court with territorial and substantive jurisdiction over his or her domicile (see n. 22 et seq.). However, legislation has regulated the local jurisdiction of the civil courts in detail (Art. 30 para. 2 sentence 2: "The law may provide for a different place of jurisdiction."). The principle of Art. 30 para. 2 sentence 1 FC is therefore only of limited significance (see n. 54). 51

Art. 30 para. 2 FC has a broad scope of application. In personal terms, it covers all natural persons and legal entities with their domicile or registered office in Switzerland. In substantive terms, it covers all actions with substantive civil law subject matter, not just compulsory claims. 52

Art. 30 para. 2 sentence 1 FC confers the justiciable right of the civil law defendant to be sued in his canton of residence at the court that has jurisdiction according to the cantonal court organization. The claim may have international, intercantonal and intra-cantonal effect. 53

Art. 30 para. 2 sentence 2 FC provides for a far-reaching reservation of this principle. It leaves it up to the legislature to provide for exceptions to the guarantee of the judge of domicile (including by means of international treaties), without specifying the conditions under which such exceptions are permissible. Due to the comprehensive codification of civil procedure, including international proceedings, there is little room for the principle of the judge of domicile under Art. 30 para. 2 sentence 1 FC. 54

55 If the defendant waives his or her right to the judge of domicile, Art. 30 para. 2 sentence 1 FC naturally loses its meaning. This is the case in the event of a plea of lack of jurisdiction and where there is a valid jurisdiction or arbitration agreement.

56 Art. 30 para. 2 sentence 1 FC is therefore today merely a catch-all fundamental right and an aid to interpretation. The provision plays the role of a fallback guarantee in the absence of a statutory or constitutional provision. Art. 30 para. 2 sentence 1 FC fulfills the function of an aid to interpretation when provisions of laws, treaties or jurisdiction agreements need to be interpreted (constitutional interpretation of the law).

D. Public court proceedings

57 Art. 30 para. 3 FC guarantees the public nature of the judiciary, specifically of court hearings and the pronouncement of judgments. This creates transparency that allows the "general public" to scrutinize the judiciary while respecting the separation of powers. This section deals with the publicity of proceedings; the next section deals with the public pronouncement of court judgments (E. below).

1. Scope and scope of application

58 According to the wording of the heading of Art. 30 FC ("Judicial proceedings") and its para. 3 (sentence 1: "Court hearings and the pronouncement of judgments are public."), the principle of the public nature of court hearings applies across jurisdictions. Nevertheless, the Federal Supreme Court assumes that the scope of application of this principle is limited to civil and criminal proceedings, namely in accordance with Art. 6 no. 1 ECHR. This interpretation of the law must be rejected. Neither can a corresponding narrowing of the scope of application of Art. 30 para. 3 FC be inferred from the 1999 Dispatch on the Federal Constitution, nor are there any objective reasons why the concern for transparency and the possibility of judicial review should be less relevant in the area of public law than in the area of civil and criminal law. This is not altered by the fact that the legislature acted in accordance with the Federal Supreme Court (but, in my opinion, unconstitutionally) when it provided for the principle of written form for proceedings before the Federal Administrative Court.

According to Federal Supreme Court practice and literature, the principle of public hearings does not apply to arbitration proceedings. This is justified by the fact that their public nature would contradict the meaning and purpose of arbitration clauses. However, Schefer/Schaub show that there are good reasons against making a fundamental distinction between arbitration proceedings and proceedings before state courts in this area. An arbitral award is an act of sovereignty, which should therefore be subject to the same transparency as state court decisions for the same reasons. Especially in far-reaching commercial law disputes, there can be a high level of public interest in arbitration proceedings on the part of consumers, employees, insured persons and others. 59

The scope of the right to a public procedure must then be determined horizontally (stages of the proceedings) and vertically (instances). From a horizontal perspective, only the hearing in which the parties face each other and the court is covered. Excluded are the preliminary proceedings, the court's deliberation on the judgment and the vote in the collegial court. This is subject to conflicting procedural laws which, for example, require the Federal Supreme Court to hold public deliberations on a judgment if there is no unanimity in a case. 60

The public nature of court hearings is particularly important in the lower courts. This is where the jurisdiction for the determination of facts and factual issues usually lies, where the central discovery processes and party submissions usually take place. If at least one public hearing has taken place, the right to public (oral) hearings before appellate courts is only limited. It presupposes that an oral hearing appears justified in the individual case in view of conflicting interests, for example the speedy assessment of the case. 61

With regard to the protective effect, the Federal Supreme Court has greatly reduced the scope of the public nature of court hearings with its case law, according to which there is no right to a public hearing, but only a right to the public nature of the hearings provided for by procedural law. As Steinmann correctly points out, the protection of Art. 30 para. 3 FC is thus left entirely to the discretion of the procedural legislator. This cannot be the task of a constitutional fundamental right. Steinmann therefore calls for an independent "right to the holding of public hearings ... which are necessarily oral". Such a right is guaranteed by international law in civil and criminal proceedings, where Art. 6 no. 1 ECHR generally requires a public hearing. Matters of public 62 law are generally excluded from this Convention right, meaning that they only have to be heard in public (orally) if this is provided for by procedural law. However, this legal protection gap under fundamental rights has become smaller: Art. 6 no. 1 ECHR covers many matters considered to be administrative disputes under national law, either because they fall within the scope of "civil claims and obligations" as broadly interpreted by the ECHR or (more rarely and mainly in the area of disciplinary measures) because they are considered "criminal" under Convention law.

63 Publicity of the hearing means public and media publicity. However, this does not include the right to audio and video recordings.

64 In this context, the fundamental right to be heard must be explained. The parties to the proceedings themselves are holders of fundamental rights insofar as Art. 30 para. 3 FC protects their interests. For example, it may be a concern of the accused under criminal law to be able to defend themselves at a public hearing, while conversely it is also conceivable that the accused does not wish to be heard in public. However, the public (uninvolved third parties) and the media are also holders of fundamental rights (see also Art. 16 para. 3 FC, "Freedom of information"). They are entitled to demand access to a court hearing, but not to demand a hearing. Because it is not only the parties to the proceedings who are entitled to fundamental rights under Art. 30 para. 3 FC and because this provision also protects the interests of third parties, the parties to the proceedings cannot waive the public nature of the hearing ("no right to non-publicity"); i.e. the courts do not have to comply with the parties' request to exclude or restrict the public.

2. Restrictability

65 Contrary to the principle that fundamental procedural rights are non-restrictable minimum standards, the right to publicity of court hearings is subject to restrictions, provided that these serve an overriding public interest and are proportionate. Like all restrictions on fundamental rights, restrictions on the publicity of court hearings must be examined separately for their proportionality and admissibility in each individual case. Blanket provisions such as those in Art. 54 para. 4 CPC, according to which family law proceedings are not public, do not stand up to this standard. Admissible public interests include public order and safety, morality, national interests, the protection of privacy interests as well as children and young people and the administration

of justice itself. Proportionality requires the conflicting interests to be weighed up in each individual case, taking particular account of the importance of media court reporting ("watchdog function" of the media, media as "public watchdogs").

In general, public law proceedings are largely characterized by the written form for reasons of procedural economy, so that no public hearings regularly take place. This does not violate the international procedural guarantees, which are only applicable to civil and criminal proceedings, but in my opinion this is not compatible with the current Art. 30 para. 3 FC (see n. 7, n. 58). Assuming that the current administrative procedural law gives due weight to procedural economy, the wording of Art. 30 para. 3 FC should be clarified to this effect, i.e. administrative proceedings should at least be excluded from the scope of application of public court hearings. 66

If the right to a public hearing is inadmissibly restricted (i.e. violated), the legal consequence is that the judgment is set aside, unless the defect can be remedied in the appeal proceedings by holding the public hearing before this instance at a later date. This presupposes that the appellate instance has the same (full) cognizance as the lower court authority. In proceedings before the Federal Supreme Court in particular, it should therefore not normally be possible to remedy a violation of the principle of publicity. In any case, curing procedural errors by lower courts in appeal proceedings is problematic. In particular, it shortens the appeal process, because in this constellation the appellate instance decides for the first time in a correct procedure. 67

E. Public pronouncement of judgment

The public should be informed not only of the trial, but also of the outcome of court proceedings in order to be able to exercise a control function over the judiciary (see N. 3, N. 57). Art. 30 para. 3 FC therefore stipulates that court judgments must be publicly announced or published. In practice, there is currently still a huge problem, especially at the cantonal level, with the online publication of all court judgments covered by the scope of this provision (see n. 69), which is actually to be expected today. 68

1. Scope of application and scope

69 The public nature of the judiciary and its judgments has a broad scope in two respects. Firstly, it applies to all judicial proceedings in all areas of law, even those before lower courts and/or of objectively minor importance (including penalty orders, orders to discontinue proceedings and orders not to prosecute); here too, the principles of democratic control, legality and procedural fairness must be fully respected. It is also not appropriate to restrict the publicity of judgments to judgments that are not yet legally binding or have been overturned by an appeal court. With regard to arbitral awards, the statements made in N. 59 apply mutatis mutandis. Secondly, the duty of disclosure under Art. 30 para. 3 FC is comprehensive insofar as it covers court judgments in their entirety; i.e. in addition to the recitals, the findings on the facts of the case, the dispositive with the court's decision, including the cost consequences, and the rubric with the file number and the date of the decision, the details of the dispute, the panel and its composition as well as the parties and their legal representatives must be published.

70 Traditionally, the publicity of a judgment requires "that at the end of court proceedings the judgment is announced in the presence of the parties as well as the public and media representatives", but the meaning and purpose of the constitutionally required public announcement of court judgments can also be ensured by means of other forms of announcement, such as public circulation, official publication or online publication of a judgment. The latter forms of publication are equivalent and not subsidiary alternatives to the oral reading of a judgment. The obligation to publicly announce a judgment is of particular importance in the (many) proceedings in which there is no public hearing and oral deliberation of the judgment. However, a right to be served with a copy of a judgment does not follow from Art. 30 para. 3 FC.

71 In view of the purpose of the public nature of judgments, which is to enable trust in and control over the judiciary, the circle of holders of fundamental rights is also broad. The parties to the proceedings are generally entitled to knowledge of their judgment due to their direct involvement. The specific fundamental right to the publication of court judgments also protects in particular the legitimate interests of the general public and, above all, of media court reporting, which in principle do not require any further justification. Consequently, the parties can neither waive the publication of judgments nor demand the non-publication of their (anonymized) judgment.

2. Restrictability

Like the publicity of court proceedings, the publicity of judgments is not absolute (see N. 65). It can be restricted in individual cases as part of a balancing of interests (proportionality test) if conflicting public or private interests prevail and the law itself provides for a corresponding exception. In particular, court judgments are regularly only made accessible to the public in anonymized form due to the protection of the privacy of the parties to the proceedings. The possibility that anonymized persons remain identifiable does not have to be ruled out. In particular, the comprehensibility of the judgment sets limits to its anonymization. Within these limits, the merely abridged publication of judgments is also permissible. There are hardly any conceivable circumstances that would justify the complete omission of publication of even an abridged and anonymized version of a judgment. In civil and criminal proceedings within the meaning of Art. 6 ECHR, this would in any case be incompatible with no. 1 of this provision. 72

A violation of the right to the publicity of a judgment can be remedied comparatively easily, namely by the appeal court obliging the lower court to publish the judgment retrospectively. 73

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COMMENTARY ON

Art. 31 FC

A commentary by Ahmed Ajil / David Mühlemann

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Art. 31 Deprivation of liberty

[1] No person may be deprived of their liberty other than in the circumstances and in the manner provided for by the law.

[2] Any person deprived of their liberty has the right to be notified without delay and in a language they can understand of the reasons for their detention and of their rights. They must be given the opportunity to exercise their rights, in particular, the right to have their next-of-kin informed.

[3] Any person in pre-trial detention has the right to be brought before a court without delay. The court decides whether the person must remain in detention or be released. Any person in pre-trial detention has the right to have their case decided within a reasonable time.

[4] Any person who has been deprived of their liberty by a body other than a court has the right to have recourse to a court at any time. The

court shall decide as quickly as possible on the legality of their detention.

CONTENT

I. ORIGIN OF THE STANDARD

1 "Deprivation of liberty must always be a measure of last resort, strictly necessary and proportionate. Any other approach constitutes a violation of human rights." " These are the words of the former Council of Europe Commissioner for Human Rights, Dunja Mijatović, reminding us that safeguards relating to deprivation of liberty enjoy **special protection**.

2 With regard to **international conventions**, Article 5 of the European Convention on Human Rights (hereinafter: ECHR, ratified by Switzerland in 1974), which protects the right to liberty and security, and Article 9 of the International Covenant on Civil and Political Rights (hereinafter: UN Covenant II, ratified by Switzerland in 1992) are legally binding on Swiss authorities. For any question relating to deprivation of liberty, it is therefore essential to refer to international obligations, in particular Art. 5 ECHR.

3 At the constitutional level, Art. 31 of the Constitution essentially reflects these treaty guarantees. It should be noted that the Federal Constitution did not originally provide for any guarantees in relation to deprivation of liberty, as this was an area falling within the authority of the cantons. In fact, the right to personal liberty, from which Art. 31 of the Constitution, was considered an "inalienable and imprescriptible" right, but **unwritten** until the total revision of the Federal Constitution, which came into force on January 1, 2000.

4 Guarantees relating to deprivation of liberty must be placed in a broader context, namely that of **freedom of movement**. The right to freedom of movement—of which deprivation of liberty is the most extreme restriction—is an essential fundamental right on which the exercise of most fundamental rights depends, such as freedom of movement or communication, protection of privacy, freedom of religion, and economic freedom. The right to freedom of movement has been enshrined and codified in various instruments, including the *Magna Carta* of 1215 (prohibiting deprivation of liberty without trial by peers), the United Nations Charter of 1945 (human dignity and fundamental freedoms) and the ECHR of 1950 (in particular Art. 5 ECHR, see below). The Swiss Federal Constitution refers to this in Art. 10 (Art. 10 para. 2, protecting the right to freedom of movement, see N. 25) and, of course, in Art. 31 Cst., which is discussed in this commentary.

Art. 31 Cst. comprises four paragraphs. The first paragraph is based solely on Article 5 § 1 ECHR, while paragraphs 2 to 4 are also based on provisions contained in various preliminary drafts preceding the total revision of the Federal Constitution that came into force in 2000. The third paragraph is the only one that specifically concerns pre-trial detention, while the other three paragraphs apply to all forms of deprivation of liberty. The wording of this provision has not been amended since it came into force. It should be noted that the first paragraph concerns the requirements relating to deprivation of liberty, while paragraphs 2 to 4 guarantee certain rights to persons **already deprived** of their liberty. 5

II. CONTEXT: DEPRIVATION OF LIBERTY IN SWITZERLAND IN PRACTICE

A. Statistics on deprivation of liberty in Switzerland

As of January 31, 2025, 6,994 people were deprived of their liberty in Switzerland. Of these, 4,362 were detained in connection with the enforcement (including early enforcement) of sentences and measures (Art. 75 ff. SCC), 2,211 were in pre-trial detention or detention for security reasons (Art. 220 ff. Criminal Procedure Code, hereinafter: CPC), and 220 were in administrative detention under immigration law (Art. 75-78 LEI). In terms of the "number of inmates " at a given reference date, Switzerland is among the countries with a particularly low detention rate. However, the total number of people deprived of their liberty over the course of a year (the 'flow') is "very high" in comparison with other European countries: in 2022, 37,127 people entered prison in Switzerland, representing **an incarceration rate three times higher** than the European median incarceration rate. This partly explains the prison overcrowding that several institutions, particularly in French-speaking Switzerland, have been suffering from for years. 6

Another factor explaining the high incarceration rate is the frequency of short prison sentences, i.e., less than six months, handed down without suspension. In 2024, out of a total of 4,997 custodial sentences without suspension, 56.8% (2,837) were for less than six months. This figure was 4,267 in 2023, meaning that short custodial sentences have fallen dramatically by 48%. This drop could be linked to the revision of the CCP, in particular the introduction of Art. 352a CCP, which now provides for the hearing of the person prosecuted 7 by the criminal prosecution authority if it is likely that the summary penalty order will result in a PPL to be enforced.

8 However, a significant proportion of short prison sentences served are alternative custodial sentences (PPLS), imposed in lieu of a monetary penalty (Article 36 of the Swiss Criminal Code) or a fine (Article 106 of the Swiss Criminal Code). Switzerland stands out internationally for its particularly high frequency of imposing SLS, which account for around half (4,964) of the 9,297 incarcerations for the enforcement of a sentence or measure in 2023.

9 The short duration of detention raises fundamental questions with regard to the objective of rehabilitation set out in Art. 75 of the Swiss Criminal Code, as a few days or weeks of deprivation of liberty generally do not allow for the implementation of sustainable support measures or have a significant impact on the life course of the convicted person. Alternative custodial sentences are also criticized from a human rights perspective, and there are increasing calls for their abolition. With regard to Switzerland, the European Court of Human Rights (ECHR) has analyzed PPLS from the perspective of Art. 8 ECHR on the protection of privacy. It ruled that a five-day PPLS for a fine of CHF 500 imposed on a person begging constituted a violation of this article.

B. Groups particularly affected

10 In Switzerland, **foreign nationals** are particularly affected by deprivation of liberty. This is due in particular to the existence of specific immigration law offenses, such as illegal residence (Art. 115(1)(b) of the Foreign Nationals and Integration Act, hereinafter: FNA), violation of an entry ban (Art. 119 para. 1 LEI), or non-cooperation in removal proceedings (Art. 115 para. 1(a) LEI). In addition, there are forms of deprivation of liberty that fall under administrative law, such as detention pending removal or expulsion (Art. 76 ff. FNA) or preparatory detention (Art. 75 FNA), which may be added to criminal detention or extend its effects cumulatively. A report published in 2025 by the Swiss Observatory on Asylum and Foreigners (ODAE-Suisse) highlights structural deficiencies in administrative detention in Switzerland.

11 In addition, foreign nationals are, in some cases, automatically excluded from alternative forms of enforcement such as community service, semi-detention, or electronic monitoring. Furthermore, conditional release is also denied to foreign nationals in advance or applied with greater restraint, often due to

considerations related to residence status rather than the conduct or reintegration of the person concerned. This treatment, based on migration criteria rather than individual prognosis, is considered by some authors to be contrary to the principle of equality (Art. 8 Cst.) and the prohibition of arbitrariness (Art. 9 Cst.). In summary, the practices described above contribute to the overrepresentation of foreign nationals in the prison population and are interpreted in the literature as a form of criminalization of migration.

Also heavily affected by deprivation of liberty, this time in the name of security imperatives, are **people suffering from mental disorders**. This dynamic is partly reflected in the significant increase in the average number of people placed in detention or in an institutional measure under Art. 59 CP (see also N. 42) due to a high risk of recidivism: this figure has increased by around 70% since the new sanctions law came into force in 2007. At the same time, the average length of stay in prison has increased significantly since 2007: from 595 days in 2007 to 1,605 days in 2023, an increase of around 170%. These data reflect a shift in criminal law away from a model focused on punishing a past act (the logic of time-limited sentences) towards a model focused on prevention, whose primary objective is to neutralize the supposed danger posed by the individual (see also N. 55). This shift, which Oberholzer describes as a transition "from repression to prevention," raises fundamental questions about the principles of proportionality, predictability, and legality of criminal measures in a state governed by the rule of law. Furthermore, the usefulness of such measures remains debatable. 12

C. Adverse effects of deprivation of liberty

Any deprivation of liberty is an extremely traumatic psychological and social experience for those concerned. The breakdown of social contacts, the loss of physical and financial autonomy, the inability to organize one's life freely, the emotional and social damage to family and friends, and psychological or physical abuse in detention are all factors that contribute to stress. The European Court of Human Rights even recognizes that incarceration, by its very nature, involves a certain degree of humiliation for prisoners. 13

Pre-trial detention (see N. 39 and N. 63 ff.) constitutes a particularly brutal infringement of personal freedom, particularly due to the absence of a period allowing the person concerned to prepare for the deprivation of liberty—a period that may sometimes exist after a final conviction or an administrative 14 decision that has entered into force. Imprisonment occurs suddenly, without transition, leaving no time to prepare psychologically or to anticipate the practical repercussions such as loss of employment, separation from loved ones, or complete disruption of daily life. This abrupt upheaval – often referred to as “prison shock” – is associated with an increased risk of suicide, particularly during the first few days of detention. This risk is all the greater as the regime of pre-trial detention is normally stricter than that of the execution of sentences, with complete isolation being widely practiced, at least at the beginning of incarceration.

15 According to a report by the Swiss Center of Expertise in Human Rights (hereinafter: SCHR), practitioners involved in the enforcement of criminal sanctions in Switzerland “unanimously consider pretrial detention to be the harshest form of deprivation of liberty.” Thus, although pretrial detention is *de jure* only preventive in nature, it must be noted that *de facto* it inevitably also has a punitive character. This is one of the reasons why the third paragraph of Art. 31 Cst. (see N. 63 ff.) is specifically dedicated to pretrial detention, the implementation of which in Switzerland has been the subject of much criticism from the European Committee for the Prevention of Torture (CPT) and the National Commission for the Prevention of Torture (CNPT). Several initiatives aimed at improving the conditions of detention under this regime are currently underway. At the end of 2023, the Conference of Cantonal Justice and Police Directors (CCDJP) adopted a “guideline on pretrial detention and detention for security reasons,” aimed at ensuring greater compliance with the principle of proportionality in the conditions of pretrial detention.

16 The **practice of solitary confinement**, i.e., the individual detention of a person for at least 22 hours a day without any real possibility of contact with other people, is particularly harmful. According to a report by the World Health Organization (WHO), the medical repercussions of solitary confinement include panic attacks, depression, anger, rage, perceptual disturbances, even total confusion, sensory disturbances, hallucinations, paranoia, psychosis, self-harm, and suicide. In Switzerland, the serious damage to health caused by isolation has long been known. A literature review by Zurich psychiatrist Reto Volkart dating from 1983 provides a damning overview of this issue. The practice of “prolonged isolation,” i.e., for more than 15 consecutive days, is considered cruel, inhuman, and degrading treatment and is strictly prohibited by the Nelson Mandela Rules. Nevertheless, prolonged isolation

continues to be practiced in Switzerland, particularly in the context of the enforcement of sentences in the form of a security measure within the meaning of Article 78(b) of the Swiss Criminal Code, which provides for the possibility of such a security measure for the protection of the detainee or third parties. Some cantonal legislation also allows for cell confinement as a disciplinary measure (in connection with Article 78(c) of the Criminal Code) for a period exceeding 14 days.

Solitary confinement is particularly problematic when applied to persons with 17
disabilities (including mental disorders): the United Nations Committee on the Rights of Persons with Disabilities (CRPD) emphasizes that solitary confinement applied to persons with disabilities may be considered a form of torture.

D. Suicide and assisted suicide

In Switzerland, an average of eight people per year committed suicide in de- 18
tention between 2003 and 2023. **Switzerland ranks poorly internationally in terms of the suicide rate in detention**. According to annual surveys by the Council of Europe, it regularly ranks among the countries with a "**very high**" rate, i.e., more than 25% above the European median. This excess mortality due to suicide is a worrying indicator of the conditions of detention and the vulnerability of prisoners in Switzerland.

The issue of **assisted suicide** is closely linked to that of suicide. Assisted sui- 19
cide is subject to a relatively liberal legal regime in Switzerland, with Article 115 of the Criminal Code only punishing incitement and assistance to suicide for selfish motives. Article 10(2) of the Swiss Constitution and Article 8(1) of the European Convention on Human Rights protect the right to self-determination, which includes the right to decide when and how to end one's life. This right is also protected by the constitutional guarantee of human dignity (Article 7 of the Swiss Constitution). However, this does not imply a right to assistance in suicide from third parties or state authorities. The Swiss Center of Competence for the Enforcement of Sanctions (CSCSP) has developed a guide for prisons, which sets out several conditions for processing a request for assistance in suicide.

III. SCOPE OF APPLICATION OF ART. 31 CST.

A. Personal scope

20 Due to the significant consequences of deprivation of liberty on a person's life and health, Art. 31 Cst. covers a broad personal scope, stating that "**no one may be deprived of their liberty**." The constitutional guarantee covers both ordinary citizens (including minors) and foreign nationals residing in Switzerland, whether legally or not. As deprivation of liberty is broadly defined, a person does not need to be involved in criminal proceedings to benefit from the protection provided by Art. 31 of the Constitution. Furthermore, any form of deprivation of liberty by the state, whether it be a criminal sentence or measure, an administrative measure (in the areas of asylum, migration, and internal security), a civil measure, or a sanction under military law, falls under constitutional and conventional protection. This consideration is particularly important in view of the growing importance of extra-criminal measures that infringe on personal freedom.

21 Subjectively, according to the established case law of the European Court of Human Rights, deprivation of liberty presupposes **the absence of free and informed** consent on the part of the person concerned. On the question of consent in the context of civil measures involving deprivation of liberty, the European Court of Human Rights has clarified—notably in the Stanev v. Bulgaria judgment—that the presence of a guardian or the absence of express opposition is not sufficient to consider that a placement is voluntary. It requires the free, informed, and legally valid consent of the person concerned. When a person agrees to remain in an institution to which they were initially transferred without their consent, the ECtHR considers that there is no longer any deprivation of liberty. However, consent alone is not sufficient to undermine the protection provided by international conventions.

B. Material scope

22 In order to determine whether an individual is deprived of their liberty and can therefore benefit from the relevant treaty and constitutional guarantees, it is necessary to consider their specific situation and take into account a **set of criteria**, such as the type, duration, and context of detention, its effects, and the manner in which it is carried out. The effects of the measures must be examined in a "cumulative and combined" manner ."

A central aspect of this substantive assessment concerns the distinction between deprivation of liberty and "mere" **restriction of movement**, to which the guarantees relating to personal liberty provided for in Art. 10 para. 2 of the Constitution and Art. 12 para. 1 of the UN Covenant II apply. The difference between deprivation and restriction of liberty is one of intensity and degree, not of nature or substance. The measures must be extraordinarily incisive, preventing a person from going and living where they wish. However, deprivation of liberty involves broader guarantees than restriction of freedom of movement. While such restriction must comply with the principles of legality and proportionality, there is no requirement for a court to review the legality of the measure, as is the case for deprivation of liberty. Unlike Article 5 of the ECHR, which exhaustively lists the situations in which deprivation of liberty is permissible under human rights law (see N. 36 ff.), there is no comparable list governing restrictions on liberty. Furthermore, as Switzerland has not ratified the 4th Additional Protocol to the ECHR, a measure that is merely restrictive (and not depriving) of personal liberty does not enjoy the specific protection of the ECHR. 23

As for the time criterion, **eight minutes** may already be sufficient for there to be deprivation of liberty. In principle, the greater the spatial restriction, the less the duration of the deprivation matters. Confinement in a cell for only a few minutes constitutes deprivation of liberty. House arrest (see below, N. 26) must last longer to reach the threshold necessary to be considered deprivation of liberty. 24

With regard to the specific conditions of implementation, **coercive measures** are not a necessary condition for the qualification of deprivation of liberty. The person concerned does not necessarily have to be physically restrained during their detention. According to some authors, placement in closed units of homes or medical-social establishments for elderly people or people with dementia must also be classified as deprivation of liberty within the meaning of Art. 31 of the Constitution and Art. 5 of the ECHR. 25

Judges also have a wide margin of discretion with regard to the criterion of **space**. According to the Federal Supreme Court and the European Court of Human Rights, a ban on leaving the airport for several days constitutes deprivation of liberty. House arrest also constitutes deprivation of liberty, even if certain exceptions, such as medical visits or religious services, are granted. A general lockdown that applies to the entire population, particularly during a 26 pandemic, does not constitute a deprivation of liberty. Forced exile on an island may constitute a deprivation of liberty if police surveillance is such that the person cannot leave their residence without prior authorization, if the space that can actually be used is limited (in this case, 90% of the island's surface area was occupied by a prison), and if the possibilities for social contact are virtually non-existent. However, the factual impossibility of leaving an enclave of 1.6 km^2, caused by a ban on entry into the neighboring country, does not constitute deprivation of liberty within the meaning of Art. 5 ECHR, as long as the person theoretically has the possibility of moving to another part of the country to escape *de facto* from the geographical restriction.

27 It should also be noted that Art. 31 Cst. and 5 ECHR do not in principle apply to the **conditions of detention** per se. These are dealt with under other provisions, in particular Art. 3 ECHR (degrading treatment) or Art. 7 of the Constitution (human dignity), Article 8 of the ECHR (right to privacy) and Article 13 of the Constitution (protection of privacy), or Article 14 of the ECHR (discrimination) and Article 8 of the Constitution (equality). The terms and conditions of detention must in all cases respect human dignity (Art. 7 of the Constitution) and avoid subjecting detainees to "distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention ." This principle is also enshrined in Article 75 of the Criminal Code, which states that custodial sentences ”must correspond as closely as possible to ordinary living conditions, provide prisoners with the necessary assistance, combat the harmful effects of deprivation of liberty, and take adequate account of the need to protect the community, staff, and fellow prisoners. "

28 These conditions include, in particular, hygiene, air and light, food, social relations, procedural rights, and the exercise of political rights. **Prison isolation**, particularly when prolonged or applied to vulnerable individuals, may **constitute a violation of Article 3 of the ECHR.** The placement of a drug-dependent patient in a secure room as part of a compulsory treatment order (PAFA) was ruled by the Federal Supreme Court to constitute “an additional restriction of personal freedom” within the meaning of Art. 10 para. 2 of the Constitution and therefore requiring a legal basis. At the soft law level, conditions of detention are covered by the European Prison Rules (EPR) and the Nelson Mandela Rules, as well as other guidelines on deprivation of liberty.

IV. ART. 31 PARA. 1 CST.: LEGALITY AND LEGITIMACY OF DEPRIVATION OF LIBERTY

The first paragraph of Art. 31 Cst. enshrines the principle of legality, echoing Art. 5 § 1 ECHR. It provides that "no one may be deprived of liberty except in the *cases provided for* by law and *in accordance with the procedures* prescribed by law." This wording refers, on the one hand, to the requirement for an explicit **legal basis** in domestic law for any measure depriving a person of their liberty (*cases provided for by law*) and, on the other hand, to compliance with the **formal procedures laid down by that same legislation** (*procedures prescribed by law*) . In other words, deprivation of liberty must not only be based on a legal basis, but must also be applied in accordance with the procedural guarantees established by that standard, as these requirements constitute essential safeguards against arbitrariness. 29

In cases where a matter is subject to review of conformity with the Convention, the ECtHR generally refrains from questioning domestic law. However, since this is a serious restriction of a fundamental right, the Court requires that the law be "of high quality," i.e., **accessible, predictable, and precise**, in other words, characterized by a high degree of normative density. It must also comply with the purpose of Article 5 of the ECHR, which is to protect all individuals against arbitrariness. Since deprivation of liberty is understood in its broadest sense by Article 31 of the Constitution, all applicable legal bases—including those derived from administrative law (asylum, migration, PAFA, etc.) or civil law (placement for assistance, adult protection, etc.), and not only those derived from criminal law and criminal procedure, must be taken into consideration and are subject to the guarantees provided for by the standard. 30

For a deprivation of liberty to be lawful, it must not conflict with the grounds listed exhaustively in Art. 5 § 1 ECHR. These grounds make it possible to give concrete expression, as indicated in the case law of the Federal Court, to the safeguards provided for in Art. 31 of the Constitution with regard to permissible grounds for detention. Three main principles derive from the case law of the European Court of Human Rights with regard to Article 5 § 1 of the ECHR: the narrow interpretation of the exceptions, which are listed **exhaustively**; the regularity of the deprivation of liberty, which is emphasized from both a procedural and a substantive point of view; and the importance of the speed of the required judicial reviews. At the same time, the principles of pro- 31 portionality and the inviolability of the essence of fundamental rights referred to in Art. 36 para. 2 to 4 of the Constitution must also be respected.

32 The principle of proportionality and the protection afforded by Art. 5 of the ECHR imply that freedom is the norm and that any measure that infringes upon it must remain the **ultima ratio**. At least in official discourse, there is international consensus that deprivation of liberty should only be used as a last resort. The standards of the CPT and numerous recent recommendations by the Council of Europe explicitly state that incarceration should only be considered as a last resort and support a criminal policy geared towards reducing the use of detention. This principle is not explicitly reflected in the case law of the ECtHR relating to Article 5 of the ECHR, but the Court's arguments in cases concerning violations of Articles 8 to 11 of the ECHR provide relevant analogies. In the case of *Hatton and Others v. the United Kingdom*, the Court ruled that States are required to minimize interference with the exercise of human rights as much as possible by seeking less intrusive alternatives and striving "to achieve their aims in a manner that is most respectful of those rights." It further held, referring to the judgment in Dudgeon v. United Kingdom, that "where a government policy, as reflected in criminal legislation, impinges on the most intimate aspects of an individual's private life, the scope of the State's margin of appreciation is reduced." In particular, the State must demonstrate scientifically that the interference with fundamental rights is necessary.

33 Applied to personal freedom, the above statements by the ECtHR imply an obligation for national authorities to **prove the effectiveness** of the measures imposed to achieve their objective and to find alternative solutions. In concrete terms, the authorities (in particular the legislature and the courts) must systematically examine, even on a case-by-case basis, whether alternative measures or, failing that, shorter periods of deprivation of allow **the objectives pursued** to be achieved, such as social reintegration (Art. 75 CC) or the restoration of social peace. The results of research on the impacts of different measures – particularly on children and relatives of detainees – must therefore be taken into consideration.

A. Grounds justifying deprivation of liberty under Art. 5 § 1 ECHR

Deprivation of liberty is only permissible if one or more of the grounds listed in Art. 5 § 1 ECHR apply. As stated in the text of the provision, "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty *except in the following cases* and *in accordance with the law*" (emphasis added). The ECHR is of **paramount importance** for any infringement of fundamental rights resulting from deprivation of liberty: in its practice, the Federal Court takes into consideration the case law of the ECtHR and both judgments involving Switzerland and those concerning complaints made against other States. 34

1. Post-sentence detention

Art. 5 § 1(a) ECHR refers to lawful detention after conviction ("lawfully detained after conviction by a competent court"), typically a custodial sentence ordered by a court as provided for in Art. 40 SCC, Art. 36 SCC (substitute custodial sentence) or Art. 41 SCC (custodial sentence in lieu of a financial penalty). It should be noted that judges must expressly justify their choice of a custodial sentence (Art. 41 para. 2 CC), which must appear to be the only means of preventing the offender from committing further offenses. In addition, the guarantees provided for in Art. 6 ECHR apply with regard to a fair trial. In the Swiss context, internment (Art. 64 CP), which is a purely security-related measure, also falls within the scope of Art. 5 § 1 (a) ECHR. Finally, the concept of "after" implies not only a temporal succession, but also a causal link between the grounds given in the conviction and the pronouncement of detention. However, this link fades as time passes. 35

2. Non-criminal preventive detention

Article 5 § 1(b) of the ECHR provides for the possibility of detention for failure to comply with a court order or to ensure the fulfillment of a legal obligation, for example in the event of non-payment of a fine or violation of the conditions of parole. The measures in question must not be punitive in nature. The person concerned must have received a **binding order**, must have had the opportunity to comply with it, and must have failed to do so. The deprivation of liberty must also serve exclusively to ensure the fulfillment of the obliga- 36 tion, which could not be achieved by less severe measures. This obligation must be specific and concrete.

37 With regard to the nature of the legal obligation, it may be a negative obligation, in particular the obligation to refrain from committing offenses, which opens the door to **pre-trial detention outside the criminal justice system**, which has been dealt with by the ECtHR both from the perspective of Art. 5 § 1 (b) ECHR and under Article 5 § 1 (c) ECHR. However, the "potential" perpetrator must know what specific act he or she should have refrained from committing and there must have been concrete indications suggesting that he or she did not intend to refrain from committing it. For the obligation to be sufficiently concrete and specific, the place and date of the offense and the potential victims must be specified. Preventive detention that does not meet this requirement for precision cannot therefore be considered. This is one of the reasons why the proposal for preventive detention for "potential terrorists" had to be abandoned when the Federal Act on Police Measures to Combat Terrorism (LMPT) was adopted in Switzerland in 2020. House arrest, on the other hand, has been retained and is now part of the preventive arsenal of the Federal Act on Measures to Safeguard Internal Security (LMSI). This is despite the fact that application in accordance with Article 5 of the ECHR seems impossible, in particular because the grounds set out in Article 23*o* LMSI and in the Message relating to the MPT are not sufficiently precise to justify preventive detention within the meaning of either Art. 5 § 1 let. b) ECHR or Art. 5 § 1 let. c) ECHR (see below, N. 39 ff.) .

38 The ECtHR considers that Article 5 § 1 ECHR is not violated as long as the detention complies with the principle of proportionality and the deprivation of liberty is lifted **as soon as the concrete risk disappears**. This requires continuous assessment of the situation and cannot, in principle, justify detention exceeding a few hours. In accordance with this case law, the Federal Supreme Court considers that keeping demonstrators in a police cordon ("kettling") for 2.5 hours, followed by detention for security checks for 3.5 hours, constitutes permissible deprivation of liberty, both from the perspective of subparagraph (b) – to prevent the persons concerned from committing an offense, in this case violent acts during a prohibited demonstration – and from letter c) (see below) – to curb suspicions relating to the commission of new offenses.

3. Pre-trial detention

Article 5 § 1(c) of the ECHR refers to forms of deprivation of liberty that apply to persons suspected of having committed a criminal offense. This letter covers provisional arrests by the police to bring a person to the police station (Art. 217 CCP) and police custody. Simple apprehension by the police (Art. 215 CCP) may also be taken into account, as the existence of an **element of coercion** in the exercise of police powers of arrest and search indicates a deprivation of liberty, notwithstanding the brevity of these measures. The duration of the apprehension preceding a police arrest is deducted from the 24-hour period during which the person must be released or brought before the public prosecutor (see Art. 219 para. 4 CCP). 39

The most typical manifestation of Art. 5 § 1 let. c) ECHR is **detention prior to trial** as provided for in Art. 220 CCP, including pre-trial detention until the indictment is filed with the court and detention for security reasons between that time and the entry into force of the judgment. In order to order pre-trial detention, there must be "strong" suspicion and, cumulatively, at least one of the four specific grounds for detention must be present, namely the risk of collusion, the risk of flight, the risk of acting on the crime, and the risk of reoffending (Art. 221 CCP). In doing so, the CCP goes further than the ECHR, which only mentions "sufficient" suspicion. The existence of one of the four grounds must be based on concrete evidence; mere presumption is not sufficient. Pre-trial detention must in principle be a measure of last resort, in order to comply with the principle of proportionality (Art. 36 para. 3 Cst.). It must be noted that this is often not the case in practice, as the wide range of possible alternative measures (Art. 237 CCP) remains underutilized. From the point of view of the rule of law, this is problematic, given the binding nature of the principle of proportionality. 40

4. Detention of minors

Art. 5 § 1 let. d) ECHR refers to the detention of a **minor**, as provided for in the Juvenile Criminal Law (JCL, 311.1) via placement (Art. 15 JCL) and, depending on the terms of enforcement, geographical prohibition (Art. 16a DPmin). The criminal procedure applicable to minors, as provided for in Art. 27 of the Federal Act on Criminal Procedure Applicable to Minors (PPmin, 312.1) (pre-trial detention and detention for security reasons). It follows from the principles of juvenile criminal law referred to in Art. 2 DPmin and Art. 4 JCP 41 that coercive measures involving deprivation of liberty remain a *last resort* and are subject to stricter time limits for extension (see Art. 26 ff. JCP). Art. 5 § 1 (d) ECHR also includes measures of placement for assistance in the case of minors (Art. 314*b* CC). Switzerland is regularly criticized by both national and international bodies for the deprivation of liberty of minors, particularly in the area of migration.

5. Detention of particularly vulnerable persons

42 Art. 5 § 1 let. e) ECHR concerns the deprivation of liberty of persons suffering from mental disorders or drug addiction, or persons described as "vagrants." The deprivation of liberty ordered for the purpose of containing a contagious disease also falls under Art. 5 § 1 let. e) ECHR. In the Swiss Criminal Code, this corresponds to forms of deprivation of liberty that are **strictly speaking non-punitive**, namely institutional therapeutic measures (Art. 59 SCC for the treatment of mental disorders, Art. 60 SCC for the treatment of addictions, and Art. 61 SCC for offenses committed by young adults) . In the case of minors, the DPmin provides for placement for the treatment of mental disorders (Art. 15, para. 2, let. a DPmin). Switzerland has been reprimanded both nationally and internationally for subjecting persons with mental disorders to institutional measures within the meaning of Art. 59 CP.

43 According to the SKMR, the facilities where measures are enforced and the forensic psychiatric divisions of existing prisons "can only be partially classified as institutions that are exempt from the enforcement of sentences and attached to the health sector, even when interpreted generously." The United Nations Human Rights Committee has also criticized the inadequate treatment resulting from inappropriate placement. It states that the detention of persons with mental disorders should only be used as a last resort and that alternatives to deprivation of liberty in institutions must be found and implemented. Furthermore, it considers that Article 59 of the Swiss Criminal Code is not compatible with the UN Covenant II. The Committee recommends that Switzerland amend its legal provisions in order to comply with its international obligations. The situation of persons with severe mental disorders has also been the subject of a long-standing dialogue between the CPT and the Swiss authorities. In its report on its 2021 visit, the CPT recommends that the Swiss authorities repeal disciplinary sanctions for persons subject to institutional treatment and suffering from mental disorders. In light of this criticism, the

steady increase in the number of persons with mental disorders deprived of their liberty under the law on measures is a cause for concern.

The Civil Code (CC, 210) provides for placement for assistance purposes (Art. 426 and 427 CC). The Child and Adult Protection Authority (APEA) must rule without delay on a request for release (Art. 385 CC, Art. 426 para. 4 CC) and review the legality of the placement after six months at the latest (Art. 431 para. 1 CC). As with Art. 5 § 1 let. a) ECHR, the criminal detention of a person classified as "insane" must be causally linked to the grounds for the conviction. If the person does not reside in an appropriate institution, the measure must be lifted (Art. 62c CC). On April 30, 2019, the ECtHR condemned Switzerland for placing a person with a mental illness in care. In its judgment, the Court specified that deprivation of liberty for the sole reason of **endangering others** was not provided for in Art. The applicant's deprivation of liberty therefore had no legal basis under national law and violated Article 5 § 1 (e) of the ECHR (right to liberty and security). In other words, the use of civil law measures for purely preventive security purposes, a trend that can also be observed in Switzerland, is inadmissible from the point of view of constitutional and convention requirements. The practice of internment for assistance purposes continues to raise serious concerns with regard to the obligations arising from Article 5 of the ECHR and the Convention on the Rights of Persons with Disabilities (CRPD). In this regard, the particular problem of persons placed in closed institutions without any real judicial control, often solely on the basis of contracts concluded with relatives, should also be highlighted. 44

6. Administrative detention in the field of migration

As a final exception, Art. 5 § 1 let. f) ECHR provides for legitimate forms of deprivation of liberty in the context of entry bans, the management of the presence and removal of foreign nationals from the territory of a Member State. The existence of this exception may seem surprising at first glance, but given the state-centric nature of international law, there is no fundamental right guaranteeing **access to or residence in the territory of a Member State** of the ECHR without being a citizen or legal resident. In principle, a Member State does not violate the Convention when it prevents the unauthorized entry of a person into its territory by means of temporary detention. In Switzerland, these forms of detention exist in particular at Zurich-Kloten and Geneva-Cointrin airports. These are "transit zones" in which persons without entry 45 authorization may be detained. These zones have been classified as deprivation of liberty by the Federal Supreme Court, the Federal Council, and the CPT.

46 In the case of asylum seekers who submit an asylum application immediately upon arrival in the country, their detention in transit zones must not exceed 60 days, according to Art. 22 para. 5 of the Asylum Act (AsylA). If the State Secretariat for Migration (SEM) does not rule on the admissibility of the **asylum application** within 20 days, the person must be transferred to a canton or a federal center (Art. 23 AsylA). In principle, once the person crosses the border, they are on Swiss territory and cannot be prevented from *accessing* it. Detention under Art. 5 § 1 let. f.) therefore becomes inadmissible. Finally, Art. 73 LEI provides for the detention of persons without a short-term, residence or settlement permit in order to notify them of a decision concerning their residence status (Art. 73 para. 1 let. a LEI) or to establish their identity and nationality (Art. 73 para. 1 let. b LEI). This detention may not exceed three days (Art. 73 para. 2 LEI).

47 Once a foreign national without a residence permit is *on* the territory and **threatens public order** or is likely to evade a removal or expulsion decision, he or she may be placed under house arrest or prohibited from entering a specific region (Art. 74 LEI). However, if the enforcement measures are such that deprivation of liberty appears to be taking place, it is not Art. 5 § 1(f) ECHR that applies, but Art. 5 § 1(b) ECHR. In this case, the deprivation of liberty cannot be punitive in nature and must be lifted as soon as the obligation in question (in particular that of not threatening public order) is fulfilled.

48 The law on foreign nationals provides for various **coercive measures** involving deprivation of liberty (Art. 75-78 LEI). Art. 81 LEI imposes certain guarantees, namely the right to contact a lawyer, family members, and consular authorities (Art. 81 para. 1 LEI), the obligation to detain the persons concerned in facilities specifically designed for this purpose or, failing that, to separate them from persons in preventive detention or serving a criminal sentence (Art. 81 para. 2 LEI), and respect for the specific needs of vulnerable persons, unaccompanied minors, and families with children (Art. 81 para. 3 LEI) . At present, only a few cantons have facilities specifically designed for administrative detention. Apart from the Frambois facility (GE), most administrative detention regimes have been set up in former prisons. However, these buildings are often unsuitable for the non-criminal nature of administrative detention.

At the same time, there are many smaller facilities in Switzerland that house persons in administrative detention alongside prisoners in pretrial detention, detention for security reasons, or serving sentences or measures. As a result, the foreign nationals concerned are very often placed in prisons or prison-like facilities that are ill-suited to the specific needs of this population. This situation persists despite the Federal Court's requirement that deprivation of liberty can only be justified to the extent strictly necessary for the enforcement of the removal order, and that the conditions of enforcement must reflect the administrative – and strictly non-punitive – nature of the detention.

Finally, a foreign national may be detained in the event of expulsion, removal, 49
enforceable expulsion at first instance (Art. 76 LEI) or while awaiting a decision on removal or expulsion, for a maximum period of six months (Art. 75 LEI). For detention to be compatible with constitutional and treaty requirements, the enforcement of the expulsion or removal must be **foreseeable** and the authorities must respect the principle of expediency, particularly in the procurement of identity documents. The ECtHR has also specified that deprivation of liberty ceases to be in accordance with Art. 5 ECHR when the removal procedure is not conducted with the required diligence. A recent report highlights that in Switzerland, these requirements are not always met, particularly with regard to the principle of proportionality, procedural guarantees, and conditions of detention. In 2016, the Federal Supreme Court ordered the release from detention pending deportation of an Iraqi national convicted of terrorism-related offenses because the first-instance deportation decision, ordered by fedpol, had not examined the principle of non-refoulement applicable to refugees (Art. 25 para. 2 of the Constitution, Art. 5 of the Asylum Act) or non-refoulement in cases of risk of torture (Art. 25 para. 3 of the Constitution, Art. 3 of the ECHR). Expulsion was therefore not possible in this case. This scenario is one of the reasons why the LMPT (see N. 39) introduced the grounds of "threat to internal or external security" for both detention during the preparatory phase and detention to ensure the enforcement of removal or expulsion (Art. 75 para. 1 let. i LEI), as well as for the possibility of isolating a detained foreign national (Art. 81 para. 6 LEI), thereby strengthening the security approach in the field of asylum.

B. Positive obligations

50 The case law of the ECtHR relating to Art. 5 ECHR **is not limited to negative** obligations, i.e. the requirement to refrain from treatment contrary to the principles of the Convention. Positive obligations have also been highlighted in case law: Member States must take appropriate measures to protect all persons falling within their jurisdiction. This applies to cases of criminal extradition, where there is reason to fear that the State to which extradition is planned will not respect the guarantees provided for in Article 5 of the ECHR.

51 For example, **incommunicado detention** (i.e., without any possibility of contact with the outside world) constitutes a fundamental violation of the basic guarantees relating to deprivation of liberty. A Member State must record data on the date, time, and place of detention, the name of the detained person, the reasons for detention, and the authority responsible for the detention. If a person is at risk of being held incommunicado (a common US practice in the context of the fight against terrorism) in the hands of another state, the Member State violates the Convention on the merits if it transfers that person to foreign authorities for detention, and on procedural grounds if it fails to examine the legality of the detention abroad. In this case, the former Yugoslav Republic of Macedonia was responsible not only for detaining the applicant in a hotel for 23 days, but also for transferring him to Afghanistan and detaining him for four months in an extrajudicial detention center operated by the CIA. In such a case, when a Member State has placed a person under its authority, even for a short period, it may be required to provide evidence of its ignorance of human rights violations by another State (according to the principle of *affirmanti incumbit probatio*).

52 Finally, the state-centric approach that continues to prevail with regard to the applicability and enforcement of human rights tends to obscure the fact that states are not the only actors that violate these rights and freedoms. Positive obligations must also be respected when state agents are aware of deprivations of liberty carried out by private actors, tolerate them, or even cooperate with them. In this context, the role of private security companies, which perform sovereign tasks and use force, as is the case with security agents in federal asylum centers (CFA), remains to be examined.

C. Absence of arbitrariness

Upstream of the more concrete procedural guarantees described in paragraphs 2, 3, and 4 of Art. 31 of the Constitution, the second part of paragraph 1 ("in accordance with the law") refers to a general procedural guarantee. This serves to mitigate the risks of abuse arising from the misuse of domestic laws, in order to protect everyone from arbitrariness. Deprivation of liberty may thus be considered arbitrary if there is an element of **bad faith, cunning, or deception** on the part of the authorities. It may also become arbitrary when there is no consistency between the reason given, the place, and the specific conditions of detention, for example when persons are detained in a strict prison regime without justification related to their situation. Similarly, detention may be considered arbitrary if there is a lack of proportionality between the aim pursued and the means of coercion chosen, or if the time between the annulment of a detention measure and the adoption of a new legally valid decision is excessive. 53

According to some authors, this mechanism of protection against arbitrariness is increasingly being put to the test in practice. Under the pretext of preventing various forms of violence, **the use of the concept of dangerousness** is tending to become an instrument of arbitrariness. The "preventionist" approach focuses on measures that do not target actual offenses, but rather predicted "dangerousness." This applies to the field of internal security, particularly in the area of counterterrorism, for example through the preventive investigative powers of the intelligence services, as well as the prison system, where more and more people are being held in provisional detention as part of institutional and internment measures. 54

V. PROCEDURAL GUARANTEES UNDER ARTICLE 31 OF THE CONSTITUTION

A. Importance of procedural guarantees

Deprivation of liberty represents a particularly incisive interference with a person's fundamental rights. It is therefore of paramount importance that the person concerned be able to benefit from a fair procedure when their right to freedom of movement is affected (see above, N. 4). The right to benefit from procedural subject status (Prozesssubjektstellung) is closely linked to human 55 dignity: for deprivation of liberty to be respectful of human rights, the persons concerned must be treated as legal subjects capable of participating in and influencing the proceedings (and not reduced to objects of law). To this end, Art. 31 of the Constitution provides for specific procedural guarantees that go beyond the general procedural guarantees (Art. 29 of the Constitution) and the guarantee of access to the courts (Art. 29a of the Constitution), by specifying them for the deprivation of liberty. Art. 31 of the Constitution guarantees the right to information and the right to effectively assert one's rights (Art. 31 para. 2 of the Constitution), the review of the legality of pre-trial detention (Art. 31 para. 3 Cst.) and the possibility for detained persons to appeal to a court at any time to review the legality of their detention (Art. 31 para. 4 Cst.).

B. Art. 31 para. 2 Cst.: Right to information and to assert one's rights

56 Art. 31 para. 2 Cst. refers to the right to information, which is also covered by Art. 5 § 2 ECHR. Information is essential to enable persons deprived of their liberty to assert all their rights guaranteed by the constitutional norm (see in particular Art. 31 paras. 3 and 4 Cst.). This guarantee reflects the constitutional right **to be heard** (Art. 29 para. 2 Cst.). The right to information only applies from the moment that the deprivation of liberty becomes effective, i.e., when the person is arrested or placed in detention. The mere existence of an arrest warrant is not sufficient to give rise to this obligation to provide information: this right takes effect as soon as the person is actually deprived of their liberty. This is a procedural guarantee applicable to all types of detention.

1. Reasons for the deprivation of liberty

57 Art. 31(2) of the Constitution contains several guarantees regarding the manner and content of the notification. The two purposes concern the reasons for the deprivation of liberty on the one hand and the rights of the person concerned on the other. With regard to the reasons, the text of Art. 5 § 2 ECHR goes slightly further than Art. 31 para. 2 Cst. by adding that the person must also be informed of "**any charges against them**." In criminal proceedings, Art. 158 para. 1(a) CCP and Art. 219 CCP require that the accused be informed of the offenses with which they are charged. For further details on the criteria relating to the communication of the reasons for detention, reference should

be made to the CCP and the case law of the ECtHR and the Federal Supreme Court.

The quality of the information must be assessed in light of the specific circumstances. The grounds for detention must be **sufficiently explicit**, both legally and factually, to enable the person to request a review of the legality of their detention in accordance with Art. 31 para. 4 of the Constitution. It is not sufficient to merely mention the legal provision(s) that are alleged to have been violated. However, the authorities are not required to present the charges and evidence in full, nor to grant access to the investigation file until the first hearing has taken place (see Art. 101 CCP). 58

2. Rights to be asserted

Among the rights of the detained person is the right **not to incriminate oneself** (*nemo tenetur*, cf. Art. 158 para. 1 let. b CCP for criminal proceedings) . This principle can be inferred from Art. 6 § 1 ECHR and is explicitly guaranteed by Art. 14(3)(g) of the UN Covenant II. It should be noted that this constitutional right is undermined by the obligations of persons suspected of having committed offenses under the Federal Road Traffic Act (RTA), in particular the obligation to participate in the determination of unfitness to drive (Art. 91a RTA in conjunction with Art. 51 RTA) . Finally, it is important to note that the obligation to inform the person of their right to refuse to testify is an achievement of the new Federal Constitution of 1999. Indeed, both Art. 31 para. 2 Cst. and Art. 32 para. 2 Cst. (for criminal proceedings) establish this right to refuse to testify as a directly applicable fundamental right. The person concerned must also be informed of their right to free legal defense (see Art. 29 para. 3 Cst.) and their right to request a review of their liberty at any time (Art. 226 para. 3 CPP). Legal assistance in detention is also recognized by the European Prison Rules (paragraph 23.1) and the Nelson Mandela Rules (Rule 61). 59

Beyond the obligation to inform the person of their rights, without which the evidence becomes inadmissible (Art. 158 para. 2 CCP in conjunction with Art. 141 para. 1 CCP for hearings), it is essential that the person be **enabled to assert** those rights. When a person requests legal defense, the authorities are therefore required to respond quickly and effectively. According to some legal scholars, the mandatory defense provided for in the case of pretrial detention (Art. 130(a) CCP) should apply analogously to the enforcement of sentences 60 and measures. This is because the enforcement of a sentence is characterized by a series of decisions, each of which deserves adequate defense, particularly because detention involves increased vulnerability and a greater need for support. Beyond its purely defensive function, the right to assert one's rights also has a positive dimension, namely the ability and effective possibility to submit requests or applications to the authorities. Thus, a person serving a sentence or measure must be able to invoke the principle of rehabilitation enshrined in Art. 75 of the Criminal Code.

61 With regard to the modalities of notification, Article 31(2) of the Constitution provides for two criteria. The first is temporal in nature ("immediately"). The wording of Article 5(2) of the ECHR ("as soon as possible") is equivalent to the provisions of the constitutional text. *In concreto*, this temporal criterion does not imply any fixed time limit, but means that the information must reach the person **sufficiently early** for them to be able to effectively assert their rights. In all cases, the information must reach the person before an initial hearing and before they make any potentially self-incriminating statements. A delay of several days is inadmissible in all cases.

62 The second criterion concerns the language of communication. The detained person must be able to understand the language used, without it necessarily being their mother tongue. This may require translation. With regard to criminal proceedings, Article 219(1) of the Criminal Procedure Code provides for information to be given "in a language that [the arrested person] understands." The information must be provided to the person in **accessible, non-technical language**. Particular attention must be paid to persons whose ability to understand is limited, whether due to mental disorders, intellectual disability, temporary confusion (e.g., in the case of heavy alcohol consumption), or any other reason. In such cases, it is necessary to ensure that the information is provided in an appropriate manner, in particular with the assistance of trained or specialized personnel. In any case, it is the responsibility of the authorities to ensure that the person fully understands the reasons for their detention and their rights. It is possible to inform a legal representative if it can be reasonably assumed that the information will then reach the person concerned directly. Finally, the information does not necessarily have to be provided in writing; it can be provided orally. However, it is reasonable to keep a written record, for example in the form of minutes drawn up at a later date.

Finally, Art. 31 para. 2 of the Constitution also guarantees the right to **inform one's relatives**. The wording implies the involvement of an intermediary: neither the Constitution nor the ECHR guarantees the right to inform one's relatives or legal representatives *oneself*. The concept of a relative is not limited to the family circle, but extends to “any person connected by a private, professional, associative or other interest to the person deprived of liberty.” In the context of criminal proceedings, Art. 214 para. 1 CCP reflects this constitutional right, requiring the competent criminal authority to “immediately” inform the relatives of the arrested person and, at the latter's request, their employer or, where applicable, their country's embassy. However, the exception provided for in Art. 214 para. 2 CCP introduces a procedural restriction to this fundamental right, allowing the authority to delay the notification in order to preserve the effectiveness of the investigation. This power of postponement raises questions as to the compatibility of the requirements of the investigation with constitutional guarantees. 63

C. Art. 31 para. 3 Cst.: Pre-trial detention

The third paragraph of Art. 31 Cst. differs from the others in that it refers exclusively to a particular form of deprivation of liberty: pre-trial detention (also known as preventive detention or detention before trial). In Swiss law, this category includes pretrial detention in the strict sense (Art. 220 para. 1 CCP) as well as detention for security reasons (Art. 220 para. 2 CCP). Art. 31 para. 3 Cst. concerns two aspects: the initial review of preventive detention and its duration. This provision must be read in the light of the **presumption of innocence** set out in Art. 32 para. 1 Cst. 64

1. Review of legality

The review of the legality of pretrial detention is a specific and **automatic** guarantee, unlike the general guarantee of judicial review referred to in Art. 31 para. 4 Cst. (see N. 71 below), which must be expressly requested by the person deprived of liberty. Article 31(3) of the Constitution guarantees an initial review upon detention but does not provide any guarantees for subsequent reviews, which must meet the criteria specified in Article 31(4) of the Constitution. With regard to the time limit within which this initial review must take place, we find here the adverb “immediately,” already mentioned in Art. 31 para. 2 of the Constitution. According to the European Court of Human 65

Rights, a maximum time limit of 48 hours should not, in principle, be exceeded. The Court considers that a period exceeding four days to rule on legality is prima facie too long, even in the context of the fight against terrorism. In certain circumstances, a shorter period may also be contrary to the principle of speed, particularly in the case of minors and/or non-violent offenses.

66 In Switzerland, the public prosecutor must submit a **request for detention** for a maximum of three months to a coercive measures court (hereinafter: CMC; Art. 13(a) CCP; Art. 18(1) CCP). This request must be made "without delay" and within a maximum of 48 hours after apprehension by the police (Art. 224 para. 2 CCP). The TMC rules immediately, but also has a maximum of 48 hours (Art. 226 para. 1 CCP) to order either detention or a coercive measure, or immediate release (Art. 226 paras. 3-5 CCP). The TMC hears the accused *in person,* with some exceptions (Art. 225 CCP).

2. Courts of coercive measures: a real counterbalance?

67 The TMCs were created with the 2007 revision of the CCP to provide "an indispensable counterbalance to the powers of the police and the public prosecutor's office." The development of the TMC was intended to address a **lack of impartiality on the part of investigating judges**, as explained in the Federal Council's Message on the unification of the Criminal Procedure Code. The case law of the ECHR seemed to require that, *de facto*, only magistrates not involved in a case could not only rule on the legality of detention (Art. 31 para. 4 of the Constitution) but also order detention (Art. 31 para. 3 of the Constitution). Indeed, the wording of Art. 5 § 3 ECHR leaves some room for interpretation by stating that the person must be brought before a judge "or other officer authorized by law to exercise judicial power" ("officer" in English). Case law has clarified that a magistrate does not necessarily have to be a judge, but must nevertheless possess the attributes specific to this function, in particular independence. On the contrary, according to the text of the Constitution, the power to *order* pre-trial detention must *imperatively* be vested in a judge.

68 While the presence of TMCs is now a welcome achievement, it must be noted that there is still no real counterweight to the criminal prosecution authorities. TMCs almost never refuse requests for pretrial detention made by public prosecutors. This is all the more problematic in cases (which have been predominant since the new CCP came into force) where the case results in a **pe-**

nal order that may impose a custodial sentence of up to six months (Art. 352 para. 1 let. d CCP). In order for a court to rule on the validity of an order (Art. 356 para. 2 CCP), an objection must be filed. Without an objection, the order is treated as a final judgment (Art. 354 para. 3 CCP). Unlike cases in which a court rules on the final penalty, detention in these cases ultimately escapes the judicial review required by both the Constitution and the Convention. With the introduction of Art. 352*a* CPP, which came into force on January 1, 2024 (see N. 7 above), which now provides for a hearing by the public prosecutor "if it is likely that the penal order will result in a custodial sentence to be enforced," is to be welcomed, it still does not remedy the lack of judicial review.

3. Maximum duration of pre-trial detention

Art. 31 para. 3 of the Constitution codifies the principle of speed, with the 69 person concerned having the right to "be tried within a reasonable time." This principle is also included in Art. 5 § 3 of the ECHR and recalls the principle of speed in judicial and administrative proceedings (Art. 29 para. 1 of the Constitution). However, this is not "a guarantee in the strict sense of the term." In practice, two criteria are decisive in assessing the "reasonableness" of the time limit: the complexity of the case on the one hand and the severity of the expected penalty on the other. This second criterion is also found in Art. 212 para. 3 CCP. According to the Federal Supreme Court, reasonableness must take into account the behavior of the defendant and the issues at stake in the proceedings. There is no **maximum time limit**, as in other countries. For example, the Austrian Code of Criminal Procedure provides for six months for misdemeanors and one year for crimes, with a maximum of two years in exceptionally serious cases. It also sets different time limits depending on the reason for pretrial detention: the mere risk of collusion does not justify holding a person in detention for more than two months.

Such time limits would be desirable in Switzerland, where **pre-trial detention can be very long**. The Federal Supreme Court has ruled that pre-trial 70 detention must not exceed three-quarters of the final sentence imposed – which is already longer than the two-thirds of the sentence after which conditional release is granted in the absence of an unfavorable prognosis (Art. 86 of the Criminal Code). When pre-trial detention exceeds two-thirds of the expected sentence, a decision (or at least an assessment) regarding the granting of conditional release is required.

71 The absence of a fixed time limit may result in less pressure on the prosecuting authorities to act swiftly. Given that the period of pre-trial detention can be deducted from the sentence imposed under Art. 51 CP, judges may be tempted to take this into account when determining the sentence. In addition, release only comes into play when there is a "serious" violation of the principle of celerity and the authorities appear neither able nor willing to move the case forward and bring it to a conclusion. In less serious cases, it is up to the court to determine how to take into account a violation of the principle of celerity, for example by reducing the sentence. Like a snake biting its own tail, a potential violation of the principle of celerity is therefore often likely to be absorbed by the sentence ultimately imposed, which is not in line with the constitutional and conventional protection provided. One solution would be to consider that one day of pretrial detention is equivalent to two days of detention in execution of a sentence.

D. Art. 31 para. 4 Cst.: *Habeas corpus*

72 Art. 31 para. 4 Cst. is modeled on Art. 5 § 4 ECHR and embodies the principle of *habeas corpus*, namely the right to lodge an appeal **"at any time" to have the legality** of the deprivation of liberty examined in terms of its substantive and procedural requirements. This principle applies to all forms of detention. Unlike the detention order ("Haftanordnung") (para. 3), the legality of ongoing detention must be reviewed by a court. The phrase "without a court order" does not preclude subsequent review, particularly when the circumstances that justified the initial detention are likely to change, for example the risk of collusion (for pre-trial detention), the administration and effect of treatment (for PAFA or therapeutic measures) or dangerousness (for internment).

1. Frequency of review

73 This review of the legality of detention must be available at reasonable intervals. The frequency of these reviews depends on the nature and duration of the deprivation of liberty, as well as the stage of the proceedings. In the early stages of criminal proceedings—particularly in cases of pretrial detention—or in situations where the evidence is uncertain, more frequent reviews are required. Thus, the Federal Court ruled that the one-month time limit for inad-

missibility provided for in Art. 228 para. 5 CCP for filing a new application for release is not contrary to Art. 5 § 4 ECHR, whereas a two-month time limit was considered excessive. The principle of periodic review also applies to situations in which deprivation of liberty lasts for a long time, particularly in the context of institutional therapeutic measures (Article 59 of the Criminal Code) or internment (Article 64 of the Criminal Code). In such cases, the Criminal Code provides for annual judicial review (Art. 62*d* and 64*b* CC, respectively). A review may also be requested outside the annual intervals, at the request of the person concerned. The principle of periodic review guaranteed in Art. 5 § 4 ECHR **is in clear tension with the regime of life imprisonment** provided for in Art. 64 para. 1bis CP, combined with Art. 123a Cst., which does not provide for any judicial review mechanism when the person is considered "irreversibly unamendable." This lack of review raises serious questions about the compatibility of this regime with the fundamental guarantees of the ECHR. The Federal Court has emphasized, in a specific case, that permanent non-reformability cannot be demonstrated in a scientifically reliable manner.

The review of legality includes a review of **conventionality**, in particular to 74
verify that the guarantees of judicial review in Art. 30 of the Constitution and Article 6 of the ECHR – independence, impartiality, and fair treatment – as well as the general purpose of the Convention (Article 1 of the ECHR: obligation to respect human rights) are respected. The procedure must be adversarial and respect the "equality of arms" between the parties, which seems to require compliance with the general procedural guarantees of Art. 29 Cst.

2. Requirement of speed

With regard to the requirement of speed, it should be noted that the ECtHR 75
has criticized Switzerland on three occasions for violating Art. 5 § 4 ECHR on three occasions for violating Art. 5 § 4 ECHR due to the lengthy duration of proceedings resulting from complex administrative responsibilities in the context of the enforcement of sentences and measures. In the case of I.L. v. Switzerland, more than a year had elapsed between the applicant's request for release and the successive decisions handed down by the higher cantonal court and the Federal Court. The Court considered that such a delay did not constitute an examination "within a reasonable time" within the meaning of Article 5 § 4 of the ECHR. As in the case of Derungs v. *Switzerland*, it emphasized that the slowness of the proceedings could not be explained by the par-

ticular complexity of the case. The main cause of the delay was rather the fact that the appeal had first to be addressed to an administrative authority, which does not constitute a court within the meaning of the Convention, before reaching a judicial instance. In order to avoid future convictions by the Strasbourg Court, Switzerland should consider introducing **a direct judicial remedy** in all cantons, at least for decisions falling within the material scope of Article 5 § 4 ECHR.

76 To date, the Federal Court has not followed the **clear signals** from Strasbourg: it considers that the principle of expeditiousness in Article 5 § 4 ECHR is respected if "the circumstances did not make a more rapid decision reasonably possible."

3. Right to compensation

77 Article 5 § 5 ECHR provides for a **right to compensation** in the event of deprivation of liberty contrary to the Convention. This is the only guarantee that has not been included in the text of Article 31 of the Constitution. According to the case law of the ECtHR, States must deal with claims for compensation in the spirit of Article 5 § 5 ECHR. During criminal proceedings, compensation and reparation for non-pecuniary damage may be awarded (Art. 431 para. 1 CCP), including in cases of full or partial acquittal or dismissal of the case (Art. 429 CCP). This may be taken into account when determining the sentence. Finally, the Federal Supreme Court is of the opinion that it is up to the judge to decide on the best way to compensate for the harm suffered by a person.

VI. OUTLOOK

78 Ultimately, Art. 31 of the Constitution stands as a cornerstone of the protection of fundamental rights in matters of deprivation of liberty, guaranteeing a strict legal framework and essential procedural safeguards. While the provision, which is closely linked to Art. 5 ECHR, accurately reflects international standards, its practical application in Switzerland still reveals tensions, particularly with regard to pre-trial detention, due to the isolation practiced there and the absence of a maximum duration, as well as the still very weak counterbalance provided by the courts of coercive measures. The increasingly extensive use of criminal measures and the increasingly long periods of deten-

tion under this regime are also causes for concern in terms of respect for fundamental and human rights.

Recent developments in criminal policy and the criminal justice system—in particular the trend towards prioritizing security and prevention—call for increased vigilance to ensure that deprivation of liberty is truly a measure of last resort, proportionate and respectful of human dignity. A stronger commitment to alternative measures, greater consideration of the needs of vulnerable people, and harmonization of cantonal practices are, among other things, essential levers for improving the effectiveness of this constitutional guarantee. 79

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COMMENTARY ON

Art. 32 FC

A commentary by Lukas Staffler

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Art. 32 Criminal proceedings

[1] Every person is presumed innocent until they have been found guilty by a legally enforceable judgment.

[2] Every accused person has the right to be notified as quickly and comprehensively as possible of the charge brought against them. They must be given the opportunity to assert their rights to a proper defence.

[3] Every convicted person has the right to have their conviction reviewed by a higher court, with the exception of cases in which the Federal Supreme Court sits at first instance.

CONTENT

I. GENERAL INFORMATION

A. History of origin

1 The FC 1874 had no provision on the various guarantees in criminal proceedings like today's Art. 32 FC. Nevertheless, these were largely derived from **Art. 4 FC 1874** by case law with the consent of the literature. This applies in particular to the rights of the defense, the presumption of innocence and double-instance jurisdiction in criminal proceedings.

2 With the **total revision of the Federal Constitution in 1999**, the constitutional practice with the international minimum guarantees of a fair trial, in particular those of the ECHR and UN Covenant II, were cast in a new constitutional norm, which concretized the general procedural guarantees under Art. 29 FC for the area of criminal proceedings. To this end, Art. 32 FC was divided into three paragraphs with different objectives, which are intended to guarantee persons subject to the law a fair criminal procedure. Nevertheless, essential guarantees of criminal proceedings such as the prohibition of double prosecution and punishment or the right to compensation in the event of miscarriages of justice or unlawful imprisonment were not included in Art. 32 FC.

3 At present, Art. 32 FC is to be regarded as a constitutional **link between different normative levels**, which concretizes aspects of fairness for criminal proceedings:

- Together with Art. 5 para. 4 in conjunction with Art. Art. 190 FC constitutes the link to the international level, in particular to Art. 6 ECHR and its interpretation by the ECtHR.
- At the federal constitutional level, Art. 32 FC articulates a special provision for criminal proceedings compared to other procedural guarantees (Art. 29 et seq. FC).
- Finally, at the statutory level, Art. 32 FC represents the constitutional premise for the legally enshrined rights of accused persons.

B. Constitutional significance

1. State criminal proceedings and the protection of fundamental rights

Art. 32 FC is a **fundamental norm of the rule of law**. A democratic constitutional state can exercise its criminal power very extensively, but in order to remain a constitutional state it must effectively guarantee basic legal elements such as civil and human rights, the legality of executive power, control by an independent judiciary and predictable and calculable action by the state. 4

Criminal sovereignty must be contained by the rule of law, because of all the areas of law available to the constitutional state, criminal law is the **most invasive state instrument from the perspective of fundamental rights**: it legitimizes state interference in personal freedom and psychological integrity, in private and family life, in personal honour and in property and therefore has a massive, state-induced impact on core aspects of life. For this reason, state criminal law requires legitimation and protection mechanisms, which must be developed in criminal procedural law in particular. 5

Consequently, fundamental rights are of particular importance in criminal proceedings. This is not primarily a matter of traditional defensive rights against state authority ("*duty to respect*"), but primarily of **positive state duties to protect** the free exercise of fundamental rights ("*duty to protect*") and to ensure their structural and systemic guarantee ("*duty to fulfill*"). For fundamental procedural rights in criminal proceedings, this means that, in addition to refraining from interfering with the exercise of fundamental rights in criminal proceedings, the state must also implement positive measures so that the persons concerned can effectively exercise their fundamental procedural rights and be adequately protected from unlawful state restrictions. 6

At its core, Art. 32 FC therefore protects the party status of the accused in criminal proceedings. This means that the accused person is not merely an object of the proceedings, but should have concrete opportunities to participate as a "**subject of the proceedings**". At the legislative level, this guiding principle is derived from Art. 3 para. 1, 2 lit. c CrimPC, repeating constitutional maxims (Art. 7 and 29 para. 1 FC). The democratic constitutional state must effectively guarantee elementary fundamental procedural rights in order to provide a sufficiently legitimate basis for interventions in elementary fundamental rights initiated by the state through criminal proceedings. 7

8 The fundamental procedural rights in Art. 32 FC are based on the **party status** of the persons involved in the proceedings and on **human dignity** (Art. 7 FC). This is related to the scope of application of fundamental procedural rights vis-à-vis natural and legal persons: Since legal persons have party status in criminal proceedings (Art. 112 CrimPC) but no human dignity, the scope of Art. 32 FC does not extend to them to the same extent as to natural persons.

2. Fair criminal proceedings

9 Fair criminal proceedings ("*fair trial*", "*procès équitable*") are required for sovereign interference with elementary fundamental rights to be constitutionally acceptable. Criminal law and criminal procedural law can have serious consequences for the persons concerned. Fairness in criminal proceedings is intended to limit the inherent potential of this *ius terrible* to endanger fundamental rights (and make it susceptible to abuse) in favor of those affected. Nevertheless, fairness also takes legitimate prosecution interests into account. In this respect, the principle of fairness is the **constitutional guiding principle of the constitutional criminal process**. Although there is no explicit reference to fair criminal proceedings in the FC, for Switzerland this arises from Art. 3 et seq. CrimPC and international obligations (in particular Art. 6 ECHR, Art. 14 UN Covenant II).

10 Specifically, fairness in constitutional criminal proceedings requires not only the establishment and conduct of proceedings before independent courts but also, in particular, the guarantee of **the effective participation of the accused person** in **the preparation of the basis for the criminal judgment**, which is conveyed through the criminal proceedings. The principle of participation in criminal proceedings set out in Art. 32 FC specifies the principle of the right to be heard (Art. 29 para. 2 FC) and the associated rights to information, preparation, representation and participation, which are ultimately intended to create equality of arms between the prosecuting authorities and the accused.

11 Criminal proceedings are to be regarded as "fair" if the criminal procedural framework does not determine decisions from the outset (**open-endedness of criminal proceedings**) and accused persons are able to exhaustively present their perspectives and interests by means of procedural rights: they should be able to assume that these will be adequately (and seriously) taken into account in reaching a verdict.

C. Legal source triad of FC, ECHR and CrimPC

For a long time, the constitutional significance of Art. 32 FC was evident in the case law of the Federal Supreme Court, as many questions of interpretation of criminal procedure law were discussed as constitutional issues. The standardization of the CrimPC at the federal level as of 1.1.2011 has quantitatively reduced the case law appeal to Art. 32 FC, but as a **minimum guarantee of criminal procedure law at the constitutional level**, the norm is still significant in the light of a judicially progressive understanding of fundamental rights. Overall, Art. 32 FC specifies the general fundamental procedural rights in criminal proceedings with minimum constitutional provisions and must be read in conjunction with Art. 29, 29a and 30 FC. 12

At the same time, Art. 32 FC must be interpreted in concordance with the **procedural guarantees of the ECHR** (in particular Art. 6 ECHR) and ECtHR case law. This results from the constitutional status of the ECHR and its interpretation, but also from the obligations in Art. 190 FC in conjunction with Art. 5 para. 4 FC. Art. 5 para. 4 FC. In practice, the fundamental procedural rights in Art. 6 para. 2 and 3 ECHR represent a significant driving force for the development of constitutional guarantees vis-à-vis the prosecution authorities. 13

This applies primarily to ECHR judgments against Switzerland, which, like every other Convention state, is obliged to comply with judgments of the Strasbourg Court under Art. 46 ECHR ("*inter partes*" **effect**). In addition, ECHR judgments on other Convention states in accordance with Art. 1 and Art. 19 ECHR have an orientation effect for Switzerland for comparable problems ("*erga-omnes*" **effect**): Since the Convention states have accepted the ECHR as the minimum standard of a pan-European human rights catalog, their obligation includes proactive cooperation in fulfilling this minimum standard to avoid future convictions. 14

The guarantees of Art. 32 FC are further differentiated **at the statutory level** in the CrimPC. While the minimum provisions of the FC and the ECHR concretize the ordinary law provisions of the CrimPC, the CrimPC guarantees are expanded via the constitutional (or ECHR-compliant) interpretation, should their normative content offer less protection. For example, the orientation of the accused person to their right to a defense (Art. 158 para. 1 lit. c. Alt. 1 CrimPC) must be interpreted in conformity with the constitution to the effect 15 that they must be given the right to a defense of their choice in a practical and effective manner.

D. International developments

16 Procedural guarantees in criminal proceedings can be found in various international agreements, for example in Art. 6 para. 2 and 3 ECHR and Art. 2 **ECHR ZP VII** and in Art. 14 **UN Covenant II**. A direct comparison of these norms with Art. 32 FC reveals that the wording of the former is more detailed. For example, while Art. 32 para. 2 sentence 2 FC speaks generally of the possibility of the accused person to assert the "rights of defense to which he is entitled", Art. 6 para. 3 lit. b-e ECHR and Art. 14 para. 3 lit. b, d-g UN Covenant II provide detailed defense guarantees for criminal proceedings. This discrepancy in the level of detail, which is sometimes criticized in the literature as "incompleteness", is not fundamentally objectionable. This is because the international law standards set out minimum guarantees guaranteed by international treaties, which the contracting states implement in their legal systems at constitutional and, in particular, at statutory level.

17 Beyond the ECHR and UN Covenant II, fundamental rights under criminal procedure law can be found in **international human rights treaties and declarations**, namely in Art. 10-11 of the Universal Declaration of Human Rights of 10.12.1948, Art. 8 of the American Convention on Human Rights of the Organization of American States of 22. 11.1969, Art. 7 of the African Charter on Human and Peoples' Rights (Banjul Charter) of 27.6.1981, Art. 12-13 of the Arab Charter on Human Rights of 22.5.2004 and Art. 20 of the Declaration of Human Rights of 18.11.2012 of the Southeast Asian group of states ASEAN.

18 In addition, the **statutes of international criminal tribunals** contain fundamental procedural rights under criminal law, as in the statutes of the ad hoc criminal tribunals, namely the International Criminal Tribunal for the former Yugoslavia (Art. 10, 18 para. 3, 20, 21 ICTY Statute) and that for Rwanda (Art. 9, 17 para. 3, 19, 20 ICTR Statute) as well as in the Statute of the Residual Mechanism for the two criminal tribunals (Art. 7, 16 para. 3, 18, 19 MICT Statute), which brings their activities to a close. Higher standards on procedural rights can be found in the Rome Statute of the International Criminal Court, as Art. 67 of the Rome Statute as the central norm for rights of defence is to be interpreted consistently with internationally recognized human rights standards in

accordance with Art. 21 para. 3 of the Rome Statute. Further rights of defense can be found in Art. 20 ("*ne bis in idem*"), 55, 60, 63, 66 f. Rome Statute.

For the **EU Member States**, fundamental rights in criminal proceedings are expressly enshrined in EU primary law in Art. 47-50 of the Charter of Fundamental Rights of the European Union (CFR), which entered into force with the Treaty of Lisbon on December 1, 2009. These EU procedural safeguards are thus additional to the minimum safeguards of the ECHR, but go beyond a mere minimum standard. 19

In order to implement the requirements of the CFR and in the sense of standardizing existing criminal procedural rights (primarily from the ECHR), a*roadmap*was launched **to strengthen the procedural rights of suspects or accused persons** in criminal proceedings in order to strengthen the principle of mutual recognition of judicial decisions and judgments in criminal matters as well as police and criminal justice cooperation in cross-border cases. To implement this, several directives with minimum provisions for the criminal procedure codes of the member states were provided for. Ultimately, a new minimum standard of fundamental procedural rights applies in the EU Member States, which fills gaps in the ECHR minimum guarantees or even expands on them. An extended roadmap for the expansion of further fundamental rights in criminal proceedings is now being discussed. 20

Furthermore, **supranational EU prosecution institutions** such as EU agencies and authorities are bound by corresponding fundamental and procedural rights on the basis of Art. 51 para. 1 CFR and because of their legal basis. This also applies to the European Public Prosecutor's Office (EPPO), which took up its work on June 1, 2021. Procedural safeguards for suspects and the guarantee of judicial review are listed in particular in Art. 41 and 42 of the legal basis of the EPPO. 21

II. SCOPE OF APPLICATION

A. Personal scope of application: "Every person"

Art. 32 FC basically covers all persons who actually or objectively appear to be suspected of a criminal offense. In addition to this material consideration, the status of suspect is formally established at the latest when an official notification of the alleged offense is issued. Therefore, all **natural persons** who 22 are suspected, accused or charged with a criminal offense by means of a criminal complaint or criminal application or as part of an official procedural act (Art. 111 para. 1 CrimPC) are entitled to basic procedural rights.

23 The extent to which the fundamental procedural rights under Art. 32 FC also apply to accused **legal** entities is disputed. According to the literature, companies are in principle entitled to the same procedural rights as natural persons under Art. 112 CrimPC, unless the SCC or CrimPC contain provisions to the contrary. For this reason, large parts of the guarantee of fairness should also apply to legal persons. Although the FSC grants certain procedural rights to legal persons accused of criminal offenses, it handles the scope of protection in a differentiated and restrictive manner compared to that of natural persons. From an international perspective, the ECHR has yet to issue a leading decision in this regard, although various Art. 6 ECHR guarantees have been declared applicable to companies. The procedural rights of legal persons include, for example, the presumption of innocence, the principle of "*in dubio pro reo*", the right to remain silent and the freedom to cooperate, the right to information about the rights of the accused and the content of the criminal accusation, the guarantees arising from the right to be heard and the right to appeal. Legal persons are to be exempt from the right to the free administration of justice (Art. 130 et seq., 136 et seq. CrimPC).

24 The procedural rights enshrined in Art. 32 FC **do not apply** (directly) to other persons involved in the criminal proceedings, namely witnesses, injured parties (Art. 115 CrimPC), victims (Art. 116 para. 1 CrimPC, Art. 1 para. 1 OHG), private claimants (Art. 118 CrimPC) and their legal representatives (Art. 127 CrimPC). Furthermore, Art. 32 FC does not apply directly to the legal representation of accused persons. The rights of the defense counsel are derived indirectly from their position as legal counsel for the accused.

B. Material scope of application: "criminal proceedings"

1. Criminal proceedings in the narrow sense

25 Art. 32 FC refers to criminal proceedings. These are state court proceedings in which a decision is made on the application of standards that provide for a **sanction** (namely a custodial sentence, fine, fine and outpatient or inpatient measures). The material scope of application covers all standards that are attributable to criminal law. This is illustrated by the case law on Art. 78 BGG:

The term "criminal matter" used there includes "all decisions based on substantive criminal law or criminal procedural law". Nevertheless, the concept of criminal proceedings within the meaning of Art. 32 FC is to be understood functionally; it includes all proceedings which, due to their legal nature, enable the imposition of preventive or repressive sanctions.

2. "Engel criteria"

In the opinion of the FSC, the ECtHR case law must be taken into account when defining the functional understanding of the term. Based on the concept of "criminal charges" under Art. 6 ECHR, the Strasbourg Court has developed an autonomous understanding of the concept of criminal proceedings. Since its leading decision in 1976, the classification of types of proceedings as "criminal proceedings" has been based on the so-called "Engel criteria". These three criteria are generally examined alternatively, although the ECtHR carries out a cumulative examination in individual cases. For the criminal classification of state sanctions according to the Engel criteria, the extent to which the legal basis to be examined pursues a **punitive-deterrent concept** in its normative context and not a civil-law-compensatory or security-law-preventive approach appears to be essential. 26

According to the **first Engel criterion**, it depends on the classification of the respective norm in national law, namely the extent to which the provision in question belongs to criminal law (in particular the SCC or other statutory criminal provisions). 27

If the first criterion is unproductive, the Court takes into account the nature of the offense according to the **second** and probably most important **Engel criterion**. In order to examine the legal nature of the offense for its preventive or repressive character, both the legal consequences and the elements of the offense are taken into account. It is examined whether the legal provision in question has a general or specific group of addressees, whether it pursues punitive or deterrent purposes, whether it protects general social interests, whether a finding of guilt is necessary for the imposition of a sanction, whether the proceedings were initiated by a public authority authorized to enforce the law and how other Convention states classify comparable proceedings. 28

29 If there is no clear classification from the previous criteria, the ECtHR applies the **third Engel criterion** on the nature and severity of the sanction and the associated communicative effect of a social stigma of punishment. Both the abstract threat of sanction and any alternative measures are important here. Thus, a minor fine also has a criminal character if non-payment leads to a substitute custodial sentence or the confiscation of property.

3. Criminal proceedings in the broad sense

30 In addition to criminal proceedings and juvenile criminal proceedings (Art. 3 para. 1 JStPO), **the material scope of** Art. 32 FC also includes misdemeanor proceedings, administrative criminal proceedings (Art. 82 VStrR) and criminal tax proceedings (Art. 188 para. 2 DBG). Antitrust sanctions (Art. 49a Cartel Act) and customs proceedings are also covered.

31 Disciplinary proceedings (insofar as they only impose minor disciplinary measures), preventive police measures (e.g. measures to safeguard internal security), tax proceedings and international administrative assistance in tax matters fall **outside the material scope** of Art. 32 FC. Independent confiscation proceedings are also not regarded as criminal proceedings (with regard to the presumption of innocence enshrined in Art. 32 para. 1 FC), but as proceedings against property and assets.

4. Criminal legal assistance

32 The material scope of application of Art. 32 FC for **international legal assistance in criminal matters** is complex. According to the legislature and case law, mutual assistance in criminal matters is not to be classified as criminal proceedings but as administrative proceedings, which means that the scope of Art. 32 FC does not apply. This position, which is also prevalent in the literature, can be assigned to the so-called "**legal assistance theory**", according to which criminal legal assistance is not geared towards (domestic) criminal proceedings, but is merely initiated by a foreign country in order to promote foreign criminal proceedings. Mutual legal assistance is aimed at the performance of public duties (implementation of intergovernmental cooperation; compliance with obligations under international law).

33 The opposing view (**the** so-called "**Rechtspflegetheorie**") advocates the criminal procedural nature of international mutual assistance in criminal matters. According to this view, the measures in the requested state contribute

functionally to the criminal proceedings in the requesting state in the same way as a domestic measure, because the requested state substitutes for the requesting state and the requested measure remains an act of criminal procedure within the state. Consequently, the scope of Art. 32 FC would be opened.

This dichotomy between the theories focuses only on two dimensions of mutual legal assistance: the requesting and the requested state. In the meantime, the discussion has been given new food for thought by focusing on the individual as a third dimension. Based on the model of "international criminal proceedings based on the division of labor", mutual assistance in criminal matters is thus said to have a "**dual legal nature**". It is true that neither the theory of mutual legal assistance nor the theory of legal proceedings can comprehensively reflect the legal nature of mutual legal assistance in criminal matters; the administrative nature of mutual legal assistance appears just as unconvincing in view of the genuine criminal procedural measures in the requested state as the criminal procedural nature of mutual legal assistance, especially since central criminal law issues are clarified in the requesting state. The practicability of the characterization as a dual nature *sui generis* is doubtful, as this classification does not provide any orientation for the practically decisive question of the applicability of fundamental criminal procedural rights in mutual legal assistance proceedings. 34

It seems preferable to differentiate the legal nature according to individual forms of mutual assistance. Since enforcement assistance under Art. 94 et seq. IMAC concerns criminal proceedings that have already been concluded, the guarantees of criminal proceedings do not apply for this reason alone. The situation is different in the case of extradition for the purpose of criminal prosecution and so-called mutual legal assistance. Here, domestic mutual legal assistance functionally replaces investigative measures in the foreign state, which would in principle speak in favor of opening up the material scope of application of Art. 32 FC. Based on the model of international criminal proceedings based on the division of labor, **criminal procedural guarantees** must be guaranteed **in the overall context of the criminal proceedings** - and not completely and fully in the respective national context. Therefore, if, from an overall perspective, criminal procedural guarantees are shifted to foreign criminal proceedings and must be exercised there, the non-applicability of Art. 32 FC in domestic mutual legal assistance proceedings is not objec- 35 tionable. This mediating approach with a strong case-by-case approach claims to build on the more recent ECtHR case law on the fundamental rights of inter-state cooperation obligations in mutual legal assistance in criminal matters.

III. PRESUMPTION OF INNOCENCE (PARA. 1)

36 The presumption of innocence is the first procedural guarantee mentioned in Art. 32 FC. The wording of Art. 32 para. 1 FC is based on the international models in Art. 6 para. 2 ECHR and Art. 14 para. 2 UN Covenant II. At the federal level, the presumption of innocence is enshrined in Art. 10 CrimPC. It is also related to other aspects of procedural law, such as public information (Art. 74 para. 3 CrimPC), the freedom of the accused to incriminate themselves and cooperate (Art. 113 para. 1 CrimPC) and the consequences of costs and compensation in the event of acquittal or discontinuation of proceedings (Art. 426 para. 2 and Art. 430 para. 1 lit. a CrimPC).

37 The core of the presumption of innocence is the protection of the **open-ended nature of criminal proceedings**, as fair criminal proceedings start without a predetermined outcome and therefore with an uncertain outcome. Only regular criminal proceedings bring certainty about criminal responsibility and sentencing.

38 The presumption of innocence results in the prohibition of the punitive nature of criminal proceedings: Punishments may not be anticipated in ongoing criminal proceedings before the outcome of the judgment. Consequently, according to Art. 234 para. 1 CrimPC, there is a strict separation between convicted persons in prison (primarily for the purpose of resocialization) and prisoners in criminal detention (primarily for the purpose of securing the presence of the accused and gathering evidence), including different forms of detention regimes.

A. Material scope of protection

39 With regard to the material scope of the presumption of innocence, reference should be made to the above explanations. Mutual assistance proceedings may fall within the scope of Art. 32 FC on a case-by-case basis (in particular in extradition proceedings for criminal prosecution) if there are indications that the presumption of innocence is not sufficiently taken into account in

foreign criminal proceedings or if there are indications of previous convictions from the conduct and documents of the foreign mutual assistance authorities.

B. Temporal scope of protection

The protection of the presumption of innocence is granted to the person concerned from the time at which he or she materially becomes an accused person (Art. 111 CrimPC). **The beginning of the guarantee of the presumption of innocence** therefore coincides with the formal notification of investigations against the person concerned or implicitly with the implementation of measures directed against them as the accused. The final (legally binding) court decision on the accusation of guilt marks the **end of the presum**ption of innocence: the decisive factor is the extent to which judicial proceedings are still ongoing in which a court can still materially deal with the question of guilt. 40

In some cases, the presumption of innocence extends beyond the end of the criminal proceedings ("**second protective dimension of the presumption of innocence**"). This applies to cases of acquittals or discontinuation of proceedings (e.g. due to the statute of limitations) in which no residual suspicion may be maintained. Decisions on costs to the detriment of the acquitted accused person are only permissible if the accused person caused the criminal proceedings against them to be opened or obstructed their progress (Art. 426 para. 2 CrimPC). 41

C. Individual protective contents

1. Evaluation of evidence

The Federal Supreme Court has established the presumption of innocence in particular as a **rule for the assessment** of evidence. In a leading decision, it clarified that the criminal court "may not declare itself convinced of the existence of facts unfavourable to the accused if, when viewed objectively, there are considerable and unquestionable doubts as to whether the facts have materialized in this way". This guiding decision is reflected today in the wording of Art. 10 para. 3 CrimPC ("If there are insurmountable doubts as to the fulfillment of the factual requirements of the charged offense, [...]") (rightly criticized by the literature). Reasonable doubts about the guilt of the accused per- 42 son must work in their favor ("*in dubio pro reo*"). This only concerns factual issues, not legal issues. In practice, the procedural principle is reviewed very cautiously: A violation of the rule of evidence "beyond reasonable doubt" occurs if the accused person is convicted "although, on an objective assessment of the evidence, there remained manifestly substantial or absolutely unquellable doubts as to [their] guilt". Ultimately, the Federal Supreme Court examines questions of the assessment of evidence on the presumption of innocence within the narrow limits of the protection against arbitrariness. Arbitrariness exists if the court "assumes facts that are in clear contradiction with the actual situation, are based on a manifest error or are contrary to the concept of justice in an offensive manner".

43 Functionally, this protection ensures the **impartiality** of the persons involved in a judicial decision (Art. 30 para. 1 FC). They must not enter the proceedings with a preconceived opinion. Only if judges enter the proceedings with an open mind can requests for evidence be considered fairly and evidence presented be assessed impartially.

44 This procedural principle **does not apply** at the end of the criminal investigation; in case of doubt, the decision between discontinuing the proceedings or bringing charges must be made in favor of the latter ("*in dubio pro duriore*", Art. 324 in conjunction with Art. 319 CrimPC). In contrast to the assessment of evidence in the broad sense (overall procedure for establishing the facts), the procedural principle of "in dubio pro durore" applies to the assessment of evidence in the narrow sense (collection and review of evidence admissible in proceedings in accordance with Art. 139 et seq. CrimPC), the procedural principle of "*in dubio pro reo*" does not apply. The "*in dubio pro reo*" principle only becomes applicable after all necessary evidence has been collected and examined: If, on the basis of the evidence, reasonable doubt remains as to the criminal responsibility of the accused person, he or she must be acquitted of the charges. Furthermore, the principle is not applicable to prognosis decisions with regard to the detention of mentally abnormal persons, decisions on preventive detention or preventive police measures based on the Concordat on Measures against Violence at Sporting Events, as these do not involve questions of criminal guilt.

45 **Anticipated assessment of evidence** is difficult to reconcile with the presumption of innocence. Here, the court decides in advance whether evidence to be collected later is likely to support the statements made. Contrary to the

advice of the literature, the legislator has decided to retain the anticipated assessment of evidence (to the detriment of the accused person), although it has regulated this cautiously in Art. 139 para. 2 and Art. 318 para. 2 CrimPC. The main problem with this is that it restricts the open-endedness of factual investigations, which is guaranteed by the presumption of innocence. Nevertheless, case law and some of the literature support the admissibility of anticipating the assessment of evidence if the court "can assume without arbitrariness in anticipating the assessment of evidence that its conviction would not be changed by further evidence". According to established case law, it is essential for admissibility that the court arrives at a corresponding, arbitrary conviction based on evidence that has already been taken. Review by the Federal Supreme Court is limited to an examination of arbitrariness (Art. 9 FC). In contrast, another part of the literature calls for a more restrictive approach. The anticipated assessment of evidence in criminal proceedings should at most be possible in the case of undisputed factual elements to exonerate the accused.

2. Distribution of the burden of proof

As a rule of burden of proof, the presumption of innocence ensures that the state conducting the proceedings bears the **responsibility for proving guilt**: The prosecuting authorities must prove the guilt of the accused person. Conversely, the accused person does not have to prove their innocence; such a reversal of the burden of proof would be inadmissible in principle. This implies, for example, the prohibition of drawing negative conclusions from their silence. Because the burden of proof lies with the state conducting the proceedings and doubts therefore work in favor of the accused person, the burden of proof rule is closely related to the rule on the assessment of evidence. 46

Nevertheless, the presumption of innocence is not absolute: it does not prohibit certain **presumptions in substantive criminal law**. For example, criminal offences such as abstract endangerment offences, pre-criminalization or possession offences are compatible with the presumption of innocence. According to the literature, the same applies to the construction of reversals of the burden of proof in defamation offenses under Art. 173 no. 2 SCC. 47

Even in **procedural criminal law**, the presumption of innocence is not absolute, but offers scope for legally enshrined presumption and evidence rules. 48

Their admissibility depends on their rebuttability in the proceedings; the decisive factor is whether a judicial assessment of the evidence is admissible and whether the accused person has sufficient opportunity to provide counter-evidence. Furthermore, these presumption rules must serve a permissible purpose and be reasonably limitable. Particularly in the most important cases in practice, namely the confiscation of proceeds from suspected criminal activity (Art. 70 para. 1 SCC), the Federal Supreme Court assumes a reversal of the burden of proof, which is rightly criticized in the literature. Duties of acquiescence in criminal proceedings within the meaning of Art. 113 para. 1 sentence 3 CrimPC (or even minimal duties to cooperate, such as when testing breath or blood alcohol) do not violate the presumption of innocence.

49 Ultimately, the presumption of innocence in Art. 32 para. 1 FC is directed at both the prosecuting authorities and the **legislative bodies**: it is up to the legislative power to lay down rules of evidence and presumption in conformity with fundamental rights.

3. Freedom from self-incrimination and cooperation

50 The principle of "*nemo tenetur se ipsum accusare*" is closely linked to the presumption of innocence and the inherent distribution of the burden of proof, which is primarily enshrined in simple law in Art. 113 para. 1 CrimPC. The "nemo*tenetur*" guarantee essentially contains two elements of protection. On the one hand, the accused person is not obliged to testify in criminal proceedings or to contribute to their incrimination (**freedom from self-incrimination**). On the other hand, the accused person is free to cooperate with the prosecuting authorities (freedom to**cooperate**). In this respect, the authorities may not use evidence that has been obtained against the will of the accused, in particular through coercion or pressure. The "*nemo tenetur*" guarantee protects the role of the accused person as a legal subject in criminal proceedings and thus their right to autonomy in the proceedings.

51 Art. 6 para. 2 ECHR deals with the state's prohibition of forcing the accused person to cooperate in their conviction in any way, which is why self-incrimination is central to ECHR case law. In contrast, the domestic guarantee in Art. 113 para. 1 CrimPC is broader, as it protects the accused person from being forced to cooperate in incriminating themselves in criminal proceedings. Consequently, **the free decision of the accused** to incriminate themselves and make their own exculpatory statements is a legal right. According to Art. 3

para. 2 lit. d and Art. 140 CrimPC, the accused may not be forced to testify or cooperate either directly (e.g. through torture, threats or deception) or indirectly. Even the threat of adverse consequences for refusing to testify is inadmissible. In addition, the accused must be informed of their right to self-incrimination and freedom to cooperate at an early stage (Art. 158 para. 1 lit. b CrimPC). Against this background, Wohlers aptly describes the "*nemo-tenetur*" guarantee as a prohibition on the use of evidence. Disregarding this procedural right can lead to a ban on the use of evidence.

With regard to the freedom to cooperate in criminal proceedings, literature 52
and case law distinguish between inadmissible coercion and admissible passive duties of acquiescence. Active duties to cooperate on the part of the accused (such as urine tests, squats, 3D facial measurements) are discussed critically because there is a functional threat of undermining the freedom from self-incrimination. However, the core concern of the freedom to cooperate is to **protect the accused person from willingly participating in their own conviction**. In this respect, coercive measures involving interference with the physical substance of the person concerned are permissible under Art. 196 et seq. of the CrimPC as long as their existence does not depend on their will. Accordingly, the urine sample is permissible, but the use of a lie detector is not.

4. Public and private prior conviction

The addressees of the presumption of innocence are primarily the criminal 53
prosecution authorities. They should not exhibit any behavior in the ongoing criminal proceedings that indicates a determination of the guilt of the accused person. This applies both to official statements (**court reporting**) and informal statements. The public impression of judicial activity is only guaranteed and the criminal court's assessment of evidence is unbiased if no official statements are made that cast doubt on the innocence of an acquitted person or that amount to a prior conviction. It is also intended to protect against the pressure to prejudge that arises when the public is prematurely given the impression of the guilt of the accused person by official conduct. Accordingly, official (even unconscious) statements before and during criminal proceedings that present the guilt of the accused person as proven, even though this has not yet been established in court, are prohibited.

54 In this respect, the active **public communication of the prosecution authorities**, which takes into account the legitimate need for information of the general public (guaranteed in Art. 17 FC and specifically in criminal proceedings in Art. 74 CrimPC), is quite delicate, especially if it takes place beyond the media through its own supplementary judicial communication. Active media work cannot rule out all influence, which is why great caution, care and restraint are required in communication by the prosecution authorities; in particular, emphasis must be placed on the provisional nature of the information in question. The disclosure of investigative measures and the suspicion of a crime against a person appears to be permissible. What is not permissible, however, is the prejudicial presentation of a person, their designation as a "perpetrator" or, in general, any opinion-forming reporting that creates the impression that he/she has already been proven to be a perpetrator. It is precisely because of the massive stigmatizing effect and the restriction of other fundamental rights (in particular the right to private and family life and the protection of honour against defamation) that names should not be mentioned. Measures to secure proceedings with a highly suggestive visual impact, such as special prison clothing, metal cages or glass cabins, are at least justifiable from the point of view of this guarantee, despite the tensions with the presumption of innocence, if their security character is paramount and acquittal remains an option. However, such measures may violate other provisions of fundamental rights (such as the prohibition of inhumane treatment).

55 In addition to the criminal prosecution authorities, the presumption of innocence must also be guaranteed by **other state authorities**. Insinuations or allegations of (as yet undetermined) guilt by public officials and employees mislead the public into believing that the accusations made are in fact established. This in turn puts the court involved under pressure to prejudge and undermines both the procedural position of the accused person and their reputation. Finally, in hierarchical authority structures, there is a risk that the prejudicial statements of high-ranking officials will be interpreted as instructions by subordinate employees.

56 **Political actors**, on the other hand, should be given more leeway, even if they hold public office. In the interests of liberal democracy, there should be room for provocative statements about ongoing criminal proceedings in political debates. However, a distinction must be made depending on the context of the statements: If the political office-holder makes his or her statements in

the context of the respective exercise of public office, the above applies. Outside of this context, the standard of the presumption of innocence is lower in favor of the political battle of opinions.

Prejudicial media coverage or defamatory campaigns by **private individuals** 57
can impair the impartiality of the court conducting the proceedings. In such cases, both the presumption of innocence under Art. 32 para. 1 FC and the right to privacy of the person concerned or their protection of personality (Art. 13 FC) are violated. Nevertheless, private media reporting falls within the scope of protection of media freedom within the meaning of Art. 17 FC, which, as a critically analyzing, free and evaluating press, serves important and legitimate information interests of the general public for liberal democracy (so-called *public watchdog*). In this respect, careful consideration is required in two directions: Journalists should report critically and analytically on the accusation and personality of the accused person (**suspicion reporting**), but should not be allowed to conduct a campaign against an accused person that, from an objective point of view, makes concerns about a prior conviction appear justified. In addition, in the case of reporting that steers a conviction, the **state obligation** recognized by the Federal Supreme Court to take appropriate **countermeasures** in order to bring the reporting back within the limits of necessary objectivity applies. In this respect, the duty to protect of the prosecuting authorities conducting the proceedings may require them to actively intervene in the reporting in order to ensure the guarantees associated with the presumption of innocence. Appeals to the self-responsibility of media professionals are usually not enough. In extreme cases of serious violations of procedural fairness and the presumption of innocence, proceedings should be discontinued.

IV. RIGHT TO INFORMATION (PARA. 2 SENTENCE 1)

In accordance with Art. 6 para. 3 lit. a ECHR and Art. 14 para. 3 lit. a UN 58
Covenant II, Art. 32 para. 2 sentence 1 FC requires the accused person to be informed in detail at an early stage of the criminal proceedings about the nature and grounds of the charges against them in a language they can understand. Art. 32 para. 2 FC thus substantiates the right to be heard in accordance with Art. 29 FC and Art. 3 para. 2 lit. c CrimPC and is related to the accusation maxim in criminal proceedings in accordance with Art. 9 CrimPC. The core purpose of the right to information is to enable the person concerned to **pre-**

pare their **defense** and to **enable** them to defend themselves. In this respect, this right to information is functionally related to the effective right of defense in Art. 32 para. 2 sentence 2 FC and protects against being taken by surprise. Essentially, the accused person's right to information extends to

- The nature and assessment of the allegations made (Art. 158 para. 1 lit. a CrimPC; see also Art. 143 para. 1 lit. b CrimPC);
- the rights to which the accused is entitled (Art. 143 para. 1 lit. c, Art. 158 para. 1 lit. a-d CrimPC; see also Art. 143 para. 1 lit. c CrimPC);
- the right to inspect files (Art. 101, Art. 107 para. 1 lit. a, Art. 225 para. 2 CrimPC).

A. Timing of the information

59 According to Art. 32 para. 2 sentence 1 FC, the "accused" person should receive information about the charges against them "as quickly as possible". This is intended to **enable** the person concerned to **exercise effective rights of defense** at an early stage of the proceedings, when decisions on the defense strategy are still effectively open. The concept of the accused under Art. 32 para. 2 sentence 1 FC is detached from the formal filing of charges, as the rights to information exist during the investigation phase. The decisive factor is the **status of the accused** in accordance with Art. 111 **CrimPC**. The start of the right to information is marked by the implicit (e.g. taking of a measure) or explicit knowledge of the person concerned that they are under investigation. This is the case at the latest at the first interrogation (Art. 158 CrimPC). If this information is not provided, evidence from the interrogation is absolutely unusable (Art. 158 para. 2 in conjunction with Art. 141 para. 1 CrimPC).

60 The right to information may be subject to **restrictions** due to legitimate prosecution interests, for example if the success of the investigation is jeopardized by attempts to thwart the accused. Nevertheless, the duty to inform must be linked to the exercise of effective rights of defense. Therefore, the restrictions reach their limits if they are intended to weaken the defense or threaten disadvantages for the subsequent criminal proceedings. If the success of the criminal investigation is only threatened by the exercise of procedural rights, the right to information must be given priority. While in ordinary criminal proceedings the duty to provide information in accordance with Art. 158 f. CrimPC takes place expeditiously due to the explicit official obligations in

accordance with Art. 219 para. 1 and 2 CrimPC, there are serious constitutional concerns in administrative criminal proceedings because the accused person has to wait longer for the information to be provided in accordance with Art. 39 para. 3 in conjunction with Art. 55 VStrR. Art. 55 VStrR, the accused may be detained for longer than 72 hours without the presence of legal counsel and without being informed of the charges.

If the duty to inform is subject to **delays**, the notification must be made up for in such a way that there is sufficient opportunity to prepare for the proceedings. The content requirements for orientation vary depending on the stage of the proceedings (notification of the charges at the first hearing in accordance with Art. 158 CrimPC; indictment in accordance with Art. 325 para. 1 lit. f CrimPC). It may be appropriate to suspend the proceedings in order to give the defense sufficient time to prepare. From the perspective of convention law, disadvantages suffered by the accused can at best be remedied through the judicial process. The ECtHR is generous in its treatment of the possibility of curing disadvantages through subsequent information. 61

B. Substantive requirements for information

In terms of content, the right to information extends to the communication of the **alleged facts** (descriptions of the place, time and subject matter of the alleged offense) as well as the (preliminary) **legal assessment of the** prosecuting authorities. 62

The accusation and its criminal classification may not only be communicated in abstract terms. In order to provide the accused person with "comprehensive" information, **detailed information** must be disclosed, depending on the circumstances of the individual case and the respective stage of the proceedings. The extent to which the accused person can understand the content and scope of the criminal charges and prepare their defense within a reasonable period of time must be examined. There is no requirement to list specific evidence. 63

The state of knowledge of the facts and legal assessment in the investigation proceedings may change as the facts of the case **progress**. If the reason or nature of the accusation changes as a result, the prosecuting authority must provide new information. Only then can the accused person effectively prepare for new or changed allegations. 64

C. Form and linguistic comprehensibility

65 In principle, the information does not have to be given in writing, but may be given orally. The decisive factor is that the effectiveness of the protective purpose is not undermined, which would be the case, for example, with oral information in a complex case. In view of the importance of the right to information for the effectiveness of the defense and the exceptional psychological situation in which the accused person finds themselves in criminal proceedings, purely oral information seems inappropriate. **Written information** about the facts of the case is required.

66 It is essential that **the accused person is informed directly and personally**, and that this information is formally provided to them and their defense. Simply informing the legal counsel is not sufficient, as the right to information aims to protect the procedural subject position of the accused person.

67 The information must be comprehensible so that the accused person can organize their defence effectively. The information must therefore be provided in a **language that the accused understands**. Challenges exist if the accused person has difficulties understanding the allegations due to mental health problems. In addition to the procedure set out in Art. 155 para. 2 CrimPC, it would appear expedient, as in the case of hearing-impaired or speech-impaired parties to proceedings under Art. 143 para. 7 CrimPC, to draw up a written statement or to allow the assistance of a suitable person.

68 The postulate of comprehensible orientation may require the assistance of a translation in accordance with Art. 68 para. 2 CrimPC if the accused obviously does not understand the language of the court. There is no entitlement to a translation into the accused's own native language; a translation into a language that the person concerned can understand is sufficient. However, the accused person must indicate their need for translation in the case of non-translated procedural steps. Not only Art. 68 para. 2 CrimPC, but also ECtHR case law has so far refrained from **requiring a translation of the notification or the indictment**, although the Court warns of the disadvantages this would entail for the accused. However, a right to a written translation appears unavoidable for the protective purpose of Art. 32 para. 2 FC and, in view of modern IT aids for automated translation, can be realized at a low threshold.

V. EFFECTIVE DEFENSE (PARA. 2 SENTENCE 2)

Art. 32 para. 2 sentence 2 FC guarantees the accused person the assertion of the rights of defense to which they are entitled. Although no individual rights of defense are expressly mentioned, the core concern of effective defense is to provide the accused with concrete and practical procedural rights of defense in order to ensure their **effective participation in the criminal proceedings**. Effective participation means being put in a position to defend oneself concretely and effectively against accusations made by the criminal prosecution authorities. This requires specific rights of defense and appropriate framework conditions. 69

For the individual rights of defense, reference should be made to the specialist literature on criminal procedure. Concrete **minimum requirements** for criminal procedural rights of defense are listed in **Art. 6 para. 3 ECHR**: Effective defense requires, in particular, sufficient time and opportunity to prepare for the proceedings, self-defense or defense by legal counsel through the defense of choice or official defense, confrontation with witnesses against and incriminating witnesses and, if necessary, the free assistance of an interpreter. The minimum requirements of international and constitutional law are concretized at the statutory level in the CrimPC. According to the legislative will, the procedural guarantees under criminal law must be extended beyond the minimum requirements. 70

The **framework conditions** for an effective defense include ensuring that the accused person is adequately informed about their rights of defense beyond the factual right to information (Art. 32 para. 2 sentence 1 FC). Since criminal proceedings are extremely complex and have serious consequences for the persons concerned, the accused often needs the support of legal counsel throughout the criminal proceedings in order to be able to defend themselves appropriately. Finally, for an effective defense, the criminal proceedings as a whole must be fair. 71

A. Information on defense rights

In order for the accused person to be able to effectively exercise the rights of defense to which they are entitled, they must be aware of them. Particularly as Art. 32 para. 2 sentence 1 FC only refers to information about the accusations made, the right of the accused person who has not been arrested (Art. 31 para. 72

2 FC) to be **informed of their rights of defense** by the prosecution authorities is based on Art. 32 para. 2 sentence 2 FC in conjunction with Art. 158 para. 1 lit. This must take place from the first interrogation (Art. 158 para. 1 CrimPC), so that in particular the status of the accused within the meaning of Art. 111 CrimPC must be taken into account. Both for human rights reasons and in view of the exceptional psychological situation for the accused person, it is necessary to inform them of their rights as soon as they arrive at the police station, for example during police detention in accordance with Art. 215 para. 1 lit. b, c CrimPC.

73 According to the intention of the legislator, it should be sufficient to inform the accused person of their rights of defense once. This is not convincing due to the discrepancy with the duty to inform between the accused and other parties to the proceedings. Rather, Art. 158 para. 1 CrimPC establishes a **minimum standard** for the legal information to be provided to the accused by the prosecuting authorities during the first interrogation, while Art. 143 para. 1 lit. c CrimPC expressly requires comprehensive legal information. This must be provided irrespective of the accused person's level of knowledge about their position in the proceedings, their procedural rights or the subject matter of the proceedings. Particular attention must be paid to the quality of the information provided so that the right to an effective defense is not undermined.

B. Legal assistance

74 The core concern of the right to legal counsel is to give the accused person the opportunity to participate in their own criminal proceedings in an informed manner and to lend sufficient weight to their position in the proceedings or in the sentencing process. The defense in criminal proceedings is solely committed to their interests (Art. 128 CrimPC). In this respect, every accused person has the right to defend themselves or to call in a defense lawyer. They may call upon a defense counsel of their own choosing and paid for by them (Art. 127 para. 5, Art. 129 CrimPC). This also applies to minor criminal proceedings, but not, according to the Federal Supreme Court, to psychiatric examinations of the accused. The legal counsel of the accused person is to be classified as **support for the subject of the proceedings** in order to realize his rights of participation. The main decisions on the defense strategy are the responsibility of the accused person, who must have a corresponding information and knowledge base for this.

1. Self-defense

Subject to cases of mandatory defense, the accused person has the right to **self-defense** if they so wish (Art. 129 para. 1 CrimPC). If they choose self-defense, they must carefully observe the corresponding duties to act with regard to the criminal proceedings. To this end, they must have appropriate opportunities to inspect files and have access to legal texts and textbooks. 75

The informed defendant can decide not to contest the accusations and statements of the prosecution and to participate in the proceedings with a **trial strategy of defenselessness**. It is then crucial that they have recognized the scope of their defence strategy and can participate in their own criminal proceedings as an informed subject of the proceedings as they wish. 76

The prosecuting authorities (in particular the court) may examine whether it appears appropriate in the interests of the administration of justice to appoint legal counsel despite the accused's wish to defend themselves (in particular if the accused is unable to defend themselves). In the event that the accused is unable to defend himself (Art. 130 lit. c CrimPC), the prosecution authorities are obliged to carry out a corresponding review (Art. 131 para. 1 CrimPC). The appointment of **legal counsel against the will of the accused person** is a serious interference in their defense, but may be permissible if this appears necessary in the interests of the administration of justice and the accused person can continue to influence their own criminal proceedings. The compulsory appointment is legitimate (or necessary in the case of a necessary defense) if, in a specific individual case, access to the file can only be granted to the defense and not to the accused. The legal counsel appointed by force must not adversely affect the defense of the informed accused person. 77

2. Necessary defense

In the cases listed in Art. 130 CrimPC, legal assistance by a defense counsel is mandatory. Compulsory defense limits the right to self-defense in criminal proceedings. Its *raison d'être* is discussed in many ways and is sometimes interpreted as the state's duty of care (Art. 132 para. 1 lit. a CrimPC) to remedy a lack of legal knowledge and procedural defense skills, to establish the truth and to ensure that the criminal proceedings are conducted in a judicial manner. If the appointment of legal counsel is indicated, the compulsory appointment of such counsel is permissible even if the accused person refuses it, as 78 the prevailing view is that necessary defense cannot be dispensed with. According to the Federal Supreme Court, the necessary defense counsel can be forfeited if the rights of defense are abused, which is rightly viewed critically in the literature.

79 For the requirement of effective defense under Art. 32 para. 2 sentence 2 FC, the **time of appointment** of counsel is decisive. This is generally described as "without delay" in Art. 131 para. 1 CrimPC and is described in more detail for the preliminary proceedings in Art. 131 para. 2 CrimPC.

3. Elective defense

80 In principle, the accused person has the right to **elective** or private defense, i.e. to legal representation by a criminal defense lawyer of their choice (Art. 129 CrimPC). The core of elective defense is the independent choice and appointment of legal counsel for the accused in criminal proceedings. Domestically, Art. 127 para. 5 CrimPC refers to Swiss law on lawyers, which in principle reserves professional representation in court to the legal profession in accordance with Art. 2 para. 1 FMLA. This does not affect the exception in Art. 127 para. 5 last sentence CrimPC, which refers to special cantonal provisions for the defense in misdemeanor criminal proceedings.

4. Official defense

81 The official **defense** is a counterpoint to the electoral defense. In this case, the defense is not appointed by the accused, but by an authority. Compensation is paid by the public authorities (Art. 135 CrimPC). Despite the different legal relationship between the accused and the defense, the legal counsel has the same duty of care, the same independence vis-à-vis the state and the same unilateral protection of the interests of the accused as in the case of elective defense. Official defense extends to the proceedings of the first and second cantonal instance. For criminal appeals to the Federal Supreme Court, the right to an official defense is denied by the Federal Supreme Court (probably contrary to the Convention), but affirmed in the literature.

82 Although the authority conducting the proceedings appoints the defense, the **right to choose legal counsel** also applies to a certain extent to the official defense. Although there is no right to a defense counsel of one's own choice (Art. 133 para. 2 CrimPC), the preferences of the accused must be sufficiently taken into account, which implies a right to propose an official counsel. In this

respect, the director of proceedings may only reject the representation of choice proposed by the accused for objective reasons. Only in this way can the relationship of trust between the client and legal counsel be established and the accused's right to informed participation (Art. 134 para. 2 CrimPC) be safeguarded. It is critical that the language skills of the public defender are not an essential selection criterion and that there is no need under Convention law to consult the accused person before appointing their legal counsel. Furthermore, the right to make proposals and the relationship of trust imply the fundamental right of the accused - albeit subject to high hurdles under Art. 134 para. 2 CrimPC - to bring about a change of counsel; however, restrictions must be accepted in order to ensure the conduct of the proceedings.

Art. 132 para. 1 lit. a CrimPC regulates the necessary official **defense**, which 83 basically concerns four cases. Firstly, there is a necessary official defense if the person can determine their own defense but fails to do so despite being requested to do so (Art. 132 para. 1 lit. a no. 1 CrimPC). Secondly, a necessary defense exists if, in the case of necessary defense in ongoing criminal proceedings, the mandate of the defense of choice is withdrawn or resigned and no new counsel is appointed despite being requested to do so (Art. 132 para. 1 lit. a no. 2 CrimPC). Thirdly, there is a conversion into a necessary official defense if, in the course of a necessary defense, the accused person initially appoints a counsel of choice but is unable to pay for it due to established indigence. Fourthly, the principle of effective defense requires that an official defense be appointed despite the existence of an optional defense if the latter seriously violates its duty to provide assistance.

If the accused person is indigent and it is necessary in the interests of the ad- 84 ministration of justice, the state must provide them with **free defense counsel** (Art. 132 para. 1 lit. b CrimPC). The institute of free defense in criminal matters enshrined in the CrimPC implements the requirements of Art. 29 para. 3 FC specifically for the requirements of fair criminal proceedings in accordance with Art. 32 para. 2 FC. The first requirement for this is **indigence;** the reason for this is irrelevant. If the lack of means is only partial, the state can make the appointment of legal counsel dependent on the accused making a contribution. The granting of a free appointment does not necessarily imply permanent exemption from defense costs: If the financial situation of the once indigent accused person improves after his conviction, the charging of defense costs for the convicted person who is no longer indigent is permissible. This principle is reflected in Art. 135 para. 4 CrimPC, which provides for the obligation to reimburse the costs of the official defense if the indigence ceases to exist. The second requirement is the necessity of the defense to **safeguard the interests** of the accused (Art. 132 para. 2 CrimPC, "*interests of justice*"), the interpretation of which must be based on the Federal Supreme Court's practice on Art. 29 para. 3 FC. Within the limits of Art. 132 para. 2 CrimPC, this requirement is based on the realistic chance of an effective defense and, consequently, the extent to which the accused person has a concrete and effective defense. The appointment of a defense appears to be mandatory for appeal proceedings. If both conditions are met, the state is obliged to provide the unrepresented accused person with a criminal defense as soon as this appears necessary to exercise the rights of defense (according to Art. 131 CrimPC already in the preliminary proceedings). In principle, official defense remains excluded in accordance with Art. 132 para. 2 in conjunction with Art. 132 para. 3 StPO. para. 3 CrimPC for so-called **minor cases**, the requirements for which are listed as examples in the law. Due to this wording of the law (para. 2: "in particular"; para. 3: "in any case"), the official defense remains possible as an exception despite falling below the de minimis limits.

5. Legal counsel of the first hour

85 The right to legal assistance from the first police questioning or the first interrogation by the public prosecutor (so-called "first-hour**lawyer**"), which is based on Art. 159 CrimPC, is an important cornerstone for the realization of equality of arms in criminal proceedings and thus of fair criminal proceedings. This right arises upon detention or at the beginning of the first interrogation (Art. 143 para. 1 lit. c, Art. 158 para. 1 lit. c CrimPC). Functionally, the right to defense counsel already applies in the preliminary proceedings; the accused person has the right to access to legal counsel during the first police interrogation. Since it is in the preliminary proceedings, and in particular in the first interrogation, that the decisive course is set for the criminal defense in the specific case, the right to legal counsel from the outset also gives rise to a right to his presence during the police interrogation. Therefore, access to the defense is decisive for the evaluation of the confession of the accused person and its obtaining in violation of the freedom from self-incrimination.

86 However, the right of access to the defense is not absolute. Compelling circumstances in a specific individual case (e.g. terrorist defense) may make a **re-**

striction necessary, whereby the state has a duty to demonstrate this. Even if a restriction appears to be justified, the overall fairness of the criminal proceedings may be affected if the rights of defense of the person concerned are permanently and significantly impaired. Furthermore, the right to legal assistance during police questioning **can be waived**. In view of the intimidating situation in which an accused person finds themselves and taking into account the difficulty of providing evidence, the ECtHR states that high standards must be set for an effective waiver: The accused person must be sufficiently aware of the implications of a waiver.

6. Communication in defense

Art. 159 para. 2 and Art. 235 para. 4 sentence 1 CrimPC guarantee the right of the (detained) accused person to have contact with their legal counsel. In the case of foreign-language speakers, this requires the **involvement of a translator** for defense discussions. The accused may communicate in person or in writing with their legal counsel without supervision or monitoring. In terms of content, the defense is not subject to a prohibition (in particular not via the duty of confidentiality under Art. 73 para. 2 CrimPC) to inform their client about the content of documents from the criminal files; this would inadmissibly restrict their professional rules. 87

This communication may only be restricted in exceptional cases if there is reasonable **suspicion of abuse**. In order to preserve the exceptional nature of this restriction, approval by the compulsory measures court is required (Art. 235 para. 4 sentence 2 CrimPC). However, compelling security interests that require accompanying measures in extreme cases must not affect the confidentiality of oral or written communication between the defense and the client. 88

7. Bad defense

Effective defense is not only guaranteed by the appointment or presence of legal counsel; it also requires that the legal counsel effectively exercises the rights of the accused person. Therefore, Art. 32 para. 2 FC (in conjunction with Art. 29 para. 3 FC and Art. 6 para. 3 lit. c ECHR) entitles the accused person to competent, committed and effective representation of their party's interests. In this respect, the suitability of the official defense is taken into account as a result of the revision of the CrimPC (Art. 133 para. 2 CrimPC). 89

However, how to deal with **poor** defense is not fully clarified in practice. Although the serious neglect of professional and ethical duties by the legal counsel can result in a judicially ascertainable violation of the accused person's rights of defense, not every suboptimal defense leads to the affirmation of its ineffectiveness. The decisive factor is the extent to which the accused person was able to exercise their rights of defense (without unjustifiable errors) through their legal counsel and whether the legal counsel (in consultation with them) implemented a consciously chosen defense strategy.

90 Both the FSC and the ECtHR assume that failures on the part of the legal counsel are in principle attributable to the accused person. The only exception recognized by the FSC applies to gross errors in the context of the necessary defence. However, it should be borne in mind that the accused person is not in a position to supervise their legal counsel. In this respect, the state's duty to intervene to ensure an effective defense appears ambivalent: the need for protection of the person concerned stands in contrast to the state's non-interference in their defense matters, whereby the latter arises both from the autonomy of the person concerned and the legal profession as well as from the partiality of the prosecuting authorities. Under Convention law, it is difficult to conceive of a duty of protection on the part of the state to eliminate or prevent errors in elective or compulsory defense; it is precisely the independence of the legal profession that speaks against state guardianship with powers of intervention. Nevertheless, the Federal Supreme Court and the literature advocate a **duty of the prosecution authorities to monitor the fundamental effectiveness of the defense**. As an excess control, it only applies in the case of manifestly serious misconduct and is dependent on the respective procedural context, as defense failures can be remedied depending on the phase of the proceedings. According to the Federal Supreme Court, serious breaches of duty by the defense include blatant failure to meet deadlines and appointments, failure to attend important witness hearings, lack of diligence in the preparation of hearings and other procedural acts as well as lack of provision for substitutes. According to the ECtHR, inactivity on the part of the criminal defense, non-attendance at the interrogation of the accused in the preliminary proceedings or failure to take legal action (despite the accused's wishes) are to be regarded as serious neglect of defense duties.

C. Overall fairness

Effective participation in criminal proceedings is only possible if the entire criminal proceedings are fair. This requires a balance between **different legitimate interests**, namely those of the prosecution, the accused and other persons involved in the proceedings, taking into account the **particularities of the criminal proceedings**. In certain cases, this balance of interests leads to the accused person being placed at a serious disadvantage in criminal proceedings, for example by restricting their rights of defense. The question then arises as to whether the criminal proceedings were nevertheless fair overall. Since this is a central question of criminal proceedings in terms of legitimacy theory, it is not surprising that the fairness of the specific criminal proceedings is protected by Convention law and can be subject to review by the ECtHR. 91

Methodologically, the ECtHR first deals with individual criminal procedural guarantees before, in a final step, examining the balance of all interests involved in the course of the so-called **overall fairness of criminal proceedings**. In this respect, the ECtHR subjects potentially fairness-endangering interventions to an overall assessment of the fairness of the entire criminal proceedings (including the investigation and appeal proceedings) and also takes into account domestic attempts at remedy and reparation. Furthermore, the overall fairness of expeditiously conducted criminal proceedings (e.g. *plea bargaining* or abbreviated criminal proceedings) is checked for arbitrary reductions in fairness guarantees, such as the right to evidence. Therefore, any waiver of benefits or claims under the fairness guarantee - which must be declared voluntarily, expressly or tacitly - must be accompanied by a minimum level of guarantees corresponding to the severity of the waiver. In addition, the waiver must not conflict with any important public interests. In addition to the state's interest in prosecution, the ECtHR also considers the perspective of the accused person in its overall fairness assessment. This is intended to protect them from abusive application of procedural rules. The same applies if a special need for protection arises due to their particular vulnerability (e.g. in the prosecution of potential victims of human trafficking). 92

VI. JUDICIAL REVIEW (PARA. 3)

93 Art. 32 para. 3 FC guarantees every convicted person the right to have their sentence reviewed by a higher court. This provision is based on Art. 2 ECHR ZP VII and Art. 14 para. 5 UN Covenant II. The designation of the **judicial guarantee of appeal** by Art. 32 para. 3 FC appears significant because its concern goes beyond the ECHR's guarantee of fairness. This is because Art. 6 ECHR only guarantees a review of the criminal charge and not of the court conviction. Art. 13 ECHR (right of appeal) does not cover this either, as this guarantee only ensures a review body and not necessarily a judicial review. Even the guarantee of legal recourse in Art. 29a FC does not include a right to judicial review. In this respect, Art. 32 para. 3 FC is linked to the guarantee of legal recourse (Art. 29a FC) and the judicial procedural guarantees (Art. 30 FC). The exception in Art. 32 para. 3 sentence 2 FC, on the other hand, is no longer relevant to criminal jurisdiction.

94 In terms of constitutional theory, the importance of judicial review of criminal proceedings under the rule of law arises from the invasiveness of interference with fundamental rights under criminal law and the associated institutional perspective on **judicial independence** (Art. 191c FC). In a constitutional state, (criminal) courts are independent of other state organs. Their legitimacy depends on the extent to which they are able to reach concrete decisions on individual cases without extraneous influences in a fair (just) procedure in accordance with legal principles. Kiener has aptly placed judicial legal protection in the context of an institutional guarantee of fundamental rights: The judicial right of review is essential not only to respect the separation of powers (Art. 30 FC), but also as an "expression of a humane organization of authorities" (Art. 191c FC).

95 The concentration of criminal justice competence in the hands of independent courts appears to be of great importance in view of the different interests and fundamental rights of all parties to the proceedings. For the person convicted in the first instance in particular, a judicial review of the decision is essential, especially as criminal justice with its prosecution, investigation and prosecution function (public prosecutor's office) and clarification, legal protection and decision-making function (criminal courts) "remains a risky undertaking" despite the rule of law safeguards. Judicial review can (only) contain risks that affect both the accused person's rights of cooperation and defense as well as the guarantee that state prosecution and punishment must be

carried out solely in compliance with the law. The **guarantee of a judicial review mechanism** includes the prohibition of a correction of the judgment by non-judicial authorities.

The guarantee of judicial review does not contradict the principle of (institutional) independence of the preceding judicial instances. Rather, Art. 32 para. 3 FC safeguards judicial independence within the state organization. Judges inevitably bring subjective views and evaluations into the judicial decision-making process. Therefore, institutional and organizational measures are required to limit subjective influences in court decisions. Only then can we speak of judicial decisions being in line with the rule of law. This containment is achieved by giving the parties to the proceedings the right to participate (**strengthening the discursiveness of the specific proceedings**) and by involving several people as decision-makers in the specific proceedings (**pluralization of judicial subjectivity**). In addition to the public nature of the proceedings and collegial decision-making, the judicial process of instances offers a state-organizational safeguard for the fundamental right to justice. 96

A. Guarantee of appeal

Art. 32 para. 3 FC presupposes the conviction of the person concerned; the statements on the material scope of application apply accordingly. According to the Federal Supreme Court, only convicted persons have the right to a double appeal in criminal matters. Its scope of review is neither prescribed by the constitution nor by the Convention. It is up to the legislator 97

- whether it creates a second legal and factual instance (appeal) or an appeal limited solely to legal review (revision),
- whether the lodging of an appeal depends on a preliminary admissibility check, or
- whether it provides for a de minimis threshold.

The forfeiture of an appeal can only occur in the case of an unexcused "total failure" on the part of both the legal counsel and (!) the accused person. If the accused person is convicted in absentia proceedings despite having legal representation, they must have the opportunity to have the conviction reviewed in accordance with Art. 368 CrimPC. 98

B. Guarantee of legal recourse

99 As Vest aptly points out, Art. 32 para. 3 FC also contains a guarantee of legal recourse, which is prefigured by Art. 29a FC. From Art. 29a, 32 para. 3 and 191b FC in conjunction with Art. 80 para. 2 BGG. Art. 80 para. 2 BGG, the cantons are obliged to provide for judicial recourse for criminal proceedings (**obligation of double jurisdiction**). In terms of content, the right to judicial review guarantees the right to an **appeal with devolutive effect**, i.e. a decision on the merits by a higher court instance.

100 This guarantee of legal recourse is **waivable**; skipping a court instance is permissible with the consent of the person concerned. A waiver of the right to appeal is also permissible in the case of agreements in criminal proceedings, provided that the accused person makes their waiver on the basis of an informed and voluntary decision regarding their fundamental right to a review of the judgment and there are no significant public interests to the contrary.

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COMMENTARY ON

Art. 42 FC

A commentary by Christina Neier

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Title 3 Confederation, Cantons and Communes

Chapter 1 Relations between the Confederation and the Cantons

Section 1 Duties of the Confederation and the Cantons

Art. 42 Duties of the Confederation

[1] The Confederation shall fulfil the duties that are assigned to it by Federal Constitution.

[2] ...

CONTENT

I. HISTORY OF ORIGIN

Since the total revision in 1999, the Federal Constitution has regulated the tasks of the Confederation (Art. 42 FC) and the tasks of the cantons (Art. 43 FC) under Title 3 "Confederation, cantons and communes" in Section 1 of Chapter 1 on the "Relationship between the Confederation and the cantons". Since 2008, this section has also included principles on the allocation and performance of tasks (Art. 43a FC). Corresponding predecessor provisions cannot be found in earlier versions of the Federal Constitution. 1

The 1995 draft Constitution still focused on the cantons and stipulated in Art. 32 para. 1: "The cantons are responsible for all tasks that are not assigned to the Confederation by the Federal Constitution." According to the explanatory notes, this allocation of responsibilities - in conjunction with Art. 3 of the 1995 Draft Constitution - sets out the "basic decision for federalism as a concrete political principle in its modern form". Unlike the current Art. 42 FC, the draft did not explicitly state the tasks of the Confederation; these would result from the interpretation of the Federal Constitution. This is to be agreed with, which is why the independent meaning of Art. 42 FC remains open to this day (cf. N. 19 f.). 2

In the consultation, it was criticized that the relationship between Art. 32 para. 1 VE 1995 and Art. 3 VE 1995 was "unclear". This is because the latter provision also established the subsidiary general competence of the cantons. The Federal Council wanted to take this criticism into account and reformulated the provisions relevant to federalism in the 1996 draft constitution. The wording of the provision on the position of the cantons (Art. 32 para. 1 VE 1995) was amended to the effect that the cantons have all the sovereign rights they need to perform their tasks within the framework of the Federal Constitution (Art. 35 VE 1996). This provision thus no longer regulated the federal distribution of powers, but the performance of tasks by the cantons. The tasks of the Confederation were newly described in Art. 3 para. 2 VE 1996: "The Confederation shall perform the tasks assigned to it by the Federal Constitution". This wording was retained and can be found today in Art. 42 FC. The change in the system - from Art. 3 para. 2 VE 1996 to Art. 42 FC - goes back to the Council of States, which took the view in the parliamentary deliberations that this was merely a concretization of the principle of federalism. 3

4 The 1996 draft constitution also introduced the principle of subsidiarity into the discussion. According to Art. 34 para. 3 VE 1996, the Confederation should now be obliged to observe the principle of subsidiarity. However, the Council of States considered the Federal Council's proposal to define the concept of subsidiarity in Art. 34 para. 3 VE 1996 to be unclear and ambiguous. It preferred to define subsidiarity as follows: "It [the Confederation] only assumes those tasks that require uniform regulation.". A minority of the Commission would have advocated the deletion of the word "only" in order to express the principle of subsidiarity in a positive way. In the National Council, the explicit anchoring of the principle of subsidiarity in the sense of the Federal Council's draft initially prevailed. The Council of States and the National Council only finally agreed on the "Germanized" wording at the conciliation conference, whereby the word "only" was deleted from the Council of States' original version. This new wording on the principle of subsidiarity was placed in Art. 42 para. 2 FC.

5 However, the paraphrasing of the principle of subsidiarity was not able to eliminate the ambiguities of this provision. By deleting the word "only", the impression was avoided that the Confederation could only be assigned those tasks that require uniform regulation. With this second paragraph, however, Art. 42 FC could now be understood to mean that the Confederation performs both the tasks assigned to it by the Federal Constitution (para. 1) and those tasks that require standardization (para. 2). However, according to the prevailing opinion, para. 2 was not intended to create an additional independent basis of competence for federal tasks. With the reform of federalism that came into force on January 1, 2008 to restructure financial equalization and the division of tasks between the Confederation and the cantons, this paragraph was finally repealed. Since then, the principle of subsidiarity has been expressly enshrined in Art. 5a FC and specified in Art. 43a para. 1 FC.

II. CONTEXT

A. Federalism-theoretical contextualization

6 There are various types of federal division of powers. The most common distribution technique (see N. 7-11) follows the dichotomy of titled (named) or enumerated competences and residual competences: For one level, competencies are explicitly designated, while the other level is assigned all residual

competencies. There are sometimes historical reasons for this type of division of powers. Federal states that have emerged from former sovereign states generally prefer to clearly state the competences of the Confederation and retain the other competences. Nevertheless, the residual powers do not necessarily have to be attributed to the subordinate level (cf. N. 9). The establishment of a residual competence for one level or another has the advantage of avoiding gaps in competence. The rule-exception scheme is seen as another type of competence allocation technique (cf. N. 10). Although a subtraction also takes place here, it is positively stipulated as a rule that one level is responsible for all tasks, unless a specific task is assigned to the other level by way of an exception. It is not apparent that such a regulatory technique is intended to have a different material meaning than the system of titled and residual competences. In particular, it cannot be assumed that the competences of one level as "exceptions" must be interpreted differently - more narrowly - than those of the other level.

B. Comparative legal contextualization

The allocation of competences in the Swiss Federal Constitution is primarily 7
based on Art. 3 FC as the "basic norm of the federal state". Like other federal constitutions, this provision is committed to the dichotomy of titled (named or enumerated) competences and residual competences (cf. N. 6). In this sense, the cantons remain responsible for all those areas that are not constitutionally assigned to the Confederation. The cantonal residual competence already arises from Art. 3 FC and is merely underlined by Art. 42 FC from the perspective of the Confederation. Due to the subsidiary general clause of Art. 3 FC, the Federal Constitution provides a "seamless system of division of powers". The Federal Supreme Court decides on conflicts of jurisdiction between the Confederation and the cantons in accordance with Art. 189 para. 2 FC in conjunction with Art. 120 para. 1 lit. Art. 120 para. 1 lit. a BGG. Other central provisions of the federal division of powers are Art. 5a FC (principle of subsidiarity), Art. 43 FC (tasks of the cantons), Art. 43a FC (principles for the allocation and fulfillment of tasks), Art. 44 FC (principles of cooperation between the Confederation and the cantons) and Art. 47 FC (autonomy of the cantons).

The Austrian Federal Constitution Act (B-VG), like the Federal Constitution, 8
recognizes the dichotomy in the distribution of competences of titled competences and residual competences, in that the competences of the federal gov-

ernment are named in the constitution and all other subject areas fall within the competence of the federal states. In this sense, according to the general clause of Art. 15 para. 1 B-VG, the Austrian federal states are responsible unless the federal constitution expressly assigns a matter to the federal government. The areas of responsibility of the federal government are listed enumeratively in particular in Art. 10-12 B-VG.

9 Art. 35 of the Belgian Constitution would also require an explicit allocation of competence for the competence of the higher federal level ("federal authority") and grant the Communities and Regions a residual competence. However, due to a transitional provision, this regulation does not (yet) apply. At present, therefore, the residual competence in Belgium - as in Canada - lies with the federal level.

10 The German Basic Law (Grundgesetz, GG) declares in its basic standard on the division of powers between the federal government and the federal states in Art. 30 that the exercise of state powers and the fulfillment of state tasks is a matter for the federal states, unless the Basic Law makes or permits other provisions. In the same way, Article 70 of the Basic Law stipulates that the federal states have the right to legislate unless the Basic Law delegates this power to the federal government. The regulatory technique of the German Basic Law is qualified as a rule-exception scheme (cf. N. 6). However, the different regulatory techniques do not change the fact that in many federal states the higher level, i.e. the federal government, has the majority of responsibility due to the constitutional allocation of numerous and significant powers. This applies to Germany as well as to Austria, and no less so to Switzerland, where the area of responsibility of the federal government is constantly growing - also as a result of the increase in state treaty norms.

11 Similarly, the European Union, as a federally structured system, requires a distribution of competences between the Union and the Member States. Unlike in federal states, the allocation of competences here is one-dimensional, in that the EU treaties only establish the competences of the Union, but not those of the Member States. It is true that Art. 5 para. 2 TEU stipulates that, in accordance with the principle of conferral, the Union only has those competences that were transferred to it by the EU Treaties, and that all other areas remain with the EU Member States. However, the latter aspect only has a descriptive effect, as sovereignty in the Member States is constituted by their constitutions and is not transferred by Union law. Another difference to feder-

al states is that the Union cannot assign itself any new powers. It is up to the Member States to authorize it to regulate new areas by amending the treaty - this requires unanimity and ratification (cf. Art. 48 TEU).

III. COMMENTARY IN THE NARROW SENSE

A. Basic concepts of competence law

Art. 42 FC refers to "tasks" assigned to the Confederation by the Federal Constitution. In contrast, other constitutional provisions relating to competences use the term "competence" (e.g. Art. 43, 57, 61a, 67a and 76 FC). In the old Federal Constitution of 1874, the term "competence", which is generally used synonymously with "jurisdiction", was still used in several places (e.g. Art. 16, Art. 24bis and Art. 84 FC 1874). While the Federal Constitution of 1999 initially only spoke of "tasks" and "responsibilities", the term "competence" was reintroduced into the Constitution with the insertion of Art. 117b FC following the adoption of the Care Initiative in 2021. The basic legal concepts of "task" on the one hand and "responsibility" or "competence" on the other must be distinguished in the federal context. Art. 43 FC also differentiates in this sense, according to which the cantons determine which "tasks" they fulfill within the scope of their "competence" (cf. Art. 43 N. 8-11). 12

The "tasks" form the interface between the state and society. The Constitution defines which tasks the state must perform and thus reflects the "expectations towards the state". In this way, it also defines the state: the state is made responsible for fulfilling these tasks; the boundary to society is thus drawn. The FC also specifically refers to state tasks when it comes to this demarcation between the state and society. Furthermore, in the literature, the task is generally qualified as a duty of the state to make a regulation or take a measure. Accordingly, a task covers an area of activity in which the state is fundamentally obliged to take action. However, the state's duty to perform a task does not say anything about which level of government is responsible for it. It is not necessarily possible to infer from a task which local authority is responsible; conversely, an attribution of competence regularly leads to the conclusion that a (state) task exists. 13

Only the competence determines who is authorized to perform a (state) task. It links the state task with an organizational unit. For example, the FC speaks of "federal tasks" and "cantonal tasks" in the competence standards of Art. 42 14

FC and Art. 43 FC. Through this allocation, the state tasks become federal tasks on the one hand and cantonal tasks on the other. In the federal context, the competence norms focus on precisely this vertical distribution of tasks between the two levels of state organization, namely the Confederation and the constituent states (the allocation of responsibilities to the municipalities is regularly the responsibility of the latter). This refers to the so-called "association competence". By empowering one local authority to perform tasks, a constitutional provision of competence is at the same time withheld from the other. Only the addressee of the competence is authorized to adopt a specific regulation or measure. Authority or authorization means that the person responsible is not necessarily obliged to take a measure. A competence can include both permission and an obligation to perform a task.

15 The order of duties and the order of competences therefore take on different perspectives: While the order of tasks in a constitution obliges the state to perform a specific activity and thus removes it from the purely social sphere, the order of competences focuses on the delimitation of the scope of action between the Confederation on the one hand and the constituent states on the other.

B. Federal tasks and federal competences

16 It follows from Art. 42 FC that the Confederation must fulfill all the tasks assigned to it by the Federal Constitution. According to the wording of the norm, the focus is on the tasks of the Confederation and less on its competences, which are regulated in the individual competence norms of the Federal Constitution (cf. N. 20). While the delimitation of tasks and competences is important for Art. 43 FC (cf. Art. 43 FC n. 8-11), it plays a subordinate role for the Confederation. The decisive factor for the Confederation's power to act is the existence of a corresponding competence norm. Against this background, the Federal Constitution does not clearly and unambiguously distinguish between these two categories.

17 The relationship between competence and task in the Federal Constitution is correspondingly complex. According to Art. 42 FC, the Confederation fulfills the tasks assigned to it by the Federal Constitution. However, this does not mean that the Confederation's powers are exhausted. It is not only responsible for assigned tasks in the sense of a duty to act (e.g. Art. 38 para. 1, Art. 62 para. 5 FC: "The Confederation shall regulate...", but also Art. 40 para. 1, Art.

64 para. 1 FC: "The Confederation shall promote..." and Art. 77 para. 1, Art. 92 para. 1 FC: "The Confederation shall ensure..."). Federal competence also exists if the Federal Constitution declares the Confederation to be responsible without simultaneously imposing a task on it, i.e. a duty to act. There is no (direct) duty to act, but the Confederation is responsible for the enabling provisions, the "may" provisions (e.g. Art. 71 FC: "The Confederation may promote Swiss film production and film culture.").

In addition, in some places the Federal Constitution entrusts the Confederation with a task, but limits the associated duty to act to the "scope of its competence" (e.g. Art. 76 para. 1 FC on water supply and Art. 118 para. 1 FC on health protection). In these cases, the federal legislator requires additional constitutional authorization. Such a limitation of the fulfillment of tasks by competence is found above all in those provisions that simultaneously empower the Confederation and the cantons (e.g. Art. 57 para. 1 FC on national security and civil protection, Art. 61a para. 1 FC on the Swiss education area, Art. 67a para. 2 FC on music education and Art. 89 para. 1 FC on energy policy). 18

It is true that the assignment of a task to the Confederation regularly also entails its responsibility. However, due to the complex interplay of tasks and competences, the competences of the Confederation can only be derived from Art. 42 FC to a limited extent. Consequently, its (practical and legal) significance is limited. 19

Another - even more important - reason for the limited independent content of Art. 42 FC lies in the fact that the question of the Confederation's concrete competence must be directed to the specific competence norm, in particular in Chapter 2 of Title 3 of the Federal Constitution. The individual substantive norms simultaneously determine the scope of federal competence and the legal effects on cantonal competences. For although the use of the verb "fulfils" ("accomplit", "adempie") in Art. 42 FC could lead to the conclusion that the Confederation is obliged to fulfil its duties in every case, the need for action only arises from the relevant individual provision (possibly in conjunction with other constitutional requirements) - whereby even purely enabling norms (cf. N. 17) require that the Confederation regularly examines whether action is necessary. For this reason, the Federal Supreme Court does not review the competence of the Confederation directly on the basis of Art. 42 FC, 20 but on the basis of a specific substantive norm (e.g. Art. 78 para. 2 FC), for example by ruling on the scope of a "federal task".

C. Assignment of tasks by the Federal Constitution

21 Despite its minor importance (n. 19 f.), Art. 42 FC makes it clear that the Confederation is responsible for the fulfillment of tasks, namely those assigned to it by the Constitution. The Federal Constitution thus takes account of the fundamental fact that it constitutes the state and assigns it tasks, i.e. responsibility. Art. 42 FC clarifies the system of individual authorization implicit in Art. 3 FC (also known as the principle of enumeration): The allocation of "tasks" to the Confederation must - in principle expressly and conclusively - be made by the Federal Constitution. However, the combination of these two provisions shows that it is primarily not the tasks but the responsibilities of the Confederation that are to be laid down in the Constitution. If the Confederation is responsible in an area and may - but does not have to - make a regulation, it can only take on a task in the sense of a duty to act at the legislative level.

22 In any case, the requirements of Art. 42 FC are met if the task or competence of the Confederation is expressly enshrined in the Constitution. It is also recognized that, in exceptional cases, the Confederation is tacitly empowered to perform a specific task. Tacit powers for the federal government can arise by virtue of the factual connection (pouvoirs implicites, implied powers) or by virtue of the federal state structure (pouvoirs inhérents, inherent powers). A competence by virtue of the factual connection follows from the necessity of being able to exercise an explicit competence at all. There are hardly any such powers in the current Federal Constitution. The Confederation is competent by virtue of the federal state structure if its competence must reasonably arise from the principle of the federal state. Such competence applies, for example, to the protection of the state and the determination of coats of arms or flags. Since the total revision of the Federal Constitution in 1999 and the associated intention to enshrine unwritten constitutional law in the constitutional charter, there is little room for tacit powers; they require special justification.

23 Due to the "constitutional reservation" of Art. 42 FC in conjunction with Art. 3 FC. Art. 3 FC, new federal powers are only possible with a corresponding constitutional amendment. New tasks or responsibilities can be transferred to the Confederation or existing ones can be withdrawn by means of a total revision in accordance with Art. 193 FC or by means of a partial revision in accor-

dance with Art. 194 FC. The federal legislator is therefore responsible for changing the federal system of tasks and responsibilities; it has the authority to do so. A (voluntary) assignment of powers by the cantons, for example by treaty, is excluded. Equally inadmissible is the creation of new competences by filling gaps or by customary law.

D. Overview of federal responsibilities

The majority of federal responsibilities can be found in Chapter 2 (Responsibilities) of Title 3 (Art. 54-125 FC). In the light of these provisions, the Confederation - in part jointly with the cantons - is essentially responsible for the following areas: 24

- foreign affairs;
- national security and civil protection;
- education and research;
- sport and culture;
- environmental protection and spatial planning;
- public transportation;
- energy and communication;
- economic policy;
- Housing, social security and health protection;
- migration;
- civil and criminal law.

According to the wording of Art. 42 FC, the Confederation is obliged to fulfill 25 the tasks assigned to it. However, the general view is that it is also permitted to entrust third parties such as the cantons or private individuals or organizations outside the federal administration with the fulfilment of its tasks, subject to the requirements of the specific substantive provision. However, this does not release it from its general duty of fulfillment.

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COMMENTARY ON

Art. 43 FC

A commentary by Christina Neier

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Art. 43 Duties of the Cantons

The Cantons decide on the duties that they must fulfil within the scope of their powers.

CONTENT

I. HISTORY OF ORIGIN

Since the total revision in 1999, the Federal Constitution has included a fundamental provision on the tasks of the cantons in Art. 43 FC in Section 1 of Chapter 1 on the "Relationship between the Confederation and the Cantons" in addition to the tasks of the Confederation (Art. 42 FC). In addition, since 2008, Art. 43a FC has laid down principles for the allocation and fulfillment of tasks. Earlier versions of the Federal Constitution did not contain any direct predecessor provisions. 1

The 1995 draft constitution provided for general rules on cantonal responsibility in two places. Firstly, in continuation of the old Federal Constitution, Art. 3 VE 1995 stated that the cantons "shall exercise all rights not conferred on the Confederation." On the other hand, Art. 32 para. 1 VE 1995 was also proposed, which read: "The cantons are responsible for all tasks that are not transferred to the Confederation by the Federal Constitution." According to the explanatory notes, the latter provision was intended to enshrine the "subsidiary responsibility" or "subsidiary performance of tasks" of the cantons and thus continue those elements of the normative program of Art. 3 that concern the division of tasks between the Confederation and the cantons. 2

While Art. 3 VE 1995 spoke of cantonal "rights" - as did Art. 3 FC 1874 - Art. 32 para. 1 VE 1995 now speaks of "tasks" of the cantons. In the consultation process, it was therefore criticized that the latter wording could give a different meaning to the concept of sovereignty in Art. 3 VE 1995, in the sense of a weakening of the presumption of competence to a division of tasks. The Federal Council wanted to take this criticism into account in the 1996 draft constitution. It deleted the provisions on cantonal "rights" from Art. 3 FC and transferred them to the new Art. 35 VE 1995, deliberately omitting the word "rights". The provision of Art. 35 VE 1996 then read: "Within the framework of the Federal Constitution, the cantons have all the sovereign rights they need to perform their duties". Systematically, this provision on the position of the cantons was located after the provision on the principles of cooperation between the Confederation and the cantons. 3

During parliamentary deliberations, the Council of States proposed a different system: The "classic rule on the division of powers between the two levels" should precede the principles of cooperation between the Confederation and 4 the cantons. In addition, new, unclear terms such as "sovereign rights" should be avoided. The Council of States therefore proposed a new wording for the provisions on the position of the cantons, which ultimately prevailed and corresponds to that of the current Art. 43 FC under the marginal "Tasks of the cantons". The National Council agreed with the Council of States' proposal, both in terms of wording and system, as it was clear and concise and therefore preferable to that of the Federal Council.

II. CONTEXT

5 A clear and unambiguous distribution of competences (generally synonymous with the concept of powers) between the Confederation and the constituent states is a central and indispensable component of a federal constitution. A federal system of competences usually consists of abstract rules of principle and concrete norms of competence. In the Federal Constitution, the former include the key norm of Art. 3 FC (principle of cantonal residual competence and principle of individual authorization of the Confederation), Art. 5a FC (principle of subsidiarity), Art. 42-43a FC (principles on the tasks of the Confederation and the cantons) and Art. 47 FC (autonomy of the cantons). The specific (federal) responsibilities in the individual subject areas are primarily regulated in Chapter 2 (Responsibilities) and Chapter 3 (Financial regulations) of Title 3 of the Federal Constitution. The Federal Supreme Court decides on conflicts of jurisdiction between the Confederation and the cantons in accordance with Art. 189 para. 2 FC in conjunction with Art. 120 para. 1 lit. Art. 120 para. 1 lit. a BGG. Like the Confederation, the cantons must also have recourse to this constitutional complaint; the BGG does not recognize a general "autonomy complaint", as is available to the municipalities (see Art. 89 para. 2 lit. c BGG).

6 According to the marginalia, Art. 42 FC deals with the tasks of the Confederation, while Art. 43 FC deals with those of the cantons. The many systematic shifts and linguistic reformulations of these two constitutional norms in the context of their drafting history reveal the lack of clarity regarding their regulatory content. As a result, they reaffirm the obligation of the Confederation and the cantons to fulfill their duties. Beyond this, however, the legal and practical significance of these two provisions is minimal. Their content is essentially already derived from Art. 3 FC. Thus, Art. 42 and 43 FC undoubtedly

contribute to the "almost inflationary increase in federalist statements of principle".

Moreover, Art. 43 FC must be read in conjunction with those provisions that lay down principles for the allocation and fulfillment of tasks. Art. 5a FC ("Subsidiarity") and Art. 43a FC ("Principles for the allocation and fulfillment of state tasks") deal specifically with the allocation and fulfillment of state tasks. In addition, Art. 44 para. 1 and para. 2 FC obliges the Confederation and the cantons to support and consider each other. According to Art. 48 para. 1 FC, the cantons may cooperate on "tasks of regional interest" and conclude intercantonal treaties for this purpose. Finally, Art. 47 FC requires the Confederation to safeguard the autonomy of the cantons and to leave them sufficient tasks and sources of funding. 7

III. COMMENTARY IN THE NARROW SENSE

A. Cantonal responsibilities and cantonal tasks

The basic concepts of competence law include "tasks" and "responsibilities" or, understood synonymously, "competences". The different meanings of "task" and "competence" become clear in Art. 43 FC, when it states that the cantons determine which "tasks" they fulfill "within the scope of their competences". The term "task" encompasses the duty to enact a measure or regulation and centers around the demarcation of the state sphere from the social sphere. Jurisdiction or competence, on the other hand, is understood as an authorization to act; in federal constitutions, it primarily serves to delimit the spheres of action of the federal government and the constituent states. According to this understanding, the wording of Art. 43 FC grants the cantons the freedom to decide which action they undertake to take, insofar as they are authorized to do so under federal constitutional law. 8

The cantonal competence, i.e. the question of the authorization of the cantons, is derived from Art. 3 FC, the principle of which is repeated in Art. 42 FC. With these provisions, the Constitution declares the cantons to be responsible for all areas that are not delegated to the Confederation. The cantons have subsidiary general competence. However, this does not imply a presumption of competence in favor of the cantons. Rather, the competences assigned to the Confederation by the Federal Constitution are to be determined 9 with the help of the usual interpretation canons; the cantons are responsible for all other areas of state activity.

10 In some cases, the Federal Constitution expressly declares the cantons to be responsible. As a rule, this declaration of competence has only a declaratory meaning, in that it confirms what applies anyway under Art. 3 FC. Examples include the explicit anchoring of cantonal responsibilities for education (Art. 62 para. 1 FC), culture (Art. 69 para. 1 FC), the relationship between church and state (Art. 72 para. 1 FC) and the protection of nature and cultural heritage (Art. 78 para. 1 FC). In some cases, cantonal competence is also expressly mentioned in the Federal Constitution in order to grant the cantons authorization to restrict freedoms guaranteed by federal law (e.g. Art. 29a FC and Art. 94 para. 4 FC), to establish an exception to federal competence (e.g. 54 para. 1 in conjunction with Art. 56 para. 1 FC on the conclusion of international treaties), to impose the implementation of a federal measure on the cantons (e.g. Art. 74 para. 3 FC on environmental protection) or to specify the cantonal competence as distinct from the federal competence (e.g. Art. 78 para. 1 FC on nature and cultural heritage protection).

11 The cantons' residual competence was the focus of the original version of this provision (cf. Art. 32 para. 1 VE 1995, see N. 2). Now, however, Art. 43 FC primarily emphasizes cantonal autonomy. If the cantons are responsible for a specific area, i.e. if they are authorized to act in a specific field of activity, they themselves determine which tasks they perform. The cantons' task autonomy is evident in two respects: firstly, in the freedom to select their own tasks (N. 12), and secondly, in the freedom to determine the modality of task fulfillment (N. 13).

B. Scope and limits of cantonal task autonomy

12 Art. 43 FC guarantees the free choice of tasks. The cantons are free to decide which tasks they actually fulfill within the scope of their competences. In principle, they are not obliged to exercise their responsibilities. They decide independently whether and to what extent they become active. This free choice of tasks is, of course, also conveyed by Art. 3 FC and by the autonomy of the cantons, which is protected by Art. 47 FC. The latter provision also requires the Confederation to leave the cantons with sufficient tasks of their own. This limits the competence of the federal constitutional authority and protects the autonomy of the cantons from being completely undermined.

Not only the "whether", but also the "how", i.e. the modalities of task fulfillment, is at the discretion of the cantons according to Art. 43 FC. They are free to decide which measures they take to fulfill their duties and what legal effect they give them. Similarly, they are free to decide whether they take action themselves or whether they delegate the task instead - in the cantonal constitution or by law - to the communes or to a public or private third party. However, autonomy with regard to the modalities of fulfillment also arises from Art. 3 in conjunction with Art. 47 BV. Art. 47 FC. A regulatory content that goes beyond these constitutional provisions is therefore not recognizable for Art. 43 FC. Placed systematically before the chapter on competences, Art. 43 FC at least reminds us once again of the autonomy of the cantons. 13

The wording of Art. 43 FC also gives the impression that cantonal autonomy is not subject to any limits. However, such limits arise not only from intercantonal law (cf. Art. 48 para. 5 FC), but above all from federal law (cf. Art. 49 para. 1 FC). Numerous task-specific restrictions under federal constitutional law dictate whether and how the cantons must take action. For example, they are expressly obliged to perform tasks if the constitution states that the cantons "shall provide" (e.g. Art. 57 FC on security, Art. 61a FC on education, Art. 81a FC on public transport, Art. 117a FC on basic medical care), the cantons must "promote" (e.g. Art. 67a FC on music education, Art. 112b para. 2 FC on the integration of the disabled, Art. 117b FC on care) or the cantons must "take action" (e.g. Art. 89 para. 1 FC on energy policy). In some cases, these provisions also stipulate the manner in which tasks are to be fulfilled. For example, they require a "high quality" of education (Art. 61a FC), basic medical care (Art. 117a FC) and nursing care (Art. 117b FC). According to Art. 43a para. 5 FC, all tasks must be provided by the cantons in a needs-based and economical manner. The Federal Constitution also regulates the case where the cantons do not adequately fulfill their responsibilities. In the area of education, for example, the Confederation is empowered to issue the necessary regulations if the cantons fail to enact harmonization measures or to achieve the common objectives (Art. 62 para. 4, Art. 63a para. 5, Art. 67a para. 2 FC). Furthermore, at the request of the cantons, the Confederation may declare intercantonal treaties generally binding in certain areas of responsibility or oblige the cantons to participate in such treaties (Art. 48a FC). In these cases of conditional federal competence, there is de facto pressure on the cantons to exercise their competences. 14

15 The constitutional principles of Art. 5 FC constitute a general federal constitutional barrier to the cantonal fulfillment of tasks. A restrictive framework is also provided by the provisions on state objectives, such as Art. 41 FC on social objectives or Art. 73 FC on sustainability. In addition, the cantons are bound by fundamental rights (Art. 7-34 FC) within the scope of their duties (Art. 35 para. 2 FC). They may only interfere with the fundamental rights of individuals if there is a legal basis for doing so, a public interest justifies the interference, the interference is proportionate and the core content is preserved (Art. 36 FC). Finally, Art. 94 FC limits the cantons' scope of action "as a fundamental regulatory principle of an economic order based on market economy principles". They are obliged to respect the economic freedom of the individual when performing their tasks (para. 1), to safeguard the overall economic interest and welfare (para. 2) and to ensure favorable economic conditions for private individuals (para. 3).

16 Limits to the cantonal autonomy of tasks also arise from international law. According to Art. 7 of the Federal Act on the Participation of the Cantons in Foreign Policy, the cantons not only have a responsibility, i.e. an authorization, but are also obliged to implement it (in good time) as a task. In practice, the international human rights conventions, which the cantons must implement independently, play a major role.

C. Overview of duties in selected cantonal constitutions

17 Due to the subsidiary general competence and autonomy of the cantons resulting from Art. 3, 42, 43 and 47 FC, it is not possible to provide a complete overview of the cantonal tasks (see, however, the list of classic cantonal tasks in Art. 48a para. 1 FC). Instead, a look will be taken here at tasks that have been written down in selected cantonal constitutions - due to their scope or content. Art. 51 para. 1 FC requires the cantons to adopt a constitution. However, the Federal Constitution does not prescribe whether and how they should enshrine their tasks in it. However, the vast majority of cantonal constitutions today contain an explicit list of tasks. Such task catalogs have an informative, standardizing and legitimizing function. However, their list is not exhaustive due to the cantonal general competence under Art. 3 FC.

18 In some cases, the cantonal constitutions contain a constitutional reservation. As a result, every new cantonal task must be expressly included in the constitutional charter. In this sense, for example, § 90, 1st sentence of the Constitu-

tion of the Canton of Basel-Landschaft requires that the assumption of new cantonal tasks, insofar as these are not imposed by federal law, requires a constitutional amendment. Further examples can be found in Section 26 para. 1 of the Cantonal Constitution of Aargau and Section 63 para. 1 of the Cantonal Constitution of Thurgau.

As an example of a comprehensive list of tasks, Art. 100-121 of the Zurich cantonal constitution of February 27, 2005 lists the following cantonal tasks: 19

- public order and security;
- spatial planning, environmental, climate, nature and heritage protection;
- transportation, water and energy supply;
- economy (in particular SMEs and social partnership) and work (compatibility, job and apprenticeship opportunities);
- agriculture and forestry;
- cantonal bank;
- non-profit housing construction and home ownership as well as social welfare;
- family, youth and old age;
- health care;
- integration (coexistence of the population and integration of foreigners);
- education, public and private schools, universities and vocational and further training;
- culture and sport.

Many other cantonal constitutions list similar tasks. Some of them stand out 20
due to their content. For example, the cantonal constitution of Bern is committed to Sunday rest (Art. 47) as well as international cooperation and humanitarian aid (Art. 54, see also the participation in the "Cooperation of the Regions of Europe"). The Constitution of the Canton of Fribourg places material security, in particular the prevention of poverty (Art. 55), at the top of its list of tasks. The rest of the constitutional text also places people at the center of attention by mandating the protection and support of the family (Art. 59-60), the promotion of youth and intergenerational relations, as well as support for vulnerable and dependent persons (Art. 63). In the canton of Basel-

Landschaft, the promotion of (non-profit) housing construction is enshrined in the constitution in detail (§ 106a). The constitution of the Canton of Jura is committed to social peace (Art. 21), the promotion of women (Art. 44) and consumer protection (Art. 52), that of the Canton of Vaud to the integration of disabled persons (Art. 61) and protection against passive smoking (Art. 65a), that of the Canton of Aargau to suitable places for non-sedentary ethnic minorities (Art. 48) and that of the Cantons of Schaffhausen and Graubünden, among others, to "meaningful leisure activities" (Art. 92 and Art. 91 respectively).

21 The broad spectrum of enshrined cantonal tasks is an expression of the cantons' task autonomy. It is true that the cantonal constitutions occasionally contain tasks that address specific concerns of the cantonal population. In principle, however, the catalogs of tasks in the various cantonal constitutions show a high degree of agreement, without any regular differences being discernible that could be attributed to cantonal characteristics such as topography or population structure. However, a comparative legal analysis of the cantonal constitutions also shows that they are open to development for new tasks that meet today's challenges. In the past decade, for example, climate protection and the promotion of renewable energy have found their way into numerous cantonal constitutions. The tasks enshrined in the cantonal constitutions therefore reflect society's current expectations of the community.

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COMMENTARY ON

Art. 43a FC

A commentary by Christina Neier

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Art. 43*a* Principles for the allocation and fulfilment of state tasks

1 The Confederation only undertakes tasks that the Cantons are unable to perform or which require uniform regulation by the Confederation.

2 The collective body that benefits from a public service bears the costs thereof.

3 The collective body that bears the costs of a public service may decide on the nature of that service.

4 Universally provided services must made be available to every person in a comparable manner.

5 State tasks must be fulfilled economically and in accordance with demand.

CONTENT

I. HISTORY OF ORIGIN

With the federalism reform on the "Reorganization of the financial equalization and division of tasks between the Confederation and the cantons" (NFA), Section 1 in Chapter 1 of Title 3 on the tasks of the Confederation and the cantons received a new provision in Art. 43a FC on the principles for the allocation and fulfilment of state tasks. While para. 1 of this provision essentially takes over the previous Art. 42 para. 2 FC - which was repealed at the same time - para. 2 to 5 introduce new principles for the fulfillment and allocation of tasks under constitutional law. The people and the cantons approved the constitutional amendment on November 28, 2004; the norm came into force on January 1, 2008. 1

The Federal Council was of the opinion that the concretization of the principle of subsidiarity in the previous Art. 42 para. 2 FC would systematically fit better into the provision of Art. 43a FC, since the essential principles for the allocation and fulfilment of tasks are now laid down there. Art. 42 para. 2 FC still stated that the Confederation shall assume those tasks that require uniform regulation. With the new Art. 43a para. 1 FC, the Federal Council proposed supplementing this provision to the effect that the Confederation also assumes those tasks that exceed the power of the cantons. With paras. 2 to 5 FC, the Federal Council wanted to introduce new "guidelines (of a non-justiciable nature)" for the fulfillment of tasks. 2

The Council of States recommended adding the words "only" and "by the Confederation" to the wording of the principle of subsidiarity in Art. 43a para. 1 FC. The adverb "only" was already the subject of discussion when Art. 42 para. 2 FC was created, but was ultimately deleted there. Furthermore, the Council of States argued in favor of inserting the word "shall" in paras. 2 and 3 of the new Art. 43a FC in order to soften the "economy-heavy" wording of the Federal Council and to express that the principle of fiscal equivalence enshrined therein does not apply absolutely. While para. 4 of the Federal Council's draft stipulated that all persons can make use of the benefits of the basic provision "in the same way", the Council of States wanted to amend this provision to the effect that the benefits of the basic provision are available to all persons "in a comparable way". The Council of States also wanted to replace the word "must" in para. 5 with "should" in order to relativize the principle and thus, once again, weaken the economic focus of the Federal Council's version. 3

4 With regard to para. 1 of the new Art. 43a FC, the National Council agreed with the Council of States. The opinion of a minority, according to which the two criteria "strength of the cantons" and "uniform regulation" must be cumulative, did not prevail. The divergent versions of para. 2 and 3 by the Federal Council and the Council of States were considered a matter of taste in the National Council. As with para. 5, the National Council then followed the Federal Council. In the wording of para. 4, however, the National Council agreed with the Council of States, arguing in favor of "must" instead of "shall".

5 In the procedure for the revision of differences, the Council of States accepted a quick agreement on the National Council's version of paras. 2 and 3, as this would not change anything in terms of content. The Council of States also agreed to the modal verb "must" in paras. 4 and 5, but at the same time confirmed that these principles would not become justiciable.

II. CONTEXT

6 Art. 43a FC is found together with Art. 42 FC on the "Tasks of the Confederation" and Art. 43 FC on the "Tasks of the Cantons" in the section on the "Tasks of the Confederation and the Cantons". Together with Art. 3 FC as the key norm in terms of competences and Art. 5a FC on the general principle of subsidiarity, these constitutional norms form the basis for the distribution of tasks and competences in the federal state. Since 2008, Art. 43a FC has laid down the principles according to which state tasks are to be allocated and fulfilled in the federal state. The word "allocation" in the margin is misleading insofar as the tasks are not allocated to the cantons. Rather, they are responsible for all areas that are not constitutionally assigned to the Confederation on the basis of the subsidiary general competence under Art. 3 FC (in conjunction with Art. 42 FC).

7 Art. 43a FC combines four principles for the allocation and fulfillment of tasks: the principle of subsidiarity (para. 1), the principle of fiscal equivalence (paras. 2 and 3), the principle of equal treatment in basic services (para. 4) and the principle of needs-based and economic fulfillment of tasks (para. 5). These tetras are intended to guide the allocation of state tasks and thus ensure a sensible division of tasks within the federal state as well as continuity.

8 The four principles are heterogeneous in terms of both their content and their objectives. They deal with the question of which level in the federal state is

best suited to fulfill a state task (para. 1) and who bears the costs and decisions incurred (paras. 2 and 3). At the same time, the provision requires the fulfillment of tasks that treats all persons equally with regard to basic services (para. 4) and generally follows economic principles (para. 5). The subsidiarity principle of para. 1 is aimed at the vertical distribution of state tasks between the Confederation and the cantons, while the principles of paras. 2 to 5 are also relevant for the horizontal fulfillment of tasks (in particular for contracts between the cantons in accordance with Art. 48 FC).

Art. 43a FC has a broad target group. On the one hand, according to the Federal Council Dispatch, the provision is addressed directly to the constitutional legislator. For the latter, the provision contains guidelines for the allocation of tasks under constitutional law. The constitutional legislator must be guided by these principles when allocating new state tasks; however, it is not bound by them. It can therefore entrust the Confederation with new tasks, even if these could have been performed by the cantons thanks to their "strength". Accordingly, popular initiatives that provide for an allocation of tasks that contradicts the principle of subsidiarity in Art. 43a para. 1 FC are also valid. On the other hand, as the dispatch further confirms, the principles of Art. 43a FC are directed at the legislator and the federal and cantonal executive authorities. 9

Opinions differ in the literature on the necessity and importance of enshrining these principles of task allocation and fulfillment in constitutional law. First and foremost, the unclear legal scope is criticized, arguing that these principles are largely "symbolic" and are difficult to reconcile with the requirement of constitutional clarity. They would lead to more problems than they solve. Since the principle of subsidiarity is generally classified as non-justiciable (see n. 19), the added value of its concretization in Art. 43a para. 1 FC compared to Art. 5a FC is also questionable. Furthermore, it can rightly be criticized that this provision mixes principles on the distribution of tasks and the fulfilment of tasks. Nevertheless, it is recognized that Art. 43a FC takes into account a "modern, differentiating federalism". In this sense, the Federal Council also emphasizes in its dispatch that the distribution of tasks and competences in the federal state is "of great importance" and that a clear allocation of tasks is a "fundamental principle of Swiss federalism". As a result, Art. 43a FC underlines the strong position of federalism in the Confederation. However, it has not yet had any particular impact. 10

III. COMMENTARY IN THE NARROW SENSE

A. Para. 1: Principle of subsidiarity

11 The central concern of the federalism reform was to enshrine the principle of subsidiarity in constitutional law. Until then, Art. 42 para. 2 FC stipulated that the Confederation shall assume those tasks that require uniform regulation. This provision was repealed with the entry into force of Art. 43a FC and replaced by its para. 1. Art. 5a FC came into force at the same time as Art. 43a FC. While the "Germanized" version of the principle of subsidiarity prevailed in the parliamentary deliberations on Art. 42 para. 2 FC, it is now mentioned literally in Art. 5a FC. Art. 43a FC serves as a concretization of the subsidiarity principle of Art. 5a FC, but - in contrast to the latter - is limited to the relationship between the Confederation and the cantons.

12 The origin of the principle of subsidiarity can be traced back conceptually to the Latin noun "subsidium" and in terms of the history of ideas to the philosophical ideas of Aquinas, Plato and Aristotle, among others. The principle became particularly well known through Catholic social teaching. According to the papal encyclical Quadragesimo Anno from 1931, "what the individual can achieve on his own initiative and with his own strength should not be taken away from him and assigned to social activity [...]", as it is contrary to justice that "what the smaller and subordinate communities can achieve and bring to a good end should be claimed for the wider and higher community". In this sense, the principle of subsidiarity can generally be applied to the relationship between state and society as well as to the relationship between different communities.

13 In federally structured states, the principle of subsidiarity focuses on the vertical relationship between the higher and lower levels. Nevertheless, the principle of subsidiarity is not mandatory for the regulation of responsibilities; these can also be distributed without the application of such a principle. In the federal state, however, subsidiarity proves to be a sensible federal structural principle in that the federal government is assigned all those tasks that cannot be dealt with by the member states. According to the encyclical (cf. n. 12), the lower level is to be assigned those tasks that it can fulfill on its own. The presumption in favor of the lower level applies here; the upper level must justify its responsibility. The principle of subsidiarity thus promises an optimal distri-

bution of tasks. In addition, the guiding principle is that tasks should be performed as close to the citizens as possible.

The principle of subsidiarity plays an important role in the European Union - alongside the European Convention on Human Rights (ECHR). The Federal Council also recognized this when it referred to European Community law in the NFA Dispatch. There, the principle of subsidiarity has been enshrined in primary law since the Maastricht Treaty of 1992. Not as a rule for the allocation of competences, but as a rule for the exercise of competences (cf. Art. 5 para. 1 TEU), this principle stipulates that the Union may only take action in areas that do not fall within its exclusive competence "if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional or local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" (Art. 5 para. 3 TEU). Accordingly, two criteria must be met cumulatively for the Union to take action: firstly, a measure must not be achievable at Member State level (negative or insufficiency criterion); secondly, the Union's action must offer added value (positive or efficiency criterion). The principle of subsidiarity under Union law can be judicially reviewed by the Court of Justice of the European Union (CJEU) and politically by the national parliaments of the Member States. 14

The subsidiarity principle of the Federal Constitution is both a competence allocation and a competence exercise maxim. This applies not only to Art. 5a FC, but also to Art. 43a para. 1 FC, as can be seen from the marginal note to the latter, and the wording does not argue against such a reading. Accordingly, Art. 43a para. 1 FC requires, on the one hand, that new tasks be assigned to the level that is best able to fulfill them. The object is therefore the allocation of a competence; Art. 43a para. 1 FC does not provide a basis for the competence itself. Secondly, the principle of subsidiarity requires the federal legislator to exercise its powers with care. It must not "unduly extend" its federal competence. 15

According to Art. 43a para. 1 FC, the principle of subsidiarity under federal constitutional law covers two alternative criteria: The Confederation shall assume state tasks if these either "exceed the power of the cantons" or if "uniform regulation by the Confederation" is required. While the repealed Art. 42 para. 2 FC only contained the latter criterion, the principle of subsidiarity in Art. 43a para. 1 FC was supplemented by the first alternative, although this 16 had already been rejected once during the total revision of the Federal Constitution. What both criteria have in common is that the Confederation should not take on any tasks that the cantons can fulfill "just as well". They reinforce the preference in favor of the cantons contained in the principle of subsidiarity. Moreover, according to the wording of Art. 43a para. 1 FC, the Confederation should "only" assume those tasks that fulfill one of these two criteria. This formulation, which goes back to the Council of States, was already the subject of parliamentary deliberations on Art. 42 para. 2 FC (cf. N. 3); however, it has no independent normative significance (especially since the parliamentary debate does not reveal the underlying reason).

17 The term "force" contained in the first alternative of Art. 43a para. 1 FC can be traced back to Catholic social teaching (cf. n. 12). The French and Italian language versions speak of "possibilités" and "capacità". The criterion "power of the cantons" leaves fundamental questions unanswered. On the one hand, it does not say whether the strength of individual cantons or the strength of all cantons as a whole is decisive. Secondly, it is unclear whether it is a question of the economic or political capacity of the cantons. The dispatch assumes that a task exceeds the strength of the cantons if they are "obviously not in a position" to fulfill the task. Plausibly, this is always the case if the cantons can only perform a task with disproportionate effort. It is very difficult to measure all of this objectively.

18 According to the second alternative of Art. 43a para. 1 FC, a task should be assumed by the Confederation if uniform regulation is necessary. With regard to the subject matter to be regulated, it is important to carefully examine whether a uniform regulation by the Confederation appears justified or whether different cantonal solutions are possible. The decisive factor here could be whether the benefit of the regulation should affect the entire country or whether a uniform solution serves to ensure equal opportunities or is required for technical reasons. Apart from this, it should be sufficient if a harmonizing federal regulation is not imposed, but rather a harmonizing federal regulation.

19 The Federal Council and Parliament clearly rejected the justiciability of the principle of subsidiarity from the outset. This would not be in line with the "Swiss understanding of the state". The Federal Supreme Court also understands the principle of subsidiarity as "little more than a maxim of state policy"; the Federal Administrative Court also denies its justiciability. In any case,

this applies to the constitutional legislature, which is required to observe subsidiarity when distributing new tasks between the Confederation and the cantons, but is not legally obliged to do so. With regard to the legislator, on the other hand, judicial enforcement of the principle of subsidiarity could be justified. Finally, the principle of subsidiarity in Art. 5a FC is substantiated by Art. 43a para. 1 FC - even if the exact standard of review is difficult to determine in individual cases (see n. 17 f.). However, (constitutional) provisions should not be denied judicial enforceability from the outset because they are subject to interpretation. The equally vague principle of subsidiarity of Union law is also subject to judicial review (cf. n. 14). Although the ECJ has so far exercised great restraint in this regard, the prevailing view in the literature is that it is responsible for reviewing whether the European legislator has fulfilled its duty to state reasons and has not manifestly exceeded its discretionary powers. Such a - restrained - control mandate could also include the principle of subsidiarity under federal constitutional law of Art. 5a in conjunction with Art. 43a BV. Art. 43a FC (whereby the possibilities for review are limited due to the restricted constitutional jurisdiction under Art. 190 FC). However, the principle of subsidiarity is primarily in the hands of the legislator anyway. It is particularly at the political level that it is necessary to decide which level of the federal state can best fulfill a specific task.

The normative power of the principle of subsidiarity is therefore evident in 20
procedural terms: the federal legislator is subject to a duty to justify or provide reasons. As early as 2016, two parliamentary initiatives called for a detailed justification of the principle of subsidiarity in the Federal Council's dispatches and consultation reports. In the meantime, the Parliament Act and the Consultation Act have been amended accordingly. Since November 2018, the Federal Council has had to justify "compliance with the principle of subsidiarity in the allocation and fulfillment of state tasks" in its dispatches on draft decrees. Accordingly, it states in one of its drafts that the federal government must "make careful use of its powers and leave the cantons sufficient scope to fulfill their tasks". An obligation to provide reasons with regard to the principle of subsidiarity also applies to the explanatory reports on consultation drafts. The legislative concretization of the principle of subsidiarity has a parallel in Union law, where the European Commission is obliged to justify in its draft legislative acts the extent to which the principle of subsidiarity (and proportionality) is complied with.

B. Paras. 2 and 3: Principle of fiscal equivalence

21 Art. 43a para. 2 and 3 FC contain the principle of fiscal equivalence. Together with the principle of subsidiarity, this principle, according to the Federal Council Dispatch, forms the basis for the structure of state tasks and competences within the framework of the NFA. With it, economic task criteria have found their way into constitutional law. However, their practical and legal significance for the distribution and fulfillment of state tasks is still unclear. This is why it is sometimes (rightly) criticized that such a principle belongs in a textbook, but not in a constitution. Elsewhere, it is more generously recognized as a "sensible directive" for the distribution of costs between the Confederation and the cantons.

22 The principle of fiscal equivalence originates from the financial sciences. There it describes the result of a distribution of public services based on institutional congruence, i.e. on a political process in which the circle of beneficiaries, the circle of decision-makers and the circle of taxpayers are congruent. Institutional congruence is considered essential for federalism in particular.

23 The Federal Council sees Art. 43a para. 2 and 3 FC as realizing precisely this principle of fiscal equivalence. An essential prerequisite for this is the following institutional congruence: the beneficiaries, cost bearers and decision makers of the state benefit should be the same. Para. 2 of Art. 43a FC requires the congruence of beneficiaries and cost bearers, according to which the costs must be borne by the community in which the benefit of the service accrues. Para. 3 of this provision grants the authority to make decisions to the municipality that bears the costs, thus addressing the congruence of cost bearers and decision makers. The two postulates can be summarized as follows: "Those who consume should have to pay for it, and those who have to pay should also be allowed to command."

24 The term "commonwealth" is not used a single other time in the entire Federal Constitution outside of Art. 43a para. 2 and 3 FC. It is ambiguous insofar as it also allows the principle to be applied to the relationship between the canton and the communes. For example, the Federal Supreme Court has used the principle of fiscal equivalence within the meaning of Art. 43a FC for the interpretation of a question on the distribution of costs between the canton and the commune. In contrast, the systematic location of Art. 43a para. 2 and 3 FC

under the chapter heading "Relationship between the Confederation and the cantons" or under the section heading "Tasks of the Confederation and the cantons" argues for a restriction to the relationship between the Confederation and its constituent states. Finally, the concretization of the principle of subsidiarity in para. 43a para. 1 FC refers expressis verbis only to these two levels of government - in contrast to the general principle of subsidiarity in Art. 5a FC (cf. n. 11).

According to the Federal Council, the principle of fiscal equivalence pursues several objectives. These include strengthening the responsibility for financing, because it is assumed that decisions are made with greater budgetary consideration if the decision-makers and the cost-bearers are identical. The congruence of beneficiaries, cost bearers and decision makers also avoids "spillovers", i.e. the use of public services by non-residents without them being financially responsible for them. This in turn is intended to optimize the supply side: The "relevant tasks [should] be provided in the right place, at the right time and to the right extent." 25

As part of the federal system of competences, the principle of fiscal equivalence merely forms a "guideline" for the allocation of tasks and resources, without superseding the other principles of competence-based regulation. The congruence of beneficiaries, cost bearers and decision makers is therefore by no means mandatory. The principle of subsidiarity pursuant to Art. 5a in conjunction with Art. Art. 43a para. 1 FC may sometimes require a different allocation of tasks. The Federal Council's demand that only those cantons that benefit from a state service should also decide on and finance it, and that the Confederation should regulate all those services whose benefits extend to the whole of Switzerland, should therefore not be understood in absolute terms. Nor can the provision be understood to mean that one community may not financially support another if it does not also benefit from it. 26

Moreover, this economic principle primarily applies to state tasks that entail a public service. The principle of fiscal equivalence under Art. 43a para. 2 and 3 FC should therefore not apply to many areas of state responsibility. In general, it must be possible to draw a circle of beneficiaries for its applicability, which is mainly possible if the benefit is geographically limited. As examples, the Federal Council cites the installation of a sewage treatment plant or - remarkably in view of the geographical scope - the area of national defense. The applicability of the principle becomes more complicated in those (numerous) 27 cases in which a service benefits several communities. In such cases, it is likely to require a corresponding distribution of costs.

28 The principle of fiscal equivalence is unanimously denied justiciability. Nevertheless, the Dispatch Guidelines of August 2020 insist that the Federal Council include statements on compliance with the principle in its dispatches on drafts relating to the division or fulfillment of tasks by the Confederation and the cantons. Corresponding examples can be found: In its dispatch on the amendment of the Federal Act on Regional Policy, for example, the Federal Council considers the principle of Art. 43a para. 2 FC to be respected because "fiscal equivalence is observed with regard to the congruence of cost bearer and decision maker".

C. Para. 4: Principle of equal treatment in basic care

29 Art. 43a para. 4 FC lays down a specific principle of equal treatment: in the area of basic services (for this term, see n. 31), state benefits must be available to all persons in a comparable manner. The Federal Council's proposal was slightly different: the basic services should have been provided in such a way that every person could make use of them in the same way. The Council of States would have preferred the modal verb "should" instead of "must", but conceded that the principle would not be justiciable even with the first formulation, with which the National Council ultimately prevailed. Thus, this third principle of Art. 43a FC is also denied justiciability by the Federal Council and the literature. Such an understanding is, of course, not compelling, especially since the provision clearly states that everyone is entitled to comparable treatment in the area of basic services. The Federal Council's view that para. 4 does not establish any enforceable rights is more justifiable. As the provision is located in the chapter on the federal system of competences, it would be difficult to argue that this provision confers subjective rights.

30 The provision imposes obligations on the Confederation and the cantons. In any case, the municipalities are not likely to be directly bound by the principle, as it is systematically embedded in the allocation and fulfillment of tasks by the Confederation and the cantons in Art. 43a FC (cf. n. 24). The cantonal organizational autonomy of Art. 47 para. 2 FC also speaks against a direct obligation of the municipalities. However, the Confederation and the cantons are only bound by the principle of equal treatment to the extent that they act within the scope of their competences. The provision does not provide a sep-

arate basis of competence for federal action. Nor does it stipulate a specific way in which the Confederation and cantons should ensure equal treatment. According to the Federal Council, self-coordination by the cantons, intercantonal agreements, federal regulations with cantonal enforcement or federal regulations with federal enforcement are conceivable.

Although the term "basic care" is also used elsewhere in the Federal Constitution and in federal legislation, it is not defined in more detail here or there. In addition, even the Federal Council recognizes that the French and Italian terms "service universel" and "servizio universale" have a different emphasis: These expressions would emphasize the focus of services on the entire population, while the German term "Grundversorgung" accentuates the basic foundation of services. He defines basic services as "the politically definable goal of ensuring that the population has access to the goods and services it needs. For the state, [basic services] have the meaning of a mandate to act to achieve this goal." "Goods" could include, for example, water, food, medicines and energy; "services" could include, for example, telecommunications services, transportation services and medical treatment. In the European Union, this is referred to as "services of general interest" and "universal service", in Germany as "services of general interest". However, these terms are also vague and not fully clarified. The service areas covered therefore result less from the terminology than from the specific formulation in the respective legal system. The Federal Constitution contains a number of provisions that are "relevant to basic services", namely, among others, Art. 81a para. 1 (public transport), Art. 89 para. 1 FC (energy supply), Art. 92 para. 2 FC (postal and telecommunications services), Art. 102 para. 1 FC (national supply of essential goods and services), Art. 104a FC (food security) and Art. 117a para. 1 FC (basic medical care). 31

According to Art. 43a para. 4 FC, basic services are to be provided to all persons "in a comparable manner". This wording is reminiscent of the general equality of rights in Art. 8 para. 1 FC. The Council of States also stated that the principle of equal treatment in the provision of basic services represents an "analogy to the case law of the Federal Supreme Court, to the requirement of legal equality". And after the entry into force of Art. 43a para. 4 FC, the Federal Council also stated that its wording was already contained "in a comparable manner" in the general principle of equal treatment in Art. 8 para. 1 FC. This raises the question of what added value the principle of equal treatment in Art. 43a FC has in relation to basic services. In any case, it is also unclear 32 when the criterion of equal access for all is fulfilled. Social aspects (accessibility for the entire population regardless of living situation, age, health, education, etc.), the geographical dimension (accessibility in all areas of the country), financial factors (affordability for all) and temporal characteristics (permanent availability) appear relevant here.

33 The Federal Council's dispatch cites "equal provision of services throughout the country" as the reason for this constitutional principle of equal treatment in the area of basic services. In subsequent materials, the Federal Council emphasized that an "efficient public service [...] is a central prerequisite for the quality of life of the population and for the competitiveness of the economy" and thus makes "a significant contribution to the social and regional cohesion of Switzerland". Müller positively emphasizes that this provision means that "not only economic aspects should be taken into account when allocating tasks".

34 The importance generally attached to basic services is illustrated by the lengthy discussion about a new general constitutional provision. This began with a parliamentary initiative in 2003, which called for important principles of the universal service to be enshrined in the constitution. Subsequently, the Transport and Telecommunications Committee of the Council of States submitted a motion instructing the Federal Council to "submit a general constitutional article on the universal service", which should "supplement the recently inserted Article 43a FC with one or more standards". The Federal Council responded to the motion to the effect that the cross-sectional provision of Art. 43a para. 4 FC was sufficient. However, after both the Council of States and the National Council continued to support the motion, the Federal Council submitted a proposal for a general constitutional provision on basic services in May 2013, but at the same time stated that it still rejected such a provision. The Federal Council presented three variants for discussion: Variant A contained only a mandate for action to the local authorities, variant B contained a definition of terms in addition to the mandate for action to the local authorities, and variant C contained a mandate for action to the local authorities and a definition of terms in addition to some key principles on basic services. The long-standing discussion about a basic service standard and thus the "spook" came to an end when the National Council decided twice in 2015 not to enter into the debate. A year later, the federal popular initiative "Pro Service public", which provided for "principles for the provision of basic services by the Con-

federation" in a new Art. 43b FC, was equally unsuccessful. This means that the principle of equal treatment in Art. 43a para. 4 FC remains in place. In any case, the legislative level is considered to be a more suitable place for basic service regulations.

D. Para. 5: Principle of needs-based and economic fulfillment of tasks

Art. 43a para. 5 FC requires that state tasks are fulfilled in a needs-based and economical manner. The Federal Council's comments on this "additional requirement" are extremely brief. This suggests that there were no or only vague ideas about the concrete content of these economic requirements. 35

The requirement to meet needs and be economical not only determines the fulfillment of tasks - as could be assumed from the wording - but also the upstream allocation of tasks. This is because, according to the Federal Council Dispatch, state tasks are to be allocated to the local authority that is in a position to perform them economically and in line with requirements. However, the principle of para. 5 does not apply absolutely to the allocation of tasks or to the fulfillment of tasks. A task may not be assigned to the Confederation solely because it could perform it more efficiently in economic terms; otherwise the principle of subsidiarity would be undermined. Nor does Art. 43a para. 5 FC restrict the commitment to fundamental rights under Art. 35 FC, as confirmed by the Federal Supreme Court. Nor can economic considerations justify disregarding the equal treatment requirement of Art. 43a para. 4 FC. 36

As with Art. 43a para. 2-4 FC (cf. N. 24 and N. 30), the question arises as to the applicability of the principle of needs-based and economic fulfillment of tasks to the municipalities. In this regard, the Federal Administrative Court stated in August 2016 that the basic principles of Art. 43a para. 5 FC "must be observed throughout the entire structure of the federal state, indirectly even down to the level of the municipalities" and "have also been reflected in various cantonal decrees". In its more recent case law, the Federal Supreme Court also recognizes that this constitutional requirement is directed at the communes (and derived from this - with recourse to other cantonal provisions - a statutory duty of the cantons within the meaning of the Data Protection Act). 37

Art. 43a para. 5 FC contains two imperatives: the imperative of meeting needs and the imperative of economic efficiency. According to the Federal Council, 38 the term "needs-based" claims a "fundamental correspondence between needs and benefits". However, this only applies in principle and does not mean that an increased need must automatically lead to a greater scope of services. However, the aim must always be to align the range of services with the needs of the population. Meeting demand also means taking into account the different needs of the various population groups. According to the Federal Council, the term "economical" requires that, on the one hand, "the intended effects are actually achieved" and, on the other hand, "the provision of services is also carried out at the lowest possible economic cost". The public authorities are therefore required to use the "financial resources efficiently" and "to keep the costs for the general public as low as possible".

39 Art. 43a para. 5 FC - like the other paragraphs of this provision - has had little legal and practical significance to date. This is mainly due to the fact that it is generally considered not to be justiciable and certainly not to convey individual entitlements. As primarily economic guidelines, it is difficult to review needs-based justice and economic efficiency on the basis of clear and predictable criteria. Even without the constitution explicitly calling for this, the state can be expected to perform its tasks in line with need and as efficiently and cost-effectively as possible. In any case, economic efficiency is also required by Art. 126 FC, according to which expenditure and revenue must be kept in balance in the long term, and is a criterion for parliamentary oversight under Art. 170 FC.

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COMMENTARY ON

Art. 45 FC

A commentary by Eloi Jeannerat / Fanny Matthey

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Art. 45 Participation in federal decision-making

[1] In the cases specified by the Federal Constitution, the Cantons shall participate in the federal decision making process, and in particular in the legislative process.

[2] The Confederation shall inform the Cantons of its intentions fully and in good time. It shall consult the Cantons where their interests are affected.

CONTENT

I. GENESIS

Art. 45 of the Constitution—which refers to and specifies the general right of the cantons to participate in the decision-making process at the federal level —had **no real counterpart** in previous federal constitutions. These obviously already provided for the main mechanisms for the cantons' participation in federal policy, to which Art. 45 para. 1 of the Constitution now refers, insofar as federalism inherently implies a certain ability on the part of the federated entities to influence decision-making at the federal level (see infra N. 5 and 7). However, the very general principle of the cantons' right to participate in the Confederation's decision-making process was not expressly included. At that time, it represented at most an unwritten or implicit rule of constitutional law. 1

Art. 45 of the Constitution did not immediately take its current form when the new constitution was drafted, which was intended to be a simple formal update of the previous one. In keeping with this initial objective, the **preliminary draft of the Federal Constitution** did not include any provision dealing specifically and exclusively with the participation of the cantons, which, as mentioned above, had no equivalent in the law in force at the time. Nevertheless, it proposed to enshrine the idea that the cantons should be involved in the formation of federal policy, as was already the case in practice and as was already required in certain situations under the old Constitution of 1874. To this end, it provided for the inclusion—in a scattered manner—of the dual principle that the cantons "participate in the decision-making process at the federal level within the framework of the Constitution“ (Art. 32 para. 2 PD-Cst., entitled 'Tasks') and that they should also, like political parties and interested groups, ”in principle be consulted during the drafting of important legislative acts and international treaties, as well as on projects of major significance " (Art. 155 para. 1 AP-Cst., which became the current Art. 147 Cst., with a slightly different wording). 2

During the **consultation process**, however, the Conference of Cantonal Governments (CCG) and certain cantons, as well as other political actors, complained that this preliminary draft did not yet sufficiently emphasize the importance of the cantons' participation in "the drafting of federal legislation" or the Confederation's duty to inform and consult them appropriately on its projects. They made various proposals for amendments to Art. 32 para. 2 of the draft Constitution. The Federal Council took these complaints into ac- 3 count by devoting a specific and independent provision to these two issues (Art. 36 of the draft Federal Constitution), a provision that the Chambers did not amend in substance and which became the current Art. 45 of the Constitution.

4 It can therefore be considered that the provision discussed here primarily reflects a **wish of the cantons**. Nevertheless, it differs from the numerous proposals—which remained unheeded—made by some of the cantons and the CdC during the drafting of the 1999 Federal Constitution with a view to clarifying or even strengthening their rights of participation in the decision-making process at the federal level.

II. CONTEXT

5 From a systematic point of view, Art. 45 Cst. occupies a **prominent place** in the Federal Constitution. It is the fifth provision of the first chapter of Title 3 of the Federal Constitution, which deals with "relations between the Confederation and the cantons ." The provision is thus the first of the Constitution's provisions dealing with an "essential element" of Swiss federalism, namely—as its title indicates—"*participation [of the cantons] in the decision-making process at the federal* level," which makes them true decision-making bodies—and not merely executive bodies—of the Confederation. Art. 45 Cst. can therefore be seen as "the" basic provision or 'cornerstone' of what is known as Swiss *participatory federalism* – sometimes also referred to as vertical federalism (described in German as either "*partnerschaftlicher [or partizipativer] Föderalismus*" and "*Mitwirkungsföderalismus*").

6 As will be seen below, however, the **normative scope** of Art. 45 Cst. is **limited** compared to other constitutional provisions that give more specific expression to this same participatory federalism (see infra N. 18 s.). . Its first paragraph merely states that the cantons participate in the federal political process "in the cases provided for by the Federal Constitution," thus referring to other articles further on in the Federal Constitution (see infra N. 11) . As for the second paragraph, which requires the Confederation to inform the cantons of its plans in a timely and detailed manner, as well as to consult them when their interests are affected, it largely overlaps with other constitutional provisions that also give the cantons the right to be informed and/or consulted on certain federal matters (see infra N. 21 s.). That being said, Art. 45 of the Constitution complements all these provisions in a certain way, emphasizing

their importance from the outset by placing them in context. Thanks to this provision, it is clearer that the participation of the cantons in the federal decision-making process does not serve solely to improve the quality of the Confederation's acts and projects, nor to gauge the acceptability of a bill or decree subject to referendum. The “association” of the cantons with federal policy is an essential aspect of Swiss federalism, the importance of which is undoubtedly growing in view of the continuing erosion of their powers. Increased and “compensatory” participation by the cantons in the federal decision-making process is necessary, otherwise federalism risks becoming an empty shell.

The association of “federal states” in the formation of the will of the federal state is not unique to Switzerland. **All federal states** have a certain level of participation by federated entities in their politics, which is one of the criteria that distinguishes them from decentralized or regionalized unitary states. Nevertheless, the cantons have rights of participation that other federated entities, such as the German or Austrian Länder, or even the US states, do not have. The latter, for example, have no right of collective referendum against federal laws. As for the Länder, they are not strictly speaking part of the federal constituent body, unlike the cantons, which can oppose constitutional revisions subject to a double majority of the people and the cantons (see infra N. 16). In these two neighboring federalist states, the upper house of parliament cannot prevent the adoption of any federal act, as the Council of States can do in Switzerland due to the perfect bicameral system (see Art. 156 para. 2 Cst.); nor does it have any other exclusive rights, unlike the US Senate. On the other hand, the German and Austrian *Länder* can instruct their delegates sitting in this same chamber – who represent members of their governments – or, at least, participate in all its sessions and intervene whenever they so request on matters concerning their *Land*. This enables them to exert direct influence on federal parliamentary procedure and even on the election of federal supreme court judges, whom the chamber must elect or propose to appoint in whole or in part, something that the Swiss cantons cannot do. Last but not least, in Switzerland, the participation rights of the cantons – and thus participatory federalism – could be subject to constitutional revision or even abolished, which is not necessarily the case in other federal states, such as Germany. In some respects, our large neighbor could thus be a source of inspiration both for those who wish to reform Swiss federalism and for those who wish to protect it from any fundamental revision. 7

8 In federal states that have succeeded confederations of states, such as Switzerland, the participation rights of federated entities in the federal decision-making process serve in particular to compensate for the loss of autonomy that they have consented to and continue to consent to. It is therefore logical that the Federal Constitution contains no provision for a general right of participation by the Confederation in the cantonal decision-making process, including, for example, the right to be systematically consulted before the adoption of cantonal legislation. This does not mean that the federal government in Bern is prohibited from exercising any **influence on cantonal politics**. A certain degree of interference by the Confederation in the cantonal political process is inevitable, particularly because of the primacy of federal law (Art. 49 para. 1 Cst.) – which the Federal Assembly ensures is respected by "guaranteeing" the cantonal constitutions (Art. 51 para. 2 Cst.) – as well as in areas where the Federal Constitution requires the Confederation to cooperate with the cantons and coordinate with them in the exercise of their respective powers, where appropriate by establishing joint bodies (see, for example, Art. 61*a* para. 2 and 63*a* para. 4 Cst.). . The same applies when the Confederation has to act as an arbitrator or simply as a mediator in inter-cantonal and international relations (see, for example, Art. 48*a*, 56 para. 3 and 172 para. 3 of the Constitution) or when it has to finance certain cantonal activities (see, for example, Art. 64 para. 2 and 77 para. 3 of the Constitution).

III. COMMENTARY

9 As already mentioned, Art. 45 Cst. has **two parts**: the first paragraph is essentially symbolic, recalling the existence of the various rights of participation of the cantons in federal policy provided for in the Federal Constitution (see infra N. 10 ff.), while the second specifically establishes one of these rights, namely the right of the cantons to be informed of and consulted on federal projects that affect their interests (see below N. 21 ff.).

A. Rights of the cantons to participate in the federal decision-making process (para. 1)

1. General

10 In its French version, Art. 45 para. 1 of the Constitution stipulates that the cantons participate in the formation of the will of the Confederation "in the

cases provided for by the Federal Constitution" and, in particular, in "the drafting of legislation." The German and Italian versions of the provision each deviate somewhat from this text, stipulating that the cantons participate in this same decision-making "in accordance with the Federal Constitution" ("*nach Massgabe der Bundesverfassung*") and, specifically, in "the development of law" ("*an der Rechtssetzung*" and "*all'elaborazione del diritto*," respectively "). These slight **differences of stylistic origin** have no fundamental implications, even if one might be tempted to believe otherwise by mistakenly attributing specific weight to the French version of the provision, which seems slightly more restrictive, as we shall see (see infra N. 13 and N. 20).

In any case, it is clear that, regardless of the language version, Art. 45 para. 1 of 11
the Constitution primarily has a declaratory function, recalling that the cantons participate in the federal decision-making process "in the cases provided for" (or "as provided for" ["secondo quanto previsto"]) by the Federal Constitution or, simply, "in accordance with" it ("nach Massgabe"). The provision thus constitutes a **referral rule** to the numerous provisions scattered throughout the Federal Constitution that envisage or impose such participation in various ways. Some participation rights apply only to specific areas, such as foreign policy or education (see Art. 55 and 62 para. 6 Cst.). Others apply only to specific types of acts, regardless of the area of competence concerned, such as the right to comment on important legislative acts and other far-reaching projects during the preparatory work, as well as on important international treaties (Art. 147 Cst.), or even the right to submit a cantonal initiative or request a referendum (Art. 160 para. 1 and 141 para. 1 Cst.). The cantons also have organic participation rights, such as the right to have a say as co-holders of federal constituent power (Art. 140 para. 1 and 195 Cst.) and to have representatives in one of the two chambers of the Federal Assembly as the supreme power of the Confederation (Art. 150 para. 2 Cst. and Art. 148 para. 1 Cst.). There is still some doctrinal controversy as to whether certain other cantonal prerogatives should be classified as participation rights. The question arises, for example, in connection with the implementation of federal law by the cantons (see Art. 46 Cst.), which does not, strictly speaking, lead them to influence the federal decision-making process, but rather to execute it once it has been completed. In our view, this implementation represents above all a general principle of division of powers that gives concrete expression to the principle of subsidiarity (see Art. 5*a* Cst.). In any case, these controversies are of no real practical importance since, as mentioned above, the

participation rights of the cantons, whatever they may be, do not enjoy any particular constitutional protection (guarantee of immutability), unlike, for example, those of the German Länder (see supra N. 7).

12 All these rights, which may be cumulative, apply in particular to the "drafting of legislation," which Art. 45 para. 1 Cst. itself mentions as a prime example of cantonal participation. However, the participation rights provided for in the Constitution actually concern a **wide variety of decision-making processes** (preparation and conclusion of international treaties, federal strategic planning decrees, sectoral plans, plan approval procedures, etc.). Only certain non-parliamentary acts of minor importance are *a priori* excluded from any form of participation by the cantons under the Constitution. In this way, the cantons can in theory attempt to influence almost all important political decisions of the Confederation, although their actual influence on the adoption of certain federal acts through their representation in the Council of States alone remains (very) limited (e.g., on the federal budget; see N. 15). Another important point is that the cantons also have no influence, even indirect, on the case law of the Federal Supreme Court, all of whose members are elected solely by the Federal Assembly (joint chambers) (cf. Art. 168 para. 1 and Art. 157 para. 1 let. a Cst.). . Indeed, the Federal Supreme Court must not (e.g. within the meaning of Art. 45 para. 2 Cst.; see infra N. 27), nor can it, request observations from cantons that are not directly involved in proceedings before it, even if the judgment to be rendered involves deciding a constitutional issue that is potentially fundamental to them. Perhaps there is room for improvement here from a federalist point of view.

2. Participation of the cantons in the legislative process

13 As stated in Art. 45 para. 1 of the Constitution, the Federal Constitution allows the cantons to participate, in particular, in "the drafting of [federal] legislation" at various stages of the adoption process. It should be noted that, contrary to what the French text might suggest, this participation does not only concern federal laws, but **all normative acts** of the Confederation; it therefore also applies to ordinances of the Federal Assembly or the Federal Council, constitutional revisions, and accession to international treaties of a normative nature, which is clearer in the German and Italian versions of Art. 45 para. 1 of the Constitution, which refer to participation in the development of

"law" ("*an der Rechtsetzung*" and "*all'elaborazione del diritto*"; see supra N. 10).

The cantons may participate in the adoption of federal law at a very early stage, during the **pre-parliamentary phase**, insofar as the cantons have their own right of legislative initiative under Art. 160 Cst., which some of them exercise quite frequently. Cantonal law specifies the body entitled to exercise this right, which in practice allows either the cantonal parliament, the cantonal electorate, or, very rarely, the cantonal government to propose the adoption of a federal law directly to the federal chambers. However, the Chambers may refuse to act on such proposals after a preliminary review procedure, which in practice quickly curbs the cantons' ambitions. It is therefore considered that the participation of the cantons in the drafting of federal legislation is primarily reflected in the consultation procedure for draft legislation (laws or ordinances) prepared by the Federal Council (Art. 147 Cst.), During these procedures, the cantonal governments defend the cantonal position, sometimes subject to popular approval, and the CdC is also invited to express its opinion. This is perhaps the stage at which the cantons can most directly influence federal legislation, as illustrated by the genesis of Art. 45 Cst. (see supra N. 2 s.). Although the consultation procedure is intended for various interlocutors (see Art. 147 Cst.), the cantons are particularly important players. It should be noted that a consultation procedure must also be conducted when a bill is not prepared by the Federal Council, but directly by Parliament through its committees. 14

It is generally considered that the cantons also participate in the **parliamentary phase** of the adoption of federal laws and constitutional revisions initiated by the authorities through the Council of States, which is composed of two representatives per canton (only one for the former "half-cantons") , which must systematically approve such projects due to the perfect bicameralism that characterizes Swiss federalism. From a purely legal point of view, however, the participation of the cantons in the federal decision-making process is limited to the appointment of the representatives in question. Once in place, they vote freely, without instructions from the cantons (Art. 161 para. 1 Cst.), unlike in other federal states where the upper house of parliament is made up of genuine "delegates" or emissaries from the federated states (see above N. 7). It would also appear that, in practice, members of the Council of States are more influenced by the political line of their parties than guided by the specif- 15 ic interests of their respective cantons. Consequently, except in cases where the interests of the cantons, particularly financial interests, are directly affected, this chamber no longer acts as a spokesperson for the cantons, even though members of parliament traditionally like to claim the opposite during debates. In short, the importance of the cantons' participation in the federal legislative process through the Council of States, sometimes described as "indirect," should be put into perspective. Its effectiveness could nevertheless be enhanced by having members appointed by the cantonal parliament for a short term, something that has not been done for a long time. As things stand, it is questionable whether, during the parliamentary phase, the participation of the cantons is not more informal—at least for the most powerful among them—through a certain amount of lobbying of parliamentarians, which is certainly not provided for, but neither is it excluded, by the Federal Constitution (see infra N. 20).

16 Finally, the cantons may in principle still intervene during the **post-parliamentary** phase of the adoption of federal laws, which must be submitted to a referendum if eight cantons so request through their parliaments or another body designated by cantonal law (see Art. 141 Cst. and 67 LDP). This right of referendum has hardly ever been used to date. It has only been successful twice, on similar issues, for which the population had also requested a referendum: once in 2003 in connection with an amendment to acts concerning the taxation of couples and families, the taxation of housing, and stamp duties, which was ultimately rejected in a vote, and again in 2025 in connection with the Federal Act of 20 6.2025 on the individual taxation of married couples. The main advantage of the cantons' right of referendum is therefore that it strengthens their position during the consultation phase or in their lobbying activities. It should be noted that, from this perspective, the cantons would have every advantage in conferring the exercise of such a prerogative on their governments, which is currently rarely the case, as this could greatly facilitate the coordination of their actions. In comparison, the cantons are inevitably key players in any constitutional revision, as well as in any urgent legislation that lacks a constitutional basis (Art. 140 para. 1 let. a and c Cst.), since these ultimately require the agreement of the majority of the cantons, in addition to that of the people. The federal authorities must therefore take their positions into account at an early stage, both during the consultation process and during the parliamentary phase, if they wish to see such projects through to completion. It should be noted in this regard that cases in which the cantons have

blocked a constitutional revision desired by the people have tended to increase in recent decades, whereas they were rare in the past, which underlines the importance of this right of participation, sometimes seen as the most important of all. Nevertheless, it is increasingly criticized, as it currently gives certain small cantons, mainly German-speaking and with a so-called conservative majority, political weight that is sometimes considered excessive.

The participation of the cantons in the approval of **international treaties** is 17
the subject of specific provisions in Art. 55 of the Constitution, as well as in Art. 140 para. 1 let. b and c and Art. 141 para. 1 let. d of the Constitution. It is regulated differently depending on the importance of the treaties concerned and their effects on cantonal powers.

3. Normative scope: criticism and perspective

In general, it may seem paradoxical that a norm expressly relating to the 18
process of drafting federal legislation does not comply with one of the main axioms of legislative drafting, namely that of avoiding superfluous declarative legislative references. It should be emphasized here that the Constitution differs from laws in that it has a function that is almost as much political as it is legal, and that a **symbolic norm** such as Art. 45 para. 1 Cst. therefore has a legitimate place in it.

When interpreting this provision, lawyers must therefore resist the temptation 19
to attribute to it a normative significance that it does not necessarily have *a priori*, while taking care not to confine it to a purely informative function. A middle ground would be to consider Art. 45 para. 1 Cst. as a **programmatic provision** highlighting the importance of cantonal participation in the federal decision-making process. The provision would thus serve as a guideline—among others—in interpreting the Constitution and resolving any tensions that may exist between its various provisions. From this perspective, it would be up to the federal legislature to take special account of the importance of the cantons' participation rights when considering regulations that implement or restrict them (e.g., the LCo and the LParl), and the Federal Court would have to take it into account in its reasoning when developing case law that could limit the cantons' ability to influence federal policy (e.g., on the intervention of cantonal authorities in federal votes; see *infra* N. 20).

20 The essentially symbolic function of Art. 45 para. 1 of the Constitution in any case prohibits attributing any limiting effect to it. The provision in no way prevents the cantons from participating in decision-making in other cases and/or in ways other than those provided for in the Federal Constitution, even though the French and, to a lesser extent, Italian versions might suggest the contrary by stating that they may only do so "in the cases provided for by the Federal Constitution" (or "secondo quanto previsto dalla Costituzione federale"). **Other forms and methods of informal** participation by the cantons in the federal decision-making process are possible as long as they do not contravene federal constitutional law, which is clearer in the German version of Art. 45 para. 1 Cst. ("*nach Massgabe der Bundesverfassung*"), but also implicitly from the cantons' general right to information provided for in Art. 45 para. 2 Cst. The cantons, through their governments or inter-cantonal bodies, may therefore implement informal participation mechanisms, for example by hiring lobbyists or organizing meetings to be heard by parliamentarians and the federal administration, and, if necessary, joining forces to coordinate their lobbying activities in Bern, as they do in practice, as long as their behavior does not violate the principle of federal loyalty (see Art. 44 para. 2 Cst., which could be the case if a systematic and misleading smear campaign were launched in connection with a federal project) . This approach is sometimes considered to be the most effective. Similarly, the fact that the cantons have various opportunities to participate in the formation of the will of the Confederation does not automatically preclude their involvement in a federal referendum campaign. Canton authorities may therefore participate in debates and issue voting recommendations in federal referendums, but only in certain specific situations, in accordance with federal case law, which unfortunately largely ignores the importance of canton participation in federal politics, as implicitly enshrined in Art. 45 Cst. It is more difficult to determine whether other formal participation rights, which are more invasive and not expressly provided for in the Constitution, could be introduced into law, such as a right of veto for the cantons on Federal Council ordinances, or even the right to request their amendment, as requested by the CdC in the consultation on the preliminary draft of the Constitution. However, these questions certainly do not fall within the interpretation of Article 45(1) of the Constitution, but rather within that of other provisions of the Federal Constitution, such as Article 182(1) of the Constitution. It should be noted that, within the framework of Bilateral Agreements III, the Federal Council is considering introducing new

formal participation rights for the cantons that are not provided for in the Federal Constitution (e.g., the possibility for the cantons to request the Federal Council to activate the safeguard clause).

B. Duty of the Confederation to inform the cantons of its plans and to consult them (para. 2)

1. General

By stipulating that the Confederation "shall inform the cantons of its plans in good time and in detail" and "shall consult them when their interests are affected," Art. 45 para. 2 of the Constitution confers on the cantons certain **specific participation rights** intended to enable them to influence the federal decision-making process. From a systematic point of view, the provision establishes two distinct rights in each of its two sentences: on the one hand, a right for the cantons to be informed – in good time – of (almost) all federal projects (1st sentence; infra N. 30 ff.) and, on the other hand, a right for the cantons to be consulted when their interests are affected (2nd sentence; infra N. 34 ff.). 21

In doing so, Art. 45 para. 2 Cst. does not have a purely declaratory and symbolic function here, unlike the previous paragraph. Admittedly, the duties to inform and consult imposed on the Confederation by Art. 45 para. 2 of the Constitution impose on the Confederation overlap in part with those provided for in other provisions of the Federal Constitution. Nevertheless, Art. 45 para. 2 of the Constitution has its own **scope** in relation to these provisions, to which it applies cumulatively where applicable. 22

This aspect is important. In fact, Art. 45 para. 2 Cst. grants, to a certain extent, "broader" participation rights than Art. **147 Cst**, which, as a reminder, gives the cantons the right to give their opinion on important legislative acts and other projects of major significance during the preparatory work. Unlike this provision, Art. 45 para. 2 concerns first and foremost (almost) all federal projects, and not only those of special importance; some projects of lesser importance may therefore have to be submitted to the cantons for consultation within the meaning of Art. 45 para. 2 Cst., even though Art. 147 Cst. does not require this (see infra N. 26 ff.). Art. 45 para. 2 of the Constitution also establishes a duty to consult the cantons that is not limited to the ordinary consultation procedure, but may also apply to other stages of the federal decision- 23 making process (see below N. 37 ff.). . From this perspective, it can be argued, as we shall see, that Art. 45 para. 2 of the Constitution requires the Confederation to involve the cantons at an early stage in the drafting of certain preliminary drafts of acts, i.e. well before the consultation procedure provided for in Art. 147 of the Constitution (see below N. 37), or even that it requires the Confederation to seek their opinion again after this phase in certain cases, when a draft is subject to substantial, totally unexpected changes that affect the interests of the cantons in a new way (see below N. 38 ff.). This potential scope of Art. 45 para. 2 Cst. remains largely overlooked and neglected in practice.

24 While Art. 45 para. 2 of the Constitution grants the cantons genuine rights to information and consultation (see, on their justiciability, infra N. 43 ff.), it does so using several undefined concepts, such as “in good time” or “when their interests are affected.” This imprecision gives the Confederation a certain **margin of discretion** in its implementation (see infra N. 31 and 35), which does not necessarily imply the adoption of a federal implementing law.

25 Nevertheless, Art. 45 para. 2 of the Constitution is now implemented by **various legal regulations** of varying degrees of precision. Some of these – such as those relating to legislation on spatial planning, nuclear energy, national roads and railways – predate the Constitution, which in this respect did nothing more than codify duties that the Confederation had already imposed on itself for a long time. Other regulations were adopted after 2000 under the new Constitution. Examples include Art. 18 para. 1 let. b of the Federal Act of October 7, 2005, on Federal Finances (FFA), adopted as part of the introduction of the debt brake precisely in order to implement Art. 45 para. 2 of the Constitution, and of course the Consultation Act (CoA). However, the latter primarily aims to implement the consultation procedure during preparatory work required by Art. 147 of the Constitution and not directly the participation rights of the cantons provided for in Art. 45 para. 2 of the Constitution.

2. Concept of “projects” of the Confederation

26 The concept of "projects " (*Vorhaben*, *progetti*) that must be the subject of information and, where appropriate, consultation with the cantons is not defined in Art. 45 para. 2 Cst., nor anywhere else in the Constitution or federal legislation. However, a systematic reading of the Constitution suggests that the constituent power intended to give a **broad scope** to the provision which, unlike Art. 55 and 147 of the Constitution, does not apply only to decisions af-

fecting the essential powers or interests of the cantons, or to important or "far-reaching" projects ."

The term "project" in Art. 45 para. 2 Cst. is thus likely to cover a very **wide range of situations**. It may refer not only to federal legislative projects, such as draft laws or ordinances, but also to other federal projects which, without necessarily laying down general and abstract rules, nevertheless have a general scope, such as planning decisions or financial or budgetary decisions to be taken by federal decrees or Federal Council decrees. In addition, the use of the term "Vorhaben" in German seems to indicate that the Confederation's duty to provide information and consultation must in principle not only occur before the acts have been fully drafted, but that in certain circumstances it may already be required when the acts in question are still at the stage of mere declarations of intent or vague programs (see infra N. 31 and N. 37). On the other hand, the concept does not cover "drafts" of decisions or judgments that may be drawn up by an appellate authority, judicial or otherwise, before it rules. 27

It is immediately apparent that this broad interpretation of Art. 45 para. 2 of the Constitution and the concept of "drafts" contained therein may conflict with other constitutional provisions. How, in fact, can the cantons be informed or even consulted in the event of an emergency or crisis requiring the rapid adoption of measures under emergency law within the meaning of Art. 173 para. 1 let. b or Art. 185 Cst., or when it is necessary to ensure the confidentiality of a project relating to national security within the meaning of Art. 57 Cst.? The apparent contradictions that may exist between Art. 45 para. 2 of the Constitution and the aforementioned standards must first be resolved according to a certain "**practical concordance**," as in the case of the amendment to the LCo adopted after the COVID crisis with the aim of exempting laws and ordinances of the Federal Assembly and the Federal Council based directly on the Federal Constitution from the consultation procedure. To compensate for this new exception to the consultation procedure, a new Art. 10 LCo – inspired in particular by the Epidemics Act (LEp) and the COVID-19 Act – now provides that, when no consultation procedure is carried out due to the urgency of the situation, the competent authority (the Federal Council or a parliamentary committee) must seek, "as far as possible, the opinion of the cantonal governments and the circles particularly concerned by the project," by conducting an "informal consultation" when the time comes, 28 which may, in principle, take the form of a brief email. This legal provision thus reaffirms the importance of consulting the cantons, while making it somewhat more flexible.

29 Finally, under Article 45(2) of the Constitution, the Confederation is only required to inform or consult the cantons on **"its" own projects**. This excludes projects from the cantons or the Swiss people, which are not organs of the Confederation (*Bund*), which is the only body concerned by the provision, as its text indicates, but of the "Swiss Confederation" as a whole (*Schweizerische Eidgenossenschaft*). Thus, certain projects that the Confederation must only approve or validate, such as cantonal constitutional revisions or popular initiatives, fall outside the scope of Art. 45 para. 2 of the Constitution, certain projects that the Confederation must only approve or validate, such as cantonal constitutional revisions or popular initiatives. It should be noted that, since this type of project cannot be modified by the federal authorities, there would be almost no reason for consultation in any case. On the other hand, if a counter-proposal is put forward to a popular initiative, a consultation must be organized within the time limits set by Art. 97 para. 2 of the Political Rights Act. In short, the projects covered by Art. 45 para. 2 of the Constitution are primarily those of the Federal Assembly, the Federal Council, and its administration. It is more difficult to determine whether decentralized institutions such as the Swiss National Bank, Swiss Post, or Swiss Federal Railways are also subject to these obligations. The question is partly academic, as the law often already requires them to inform and/or consult the cantons before taking certain decisions.

3. Information "in good time" and "in detail"

30 According to Art. 45 para. 2 of the Constitution, the Confederation must in principle inform the cantons of its projects "in good time" and "in detail." These two specifications are intended to ensure that the cantons are in a good position to decide whether or not they wish to be involved in the development of a federal project and, if so, how. Art. 45 para. 2 of the Constitution thus establishes a general framework for the exercise of the cantons' participation rights, while emphasizing their role as partners of the Confederation.

31 However, the provision leaves the Confederation considerable leeway as to when and how it informs the cantons. This is particularly true insofar as it specifies, in a relatively open manner, that the information must be provided

"**in good time**" (*rechtzeitig*, *tempestivamente*). Does this mean that the information must be provided at the most useful time for the cantons, or at the most opportune time from the Confederation's point of view? The answer may, *a priori*, depend on the circumstances. It could be argued, for example, that even though the Confederation must inform the cantons of all its plans, it should be able to temporarily suspend this duty in certain situations, particularly in cases of emergency or extraordinary circumstances (see also supra N. 28). With regard to ordinary plans, it can otherwise be considered that it will generally be necessary – and sufficient – for the cantons to be informed at a stage when the outcome is still open, so that they can attempt, if they deem it necessary, to influence the federal decision-making process by exercising their various rights of participation or by engaging in a certain amount of lobbying. However, determining this moment is a matter for the Confederation's broad discretion.

The requirement that the information provided must be "**detailed**" (*umfassend*, *compiutamente*) according to Art. 45 para. 2 of the Constitution is relatively vague in terms of content. The German and Italian terms suggest that the information to be provided to the cantons must be complete and comprehensive, i.e., sufficiently broad to enable them to understand the project as a whole and its implications. By using the adjective "detailed," the French version refers more to a meticulous and detailed description of the various elements of a project. To ensure that the information provided is not merely a token gesture, the Confederation will therefore have to strike the right balance between communicating clearly and comprehensively without drowning the essence of the message in too many details. It will also have to take into account the fact that the obligation to provide information under Article 45(2) of the Constitution goes beyond a simple general duty to inform the public about its activities, such as that imposed on the Federal Council under Article 180 of the Constitution. 32

With regard to language, the federal authorities are required to use the **three official languages of the Confederation** in their communications with the cantons, although the use of Romansh is not mandatory in the canton of Graubünden (see Art. 70 para. 1, 2^{e} sentence, Cst., which provides for its use only in relations with "persons" using that language). They may not use one of these languages exclusively, as this would jeopardize the objective of inform- 33 ing the cantons, which are not expected to understand a project explained in any language, particularly when it concerns a new and technical field.

4. Consultation with cantons "affected in their interests"

34 Art. 45 para. 2 not only imposes a general duty on the Confederation to inform the cantons about its projects, but also requires it to consult them when the projects in question affect their interests. From this point of view, the cantons enjoy a **kind of right to be heard**, of an institutional nature, allowing them to submit comments to the Confederation.

35 When does a federal project affect the interests of one or more cantons within the meaning of Art. 45 para. 2 of the Constitution? Legal doctrine generally advocates a **broad interpretation** of the provision, arguing that the cantons should be consulted not only whenever a project restricts their autonomy or affects their area of competence, but also whenever it has other forms of repercussions for them. In this latter regard, inspiration could be drawn from the practice of the Federal Supreme Court, which recognizes that a canton's interests worthy of protection within the meaning of Art. 89 para. 1 of the Federal Supreme Court Act are affected when the project or act in question significantly affects its sovereign powers ("*in ihren hoheitlichen Befugnissen berührt*"), i.e. it affects its important or essential public interests. This would include, in particular, cases where a federal project would significantly affect a canton's financial interests or would be likely to cause significant emissions affecting a large proportion of its inhabitants. It should be noted that, from this point of view, consultation may be required when a project affects the interests of one or more municipalities in the canton, interests which are similar to those of the canton. However, this will not be the case if a project only affects the private interests of individuals, even if they are important to the canton (e.g., a major company or taxpayer). Thus, it is not apparent that the cantons of Geneva and Zurich have a right to be specifically consulted within the meaning of Art. 45 para. 2 of the Constitution in the case of a proposed amendment to the FINMA Ordinance on Financial Institutions, nor do the cantons of Bern and Neuchâtel in the event of a revision of the ordinance regulating the use of the name "Switzerland for watches.

36 From this perspective, and despite the reservation mentioned above, the right of the cantons to be consulted under Art. 45 para. 2 of the Constitution can apply to a **wide variety of cases**. These include not only legislative proposals

(laws, ordinances, and even directives), but also to national construction projects such as those concerning roads and rail transport, those relating to land use or agricultural planning, or even certain budgetary or financial decisions.

In general, the duty to consult laid down in Art. 45 para. 2 Cst. is of particular 37
practical importance for projects that are not necessarily subject to a consultation procedure within the meaning of Art. 147 Cst., i.e., projects that would affect the interests of one or more cantons without being a major legislative project or other project of significant scope. That said, it can be argued that Art. 45 para. 2 Cst. may also have its own significance in relation to important legislative proposals when these affect the essential interests of the cantons. For example, it may be justified to consult them even **before the official consultation procedure** provided for in Art. 147 of the Constitution, at an earlier stage of the preliminary draft, when the outcome of the project and its possible variants is more open. In any case, since 2016, federal departments and the Federal Chancellery have been required to to involve the competent cantonal bodies in an appropriate manner in the drafting of their preliminary draft laws or ordinances when their implementation is wholly or partly the responsibility of the cantons and requires considerable human and financial resources on their part or involves the reorganization of cantonal bodies or, alternatively, substantial amendments to cantonal law.

Art. 45 para. 2 Cst. may also have its own significance in relation to Art. 147 of 38
the Constitution in relation to legislative proposals that would be subject to major revisions **during the parliamentary review phase**, insofar as such amendments would have the effect of affecting the interests of the cantons – or only some of them – in a completely new and unexpected way. In our view, consultation with the (affected) cantons should be required in such cases, even though the LCo does not naturally provide for this, since it only aims to regulate the participation of the cantons in the preparatory work. This would require a revision of the LParl, which currently only provides for the committees to hear representatives of the cantons. It should be noted that the need for such a revision was immediately recognized by the Federal Council when drafting the new Federal Constitution and its future Art. 45 para. 2 Cst..

Until now, the Federal Chambers have always been reluctant to **supplement** 39
the ParlA or, possibly, the CoA, which would undoubtedly complicate their work. When the CoA was adopted, some organizations suggested that parlia-

mentary committees be required to organize a new consultation procedure when they substantially amend a Federal Council bill. This proposal has gone unheeded. Similarly, an initiative by the Political Institutions Committee of the Council of States aimed at improving the participation of the cantons in the parliamentary legislative process (in particular by creating a right for the cantons to be heard in committees) was opposed by the committee of the same name in the National Council. The latter considered, among other considerations, that the interests of the cantons were in any case taken into account in the parliamentary process.

40 With regard to the **modalities of consultation**, the cantons must be consulted directly and individually, in practice through their executives, even though Art. 45 para. 2 of the Constitution does not specify this. The LCo now expressly requires this governmental channel to be used for projects falling within its scope, in order to block from the outset any attempt by the Confederation to consult the cantons through other bodies (in particular parliamentary or inter-cantonal bodies) or authorities (e.g., simple administrative departments). The main aim is to consult all cantons in a uniform manner and to ensure that the Confederation's interlocutor is the same body in all cantons. This does not mean, however, that the position taken by the cantonal governments cannot or should not also be validated by the cantonal parliament or, as may be the case in some cantons, by the population. It is up to the cantonal legislature to determine who in the canton is responsible for drafting opinions and which authorities will participate in the consultation, if any.

41 At first glance, the Confederation fulfills its consultation obligation by gathering the opinions of the cantonal governments whose interests are affected. It could be argued that it also has a **duty to respond and provide reasons** when it deviates from these opinions, in order to show that it has taken its duty to consult seriously and respected it. A **response** could then be seen as a sign of respect on the part of the Confederation (see Art. 44 para. 2 of the Constitution). It should be noted, however, that a proposal to oblige the Confederation to state the reasons that led it to deviate from an opinion expressed by a significant number of cantons was not retained at the end of the consultation procedure on the draft new Federal Constitution; a historical interpretation of the norm must therefore probably lead to recognition of a qualified silence on the part of the constituent on this point. That said, it is in any case clear that the Confederation has no obligation to take the opinions of the can-

tons into account in substance – i.e., to implement or enforce them – pursuant to Art. 45 para. 2 of the Constitution, even if they are unanimous. This does not, of course, mean that it is exempt from any constitutional obligation to take into account the interests of the cantons and the opinions they may have expressed during a consultation: such an obligation may exist in connection with certain projects for which the Confederation has a duty of coordination under other constitutional provisions (see, for example, Art. 57 para. 2, 61a para. 2, and 75 para. 2 of the Constitution) or in which it is expressly provided that the opinions of the cantons carry particular weight (see, for example, Art. 62 para. 6, 76 para. 6, 89 para. 5, 100 para. 2, and 110 para. 2 of the Constitution).

The cantons, for their part, have no obligation—at least no legal obligation— 42
to give their opinion. For them, this is at most an **obligation** (*Obliegenheit*), the non-fulfillment of which may weaken their position in the event of a legal challenge to the federal bill. In particular, they must bear in mind that their standing to appeal against such a bill may depend on their participation in the drafting phase. Similarly, it cannot be ruled out that, in the event of a legal challenge to a bill, the competent authority may deny them the right to invoke certain arguments or elements that they did not deem useful to raise during the consultation phase, on the grounds that their late invocation would be contrary to the general principle of good faith (Art. 5 para. 3 Cst.) or federal loyalty (Art. 44 para. 2 Cst.; see also infra N. 46).

5. Justiciability

As for the possibility of complaining to a judicial authority about a violation of 43
Art. 45 para. 2 Cst. and, more specifically, of the Confederation's duty to consult the cantons likely to be affected by its projects, has not yet given rise to **any case law**. Furthermore, it is hardly discussed in doctrine, although it should be noted that doctrine rightly answers in the affirmative, without however elaborating greatly on the matter.

The issue appears to be **essentially academic**. Article 45(2) of the Constitu- 44
tion has already been extensively codified in law, which is generally respected in practice, and in other cases, the Confederation has considerable discretion as to how to apply it. Finally, it is certain that an individual cannot obtain the annulment of a project or act implementing it by complaining to a court that the project in question was adopted in violation of the duty to consult the

cantons. It is not possible for them to invoke in their favor the violation of a procedural right that does not belong to them and that does not harm their interests worthy of protection. As for the cantons, which are therefore the only ones harmed in the event of non-compliance with Art. 45 para. 2 of the Constitution, they are traditionally reluctant to initiate proceedings against the Confederation.

45 That said, if one day one or more cantons decided to challenge in court a federal bill that they believed had been drafted or adopted in violation of Art. 45 para. 2 of the Constitution, their action would undoubtedly raise a series of **difficult legal questions** related, in particular, to the unprecedented and very specific nature of such a dispute. While it seems impossible to anticipate all of them here, let alone predict with certainty how they would be resolved by the courts, we can attempt to outline a few possible answers, depending on the nature of the project in question and the authority that adopted it.

46 In principle, the option of bringing an action before the Federal Supreme Court does not appear to be closed from the outset under the combined application of Art. 189 para. 4 of the Constitution and 120 para. 1 let. b LTF in cases where **a federal law or ordinance** has been adopted – or is in the process of being adopted – in violation of the duty to consult the cantons within the meaning of Art. 45 para. 2 of the Constitution. It can indeed be argued that this would constitute a “public law dispute” between the Confederation and the cantons that could be decided by the Federal Supreme Court as the sole instance in accordance with the second provision. In such a case, however, the Federal Supreme Court would first have to clarify whether or not it can rule on any conclusions seeking the annulment (total or partial) of the the contested act in light of Articles 189(4) and 190 of the Constitution, which the latter provision seems to prevent in the case of federal laws, which judges are required to apply and, therefore, to respect. In comparison, the annulment of a Federal Council ordinance could be considered, at least in principle. There could still be numerous legal obstacles to such a measure. In particular, it would be necessary to consider whether the cantons concerned could be accused of complaining too late about a violation of their right to be consulted within the meaning of Art. 45 para. 2 of the Constitution, in violation of the rules of good faith and federal respect (see Art. 5 para. 3 and 44 para. 1 and 2 of the Constitution). This could be the case if they had never taken any steps to be included in the development of a federal project affect-

ing their interests, even though they knew it was in preparation. It also remains to be seen whether the Federal Court would consider the violation of Art. 45 para. 2 of the Constitution as “cured” by the filing of the action, as it already widely accepts in the case of appeals against decisions rendered in violation of the fundamental right to be heard within the meaning of Art. 29 para. 2 of the Constitution. In our opinion, such a solution would probably be necessary if it appeared—particularly in view of the Federal Council's response to the action brought—that the Confederation would in any case adopt the same act after hearing the arguments of the cantons whose rights of participation had been infringed and/or that annulment of the ordinance would pose serious problems of legal certainty.

By the same token, the route of legal action before the Federal Court should 47 also be open in principle against **other projects falling within the remit of the Federal Council or even the Federal Assembly** (infrastructure projects, sectoral plans, etc.) that may have been adopted in violation of Art. 45 para. 2 of the Constitution, again in application of Art. 120 para. 1 let. b LTF. In such cases, it can be assumed that, even after finding a violation of the cantons' right of participation, the Federal Supreme Court would again be cautious in annulling the contested act. Everything indicates that it would carefully weigh up the interests involved, taking into account all the circumstances and the political nature of the decision-making process that led to the contested act, as it already does in cases of appeals against cantonal legislative acts whose adoption is marred by procedural errors or against popular votes that have not always been conducted in full compliance with the democratic rules derived from Art. 34 of the Constitution. It would then take into consideration the urgency of the project concerned, the interest of the canton or cantons in being consulted specifically on it, and the influence that their opinion could have had—or could still have—on its outcome or final parameters, bearing in mind that the vast majority of Federal Assembly and Federal Council projects are in any case subject to public consultation within the meaning of Art. 147 of the Constitution. From this perspective, it should be noted that, in most cases, any action brought before the Federal Supreme Court would have no practical significance – although it would be politically significant – other than to obtain a decision in principle on the scope of Art. 45 para. 2 of the Constitution.

48 The situation may be different in the event of a **refusal or waiver by an office or department** – i.e., federal administrative authorities – to consult one or more cantons in connection with a federal project that is being prepared or has already been adopted by them, such as sectoral plans or special plan approval procedures (rail, electricity, etc.). . First of all, it is clear that, in such a situation, the cantons could in principle lodge an appeal with the Federal Administrative Court – and then with the Federal Supreme Court – or even, depending on the case, bring a direct action before the latter (see Art. 120 para. 1 and 2 LTF) to complain of a possible violation of Art. 45 para. 2 Cst.. If the competent judicial authority were to conclude that the canton(s) concerned do indeed have the right to be specially consulted within the meaning of Art. 45 para. 2 Cst. in relation to a draft that has not yet been adopted, it should order the federal departments or offices to inform them about the draft, or even to involve them directly in the draft in progress, so that they can give their opinion on it. Finally, if the department or federal office concerned had already adopted the disputed project itself, it would be necessary to declare it null and void, unless, perhaps, the canton could be accused of having acted too late (see above N. 46) or the project was of an urgent nature and pursued an important public interest. Apart from these two scenarios, it will not generally be possible to waive the annulment of the contested federal project on the grounds that early information and consultation of the cantons concerned would in any case have had no influence on the outcome of the procedure.

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This publication reflects only the views of the authors and not those of the Federal Supreme Court or the Federal Office of Justice.

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COMMENTARY ON

Art. 51 FC

A commentary by Renata Trajkova

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Section 4 Federal Guarantees

Art. 51 Cantonal constitutions

[1] Each Canton shall adopt a democratic constitution. This requires the approval of the People and must be capable of being revised if the majority of those eligible to vote so request.

[2] Each cantonal constitution shall require the guarantee of the Confederation. The Confederation shall guarantee a constitution provided it is not contrary to federal law.

CONTENT

I. HISTORICAL BACKGROUND

The idea of a constitutional guarantee can be traced back to the Helvetic Republic. Under Article 1 of the Federal Treaty of 1815, the cantons initially guaranteed each other's constitutions. Against the backdrop of the revolutionary events of the 1830s and 1840s, this cantonal system of guarantees proved to be insufficiently stable. With the **founding of the federal state in 1848**, the Confederation therefore assumed the role of guarantor. 1

Art. 6 of the FC of 1848 required the cantons, in para. 1, to seek the Confederation's guarantee for their constitutions. The Confederation assumed this guarantee pursuant to Art. 6, para. 2 of the 1848 FC, provided that the cantonal constitutions contained nothing contrary to the provisions of the FC (lit. a), ensured the exercise of political rights in accordance with republican (representative or democratic) forms (lit. b), and had been adopted by the people and could be revised if an absolute majority of citizens so demanded (lit. c). The inspiration for this provision was the U.S. counterpart to the federal guarantee in Art. IV, Section 4 of the U.S. Constitution. 2

Since its inception, the Swiss federal guarantee has undergone **no significant substantive changes**. Even the updating of the FC did not alter this situation. In contrast to the original version, the total revision of 1999 condensed the content of Art. 6 of the FC of 1848 (and the identical provision in Art. 6 of the FC of 1874) into two paragraphs, changed the order of the requirements, and reformulated the assumption that the cantons "have" a constitution what was reformulated into a call to "adopt one." However, this is merely a formal cosmetic change. 3

II. CONCEPTUAL AND SYSTEMATIC CLASSIFICATION

The federal guarantee of cantonal constitutions is one of the so-called **federal guarantees**, which are enshrined in the fourth section of the FC, specifically in Art. 51–53 FC. If one asks an artificial intelligence or enters the term "federal guarantee" into a search engine, references are regularly made to financial guarantees provided by the Confederation, such as those recently used in the CS takeover. However, the Constitution does not understand "federal guarantees" to mean financial guarantees. Rather, the Confederation provides a guarantee that relates to the federal structure and the legal status of 4 the cantons. This refers to the promise to uphold the essential values that make the Swiss Confederation a federal state, without diminishing the cantons' own statehood. A financial guarantee, however, is not part of this.

5 The federal guarantees under Art. 51–53 of the FC are, in a sense, an expression of the mutual assistance that has characterized the Swiss Confederation since its founding. In addition to Art. 51 of the FC, the other two federal guarantees concern the protection of the constitutional order of the cantons (Art. 52) and the guarantee of the existence and territorial integrity of the cantons (Art. 53 of the FC). From a systematic perspective, the guarantee of the cantonal constitutions is found in Art. 51 of the FC, the protection of the constitutional order of the cantons in Art. 52 of the FC, and the guarantee of the existence and territorial integrity of the cantons in Art. 53 of the FC, all within the chapter on the **relationship between the Confederation and the cantons**.

6 With the specific wording "each canton shall adopt…; chaque canton se dote…; ogni cantone si dà…," Art. 51 para. 1 of the FC reaffirms that the enactment and revision of cantonal constitutions fall within the **sole competence of the respective canton**.

7 The terms "guarantee," "ensure," and "safeguard"—and their noun forms—are used as synonyms in this context. On closer inspection, the procedure resembles an **approval** rather than a guarantee. The fact that the Constitution speaks of a "guarantee" is a historical relic. At the same time, however, the term emphasizes that a guarantor role is to be established that goes beyond purely preventive oversight.

III. FUNCTION

8 Art. 51 of the FC essentially contains **three main requirements**: It obliges the cantons to adopt written constitutions in the formal sense, which must meet certain requirements and be submitted to the Confederation for approval.

9 Different perspectives can be taken to answer the question of the function of the federal guarantee of cantonal constitutions. From **the federal government's perspective**, the guarantee procedure aims—in accordance with the still-prevailing "homogeneity or convergence theory"—to ensure that the structures of the cantons exhibit certain common basic parameters prescribed by the federal government. Historically, this function can be substantiated by

the fact that the cantonal guarantees of the cantonal constitutions were replaced by a uniform federal system. Such a system is only feasible if the federal government can identify common denominators. However, the primary aim is to establish a few minimum requirements, grant the greatest possible freedom in the organization of the state, and provide federal guarantees that serve this freedom. Comparative law also shows that minimum requirements for the constitutions of member states are an established instrument for achieving a certain degree of structural uniformity. While the standard of review—i.e., compatibility with federal law—is the same for all cantons, the cantons retain considerable freedom in the concrete implementation of these requirements in their cantonal constitutions. The result is a harmonization of regulations with only a modest loss of autonomy, which is a fine example of a federalist compromise typical in this country.

Art. 51 para. 1 of the FC, as it were, expresses the “constitutionality” of the cantons as sovereign member states. From **the cantons’ perspective**, the guarantee therefore signifies, on the one hand, a commitment to the federal state. The price for this lies in the legal protection of individual litigants, because provisions of the cantonal constitutions can no longer be challenged under the guarantee (see N. 38 et seq.). On the other hand, it constitutes a genuine federal guarantee, through which the cantons are specifically certified as having constitutions compatible with federal law. The guarantee of the cantonal constitutions and the associated review of federal law thus form the foundation for the constitutional order of the cantons. 10

IV. COMMENTARY IN THE STRICT SENSE

A. Requirements for Cantonal Constitutions (Art. 51 para. 1 FC)

1. Overview

Art. 51 para. 1 of the FC contains **two of the three main requirements** for the cantons, namely that they have written cantonal constitutions in the formal sense and that these meet certain substantive requirements of the FC. The wording of the FC is imprecise here, as it merely states that each canton shall adopt a democratic constitution (Art. 51 para. 1 sentence 1 of the FC), that this constitution requires the approval of the people, and that it must be amendable if a majority of eligible voters so demands (Art. 51 para. 1 sentence 11

2 of the FC). In addition to being democratic, requiring popular approval, and being subject to revision, cantonal constitutions must also be compatible with federal law. This requirement arises from the interplay with Art. 51 para. 2 sentence 2 of the FC, according to which the Confederation guarantees the cantonal constitution provided it does not conflict with federal law (third main requirement). Also not explicitly addressed—but undisputed—is the requirement that the constitution must be written (see N. 12).

2. Specific Requirements

a. A Written Constitution in the Formal Sense

12 Remarkably, the requirement of written form itself is not expressly stipulated: Nevertheless, it is presumed that the cantons must have a written constitution. The **written form** follows from the very fact that the cantons are obligated to submit a request to the Confederation for the guarantee of their cantonal constitution. Historically speaking, this is a matter of course; from a comparative law perspective, however, it is by no means a necessity: Canada and the United Kingdom, for example, recognize unwritten constitutions of their constituent parts.

13 It is assumed here that this involves *a* unified constitutional document that possesses heightened legal force and can be amended only through a qualified procedure. Constitutional status therefore implies that the enactment was adopted through a special legislative procedure, which is why it takes precedence over other cantonal law. The Federal Supreme Court assumes that Art. 51 of the FC "tacitly" presupposes this primacy. In the legal literature, however, this requirement is questioned: for instance, the formal nature of a constitution can only be prescribed by the constitution itself and not imposed by federal law. It lies within the competence of the cantons to decide what possesses **constitutional status**. For cantons that have a mandatory legislative referendum, the distinction will indeed be more difficult to make. For if no additional requirements are imposed on the procedure, there is, from a formal perspective, no superiority of the cantonal constitution over "ordinary" statutory law. For this reason, Martenet emphasizes the significance of the federal guarantee, by virtue of which the cantonal constitution occupies a deliberate special position. Since all cantons provide for a qualified procedure for their constitutions on their own initiative, the practical significance of this question is minimal. However, the discussion is not without significance, because, in

my view, it is only through the definition of the term “cantonal constitution” under Art. 51 of the FC that an intra-cantonal hierarchy of norms, as known in all cantons, becomes legally binding on the Confederation. Without this requirement, it would be irrelevant to the federal government whether the cantons provide for a constitution and—based on that—an intra-cantonal hierarchy of norms. From a historical perspective, too, it is clear that the subject matter referred to in Art. 51 of the FC is a written enactment that is difficult to amend, to which, regardless of its content, a heightened status is accorded in its canton of origin. The fact that the cantons have implemented these requirements even without an explicit request underscores their self-evident nature from the cantonal perspective.

Closely linked to the question of the quality of the cantonal constitution is the 14 question of the constituent body: **the constituent body** is, apart from the case of a popular initiative, on the one hand the cantonal legislature, which is referred to as the “Cantonal Council” or “Grand Council” depending on the canton. Two cantons (Appenzell Innerrhoden and Glarus) also have the so-called Landsgemeinde. Due to organizational autonomy, political structures and procedures can vary considerably from canton to canton. What the cantons have in common is that the consent of the electorate is required for constitutional enactment (see N. 17 ff.), so that the electorate also acts as the constitutional authority. In this sense, the preambles also refer to the voters (“the people”).

b. Democratic Constitution

The cantonal constitution under review must be democratic. A democratic 15 constitution is based on two cumulative requirements: First, a cantonal constitution is democratic only if it respects the **principle of the separation of powers**. Specifically, the cantons must therefore have parliamentary, governmental, and judicial bodies that are independent of one another in terms of personnel and organization. An absolute monarchical or aristocratic regime is thus ruled out. In terms of specific structure, the cantons enjoy a high degree of organizational autonomy—though to date, all cantons have opted for a collegial system. A purely representative constitution would also be theoretically permissible, although today all cantons utilize instruments of direct democracy.

16 Second, the **legislature** (the Cantonal Council or Grand Council, depending on the canton) must be elected through **direct popular election**. This requirement is unnecessary in the case of the Landsgemeinde, since there the voters act and represent themselves. The cantons are free to choose the electoral system for the Cantonal Council or Grand Council. The cantons must "merely" ensure a general, equal, free, and secret election.

c. Approval by the People

17 The cantonal constitution requires the approval of the people, as expressly stated in Art. 51 para. 1 sentence 2 of the FC. This obligates the cantons to introduce a **mandatory constitutional referendum**.

18 It is disputed whether this obligation applies to both a **total revision and a partial revision**, i.e., to the revision of the entire cantonal constitution or only to individual provisions. Historically, a constitutional referendum was required only for a total revision. Since all cantons have a mandatory referendum for constitutional amendments, the discussion has no practical significance. However, it may be regarded as a federal achievement that successful partial revisions of cantonal constitutions always require the approval of the people.

19 The answer to the question of who constitutes the "people" has indeed led to discussions, but today it can be clearly substantiated historically: Approval must be granted by the **majority of valid voters, excluding blank ballots**.

d. Constitutional initiative

20 Furthermore, federal law stipulates that a constitutional revision must be possible **at any time** if the "majority of eligible voters so demands." In other words, the cantons must introduce a constitutional initiative. The term "at any time" implies a prohibition on the establishment of waiting periods, autonomous substantive barriers, and perpetual clauses. This prohibition applies to both total and partial revisions.

21 The constitutional initiative may also relate to **any constitutional content**. Screening out content deemed unworthy of the constitution is incompatible with the Swiss understanding of popular rights.

e. Compatibility with Federal Law

From today's perspective, the most practically significant prerequisite for constitutionality is the compatibility of the cantonal constitution with federal law. Federal law also includes all international law binding on Switzerland. In addition to federal laws, ordinances, and the international law applicable to Switzerland, this also encompasses all principles of the rule of law, including the practice of the highest courts. This is a **broad spectrum** ranging from fundamental rights, social objectives, and competences to regulations governing the relationship between the Confederation and the cantons. 22

The scope of application of federal law as defined in Art. 51 para. 2 of the FC is reminiscent of the descriptions in Art. 95 lit. a and lit. b of the BGG, which establishes the admissible grounds for appeal—"federal law" and "international law"—before the Federal Supreme Court. Even though the scopes of application are nearly identical, one must not be misled into confusing Art. 95 BGG with the requirements for the guarantee procedure due to the wording: The Federal Supreme Court's jurisdiction is much broader, as it examines not only federal and international law but also cantonal constitutional rights, provisions regarding citizens' political suffrage, as well as referendums and popular votes, and intercantonal law (Art. 95(a)–(e) BGG). Nevertheless, it can be concluded from the comparison that the term "federal law" is understood more broadly under constitutional law than the procedural interpretation of the BGG permits. Thus, (in accordance with the monistic system), the terminology of the federal guarantee includes relevant international law under "federal law," whereas under Art. 95(b), international law constitutes a separate ground for appeal before the Federal Supreme Court alongside federal law. However: The comparison with the appeal proceedings before the Federal Supreme Court is confusing at first glance because the functions of the guarantee and appeal proceedings differ. The guarantee of the cantonal constitutions is a federal guarantee, whereas the appeal proceedings before the Federal Supreme Court primarily serve the purpose of legal protection. With regard to the subject matter of the review, both are a form of **abstract judicial review**, a process in which a legislative act is examined for its compatibility with superior law (see N. 30). For this reason alone, a comparison is warranted. Despite the different functions of the guarantee procedure and the appeal procedure, the benchmark of "federal law" also regularly serves as a further argument for the Federal Supreme Court to exclude judicial review of cantonal constitu- 23 tions (see N. 38). Therefore, it should be emphasized that the benchmarks are not the same.

24 **It is not** a matter for the guarantee to examine whether the cantonal constitution is **compatible with the rest of cantonal law**. This correlates with the requirement that the Federal Supreme Court—apart from constitutional rights, political rights, and intercantonal law—also "merely" reviews compliance with federal law. A certain coherence can be seen in this, as it is clear that respect for the cantonal hierarchy of norms remains a cantonal matter.

25 For a provision in a cantonal constitution to be denied constitutional protection, it must violate federal law. However, a violation of federal law does not occur merely because a contradiction with federal law is apparent. Constitutional protection is denied only if the cantonal constitutional provision **defies any interpretation consistent with federal law**. This mechanism is reminiscent of the practice regarding the invalidity of cantonal popular initiatives: Most cantons stipulate that their constitutional and legislative initiatives must be compatible with higher-ranking law (which already follows from federal law under Art. 49 para. 1 of the FC and can accordingly also be invoked before the Federal Supreme Court). According to case law, these constitutional and legislative initiatives are to be declared invalid only if they are to be interpreted in a way that makes them appear, with near certainty, to be inadmissible. The underlying rationale of this case law is the principle that, in cases of doubt, initiative proposals with ambiguous texts must be submitted to the electorate for a vote, provided that, when interpreted accordingly, they appear to be compatible with higher-ranking law (*in dubio pro populo*). In the guarantee procedure, however, the significance of this principle is significantly qualified: When a cantonal constitution is submitted to the Federal Assembly for guarantee, it has (1) undergone a cantonal legislative process and has (2) been adopted by the cantonal electorate in a mandatory referendum. A preliminary review (regardless of its specific cantonal form) has thus taken place. If, following this screening, a conflict with federal law still arises, then, in my opinion, the provision in the cantonal constitution must not be guaranteed. To guarantee a cantonal constitutional provision even when no interpretation compatible with federal law is possible violates Art. 51 para. 2 of the FC.

26 Furthermore, Art. 51 para. 2 of the FC applies the requirement of compatibility with federal law only to the cantonal constitution. However, the guarantee decision creates the expectation that subordinate cantonal law must also be in

harmony with constitutional law. Since the guarantee decision only examines compliance with federal law, this, in my view, merely implies that the remaining cantonal law must be compatible with federal law. This, in turn, is a requirement that already follows from para. 49(1) of the FC ("Federal law takes precedence over conflicting cantonal law"). However, Art. 51 of the FC does not merely constitute an **application of Art. 49 para. 1 of the FC**, but supplements it with the obligation of the Federal Assembly not to guarantee the cantonal constitution in the event of such a conflict. Dogmatically, however, the lack of approval does not alter the effect—a provision of a cantonal constitution that violates federal law has no effect from the outset (even if the violation of federal law is only noticed at the time of approval). It cannot therefore be denied that approval today has more symbolic significance than practical relevance.

B. Approval of Cantonal Constitutions (Art. 51 para. 2 of the FC)

1. Procedure

Every canton is obligated to submit any amendment to its cantonal constitu- 27
tion to the Confederation—regardless of whether it is a total or partial revision. – In principle, **two phases** must be distinguished: the enactment of the cantonal constitution in the form of a total or partial revision under cantonal law and the subsequent guarantee of the cantonal constitutional provisions by the Confederation.

The subject of the review may be a **cantonal constitution that has just** 28
been adopted or has already entered into force: The cantons are indeed entitled to adopt cantonal constitutions in accordance with cantonal law and to bring them into force even before they are guaranteed. Federal law does not prevent this either.

For the procedure, it is irrelevant whether the constitutional provisions to be 29
reviewed have just been adopted or are already in force. There are **no deadlines** within which the request must be submitted. However, if a canton remains completely in default, the Federal Council, as the supervisory body, is instructed to call upon the cantons to submit the revised constitution.

The body responsible for guaranteeing constitutionality is the **Federal As-** 30
sembly (Art. 52 para. 2 in conjunction with Art. 172 para. 2 of the FC), which

conducts an abstract review of constitutionality. The subject of review within the framework of this abstract review of constitutionality is the cantonal constitution as a whole (in the case of a total revision) or a single provision or several provisions of the cantonal constitution (in the case of a partial revision).

31 The **procedure** is structured as follows: The canton concerned first submits a request to the Federal Council, which prepares the approval procedure for the Federal Assembly. The request is filed with the Federal Chancellery. After reviewing the cantonal constitution, the Federal Council drafts a motion with a message to the Federal Assembly, in which it sets forth its assessment (approval/non-approval with corresponding considerations). The Federal Assembly is not bound by this motion, although it will generally follow the motion. Consideration of the matter is mandatory.

32 The Federal Assembly—like the Federal Council before it—conducts a purely **legal review**. It examines only the content of the cantonal constitution, not the manner in which it was adopted. In an era of highly effective judicial review by the Federal Supreme Court, the necessity of political legal review by the Federal Assembly is certainly open to question. In particular, if the federal duty of loyalty under Art. 44 para. 2 of the FC is used to incorporate political considerations, this leads to a relativization of the legal review. Such difficulties reveal the conceptual problem of conducting an abstract review of norms by a political body: Political considerations of expediency should have no place in legal review, which in turn demonstrates that the Federal Supreme Court is better suited to conducting such abstract judicial review.

33 The Federal Assembly may refuse to grant approval entirely or only partially (i.e., only for individual constitutional provisions). If the National Council and the Council of States reach different decisions, a simple reconciliation of differences takes place. The second rejection thus constitutes a negative guarantee decision. The guarantee decision is ultimately issued in the form of a **simple federal resolution** within the meaning of Art. 141 para. 1 lit. c and Art. 163 para. 2 of the FC. The guarantee decision is therefore not subject to an optional referendum, nor can it be challenged before the Federal Supreme Court.

2. Legal Effect of the Approval Resolution

According to prevailing doctrine, the positive approval resolution is of a **declaratory nature**, which is why cantonal constitutions may also enter into force in advance. If the cantonal constitution meets all requirements and the Federal Assembly issues a positive approval resolution, nothing stands in the way of the cantonal constitution entering into force (unless it has already been enacted). However, the cantons may stipulate that the Federal Assembly's grant of approval is a prerequisite for entry into force, thereby conferring constitutive effect on the decision. Following approval, the cantonal constitutions are published as the only cantonal enactments in the Systematic Collection of Federal Legislation. 34

In the event of **non-approval, the provision, according to prevailing opinion**, *ex tunc***(from the time of its adoption) ceases to have effect**. In the case of a revision that has just been adopted, this means that the successful referendum remains without effect. Here, too, the Federal Assembly's decision is attributed declaratory effect, since a void provision could never have produced legal effects. However, it is not disputed that a cantonal constitution that has been adopted in accordance with the prescribed procedure and brought into force under cantonal law does indeed produce legal effects, especially when it is not obvious that it violates the requirements for constitutionality. An act of application based on this provision would have to be revoked, which is incompatible with the theory of nullity. In fact, the guarantee decision therefore has constitutive effect. 35

From a dogmatic perspective, it would be more accurate in this context to speak of nullity *ex nunc*. The unguaranteed provisions violate federal law and should be repealed or not applied accordingly within the framework of abstract or concrete judicial review. However, this would require that a cantonal constitutional provision be subject to review within the framework of abstract and concrete judicial review. Such an approach, however, is incompatible with the current Federal Supreme Court's exclusion of abstract and concrete judicial review of cantonal constitutional provisions (see N. 37). Applying the theory of nullity *ex tunc* therefore has the advantage that the legal basis for the act of application never existed in the first place, which is why the decision based on it also lacks a legal basis. A proceeding is unnecessary. In practice, one limits oneself to stating that a corresponding provision is not guaranteed—which essentially establishes its nullity. The issue is put into perspec- 36 tive by the fact that cases in which provisions of the cantonal constitution have not been guaranteed are very rare.

3. Procedural Implications of the Guarantee Ruling

37 As already noted, the guarantee ruling has procedural implications: Although cantonal constitutions are unambiguously cantonal law and the relevant legislation in Art. 82 para. 2 BGG does not provide for an exception, they cannot be the subject of a challenge in an appeal. As a result, the cantonal constitution (or individual provisions thereof) cannot be annulled by the Federal Supreme Court, even if they violate federal law. The Federal Supreme Court has upheld this position since 1891. The exclusion is explained by the fact that Art. 172 para. 2 of the FC, which assigns the authority for abstract judicial review to Parliament, is a *lex specialis* to Art. 189 of the FC. In my view, the exclusion can be directly justified by the interplay of both provisions: cantonal constitutions are guaranteed by the Federal Assembly, which constitutes an act of the Federal Assembly, thereby precluding abstract judicial review of cantonal constitutions by the Federal Supreme Court (Art. 172 para. 2 in conjunction with Art. 189 para. 4 of the FC). Even if the exact derivation is open to debate, legal scholarship appears to have accepted the **exclusion of abstract judicial review**. However, this practice can be fundamentally questioned: As already mentioned in N. 23, the scope for abstract judicial review by the Federal Supreme Court and the Federal Assembly differs significantly. That Art. 172(2) of the FC therefore constitutes a special provision is, at the very least, not compelling. A more obvious route is via Art. 189 para. 4 of the Federal Constitution, according to which, by virtue of the guarantee decision, the FC's review of the cantonal constitution—as an act of the FC—cannot be challenged before the Federal Supreme Court. But even here, one could counter that the cantonal constitution itself is not an act of the FC. Dogmatically, therefore, the exclusion rests on a less stable foundation than longstanding historical practice suggests. If one conducts the discourse outside the context of the separation of powers, there is not much room left for argumentation in favor of the exclusion. In my opinion, the solution that appears coherent is therefore to treat cantonal constitutions like any other cantonal law and to permit abstract judicial review.

38 Out of respect for the Federal Assembly's approval procedure and the associated review of conformity with federal law, the Federal Supreme Court also

refrains, as a matter of established practice, from conducting an incidental review of cantonal constitutions in a specific review of legal norms. This **exclusion of incidental review** by the Federal Supreme Court is almost unanimously criticized in the literature, as such an approach is neither covered by the legal basis nor functionally justified. Although the Federal Supreme Court itself has expressed doubts about its own practice, it has also advocated for its expansion.

The scholarly discourse can be supplemented by noting that, using the same line of reasoning, the incidental review of the constitutionality of all federal law could be dispensed with: Is it not a regular part of the legislative process for the Federal Council to issue a dispatch in which it examines constitutionality, and for the Federal Assembly to debate on this basis? Purely factually, this process could also be regarded as a preliminary review, with the consequence that the Federal Supreme Court would no longer be permitted to review the matter here due to prior consideration. However, the incidental review of federal ordinances is essential in practice. Even federal laws are reviewed by the Federal Supreme Court for their constitutionality, even though the requirement to apply Art. 190 of the FC always applies. To put it bluntly, one might therefore ask whether the existence of the guarantee procedure should prevent the Federal Supreme Court from fulfilling one of its core tasks. In my opinion, Art. 51 of the FC does not provide a sufficient basis for such restraint. It is, in fact, an illusion to believe that the Federal Assembly or the Federal Council can comprehensively and fully review the compatibility of a cantonal constitution with all federal law within the meaning of Art. 51 para. 2 of the FC. From today's perspective, the scope of the federal law to be reviewed is so vast that a renewed review is virtually a given.

Since 1985, the Federal Supreme Court has, at least in exceptional cases, conducted a specific review of constitutionality when the federal law in question—regardless of its level—only entered into force after the guarantee procedure. This **exception** also applies to unwritten, evolving, overarching constitutional principles. The reasoning behind this is convincing: Restraint is not appropriate when the Federal Assembly had no opportunity whatsoever to examine compatibility with a specific norm. Law that entered into force later should therefore not be included in the effect of the guarantee decision. The further development of constitutional principles could provide an occasion to "clarify" the established practice of concrete constitutional review as a whole. 39

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COMMENTARY ON

Art. 52 FC

A commentary by Renata Trajkova

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Art. 52 Constitutional order

[1] The Confederation shall protect the constitutional order of the Cantons.

[2] It shall intervene when public order in a Canton is disrupted or under threat and the Canton in question is not able to maintain order alone or with the aid of other Cantons.

CONTENT

I. HISTORICAL BACKGROUND

Like Art. 51 of the FC, Art. 52 of the FC dates back to the **founding of the federal state**. Systematically, it not only stands alongside Art. 51 of the FC but is also substantively linked to it. Art. 52 para. 1 of the FC defines the Confederation's duty to guarantee the protection of the constitutional order of the cantons. Art. 52 para. 2 regulates the most significant measure for fulfilling this duty of guarantee: federal intervention. 1

Art. 52 of the FC is the **result of the most recent total revision of the FC** (so-called "updating"): Its provisions were previously regulated in Art. 5 of the FC of 1848 and 1874 (guarantee of the territory and statehood of the cantons) and Art. 16 of the FC of 1848 and 1874 (federal intervention). During the update, these provisions were largely consolidated, shortened, and in part transferred to other provisions (see N. 3, and also N. 8 et seq.). 2

Art. 5 of the FC of 1848 and 1874, which is now enshrined in Art. 52 para. 1 of the FC, originally guaranteed the territory, sovereignty, and constitutional order of the cantons by the Confederation and additionally guaranteed the freedom and rights of the people as well as the constitutional rights of "citizens." Thus, the predecessor provision went further than the current norm: the federal guarantee of legal recourse to protect the fundamental rights enshrined in the cantonal constitutions was transferred to Art. 189 para. 1 lit. d and f of the FC. According to the current wording of Art. 52 para. 1 of the FC, individual protection of fundamental rights is, in principle, no longer part of this federal guarantee. The territorial and property guarantees, also mentioned in the original version, are now found in Art. 53 of the FC. The "sovereignty" referred to is no longer listed separately apart from the general provision in Art. 3 of the FC. Art. 52 para. 1 of the FC therefore now covers only the protection of the constitutional order. 3

Art. 52 para. 2 of the FC, in turn, regulates federal intervention, which was previously enshrined in **Art. 16 para. 1–4 of the FC of 1848 and 1874**. Through federal intervention, the Confederation was intended to restore internal security and order in a canton if the canton in question was unable or no longer able to do so. Art. 16 of the FC of 1848 and 1874 still distinguished between (1) the prerequisites and (2) the modalities of federal intervention. In the view of the constitutional framers of that time, in the event of serious dis- 4 turbances to internal security, cantonal governments would first request assistance from the Federal Council and then from other cantons, provided the Confederation was unable to help. In addition, intervention by the competent federal authority—which may vary depending on the specific case (see the measures under N. 13)—was envisaged in the event of a threat to, and not merely a disturbance of, Switzerland's security (Art. 16 para. 2 of the FC of 1848 and 1874). Under the heading of "necessary measures," a distinction was made between unarmed and armed federal interventions (Art. 16, para. 1 of the FC of 1848 and 1874). After the Second World War, the conviction prevailed that domestic military operations should be avoided and that civilian police resources of the cantons should be used instead. A federal intervention should constitute an absolute exception. This "ultima ratio" principle continues to shape federal intervention to this day. The reformulation of Art. 52 of the 1999 FC dispenses with all these distinctions compared to the (identical) versions of 1848 and 1874. What remains is the principle of subsidiarity.

5 Against this backdrop, federal intervention has **no practical significance** today. The last federal intervention dates back to 1932; the other nine took place in the 19th century. Most interventions occurred in the canton of Ticino, though they involved quite different operations, such as addressing the decades-long conflict between liberals and conservatives in the canton or defending against external threats. The last federal intervention was that of November 9, 1932, in the canton of Geneva, during which the Lausanne Recruit School was tasked with containing the conflict between radical socialists and right-wing extremists.

6 However, the fact that there are only a few examples of federal interventions does not mean that the federal guarantee under Art. 52 of the FC should be called into question as such: due to its historical legitimacy and its preventive effect as a warning signal under federal law, this provision is **indispensable**. Nevertheless, it cannot be denied that the guarantee of the protection of the constitutional order is today primarily a task of the Federal Supreme Court. Through its case law, the Federal Supreme Court, as the highest court and court of last resort, succeeds in contributing to the maintenance of the constitutional order of the cantons in a more subtle manner. One example is the voting rights complaint under Art. 82(c) BGG, in which the Federal Supreme Court may freely review cantonal constitutional, statutory, and regulatory law, provided that it is closely related to the right to vote and stand for election.

II. COMMENTARY IN THE STRICT SENSE

A. The Confederation's Duty to Protect (Art. 52 para. 1 of the FC)

The federal guarantee requires the Confederation (see note 19 regarding jurisdiction) to protect the rule of law in the cantons from imminent serious disturbances such as unrest or constitutional crises. The provision on the constitutional order establishes the **Confederation as the guarantor** "of the universal respect for all significant components of cantonal sovereignty: the constitutional order and the rights and freedoms of the cantonal people." 7

The **term "constitutional order"** is interpreted differently in the literature. 8
It fundamentally refers to cantonal constitutional law as a whole. The constitutional order refers to the foundations of the Swiss Confederation and is thus a constitutional prerequisite of the Swiss federal state. In conjunction with Art. 51 of the FC, this can therefore only refer to what has been guaranteed by the Confederation. However, the interplay between Art. 51 of the FC and Art. 52 of the FC implies that cantonal autonomy as such is also protected. Together with Art. 47 of the FC, according to which the Confederation safeguards the autonomy of the cantons, Art. 51 and Art. 52 of the FC thus also stand for cantonal autonomy.

It follows from the provision's function as a federal guarantee that the point of 9
reference for the guarantee is the constitutional order of the cantons. Thus, it is not the constitutional order of the Confederation that is guaranteed, but rather that of the cantons, which the Confederation undertakes to protect and uphold. At the same time, history and the previous versions of the FC show that the phrase "constitutional order" encompasses more than the current wording suggests. Indeed, the previous wording is crucial for understanding the constitutional order: According to Art. 5 of the FC of 1848 and 1874, "the sovereignty and the constitutional order of the cantons" were protected. The current wording of Art. 52 of the FC refers only to the constitutional order, while sovereignty no longer appears in the current wording of this provision. However, there is no documentation that there was an intention to deviate from the content of the constitutional order, as it was still described as "the sovereignty and constitutional order of the cantons." Although unstated, it remains part of Art. 52 of the FC that a canton's sovereignty is part of its constitutional order. In other words, there is no indication that the division of Art. 5 of the FC of 1848 and 1874 into several separate provisions was intended to be

accompanied by a narrower understanding of the constitutional order. The term “sovereignty” within the meaning of Art. 3 of the FC (“The cantons are sovereign insofar as their sovereignty is not restricted by the FC”) is, in turn, open to interpretation. It refers to what constitutes the canton as a constitutional “state.” This includes, among other things, cantonal autonomy in all its facets. These historical considerations therefore argue for a broad understanding of the constitutional order (regarding the distinction from federal supervision under Art. 49 para. 2 of the FC, see N. 16). The constitutional order of the cantons encompasses all norms that form part of the cantons’ constitutional order (and thus, in particular, cantonal autonomy).

10 The literature states that the Confederation’s duty under Art. 52 para. 1 of the FC exists regardless of whether a disturbance or threat within the meaning of Art. 52 para. 2 of the FC is present. However, it is difficult to conceive of cases in which there is not simultaneously a disturbance or threat to the constitutional order. In practice, therefore, the obligation to protect applies primarily in cases of **disturbances or threats,** because only then does a need for protection arise: This primarily concerns the protection of cantonal rule of law against unlawful attacks by other cantons, but also against insurrectionary movements and against interventions by the federal government itself (if the disturbances or threats originate from federal authorities). These include, in particular, abuse of power, riots, acts of sabotage, regional civil wars, or coup attempts. Disruptions or threats to the constitutional order manifest in various ways: Intra-cantonal problems can range from issues with the separation of powers (such as when the executive branch systematically ignores the legislative branch) to complete inaction (such as when an authority refuses to hold a referendum despite a legal obligation to do so). A canton’s constitutional order can also be compromised if the cantonal authorities are no longer functional, for example because the democratically elected government can no longer carry out its official duties. What these situations have in common is that they involve cases where the cantonal security forces are overwhelmed. The Confederation is obligated to ensure that political disputes within the cantons, as well as relations between the cantons, remain within the constitutional framework. In doing so, it helps prevent cantonal conflicts from escalating to the point where they destabilize the Confederation itself.

11 In this context, **order throughout the entire canton** need not be affected; rather, it is sufficient for such a situation to occur anywhere within the can-

ton's territory. Drawing the line between this and a state of emergency not covered by Art. 52 of the FC—which involves multiple cantons and permits emergency law—is difficult. This is due in no small part to the fact that the state of emergency or emergency law is not expressly regulated, but can be implicitly derived from Art. 165, Art. 184, and Art. 185 of the FC. By its very nature, Art. 52 of the FC generally applies whenever only one or, at most, two cantons are involved. If, however, the conflict becomes a problem affecting the whole of Switzerland, action should be taken based on the constitutional right of urgency.

Unlike para. 2, Art. 52(1) of the FC does not address the question of **when the Confederation must act**. Due to their extensive organizational autonomy, the cantons are in principle responsible for ensuring the protection of their own constitutional order. Thus, the protective obligations under Art. 52 of the FC constitute only subsidiary federal requirements with limited practical effect. If a canton cannot avert the acute threat or impairment on its own, the duty to protect under Art. 52 para. 1 of the FC applies, and the federal government's right to intervene under Art. 52 para. 2 of the FC comes into play. 12

The **measures** by which the Confederation can fulfill its duty of guarantee are diverse and are not listed in Art. 52 of the FC (on the relationship to federal intervention, see N. 15, and on the distinction from federal supervision, see N. 16). An important option is the legal remedy, which remains available even in the event of unrest and constitutional crises. Appeals in matters of public law (or, depending on the case, subsidiary constitutional complaints) may be filed with the Federal Supreme Court against sovereign acts of cantonal courts of last instance. Private individuals may challenge the violation of constitutional rights as well as the principle of the separation of powers. However, this step is only of limited use as a measure within the meaning of Art. 52 of the FC, because the Federal Supreme Court can only adopt a case-by-case perspective. Nevertheless, within the framework of abstract judicial review, the Federal Supreme Court can apply a broader perspective than when reviewing individual acts. A further limitation on the legal remedy arises from the fact that the federal judicial system does not provide for litigation procedures for intra-cantonal disputes between state organs, which regularly underlie the cases of application of Art. 52 of the FC. Appeals by federal authorities can be attributed to federal supervision (see N. 16). When selecting measures to fulfill 13 the duty to guarantee, the general principles of the rule of law must be observed.

14 The cantons must, in principle, ensure that the constitutional order is maintained, if necessary by police means. If cantonal measures fail or prove insufficient from the outset, assistance must be sought from other cantons. If these too prove insufficient, the canton may request the Confederation to mobilize **troops for public order duties**. In doing so, the Confederation always reserves the right to decide on the mobilization and command. Public order duties, however, have little practical significance. Army deployment today takes the form of assistance duties, as was recently the case during the COVID-19 pandemic. The role of the army is limited to assisting the civil authorities at their request. Mobilization and assignment to the cantons are carried out by the federal government.

B. Duty to Intervene (Art. 52 para. 2 of the FC)

15 Art. 52 para. 2 devotes a separate para. to federal intervention. This reflects a historically significant application of the guarantee measures. The term "federal intervention" (or "Eidgenössische Intervention"; "Intervention de la Confédération"; "Intervento della Confederazione") refers to the **intervention of the Confederation in the event of a disturbance or an imminent threat to public order** in a canton. The purpose of federal intervention is to restore public order in a canton that has been disrupted. The relationship to the other measures for fulfilling the guarantee obligation is sometimes unclear and is not explicitly addressed. While some measures under Art. 52 para. 1 of the FC may have a preventive character (e.g., assistance from the armed forces or an appeal to the Federal Supreme Court), federal intervention is fundamentally repressive due to its additional requirements (N. 17). However, this does not preclude the simultaneous ordering of other (milder) measures within the framework of a federal intervention.

16 The distinction from federal supervision under Art. 49 para. 2 of the FC remains questionable. Under Art. 49 para. 2 of the FC, the Confederation monitors the cantons' compliance with federal law. For Schweizer/Müller, federal supervision constitutes an instrument of the Confederation to fulfill the federal guarantee under Art. 52 of the FC. Biaggini, on the other hand, distinguishes between action taken within the framework of federal supervision and federal execution under Art. 49 of the FC, even though he acknowledges that the

scopes of application may overlap. Unlike **federal execution**, which is dedicated to the enforcement of federal law, federal intervention aims to protect authorities that are loyal to the federal government but overwhelmed. While federal intervention measures thus generally benefit a canton, federal execution, on the other hand, involves federal intervention within the framework of its supervision of a canton. The boundaries can be fluid.

17 Federal intervention is subject to two cumulative conditions: First, there must be an **imminent or already existing disruption or threat to the constitutional order of the cantons**. The disturbance must be understood in a qualified sense; this covers events that are difficult to control (attempted coups, uprisings, or even serious threats to critical infrastructure) that could destabilize the canton as an institution (see N. 10).

18 Second, the **principle of subsidiarity** must be upheld; federal intervention is only an option if the affected canton is unable to resolve the disturbance on its own or with the help of other cantons. Assistance from other cantons may involve calling in police forces from other cantons through concordats or the IKAPOL. The cantons must do everything in their power to prevent a disturbance and to restore public order in the event of a disturbance. The Confederation bears only a subsidiary ultimate responsibility.

19 Federal intervention may be ordered by both the Federal Assembly and the Federal Council (Art. 173 para. 1 lit. b of the FC and Art. 185 para. 2 of the FC). The **competence** of the Federal Council is particularly relevant outside of parliamentary sessions and in urgent cases. The decision to intervene is issued ex officio or at the request of a canton.

20 A wide range of measures may be considered as intervention measures—these possibilities are limited in particular by the principle of proportionality. The competent authorities have a margin of discretion. This has far-reaching implications: As far as can be seen, the literature has not addressed whether federal intervention also authorizes the **circumvention of the constitutional division of powers**. In other words, is the federal government permitted to do more simply because it meets the requirements for federal intervention? This is certainly supported by the fact that a key requirement for federal intervention is precisely to intervene in areas of cantonal autonomy. A cantonal government that is no longer functioning (for example, due to inaction or the resignation of all members without successors) is, in principle, a cantonal mat-

ter. If the federal government intervenes in such a case, it formally violates the constitutional division of powers. However, this issue is mitigated by the fact that federal intervention, in the broadest sense, is carried out for the benefit of the affected canton and is subject to conditions that respect the division of powers and call for a cautious approach. The canton therefore has an interest in the federal government intervening. Theoretically, however, the choice and implementation of intervention measures remain susceptible to abuse.

21 The primary intervention measures available are the **dispatch of a commissioner** or an army deployment. The mandate remains the same, namely to restore order in the canton. This appointed individual represents the Federal Council on site and may issue any orders deemed necessary under the circumstances. This provision grants them almost unlimited discretion. This flexibility comes at the expense of accountability: without clear guidelines, the legality of the action cannot be verified.

22 When **deploying the Army by order of the Confederation** as part of a federal intervention, the specific competences that exist in this area must be observed: The Federal Assembly is initially responsible for the mobilization of troops pursuant to Art. 173 para. 1 lit. d of the FC. In urgent cases, the FC assigns this authority to the Federal Council (Art. 185 para. 4 sentence 1 of the FC). If more than 4,000 members of the armed forces are mobilized, or if it appears that the deployment will last more than three weeks, the Federal Council must convene the Federal Assembly and allow it to decide (Art. 185 para. 4 sentence 2 of the FC).

23 The Federal Assembly decides on the allocation of the **costs** of the federal intervention that has taken place. Unlike Art. 43 of the 1996 Draft and its earlier versions, para. 2 does not contain an explicit provision on cost allocation. During the parliamentary debate, the provision on cost allocation was deemed unconstitutional.

24 While the Confederation must intervene when the conditions are met, it is unclear at what point the Confederation may intervene (**right to intervene vs. duty to intervene**). The principles of proportionality may, at most, also support a right to intervene prematurely. However, a look at the previous version of Art. 52 para. 2 of the FC (Art. 16 of the FC of 1848 and 1874) shows that the provision is also intended to respect the system of the distribution of powers, which is why early intervention might not be compatible with can-

tonal primacy. With the constitutional revision of 1999, the constitutional legislator significantly simplified the intervention provision compared to the previous version, which is why preventive measures are now possible in principle. However, in accordance with Art. 44 para. 1 of the FC (Cooperation between the Confederation and the Cantons), which specifically encompasses the principle of exercising authority with restraint, the Confederation will not intervene before it has clarified the situation and the options for intervention with the cantons. Given the extensive scope of these possibilities, the right to intervene should be exercised with restraint.

It is also controversial **against whom** a federal intervention may be directed. 25
To give effect to the protective nature of Art. 52 para. 2 of the FC, no restrictive practice should apply here. It should certainly also cover persons who, regardless of their function, endanger the constitutional order (such as terrorist groups or former public officials). On the other hand, it should be clear that fundamental rights protection continues to apply even in the event of federal intervention. In the case of unlawful acts or erroneous decisions resulting from federal interventions, any claims for damages must be handled in accordance with Art. 135 et seq. of the Military Act and, subsidiarily, under the Liability Act.

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COMMENTARY ON

Art. 55 FC

A commentary by Simon Mazidi

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Art. 55 Participation of the Cantons in foreign policy decisions

[1] The Cantons shall be consulted on foreign policy decisions that affect their powers or their essential interests.

[2] The Confederation shall inform the Cantons fully and in good time and shall consult with them.

[3] The views of the Cantons are of particular importance if their powers are affected. In such cases, the Cantons shall participate in international negotiations in an appropriate manner.

CONTENT

I. HISTORY OF ORIGIN

In the course of the acceleration of the European integration process and in particular the negotiations for Switzerland's accession to the European Economic Area (EEA), it became clear how strongly the responsibilities of the cantons can be affected by international treaties. As part of the EEA negotiations, the involvement of the cantons was therefore strengthened by relying on the then existing federal-cantonal contact committee for coordination. However, the close interdependence made it clear that greater institutionalization of cantonal involvement was necessary. Accordingly, the cantons would have been granted information and participation rights under constitutional law upon accession and with regard to the implementation and further development of EEA law. In this way, information and consultation at short notice and greater cantonal participation in the Confederation's European policy would have been constitutionally guaranteed. However, the Federal Council already stated in its dispatch on EEA accession that the involvement of the cantons was self-evident anyway. Consequently, it only considered "[a]fter political, not legal reasons [...] a constitutional provision on the consultation rights of the cantons to be opportune." 1

After the failure of EEA accession at the ballot box, the Federal Council and the cantonal governments agreed to continue cooperation in accordance with the constitutional provision proposed at the time in the Federal Decree on the EEA of October 9, 1992. The Federal Council subsequently agreed to examine the creation of a legal basis for cantonal participation in foreign policy. In doing so, it followed the proposal of the Conference of Cantonal Governments (KdK), which had been constituted in the meantime and suggested the establishment of a working group with equal representation from the Confederation and the cantons for this purpose. With the help of the Institute for Federalism at the University of Fribourg, the joint working group on cantonal participation then drew up a draft federal law on cantonal participation in foreign policy. At the request of the KdK, the spirit of the draft was provisionally applied from fall 1996 and thus before it came into force. The Federal Assembly only passed the Federal Act in 1999 after extensive discussions. At the heart of the parliamentary debate was the questionable necessity of the federal law. Following Montesquieu's dictum that "[...] les lois inutiles affaiblissent les lois nécessaires [...]", it was argued that cooperation was already working 2 well in practice on the basis of existing law and that the new constitutional article already contained all the important points on participation. In the final vote on December 22, 1999, however, both the National Council and the Council of States clearly approved the draft law. The Federal Act on the Participation of the Cantons in Foreign Policy (BGMK) came into force on July 1, 2000.

3 As part of the total revision of the Federal Constitution, the cantons' participation rights were initially introduced as a variant of the general provision on competence in foreign affairs. The proposed variant largely corresponded to the constitutional provision contained in the Federal Decree on the EEA of October 9, 1992. In the 1996 draft constitution, the cantonal participation rights were then transferred to an independent constitutional provision. As this was an existing practice that was to be enshrined in the constitution, the proposal in its form did not represent a legal policy innovation. The parliamentary debates showed a high level of approval for the Federal Council's draft. The only substantive change was the deletion of Art. 50 para. 3 VE (1996), according to which the cantons must implement those international obligations of Switzerland that fall within their area of responsibility. The deletion was justified by the fact that the cantons' general duty to implement federal law, which also includes international law, was already enshrined elsewhere and in principle in the draft constitution.

II. CONTEXT

A. Significance

4 The comprehensive federal competence in the area of foreign affairs is undisputed today due to its positive legal anchoring in Art. 54 para. 1 FC. In the early years of the federal state, however, this area was still the subject of a largely unresolved competence dispute. The Confederation followed the principle of "unity of the members of the Confederation externally, independence of the same internally", which is why it concluded numerous agreements in areas that were the responsibility of the cantons internally. However, individual cantons were not willing to accept such comprehensive federal competence: "The peripheral cantons of Ticino, Baselland and Geneva in particular repeatedly lobbied against the federal spike." The resistance of individual cantons was clearly demonstrated by the 1864 treaty between Switzerland and France,

in which the Confederation disregarded the constitutional order of competences applicable to internal relations by granting freedom of establishment to all French nationals without distinction and with the provisions on the protection of the intellectual property of French artists. Subsequently, both the government of the canton of Basel-Landschaft lodged a complaint and a petition in the canton of Geneva complained that the constitutionally guaranteed order of jurisdiction had been violated. This ultimately called into question the applicability of the relevant international treaties. Such nullification efforts, through which the cantons, for example, complained about the unconstitutionality of international treaties, were the actual trigger for the primacy of international law as it is found today in Art. 190 FC.

As a result of the considerable expansion of legislative powers at federal level 5 in the course of the 20th century, the asymmetry between the power to conclude treaties and the power to legislate was weakened. International treaties increasingly affected areas that were directly related to federal competences. With the exception of civil and criminal procedural law, which were only harmonized in the new millennium, there were still substantial points of reference to cantonal competences in the areas of (double) taxation, culture, education and criminal prosecution. The federal tension only became apparent again in the course of the qualitative and quantitative increase in the importance of international law. The focus was on increasing European integration, which had an impact on numerous cantonal areas of responsibility. As explained at the beginning (see n. 1 ff.), this then led to the institutionalization and constitutionalization of cantonal participation rights, as they are laid down today in Art. 55 FC and in the BGMK.

The constitutional-historical context makes it clear that the genesis of Art. 55 6 FC is closely linked to the development of a comprehensive federal competence to conclude international treaties. It also shows that the significance of the rights of participation lies in a partial compensation of the comprehensive competence of the Confederation in foreign affairs. This is because, due to the centralization of foreign power currently enshrined in Art. 54 para. 1 FC and the associated comprehensive power to conclude treaties, the Confederation can go beyond what is constitutionally granted to it domestically through its legislative powers in the matters to be regulated. From a federalist point of view, there is a risk that the domestic distribution of competences will be gradually undermined via the detour of international treaties. For this reason, the Confederation has always exercised federalist restraint when international treaties affect the competences of the cantons. Today, it is expressly obliged to exercise this courtoisie fédéraliste in Art. 54 para. 3 FC. Art. 55 FC then provides the instruments with which the Confederation's duty of consideration set out in Art. 54 para. 3 FC is to be implemented in concrete terms. In this way, the instruments laid down in Art. 55 FC and in the BGMK serve as a concrete form of a federal counterweight to the comprehensive power to conclude treaties.

B. Purpose

7 The purpose of cantonal participation rights is expressly - but not exhaustively - defined in Art. 2 BGMK. Participation is intended to ensure that cantonal interests are taken into account in the preparation and implementation of federal foreign policy decisions (lit. a). This is intended to ensure that cantonal interests are included at an early stage in federal foreign policy projects that are of importance to the cantons.

8 Participation should also help to ensure that the responsibilities of the cantons are safeguarded as far as possible when international treaties are concluded, amended or terminated (b). This is intended to prevent or at least reduce the threat of the cantons losing jurisdiction as a result of increasing international interdependence.

9 In addition to the effective protection of cantonal interests and responsibilities, the participation structures should also ensure better domestic support for the Confederation's foreign policy (lit. c). Close coordination with the cantons in the preparation of decisions makes sense, not least because they are generally responsible for the implementation of international treaties with legislative provisions.

C. Barrier

10 The solution chosen in Art. 55 FC for cantonal involvement in the Confederation's foreign policy cannot fully compensate for the Confederation's comprehensive competence in foreign affairs. Compensation exists only to the extent that the cantons are granted constitutional rights of participation in the foreign policy of the Confederation. As a limit, Art. 1 para. 3 BGMK therefore also stipulates that participation must not impair the Confederation's ability to

act in foreign policy. In principle, this already follows from the constitutional division of powers in the area of foreign affairs. By mentioning this restriction, however, the BGMK expressly defines the framework of what is legally permissible.

The cantons have neither a right to issue instructions nor a right to co-decide on foreign policy decisions that concern their competences or affect their essential interests. The Confederation can therefore "[...] if necessary, also take decisions that do not correspond to the ideas of the cantons." The function of Art. 55 FC is thus limited to creating participation structures in the preparation of foreign policy decisions. This ultimately expresses a cooperative understanding of federalism that relies less on a strict delimitation of competences and more on cooperation in a spirit of partnership. 11

D. Implementation

With the enactment of the BGMK, the constitutional principles of participation proposed in the course of the EEA negotiations, which later found their way into Art. 55 FC, were implemented in law. However, the implementation at the legislative level hardly goes beyond the constitutional guarantees of participation in Art. 55 FC. Accordingly, the statutory provisions have little independent normative content. Concretizations of Art. 55 FC can occasionally be seen in the fact that the domestic support of the Confederation's foreign policy is listed as an additional purpose (Art. 2 lit. c BGMK) and that the Confederation has a duty to give reasons if it deviates from the opinions of the cantons within the framework of the special weighting under Art. 55 para. 3 FC (Art. 4 para. 3 BGMK). Other differences are that the BGMK expressly names the Confederation's ability to act in foreign policy as a barrier to cantonal participation (Art. 1 para. 3 BGMK) and that a reciprocal duty to provide information is provided for (Art. 3 para. 1 BGMK). 12

The agreement between the Confederation and the cantons on the implementation, application and development of the Schengen/Dublin acquis provides a more concrete example of this in practice (see n. 17). In an overarching assessment, however, it should be noted that the open and undefined formulations of the rights of participation in Art. 55 FC and in the BGMK hardly allow any concrete specifications to be derived for the normative design of the rights of participation. Both Art. 55 FC and its current concretization in the BGMK establish only weakly formalized forms of participation. This openness 13 makes it possible to flexibly shape the degree of cantonal involvement with regard to the specific foreign policy decision and to make rapid adjustments in the event of a change in the foreign policy situation. However, the openness comes at the expense of a differentiated structure that could regulate the scope and timing of information, early involvement in exploration and a sufficient deadline for the submission and binding effect of opinions in a more substantial manner. The extent to which participation in the preparation of decisions is sufficient to effectively safeguard cantonal interests therefore depends primarily on the specific form of cooperation in practice.

E. Legal protection

14 Art. 55 FC is not a mandate to the legislature to enact implementing provisions. Despite their open formulation, the constitutional rights of participation in the form of information and consultation constitute justiciable legal claims, which is why they can be challenged even without statutory implementation. Disputes relating to cantonal participation rights (scope, content or modalities) fall under the action procedure pursuant to Art. 120 BGG. The direct route to the Federal Supreme Court is therefore open in accordance with Art. 189 para. 2 FC.

15 However, this does not guarantee effective legal protection for the enforcement of cantonal participation rights:

- Firstly, the legal action procedure is considerably restricted by Art. 190 FC. Insofar as the disputed foreign policy decision has become binding under international law, it is subject to the primacy of international law. Even in the event of unconstitutionality, the Federal Supreme Court is obliged to apply international law. Art. 190 FC continues to fulfill its original federal purpose here (see n. 4).
- Secondly, the action procedure is also largely undermined if a foreign policy decision is not yet binding under international law or is based on another form of foreign policy action. It is true that the priority of application of Art. 190 FC does not apply, which is why the action procedure is in principle open. However, it is questionable whether the duration of the legal proceedings offers effective legal protection in view of the autonomous nature of foreign policy. Decisions in foreign policy often require - at least outside of the ordinary treaty conclusion procedure - a rapid internal

opinion-forming process. The adoption of precautionary measures will also often fail due to the fact that foreign policy decisions generally do not allow for a delay, either legally or factually.

- Thirdly, due to the undefined legal terms used in Art. 55 FC, it will regularly be difficult to conclusively assess whether the scope, content or modalities of cantonal participation rights have been violated in practice. This was demonstrated in the so-called Libya affair: the diplomatic crisis was triggered by the arrest of Hannibal Gaddafi, son of the then Libyan revolutionary leader, and his wife by the Geneva police. As a result, two Swiss citizens were detained in Libya for months. As part of the efforts to secure the release of the last Swiss citizen detained in Libya, the then President of the Swiss Confederation signed an agreement with Libya on August 20, 2009, which provided, among other things, for the circumstances of the arrest in Geneva to be investigated by an international court of arbitration. While the KdK was of the opinion that the constitutional rights of participation of the affected canton of Geneva had been violated by the unilateral action of the then President of the Swiss Confederation, the Control Committee of the Council of States left the question open with reference to two legal opinions that came to the opposite conclusion.

The most likely way to strengthen legal protection de lege ferenda would be 16
to introduce a submission and preliminary review procedure before the Federal Supreme Court. Meanwhile, it seems more obvious that disputes between the Confederation and the cantons regarding participation rights should be settled through selective negotiation and mediation, even though this by no means guarantees that participation rights will be respected in the future.

F. European integration

With regard to the Schengen Association Agreement and the Dublin Associa- 17
tion Agreement, the Confederation and the cantons have laid down the rights of participation in a framework agreement. The agreement specifies the principles of participation set out in Art. 55 FC and the BGMK with regard to the implementation and adoption of further developments of the Schengen/Dublin acquis. On the one hand, this step was necessary due to the special nature of the agreements: the agreements require a dynamic adoption of further developments, which is why they also grant Switzerland the opportunity to have a say (decision shaping) in the drafting of new legal acts by the European

Union. On the other hand, Schengen cooperation primarily affects cantonal competences such as police and judicial sovereignty. This resulted in the need to make cooperation and procedures between the Confederation and the cantons in this area efficient and transparent. For example, the framework agreement regulates the immediate transmission of information, internal co-ordination of opinions, the participation of the cantons in the joint committees and the EU working groups as well as conflict resolution in the event of disputes arising from the framework agreement.

18 Efforts to make general cooperation in European policy transparent and coordinated led to the agreement on the European Dialogue in 2012. This regulates the political dialog between the Confederation and the cantons on European issues and establishes a permanent leading political body for the exchange of information. The agreement may contribute to better strategic co-ordination at the political level, but it does not strengthen the specific rights of participation under Art. 55 FC with regard to specific foreign policy decisions.

19 If the institutional framework agreement with the EU had been concluded, the Federal Council would have requested the adoption of two motions with the same wording. These called for the creation of a legal basis to guarantee cantonal participation in the dynamic adoption of EU law. Following the Federal Council's decision not to sign the institutional framework agreement, a postulate demanded that the Federal Council should continue to examine the general options for binding cantonal participation in foreign policy decisions. However, with reference to Art. 54 and Art. 55 of the FC, the Federal Council requested that the postulate be rejected; the Council of States followed this request.

20 The various agreements and political initiatives show that relations with the EU represent a constant challenge for the safeguarding of cantonal participation rights. Cantonal responsibilities and interests are permanently and strongly affected; cooperation and coordination must be carried out under great pressure to adapt in terms of content and timing, which is particularly evident in the case of dynamic adoption. On the basis of Art. 55 FC and the BGMK, this challenge can be met by concretizing cooperation and procedures. Such concretization - as in the case of Schengen/Dublin with the framework agreement - allows for close, transparent and swift coordination between the Confederation and the cantons. Particularly in relation to the EU,

however, the question arises as to whether the participation rights provided for in the Constitution and the BGMK enable the cantons' responsibilities and interests to be effectively safeguarded. The cantons must actually and legally be able to effectively introduce their concerns into the foreign policy decision-making process. If the cantonal system of competences threatens to be restricted by increasing institutional and supranational interdependence, the federalist balance must be restored by dynamically adapting the established mechanisms and participation structures. Such an adjustment would require, for example, a stronger involvement of the cantons in terms of both content and personnel or the creation of new forms of participation. If mere participation in the preparation of decisions is no longer sufficient to effectively safeguard interests, an adjustment of the legal framework is not ruled out, but is in fact necessary. Demands such as the creation of a new legal basis or a more binding participation of the cantons, which were raised during and after the failed institutional framework agreement, may therefore become more important again in the future.

III. SPECIFIC PARTICIPATION RIGHTS OF THE CANTONS IN FOREIGN POLICY DECISIONS

A. Principle of participation (para. 1)

Art. 55 para. 1 FC enshrines the constitutional principle that the cantons may participate in the preparation of foreign policy decisions insofar as these relate to their competences or affect their essential interests. In para. 1, in addition to the group of addressees and the sponsors, the material scope of participation is also defined by determining the subject matter (foreign policy decisions) and the conditions for participation (whether competences or essential interests are affected). Finally, the temporal scope of application of the constitutional provision is defined by specifying that the cantons participate in the preparation of decisions. 21

1. Addressees and holders of participation rights

The addressees of Art. 55 FC are the federal bodies that take foreign policy decisions. Due to its general foreign policy management function under Art. 184 FC, the Federal Council is primarily addressed. The Federal Council and the Federal Administration under its authority are therefore obliged to involve 22 the cantons in the preparation of foreign policy decisions that affect the competence of the cantons or their essential interests by informing and consulting them. The Federal Assembly is also a norm addressee if it makes a foreign policy decision in its area of responsibility. For example, the Federal Assembly can adopt policy and planning resolutions in the area of foreign policy (Art. 28 para. 2 and 3 ParlA). In general, it should be noted that the cantons are often involved before the parliamentary procedure is initiated. Accordingly, they usually have the opportunity to express their views on a specific foreign policy issue at the stage of preparing a decision for the Federal Council. Biaggini therefore also emphasizes that the obligation to be consulted in the parliamentary procedure is updated in particular if there are more than just minor changes compared to the Federal Council's original proposals.

23 The individual cantons are responsible for the rights of participation. The 1996 draft constitution still provided for the Confederation to inform the cantons or their joint organizations comprehensively and in good time and to obtain their opinion. However, the Federal Assembly removed the reference to the joint organizations from the draft constitution. The main reason for this was that these joint organizations - primarily the KdK - should not be constitutionalized. Rather, it is up to the organizational autonomy of the cantons to determine whether and in what form recourse to joint structures is appropriate in order to ensure the effective safeguarding of interests in the preparation of foreign policy decisions.

2. Foreign policy decisions

24 The term "foreign policy decisions" refers to participation in the Confederation's foreign policy. Foreign policy represents the core of foreign affairs. Foreign affairs encompass all cross-border activities between the Swiss authorities and foreign, international or supranational subjects of international law as well as other actors in the international community; foreign policy, on the other hand, is defined more narrowly. It relates to the pursuit of Switzerland's political objectives and interests. The orientation of foreign policy is determined in a non-exhaustive manner by the objectives set out in Art. 54 para. 2 FC. As a result, the participation of the cantons extends only to the narrower concept of foreign policy and is thus limited to decisions in connection with the pursuit of Switzerland's foreign policy objectives and interests. Other acts

or forms of action in foreign affairs, such as maintaining international contacts, consular affairs or administrative activities, are not covered.

The term "decision" is not defined in the Federal Constitution or the BGMK. There are therefore no specific requirements as to its material or formal nature. Waldmann also states that the term is not to be understood technically. In addition to involvement in the preparation and negotiation of international treaties, all other measures that aim to achieve a foreign policy decision are therefore also subject to cantonal participation rights. These include, for example, the adoption of resolutions by international organizations or the adoption of unilateral legal acts. As a result, Art. 55 FC gives the cantons a constitutional right to participate in the opinion-forming and decision-making process for all foreign policy decisions. This right must therefore also be safeguarded outside of the traditional procedures based on international treaties. For example, participation in other forms of international agreements, such as soft law, is also appropriate if the competences or essential interests of the cantons are affected. 25

3. Affecting competences or essential interests

The rights of participation under Art. 55 FC come into play if foreign policy decisions either affect cantonal competences or affect essential cantonal interests. If this is not the case, the cantons are not entitled to participation under Art. 55 FC. Nevertheless, the Confederation is free to apply the rights of participation under Art. 55 FC in such cases if it deems this appropriate. Art. 55 FC represents a constitutional minimum guarantee, which is why the Confederation can extend the rights of participation beyond Art. 55 FC. 26

With regard to cantonal competences, Art. 2 lit. b BGMK states that the participation of the cantons should contribute to safeguarding the competences of the cantons in the conclusion, amendment and termination of international treaties as far as possible. This formulation in the BGMK is too treaty-centered, even if international treaties may represent the main case of application. The guarantee of participation always applies if a foreign policy decision is likely to affect cantonal competences in terms of its content or impact. The determination of cantonal competences is based on Art. 3 FC. If the Constitution does not expressly assign an area of competence to the Confederation, the original cantonal legislative competences are affected. However, competences granted by federal law, such as enforcement and "minor foreign policy" 27 pursuant to Art. 56 FC, may also be affected by a foreign policy decision. The extent to which a foreign policy decision affects cantonal competences is not always clear from the outset. If it only becomes apparent in the course of preparing the decision that cantonal responsibilities are affected, the cantons must be involved in the process without delay.

28 Involvement in the preparation of the decision does not require that cantonal responsibilities are affected. It is sufficient for a foreign policy decision to affect the essential interests of the cantons. This constellation applies to cases in which a foreign policy decision affects the competences of the Confederation, but at the same time affects the essential interests of the cantons. In any case, participation is justified if the foreign policy decision could undermine, damage or impair the constitutional position of the cantons. This is the case if the constitutional status of the cantons is affected or if the cantons' essential organizational, material and financial responsibilities are interfered with. Art. 1 para. 2 BGMK also states in an exemplary manner that the essential interests are affected if the foreign policy decision affects important implementation tasks of the cantons.

29 The concept of essential interests is in great need of concretization. In contrast to the link to cantonal responsibilities, it leaves room for opportunity considerations. In this regard, the dispatch on the BGMK states that the definition leaves room for the cantons to participate in other areas that are essential to them, whereby these areas would have to be identified in dialog and practical cooperation between the Confederation and the cantons. Since in practice it is up to the Confederation to decide on the materiality of the cantonal interests, it also de facto decides on their inclusion in the preparation of decisions.

4. Preparation of decisions

30 According to its wording, Art. 55 para. 1 FC refers to the phase of preparing foreign policy decisions. This includes the preparation and definition of negotiating mandates as well as the preparation of negotiations and the negotiations themselves. However, the preparation of decisions also includes all other processes that precede a foreign policy decision. Strategic decisions of principle, informal contacts and exploratory talks with foreign partners on the commencement of negotiations are therefore also covered by the rights of participation. The temporal limitation of cantonal participation rights to the

preparation of decisions is also compatible with the purpose of the law, which requires early involvement in order to ensure that interests are effectively safeguarded (see n. 40). Sturny also derives the time restriction from the wording of Art. 4 para. 3 BGMK, according to which the Federal Council must take into account the opinions of the cantons. The focus on the Federal Council makes it clear that the Federal Council is the actual addressee of the cantons' participation rights and that the cantons' participation rights accordingly extend to the preparatory acts up to the conclusion of the treaty negotiations. Due to this temporal limitation, national approval, for example, is not part of the preparation of the decision and therefore does not fall within the scope of application of Art. 55 FC. Cantonal participation in the domestic approval process is based on the usual participation rights (see n. 32).

The decision preparation phase can be distinguished in two ways. It is preceded by the federal government's internal opinion-forming on general foreign policy issues, which is not already aimed at a foreign policy decision. Similarly, the cantons' rights of participation do not constitute co-decision-making powers. They therefore do not apply if the Confederation takes a decision at the decision-making stage as part of its comprehensive federal powers under Art. 54 FC, such as the ratification of an international treaty. Art. 55 FC does not give the cantons a right of veto. Accordingly, Art. 1 para. 3 BGMK stipulates that cantonal participation must not impair the Confederation's ability to act in foreign policy matters. 31

In the case of decisions with foreign policy implications, different forms of cantonal participation under constitutional law may apply. These forms of participation complement each other. In the case of domestic legal acts, the usual rights of participation under Art. 45 FC apply. These guarantee the cantons participation in legislation and other federal projects. For example, the participation of the cantons in the domestic approval or enactment of a federal act that implements an international treaty is governed by Art. 45 FC. Art. 147 FC also allows the cantons to participate in important international treaties as part of the consultation procedure, even if the interests of the cantons are not affected. The consultation procedure is usually carried out after negotiations have been concluded. The cantons are given another opportunity to comment at this time. However, neither Art. 45 FC nor the consultation procedure provide for any special weighting of the cantons' opinions. Both forms of cantonal participation are selective opinions that can no longer be 32 used to influence the outcome of the negotiations or the content of the treaty. Art. 55 FC supplements these selective forms of participation by granting the cantons participation rights in advance - throughout the entire duration of the foreign policy decision-making process - insofar as their competences or essential interests are affected. Both the time of involvement and the special participation rights under para. 3 enable the cantons to influence foreign policy decisions in a way that goes beyond the other forms of participation.

B. Forms of participation rights (para. 2)

33 If a foreign policy decision affects the competences or essential interests of the cantons, they may participate in it. The cantons are entitled to participation rights directly under the Constitution. The effective exercise of participation rights is guaranteed in particular by the forms specified in Art. 55 para. 2 FC. The Confederation is obliged to inform the cantons comprehensively and in good time and to obtain their opinions. The content can be specified in a federal law (see BGMK) or in joint agreements.

1. Right to information

34 Art. 3 para. 1 BGMK specifies the federal government's duty to provide information set out in Art. 55 para. 2 FC. The legal provision states that the basis of cooperation is mutual information. Art. 3 para. 2 BGMK further states that the Confederation shall inform the cantons in a timely and comprehensive manner about foreign policy projects that affect the competences of the cantons or affect their essential interests. Timely and comprehensive information is of crucial importance as it is the only way to ensure effective cooperation.

35 The guiding principle is always the effective safeguarding of interests. Timely information in this sense means that information is provided early enough for the cantons to be able to effectively incorporate their interests and concerns into the decision-making process. The information should be forwarded directly and continuously to the cantons. From the point of view of effectively safeguarding interests, it is not appropriate to withhold information until a certain point in time for strategic reasons. Although at the beginning of institutionalized participation rights there may have been occasional mistrust of the generous disclosure of information, this should no longer be an obstacle after many years of established practice. Moreover, Art. 6 BGMK guarantees sufficient confidentiality of the information.

The determination of the scope of the information is also based on the effective protection of interests. In this regard, Art. 55 para. 2 FC states that the Confederation shall provide the cantons with comprehensive information. This includes, among other things, the exchange of relevant data, political analyses and up-to-date information on ongoing negotiations and international agreements. In the French-language version, the expression "[...] de manière détaillée [...]" is used in this context, which expresses the fact that comprehensive information also includes details. As a result, the scope must include all relevant information, documents and data that are important for effective participation and safeguarding of interests. 36

In order to effectively incorporate the interests of the cantons into the decision-making process, not only the necessary amount of information is required, but also the capacity to evaluate and process the information. The federal government should not overload the cantons with too much information. However, it is up to the cantons to (jointly) create the appropriate channels and bodies to ensure effective participation on the basis of the information received. In this context, participation rights can be understood not only as a consequence of the centralization of foreign policy, but also as a reflection of the centralization shift from the parliamentary to the executive level. This is because the KdK is in charge of foreign policy projects. As a rule, it is responsible for information and consultation. The KdK also ensures information and coordination between the cantonal governments and the directors' conferences. Furthermore, the cantons' information officers in the Europe Division of the State Secretariat of the FDFA and at the Swiss Mission to the EU ensure the daily flow of information. In practice, these interfaces are important for early and close coordination and an indispensable reciprocal flow of information between the Confederation and the cantons as well as between the cantons. 37

2. Consultation of the cantons

Pursuant to Art. 55 para. 2 FC, the Confederation is obliged to obtain opinions from the cantons if foreign policy decisions affect their competences or essential interests. If the cantons are affected within the meaning of para. 1, the Confederation must obtain the cantons' opinions through consultations on its own initiative. If it fails to do so, the cantons may request a consultation at any time or submit a statement without being requested to do so. However, they 38 are not obliged to submit a statement. At the legislative level, Art. 4 para. 1 BGMK stipulates that the Confederation shall consult the cantons at their request when preparing foreign policy decisions that affect cantonal competences or affect essential cantonal interests (sentence 1). Furthermore, the Confederation may also consult the cantons on its own initiative (sentence 2) if it considers this to be appropriate, as stated in the dispatch. According to Fassbender, Art. 4 para. 1 BGMK with this wording "[...] does not comply with the constitutional provision [...]". Waldmann also states that "[t]he concretization [...] in the light of Art. 55 FC already has a restrictive effect [...]." From a constitutional point of view, the wording in Art. 4 para. 1 BGMK is indeed objectionable. As soon as the legal prerequisite is met (competences or essential interests affected), the Confederation is obliged to grant the cantons participation in accordance with Art. 55 FC. The legal provision does not exclude participation. However, it does indicate that the cantons will only be consulted if necessary ("[...] if they so request [...]") or based on considerations of opportunity (expediency). In view of the constitutional entitlement under Art. 55 FC, this formulation is too restrictive.

39 As with the timing and scope of the duty to inform, the specific form of the duty to consult is determined by the effective safeguarding of interests. The cantons must be granted sufficient time to submit their comments. A tight deadline due to high foreign policy urgency must be the exception. A short deadline must not mean that the cantons are in fact no longer in a position to comment at all. When determining the deadline, the complexity of the foreign policy project must be taken into account, as well as the fact that consolidation via the joint institutional bodies takes time.

40 An effective safeguarding of interests requires open consultation on the content at a time when the cantons can actually still assert their influence and their points of criticism with regard to foreign policy decision-making. If the foreign policy plans include negotiations, the consultation should, as a rule, take place prior to their commencement in accordance with Art. 4 para. 2 BGMK. This allows the views of the cantons to be incorporated into the definition of the negotiating mandate and into the negotiations. Consultation exclusively at the time of the national approval procedure would not be sufficient to effectively safeguard interests. The text of the agreement is then already binding, which is why changes to the content can no longer be made. The federal government can no longer take the interests of the cantons into

account at this point. Only consultation prior to the start of negotiations allows the cantons to exert their influence in a targeted manner on foreign policy decisions that affect their competences or essential interests. In addition, this procedure allows the Confederation to adapt the mandate in such a way that it is more broadly supported by the cantons in terms of domestic policy (Art. 2 lit. c BGMK). Finally, the early timing ensures that the cantons' concerns are not only heard at the political level, but are also actually taken into account at the technical level and thus at the administrative level of the Confederation.

With regard to the binding effect, an obligation to take note can be derived 41
from Art. 55 FC. This is confirmed in Art. 4 para. 3 BGMK, according to which the Federal Council takes into account the opinions of the cantons. The binding effect is tantamount to an obligation de moyen, which requires the federal government to deal with the cantonal opinions in the decision-making process, without this resulting in a substantive obligation to comply. The obligation to take note arises from the fact that the participation of the cantons does not constitute a right to issue instructions or co-decide, which it would be if there were an obligation to comply with the content. It cannot therefore anticipate any substantive decision in the area of foreign policy. The constitutional order of competences in foreign policy, which grants the Confederation comprehensive competence and assigns the Federal Council the general foreign policy management function, grants the Confederation, as the decision-maker, a corresponding margin of discretion.

C. Special rights of participation (para. 3)

Art. 55 para. 3 FC provides for special rights of participation if a foreign policy 42
decision affects the competences of the cantons. In these cases, the Constitution requires, firstly, that the cantons' opinion be given special weight and, secondly, that the cantons participate in the negotiations in an appropriate manner. In contrast, these special rights of participation do not apply if a foreign policy decision only affects the cantons' essential interests.

1. Qualified right of consideration

The opinions are accorded special weight if a foreign policy decision affects 43
the constitutional competences of the cantons. The special weighting may arise for various reasons: On the one hand, a special weighting may be indi-

cated by the degree of involvement: The more the cantonal competences are affected by a decision, the more weight must be given to the opinions of the cantons. On the other hand, special weighting also results from the degree of unity: if the cantons speak with one voice or if an opinion is supported by a large majority of the cantons, it must also be given special weight. A joint opinion on behalf of the cantonal governments is issued if it is supported by at least 18 cantonal governments. The special weight of the cantonal opinions is reflected in the fact that they must be given special consideration in the decision-making process in relation to the foreign policy interests of the Confederation. The opinions of the cantons must also be given special weight vis-à-vis other actors and interested parties who express themselves in the context of foreign policy decision-making.

44 The special weighting does not translate into a substantive obligation to comply. It does not constitute an obligation de résultat that obliges the Confederation to comply with the content of the cantons' opinions. However, the federal government has a constitutional duty to take note of the opinions and to attach great weight to them when making decisions. However, it can deviate from the opinions, as these are not binding. In the case of the total revision of the Federal Constitution, the KdK demanded an obligation to comply with the content in the event that the cantons express a uniform opinion within the framework of a statement. Such a binding effect was not included in the constitutional provision. With the special weighting of cantonal opinions, the Constitution does not impose a limit on foreign policy decision-making, but rather provides the Confederation with a qualified criterion for exercising its discretion. Art. 4 para. 3 BGMK stipulates that the Confederation shall inform the cantons of the reasons if it deviates from the opinions within the framework of the special weighting pursuant to Art. 55 para. 3 FC. This serves the transparent presentation of the reasons for the Confederation's decision and enables a subsequent review of the appropriateness of the reasons that prompted the Confederation to take a particular foreign policy decision.

45 With regard to cantonal participation in European affairs, the KdK continues to call for an increased binding effect in its position statement from 2013. According to the proposal, the Confederation should only be able to deviate from a uniform or majority opinion for overriding foreign policy reasons. A similar provision can be found in Germany (Art. 23 para. 5 GG) and Austria (Art. 23d para. 2 B-VG) with regard to European policy. Such a relative bind-

ing effect does not currently result from either Art. 55 FC or the BGMK. However, Waldmann rightly points out that such a binding effect would be compatible with the normative meaning and content of Art. 55 FC. It would not yet lead to a cantonal power of co-decision or a right of veto. It would also not diminish the Confederation's ability to act in foreign policy, as it could continue to act swiftly in cases of foreign policy urgency and on the basis of overriding foreign policy reasons and deviate from cantonal positions. However, a relative binding effect would first have to be introduced by means of a statutory specification.

2. Right to participate in negotiations

If a foreign policy decision affects the constitutional competences of the cantons, they may participate in international negotiations in an appropriate manner in accordance with Art. 55 para. 3 sentence 2 FC. Depending on the subject matter, the negotiating mandate must be formulated flexibly and openly. In such cases, it is not sufficient to effectively protect the concerns of the cantons by involving them in the definition of the negotiating mandate. Rather, the cantons must have the opportunity to have their concerns directly incorporated into the negotiations. The cantonal representatives can contribute the cantons' experience and expertise to the negotiations, which ultimately leads to negotiated solutions that are more firmly anchored in domestic policy and allow for easier implementation. 46

Art. 55 para. 3 FC speaks of participation in negotiations in an appropriate manner. This refers to both the modalities and the form as well as the intensity of participation. This refers to aspects such as the number of representatives of the cantons who participate in the negotiating delegation, the manner in which these representatives are selected, the delegation of the leadership of the delegation to the cantons and, finally, the duration of the involvement and thus the question of whether the representatives should participate in each individual negotiating session or only selectively. The form and intensity of participation must ultimately enable an effective representation of interests. 47

In contrast, the right to participation in and of itself is not a question of suitability. Both the constitutional text and the legal text are too restrictive in this respect. Art. 5 para. 1 BGMK specifies that the Confederation shall "[...] as a rule [...]" involve representatives of the cantons in foreign policy projects that 48 affect the competences of the cantons. However, cantonal participation may only be refused in exceptional cases. Art. 5 para. 2 BGMK also allows the Confederation to involve the cantons, even if their responsibilities are not affected. In these cases, however, the cantons are not entitled to participate.

49 Pursuant to Art. 5 para. 3 BGMK, the Confederation appoints the representatives on the proposal of the cantons. The selection procedure ensures that the interests of the Confederation and the cantons are taken into account in the selection process. As participation should take place in an appropriate manner, the cantons are not entitled to one representative per canton. A negotiating delegation that is too large would have a negative impact on the efficiency of the negotiations. The cantons must therefore coordinate closely so that either individual representatives or a small group can represent several or even all cantons. The cantons can draw on existing institutional structures and joint organizations such as the KdK to coordinate and determine the proposal. As far as can be seen, this is how it is handled, as can be seen from the Canton of Zurich's 2019-2022 external relations report. It states that the representatives are each mandated by the KdK. For example, the Canton of Zurich is the cantonal representative on the Joint Committee on the Air Transport Agreement with the EU.

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COMMENTARY ON

Art. 56 FC

A commentary by Constance Kaempfer

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Art. 56 Relations between the Cantons and foreign states

[1] A Canton may conclude treaties with foreign states on matters that lie within the scope of its powers.

[2] Such treaties must not conflict with the law or the interests of the Confederation, or with the law of any other Cantons. The Canton must inform the Confederation before concluding such a treaty.

[3] A Canton may deal directly with lower ranking foreign authorities; in other cases, the Confederation shall conduct relations with foreign states on behalf of a Canton.

CONTENT

I. SYSTEMATIC AND GENESIS OF THE NORM

Article 56 of the Constitution is part of a chapter whose main purpose is to list the competences of the Confederation. Within this chapter, it is part of the section 'Relations with foreign countries' (Art. 54 to 56), which covers both the relations of the Confederation and the relations of the cantons with foreign countries. The definition of competencies in this area raises complex questions and is not based on the traditional division of competencies in Articles 3 and 42 para. 1. According to Article 54 para. 1, "foreign affairs are the responsibility of the Confederation". This article establishes a comprehensive competence of the Confederation in the field of foreign affairs. According to Article 56, however, this competence is partially withdrawn in the areas of competence of the cantons. Art. 56 thus qualifies Art. 54 para. 1 by allowing for individual cantonal competence in the area of foreign affairs. There is thus an interdependence between these two provisions. The doctrine uses the term "small foreign policy" to describe the residual cantonal competence in foreign policy. The effects of this cantonal competence are described below (N. 7). 1

In view of the extensive treaty practice of the cantons before the birth of the federal state, their residual competence to conclude international treaties has been recognised by federal constitutional law since 1848. The equivalent of Art. 56 is thus found in Art. 9 and 10 of the former Federal Constitution of 29 May 1874 (aCst.), which are themselves equivalent to Art. 9 and 10 of the former Federal Constitution of 12 September 1848 (aCst. 1848). 2

In contrast to the two previous versions of the Constitution, however, the competence of the cantons to conclude treaties is no longer restricted to certain defined areas (public economy, neighbourhood relations and police). Article 56 thus applies to all areas "within their competence" (Art. 56 para. 1). In addition, Art. 56 abandons the practice of federal approval of cantonal international treaties that was provided for in Art. 9 aCst. and replaces it with a simple duty to inform (Art. 56 para. 2), combined with a complaints procedure (N. 18-20). 3

II. CONTEXT

The possibility for federated entities to conclude international treaties also exists in Germany, Austria and Belgium, so that the doctrine uses the notion of 4 "open federal state" to describe this type of internal organisation. In Switzerland, cross-border cooperation is of great practical importance for the cantons, as fifteen cantons share a border with at least one foreign state.

5 According to a study by Bardo Fassbender and Raffael Gübeli, 436 international cantonal treaties were in force in Switzerland as of 25 September 2017. The authors point out, however, that this list is not exhaustive, as it is impossible to take into account all unpublished treaties. It is true that Art. 56 para. 2 Cst. provides for a duty to inform on the part of the Confederation (N. 18-20). However, according to Art. 61c para. 2 LOGA, this duty to inform does not apply to agreements that 'a. have as their object the execution of agreements of which the Confederation is already aware; b. are primarily addressed to the authorities or regulate technical or administrative matters'. Furthermore, Fassbender and Gübeli point out that the Confederation does not have the means to enforce the cantons' duty to inform. Under these conditions, the existence of a duty to inform does not allow the Confederation to publish all international treaties concluded by the cantons. The study also shows that the conclusion of international treaties by the cantons has increased over the last 35 years, mainly due to the increase in cross-border cooperation. However, it appears that the existing cantonal international treaties do not reflect the extent of the cantons' external action. Indeed, similar to the phenomenon of "treaty fatigue" that is highlighted by several authors at the international level, the cantons' external action is increasingly carried out through informal agreements (soft law), which are more flexible and do not have to be approved by the Confederation or the cantonal parliaments.

The cross-border cooperation of the Swiss cantons is governed, in international and domestic law, by several conventions, which aim to facilitate this cooperation between federated entities. These are the following texts: 6

- The European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, which entered into force for Switzerland on 4 June 1982 (Madrid Convention);
- The three Additional Protocols to the Madrid Convention;
- The framework agreement between Switzerland and the Italian Republic on cross-border co-operation between regional and local authorities, which entered into force for Switzerland on 26 April 1993;
- The Agreement between the Swiss Federal Council, the Government of the Federal Republic of Germany and the Government of the French Republic on cross-border cooperation in the Upper Rhine region, which entered into force for Switzerland on 1 June 2001;
- The Agreement of 23 January 1996 between the Government of the Federal Republic of Germany, the Government of the French Republic, the Government of the Grand Duchy of Luxembourg and the Swiss Federal Council, acting on behalf of the cantons of Solothurn, Basel-Stadt, Basel-Landschaft, Aargau and Jura, on cross-border cooperation between local authorities and public bodies (Karlsruhe Agreement);
- The Convention on the Participation of Cantonal Parliaments in the Preparation, Ratification, Execution and Amendment of Intercantonal Agreements and Treaties of the Cantons with Foreign Countries.

III. THE COMPETENCE OF THE CANTONS TO CONCLUDE INTERNATIONAL TREATIES (PARAGRAPH 1)

In accordance with Article 56 paragraph 1, the cantons may conduct their own 7
foreign policy in the areas in which they are competent in accordance with the division of powers established by the Constitution. The competence of the cantons to conclude international treaties is, however, subsidiary to that of the Confederation. Thus, the cantons may only exercise this competence if the Confederation has not already concluded a treaty in the area concerned. If the Confederation concludes an international treaty in a given field, any

cantonal competence in this field becomes null and void insofar as the international treaty contains comprehensive and exhaustive regulations. For example, the Federal Court held that the Confederation had exercised its competence in the area of wine growing and AOCs (appellations d'origine contrôlée) by concluding the Bilateral Agreement on Trade in Agricultural Products with the European Union. It therefore concluded that the Canton of Geneva was not entitled to conclude international treaties in this field.

8 In some cantons, municipalities have the possibility to conclude cooperation agreements with foreign authorities. The Karlsruhe Agreement mentioned above provides a framework for these different forms of cooperation between municipalities. However, there is no agreement in the literature on how to qualify these agreements. According to the majority view, municipalities are not entitled to conclude international treaties; municipal cross-border cooperation is therefore exclusively a matter of private law. Pfisterer, on the other hand, considers that municipalities may conclude international agreements if cantonal law permits. We agree with the majority view that agreements concluded by municipalities are subject to private law. In our opinion, this position is justified by the fact that contractual obligations contained in cooperation agreements concluded by municipalities cannot engage the responsibility of the state under art. 7 para. 1 of the Karlsruhe Agreement. However, if these agreements were considered international treaties in accordance with the Vienna Convention on the Law of Treaties, their non-observance would entail state responsibility.

A. Cantonal international treaties in international law

9 Under international law, treaties concluded by the cantons are treaties like any other, i.e., according to the definition in Art. 2 para. 1 of the Vienna Convention on the Law of Treaties, agreements concluded "in writing between States and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever their particular designation". Cantons may also conclude unwritten treaties and bind themselves to international organisations.

10 From the point of view of international law, however, it is not the cantons that are bound, but Switzerland as a state. Thus, from a formal point of view, the relations of the cantons with foreign states take place through the Confederation. This means that the conduct of negotiations, signing and ratification is

the responsibility of the Confederation, which acts on behalf of the cantons concerned. In the event of non-compliance with the treaty, the Confederation alone is liable at the international level.

In addition to international treaties, the cantons may also establish cooperation with other countries through informal cooperation. The marginal note to Article 56 refers to 'relations of the cantons with other countries', which offers the cantons other forms of cooperation. The doctrine notes that this informal cooperation is more important in practice than the conclusion of international treaties. This informal cooperation is particularly used in cantons that share a border with a neighbouring state. It may take the form, for example, of contacts, discussions and agreements in cross-border regional commissions and forums. 11

B. Cantonal international treaties in domestic law

1. Conclusion, amendment and denunciation

Three procedures exist in Swiss domestic law for the conclusion of international treaties by the cantons. As mentioned above, the Federal Council is generally competent to conclude treaties on behalf of the cantons (Art. 184 para. 2 Cst.). More rarely, the Confederation may also conclude a treaty in its own name and on behalf of the canton. Finally, according to Art. 56 para. 3 Cst. the cantons may conclude treaties in their own name if they communicate directly with the lower authorities of foreign states (N. 21-22). In any event, in all three cases, the cantonal international treaty thus concluded is binding on the Confederation at the international level (nos. 9-10). 12

Within the canton, cantonal law determines which authority is responsible for foreign cooperation. In general, the executive is responsible for drawing up and signing international treaties, and the parliaments have the power to approve the content of the treaties, subject to a referendum if necessary. In some cases, it is foreseen that the cantonal parliament participates in the preparation of important treaties submitted for its approval. Generally speaking, however, the preponderance of the executive's role in the preparation of international treaties inevitably causes a certain democratic deficit. Thus, in intergovernmental relations, parliamentarians are often faced with a binary choice of whether or not to accept provisions that they have not had the opportunity to discuss. Under these conditions, the participation of parliaments 13 through the approval procedure is in our view not sufficient to ensure the democratic legitimacy of the treaties concerned. Furthermore, the increasing use of informal cooperation instruments (N. 11) may also have negative effects on the democratic principle, as these instruments do not require parliamentary approval. In order to reduce this deficit, the involvement of parliaments in the elaboration of these conventions should be increased at an early stage, i.e. during the negotiations. In a second stage, parliamentarians should have the opportunity to debate and modify the provisions proposed by the executive before approving them. The challenge is to find a balance between increasing democratic legitimacy and ensuring efficiency.

2. Rank

14 The question of the rank in domestic law of international treaties concluded by the cantons raises complex issues. Some scholars consider that international treaties concluded by the cantons are part of cantonal law at the domestic level. Other authors, with whom we agree, consider that these treaties belong to international law. Indeed, it seems logical to us that treaties concluded with foreign countries - whether through the Confederation or by the cantons autonomously - should form part of international law. If international treaties concluded by the cantons were part of cantonal law, they could not be applied in the presence of contrary federal laws, in accordance with the principle of the derogatory force of federal law. However, the doctrine unanimously recognises that these treaties derogate from subsequent and contrary federal laws. Moreover, several authors consider that Article 190 of the Constitution applies to cantonal international treaties, which also argues in favour of these conventions being part of international law.

3. Implementation

15 The way in which international treaties are to be implemented within the Swiss legal order is not determined by international law. On the contrary, the domestic authorities are free to decide how they implement international treaty obligations at the domestic level. This also applies to treaties concluded by the cantons. On the other hand, as mentioned above (n. 10), the Confederation is responsible for the observance and proper implementation of these treaties at the international level. Therefore, if a canton does not comply with a treaty it has concluded or does not implement it, the Confederation is entitled - at least in theory - to act in its place through federal enforcement. In

practice, however, the Confederation rarely interferes with the competence of the cantons to implement their obligations on their behalf.

IV. LIMITATIONS (PARAGRAPH 2)

A. Requirement of conformity with federal and cantonal law and the interests of the Confederation

At the time of their conclusion, international treaties concluded by the cantons must not conflict with either federal law or the law of the other cantons. On the other hand, as we have seen, once ratified, such treaties take precedence over any subsequent federal or cantonal laws that might conflict with them, in accordance with the principle of the primacy of international law provided for in art. 5 para. 4 of the Constitution (see N. 14). 16

Furthermore, treaties concluded by the cantons must respect the "interests of the Confederation". This formula is identical to that of Art. 48 para. 3 and must be interpreted in the same way, i.e. broadly. It refers to national interests - such as the maintenance of good relations with foreign states or international organisations - and not only to the political interests of the Federal Bern. The Federal Supreme Court does not completely rule out direct contacts between the cantons and international organisations. However, respect for the interests of the Confederation "prohibits any measure by a canton that could thwart or hinder Switzerland's relations with other states, such as resolutions of the cantonal parliaments on events abroad". The cantons thus have some room for manoeuvre in the conduct of their foreign policy, but they must take into account questions of political expediency. The cantons' room for manoeuvre is further limited by the obligation of confederal loyalty in Art. 44 para. 2, according to which the cantons may not exercise their powers in an abusive manner. 17

B. Obligation to inform the Confederation

Prior to the total revision of the Constitution in 1999, international treaties concluded by the cantons had to be approved by the Federal Council (N. 3). With the adoption of the new Constitution, this competence of the Confederation to approve treaties was replaced by a duty to inform a priori and the establishment of a complaints procedure. This limitation to a duty to inform, to- 18 gether with the possibility of lodging a complaint, is explained pragmatically by the fact that the former approval requirement was not well respected by the cantons. This requirement was perceived by several cantons as a bureaucratic obstacle to cross-border cooperation.

19 However, this amendment does not mean that the cantons are free to conclude any agreement with a foreign country. On the contrary, the cantons are obliged to inform the Confederation even before the conclusion of a treaty (Art. 61c para. 1 LOGA; Art. 27o para. 2 letter b OLOGA). The Confederation then informs the other cantons through the Federal Gazette (Art. 62 para. 1 LOGA). In the event of an objection, an amicable solution is sought (Art. 62 para. 3 LOGA). If no agreement can be reached, the Federal Council and third-party cantons may lodge an objection with the Federal Assembly within six months of publication (Art. 186 para. 3 and 172 para. 3 Cst.) The Federal Assembly then decides whether or not to approve the disputed treaty (Art. 172 para. 3 Cst.). In practice, the complaints procedure has never had to be used until now. Although it is not possible to verify them, several hypotheses can be put forward to explain this finding: 1) the a priori information procedure works well, 2) the complaints procedure is not sufficiently developed to guarantee effective control, 3) the complaints procedure is not applied because the cantons cooperate mainly on an informal basis.

20 The two-tier procedure (obligation to inform and complaints procedure) that now prevails is part of a more consensual approach, the aim of which is to reduce possible internal objections and discrepancies in the country before the conclusion of the treaty (Art. 61c para. 1 and Art. 62 para. 3 LOGA). It offers more flexibility to the cantons and thus aims to facilitate their relations with foreign countries. The aim is to reach a consensus by settling disputes through negotiation or mediation.

V. INTERNATIONAL TREATIES CONCLUDED DIRECTLY BY THE CANTONS (PARAGRAPH 3)

21 As a rule, we have seen that the conclusion of international treaties by the cantons takes place through the intermediary of the Confederation (N. 12). However, Art. 56 para. 3 allows the cantons to conclude treaties directly with lower-ranking foreign authorities. In such situations, the cantons act independently of these authorities.

The notion of "lower authorities" must be understood broadly. It refers to all territorial or local authorities, to the exclusion of central authorities. According to Art. 2 para. 2 of the Madrid Convention (N. 6), these are "communities, authorities or bodies exercising local and regional functions and considered as such in the internal law of each State". According to the text of the constitutional provision, the cantons may "deal directly" with these authorities. In practice, this means that they can communicate and negotiate with them, but also sign and ratify agreements (see for example the Convention on cross-border cooperation in the field of emergency care concluded in 2011 between the canton of Geneva and the departments of Ain and Haute-Savoie). In practice, this type of agreement represents the majority of international treaties concluded by the cantons. 22

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COMMENTARY ON

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Art. 60 Armed forces organisation, training and equipment

1 Armed forces legislation, together with the organisation, training and equipment of the armed forces, is the responsibility of the Confederation.

2 ...

3 The Confederation may, in return for appropriate compensation, take over the running of cantonal military installations.

CONTENT

I. GENERAL

A. History of origins

The Federal Constitution of 1874 had a comparatively detailed military constitution in Articles 8 to 22 aBV. It was based on the idea that the military sovereignty of the Confederation took precedence over that of the cantons. The sovereignty of the cantons, which were guaranteed their own troops, was to come into play only where it did not hinder the purpose of the Confederation. 1

The military constitution stipulated that legislation on the army was a matter for the Confederation (Art. 20 para. 1, first sentence aBV). The implementation of the "relevant laws", i.e. their execution, was to be carried out by the cantonal authorities within the limits to be determined by federal legislation and under the supervision of the Confederation (Art. 20 para. 1 second sentence aBV). 2

Art. 20 para. 2 aBV established federal competence for all military instruction and armament, whereas in the Federal Constitution of 1848 it was precisely military instruction that was still divided between the Confederation and the cantons. The procurement of clothing and other equipment as well as their maintenance was the responsibility of the cantons. According to paragraph 3, however, the costs incurred were paid by the Confederation. The conscripts were also to receive their initial equipment, clothing and armament free of charge (Art. 18 para. 3 aBV). This provision found its way into the Constitution after some cantons had passed on some of the procurement costs to the conscripts. The cantonal competence in the area of equipment was not least a concession by the Confederation, after the draft of 5 March 1872 had provided for exclusive federal competence in this area and the transfer of ownership of all war material to the Confederation. 3

Finally, the Confederation was granted the right to take over the cantonal military sites and military buildings for use or as property in return for a fair (adequate) compensation (Art. 22 para. 1 aBV). 4

With the total revision of the FC of 1999, the defense constitution was concentrated in a few articles. Art. 20 and Art. 22 aBV were merged into Art. 60 para. 1-3 FC. At the outset, this article contains the legislative competence of 5 the Confederation in the field of military affairs and establishes the competence for equipment and training. The organization of the armed forces is now also mentioned. The cantonal competence to enact implementing legislation is no longer explicitly mentioned. It results from the federalism of enforcement. Paragraph 2 describes the shared competence in the area of cantonal troops and procurement. The right to take over cantonal military sites and military buildings for use or as property in return for payment has now been combined in paragraph 3 in a general "right to take over" in return for payment.

6 With the Army Reform XXI in 2002, in force since January 1, 2004, the legislator abolished the cantonal troops. The constitutional order of competences remained untouched, since the total revision of 1999 already guaranteed no more cantonal troops. At the same time, the legislature revised Art. 118 MG ("The military is a matter for the cantons, insofar as it is assigned to them. [...]"). Now it is clarified: "The military is a matter of the Confederation as well as of the cantons, as far as it is transferred to them. [...]". The new wording was not intended to change the content. Its only purpose was to emphasize the original responsibility of the Confederation, without, however, relieving the cantons of their co-responsibility.

7 The division of competences underwent its greatest change in 2004 with the adoption of the federal decree on the reorganization of financial equalization and the division of tasks between the Confederation and the cantons (NFA). The NFA aimed to ensure a proper division of tasks and competences between the Confederation and the cantons in the long term and to eliminate false incentives and duplications. As a result, paragraph 2 of Art. 60 FC was deleted without replacement as of January 1, 2008. Enforcement responsibility in the logistical area (i.e. army materiel) now lay exclusively with the Confederation. Centralization was a business necessity, especially in the face of a greatly reduced army. The joint responsibility of the cantons was not diminished from a state policy point of view (cf. the following presentation under I.B.).

B. Today's division of powers between the Confederation and the cantons

8 Article 60 para. 1 FC declares military legislation, organization, equipment and training to be a federal matter and thus a comprehensive and exclusive

federal responsibility for the military. The enumeration - organization, equipment, training - is, in the view expressed here, purely declaratory today and no longer has any independent significance, since, in addition to legislation (Art. 60 para. 1 FC), enforcement (Art. 118 MG) is also the responsibility of the Confederation. It must therefore be understood in a historical context.

As a consequence, only the enforcement tasks explicitly provided for by federal legislation remain with the cantons. In particular and illustratively, the following enforcement tasks are to be mentioned: 9

- Pre-orientation and orientation meeting (Art. 11 para. 2 MG, Art. 97 para. 1 VMDP);
- Issuance of marching orders (Art. 87 para. 4 lit. a VMDP) as well as assessment of service transfer requests (Art. 91 para. 1 VMDP in conjunction with Annex 6) for recruitment, but not the execution of recruitment (Art. 11 para. 3 MG in conjunction with Art. 98 VMDP);
- Military control (Art. 102 VMDP), esp. handling of requests for foreign leave (Art. 43 ff. VMDP);
- Receipt, but not approval, of service transfer requests for basic and cadre training services up to subaltern officers (Art. 90 para. 2 VMDP in conjunction with Annex 6);
- Off-duty shooting (Art. 125 MG and Art. 34 ff. Shooting Ordinance), e.g. the operation of shooting ranges, the recognition of shooting clubs and their allocation to shooting ranges;
- levying the military service tax (Art. 22 WPEG);
- Operation of information centers in the event of mobilization for active duty (Art. 13 VMob);
- Disciplinary authority on the journey to enlistment and discharge (Art. 195 para. 2 and 4 MStG); also of practical relevance is disciplinary authority in the event of non-compliance with compulsory firing and failure to comply with the order to attend orientation day or recruitment;
- (Disciplinary) detention outside the service (Art. 191 para. 5 MStG) and the execution of sentences passed by the military justice system (Art. 211 ff. MStP).

10 In isolated cases, the federal legislature turns directly to the municipalities for enforcement - for example, when announcing mobilization for active service (Art. 14 para. 1 VMob) - or imposes military burdens on them (Art. 132 MG):

- Provision of premises in the event of mobilization for active duty or assistance (Art. 14 para. 3 and 4 VMob);
- Provision of shooting ranges free of charge for off-duty shooting (Art. 133 MG). The municipalities have the right to choose. They may operate a shooting range themselves or participate in a shooting range of another municipality (joint facility). Before a new shooting range is built, it must be clarified whether a community facility is an option. Alternatively, municipalities can secure a shooting right at a private shooting range. They pay the private owner for the maintenance and renovation of the shooting range in accordance with the Subsidies Act (SuG). However, the claim only exists if the private shooting range is not located on the commune's own land (Art. 8 Shooting Range Ordinance) - a differentiation that hardly seems tenable from a factual point of view.

II. PARAGRAPH 1: MILITARY LEGISLATION, ORGANIZATION, TRAINING AND EQUIPMENT OF THE ARMED FORCES

A. Military legislation

11 Military legislation is a matter for the Confederation, i.e., it may regulate all factual matters relating to the armed forces. Military legislation consists of the following, formal laws: Military Law (MG), Federal Law on Military Information Systems (MIG), Military Criminal Law (MStG), Military Criminal Procedure (MStP), Military Insurance Law (MVG), Federal Law on Compulsory Military Service (WPEG), and parts of the Acquisition Replacement Law (EOG). Formal military legislation is supplemented by numerous ordinances of the Federal Council, the DDPS and, in some cases, the Federal Assembly, as well as by a steadily growing number of treaties under international law in the areas of training cooperation, peacebuilding and armaments cooperation.

12 The cantons have no authority to enact substantive military law. They are only responsible for enacting the necessary enforcement provisions (cf. e.g. Art. 22 para. 4 WPEG). The cantonal enforcement provisions can be found

partly in their own introductory laws, but more frequently in the cantonal administrative organization law.

B. Organization

According to Art. 60 para. 1 FC, the organization of the armed forces is the responsibility of the Confederation. The military system is divided into two branches: the armed forces and the defense group (federal military administration). However, they do not have separate legal bases. 13

1. The Armed Forces

The armed forces are a sui generis state organization. It must be based on the principle of militia (Art. 94 MG). The Federal Assembly reserves the basic authority to determine the organization of the armed forces (Art. 93 MG). It has regulated the structure as well as the target and effective numbers in a separate ordinance (Art. 1 and 2 AO) and authorized the Federal Council to determine the structures and Group V to implement the detailed organization (Art. 4 and 5 AO). By the chosen form of enactment, the Federal Assembly deliberately withdrew its decision on the organization of the armed forces from referendum. 14

2. The Defense Group

Group V is part of the central administration of the Confederation. It is divided into five administrative units in accordance with the principles of Art. 8 GAOA (Art. 11 OV-VBS). The purpose of Group V is to ensure the readiness and further development of the armed forces (Art. 10 para. 2 OV-VBS). Accordingly, Group V is structured as a mirror image of the armed forces organization. Due to the quasi congruent and overlapping organization, professional military personnel de facto have a dual role as members of the armed forces and administrative employees, with the latter dominating outside of active service. On the other hand, certain functions of the armed forces and the military administration are deliberately filled in personnel union or de iure as a double hat. For example, the Chief of the Armed Forces heads both Group V (Art. 10 OV-VBS) and the Armed Forces (Art. 2 lit. a AO): "He shall form the link between the head of the DDPS (political function) and the armed forces." 15

Only in the case of a large deployment of troops in active service does the Federal Assembly elect a general (Art. 85 MG). 16

3. Other military authorities

17 With Group V and the Armed Forces, the following authorities have a close factual relationship:

- The military criminal authorities (Art. 4a et seq. MStP) consist of the Chief Auditorate as part of the central administration and the military justice system. Comparable to the division of tasks between Group V and the armed forces, the Chief Auditorate ensures favorable framework conditions so that the military justice system can fulfill its mandate (Art. 9 OV-VBS). The Office of the Chief Auditor is listed in the DDPS Organizational Ordinance as an independent administrative unit and is not subordinate to Group V. Accordingly, the members of the military justice system are not subject to the command authority of the armed forces (Art. 3 para. 1 AO). Disciplinary authority is vested in the Chief Auditor (Art. 8 para. 1 MJV). This separation under administrative organization law and decoupled command and disciplinary authority contribute to the hierarchical-institutional independence of the military justice system. Such independence is already required under international law for an effective investigation into alleged violations of the right to life or the prohibition of torture (Articles 2 and 3 ECHR). The military courts are made up of members of the military judiciary and the armed forces (so-called military judges). They are elected by the Federal Council or the Federal Assembly (cf. Arts. 7, 11 and 14 MStG). An election by the army/Group V would not be permissible and would violate the right to an independent court (Art. 6 para. 1 ECHR).

- The Federal Office of Armaments (armasuisse) acts, among other things, as the central procurement agency for Group V and the armed forces (competence according to Annex 1 Org-VöB). It also participates in international armaments cooperation (Art. 109b MG). Finally, it is responsible for the real estate management of the DDPS (Art. 8 para. 1 lit. b VILB and VAI) and the execution of decommissioned material (Art. 16 para. 1 MatV). The decommissioning of major weapon systems must be approved by the Federal Assembly (Art. 109a para. 4 MG); e.g. decommissioning of the F-5 Tiger fighter aircraft.

- At the cantonal level, there are the district commands or the cantonal military authorities, which are responsible for carrying out the tasks assigned to them.

C. Training

According to Article 60 para. 1 FC, the Confederation is responsible and thus also obliged to train its military personnel. Thorough training is a prerequisite for the functioning of the armed forces as an instrument of security policy. From a legal perspective, the training obligation can be traced back to international law of war and, in the area of (police) firearms use, to human rights (see II.C.1. below). The Confederation trains its military personnel both at home and abroad, in some cases transferring the training to third parties (cf. II.C.2./3. below). 18

1. training obligation

The content of training is based on the tasks of the armed forces (Art. 46, Art. 66 para. 2 [for peace support service] and Art. 93 para. 1 MG). In the area of its core competence, defense, Switzerland has committed itself by ratifying the Geneva Conventions and the Additional Protocols to train its members of the armed forces in the law of war. This obligation reads (almost) unanimously in all agreements and additional protocols: "Les Hautes Parties contractantes s'engagent [...] notamment à en incorporer l'étude dans les programmes d'instruction militaire [...], de telle manière que les principes en soient connus de l'ensemble de leurs forces armées [...]. 19

This is a legal obligation ("legal obligation"). However, the Geneva Conventions do not specify the form in which training is to take place. In practice, the international law of war is taught through regulations and in theoretical and practical modules of training. In addition, the rules of international law of war are to be integrated into all military exercises. In addition, Article 7 para. 1 of the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict (SR 0.520.3) obliges the military to train its own troops in the protection of cultural property. 20

The exercise of the army's police powers (Art. 92 f. MG and Art. 5 ff. ZAG) also requires careful training. The more serious the potential encroachment on fundamental rights, the more intensive the training must be. Article 2 of the ECHR imposes a "positive duty" on the contracting states, according to which the use of firearms must be trained ("trained in the use of firearms"). The ECtHR calls for "clear guidelines and criteria governing the use of force". 21

This requirement must be met by issuing rules of engagement (ROE), which specify the use of force and are summarized in pocket cards.

22 With regard to the militia system of the Swiss Armed Forces, special attention must be paid to training so that members of the Armed Forces can (re)act lawfully and appropriately in the event of the use of force, be it within the framework of police powers or the international law of war.

2. Training service

23 Training service is governed by Articles 41-64 MG. It is composed of voluntary pre-service training (Art. 64 MG), basic training (Art. 49 MG), cadre training (Art. 55 MG), and formation training service (Art. 51 MG):

- Voluntary pre-service training is offered from the age of 15 and in selected specialties (e.g., medical, cyber, military music, air force [SPHAIR]; Art. 3 para. 1 VAusb). The participants are not yet functionally integrated into the armed forces, which means that the training is in line with the Optional Protocol on the Involvement of Children in Armed Conflict. Third parties can be entrusted with the implementation of pre-service training by means of a public law contract (Art. 64 para. 2 MG in conjunction with Art. 3 paras. 2 and 3 VAusb-VBS).

- Basic training comprises recruit school (Art. 49 MG) and specialized courses (Art. 50 MG). Recruit school lasts 18 weeks and must be commenced no later than twelve months after recruitment. It is generally completed without interruption. Exceptionally, it can be "fractionated" (Art. 57 VMDP). In addition, it is possible to perform the entire training service voluntarily in one piece (Art. 54a MG, so-called "Durchdiener"). However, the proportion of those serving in the military is limited in order to maintain the militia principle and to ensure that the system functions properly.

- The training service of the formations comprises the refresher courses (WK) including preparation and discharge work (Art. 51 and 53 MG).

24 The training service also includes support services for the benefit of third parties, e.g. major national and international sporting events in Switzerland or cultural events, as well as spontaneous assistance. Originally, spontaneous assistance was dealt with under the chapter assistance service (Art. 67 ff. MG). In the context of the WEA 2014, this was corrected and spontaneous assis-

tance was transferred to the training service of the formations. Since the 2021/2022 revision, not only members of the armed forces can be deployed in the training service of the formations, but also in basic training for support services and spontaneous assistance (Art. 48d MG). At the same time, it is emphasized that the training benefit must be in the foreground, although exceptions may be granted for major sporting events and cultural events of national or international significance (the so-called Lauberhorn article). Requests for support of large civil events must be approved restrictively in order to maintain the principle of competitive neutrality (Art. 94 para. 1 FC).

Training service can also be performed in the military administration (Art. 59 MG). Here, too, the focus must be on the training benefit. In the view expressed here, applications must again be approved restrictively, since members of the armed forces compete with civilian job seekers. With the addition of paragraph 4, the legislature has already countered the false incentive to have one's own personnel serve in the military administration in order to reduce personnel costs by collecting compensation for loss of earnings. 25

Training also includes off-duty shooting (Art. 63 MG). The annual shooting exercises are carried out by recognized shooting clubs (Art. 63 para. 2 MG in conjunction with Art. 3 para. 1 Shooting Ordinance). The authorized shooting clubs receive compensation for this in accordance with the SuG (Art. 38 Shooting Ordinance). 26

Insofar as military societies and umbrella organizations organize voluntary training activities, the DDPS supports them with benefits in kind and in cash. The support of these self-chosen training activities is, according to the opinion represented here, a financial aid according to the SuG, to which a corresponding claim exists (Art. 10 ff. VATV). The competent military administration has a discretionary power in the recognition of shooting clubs, military societies and umbrella organizations. In doing so, it must observe the principle of equality of rights, the duty to safeguard public interests and the principle of proportionality. Insofar as the recognition of a new association presupposes a military need/requirement, the military administration cannot avoid reviewing the activities of the associations already recognized and taking them into account in its decision (cf. Art. 2 para. 2 VATV and Art. 19 para. 2 lit. c Shooting Ordinance). 27

28 Military training should increasingly be recognized by civilian institutions; for example, military leadership training or military driving licenses.

3. International training cooperation

29 Military training projects and exercises are increasingly taking place with foreign partners. Possible cooperation partners include other states, the United Nations (UN), the European Defence Agency (EDA) and, within the framework of the political initiative "Partnership for Peace (PfP)", NATO. The Federal Council's foreign policy decision to accept the invitation to join the PfP was brought before parliament or the people in vain. With the emergence of armed conflicts in the European area, repeated demands were made, on the one hand for strengthening and on the other (for reasons of neutrality policy) for withdrawal from the PfP. In terms of neutrality, participation in the PfP and international training cooperation in general is not objectionable as long as it is not accompanied by a duty to provide assistance. Due to Switzerland's geographic location and small size, international training cooperation is important for the Swiss Armed Forces, for example for air force exercises and generally for military cooperation capability (interoperability) and knowledge exchange.

30 The Federal Council can conclude implementation agreements with foreign partners for specific training projects and exercises or negotiate a general framework agreement (Art. 48a MG). In the latter, it lays down the key parameters such as the scope of training cooperation, state liability, etc. Group V can carry out smaller international training projects directly on the basis of such a framework agreement. Larger training projects and exercises require a technical agreement/arrangement, which Group V can conclude independently in the case of an existing framework agreement (general subdelegation in Art. 106 para. 3 VMDP). In the absence of a framework agreement, Group V applies to the Federal Council for authorization to conclude specific implementing agreements (Art. 48a para. 1 GAOA). In practice, the authority to conclude agreements is granted once a year by means of a collective authorization.

31 As in the case of peace support or assistance service abroad, the Federal Council must regulate the status of the armed forces members to be deployed by means of a "status of forces agreement" (SOFA) and, if necessary, the protection of information under international treaty law. Parliament has delegat-

ed the necessary treaty-making powers to it on a sectoral basis (Art. 150a and 150 para. 4 MG). For training cooperation, the parties regularly declare the PfP troop statute applicable, although in individual cases it must be examined whether concretizations are necessary in the respective implementation agreement (for example, with regard to competencies for technical or criminal investigations in the recipient state).

D. Equipment

1. Procurement

The Confederation is responsible for the procurement of army equipment (Art. 60 para. 1 FC). The repetition in Art. 106 para. 1 MG is purely declaratory in view of the present order of competences. Moreover, the competence to procure the necessary material results from the administration of requirements and would not require a special legal basis: the administration procures what it needs to fulfill its legal tasks. 32

The guideline for procurement is Article 93 of the MG, according to which the armed forces must be equipped in such a way that they can perform their tasks in a timely and complete manner. In view of the far-reaching implications, the Federal Council obtained the mandate for the procurement of new combat aircraft by means of a federal decree pursuant to Art. 28 para. 1bis lit. c and para. 3 ParlG (so-called planning decree). The federal decree was confirmed in the referendum of 27 September 2020. 33

The principle of proportionality further requires that, when exercising police powers, task forces must be equipped in such a way that the use of firearms is not the only, but the last effective means of coercion (ultima ratio); for example, through additional equipment with irritant spray or destabilization equipment. The individual equipment depends in each case on the specific mission. 34

The Federal Office of Armaments (armasuisse) is primarily responsible for procurement (Art. 12 OV-VBS). To ensure the supply of equipment, the Confederation may also acquire stakes in armaments companies (Art. 1 ff. BGRB). For a period of four years, it defines the strategic goals to be achieved by the defense companies (Art. 3 para. 1bis BGRB). For example, the strategic goals for RUAG MRO include support for the maintenance of Swiss Armed Forces systems (maintenance, inspection, repair). Under certain circumstances, par- 35 ticipation in defense companies enables quasi-in-house procurements, which are excluded from the material scope of procurement law (Art. 10 para. 3 lit. d SOA). These companies are also subject to various exemption provisions with regard to licenses under the War Material Act (WMO). In active service, the Federal Council may order military operation for private companies entrusted with public tasks, such as companies under the BGRB (Art. 81 MG).

36 The Federal Assembly decides on the payment framework for the financial resources of the armed forces for four years at a time (Art. 148j MG; Art. 20 FHG). This merely signals the willingness of Parliament to approve this amount within the framework of the budget decisions. The Federal Council submits the concrete credit requests to the Federal Assembly annually with the Armed Forces Dispatch. The payment framework and the approval of the credits are issued by simple federal decree (Art. 148j MG and Art. 25 para. 2 ParlG). This is not subject to a referendum (Art. 141 para. 1 lit. c in conjunction with Art. 163 para. 2 FC).

37 The procurement of army equipment is subject to certain legal peculiarities:

- According to Art. III CAP, the contracting parties may take measures necessary for the protection of their essential security interests for the procurement of arms, munitions and war material or procurements indispensable for national defense. The Swiss legislator has generally excluded these procurements from the scope of the treaty (Annex 5 para. 1 lit. c BoeB). At the discretion of the contracting authority, an award procedure may be dispensed with altogether or the invitation procedure may be chosen if the protection objectives permit this (Art. 10 para. 4 lit. a SOA). If the invitation procedure is chosen, the contracting authority is not bound by threshold values (Art. 20 para. 3 SO). Legal recourse is excluded for reasons of security policy (Art. 52 para. 5 SOA). Compensation transactions (offsets) are permitted outside the scope of the State Treaty (Art. IV No. 6 GPA e contrario).
- If weapons, means and methods of warfare (weapons systems) are newly procured, modified or put to a different use, they must be examined for their conformity with international law (Art. 36 ZP I in conjunction with Art. 11 MatV). Group V subjects the procurement object to an independent, internal administrative review and assesses whether the procurement object and the planned use are compatible with the basic principles and the

special provisions of international law of war. For this purpose, it may order firing trials and further tests. Final approval may be subject to conditions and requirements (e.g. restriction of the use of irritant spray in international armed conflict).

2. Army material

Army material includes personal equipment (armament, clothing, baggage and special equipment in accordance with Art. 3 para. 1 VPAA) and other army material (Art. 105 lit. b MG). Personal equipment remains the property of the Confederation and may not be used for private purposes (Art. 114 MG). 38

The army material is administrative property. According to the view expressed here, this is true even if Group V provides commercial services and transfers army equipment to third parties in return for payment (Art. 41 FHG in conjunction with Art. 148i MG). This is also reflected in the fact that commercial services are only provided if they do not interfere with the main task of the armed forces. The levy is not an actual task, but an opportunity to rent temporarily unused army equipment to third parties, for example. The requirement of competitive neutrality must always be taken into account (Art. 94 para. 1 FC). Under certain circumstances, discounts or price reductions are granted, which means that the army material is given as a kind of financial aid. The charge, insofar as it is not a financial aid, is agreed in a civil law contract. 39

The members of the armed forces have a duty of care for the army material. They are liable for their personal equipment and the (army) material entrusted to them in the course of duty in the event of loss or damage (Art. 139 para. 2 MG; lenient causal liability) or, in general, for damage resulting from intentional or grossly negligent breach of duty (Art. 139 para. 1 MG; fault-based liability). Special liability provisions (Art. 135 para. 2 MG) are reserved, such as Art. 75 SVG for damage caused by driving without orders/permission (so-called stolen driving). 40

Army equipment is specially protected under criminal and disciplinary law (Art. 73 MStG, misuse and squandering of army equipment). In contrast to civil criminal law, anyone who negligently damages or causes damage to or destruction of an object entrusted to him in the course of his duties is also punished. Explicitly, the unauthorized wearing of the Swiss army uniform by non-servicemen is also punishable (Art. 331 StGB). The same applies to persons li- 41 able for military service (Art. 73 MStG), whereby Art. 22 VPAA specifies off-duty occasions on which they are authorized to wear the uniform. Wearing the uniform abroad requires the approval of the military protocol (Art. 4 Ordinance on the Wearing of Foreign Uniforms in Switzerland and Swiss Military Uniforms Abroad). The latter additionally obtains the consent of the receiving state, since wearing the Swiss army uniform abroad could otherwise be perceived as an unfriendly act.

42 Upon discharge from the armed forces, certain items of equipment may be left to the members of the armed forces as property (Art. 26 ff. VPAA; e.g. equipment without camouflage print and personal weapon). The main purpose of the transfer of the personal weapon is to enable members of the armed forces to continue shooting with the army weapon after leaving the armed forces. The ordinance requires an additional shooting certificate (e.g. field shooting) and not only the fulfillment of the legal shooting obligation. In addition, a weapons acquisition certificate is required (Art. 29 f. VPAA).

43 If there are concrete indications of danger with the personal weapon or its misuse by service personnel, the district command must order the precautionary removal of the personal weapon (Art. 17 VPAA). Moreover, the Federal Administrative Court affirmed the liability of the federal government (and not of the cantonal district command, which had no knowledge of the specific circumstances) after an army member who had been declared unfit for service shot a policeman with his army pistol and injured a second during the eviction of his apartment.

44 In 2011, the Swiss population rejected the popular initiative "For protection against gun violence." According to this, the weapon would have had to be stored off duty by the army. A later transfer for ownership would have been excluded in principle.

III. PARAGRAPH 3: MILITARY FACILITIES OF THE CANTONS

45 Numerous military installations are still owned by the cantons. The Confederation may (unilaterally) take over these to the extent necessary, i.e. taking into account the public interest and proportionality. This right of takeover is directed exclusively against the cantons and not against private parties. When exercising the takeover right, the Confederation owes the cantons an appro-

priate (equitable) but not full compensation. In this respect, paragraph 3 is not an (ordinary) expropriation title, but a constitutional special expropriation right.

Until now, the Confederation and the cantons reached a consensus on the use of cantonal weapon ranges and concluded a public-law contract (Art. 6 VWS). The so-called armory agreement between the Federal Council and a cantonal government is followed by use agreements and other, more specific agreements at departmental and office level. 46

Since 2018, compensation has been based on the tenant model (Art. 7 VWS). The federal government has thus abandoned its long-standing compensation model, which consisted of interest, amortization, and maintenance expenses as well as a daily compensation per head and vehicle. 47

As in the case of the site evaluation of a new building, when deciding on a cantonal facility to be taken over, on the one hand the provisions of public law on use must be consulted so that the intended military use can actually be realized. On the other hand, the special provisions of international law of war must be taken into account in the decision-making process. Namely, military targets may not be located, as far as practical, within or near densely populated areas (Art. 58 lit. b ZP I), near installations and facilities containing dangerous forces (Art. 56 no. 5 ZP I), and near cultural property (Art. 8 lit. b Second Protocol of 26.3.1999 to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, SR 0.520.33). 48

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COMMENTARY ON

Art. 68 FC

A commentary by Marco Zollinger

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Art. 68 Sport

[1] The Confederation shall encourage sport, and in particular education in sport.

[2] It shall operate a sports school.

[3] It may issue regulations on sport for young people and declare the teaching of sport in schools to be compulsory.

CONTENT

I. GENERAL

A. History of origins

The first beginnings of a (federal) state promotion and regulation of sport were evident in Switzerland around 1874. At that time, a sport-specific constitutional provision was lacking. The federal government did address the issue of gymnastics and sports for the first time in the context of the 1874 constitutional revision. However, the discourse in this first phase of the federal constitutional coverage of gymnastics and sports was largely shaped by defense policy considerations: Based on the defense articles of the old federal constitution of May 29, 1874 (Art. 18 ff. aBV), compulsory preliminary instruction for boys from the age of 10 to 20 was introduced as part of the military organization of 1874. This served as preparation for military service. 1

Due to unsatisfactory implementation of compulsory preliminary instruction in the cantons, various adjustments were made with the military organization of 1907: Gymnastics instruction was declared compulsory at schools for boys from the seventh school year and supplemented with voluntary preliminary instruction after leaving school. The 1909 ordinance on preliminary instruction was revised in 1928 and finally transferred to the ordinance of January 7, 1947 on the promotion of gymnastics and sports. In the latter, the compulsory school sports program was fixed at three hours per week and the operation of the Federal Gymnastics and Sports School created in Magglingen during the Second World War was anchored. At the federal level, the regulations on gymnastics and sports - as well as the compulsory school sports program - were directed only at boys and young men until 1970. By the Second World War, however, 15 cantons had declared gymnastics compulsory for girls and young women as well. 2

The second phase of the federal constitutional coverage of sport in Switzerland began to emerge in the second half of the 20th century. Due to the reduced physical activity of the population, the positive health aspects associated with gymnastics and sports increasingly came to the forefront of (political) considerations. Moreover, until 1970, the articles of defense of the old Federal Constitution formed the constitutional basis, which limited the competence of the Confederation to promote gymnastics and sports, both in terms of age and gender. This limitation led to unsatisfactory results, especially with regard 3 to gender equality and the health of the entire population. In 1967, therefore, work began on a constitutional article and a federal law on the promotion of gymnastics and sport. The new Art. 27quinquies aBV was approved by a large majority in the referendum of September 27, 1970. Among other things, this gave the compulsory school sports program and the Federal Gymnastics and Sports School in Magglingen a constitutional basis and gave the federal government the authority to issue regulations on gymnastics and sports with effect for the entire population. Furthermore, the systematic placement of the constitutional article in Art. 27 et seq. aBV on education underscored the "decoupling from national defense".

4 Based on Art. 27quinquies aBV, the Federal Law of 17 March 1972 on the Promotion of Gymnastics and Sports (SR 415.0) and the Ordinance of 26 June 1972 on the Federal Law on the Promotion of Gymnastics and Sports (SR 415.01) came into force on 1 July 1972. The purpose of the law was to promote gymnastics and sports in the interest of youth development, public health and physical fitness. The "health, social and sports policy concerns" of the federal legislature were clearly expressed in it. Specifically, the federal law declared gymnastics and physical education compulsory for all students in all elementary, secondary, and vocational schools, including seminaries and teacher training colleges. Voluntary preliminary military instruction was transferred to "a modern institution," Youth and Sports.

5 While in the first two phases specific concerns were associated with the promotion of gymnastics and sport, from the third phase onwards the constitutional federal competence was characterized by a holistic promotion of sport. It is true that the content of Art. 27quinquies aBV was transferred unchanged to Art. 68 BV in the course of the total revision of the Federal Constitution. Nevertheless, it is clear from the corresponding message that the constitutional article was editorially revised in the sense of the sports associations and "now" anchors a federal competence for the holistic promotion of sport. In this sense, the Federal Council carried out this change of direction in the year the new Federal Constitution came into force with the adoption of the concept of November 30, 2000 for a sports policy in Switzerland. The sports policy concept was based on the five areas of health, education, performance, economy as well as sustainability, whereby sports policy was "embedded in the overriding state objectives" on the basis of an overall guiding principle of sport and five main objectives. Accordingly, it cannot be seen that the

federal government pursued an independent state goal with the promotion of sports in this phase. Rather, the Federal Council sought "to make a political contribution [to] the emergence of a broad culture of movement, a ´Spirit of Sport´, which can also contribute to the cohesion and identity of our society."

Based on Art. 68 BV, the Federal Law of 17 June 2011 on the Promotion of Sport and Physical Activity (Sports Promotion Law, SpoFöG; SR 415.0) and the Ordinance of 23 May 2012 on the Promotion of Sport and Physical Activity (Sports Promotion Ordinance, SpoFöV; SR 415.01) then entered into force on 1 October 2012. The proven and essential thrusts of the sports policy concept were incorporated into the new Sports Promotion Act. However, the change to a holistic approach to sports promotion did not have a substantial impact on the scope of state sports promotion. Sports promotion in Switzerland subsequently remained characterized by the primacy of private involvement as an outgrowth of the principle of subsidiarity. 6

Currently, the Federal Sports Promotion Action Plan of October 26, 2016, defines federal sports policy. The action plan was drawn up in response to motion 13.3369 of the Committee for Science, Education and Culture of the National Council and provides a conceptual and financial overview of the future development of federal sports promotion. The action plan includes a concept for mass sports and a concept for competitive sports, as well as a real estate concept for sports. 7

B. Constitutional definition of sport

The concept of sport is not defined in the Federal Constitution. Nor can it be derived from the systematics of the Federal Constitution or from any other constitutional provision. The concept of sport can only be found in Art. 68 of the Federal Constitution and in Art. 106 para. 6 of the Federal Constitution (on the use of the net proceeds from money games). Even otherwise, there is no recognized legal definition of the term. However, due to the endeavor to promote sport as a whole, a broad constitutional definition of sport can be assumed. Against this background, the Council of Europe's definition of sport can be used, as it has a certain international acceptance and, in contrast to other common definitions, a less restrictive and open formulation. According to this definition, sport covers "toutes formes d'activités physiques qui, à travers une participation organisée ou non, ont pour objectif l'expression ou l'amélioration de la condition physique et psychique, le développement des 8 relations sociales ou l'obtention de résultats en compétition de tous niveaux". In line with this concept, the Confederation promotes sport and physical activity in the interest of the physical performance and health of the population, holistic education and social cohesion.

II. PROMOTION OF SPORT AND PHYSICAL ACTIVITY

9 Art. 68 BV is located in the third section on education, research and culture in the distribution of tasks and competences between the Confederation and the cantons. From a systematic point of view, the article is thus part of the education constitution, although it was not the subject of the reorganization of the constitutional provisions on education in 2006. Due to its systematic position, the content of Art. 68 BV specific to education law and school sports - in particular Art. 68 para. 3 BV - conceptually represents an element of the Swiss education area (cf. Art. 61a BV). However, the provision has a broader, "independent meaning" insofar as it is dedicated to the promotion of sport beyond education (holistically). Three different types of federal competences result from Art. 68 BV. While Art. 68 para. 1 BV as a parallel and limited promotion competence of the Confederation does not exclude a simultaneous promotion of sport and physical activity by the cantons, Art. 68 para. 2 BV anchors a mandate for action to the Confederation to operate a sports school. Art. 68 para. 3 BV contains a concurrent, subsequently derogating legislative competence in the area of youth and school sports.

A. Paragraph 1: Promotion of sport

10 According to Art. 68 para. 1 BV, the Confederation shall promote sport, in particular education. The first paragraph of the constitutional article establishes a federal competence and at the same time mandates the Confederation to act in a promotional capacity. It forms the constitutional basis for the Confederation's promotion of sport and physical activity.

1. Competence of the Confederation to promote sport

11 The competence to promote sport exists in parallel with that of the cantons. It does not include any regulatory competence, since for systematic considerations the second and third paragraphs of the constitutional provision would otherwise be superfluous. In the absence of such a competence, the Confederation cannot establish regulations on sport per se or on individual

sports. Consequently, the power under Art. 68(1) FC is purely a power of promotion; it is limited to that. On the other hand, Art. 68 para. 1 BV does not restrict the way in which the Confederation promotes sport. The competence to promote is therefore to be understood holistically and can extend to all types of sport and to the entire population. Furthermore, the form of support results from the use of the term promoting. Promoting is primarily characterized as support through financial means. At the same time, promoting means acting in a subsidiary manner. In principle, the (financial) support must therefore refer to existing cantonal, communal or private measures and, if necessary, supplement them. The parallel competence is consequently limited to an overall but subsidiary support of sports, namely in the form of financial state benefits or through the creation of favorable framework conditions. These framework conditions are again to be defined broadly. They may include, for example, the creation of a favorable tax system for national and international sports federations and sports clubs or the fight against doping to ensure clean sport.

However, Art. 68 para. 1 BV does not only contain a competence according to 12
which the Confederation may promote sport. Rather, the constitutional article also obliges the Confederation to promote sport. In this respect, the first paragraph also enshrines an obligatory mandate for the Confederation. To a certain extent, this obligation to promote sport is in tension with the principle according to which promotion implies a subsidiary action of the Confederation. Consequently, the scope of the constitutional mandate to promote cannot be determined in the abstract. It results on the one hand from the political and social goals associated with the promotion of sports and on the other hand from the lack of private initiatives or private commitment. Both factors can vary depending on the type of sport, be the same or opposite, and be subject to change over time.

The promotion competence and the promotion mandate refer in particular to 13
training. This second sub-sentence of the first paragraph of Art. 68 BV makes it clear that promotion refers equally to grassroots sport, performance-oriented youth sport and top-level sport. At the same time, this recognizes that top-level sport is an "important motor of sport development", since it "influences mass sport as a motivator and pacesetter", as well as being a "national identity generator and an economic factor that should not be underestimated". The additional sub-sentence also allows the federal government to financially support the training and further education of sports teachers, to promote the cre-

ation of supra-regional, cantonal, communal or private sports schools and to coordinate their operation. Without interfering with the school sovereignty of the cantons (cf. Art. 62 para. 1 BV), the Confederation is thus also entitled to take measures to reconcile compulsory schooling with junior competitive sport.

2. Sports promotion measures at federal level

14 Like the scope of constitutionally permissible promotion, the type of measures to be taken is also not specified in Art. 68 para. 1 BV. However, the constitutional article does not limit the conceivable measures within the scope of what is otherwise constitutionally permissible. Based on Art. 68 para. 1 BV, the Confederation has taken a number of promotional measures. The promotion measures result from federal legislation, namely from the Sports Promotion Act, and they are concretized in the Sports Promotion Ordinance. With regard to the general promotion of sport and physical activity, the federal government first supports, coordinates and initiates programs and projects to promote regular sport and physical activity at all age levels. In addition to the Youth and Sport program, this includes in particular the Adult Sport Switzerland (esa) program. In this regard, the Confederation is essentially involved in the training and further education of managers who lead sports programs for people in adulthood. In addition, the Confederation supports the sports associations. The umbrella organization of Swiss sport (Swiss Olympic) receives an annual contribution for the promotion, development and support of Swiss sport, whereby the Federal Office of Sport (FOSPO) concludes a performance contract with the umbrella organization, which regulates in particular the cash, service and in-kind contributions of the Confederation to the umbrella organization as well as their onward transfer to the national sports associations. Within the scope of its responsibilities, the Confederation ensures that international sports federations find good framework conditions for their activities in Switzerland. In this context, the exemption of international sports federations from direct federal tax - which has been criticized in some quarters - should be mentioned. The federal government can also provide financial assistance for sports facilities of national importance. In connection with sports infrastructure, the Confederation prepares a National Sports Facilities Concept (NASAK), which shows the stock of existing sports facilities of national importance, the need for sports facilities as well as the realization prior-

ities and the cost implications. The FOSPO also runs a course and training center in Magglingen and one in Tenero.

In addition to these measures for the general promotion of sport and physical activity, the Confederation supports the promotion of performance-oriented junior sport and top-level sport. To this end, it provides, in particular, services to support top athletes in their performance development and supports the training and further education of coaches in performance-oriented junior sports and top sports. Of considerable importance in the promotion of top-level sport is also the possibility for top athletes to use their compulsory and voluntary military service for performance development and competitions. Based on the corresponding legal requirement, the Ordinance of 29 October 2003 on Military Sport (SR 512.38) regulates measures to promote top-level sport during military service. As such measures, the Confederation offers, for example, the top sports recruit school or employment as a temporary military person. Furthermore, the Confederation can support international sports events and congresses in Switzerland that are of European or worldwide significance, provided that the cantons contribute appropriately to the costs. Within this framework, the Confederation may contribute to the costs of bidding for and organizing international sports events and congresses. Finally, under the heading of fairness and safety, the Confederation creates the conditions for clean and transparent sport by combating the undesirable side effects of sport. To this end, it establishes anti-doping regulations and takes measures against competition manipulation. In addition, the existing legal basis, in the view advocated here, also provides an opportunity to combat systemic problems such as the physical and psychological abuses in sport as undesirable side effects. In particular, the federal government can make its financial support dependent on appropriate measures to combat, educate and control abuse within the associations. 15

3. Financial commitment of the Confederation, cantons and municipalities in the area of sport

As already mentioned, state sport promotion in Switzerland is characterized by the primacy of private commitment and the principle of subsidiarity. This means that private sports associations and sports clubs form the sponsorship and basis of Swiss sport. This goes hand in hand with a voluntary commitment that is difficult to quantify. This militia principle has "a long tradition" in Swiss 16 sport and relieves the state in financial terms. Moreover, the federal government and the cantons and municipalities finance only a small part of the total sports funding. The state's share of sports funding in Switzerland is estimated at 5%. In 2010, the federal government spent a total of CHF 190 million on sports, while the cantons spent CHF 232 million and the municipalities CHF 1.35 billion. In subsequent years, cantonal and municipal spending in favor of sport remained largely constant in total: in 2018, cantonal spending amounted to Fr. 290 million and that of the municipalities to Fr. 1.26 billion.

17 The Federal Act of September 29, 2017, on Money Games (Money Games Act, BGS; SR 935.51) obliges the cantons to use the net profits from lotteries and sports betting in full for charitable purposes, including in the area of sports (see also Art. 106 para. 6 BV). Around half of the cantonal expenditure in favor of sports is financed by the distribution of the net profits of the two national lotteries SWISSLOS Interkantonale Landeslotterie Genossenschaft and Société de la loterie de la Suisse romande. In 2020, the two lottery companies distributed a combined amount of Fr. 178 million for the benefit of Swiss sports. Of this amount, around CHF 120.9 million went to the cantons for the purpose of promoting mass sports and sports infrastructure. Fr. 57.1 million went to the Sport-Toto-Gesellschaft, which passed these funds on to Swiss Olympic, Swiss Football, Swiss Ice Hockey and Swiss Sports Aid. As of January 1, 2023, the (new) Foundation for the Promotion of Sports in Switzerland will take over the tasks of the Sport-Toto-Gesellschaft.

B. Paragraph 2: Sports School

18 Art. 68 para. 2 BV stipulates that the Confederation shall operate a sports school. The idea of a federal sports school arose under the impression of the Second World War in order to improve the military fitness of the (male) population. By federal decree of March 3, 1944, the Federal Gymnastics and Sports School in Magglingen was created with the purpose of training military instructors. Its operation was initially regulated by the ordinance of January 7, 1947, on the promotion of gymnastics and sports. In the course of the creation of the constitutional article, the sports school found an explicit constitutional anchoring in Art. 27quinquies para. 3 aBV. Since the total revision of the Federal Constitution in 1999, the operation of the - in the meantime renamed - Federal University of Sports Magglingen (EHSM) has been laid down in Art. 68 para. 2 BV. The Confederation is obliged to operate a sports school, since

the paragraph explicitly provides for the existence of a federal sports school. However, the Confederation has leeway in the concrete design of the sports school, both in terms of content and organization. Art. 68 para. 2 BV thus anchors a mere mandate to act. The position and tasks of the EHSM are then specified in federal legislation. Accordingly, the federal government runs a university for sports with sports science teaching, research and service as well as education and training in the tertiary sector.

The EHSM is an organizational unit of the FOSPO and contributes to the national promotion of sport and physical activity. In particular, it fulfills this task by playing an "essential role in the coordination of sports studies offered in Switzerland" and by engaging in "application-oriented and interdisciplinary sports science research and development." The EHSM enjoys autonomy in teaching and research. It is considered a higher education institution under the Federal Act of September 30, 2011, on the Promotion of Higher Education Institutions and Coordination in the Swiss Higher Education Sector (Higher Education Promotion and Coordination Act, HFKG; SR 414.20). The EHSM has three main tasks: it provides practice-oriented education and training, application-based research and development, and services. In the area of teaching, it offers a Bachelor's degree program and a Master's degree program. It can also offer continuing education courses and other continuing education programs. Of particular importance in the area of research and development is the fulfillment of federal departmental research tasks in the field of sport and exercise - namely for policy advice, expertise, evaluation and monitoring. It is thus "the federal government's research center in the field of sport". The (remunerated) services of the EHSM relate in particular to the areas of sports medicine, physiotherapy and performance diagnostics. In addition, the federal government can also support sports science research outside the EHSM in the form of research contributions. An essential element of the federal support for sports science research is a research concept, which the FOSPO develops for a period of four years at a time. The research concept fits into research policy planning and coordination under the Federal Act of 14 December 2012 on the Promotion of Research and Innovation (FIFG; SR 420.1). 19

C. Paragraph 3: Youth and school sports

20 According to Article 68(3) of the Federal Constitution, the Confederation may issue regulations on youth sports and make physical education compulsory in schools.

1. Youth sport

21 Art. 68 para. 3 BV initially grants the Confederation concurrent, subsequently derogatory legislative competence in the area of youth sports. The Confederation thus has the power to legislate conclusively in the area of youth sport beyond the promotion provided for in Art. 68 para. 1 BV. However, the Confederation has not yet issued any final regulations, which means that the cantons are still free to establish regulations on youth sports, provided they do not contradict the existing federal provisions (cf. Art. 49 para. 1 BV). Youth sport concerns the voluntary sport of children and young people inside and outside school. According to the existing legal regulation, youth sport in principle covers children from 1 January of the year in which they turn five. Participation in youth sports ends on December 31 of the year in which youth reach their 20th birthday.

22 While the federal government otherwise largely limits itself to supporting existing promotional measures, it runs its own program in the area of youth sports - the "Youth and Sports" program. This program is intended to support the development and development of children and young people and to enable them to experience sport in a holistic way. It also aims to promote sport that is suitable for children and young people, taking into account the principles of fairness and safety. It is intended to promote the embedding of children and young people in a sporting community and to support the development and development of young people from an educational, social and health point of view. On the one hand, the program is in the light of the general competence to promote sport and physical activity in the sense of Art. 68 Para. 1 BV. On the other hand, the federal government has conclusively regulated the program within the framework of its legislative competence of Art. 68 para. 3 BV. It assumes "essential execution tasks itself" and bears the "main responsibility" for the program, even if it is managed "in partnership" with the sports associations and partially executed by the cantons with their Y+S offices. Within the framework of this cooperation, the Confederation makes

contributions to courses and camps as well as to the cadre training of the cantons and private organizations.

2. School sport

The derogatory legislative competence of the Confederation in the area of school sports allows the federal legislator to intervene selectively in the school sovereignty of the cantons (cf. Art. 62 para. 2 of the Federal Constitution) and, in this course, to declare school sports compulsory. School sport was already compulsory from 1907 for boys from the seventh school year onwards and was fixed at three hours per week in the ordinance of 7 January 1947 on the promotion of gymnastics and sport. After the competence of the Confederation to declare school sport compulsory was enshrined in Art. 27quinquies para. 1 aBV, the Confederation declared gymnastics and physical education compulsory for all pupils in all elementary, secondary and vocational schools, including seminaries and teacher training schools. In Art. 1, para. 1, of the Ordinance of June 26, 1972, to the Federal Law on the Promotion of Gymnastics and Sports, the Federal Council again stipulated that at least three hours of gymnastics and sports instruction per week must be given at elementary and secondary schools. Now, the sports promotion legislation currently in force declares physical education to be compulsory in compulsory school and at the upper secondary level. Furthermore, the Sports Promotion Act stipulates that at least three lessons of physical education per week are compulsory in compulsory school. The Sports Promotion Ordinance also stipulates that at least 110 lessons of physical education must be provided regularly throughout the school year at secondary schools, which are no longer compulsory schools. In connection with this provision of the ordinance on secondary schools, the Federal Supreme Court concluded that the regulation of 110 lessons per school year was intended to allow for flexible implementation. The required regularity does not require that (also) three lessons of physical education are taught weekly at the middle schools. Beyond physical education, the cantons should promote daily sports and exercise opportunities as part of the school curriculum. 23

On the scope of federal competence in the area of school sports - i.e., on the question of whether the federal government may specify the compulsory school sports program in qualitative and quantitative terms - opinions differ, at least among scholars, while this question appears to be clarified in case 24 law. The doctrine essentially disagrees on whether Art. 68 para. 3 BV should rather be interpreted in isolation and based on a teleological interpretation, or whether the constitutional provision should be interpreted in the context of the educational constitution and therefore with special emphasis on its systematic position. Ehrenzeller holds the latter view: he argues against a federalist background that Art. 68 para. 3 BV should be read in the context of cantonal school sovereignty. Art. 62 para. 2 BV stipulates that the cantons ensure sufficient primary education. This also applied to school sport. Accordingly, the Confederation may not further specify what is to be considered sufficient with regard to school sports. The other view is expressed by Biaggini, who puts the emphasis in his argumentation on the sense and purpose of compulsory school sports. An obligation only makes sense if it is also implemented. If the federal government did not also have the authority to regulate the type and scope of the compulsory school sports program, the compulsory program could easily be undermined by insufficient cantonal implementation. Accordingly, Art. 68 para. 3 BV contains an implied federal competence to regulate the qualitative and quantitative minimum scope of school sports. The other doctrinal opinions basically acknowledge the federalist argument of cantonal school sovereignty, but add a constitutional-historical element to the debate. Since 1947, the compulsory school sports program has been explicitly endowed with three hours per week at the ordinance level. Neither in the context of the creation of the constitutional article in 1970 nor with the total revision of the Federal Constitution in 1999 or the reorganization of the constitutional provisions on education in 2006 was the scope of the compulsory school sports program effectively called into question. On each of these occasions, the people and the cantons could have expressed a different opinion on the regulation under ordinance law and could have formulated Art. 68 Para. 3 BV in a more concrete manner. Since such a concretization of the constitutional article did not take place, the majority is of the opinion that the federal government also has the constitutional authority to regulate the structure of the compulsory school sports program. Against this background and according to the view expressed here, the regulatory content of the sports promotion legislation on (compulsory) school sports proves to be in conformity with the constitution.

25 The debate - at least with regard to the quantitative scope of the compulsory school sports program - is also occasionally conducted by the cantons, since the cantonal implementation of the compulsory program presupposes the

availability of a sufficient (school) sports infrastructure and the reduction in the number of lessons of physical education would be accompanied by a cost saving. The discussion in this regard has also already been the subject of (federal) court proceedings. In this context, the Federal Supreme Court first held that the cancellation of gymnastics and sports lessons was in principle a permissible object of challenge, since the reduction of lessons was likely to affect the rights and duties of the students. The Federal Supreme Court then considered that the implementation of the federal requirement of three physical education lessons must in principle be open to judicial review in the light of the guarantee of legal recourse in Art. 29a of the Federal Constitution. In a landmark 2017 ruling, the Federal Supreme Court rebuked the canton of Geneva, which provided for fewer than three physical education lessons in its compulsory school timetable for the 2016/2017 school year. It held that it was undisputed that the canton of Geneva must provide three lessons of physical education in compulsory schools and that it did not comply with this federal requirement. The Federal Court concluded, "il appartient au canton d'introduire une troisième période d'éducation physique hebdomadaire pour tous les niveaux de l'école obligatoire dans les plus brefs délais."

The federal competence for physical education at vocational schools is not 26
controversial, since the federal government also has the authority to issue regulations on vocational education (cf. Art. 63 para. 1 BV). The Federal Council determines the minimum number of lessons and qualitative principles for physical education at vocational schools. Physical education is also compulsory at vocational schools, the extent of which depends on the basic vocational training. Finally, Art. 68 para. 3 BV contains an implicit competence to enact a minimum standard for the education and training of teachers who teach the compulsorily declared school sport. The justification for this competence follows the same logic and the same considerations that have already been explained with regard to the federal competence, according to which the Confederation may specify the compulsory school sports qualitatively and quantitatively. In this regard, however, the Sports Promotion Act merely provides that the Confederation, in cooperation with the cantons, may support the initial and continuing training of teachers who teach physical education.

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COMMENTARY ON

Art. 69 FC

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Art. 69 Culture

[1] Cultural matters are a cantonal responsibility.

[2] The Confederation may support cultural activities of national interest as well as art and music, in particular in the field of education.

[3] In the fulfilment of its duties, it shall take account of the cultural and linguistic diversity of the country.

CONTENT

I. HISTORICAL BACKGROUND

The Helvetic Constitution of 1798 was the first to establish a **cultural policy** 1
based on republican ideals within the Helvetic Republic. The promotion of national culture and the 'intellectual well-being' of the people was regarded as a state objective and a prerequisite for the material equality of citizens. The political tensions following the Sonderbund War of 1847 and the ongoing disputes over the status of culture in the emerging federal state prevented the inclusion of comprehensive cultural and educational provisions in the Federal Constitution of 1848. Nevertheless, the Confederation has supported cultural institutions since its inception. In 1849, it founded the Federal Archives, which it now operates under the name *Swiss* Federal Archives. A proposal put forward in the same year by the head of the Department of Home Affairs to promote art exhibitions and associations was rejected by the Federal Council. He is said to have justified this decision by citing cantonal responsibility for the promotion of the arts. From 1884 onwards, the Confederation supported institutions for arts and crafts and made a contribution to the Art Society. From 1887, the Confederation became more extensively involved in the promotion of the arts and founded the Federal Art Commission (EKK). In 1890, the Confederation laid the foundations for the establishment of the Swiss National Museum (now the Swiss National Museum), followed by the National Library (now the Swiss National Library).

The Confederation always regarded its role as complementary to existing 2
funding structures provided by municipalities, cantons and private patrons. It only assumed broader cultural policy responsibilities in the face of propaganda from neighbouring countries shortly before the outbreak of the Second World War. In 1939, it founded the Pro Helvetia Cultural Foundation and adopted the cultural programme of the **Spiritual National Defence**. In an attempt to counter the National Socialist film offensive, the Confederation also established the Swiss Film Chamber in 1938 and restricted film imports by law. An explicit transfer of powers from the cantons to the Confederation followed in 1958 (Art. 27^{ter} of the Federal Constitution) under the cultural-political pressure of the Cold War. This cultural funding, which was predominantly geared towards state interests, persisted for decades.

In particular, the social upheavals of the 1960s led to an opening up and 3
democratisation of cultural policy. A milestone was the final report published

in 1975 by the expert commission on Swiss cultural policy appointed by the Federal Council (the so-called Clottu Report). The report outlines a vision of a **democratic cultural policy** that understands culture as an expression of individual freedom and a prerequisite for democracy, and promotes it in its diverse forms.

4 In addition to the aforementioned powers in the field of film (Art. 27ter of the old Federal Constitution), from the 1960s onwards the Confederation was selectively responsible for other areas of culture (N. 10 f.), namely for the protection of cultural property within the framework of civil defence (Art. 22bis of the former Federal Constitution), for nature and heritage conservation (Art. 24^{sexies} of the former Federal Constitution) and for electronic media (Art. 55bis of the former Federal Constitution), as well as in the field of languages (Art. 116 of the former Federal Constitution). Efforts to further strengthen the **Federal Government's powers to promote culture** failed following the rejection at the ballot box of the 1981 Cultural Initiative, the rejection of the counter-draft in 1986 and the rejection of a cultural promotion article in 1994.

5 It was not until the completely revised FC that Art. 69 FC was to contain, for the first time, a more comprehensive **federal competence in cultural matters**. Draft 95 contained a cultural article which also provided for the promotion of understanding and exchange among the language communities, as well as the competence to enact regulations for the promotion of film and the regulation of the film market (Art. 73 Draft 95). The proposal was controversial during the consultation process, which is why a (declaratory) reservation in favour of cantonal cultural competence was included in Art. 83 Draft 96. Discussions in the constitutional commissions led to the separation of cultural promotion and language regulations into separate articles. The Federal Constitution was supplemented with a clause going beyond the mandate to update legislation, stating that the Confederation promotes 'art and music, particularly in the field of education' (Art. 69 para. 2).

II. THE CONSTITUTIONAL CONCEPT OF CULTURE

6 The concept of culture is difficult to define. In the academic world, the term is treated differently depending on the discipline; a definitive state definition of culture would be problematic. The term appears in numerous provisions of the Federal Constitution, yet the Constitution refrains from providing a **definition**. Swiss law does not recognise a uniform concept of culture. In the in-

dividual provisions of the Federal Constitution, the concept of culture is sometimes used in a broader sense (Art. 2 para. 2 FC), and sometimes in a narrower sense (Art. 69 FC), which is why the constitutional concept of culture must be interpreted in the context of the purpose and factual context of each provision. The Confederation regularly refers to the (broad) concept of culture from the UNESCO World Conference in Mexico (1982). According to this, culture 'should be regarded as the totality of the unique spiritual, material, intellectual and emotional aspects that characterise a society or a social group. This includes not only art and literature, but also ways of life, fundamental human rights, value systems, traditions and beliefs'. The Declaration of the UNESCO World Conference on Cultural Policies and Sustainable Development (known as MONDIACULT 2022) confirms this concept of culture. By adopting the declaration, some 150 states – including Switzerland – have spoken out in favour of recognising culture as a global public good (common good) with intrinsic value.

In its application to the division of powers between the Confederation and the cantons, the concept of culture requires a pragmatic qualification. The federal competence for the promotion of culture under Art. 69 para. 2 of the FC covers **culture in the narrower sense**. This generally includes the promotion of cultural creation, the dissemination of art and culture, the protection of cultural property, and the management or promotion of cultural institutions such as museums, archives or libraries. 7

It is undisputed that the concept of culture under Article 69 of the FC also encompasses artistic activities and the dissemination of art, and that in such cases the freedom of the arts (Article 21 of the FC) applies. The Federal Supreme Court has defined the constitutional **concept of art** in open-ended terms, which is why decision-makers must determine the artistic value of a work on a case-by-case basis. In doing so, one must take into account formal, material and institutional structural characteristics inherent to art, whilst also considering the artistic self-image. The distinction between cultural promotion and the promotion of the arts as a subcategory is relevant, amongst other reasons, because federal powers in the field of arts promotion are more comprehensive (see N. 20). 8

The newer concept of **intangible cultural heritage** (Art. 1(a)(no. 1) KFG) extends the scope of cultural promotion to include social traditions and practices which, according to the Federal Inventory of Living Traditions, encom- 9 pass in particular the areas of 'social practices', 'oral expressions' and 'traditional crafts'. In practice, drawing the line can be challenging. The competences of other cultural sectors in the broader sense, such as nature conservation and heritage protection, education and science, are enshrined in specific constitutional articles. In this context, UNESCO's comprehensive and open concept of culture remains the point of reference for all cultural policy.

III. OBLIGATIONS UNDER INTERNATIONAL LAW

10 The promotion of culture by the Confederation and the cantons pursuant to Art. 69 of the FC does not take place in a legal vacuum. Rather, both the Confederation and the cantons are bound, within the scope of their respective competences, by **obligations under international law** concerning the protection and promotion of culture. International agreements and conventions underscore the outstanding importance of culture for peace, human dignity and social cohesion. They give concrete form to and reinforce Switzerland's cultural policy mandate and create a binding framework within which state cultural policy must operate at national and cantonal level.

11 Even early **international humanitarian law** protected cultural property (Art. 27 of the Hague Convention (1907), and later also the Hague Convention for the Protection of Cultural Property (1954)), which underscores the paramount importance of culture for modern society. The looting and destruction of thousands upon thousands of cultural assets during the Second World War was reflected in the post-war international legal order. The Charter of the United Nations obliges the contracting parties to cooperate in the field of culture and to promote stability, welfare and peace (Art. 55(b) UN Charter). The United Nations Educational, Scientific and Cultural Organisation (UNESCO), founded in 1945 to fulfil this mandate and of which Switzerland has been a member since 1949, is committed to the preservation and promotion of culture as a means of cooperation and peacebuilding.

12 Switzerland has ratified several **international conventions** under the auspices of UNESCO, which concern the protection of cultural heritage, the fight against illicit trafficking in cultural property, and the promotion of the diversity of cultural expressions. These instruments each define their own scope of application and pursue different objectives. The protection and promotion of culture are also an expression of the human rights obligations arising from the human rights treaties binding on Switzerland (see N. 24).

At the **regional level**, Switzerland has committed itself to safeguarding and preserving culture within the European context by ratifying a series of cultural conventions adopted under the auspices of the Council of Europe. Within this framework, the protection of cultural heritage has increasingly become a matter of human rights protection. The European Court of Human Rights recognises the protection of cultural property as a legitimate public interest in a democratic society. It has also addressed the protection and promotion of culture as an integral part of various Convention rights (see N. 24). 13

IV. COMMENTARY IN THE STRICT SENSE

A. Cultural sovereignty of the cantons (para. 1)

The competence to protect and promote culture lies with the cantons. This follows from the general principles governing the division of powers between the Confederation and the cantons (Art. 3 in conjunction with Art. 42 of the FC). The non-exclusive reservation in Art. 69 para. 1 of the FC confirms the cantons' original competence in the field of culture. The inclusion of this provision in the new FC demonstrates that the **federal division of powers** in the field of culture is to continue to be of great importance. 14

The cantons pursue cultural promotion according to their own criteria. This institutionalised **cultural federalism** reflects Switzerland's linguistic and cultural diversity, of which the cantons are the principal bearers. The majority of cantonal constitutions contain a state mandate for cultural promotion. In many cantons, the cultural mandate encompasses not only the promotion of art and culture but also the protection and preservation of cultural assets. Some cantons also take on the task of preserving customs or folk culture. The extent to which the cantons interpret their responsibilities in the cultural sphere is generally determined by the provisions of the cantonal constitutions, the cantonal cultural promotion laws and cantonal funding practices. 15

Intercantonal cooperation in the field of culture has been carried out since 1986 by the Conference of Cantonal Cultural Representatives (KBK). Since 2011, the Confederation, cantons and municipalities have been exchanging views on cultural policy within the framework of the National Cultural Dialogue and adopting recommendations, reports and strategies on the topics addressed. Individual cantons and municipalities have concluded agreements amongst themselves for the mutual support of cultural institutions. Further- 16 more, the Money Gaming Act obliges the cantons to use the net profits from lotteries and sports betting in full for charitable purposes, including culture (Art. 125 para. 1 BGS). The cantons thus receive a substantial annual sum, which they (must) use, amongst other things, to promote culture.

B. The Confederation's powers to promote culture (para. 2)

1. Support for cultural endeavours in the national interest (para. 2, part 1)

17 Under Art. 69 para. 2 of the FC, the Confederation may 'support cultural endeavours of national interest'. According to prevailing legal opinion, this implies a **parallel competence for cultural promotion** on the part of the Confederation, although the Confederation's competence is less comprehensive than the cantons' original competence for cultural promotion. This is evident, on the one hand, in the wording, according to which the Confederation may 'support' cultural endeavours of national interest. The term implies a certain degree of restraint on the part of the Confederation in the promotion of culture. However, particularly in those areas where the Confederation has been pursuing an independent promotion policy for decades, there is *de facto* also an independent competence of the Confederation to promote culture. The discretionary wording grants the Confederation a wide margin of discretion in the exercise of its competence.

18 The Confederation's competence to provide funding is limited to cultural endeavours of **national interest**. In view of the significant reservations expressed by the cantons regarding the inclusion of this provision in the revised Federal Constitution, the term must be interpreted narrowly. In interpreting the constitutional concept of 'national interest', reference may be made, amongst other things, to its statutory definition in Art. 6 para. 2 of the Culture Promotion Act. A national interest is deemed to exist, in particular, where a cultural asset is important for Switzerland or its linguistic communities, a project has supra-regional implications, or a person's artistic talent is of national or international significance. This also applies where an organisation contributes to the networking of cultural practitioners, a project promotes innovation, or a cultural event has a national or international reach; likewise, where a project makes a significant contribution to national or international

cultural exchange. The Confederation's competence to promote culture in the national interest also includes the protection of cultural property (see N. 44).

The list in Art. 6 para. 2 KFG is illustrative; the Confederation retains considerable **discretion**. The Confederation's cultural policy documents therefore reflect a decidedly broad interpretation of the provision. Under such an interpretation, federal cultural promotion increasingly resembles a parallel federal competence. 19

2. Promotion of the arts and music in the field of education (para. 2, part 2)

With regard to the promotion of the arts and music, particularly in the field of 20 education, Art. 69 para. 3 of the FC establishes an **independent promotional competence** as a parallel federal competence. The Confederation's competence in this area is more comprehensive than that in the field of culture in general. Where the Confederation promotes education in the arts and music, it must respect cantonal educational sovereignty, which particularly favours support schemes in the extracurricular sector.

Article 67a of the FC supplements both the education articles and the culture 21 articles of the FC. As a *lex specialis* to Article 69(2) of the FC, the provision assigns the Confederation more extensive promotion powers in the field of music. It grants the Confederation a power to provide support in the field of **musical education**, in particular for children and young people (Art. 67a para. 1 and para. 2, first sentence, of the FC). It obliges the cantons to promote musical education and to work towards high-quality music teaching in schools (Art. 67a para. 1 and para. 2, first sentence, of the FC). The aim is to strengthen the musical education of children and young people. In implementation of Art. 67a para. 3 of the FC and the new Art. 12 para. 4 of the Culture Promotion Act, the 'Young Musical Talents' Ordinance supplements federal legislation. The 'Young Musical Talents' programme aims to identify children and young people with above-average musical ability and potential at an early stage and to support them in a targeted and sustainable manner. The Confederation is responsible for the overall management of the programme and sets the minimum requirements for cantonal funding applications.

C. Respect for the country's cultural and linguistic diversity (para. 3)

22 Article 69(3) of the FC obliges the Confederation, in fulfilling its cultural responsibilities, to respect the **cultural and linguistic diversity** of the country. Cultural diversity is an essential feature of Switzerland. It is institutionally enshrined in the preamble to the FC, in its purpose clause (Art. 2 para. 2 of the FC), in the individual fundamental rights (in particular Art. 18 (freedom of language), 21 (freedom of the arts), 15 FC (freedom of religion)) and in the relevant articles on competences. The emphasis on cultural diversity is balanced by the preservation of Switzerland as a political entity. The Swiss Federal Constitution is characterised by the pursuit of unity in diversity. This tension between diversity and unity is also reflected in the provisions on the promotion of culture.

23 Due to the **open concept of culture** (see N. 6 f.), consideration for cultural diversity is not limited to Switzerland's traditional four-language system (Art. 4 FC) and regional diversity. The open concept of culture is a prerequisite for a contemporary understanding of culture and opens the Constitution to cultural concerns of the most diverse kinds, as well as to the constant – and sometimes surprising – development of art and culture. The Federal Constitution protects cultural diversity, however it may appear as 'a dynamic, even fluid element'. The aim is to ensure the diversity and continuous development of cultural activities and to enable all sections of the population to participate in cultural life.

V. PROTECTION OF FUNDAMENTAL RIGHTS

A. Ensuring favourable framework conditions

24 Cultural promotion by the Confederation and the cantons, like all state action, is bound by fundamental rights. The Federal Constitution obliges the state to **realise fundamental rights** throughout the legal system (Art. 35 FC) . Several fundamental and human rights simultaneously oblige the Confederation and the cantons, at a policy level, to preserve and promote a liberal cultural life, in particular freedom of the arts (Art. 21 of the FC). However, a legal entitlement to the allocation of subsidies for culture cannot be derived either from fundamental rights or from Art. 69 of the FC.

In the field of culture, the **constitutional duty to promote** primarily entails the task of creating political and legal framework conditions that enable cultural exchange, education and diverse cultural production, and that safeguard the country's 'basic cultural provision'. The promotion of culture is a prerequisite for the exercise of fundamental freedoms (freedom *through* the state). Access to and engagement with the cultural products of others is an important component of human experience and a prerequisite for multidimensional personal development through education, art, science and other cultural goods and practices. At a policy level, the mandate to realise fundamental rights entails the duty to create the legal and practical conditions on which art and culture are based, including the protection, preservation, promotion and dissemination of culture. 25

International human rights treaties also highlight the interconnection between cultural promotion and individual spheres of freedom. Article 27 of the Universal Declaration of Human Rights protects the right to freely participate in the cultural life of the community and to enjoy the arts. Underlying this provision is the idea that only free participation in the cultural life of a society enables the *free* development of a person. The same idea is found in Article 15 of the UN Covenant I. According to the Social Committee, the promotion and respect of cultural rights are prerequisites for the protection of human dignity and fulfilling interactions in a culturally diverse world. In a similar vein, Article 27 of the UN Covenant II protects the right of minorities to 'maintain their own cultural life'. UNESCO, too, has repeatedly emphasised that culture is a social phenomenon arising from the combination of individual creative activities and cooperation. The European Court of Human Rights protects various aspects of cultural participation, in particular through the application of the freedom of expression (Article 10 of the ECHR) and the right to respect for private and family life (Article 8 of the ECHR). 26

B. Duties of prevention and protection

At the level of prevention and protection, fundamental rights in general and artistic freedom in particular ensure a **prohibition on the instrumentalisation** of culture for state purposes. State cultural funding serves the cultural practitioners it supports. It must be geared towards supporting personal development and cultural diversity. Conversely, this means that the state may exercise only limited control over state-funded culture. 27

28 Within the framework of public administration, the authorities are obliged to approach funded culture with an objective and impartial attitude. Whether the state has an **obligation of neutrality** towards culture has only been addressed to a limited extent in legal scholarship and case law. In principle, the state must ensure that funding measures in the cultural sector – just like those for the media or academia – are value-neutral and thus structure all its actions in an 'opinion-neutral' manner. For state cultural institutions, the obligation of neutrality is linked to procedural and substantive requirements (see N. 27). The duty of neutrality is breached, for example, when the state takes a one-sided, evaluative stance on works of art protected by fundamental rights (prohibition on evaluation). From today's perspective, an official statement that an artistically designed tomb "barely exceeds the standard of a garden sculpture" is problematic. In the case of funding measures, there is a prohibition on identification. The claim that art is funded by the state "to enhance our country's standing, and not to denigrate it" must therefore be rejected.

29 This does not, however, mean that the state must adopt an indifferent attitude towards cultural activities in a negative sense. Rather, the state is obliged to guarantee cultural diversity (see N. 19) and, where appropriate, to promote it; that is, to take active measures and – where necessary – to take a stand and implement protective measures.

An expression of the constitutional **duty to protect** is to promote culture whilst balancing it against other protected legal interests, such as protection against discrimination or overriding public interests. If cultural forms of expression infringe the fundamental rights of third parties or other protected legal interests in an unjustifiable manner, exclusion from cultural funding instruments may be justified in justified individual cases. Where there is a suspicion that cultural works or activities infringe upon protected legal interests, a careful examination and weighing up of the conflicting interests must be carried out on a case-by-case basis, taking the overall context into account; procedural rights must be upheld (in particular the right to be heard (Art. 29 para. 2 of the FC)) and the authority must exercise the greatest possible objectivity and restraint in its decision.

C. Procedural guarantees

30 Even where the state exercises restraint, cultural promotion exerts a decisive influence on culture through the allocation of state resources. This makes it

all the more crucial that the instruments and procedures of cultural promotion comply with the **requirements of the rule of law**. The prohibition of arbitrariness (Art. 9 of the FC), the principle of equality before the law (Art. 8 of the FC) and procedural rights (Art. 29 et seq. of the FC) must be observed in state cultural promotion in general and in the allocation of subsidies in particular. Of particular importance are the equitable structure of funding, the definition of balanced funding criteria, the composition of the competent body, the transparent justification of funding decisions and legal protection.

When awarding funding measures, the right to equal and fair treatment under 31
Art. 29 para. 1 of the FC must be guaranteed. The guarantee of the right to be heard (Art. 29 para. 2 of the FC) requires that funding procedures be structured in such a way that those affected can put forward their arguments. This is generally fulfilled by the project application. The authority must assess the substance of the application and give reasons for its decision. The **reasons** must be formulated in such a way that they address the content of the funding application and set out the grounds for the decision in a comprehensible manner. The scope of the requirement to state reasons depends on the circumstances of the individual case and the authority's discretion.

The Cultural Promotion Act excludes the **ground of inappropriateness** in 32
appeal proceedings against financial grants (Art. 26 para. 2 CPA). Some legal scholars view this restriction critically in light of the guarantee of access to the courts (Art. 29a of the FC). Given the precarious nature of the cultural sector and the sometimes heavy reliance of cultural practitioners and cultural institutions on state subsidies, an extension of legal protection would be welcome. The Federal Supreme Court ruled that at least the absolute exclusion of a legal remedy against decisions concerning cultural funding constituted a violation of the guarantee of access to the courts (Art. 29a of the FC).

VI. STRUCTURE OF CULTURAL FUNDING

A. At federal level

The **Federal Act on the Promotion of Culture (KFG)** sets out the federal 33
government's cultural mandate in concrete terms. It governs the Confederation's cultural promotion in the areas of the preservation of cultural heritage, artistic and cultural creation (including the promotion of emerging talent), the dissemination of art and culture, exchange between cultural and linguistic

communities in Switzerland, cultural exchange with other countries, and the organisation of the Pro Helvetia Foundation (Art. 1 KFG). This is without prejudice to a considerable number of special laws governing selected areas of federal cultural promotion. Of particular relevance are the acts concerning the National Library, the federal museums and collections, film, nature and heritage conservation, and the transfer of cultural property.

34 To implement its cultural responsibilities, the Confederation has four **cultural institutions** as the main bodies responsible for its cultural policy: The Federal Office of Culture (FOC), the Pro Helvetia Foundation, the Swiss National Library and the Swiss National Museum. The Cultural Dispatch adopted by the Federal Assembly specifies the federal government's funding priorities and sets out federal expenditure on culture for a four-year funding period (Art. 27 KFG).

35 The Confederation has various **resources** at its disposal for the promotion of culture and cultural participation. The Confederation promotes the creation of art and culture and cultural participation through, amongst other things, funding and prizes, thereby supporting both excellence and broad-based participation. The preservation of works of art and cultural assets takes place within the framework of cultural property protection law, as well as through measures for archiving and storage in federal museums, collections and archives (see N. 44 f.). Support for cultural outreach at federal level is primarily provided through the funding of exhibitions and outreach programmes in cultural institutions, such as the Swiss National Museum.

B. In the cantons

36 Most cantons have a cultural promotion act that gives concrete form to their constitutional **cultural mandate** (see N. 13). On this basis, they set out the guidelines for their cultural policy, as well as the priorities and budgetary measures, in each legislative period. Implementation is generally carried out jointly by the canton and the municipalities, based on an internal division of responsibilities, some of which is expressly enshrined in law. Municipalities have varying degrees of discretion in developing their cultural promotion policies. The material scope of the cantonal cultural promotion laws varies. As a rule, they cover the promotion of cultural and artistic creation, outreach, artistic education, access to culture, cultural participation, cultural heritage and the organisation of cantonal cultural institutions. In some cantons, the

protection of tangible and/or intangible cultural heritage is regulated by specific legislation.

The organisation of the cantonal bodies responsible for cultural promotion falls within the **autonomy** of the cantons. As the cantons are also responsible, among other things, for implementing international agreements in the cultural sphere, it may be necessary to adapt their institutional structures accordingly in order to meet international obligations (see N. 6), such as following Switzerland's ratification of the Convention for the Safeguarding of the Intangible Cultural Heritage (see N. 10). The cantons of Fribourg and Vaud have specific structures for intangible cultural heritage. 37

Most cantons operate according to the **principle of subsidiarity**, whereby promotion is primarily the responsibility of private individuals and private or public organisations. The forms of cultural promotion are diverse. Key promotional measures include financial contributions in the form of one-off or recurring subsidies; in addition, other forms of support may be provided for by law, such as the awarding of cultural prizes and grants, the purchase of works, or the provision—whether free of charge or for a fee—of production and outreach spaces, infrastructure or personnel. 38

C. Support in emergency situations

The duty to support culture applies particularly in emergency situations, such as pandemics, armed conflicts, natural disasters or cyberattacks. This stems from the great importance attached to culture in a federal state, as well as an awareness of its **systemically significant role** in a pluralistic democracy. Public funding of culture contributes to the democratic development of the community and fosters an openness to the ideas of others, which is essential for the exercise of citizens' most fundamental rights and duties. 39

The COVID-19 pandemic between 2020 and 2022 confronted the entire cultural sector with considerable economic and structural difficulties. A series of urgent measures were taken to mitigate the social and economic consequences for cultural practitioners and cultural institutions. The measures pursued a threefold objective, namely to mitigate the economic consequences of the pandemic for cultural enterprises, cultural practitioners and amateur cultural associations, to support cultural enterprises in adapting to the new conditions, and to preserve cultural diversity (Art. 1 **Covid-19 Culture Ordi-** 40

nance). The decentralised management of these measures, as well as the enhanced cooperation between state actors at all federal levels, civil society and the private sector, were assessed positively in retrospect. However, the pandemic also highlighted systemic weaknesses in the cultural sector, in particular the precarious working conditions of cultural practitioners and their lack of social security.

41 Emergency situations underscore the need for **continuous state funding for culture** through close cooperation between the Confederation, cantons and municipalities, as well as state protective measures, including enhanced protection of cultural heritage. As these situations often transcend national borders, international instruments such as the 1954 Hague Convention and the 1970 UNESCO Convention are particularly significant. Furthermore, in an environment shaped by climate change, the issue of sustainability is becoming increasingly important. As public actors, cultural institutions in particular bear a responsibility towards society in this regard. They must commit to sustainable development within the scope of their capabilities. The creation of a normative framework for action that spans the cultural competences of the Confederation and the cantons is crucial to ensuring a rapid and effective response to current and future emergencies of all kinds.

D. Supporting the digital transformation of the cultural sector

42 The **digital transformation** offers new opportunities for the cultural sector. However, it also presents a major challenge for the entire sector and is leading to profound changes in all phases of cultural creation. New channels for the dissemination and communication of culture are emerging, as are new means for their archiving and preservation. Blockchain technologies, streaming platforms and the increasing use of artificial intelligence in cultural production and distribution are redefining the relationships between cultural practitioners, institutions and the public. These developments not only raise significant data protection issues (Art. 13 of the FC), but also present new economic challenges relating to copyright, fair remuneration and the equitable distribution of economic returns (Art. 27 of the FC). At the same time, they affect fundamental rights such as freedom of the arts (Art. 21 of the FC) and freedom of expression (Art. 16 of the FC).

43 The Confederation has made the digital transformation a priority of its cultural policy and intends to develop funding instruments that take account of the

new digital forms of production and distribution. Within the framework of its constitutional obligations to promote culture, it bears a particular responsibility to create favourable conditions for equitable, accessible and legally secure **digital infrastructures** and to promote digital skills in the cultural sector. The Confederation and the cantons are called upon, within the scope of their respective competences, to respond appropriately to this development, for example through support measures or by adapting legal frameworks, such as copyright law.

VII. PROTECTION OF CULTURAL PROPERTY

A. Purpose and Legal Basis

The **protection of cultural property** also falls within the scope of cultural promotion within the meaning of Art. 69 para. 2 of the FC. The protection of cultural property is a prerequisite for cultural diversity and participation. The law on cultural property aims to protect cultural property from destruction, theft, looting and illegal import and export. 44

Cultural property is defined as property which, for religious or secular reasons, is significant for archaeology, prehistory, history, literature, art or science and is listed in one of the categories of the list of cultural property contained in the 1970 UNESCO Convention (Art. 2 para. 1 KGTG). Switzerland has ratified the UNESCO Convention on the Protection of Cultural Property. With the ratification of the UNESCO Convention on the Protection of the Underwater Cultural Heritage, the definition of cultural property in Art. 2 para. 1 KGTG was supplemented to include the definition of underwater cultural heritage as set out in the Convention. In addition to these two international legal instruments, a number of other international conventions regulate the details of the protection of cultural property. The Confederation has fulfilled its obligation to implement its international legal obligations in domestic law through the Cultural Property Transfer Act. This regulates the import of cultural property into Switzerland, its transit and export, and its return from Switzerland (Art. 1 KGTG). 45

Trade in movable cultural property is subject to restrictions in order to combat illicit trade. In regulating trade in movable cultural property, the Confederation also relies on its power to **regulate private-sector activities** under Article 95 para. 1 of the FC. It is a matter of debate to what extent the protec- 46 tion of cultural property may interfere with the free market. The public interest in regulating the free market to protect cultural property is recognised in principle under both international law and constitutional law. In its judgment in *Beyeler v. Italy*, the ECtHR recognised Italy's control of the cultural property market as being in the public interest for the protection of a country's cultural and artistic heritage. According to the ECtHR, Contracting States have, within the framework of the protection of property (Art. 1, 1st Additional Protocol to the ECHR of 20 March 1952 (not ratified by Switzerland)), a certain margin of discretion to assess what constitutes the protection of cultural property in the public interest. This balancing of interests remains challenging in individual cases and must not be exploited for purposes unrelated to the protection of cultural property, such as the trade in cultural property.

B. Dealing with culturally sensitive artefacts

47 In 1998, Switzerland adopted the 'Washington Guidelines' (also known as the Washington Principles), which set out the principles for the return of cultural property belonging to victims of the Holocaust and other victims of Nazi persecution. Within this framework, the Confederation has taken a series of measures to identify looted cultural property and implement the guidelines, including the establishment of a contact point for looted art and the allocation of funds for provenance research. By adopting the so-called Pult Motion, the Federal Assembly has taken a further step towards implementing the Washington Principles and has obliged the Federal Government to establish a **commission** to assess relevant requests. With the entry into force of the Ordinance on the Independent Commission for Culturally Controversial Heritage (VUKBK) on 1 January 2024, a permanent administrative commission with an advisory and preparatory function is to be established within the meaning of Art. 8a para. 2 RVOV. The adopted Ordinance raises a number of legitimate questions, particularly regarding the principle of legality, the scope of application and the envisaged procedure. With the partial revision of the KGTG, the Commission was subsequently provided with a formal legal basis and its tasks were defined. Consequently, the Federal Council replaced the VUKBK with the Ordinance on the Commission for Culturally Significant Heritage with a Historical Burden (VKHBK) and appointed the members of the Commission for Culturally Significant Heritage with a Historical Burden (KHBK). The Commission commenced its work shortly thereafter and is, among other things, drafting procedural rules for the handling of individual cases. By inter-

national standards, this is the first commission to deal with restitutions arising from both the Nazi and colonial contexts.

Given the limited federal powers in the field of culture, it is questionable whether the establishment of a commission that makes recommendations on the return of works of art or other cultural property, for example from the collections of **cantonal museums**, falls within the federal government's remit. This question, which was left open in Parliament, will need to be answered when a specific case arises. 48

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COMMENTARY ON

Art. 74 FC

A commentary by Clémence Demay

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Art. 74 Protection of the environment

[1] The Confederation shall legislate on the protection of the population and its natural environment against damage or nuisance.

[2] It shall ensure that such damage or nuisance is avoided. The costs of avoiding or eliminating such damage or nuisance are borne by those responsible for causing it.

[3] The Cantons are responsible for the implementation of the relevant federal regulations, except where the law reserves this duty for the Confederation.

CONTENT

I. ORIGIN AND CONTEXT

Article 74 of the Constitution—first introduced in 1971—is the result of a long legislative debate. Two observations formed the backdrop to this debate: the increase in pollution during the period of economic growth following World War II and the need to address these nuisances. These considerations, coupled with a convergence of political factors favorable to taking into account the need to protect the environment, were the driving forces behind the discussions. This constitutional provision thus evolved in tandem with **political, collective, and health awareness** of ecological fragility and the intrinsic link between the environment and human existence. The progression of these concerns in public international law also played a crucial role in the evolution of Article 74 of the Constitution. 1

In this context, the purpose of this provision is to clarify the Confederation's powers in the field of environmental protection in the broadest sense and to serve as a guideline, alongside the principle of sustainable development (Art. 73 Cst.), for Section 4 of Chapter 2 of Title 3 of the Constitution entitled "Environment and Spatial Planning." Art. 74 Cst. introduces the **"catalogue of powers"** of the Confederation, the cantons, and the municipalities in the field of the environment. This catalog has been formed in successive layers and reflects the fragmentation of environmental law sources within the Swiss legal system, as the subject matter has become more complex and developed in line with the gradual increase in scientific knowledge in this field. 2

A. Art. 24^{septies} aCst.

Art. 74 of the current Constitution is a reproduction of Art. 24^{septies} aCst. This first version of environmental competence was introduced following a parliamentary motion tabled by National Council member **Julius Binder** of the Christian Democratic Party on March 13, 1964, at a time when Switzerland was experiencing a significant increase in pollution. In his speech, the politician urged the Swiss authorities to take measures to combat noise, vibrations, and smoke or gas emissions, which were "increasing at an alarming rate [...] and posing a significant danger to human and animal health." His text received widespread attention when it was submitted. Indeed, it aimed to combine an anthropocentric and ecocentric approach to environmental protection, which distinguished it from other positions at the time and enabled it to gain support 3 from a wide range of stakeholders. Parliament adopted the Binder motion without opposition, although the majority of the Federal Council was against it. The Federal Council was then obliged to act on it and chose to do so by introducing a suitable provision on environmental protection into the Constitution, which reproduced the wording of the motion.

4 Before the adoption of Article 24^{septies} aCst., **the environment** was certainly mentioned in the Constitution, but only specific elements such as water, forests, and heritage were included. It was primarily addressed at the federal level through police regulations related to issues arising from the exercise of hunting and fishing rights, and its protection was ensured by initiatives taken at the cantonal level. At that time, the environment was a subject of legal concern in federal legislation mainly because of its hazards—such as floods or landslides, for example—or through specific sectoral issues (combating deforestation, regulating the chemical industry and its water pollution, etc.). It was not addressed in a **holistic** manner, taking into account its essential qualities for human and non-human life. Only spatial planning included an environmental component at that time, but it remained marginal.

5 It was not until the second half of the 20th century that the concept of the environment found its place in the Constitution as a subject of protection in its own right.

In its 1970 message on the introduction of **Art. 24^{septies} aCst.,** the Federal Council stated that this provision was intended to serve as the basis for "general protection under public law against harmful and inconvenient effects ." *De facto*, in the face of increasing pollution, the Binder motion had revealed the inadequacy of the existing legislative framework—in particular the provisions concerning neighbor law and private liability—to deal with the scale of the damage and its consequences. The Federal Council, following this observation, considered that there was a lack of specialized expertise in the field of the environment, a need to adopt harmonized measures to protect it, but also that the cantons had made only limited use of their power to regulate environmental protection, so that there was a pressing need to remedy this lack of action. The Federal Council's **areas of priority concern** in its Message were primarily the deterioration in air quality and the increase in noise pollution linked to industry. In addition, in support of its Message, the Federal Council emphasized what seemed obvious: the growing explosion of pollution and damage to the environment is “always [the product of] human activity” and not a contingent terrestrial process, as some members of the public and certain political circles have since tried to argue.

Art. 24^{septies} was **adopted by a large majority of the population in 1971**, following a consultation process that received mostly enthusiastic feedback. Art. 24^{septies} aCst. thus confirmed the federal government's authority to legislate and take measures to combat harmful and/or nuisance damage. 6

B. The rise of international environmental law and the adoption of the LPE

After a period of unbridled pollution linked to the economic recovery in the years following the Second World War, the 1970s heralded the beginning of a **shift towards environmental protection** in Swiss law. The political debate was dominated by public concern about the decline of forests, in addition to the threat of pollution. In this context, the adoption of Art. 24^{septies} aCst. offered some relief to the electorate, as it appeared to demonstrate a political will to take action and adopt – in the near future – legislation providing general protection for the environment. 7

On the international stage, due to the supranational and cross-border nature of the issues at stake – the effects of pollution know no borders and certain common goods are at risk of significant degradation or even disappearance – states also took a stand. This led to the rise of international environmental law. Under the auspices of the United Nations, a first conference on the environment was organized. This led in 1972 to the **Stockholm Declaration** and the creation of the **United Nations Environment Programme** (UNEP). Similar to Art. 24^{septies} aCst., Principle 2 of this declaration reflects the commitment of states to preserving the environment and calls for the fight against various forms of pollution. 8

Although this decade saw a flurry of activity on the issue of threats to the environment, 14 years passed between the adoption of Art. 24^{septies} aCst and its implementation through the **Environmental Protection Act of October 7, 1983** (LPE), which came into force on January 1, 1985. However, legislative work began quickly after the adoption of the constitutional provision, under the aegis of a commission of experts chaired by Prof. Leo Schürmann. Nevertheless, the preliminary draft submitted for consultation in 1974 was considered too ambitious by economic circles and certain political groups, as it pro- 9 vided, in particular, for the possibility of compelling the cantons to adopt implementing standards. In retrospect, the text can be described as "visionary" because of its reference to the concept of "sustainable development." Faced with criticism of the draft and for political reasons, the Federal Councilor in charge of the dossier opted for inaction until 1977, when a new commission of experts presented a revised draft. This new draft incorporated developments in international environmental law that had taken place in the meantime, as well as the criticisms made during the first consultation in 1974, which enabled it to obtain the approval of the various political parties. The LPE was therefore adopted on October 7, 1983, at the end of this tedious process.

10 Art. 1 para. 2 LPE enshrines the principles of prevention and precaution (see II.B and II.C below) and Art. 2 LPE enshrines the "polluter pays" principle (see II.D below), which were subsequently incorporated into Art. 74 para. 2 of the Constitution. Although this federal law is not the only one that gives concrete expression to the constitutional mandate to protect the environment, it plays a central role in this regard due to its cross-cutting and general nature. Legal doctrine also presents the LPE as a kind of "**general section**" of environmental law.

11 A decade after the process that led to the adoption of the LPE, international environmental law also developed. A new United Nations conference was held in Rio between June 3 and 14, 1992. It resulted in a new Declaration that specifies the commitment of States to environmental protection and invites them to legislate on this subject. The United Nations Framework Convention on Climate Change (UNFCCC) was adopted on this occasion. It reflects the evolution of States' environmental concerns in the face of specific threats such as climate change, biodiversity loss, and desertification. The UNFCCC enshrines the principle of common but differentiated responsibility of actors in global warming and generalizes the principle of causality. It was in light of these various principles that the wording of Art. 24septies aCst. was amended during the total revision of the Federal Constitution in 1999.

12 As part of this **1999 revision of the Constitution**, it was decided to amend the text of Art. 24^{septies} aCst. to include a reference to these general principles and to remove references to noise and air pollution, in order to give this provision a comprehensive scope. The Chambers considered the text of the provisions relating to environmental powers to be consensual. Only their reorganisation within the new title of the section "Environment and spatial plan-

ning" was the subject of discussion during the sessions. Ultimately, the Chambers agreed that federal environmental powers should take precedence over those relating to spatial planning, as they are a prerequisite for the latter. Art. $24^{septies}$ aCst. thus became Art. 74 Cst.

In May 2018, a federal popular initiative was submitted to amend Art. 74 Cst. 13
by adding a para. 2^{bis}. Entitled "For a Switzerland free of synthetic pesticides," it aimed to ban the use of this type of pesticide in agriculture. It was rejected at the polls on June 13, 2021, by 60% of the electorate. Considerations related to the risk of higher prices for agricultural products and the desire not to interfere with farmers' choices seem to have been decisive in voters' decisions, even though opposition to the use of pesticides is a widely shared concern among the population, according to polls. Article 74 of the Constitution has therefore remained unenforced since the 1999 revision.

II. COMMENTARY

A. General remarks

Article 74 of the Constitution forms the **"epicenter" of environmental** law 14
in Switzerland. It forms the basis for Swiss constitutional environmental law due to its cross-cutting nature. Its purpose is to guide all environmental policies. It is the counterpart to Article 191 TFEU in European Union law and reflects some general principles of international environmental law (the principles of prevention, precaution and causality).

Thus, like Articles 2(2) and 4 of the Constitution and Article 73 of the Consti- 15
tution, Article 74 of the Constitution emphasizes the need to preserve conditions favorable to life on the planet for living beings and future generations. To this end, it grants the Confederation **general competence** to address the environment in its various aspects. Articles 75 to 80 of the Constitution specify this mandate in relation to particular aspects of the environment and its components.

The **responsibility** established by Article 74 of the Constitution concerns 16
public authorities. This provision does not mention private actors. However, the latter are expected to take into account the information provided to them regarding the need to protect the environment, in order to encourage them to adopt voluntary behavior in this regard. Public authorities are also empow-

ered to take measures against these private entities, by virtue of the powers assigned to them.

B. Art. 74 para. 1 – Protection against harmful and nuisance effects

17 The first paragraph of Art. 74 Cst. establishes concurrent legislative authority that is not limited to the principles in favor of the Confederation. Cantonal law may therefore remain in force or supplement federal law, provided that the Confederation has not exhausted its authority or reserved it. The means by which the authority intends to fulfill its mandate are not specified in Art. 74 of the Constitution, so that the **federal legislature** has considerable leeway in this area.

18 This room for maneuver is more limited when it comes to **environmental taxes**. In this regard, the authority must comply with the requirements imposed in the area of taxation, namely a high degree of precision and a formal law for the introduction of a tax (Art. 127 Cst.). These requirements are more flexible for incentive taxes, which do not involve any specific state consideration or universality. Such taxes may in fact originate from a power such as that enshrined in Art. 74 Cst. Their existence must nevertheless satisfy the requirements of the principle of legality. Therefore, the adoption of taxes such as those provided for in Art. 29 ff. CO2 Act or Art. 32e LPE is permissible in principle, as it constitutes a special-purpose tax, the principles of collection and maximum amounts of which are regulated at the level of the law.

19 The purpose of the mandate granted to the Confederation is to protect human beings and their environment. This scope of application has been **specified in Art. 1 LPE**, which states that the purpose of this legislation is to protect "humans, animals and plants, their biocoenoses and biotopes against harmful or inconvenient effects, and to conserve natural resources, in particular biological diversity and soil fertility, on a sustainable basis." Similarly, the concept of harm has been clarified in the LPE, which focuses on harm caused by humans and their installations in the form of pollution (Art. 7 para. 1 LPE). This law is the most important legislative implementation of federal constitutional competence, which is why its main provisions are briefly summarized below.

The EPA distinguishes between two types of harm against which measures must be taken: harmful harm and nuisance harm. Harmful damage within the meaning of the LPE refers to “influences that harm human life or physical or mental health or cause damage to the natural environment,” while nuisance damage "is characterized by the fact that it disturbs people in their daily lives without causing them any real harm. [...] This results in an infringement of personality and, by the same token, of the freedom of those affected." Thus, in the case of noise pollution, for example (which does not cause physical harm, but which has been shown to affect the heart rate and cause discomfort when exposed to it for prolonged periods), it will be classified as harmful. This classification means that non-human entities exposed to similar infringements will not be protected in such cases and that any action aimed at limiting infringements that are harmful to an animal population alone will be doomed to failure due to the lack of measurable harm. This distinction is representative of the **anthropocentrism** that characterizes Swiss environmental law, from which the LPE is no exception. 20

The protection mechanism at the heart of the LPE for achieving its objective is the **limitation of damage in two stages** (Art. 11 LPE). This mechanism aims to prevent damage by taking action at the point of emission, regardless of existing environmental damage, for example through building regulations. In order to comply with the limit values, an initial measure is taken directly at the point of emission, followed by a second measure at the point where the effects of the emissions occur. Through this mechanism, the federal law gives concrete expression to the general principles of prevention and precaution, as well as the principle of causality—in terms of cost allocation—since the measures must be borne primarily by the emitting facility. Thresholds are therefore set in the form of emission or immission values that must be complied with. In the event of a violation, remediation or protective measures may be required. At the same time, **impact studies** and **appeals by associations** are two complementary instruments that also aim to ensure compliance with the constitutional mandate of Art. 74 para. 1 of the Constitution. 21

Due to its primarily technical nature, the LPE contains a number of delegation clauses in favor of the Federal Council. Numerous dependent ordinances therefore supplement the implementation of this law and, a fortiori, the mandate of Art. 74 of the Constitution. This process guarantees a certain degree of adaptability of the law, which can be an advantage. However, it also has the 22 disadvantage of a loss of democratic legitimacy. Ordinances are not the product of the elected legislature, but of the federal administration, and are not subject to referendum or an external consultation procedure similar to that for federal laws. As a result, essential elements relating in particular to permissible concentration limits for substances or pollutants are not subject to public scrutiny. In the area of railway noise, for example, the Federal Council—contrary to its duty to set an example and its delegated mandate of protection—has refrained from enacting immission limits for economic reasons, as remediation would place too great a burden on the state. This illustrates the tensions that can arise between the will of the people and its implementation.

23 Alongside the LPE, **other federal laws** give concrete expression to the mandate of Art. 74 of the Constitution, such as the CO2 Act and the Genetic Engineering Act, to name but a few. These standards add to the arsenal of environmental protection legislation.

C. Art. 74 para. 2 – The main principles

24 Para. 2 of Art. 74 of the Constitution enshrines three key principles of environmental law, namely prevention (1.), precaution (2.) and causality (3.). All three principles have a **cross-cutting and programmatic** scope for Swiss environmental law as a whole. All state bodies are required to comply with them. These are principles that impose implementation obligations on the authorities. In the event of a gap or deficiency in protection, litigants may invoke them for interpretative purposes to justify the need for action, even though these principles are often also embodied in infra-constitutional norms with a scope that may be similar.

25 **No subjective right** can be directly inferred from Article 74 of the Constitution, although the issue has been debated. Case law and legal doctrine consider that the legislature did not intend this to be the case and that it is therefore not possible for individuals to invoke this provision to obtain benefits from the state.

26 In this regard, however, several clarifications are in order. First, it should be noted that the principles enshrined in Art. 74 Cst. **must be implemented** and that a lack of legislation or implementation may be invoked in connection with other rights in the event of litigation.

Secondly, this lack of enshrined subjective rights does not deprive the **case law of the European Court of Human Rights** on human rights and environmental damage of its effectiveness and applicability. Thus, even in the absence of a fully-fledged "right to a healthy environment" in the Convention or the Constitution, human rights include various components relating to the effects of inadequate environmental protection on individuals, in particular in connection with the rights enshrined in Articles 2, 6, 8, 10, and 11 of the ECHR (right to life, fair trial, right to privacy, and freedom of expression and association). However, in the context of litigation relating to these various rights, the principles of Article 74 of the Constitution have an effect and must be taken into account when assessing compliance with state obligations. Thus, in the case of *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, the ECtHR examined the positive obligations of the State in relation to climate policy. At the end of its analysis, the ECtHR concluded that Switzerland had violated Articles 6 and 8 of the ECHR by Switzerland, as it had not adopted sufficient greenhouse gas emission reduction targets (no carbon budget or other quantification instrument and no appropriate measures to meet sufficiently precise reduction targets) and had failed to guarantee the applicants' access to justice. In its decision, the ECtHR reiterated that the precautionary principle plays a key role in assessing States' compliance with human rights in the environmental context, giving it a scope that, while not that of an independent subjective right, is intrinsically linked to these other subjective rights. 27

Thirdly, it should also be noted that **the Aarhus Convention**, ratified by Switzerland on March 3, 2014, provides that access to the courts must be guaranteed in order to establish deficiencies in climate and environmental protection, a right currently linked in doctrine to Art. 74 of the Constitution in the event of a protection gap. 28

Finally, in connection with Art. 74 of the Constitution and the developments just mentioned, a growing part of legal doctrine considers that an unwritten constitutional right of access to the courts in environmental matters should be recognized and linked to Art. 74 Cst., interpreted in the light of the Aarhus Convention, but also Articles 6 and 8 of the ECHR. The purpose of such a right would be to "establish a lack of legislative protection, in the implementation of legislation or in the absence of other remedies in this area." 29

In view of the above, it should be noted that although Art. 74 of the Constitution does not enshrine any subjective rights, it nevertheless has **significant** 30

potential in terms of environmental litigation and human rights. Its programmatic scope also remains.

1. The principle of prevention

31 The principle of prevention involves minimizing any harm which, alone or in combination with other factors, could become harmful or inconvenient. As specified in the Message on the new Federal Constitution, it translates the motto **"prevention is better than cure" into legal terms .**" In the face of various types of pollution, it requires risk reduction measures to be taken at both the planning and implementation stages. A known or certain environmental risk must exist in order for this principle to be invoked, which requires scientific knowledge.

32 In accordance with the principle of prevention, measures may be required in the areas of waste, noise, and the concentration of pollutants. These measures may include the adoption of remediation measures. The principle of prevention is reflected in the two-tier protection mechanism of the LPE, which requires action to be taken first and foremost on emissions from installations. Art. 1 para. 2 LPE also states that "impacts that could become harmful or inconvenient shall be reduced preventively and at an early stage." This is therefore an **obligation to achieve a specific result**.

33 The case law of the European Court of Human Rights also recognizes the principle of prevention in similar terms. The conclusions of the *Osman* decision have been extended to environmental risks over the years and as a **European consensus** has emerged on the need to protect the environment in relation to other human rights. The principle of prevention has thus been applied in particular to assess violations of Articles 2 or 8 of the ECHR. The ECtHR has also considered that the role of citizens' access to information is essential in preventing environmental damage in the context of dangerous activities, highlighting the potential of this principle in relation to the rights guaranteed by the Aarhus Convention.

2. The precautionary principle

34 This second fundamental principle of environmental law complements the principle of prevention where there is **scientific uncertainty** about the effects of a substance, facility, or action and state intervention is nevertheless necessary. This principle therefore plays a central role in the areas of new

products and technologies. The precautionary principle can be summed up by the Latin adage *in dubio pro securitate*, which amounts to an invitation to "not be overly optimistic when it comes to protecting people and their environment, and thus prevent damage even if the risks are uncertain."

From a philosophical point of view, according to Dunia Brunner, the rise of this second principle reflects an evolution in the human relationship with science, which is now also understood with its uncertainties and not only as the result of deductive reasoning. Some legal scholars have also emphasized the similarity between this principle and the Aristotelian **virtue of prudence**, which highlights the human and fallible nature of all science and calls for all living beings and their environment to be considered as a single community with a shared destiny marked by uncertainty. 35

The precautionary principle is one of the general principles of international environmental law. It is found in Article 15 of the Rio Declaration, which states that "to protect the environment, precautionary measures should be taken by States according to their capabilities. 15 of the Rio Declaration, which states that "in order to protect the environment, precautionary measures should be widely applied by States according to their capabilities. Where there is a risk of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing the adoption of effective measures to prevent environmental degradation." It is also present in the case law of the European Court of Human Rights, where it first appeared in the case of *Tatar v. Romania*. In that case, the European Court of Human Rights stated that a hypothetical risk may be sufficient to constitute a violation of positive obligations. Many other instruments of international environmental law also refer to precaution in a similar sense. 36

The wording of Art. 74 para. 2 does not explicitly mention precaution. However, there is no longer any doubt that this principle is linked to and included in it. Indeed, the preparatory and legislative work relating to it has always referred to the precautionary principle as **one of the fundamental pillars of environmental law** enshrined in this provision. It is also enshrined in domestic law in numerous provisions, in particular in Article 11(3) of the Environmental Protection Act, Article 4 of the Nuclear Energy Act and Article 9 of the Law on Epizootic Diseases. 37

38 The precautionary principle establishes an **obligation of means**. In practice, its application must be balanced against the principle of proportionality and the public interest. While caution is essential in environmental matters, zero risk is impossible to guarantee. Thus, in order to be admissible, the risk in question must appear plausible and, at a minimum, be based on a rational assessment. In this regard, in recent years, the concept of “planetary boundaries” has redefined the contours of precaution, since exceeding these thresholds can no longer be considered an uncertain risk and this principle is therefore applicable to them. Finally, in addition to the notion of plausibility, for precaution to prevail in a given situation, the intervention of the authority must appear to be necessary and must not disproportionately infringe on other rights. Such a balancing act inevitably leads to tension with regard to rights such as the guarantee of property or economic freedom in particular. Consequently, in the absence of a hierarchy between these guarantees and in the event of conflicts between fundamental rights, other rights could override the application of the precautionary principle in its component as a prerequisite to the right to a healthy environment, even in the presence of a plausible risk, if justified by significant special circumstances.

3. The principle of causality

39 The

principle of causality, also known as the “polluter pays” principle, aims to **make the cost of environmental protection measures** borne by those who cause damage. Its application is intended to "[...] encourage a shift from dangerous and environmentally damaging behavior to behavior that takes cost into account [...] and has the effect of correcting or eliminating distortions of competition insofar as [the internalization of costs] makes cheap but environmentally harmful manufacturing processes more expensive but harmful to the environment, in favor of products manufactured using more expensive but also more environmentally friendly processes." Behind this principle lies the influence of economic theories known as “redistributive taxation”—the cornerstone of which is to highlight the social cost of pollution and the impossibility of relying on simple market self-regulation in this regard—and environmental taxation.

40 In international environmental law, this principle is **enshrined in** Article 16 of the Rio Declaration. It had already been formulated in 1972 in the OECD Rec-

ommendations. In domestic law, the "polluter pays" principle has been implemented in particular in Articles 2 LPE, 32 LPE, 3a of the Water Act (LEaux), 4 of the Air Pollution Control Act (LRaP), and Articles 59 of the Environmental Protection Act (LPE) and 54 of the Water Act (LEaux).

For the principle of causality to apply, the measures to be taken must be attributable to **a responsible entity**. This is the case if it is possible to identify "those who can be blamed for a specific action or omission that caused the damage." There must then be a causal link between the behavior of that entity and the damage. Finally, the law specifies the extent to which the costs of a measure are payable by a disruptive entity, as well as the means of protection that must be financed by its contribution. 41

D. Art. 74 para. 3 – Cantonal enforcement

Paragraph 3 of Art. 74 of the Constitution explicitly reiterates the general principle of Art. 46 para. 1 of the Constitution, which stipulates that the cantons shall implement federal law in accordance with the Constitution and the law. Paragraph 3 therefore has a **declaratory legal significance**. 42

As an exception to the above-mentioned general principle, the Confederation has reserved **its own enforcement powers** in the areas of **genetic engineering and waste**. In other areas, the Confederation retains a supervisory role over cantonal enforcement. This task is specified in particular in Articles 37 and 38 of the Environmental Protection Act (EPA). 43

In the context of the monitoring carried out, the Confederation does not have specific sanctions at its disposal against cantons that do not adopt the necessary measures or fail to implement them properly. In this regard, some legal scholars criticize a **lack of implementation**, which is regrettable from the point of view of the effectiveness of environmental law. 44

III. CONCLUSION

Art. 74 of the Constitution was designed as a provision allowing for broad and preventive action against environmental damage. It therefore has **great potential**. However, to date, this provision has not fulfilled its initial promise due to shortcomings in its implementation and a lack of political will to adopt binding measures in the sectors with the highest emissions. 45

46 In light of this situation, we are seeing a myriad of initiatives from civil society to strengthen environmental law. Through their commitment, citizen movements are pressing authorities and other members of society to adopt a more holistic view of the environment. Voices are being raised, for example, to highlight the inadequacy of an approach focused on facilities in the face of the omnipresence of immissions, or the failure to take into account the interests of non-human entities or the need to protect biodiversity. The participation of these movements raises **democratic questions that are essential** to the development of an emancipatory protection regime for all, such as: "How are technical and ecological policy decisions currently made? By whom? And in whose interests?" Only by addressing these issues can effective solutions that serve the public interest be outlined and the mandate of Article 74 of the Constitution be fully fulfilled.

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COMMENTARY ON

Art. 75b FC

A commentary by Fabian Mösching

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Art. 75*b* Second homes

[1] No more than 20 per cent of the total stock of residential units and the gross residential floor area in any commune may be used as second homes.

[2] The law shall require communes to publish their first home percentage plan and a detailed report on its implementation every year.

Art. 197 Transitional provisions following the adoption of the Federal Constitution of 18 April 1999

Transitional provision to Art. 75b (Second homes)

[1] If the relevant legislation does not come into force within two years of the adoption of Article 75*b*, the Federal Council shall issue the required implementing provisions on construction, sale and recording in the land register by ordinance.

[2] Building permits for second homes granted between 1 January of the year following the adoption of Article 75*b* and the date on which the implementing provisions come into force shall be null and void.

CONTENT

I. HISTORY OF ORIGINS

A. The problems with second homes

1. Excessive Alienation of Swiss Land

1 The first federal regulation concerning second homes was introduced as a measure against the alienation of domestic soil to foreign persons in 1961. The urgent federal resolutions were transferred to the Federal Law of 16 December 1983 on the Acquisition of Real Estate by Persons Abroad (SR 211.412.41), which restricts this acquisition and makes it subject to a permit requirement. The regulation, which has since become known as the "Lex Koller", is intended to prevent the alienation of domestic soil. Since its introduction, however, it has lost much of its effectiveness. On the one hand, it is limited to foreign demand only, with the share of second homes owned by foreigners being only an estimated 20%. On the other hand, the conclusion of the Agreement on the Free Movement of Persons with the EU reduced the scope of the Lex Koller even further, because EU/EFTA citizens residing in Switzerland have been put on an equal footing with Swiss nationals.

2. Overexploitation of Swiss mountain landscapes

2 Due in particular to its limited effectiveness, the Federal Council attempted to repeal the Lex Koller in 2007, but failed to do so in Parliament. Nevertheless, its Art. 8 para. 2 and 3, intended as flanking measures, were transferred to the RPG (SR 700) on July 1, 2011. Following the rejection of the repeal of the "Lex Koller", the two norms were redrafted as an indirect counter-proposal to the second-home initiative, which has since come to fruition, and which aimed at a stronger spatial planning control of two-home construction.

3 By stopping the construction of second homes, the initiative aimed at preserving the landscape and agricultural land, thus keeping the mountain regions attractive as tourist areas and creating affordable housing for the local population. The intended goals leave no doubt that the problems associated with second homes have changed over time. In the meantime, ecological concerns have come to the fore, in particular the consumption of land for dwellings that are only used for a few weeks a year (the problem of the so-

called "cold beds"), but the population has also become increasingly aware of negative economic effects on the local population and the tourism industry.

3. Adoption and entry into force of the Secondary Residence Initiative.

On March 11, 2012, the popular initiative "Stop the rampant construction of second homes!" was finally accepted with 50.6% votes in favor and 13.5 votes against, and the Federal Constitution was amended with the present Art. 75b and Art. 197 no. 9. Art. 8 para. 2 and 3 RPG were again repealed on January 1, 2016 in the course of the introduction of the Secondary Residence Act; parts of the content of the norm were thereby incorporated into Art. 3 and 12 of the Federal Act of March 20, 2015 on Secondary Residences (Secondary Residence Act, SHA; SR 702). 4

B. Implementation problems

Upon adoption of the initiative, its provisions entered into force immediately (cf. Art. 195 FC). Much else, however, remained unclear due to the careless, poorly structured and generally deficient formulations of the new constitutional norms. First of all, there was disagreement as to whether the initiative could be applied directly or not (cf. n. 8 et seq. below); the central term "secondary residence" was not even defined. Further problems were caused by the simultaneous use of the terms "dwelling" and "dwelling units", the double standard of calculation based on dwellings and "gross floor area", the latter term also not being sufficiently defined. Moreover, the initiative consisted of an arbitrary sequence of specifications for direct application (Art. 75b para. 1 FC) as well as mandates to the legislator (Art. 75b para. 2 and Art. 197 No. 9 para. 1 FC). The restriction of the initiative to the "construction" of second homes (cf. title of the initiative) as well as the measures to building permits caused further confusion (on all this, see II. below); as did the concentration on a "first home share plan", whereby this term was also used in a misleading manner (see III. below). In addition, the content of the implementing provisions was limited and had to be enacted within two years of the adoption of the initiative (IV. below), and the fate of building permits issued between January 1, 2013 and the entry into force of the implementing provisions was unclear (V. below). 5

The situation was further complicated by the fact that at most a handful of municipalities affected by the initiative had actually approved it. Additional 6 frictions in the implementation and, in particular, in the drafting of the Implementing Law (SHA) were readily foreseeable. Despite numerous supreme court decisions, the problems persist.

C. Possible solutions

1. Second homes ordinance of 22 August 2012 (aZWV).

7 Even before the SHA entered into force, the Federal Council issued a Secondary Residence Ordinance on August 22, 2012, to fulfill the legislative mandate of the initiative and eliminate the most pressing legal uncertainties. This ordinance entered into force on January 1, 2013 and applied to municipalities in which the share of second homes in the total stock of dwellings was more than 20% (Art. 1 para. 1). The annex contained a list of municipalities for which there was a rebuttable presumption that the share of secondary residences was more than 20% (Art. 1 para. 2 and 3). In addition, Art. 2 contained a first (unsuccessful) definition of the term "secondary residence"; it also specified the handling and the possibilities of conversion for already existing or already legally approved apartments and hotel businesses (Art. 3).

8 The Federal Council's action was not without controversy due to its urgency in terms of time and related questions of competence (see n. 47 below). This ordinance, not to be confused with the one that now exists based on the SHA, was repealed with the introduction of the SHA on January 1, 2016.

2. Decisions of the Federal Supreme Court of May 22, 2013

a. Direct applicability

9 Finally, due to numerous applications for the construction of second homes, the Federal Supreme Court already had the opportunity in May 2013 to comment on various issues related to the implementation of Art. 75b and Art. 197 no. 9 FC. With regard to the direct applicability of the Secondary Residence Initiative, it stated that the facts and the legal consequences were clear and specific with regard to those residential uses which undoubtedly fell under the concept of secondary residences and were intended in a municipality with a clearly excessive proportion of secondary residences. The circumstances covered in this way ("cold beds") were relatively simple to delimit and not complex. Therefore, there was nothing to prevent the immediate applicability of

this "hard core" of the new, special constitutional norm, even if it meant a not insignificant restriction of the property guarantee (Art. 26 FC).

However, Art. 75b FC would still have to be concretized to a large extent, in particular with regard to the construction of managed secondary residences, the conversion of primary and secondary residences as well as the expansion and replacement of existing secondary residences. The direct applicability of Art. 75b para. 1 in conjunction with Art. Art. 197 para. 9 subpara. 2 FC is accordingly limited to a precautionary ban on building permits for secondary residences in the affected municipalities until the implementing provisions come into force, which in effect amounts to a planning zone. This prohibition was to be interpreted broadly in order not to anticipate the legislator and to prevent a prejudice of the future implementing provisions. All in all, it was merely a temporary restriction of the property guarantee until the implementing provisions were issued. For such a precautionary and temporally limited measure, no high requirements were to be placed on the definiteness of the norm. 10

These rulings were issued despite the fact that a large part of the doctrine was against the direct applicability of the initiative. In particular, the inadequate definition of the term "secondary residence" was criticized, which made it hardly possible for the persons concerned to orient their behavior according to the new norm and to sufficiently foresee the consequences of their behavior. 11

b. Dealing with building permits

Another controversial issue was how to deal with building permits for second homes that were issued after the initiative was adopted on March 11, 2012. The Federal Supreme Court came to the conclusion that Art. 197 para. 9 FC, which provides for the nullity of building permits granted from January 1, 2013 until the entry into force of the implementing provisions, is not a deviating transitional provision, but merely intensifies the legal consequence (nullity instead of contestability). Thus, the usual principles on the intertemporal validity of the law were applied (for more details on the resulting consequences see V. below). 12

3. Secondary Residence Act

13 Finally, on January 1, 2016, the long-awaited SHA and the associated Secondary Residence Ordinance of December 4, 2015 (ZWV; SR 702.1) - not to be confused with the one of August 22, 2012 (n. 7 above) - came into force. The legislator thus fulfilled the mandate of Art. 197 No. 9 para. 1 FC and enacted the implementing legislation. The SHA defines, among other things, the concept of secondary residences (Art. 2 para. 4) and, in demarcation therefrom, primary residences as well as residences which are treated as equivalent to primary residences. It regulates the calculation of the proportion of secondary residences (Art. 4 f.) and contains a specification of the ban on secondary residences in Art. 75b FC (Art. 6). It also contains provisions on the construction of new dwellings (Art. 7 ff.) and the modification of existing dwellings in municipalities with a proportion of second homes of more than 20%. In addition, it contains enforcement (Art. 15 ff.), penal (Art. 21 ff.) and final provisions on implementation and transition (Art. 23 ff.).

14 The SHA was preceded by an extra-parliamentary compromise between a delegation of National Councillors and the initiative committee. In exchange for concessions on the content of the law, the initiators agreed to forego a referendum. The compromise reached was subsequently adopted by parliament without any major opposition.

15 Reactions to the result were predominantly critical. Biaggini is of the opinion that "[t]he legislative implementation (...) is not one of the finest moments of legislative methodology and parliamentarianism." Alig/Griffel even speak of the fact that the Secondary Residence Act is essentially an exception to the restriction on second homes provided for in the constitution, flanked by enforcement and penal provisions. Nevertheless, there are good reasons in favor of the compromise reached. For example, the explicit approval of the initiators is a strong indication that the SHA takes into account the spirit and purpose of the new constitutional provisions. After the initiative was adopted, it was not necessarily clear how the will of the people was to be interpreted and what objectives had been pursued with the initiative in the first place.

16 Furthermore, it was imperative to reconcile the apodictic provisions of Art. 75b FC with other constitutional norms (e.g. spatial planning, principle of proportionality, property guarantee, freedom of establishment). It would therefore be wrong to speak of a lazy legislative compromise, or - as Biaggini again

points out - that the Councils have seldom been so fortunate that Art. 190 FC declares the result of parliamentary legislative work to be authoritative and exempts it from judicial review. Nevertheless, the SHA now provides a basis for dealing with the construction of second homes, on the basis of which the elimination of existing ambiguities can be tackled. The concrete effects of the implementing provisions on the individual provisions of the initiative are to be shown below on the basis of the individual norms.

II. ART. 75B PARA. 1 FC

A. Relationship to other constitutional norms

1. Spatial planning

With the adoption of the initiative, the federal government has the competence to legislate in the area of second homes. In my opinion, it represents a mere supplement to the basic legislation in the area of spatial planning according to Art. 75 RPG and is to be handled restrictively. However, it can also be considered as a comprehensive competence regarding secondary residences. In this way or another, the federal government is authorized to regulate all legal issues concerning secondary residences. Furthermore, it is a competing, i.e. subsequently derogating, competence. Cantonal law only ceased to be in force when the SHA was enacted and only to the extent that federal competence is actually exhausted. Since the restriction of the construction of second homes is a federal task, building permits in this respect can also be challenged by nature and heritage protection organizations with an association complaint pursuant to Art. 12 NHG, thus taking into account the "concerns of nature and heritage protection" (Art. 78 para. 2 FC). 17

Art. 75b FC and the implementing legislation based on it continue to leave room to the cantons and municipalities for certain regulations on secondary residences. Thus, Art. 3 para. 2 SHA allows the cantons to enact regulations that restrict the construction and conversion of dwellings more than the Secondary Residence Act provides, e.g. by means of quotas or secondary residence taxes. The enforcement of the initiative is also left to the cantons as well as the municipalities (cf. Art. 23 SHA). 18

2. Proportionality and property guarantee

19 In principle, all norms of the Constitution have equal priority, as long as no individual regulation is deliberately given priority by the constitutional legislator. The strict limitation of the proportion of second homes to 20% by Art. 75b para. 1 FC prevents case-by-case assessments, which on the one hand constitutes an encroachment on the property guarantee (Art. 26 FC) and on the other hand a violation of the proportionality requirement (Art. 5 para. 2 FC). There is a situation comparable to Art. 78 para. 5 FC (moor protection), in which one regulation claims priority over other constitutional norms. In such circumstances, the restrictions on fundamental rights imposed by the constitution itself must be accepted. However, the present preference applies only to the constitutional provisions just mentioned; it cannot be inferred from Art. 75b para. 1 FC that other norms should also take a back seat.

B. Scope of application

1. Material scope of application

20 Art. 75b para. 1 FC is both a conditional and a final norm. On the one hand, it requires that if 20% of the total number of dwellings are second homes (factual), then a restriction to this limit (in the sense of a ban) is provided for as a legal consequence and, as a logical consequence, no more building permits can be issued.

21 There are various demands that the same legal consequence should also occur if the share of second homes in the gross floor area of a municipality used for residential purposes exceeds 20%. This is undoubtedly true according to the wording of the norm. However, up to now there is no valid definition of the term "gross floor area" in Switzerland and a practical survey could not be provided either; accordingly, the SHA refrains from determining the gross floor area. The restriction of the areas occupied by secondary residences is only taken into account by the fact that conversions and extensions of old-law residences are restricted (cf. Art. 12 SHA). Furthermore, within the framework of the impact control (Art. 19 SHA), the annually published results of the building and housing statistics are to be used to verify whether the assumption used to justify this approach, that second homes are usually smaller than primary homes anyway, is actually true. At least the first impact report could not refute the assumption. Under these circumstances, the accusation of a breach

of the constitution voiced against the legislator in connection with the waiver of the gross floor area seems, in my opinion, more dramatic than it actually presents itself.

The final content of Art. 75 FC, on the other hand, is manifested in the fact that it establishes the 20% limit as the ratio to be aimed for between primary and secondary residences. Thus, on the one hand, the municipalities are required to take precautions so that the threshold of 20% is not reached in the first place. On the other hand, municipalities with a proportion of second homes of more than 20% must take measures to reduce the proportion of second homes. These requirements are implemented by Art. 12 para. 1 SHA and Art. 3 para. 1 SHA, respectively, in a rather restrained manner, in that the cantons are only required to take measures if necessary. 22

2. Local scope of application

The local scope of Art. 75b FC covers the whole of Switzerland insofar as all municipalities have to draw up a housing inventory (also Art. 4 SHA; cf. III. below). Based on this, it is decided whether a municipality also falls within the scope of the conditional second home restriction according to Art. 75 para. 1 FC. If this is the case, the restriction (of course) applies to the entire municipality and not only in the construction zone. Furthermore, due to the final purpose, all municipalities are required to prevent the second home share of 20% from being exceeded (see also Art. 6 para. 1 SHA). 23

It is possible for municipalities to escape the local scope of the restriction measures if, as a result of mergers or splits, their share of second homes falls below the 20% limit. In this respect, only newly created municipalities whose territory is not contiguous and which have merged or split only for the purpose of circumventing Art. 75b can be considered abusive of the law. However, it is highly doubted whether the federal government would have any means of action against such maneuvers, if they could be proven at all. In any case, no examples are known so far. 24

C. Concept of "secondary residence

The term "secondary residence" (cf. n. 11 above) has been defined in detail in Art. 2 SHA. It is defined negatively, i.e. according to para. 4, a dwelling is con- 25 sidered a secondary dwelling if it is neither a primary dwelling nor equivalent to a primary dwelling.

1. Dwelling

26 Art. 2 para. 1 lit. a - e SHA lists the requirements for a dwelling, which must be fulfilled cumulatively. A dwelling is thus a set of rooms suitable for residential use, forming a structural unit, having access either from the outside or from an area within the building shared with other dwellings, having cooking facilities and not constituting a vehicle. Normally, an apartment consists of several rooms, but a single room can also meet all the requirements on its own (one-room apartment). The right to use the apartment is irrelevant, i.e. it does not matter whether the apartment is owned by or rented to the user.

2. Primary residence or secondary residence

27 A primary residence, on the other hand, is a dwelling that is used by at least one person who is resident in the municipality in which the dwelling is located (Art. 2 para. 2 SHA). In addition to various other exceptions, in particular dwellings that are permanently occupied for purposes of gainful employment and education are treated as primary residences (cf. Art. 2 para. 3 lit. a-h SHA) and are thus not frowned upon in the sense of the legislator.

28 The concept of secondary residences thus defined by the legislator is not objectionable and is likely to be in line with the objectives pursued by the Secondary Residence Initiative. In principle, those dwellings that are rarely used and/or primarily serve as capital investments and are not made available as living space for a longer period of time (so-called "cold beds"; see n. 3 above) are to be considered second homes.

3. Calculation of the proportion of secondary residences

29 Based on the aforementioned concept, the share of secondary residences can also be calculated precisely. It is calculated by dividing the number of dwellings considered as secondary residences by the total number of all dwellings (multiplied by 100). It must be taken into account that an accurate result can only be obtained if the use of the dwellings is correctly surveyed. Otherwise, the percentage of second homes is overestimated. The municipalities around the border area would do well to demand a proper census (cf. n. 43 below).

D. Ban on secondary residences and residences still permitted

New second homes according to Art. 2 SHA may no longer be approved in municipalities with a second home share of more than 20% based on Art. 6 para. 1 SHA. This clarifies the prohibition of second homes in Art. 75b FC, which, according to case law, already existed before the law came into force due to its direct applicability, but only comprised a "hard core" (see above n. 9 ff.). 30

1. New dwellings with restrictions on use

The prohibition covers the creation of a secondary dwelling both by means of new construction and by means of conversion of an existing structure that previously contained no dwellings. In the municipalities concerned, new dwellings may in principle only be built with a specific restriction on use (Art. 7 para. 1 SHA), the alteration of which normally requires (building) permission (Art. 13 SHA). Permitted is the use as primary residences and residences that are equal to them (lit. a) as well as a tourist managed residence (lit. b). An apartment is considered to be such if it is permanently offered for the exclusive short-term use of guests at market and local conditions and if it: a. is located in the same house in which the owner has his residence (granny annexe) or b. is not tailored to the personal needs of the owner and is managed within the framework of a structured accommodation business (Art. 7 para. 2 SHA). Pursuant to Art. 7 para. 3 SHA, the authority responsible for the building permits orders the respective restriction of use in the building permit by means of a use condition. This is a so-called prohibition of misappropriation. 2. 31

2. New dwellings without restrictions on use

Exempted from the ban on secondary residences according to Art. 6 SHA are, in particular, residences that have been approved as residences without use restrictions on the basis of an exception according to Art. 8 or 9 SHA. On the one hand, these are dwellings for the cross-financing of structured accommodation establishments, both of existing establishments and of new establishments to be built (cf. Art. 8 SHA). On the other hand, this concerns dwellings within the building zones in protected buildings or buildings that are characteristic of the locality (Art. 9 SHA), the purpose being the preservation of the building. 32

33 Also permissible are apartments that can be approved on the basis of a project-related special use plan pursuant to Art. 26 f. SHA, and those that fall under the transitional provisions of Art. 25 para. 2 and 4 SHA, although they are not explicitly mentioned in Art. 6 para. 2 SHA.

34 From the point of view of Art. 75b FC, Art. 8 SHA (apartments for cross-financing structured lodging establishments) is particularly problematic, because it allows hotel establishments to create new "cold" beds under certain circumstances (n. 3 above), or to convert up to 50% of their main floor space into "cold" beds. In contrast, the "warm" beds that are created in tourist apartments according to Art. 7 para. 1 lit. b SHA can be easily reconciled with the objectives of Art. 75b FC. The exceptions of Art. 9 SHA are based on the public interest in the preservation of protected buildings. Para. 1 is aimed at protected buildings or buildings that are characteristic of a particular locality within the building zones, while para. 2 is aimed at buildings outside the building zone. As a result, the exception according to para. 2 serves not only the continued existence of the building, but also that of the surrounding cultural landscape and corresponds to the concerns of Art. 75b FC.

E. Abuse of rights in connection with restrictions on use

35 Based on Art. 14 para. 1 SHA, it is possible to suspend the restriction of use as a primary residence for a certain period of time, which is intended to avoid cases of hardship that may arise in the event of a strict, schematic application of the law, regardless of the specific circumstances. A suspension is possible either in cases of personal hardship (death, change of residence or change of civil status (lit. a) or in cases of structural hardship (unsuccessful tender for lawful use (lit. b).

36 According to the Federal Supreme Court, the introduction of the possibility under lit. b in particular has increased the potential for abuse in connection with the construction of new apartments in municipalities that fall under the scope of Art. 75b FC. Accordingly, it has tightened its jurisprudence on the abuse of rights in the area of the construction of apartments in the municipalities concerned. Specifically, it must be examined ex officio whether there are specific indications that make the intention or the possibility of a primary residence use of the construction project appear unrealistic.

F. Guarantee of vested rights; old-law dwellings

In connection with the effects of Art. 75b FC on already existing dwellings, the guarantee of vested rights is regularly mentioned. This guarantees that legally constructed buildings, which have become illegal due to new decrees, may be maintained and continue to be used in the previous manner. It has no direct effect with regard to Art. 75b FC, because its application to existing buildings is not provided for. Existing buildings have not become illegal with the entry into force of Art. 75b FC. Art. 75b para. 1 FC only sets a maximum percentage of second homes per municipality; it cannot be said which second home has led to the limit being exceeded. A (basically problematic) retroactivity clause does not exist either. 37

1. Exemption clause

Because the grandfathering guarantee only covers the previous use, old-law dwellings that were used as primary residences can in principle no longer be converted into secondary residences after the entry into force of Art. 75b FC. Without exceptions to this rule, however, pre-existing primary residences in the affected municipalities would lose a great deal of their value, because part of the price would cover the possibility of conversion. This process would disadvantage the owners of primary residences (the local population), while due to the shortage of supply, pre-existing secondary residences - mostly with non-resident owners - would increase in value. Art. 11 para. 1 SHA therefore now provides that old-law dwellings - subject to existing or future restrictions of use under cantonal or communal law - are free in the type of residential use. In principle, they may therefore be used as primary or secondary residences without restriction, whereby a dwelling is deemed to be under former law if it legally existed or was legally approved on March 11, 2012 (Art. 10 SHA; see also n. 53 below). Such old-law dwellings may be renewed, converted and rebuilt within the framework of the existing main usable area (Art. 11 para. 2 SHA). Likewise, they may be extended within the building zones by a maximum of 30% of the pre-existing main usable area, provided that no additional dwellings are created (Art. 11 para. 3 SHA). 38

2. Concerns and possible consequences

In connection with the unrestricted conversion of old-law dwellings to secondary residences, the Federal Council fears two central undesirable devel- 39 opments. On the one hand, due to the shortage of second homes, there would be a great financial incentive for local residents to sell their centrally located primary homes to foreigners who would like to use them as second homes. With the profit they make, they could then build or purchase a new and larger primary residence in a peripheral location on the outskirts of the village. This leads to an emptying of the village centers and additional urban sprawl; if this process takes place within a municipality, it is called the "donut effect". On the other hand, the free conversion of primary to secondary residences in tourist communities could displace local residents because primary residences would become scarcer and more expensive.

40 In order to prevent such undesirable developments, Art. 3 para. 4 aZWV already stipulated a ban on abusive conversions. However, it proved to be unworkable due to its legal and practical shortcomings. Art. 12 para. 1 SHA now merely provides that cantons and municipalities may take measures, if necessary, to prevent abuses and undesirable developments resulting from the change of use. In this context, it is possible to restrict the conversion of dwellings previously used for primary residential purposes to secondary residential purposes as well as the modification possibilities of old-law dwellings. In addition, these changes in use and construction can be made subject to the building permit requirement if this is not already the case (Art. 12 para. 2 SHA). In its current form, however, Art. 12 SHA is largely redundant, since the cantons can already take the proposed measures based on Art. 3 para. 2 SHA, which authorizes them to enact regulations that restrict the use of dwellings more than the SHA does. Although not explicitly mentioned, the introduction of fiscal restriction measures would also be possible on the basis of Art. 3 para. 2 SHA.

41 In various quarters, the indirect design of the measures to prevent abuse and undesirable developments is regarded as insufficiently far-reaching and, in view of the meaning and purpose of Art. 75b FC, as unconstitutional. However, the feared abuses have so far largely failed to materialize, which is why cantons and municipalities have exercised restraint; an introduction on a provisional basis would also appear to be misguided. This is only because the requested measures, which would allow the conversion of primary residences into secondary residences only in exceptional cases, would be associated with serious encroachments on the fundamental rights of those affected (especially freedom of establishment, property guarantee) and the implementation would

require a hardly proportionate control of personal living conditions. Moreover, the economic frictions would be difficult to control.

III. ART. 75B PARA. 2 FC

Like various other terms in Art. 75b FC, the "first-home share plan" is used in an extremely misleading manner. In the present context, the term "first-home share plan" is usually used as a synonym for first-home share regulations that determine the share of first homes in a municipality. In the legal implementation of Art. 75b para. 2 FC, however, the term is obviously understood to provide information on the type of use of all dwellings in a municipality, so that it can be determined how high the proportion of second homes is. Accordingly, it is an inventory or a register and not a planning measure. Art. 4 SHA, which implements the legislative mandate of Art. 75b para. 2 FC, therefore uses the term "housing inventory" instead of "primary residence plan". Based on Art. 4 para. 1 SHA, all Swiss municipalities are therefore obliged to draw up an annual housing inventory, irrespective of the proportion of second homes they own. This inventory must at least list the total number of dwellings and the number of primary residences (Art. 4 para. 2 SHA). Art. 75b para. 2 FC itself cannot be applied directly due to its nature as a legislative mandate. 42

Specifically, each municipality must provide the FSO with its population data annually with a cut-off date of December 31 by January 31 of the following year at the latest. By the same date, the communes must also update their data in the building housing register (GWR) (art. 1 para. 1 ZWV). Based on the commune data in the GWR, the Federal Office for Spatial Development (ARE) determines for each commune by March 31 of each year whether or not its share of second homes exceeds 20% (art. 2 para. 2 ZWV). An appeal against the ARE's decision may first be lodged with the Federal Administrative Court and then with the Federal Supreme Court in matters of public law. If a municipality is content with collecting the minimum data, however, it will regularly show a higher proportion of secondary residences than actually exists on its territory. This is due to the fact that in the GWR, only those dwellings represent primary residences that can be assigned to persons with a place of residence in the municipality. Dwellings that cannot be assigned to a person residing in the municipality are considered potential secondary residences. As a result, all apartments that are treated as primary residences according to Art. 2 para. 3 SHA are statistically counted as secondary residences, even though this is not 43 the case. In order to avoid this, the municipalities can, in addition to the primary residences, also separately record the category of residences treated as primary residences within the meaning of Art. 2 para. 3 SHA and assign these to the primary residences. They are then no longer considered secondary residences, which reduces the proportion of secondary residences in the municipality. This is the only way to precisely determine the proportion of secondary residences (cf. n. 29 above).

44 Municipalities whose proportion of secondary residences is constantly in the limit range of 20% (so-called lift municipalities) should accordingly not be satisfied with the minimum content according to Art. 4 para. 2 SHA when collecting data for drawing up the inventory of secondary residences, but should choose the procedure according to para. 3 and additionally closely monitor the development of the proportion of secondary residences. Already a different use of a few dwellings can lead to the fact that a municipality is subject to the scope of application of Art. 75b FC or not. If the proportion of second homes falls below 20%, the basis for the restrictions on use according to Art. 7 para. 1 SHA will no longer apply. Although the legal basis for the use restriction ceases to exist, the cancellation of this condition does not take place ex officio, but an application by the owner is necessary so that the competent authority instructs the land registry to delete the note (Art. 25 para. 3 SHA). The situation is unclear if, after falling below the 20% threshold and the deletion of restrictions on use, the threshold is again exceeded. The SHA does not regulate this situation, so that these apartments are neither new nor old-law apartments. It will have to be clarified how their possibilities of use and expansion are to be treated. On the other hand, it is already undisputed on the basis of Art. 75b para. 1 FC that a building permit may not be granted for a secondary dwelling which leads to the limit being exceeded (Art. 6 para. 1 sentence 2 SHA).

IV. ART. 197 NO. 9 PARA. 1 FC

45 With this transitional provision, the Federal Council was authorized to issue the necessary implementing provisions on creation, sale and registration in the land register by ordinance if within two years (i.e. by March 11, 2014) the legislation required to implement Art. 75b has not entered into force. Obviously, this was intended to put the legislator under time pressure. As expected, the necessary law was not yet in force at the time in question, but the Federal

Council (surprisingly) acted already before and issued a first ordinance on secondary residences, which entered into force on January 1, 2013 (aZWV, not to be confused with the current ZWV; see above n. 7 f.). In doing so, it wanted to ensure an equal application of the new constitutional norms until the implementing legislation came into force.

However, the question arose whether the Federal Council was authorized to issue such an ordinance at all at that time. While the Federal Council considered itself competent to do so on the basis of Article 182 para. 2 FC, according to which it is responsible for the execution of legislation and the enactment of the necessary regulations, a considerable part of the doctrine was of the opposite opinion. Only an existing law would allow the Confederation to issue an ordinance on the basis of Art. 182 para. 2 FC. The Federal Supreme Court did not comment conclusively on this dispute in a diplomatic manner and merely stated that it would in any case be overly formalistic to demand that the Federal Council enact the aZWV a second time, this time on the basis of Article 197 no. 9 para. 1 FC. 46

After March 11, 2014, and until the entry into force of the law required by Article 75b FC, the aZWV was then considered an ordinance within the meaning of Article 197 no. 9 para. 1 FC, at which point it also undoubtedly had a secure basis of competence. With the entry into force of the SHA, the aZWV was finally repealed on 1 January 2016 (n. 8 above). 47

V. ART. 197 NO. 9 PARA. 2 FC

There was also disagreement about the scope of Art. 197 no. 9 para. 2 FC prior to the Federal Supreme Court's landmark decisions. The majority of the doctrine and the cantonal courts assumed that this transitional provision clarified Art. 75b para. 1 FC and took precedence over it as a lex specialis. As a legal consequence of Art. 75b para. 1 FC, Art. 197 No. 9 para. 2 FC unambiguously stipulates the nullity of building permits only as of January 1, 2013 and not already as of the entry into force of the initiative. This leads to the compelling conclusion that the old law continues to apply until December 31, 2012 and that building permits issued remain valid. 48

However, the Federal Supreme Court did not consider Art. 197 No. 9 para. 2 FC to be a transitional norm, but rather a tightening of the legal consequence of Art. 75b para. 1 FC (nullity instead of contestability, n. 11 above). As a result, 49 the usual rules on the intertemporal validity of the law are applied and the legality of an administrative act is assessed according to the legal situation at the time of its issuance. Changes in the law that occur only in the course of the appeal proceedings are normally not to be taken into account, unless a substantial public interest requires the application of the new law or the latter has been enacted for the sake of public policy. However, such compelling reasons, respectively an overriding public interest, did not exist according to the Federal Supreme Court.

50 Due to the direct applicability of Art. 75b para. 1 FC, the legal situation is as follows: For building applications that were granted before March 11, 2012 and subsequently challenged, the law at the time of the first-instance assessment by the cantonal authorities applies. Building permits issued after 11 March 2012 are subject to the new law; they are contestable even if they were submitted before the initiative was adopted. If the building permit was only granted by the first instance after 1 January 2013, it is null and void. A different decision is only to be taken if there are special constellations of protection of legitimate expectations and denial or delay of justice.

51 The consequence of these decisions of the Federal Supreme Court would actually be that apartments which were approved by the first instance before March 11, 2012 are also considered to be "under old law", even if they were still the subject of appeal proceedings thereafter. Art. 10 SHA, on the other hand, now states that an old-law apartment within the meaning of the law is only one that legally existed or was legally approved on March 11, 2012. The legislator did not provide any justification for this restriction.

VI. IMPACT ANALYSIS

52 During the referendum campaign, the proponents of the initiative presented it as a simple means to stop urban sprawl in mountainous regions and to provide affordable housing for the local population (supra n. 3). Like other recent initiatives, it was focused more on a simple but cutting formulation in view of its chances of success at the ballot box than on seriously addressing sustainable solutions to the problems it addressed. As is often the case, the reality turned out to be far more complex than expected, and the results of the second-home initiative are accordingly mixed.

A. Economic aspects

The feared negative economic consequences have materialized in the affected communities - as predicted by the experts and thus unsurprisingly - although this was consistently denied before the vote. Thus, wealth inequality increased, because the unrestrictedly permitted primary residences suffered value losses compared to the contingent second residences. In other words, the owners of existing vacation homes (probably mostly foreigners) have benefited, while the local owners of primary residences are among the economic losers. In addition, unemployment has increased in the already structurally weak regions. According to the first impact analysis, however, there are no substantial economic difficulties, even if the effects of Art. 75b FC on gross value added, employment and tax revenues should become more noticeable in the future. Despite the collateral economic damage, urban sprawl did not slow down significantly in the affected communities. 53

In turn, real estate prices in the affected municipalities generally declined in the first few years after the initiative was adopted - contrary to experts' expectations. It was not until 2021, and especially under the influence of the Corona pandemic from 2020 onward, that prices reached the same level they would likely have had without the initiative. Actually, it was assumed that the bifurcation of the market into old- and new-law apartments would directly result in price increases, since even after the adoption of Art. 75b FC, 90% of transactions would still involve old-law apartments. There were two main reasons for the paradoxical development of real estate prices: On the one hand, the already mentioned economic problems of municipalities within the scope of Art. 75b FC led to a lower local demand for real estate. On the other hand, the legal and economic imponderables in connection with the initiative led to restraint in real estate transactions. 54

Further developments in the housing market of the affected municipalities are uncertain. Although it is likely that price appreciation for grandfathered housing should be delayed, exacerbated by the need for additional housing in decentralized locations due to the pandemic and the increased opportunity for home offices. Additional affordable housing for local residents, on the other hand, is not likely to occur. Old-law housing will become more difficult for locals to afford, while the market for new-law housing remains small (in part due to the shortage of building land resulting from the new RPG), so it will remain expensive. If, contrary to expectations, the stock of new-law apartments 55 were to increase - after all, local owners of old-law apartments have a financial incentive to sell them and thus finance cheaper new-law apartments - the undesirable urban sprawl would be intensified. The aforementioned "donut effect" would occur belatedly after all. Until now, it was not or hardly detectable.

56 It cannot be reliably predicted whether the intensifying home-office trend as a result of the Covid 19 pandemic will lead to an intensification of the use of second homes or even to an increase in the number of people taking up residence in the peripheral regions, which would lead to a permanent decline in the proportion of second homes.

B. Legal aspects

57 From a legal perspective, the main objection is that the poorly thought-out wording has created plenty of legal fodder in the implementation of the initiative. According to the impact analysis of the Zweitwohnungsgesetz (ZWG), legal practice on some essential issues has already developed within a relatively short period of time. With the SHA, the parliament, in an attempt to accommodate the affected communities and their specific problems in the area of secondary residences, at least explored the limits of Art. 75b FC. This approach is also based on the fact that Art. 75b FC prevents solutions adapted to the specific situation of a municipality by deliberately undermining the principle of proportionality through the absolute 20% limit. The claim of priority over other constitutional provisions joins the inglorious list of recent initiatives that deliberately undermine the equivalence of norms and accept that elementary legal principles are undermined. This zeitgeisty phenomenon is questionable from a constitutional perspective.

58 For the future, increased attention should be paid in particular to the needs of the less touristy areas; the mountain regions affected by the initiative do not only consist of St. Moritz, Zermatt or Verbier. A pragmatic handling of the ban on second homes is particularly appropriate in peripheral, structurally weak areas, otherwise the migration of the local population will be further aggravated due to the poor economic prospects. In this context, not only the federal legislator is challenged, but also the affected municipalities should make more use of the spatial planning and fiscal options that are already available to them.

C. Résumé

Overall, the two goals envisaged by Art. 75b FC (stopping urban sprawl and affordable housing) have not been achieved so far. For the near future, it looks uncertain with regard to stopping urban sprawl, while affordable housing for the local population is likely to remain a utopia. However, the results of the first impact analysis are still of limited significance, especially from an economic point of view, due to the relatively short period of time since Art. 75b FC came into force; this will hopefully change in the future. 59

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COMMENTARY ON

Art. 77 FC

A commentary by Martin Looser / Alexander Lueger

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Art. 77 Forests

[1] The Confederation shall ensure that the forests are able to fulfil their protective, commercial and public amenity functions.

[2] It shall lay down principles on the protection of the forests.

[3] It shall encourage measures for the conservation of the forests.

CONTENT

I. HISTORY

The current distribution of forests and landscape structure in Switzerland is largely due to the intensive deforestation that began in the Middle Ages and continued into the 19th century. For several centuries, the forest was an **indispensable source of raw materials and food** and served various, sometimes conflicting, interests (in particular, forestry, gathering and shifting cultivation). 1

At the end of the 18th century and in the first half of the 19th century, deforestation and the associated destruction of the forest reached a peak. Industrialization caused the demand for wood to rise sharply. The separation of forestry from agriculture and the resulting professionalization also contributed to an intensification of wood use. The massive overuse of the forest eventually led to **severe natural disasters**, particularly flooding and avalanches. 2

Despite these worrying developments, the Federal Constitution of September 12, 1848, contained no provisions on forestry. This is partly due to the fact that the newly created federal constitution was a "minimal solution" that wanted to leave **as many powers as possible to the cantons.** On the other hand, the authorities and the population lacked awareness of the urgent need for action. Legislative authority in forestry thus remained with the cantons for the time being. However, cantonal forestry legislation was hardly able to prevent deforestation. Most of the decrees were not aimed at protecting the forest, but at erecting economically motivated trade barriers. 3

It was only after **devastating floods** hit the cantons of Ticino, Graubünden, St. Gallen, Valais and Uri in the fall of 1868 that the need for action at the federal level was recognized. The natural disaster is also referred to as the "decisive event for the creation of a federal forestry authority" or even as a "wake-up call". 4

It was against this backdrop that Art. 24 aBV was incorporated into the Federal Constitution of May 29, 1874. Para. 1 granted the federal government the **right of supreme supervision over water engineering and forestry police in high** mountains and at the same time a fundamental legislative competence. Para. 2 obliged the federal government to support the correction and control of the wild waters as well as the afforestation of their headwaters and 5 to establish the necessary protective provisions for the preservation of these works and the already existing forests. On March 24, 1876, the first forestry police law was enacted on the basis of the newly created constitutional norm. The aim of the decree was to preserve the forest in quantitative terms by largely prohibiting any reduction in forest area. Despite these efforts, the Forestry Police Act did not noticeably improve the situation in practice. The main reason for this was a lack of enforcement in the mountain cantons, which lacked the necessary financial means and resources to set up a forestry service.

6 Due to the lack of success of the Forest Police Act of March 24, 1876, and the growing demand for federal funding for reforestation efforts outside the federal forest area, the restriction of federal jurisdiction to the high mountains was finally eliminated in the constitutional amendment of July 11, 1897. The subsequent adaptation of the Forest Police Act came into force on August 1, 1898. However, the significance of this revision was not limited to the expansion of the spatial scope of application. The mandate to also protect the forests in the Jura and Mittelland was an expression of the important realization that "these forests, with their different functions, also form an integral part of the natural basis of life" and must therefore be preserved.

7 The extended scope and the "much greater variability of the circumstances to be regulated" required further adjustments to the legal basis. The Federal Assembly therefore passed a total **revision of the Forest Police Act** on October 11, 1902. The funding instruments were greatly expanded through federal funding to support afforestation, for example. The right of ordinance, which defined the terms forest and deforestation and, from 1965, set out the binding conditions for deforestation, also played an important role. The measures proved effective, with Switzerland's forest area increasing by over 40 percent during the 20th century.

8 In the second half of the 20th century, conditions changed significantly compared to when the Forest Police Act was passed in 1902. The focus was on the forest dieback that came to the attention of politicians in the 1980s, the growing pressure on the forest ecosystem due to increasing urban sprawl and the deteriorating economic situation of forestry operations due to falling yields. In addition, the population became increasingly aware of the **functions of the forest as protection against natural hazards, as a natural habitat and as a recreational area**. Furthermore, politicians realized that mere quantitative

forest protection was not enough to preserve the forest functions. Measures of qualitative forest conservation through active tending and management of the forest became necessary.

In the light of these new challenges, the Forest Police Act of October 11, 1902, was again completely revised towards the end of the 20th century. On October 4, 1991, the Federal Assembly passed the **Forest Act** that is in force today. This came into force on January 1, 1993, together with the Forest Ordinance of November 30, 1992. In terms of constitutional law, the Forest Act is more broadly based than the earlier Forest Police Act. Under the Federal Constitution of May 29, 1874, it was based not only on Article 24 of the Federal Constitution, but also on Articles 24^{sexies} (protection of nature and the homeland), 24^{septies} (environmental protection) and 31bis (economic national defense) of the Federal Constitution. The Forest Act contains a comprehensive set of regulations on the principles of forest law; its entry into force also marked the transition from a purely quantitative understanding of forest conservation to one that is reinforced with qualitative elements. 9

The Forest Act also formed the starting point for the revision of Art. 24 of the Federal Constitution in the course of the **total revision of the Federal Constitution of April 18, 1999**. The constitutional provision was to be merely updated and editorially revised in line with the explicit goal of the revision. The part of Art. 24 para. 1 FC that is relevant to the forest was transferred to the current Art. 77 para. 2 FC. The term "supreme supervision", which also included the power to enact basic legislation (see above, N. 5), disappeared from the constitutional text, as did the term "forest police". In a contemporary formulation, the provision simply states that the Confederation shall define the principles for the protection of the forest. The elements of Article 24 para. 2 FC concerning the forest can be found in Article 77 para. 3 FC in a linguistically adapted form. The forest functions already mentioned in Art. 1 WaG (protective, productive and welfare functions) were also newly defined in Art. 77 para. 1 FC and thus at the constitutional level. The content of Art. 24 aBV concerning the water police was incorporated into Art. 76 FC. 10

Article 77 FC has **not been amended** since the Federal Constitution of April 18, 1999 came into force on January 1, 2000. In 2005, the Helvetia Nostra Foundation launched a popular initiative entitled "Save the Swiss Forest" to amend Article 77 FC. The aim of this was to tighten the ban on deforestation and to promote natural silviculture. The Federal Assembly did not accept the 11 indirect counter-proposal subsequently submitted by the Federal Council. The initiative committee then announced the withdrawal of the popular initiative. Subsequent partial revisions of the Forest Act were adopted that did not require any amendments to the Constitution (2012: more flexible forestry policy; 2016: improved prevention with regard to biotic hazards and climate change, promotion of the timber industry, new regulations for forestry training).

II. CONTEXT

A. Preliminary remarks

12 Thematically, Art. 77 FC is assigned to Section 4, “Environment and Spatial Planning”. This assignment already shows that the forest is not to be understood in isolation, but “in concert with the other provisions of this section”. There are **close links** in particular to sustainability (Art. 73 FC), to environmental, nature and homeland protection (Art. 74 and Art. 78 FC) and to spatial planning (Art. 75 FC), especially since the Forest Act is also partly based on these constitutional provisions (see above, N. 9). In addition, Art. 77 FC is also related to water protection (Art. 76 para. 3 FC) and to fishing and hunting (Art. 79 FC).

B. Sustainability (Art. 73 FC)

13 Art. 73 FC explicitly enshrines the principle of sustainability at the constitutional level. Accordingly, the Confederation and the cantons shall strive for a balanced relationship between nature and its capacity for renewal on the one hand and the demands placed on it by humans on the other. The principle of sustainability was **originally developed in forestry**. It was in this context that it was first mentioned (at least implicitly) at the federal constitutional level. Art. 24 para. 2 aBV (before, N. 5) provided that “existing forests” were to be preserved. Since sustainability has now been placed before the environmental and spatial planning provisions as a constitutional principle in Art. 73 FC, it was no longer necessary to mention it again in Art. 77 FC. The sustainability principle thus continues to apply without restriction in forestry law. It is reflected, for example, in the forest conservation requirement in accordance with Art. 1 para. 1 let. a and Art. 3 Forest Act and is explicitly mentioned as a management principle in Art. 20 para. 1 Forest Act. Finally, the main objective

of the “Forest Policy: Objectives and Measures 2021–2024” approved by the Federal Department of the Environment, Transport, Energy and Communications on May 26, 2021, is to ensure sustainable forest management.

C. Environmental, nature and heritage protection (Art. 74 and 78 FC)

Since the forest is part of the natural environment, the environmental protection regulated in Art. 74 FC overlaps to some extent with the content of Art. 77 FC. There are thematic links, for example, to air pollution control and protection against environmentally hazardous substances (Art. 18 Forest Act). Furthermore, as a **habitat for animals and plants**, forests fall within the scope of nature and cultural heritage protection under Article 78 FC (in particular para. 4 on species and biotope protection and para. 5 on the protection of mires and mire landscapes). These cross-references are also reflected in the relevant implementing legislation. For example, the Federal Act on the Protection of Nature and the Homeland contains provisions on the protection of special forest communities (Art. 18 para. 1^{bis} NHG), on forestry use (Art. 18c para. 1, Art. 19 and Art. 23d para. 2 lit. a NHG) and on riparian vegetation (Art. 21 NHG). The Federal Council inventory ordinances for the protection of alluvial zones and mires and moorland also include alluvial zone and mire forests and thus serve their conservation. 14

The **relationship between forest law and environmental and nature protection and heritage conservation legislation** is subject to some uncertainties. Case law has so far only commented on this selectively. For example, the Federal Court ruled that forest law is a *lex specialis* in relation to Art. 32d of the Environmental Protection Act (EPA) (assignment of costs for the remediation of contaminated sites). With reference to this ruling in particular, legal scholars hold the view that forest law generally takes precedence over environmental and nature and heritage protection legislation. However, as far as the protection of forests in their function as biotopes is concerned, the provisions of species and biotope protection take precedence. According to the view presented here, the provisions of forest law and environmental and nature and heritage protection legislation are generally applied alongside each other, especially since it is difficult to determine which provisions fall under forest law in some cases. Any conflicts between norms must be resolved in the context of the interpretation of the law. Since the Federal Court did not ex- 15 plain the reasons for its decision that forest law takes precedence in this specific case, no further statement can be inferred from the judgment, apart from the relationship between forest law and Art. 32d EPA, regarding the relationship to environmental and nature and home protection legislation.

D. Spatial planning (Art. 75 FC)

16 Article 75 FC grants the Confederation the power to legislate on the principles of spatial planning. As spatial planning is relevant for all state tasks with spatial implications, it has an **interdisciplinary function**. In principle, forests are also subject to spatial planning, as can be seen from Art. 1 para. 2 let. a and Art. 3 para. 2 let. e of the Spatial Planning Act (SPA), according to which forests and their functions are to be protected by spatial planning measures.

17 There is a special feature regarding land-use planning. In this context, Art. 18 para. 3 RPG stipulates that forest area is defined and protected by forestry legislation. Consequently, forest is excluded from the otherwise comprehensive land-use planning and is instead subject to the regime of forest legislation, without being excluded from the scope of spatial planning law. The forest definition is regulated in Art. 10 WaG. Accordingly, anyone who can demonstrate a legitimate interest can have the canton determine whether an area is a forest (para. 1). In addition, when issuing and revising land-use plans in accordance with the Spatial Planning Act, a forest determination must be ordered in areas where building zones border on forests or are planned to do so in the future (lit. a) and outside the building zones where the canton wants to prevent an increase in forest (lit. b).

18 The Forest Act therefore contains **various substantive spatial planning provisions**, some of which also refer to land-use planning in order to ensure a certain degree of coordination. Attention is drawn in the first instance to Art. 11 ff. of the 'Forest and Spatial Planning' section, which govern the relationship between clearing and building permits (Art. 11 WaG), the allocation of forest to a usage zone (Art. 12 WaG) and the demarcation of forest and usage zones (Art. 13 WaG). Furthermore, the Forest Act refers to spatial planning law in Art. 5 para. 2 let. b (exemption permit for deforestation), Art. 10 para. 2 (forestry determination in the enactment and revision of land-use plans) and Art. 17 (forestry distance).

III. COMMENTARY IN THE NARROWER SENSE

A. Preliminary remarks

Article 77 FC is divided into three paragraphs. According to para. 1, the Confederation shall ensure that the forest can fulfil its protective, useful and welfare functions. To this end and to ensure a certain degree of harmonization in forest law, the Confederation shall then have the power to enact framework legislation (principle legislation) in accordance with para. 2. Finally, para. 3 enshrines a mandatory promotional competence of the Confederation for the conservation of the forest. 19

B. Forest

1. Qualitative and quantitative forest concept

The Federal Constitution does not elaborate in detail how the forest concept used in Art. 77 FC is to be understood. However, a corresponding **legal definition** can be found in the implementing legislation in Art. 2 ForestA in conjunction with Art. 1 ForestO. It includes both qualitative and quantitative characteristics and is essentially based on the description in the old law in the Implementing Ordinance of October 1, 1965, as well as the Federal Supreme Court rulings issued to date. 20

The **qualitative characteristics** arise from Art. 2 para. 1 WaG. According to this, forest is defined as any area that is stocked with forest trees or forest shrubs and can fulfill forest functions. Its origin, type of use and designation in the land register are not decisive. As a defining characteristic, the area in question must be capable of fulfilling protective, productive or welfare functions in accordance with Art. 1 para. 1 let. c LFA (see below, N. 30). It is sufficient for the area under consideration to fulfill just one of the aforementioned functions. The presence of characteristic forest soil, a forest fringe and a forest microclimate typically indicates the presence of forest. Finally, the qualitative forest concept is further defined by means of a positive and negative catalog in Art. 2 paras. 2 and 3 WaG and Art. 2 and 3 WaV, in that certain phenomena are included or excluded. 21

In order to simplify and standardize the assessment of forest quality, especially in the case of smaller stands, the first sentence of Art. 2 para. 4 of the Forest 22

Act allows the cantons to define the unspecified qualitative forest concept in more detail by means of **quantitative characteristics**. Accordingly, the cantons may determine the minimum width, surface area and age of a growing area, and the minimum width and surface area of other stocking that is considered to be forest. When determining these, they must adhere to the framework set by the Federal Council in Art. 1 para. 1 WaV (see below, N. 23). If the thresholds set in this way are reached, the fulfillment of forest functions and thus forest quality (except under exceptional circumstances) is considered to be given. On the other hand, if the values are not reached, it cannot be automatically concluded that there is no forest, but rather an assessment must be made based on the qualitative characteristics (see also below, N. 25).

23 When **setting the quantitative criteria**, the cantons must ensure that these do not undermine the qualitative definition of forest, but rather serve only to clarify it. In its previous case law, the Federal Supreme Court assumed that stocked areas of around 500 square meters or more, 12 meters wide and 15 years old are regularly suitable for performing forest functions. It is therefore contrary to the qualitative concept of forest if the cantons apply the maximum values specified in Art. 1 para. 1 WaV "mechanically and indiscriminately". In this case, the above-mentioned values defined by the Federal Supreme Court apply instead of the cantonal criteria.

24 A special regulation, which was adopted from the case law of the Federal Supreme Court and incorporated into the law, can be found in Art. 2 para. 4, sentence 2, WaG and Art. 1 para. 2, WaV. According to this, regardless of its area, its width or its age, a stand of trees is always considered to be forest under federal law if the stand of trees fulfills **a particularly important welfare or protective function**. If this is the case, the threshold values do not apply. In other words, the provisions stipulate that if the stocking has a special functional significance, quantitative criteria are not to be taken into account. These include, in particular, very small areas of stocking along watercourses (riparian woody vegetation as per Art. 18 para. 1^{bis} NCHA) and those that are of particular importance due to their composition (rare forest associations as per Art. 18 para. 1^{bis} NCHA). They also include small areas of stocking that have a particularly strong influence on the landscape due to their location.

25 The special regulation is intended to ensure that, under certain conditions, areas of stocking that do not meet the cantonal minimum criteria can also be considered as forest. In this case, it is not sufficient that the areas can fulfill

forest functions (see Art. 2 para. 1 in conjunction with Art. 1 para. 1 let. b LFA). Rather, according to the text of the law and the ordinance, such stockings only acquire forest characteristics in the sense of a **qualification** if they fulfill welfare or protective functions "to a particular extent" (see above, N. 24). However, this qualifying requirement does not apply to every case in which the minimum cantonal criteria are not met: the special regulation is only relevant if the minimum cantonal criteria have been set in such a way that they *specify the* qualitative forest concept in line with the Federal Supreme Court's case law (see above, N. 23). According to the Federal Supreme Court, this is always to be denied if a canton makes full use of the federal legal framework without differentiation. In such cases, the Federal Supreme Court does not limit its examination to whether a stand of trees fulfills welfare or protective functions to a particular degree, but rather focuses on the qualitative requirements according to Art. 2 para. 1 in conjunction with Art. 1 para. 1 let. b LFA; this applies in any case to stocked areas from a size of about 500 square meters, a width of 12 meters and an age of 15 years (see above, N. 23).

Finally, the question remains to what extent the requirement that the stocking must fulfill welfare or protective functions to a "particular degree" places **higher demands on the forest functions** than the qualitative forest concept. The same also applies to the question of whether Art. 2 para. 4 WaG and Art. 1 para. 2 WaV require the *actual* fulfillment of welfare or protective functions (as the wording suggests) or, as in the case of Art. 2 para. 1 WaG (see above, N. 21), whether suitability for fulfillment is sufficient. However, these questions go beyond the scope of the present commentary on Article 77 FC. 26

2. Dynamic and static forest concept

The forest concept does not define any spatial boundaries. Rather, forest can develop anywhere, provided that an area stocked with forest trees or shrubs meets the relevant qualitative and quantitative characteristics. The expansion of the forest can be intentional or unintentional. The forest determines "its local area of applicability and its purpose of use under its own power under federal law". If the expansion of the forest contradicts cantonal and municipal land-use planning, the latter is superseded. In case law and doctrine, therefore, there is talk of a **dynamic forest concept**. However, the dynamic forest concept is breached in two ways. In the context of a forest determination, it is replaced by the **static forest concept** in areas where building zones border 27 on the forest or are planned to do so in the future (Art. 10 para. 2 let. a ForestA) or – outside the building zones – in areas where the canton wants to prevent an increase in forest (Art. 10 para. 2 let. b ForestA). In the latter case, the areas concerned must be designated in the cantonal structure plan in accordance with Art. 12a WaV. The relevant forest boundaries must then be entered in the land-use plans (Art. 13 para. 1 WaG), with the result that new stockings outside these boundaries are not considered to be forest (Art. 13 para. 2 WaG). Consequently, the removal of such stockings is permitted without a clearing permit in the corresponding areas.

C. Paragraph 1: Objective

28 According to Art. 77 para. 1 FC, the Confederation shall ensure that the forest can fulfill its protective, economic and welfare functions as a **target.** In contrast to Art. 24 AFC, which was primarily focused on the protective function, a "broader understanding of the function of the forest" is now enshrined in constitutional law (see above, N. 5). At the same time, this also substantiates the thrust of the fundamental legislative competence under Art. 77 para. 2 FC and the implementing competence based on it. The objectives enshrined in Art. 77 para. 1 FC must also be observed when interpreting the law. Furthermore, the requirement has an impact on the definition of ownership in that the permissible use (in particular in the implementing legislation) is described in more detail. Even if the constitutional text does not state, as it does in Art. 76 para. 1 FC, that the Confederation is to ensure the fulfilment of the forest functions "within the scope of its powers", the Confederation is not granted any additional powers under Art. 77 para. 1 FC beyond those specified in paras. 2 and 3.

29 The **protective function** of the forest is to protect people and property from natural hazards, such as avalanches, landslides, erosion and rockfall (see Art. 1 para. 2 WaG). The **utilization function** is particularly relevant when wood is extracted from the forest as a raw material for construction or energy purposes. The forest then fulfills a **welfare function** if it "serves people as a recreational area due to its location, structure, stocking and design". Furthermore, the latter function is demonstrated by the fact that the forest shapes the landscape, protects against harmful environmental influences (such as noise), safeguards water supplies in terms of quality and quantity, and provides a habitat for animals and plants.

The various forest functions are not ranked in any order, but are fundamentally **equally important**. However, the cantons are required to ensure sustainable forest management and to enact planning and management regulations for this purpose (Art. 20 para. 1 and 2 WaG). According to Art. 18 para. 2 of the Forest Ordinance (WaV), at least the site conditions and the forest functions and their weighting must be recorded in the forestry planning documents. Accordingly, despite the fundamental equality of the forest functions, a focus is set. For historical and traditional reasons, the protective function is of particular importance (see Art. 20 para. 5 WaG). 30

Finally, the **principle of forest conservation** is (at least implicitly) derived from the objectives set out in Art. 77 para. 1 FC. It is explicitly mentioned in Art. 77 para. 3 FC. While forest conservation used to be understood in the sense of quantitative forest protection (see above, N. 5), it is now understood in a broader sense that also encompasses qualitative forest protection. The fundamental ban on deforestation in accordance with Art. 5 WaG remains central here. In addition, reference is made to the implementing legislation in Art. 14 et seq. (protection against various types of impairment) and 20 et seq. WaG (management and use of the forest). 31

D. Paragraph 2: Basic legislative competence

Article 77 para. 2 FC grants the Confederation the power to legislate on the protection of the forest. This was still expressed in Article 24 para. 1 aFC by the fact that the Confederation was granted the right of supreme supervision over the forest police (see above, N. 5). Whether and to what extent the two formulations have the same meaning is controversial. Some legal scholars are of the opinion that although the power to legislate that arises from the supreme supervision corresponds to the power to enact framework legislation, the power to enforce the law by the federal government is also derived from it. Elsewhere, the term “supreme supervision” is interpreted restrictively to mean that the federal government may only make subsidiary use of the power, to the extent necessary for the supreme supervision. Regardless of these earlier terminological ambiguities, it seems clear under current law that the federal government may be responsible for enforcement based on legislation (Art. 46 para. 1 FC), even if this is no longer expressly granted in Art. 77 FC. In this context, particular reference is made to Art. 49 para. 1 Forest Act, 32 according to which the Confederation shall supervise the enforcement of the Forest Act and carry out the tasks conferred directly upon it by this Act.

33 The fundamental legislative power allows the federal government to legislate minimum requirements in terms of the objectives of Art. 77 para. 1 FC and to ensure the necessary legal harmonization, while at the same time leaving the cantons their own regulatory leeway. However, this does not preclude the federal government from also creating directly applicable standards and regulating in detail aspects that are considered particularly important. In certain areas, the Forest Act has **extensive and at the same time far-reaching regulatory content**. For example, it contains directly applicable provisions on deforestation and forest determination (Art. 4 ff. WaG) and on spatial planning (Art. 11 ff. WaG). When the Forest Act was created, the comprehensive regulation was justified by the fact that the Federal Constitution placed "responsibility for the forest in the hands of the Confederation", which is why the legislature had to take this principle into account. The aspects crucial to forest conservation should therefore be regulated by law. Since the depth of regulation of the Forest Act was already known at the time of the enactment of Article 77 FC, it can be assumed that the wording "principles of forest protection" is to be understood broadly. Even if the view were to be taken that the content of individual provisions goes beyond the basic legislative competence, Article 190 FC would preclude non-application.

E. Paragraph 3: Promotion of conservation measures

34 Article 77, para. 3 FC establishes a mandatory promotional competence of the Confederation for the conservation of the forest. The measures are to be geared towards the quantitative and qualitative conservation of the forest. Consequently, they must serve to **ward off dangers for the forest**. The specific design of the promotional instruments is left to the implementing legislation. The primary consideration is the granting of subsidies (Art. 35 ff. WaG), but also precautions against harmful organisms (Art. 27a WaG) and measures for adaptation to climate change (Art. 28a WaG), as well as the promotion of training, advice, research and the provision of basic information (Art. 29 ff. WaG). Limits arise from the economic freedom under Article 27 FC. For example, the federal government is prohibited from influencing the forestry and wood industries by means of economic control measures, as there is no constitutional basis for this, such as that provided for in Article 104, para. 2 FC for

agriculture. A deviation is only possible in the event of forest disasters or exceptional timber yields, based on Art. 102 para. 2 FC and Art. 28 and Art. 38a para. 1 lit. c WaG.

The Forest Act led to an increase in subsidies. The available federal funds and contribution rates were increased with the aim of guaranteeing the survival of forestry operations, which in turn were to ensure the quantitative and qualitative preservation of the forest. Initially, the Forest Act provided for a complex system of subsidies. Subsidies and financial assistance were then granted on a project-specific basis and scaled according to the financial strength of the cantons. With the reorganization of the financial equalization and division of tasks between the Confederation and the cantons (NFE) on January 1, 2008, the tasks, responsibilities and financial flows between the Confederation and the cantons were unbundled as much as possible and reasonable. Support for the cantons now generally takes the form of **multi-year programs with agreed objectives, as well as global and flat-rate contributions** instead of individual subsidies. Program agreements (public-law contracts) between the federal government and the cantons (Art. 46 para. 2 FC) serve as the instrument for granting subsidies. The Forest Act was also amended accordingly, specifically Art. 36 ff. WaG, according to which subsidies must be granted on the basis of program agreements. The relevant legal provisions are substantively specified in Art. 39 ff. WaV and formally in Art. 46 ff. WaV. Based on these, the two program agreements “Forest” and “Protective Structures and Hazard Foundations” were concluded. The first program agreement mentioned includes the sub-programs “Protective Forest,” “Forest Biodiversity” and “Forest Management.” Subsidies are now only granted by decree in exceptional cases, when the project requires an individual assessment by the federal government (Art. 36 para. 2 and Art. 37a para. 2 Forest Act G) or in the case of extraordinary events (Art. 37 para. 1bis and Art. 38a para. 2 let. b in conjunction with para. 1 let. c of the Federal Act on Gambling and Gambling Casinos (GamblA)). 35

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COMMENTARY ON

Art. 81 FC

A commentary by Markus Schreiber

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Section 5 Public Construction Works and Transport

Art. 81 Public Construction Works

The Confederation may in the interests of the country as a whole or a large part of it carry out and operate public construction works, or provide support for such construction works.

CONTENT

I. HISTORY

The content of Art. 81 of the Federal Constitution largely corresponds to Art. 21 of the 1848 Federal Constitution. Paragraph 1 of the latter regulated the right of the Confederation to construct or support the construction of public works at the expense of the Confederation in the interests of the Confederation or a large part thereof. Paragraph 2 provided for a specific right of expropriation in return for full compensation. Paragraph 3 allowed the Federal Assembly to prohibit the construction of public works if they violated the military interests of the Confederation. The background to this constitutional article included the planned watercourse corrections, as the Linth correction some 30 years earlier had not been based on a sufficient legal basis. The materials, on the other hand, primarily mention the construction of railway lines as the subject of the article. 1

The provision was transferred to Art. 23 of the 1874 Constitution with minor adjustments to the wording, but otherwise unchanged. 2

During the total revision, the content of para. 1 of Art. 23 of the 1874 Constitution was incorporated into the 1999 Constitution, with only the linguistic reference to the Confederation and its bearing of costs being omitted. In addition, the "operation" of the facilities is now also mentioned alongside their "construction," although this was already covered by the 1874 Constitution. Paragraphs two and three, on the other hand, were not adopted, as they were considered dispensable, firstly because of the right of expropriation already associated with the relevant responsibilities and secondly because of federal legislation in the military field. From a systematic point of view, the provision was moved from the general provisions, where it was located between provisions on the military and higher education (1848 Federal Constitution) and on spatial planning and water and forest protection (1874 Federal Constitution), to a separate section on public works and transport. Overall, the systematic classification of the norm proved difficult in the context of the total revision. 3

The predecessor provisions of the 1848 and 1874 Federal Constitutions initially gained practical significance primarily with regard to waterway corrections and the construction of mountain passes. In 1897, the Federal Act on the Acquisition and Operation of Railways on Behalf of the Confederation and the Organization of the Administration of the Swiss Federal Railways was enact- 4 ed. This was based not only on Art. 26 of the 1874 Federal Constitution on the construction and operation of railways, but also on Art. 23 on public works. Similarly, individual railway lines were apparently built on the basis of Art. 23 of the 1874 Federal Constitution. Even mere financial assistance to a railway line in economic difficulties was provided on the basis of Art. 23 of the 1874 Federal Constitution. In 1902, in the absence of federal competence in the field of energy, the Electricity Act was enacted on the basis of, among other things, Art. 23 of the 1874 Federal Constitution.

5 In some cases, the federal legislature additionally based infrastructure legislation on Art. 81 of the Federal Constitution (or its predecessor provisions), even though the federal government had specific jurisdiction in the area in question. This applies, for example, to the Pipeline Act of 1962, which, in addition to the pipeline article of Art. 26bis, which had only recently been inserted into the Federal Constitution, also referred to Art. 23 of the 1874 Federal Constitution. Why the federal legislature also refers to the constitutional provision on public works in cases where it would have had jurisdiction can only be speculated. In some cases, these could be legislative measures which, from the point of view of the federal legislature, are no longer fully covered by its jurisdiction. In that case, these would be additionally based on the provision on public works "as a precaution." In the previous versions, however, their additional mention could also be justified by the fact that these versions still contained their own expropriation regulations. The extent to which the current version also contains at least an implicit right of expropriation is explained below in N. 33.

II. CONTEXT

6 The purpose of Art. 81 of the Federal Constitution is to enable the construction of infrastructure that would exceed the power of the cantons or that would not be built by individual cantons due to its significance for the entire country. As the historical example of the railway lines shows, the norm can also become relevant where – regardless of the capacity and will of the cantons – nationwide planning and coordination appears necessary.

7 Despite its systematic position at the beginning of Section 5, Art. 81 of the Federal Constitution does not constitute an "overarching" provision on infrastructure. This is all the more true given that a corresponding addition in the form of a paragraph 2, which would have generally obliged the federal gov-

ernment to provide efficient infrastructure, was rejected. Rather, it is a subsidiary catch-all provision for works whose construction by the federal government would otherwise have no specific legal basis, as opposed to the more specific bases of competence of the federal government.

In view of the specific competences of the Confederation that exist in many areas today, the provision is considered superfluous in some cases. However, since legislation and, even more so, constitutional amendments tend to lag behind technical progress ("legal lag"), the provision may continue to be relevant in the future. For example, the federal government based the Federal Act on Underground Goods Transport (UGüTG) on Art. 81 of the Federal Constitution in addition to Art. 87. Since such projects differ from existing aboveground railways, it would have been questionable to what extent this law could have been based solely on Art. 87 (see N. 23 below). 8

Another example is the construction of a CO2 transport pipeline infrastructure, which could be used as part of the "net zero" greenhouse gas target to capture unavoidable CO2 emissions (e.g., from waste incineration plants or certain industrial facilities) locally and then either use them elsewhere (e.g., for the purpose of producing synthetic gases based on renewable energy sources) or (much more controversially) store them underground. However, a CO2 pipeline infrastructure cannot be subsumed under the federal jurisdiction over pipelines under Art. 91 para. 2 of the Federal Constitution, as CO2 is not a fuel or propellant. It has already been argued in academic circles that the construction of a corresponding pipeline infrastructure by the federal government could be based on Art. 81 of the Federal Constitution (in conjunction with Art. 74 of the Federal Constitution). 9

Despite some criticism, the provision may therefore continue to gain significance in view of constant technological change. In this respect, the finding in the literature that the rare invocation of Art. 81 of the Federal Constitution does not detract from its significance, but rather follows from its purpose of serving as a catch-all provision, seems very apt. 10

III. COMMENTARY IN THE NARROW SENSE

A. Type of federal competence

11 According to the prevailing interpretation, Art. 81 FC is intended to enable the federal government to provide corresponding services directly on the basis of the Constitution – i.e., without prior legislation. In this respect, it is a (direct) administrative competence. This is being questioned in recent doctrine with reference to the principle of legality. However, the form in which the federal government must decide on measures under Art. 81 of the Federal Constitution cannot be answered in abstract terms, but depends in each specific case on the extent to which law is enacted (or only applied) and on the requirements to be imposed on the level and density of norms in accordance with general and (e.g., in tax law) specific principles (see N. 39 ff.). Art. 81 of the Federal Constitution does not contain any mandate for the federal government to create such works, but leaves the decision on whether to take action to the discretion of the federal government.

12 Despite the lack of a reference to the Confederation bearing the costs, in contrast to Art. 23 para. 1 of the 1874 Federal Constitution, it is clear that funds from the federal budget can be made available to the extent necessary to exercise administrative powers.

13 It is questionable to what extent Art. 81 of the Federal Constitution grants the Confederation legislative powers beyond this. Since the support and, in particular, the possible operation of larger works can often only be regulated sensibly by means of appropriate legislation, it can be assumed that Art. 81 of the Federal Constitution confers limited legislative powers in addition to administrative powers. This is also in line with the statements in the materials. Furthermore, the creation of suitable legal foundations can be an essential support service provided by the Confederation.

14 In the absence of federal competence for the railway system (which was only created two years later as Art. 26 of the 1874 Federal Constitution), the Railway Act of 1872 was apparently based solely on the predecessor provision of Art. 81 of the Federal Constitution, namely Art. 21 of the 1848 Federal Constitution. However, a law enacted solely on the basis of Art. 81 of the Federal Constitution must be limited in content to those provisions that are necessary for the implementation of the specific project. This will be the case above all

in the first variant ("construct and *operate*") with regard to maintenance. Requirements and conditions for financial support could also be regulated here. In contrast, the literature argues that, according to Art. 81 BV, the federal government may only enable success-oriented works, but not regulate them. Whether this approach could be sustained in practice at all seems questionable given the complexity of novel infrastructures in particular. In any case, the variant in which construction is supported by third parties would be considered inadmissible if it regulated subsequent operation.

B. Construction and support of public works

1. Concept of "public works"

The linchpin of the provision is the concept of "public works." The materials relating to the 1999 Federal Constitution do not explain this concept. The wording appears to be very open in this respect. The word "work" alone does not necessarily imply the requirement of physicality, as shown by the concept of work in copyright law, which includes computer programs (Art. 2 para. 3 URG). At first glance, the connection with the verb "to construct" in the German wording of the provision suggests a restriction to physical works. However, it should be noted that the other language versions contain wording that would also apply to intangible works ("réaliser," 'realizzare'). 15

Compared to the German and Italian versions, the French version also uses two different terms ("*travaux*" and "*ouvrages*"). However, it is not apparent that this is intended to make any kind of conceptual distinction, especially since both terms can be translated as "work." 16

A historical interpretation of the provision shows that it covers large infrastructure projects such as railway facilities and other technical works. It is clear here that "works" under the 1848 and 1878 Federal Constitutions primarily referred to "structures." However, work such as repairing damage or restoring a previous condition should also be included. Under Art. 23 of the 1874 Constitution, the transformation of the ground was often emphasized as an essential feature of the "work." 17

The systematic interpretation points in the direction of (transport-related) structures, because Art. 81 of the Constitution is regulated in a joint section with transport infrastructure. At the same time, the significance of the system- 18 atic position for interpretation must be relativized insofar as the classification of the provision within the framework of the total revision caused difficulties. The comparison with the terms "work" and related terms in other areas of law is also not very meaningful, as these differ greatly both from each other and in comparison with Art. 81 BV.

19 Thus, a structural understanding brings the concept of a work closer to "buildings and facilities" within the meaning of Art. 22 of the Federal Act on Planning and Development (RPG), but this cannot be used to interpret Art. 81 of the Federal Constitution. The civil law concept of a work in contract law (Art. 363 CO) differs significantly from the concept in Art. 81 BV, as it can even cover purely intellectual works, at least in some cases. It seems more obvious to refer to the liability of the owner of a work under Art. 58 CO. However, due to its reference to at least a temporary fixed connection with the ground, this concept of a work appears too narrow in view of a modern understanding of Art. 81 BV, as will be shown below.

20 A teleological interpretation argues in favor of a broad understanding of the concept of a work. Since Art. 81 of the Federal Constitution is intended to serve as a catch-all provision for areas in which the federal government has no specific jurisdiction, the definition of a work must not be too narrow and should be open to technical developments in particular. There is therefore a legitimate debate as to whether satellites (as non-earthbound installations) or virtual or digital infrastructures could fall under the concept of a work. The importance of the latter becomes clear in light of the events of July 2024, when a faulty software update caused damage worldwide and led to the cancellation of thousands of flights, among other things. Ultimately, it is irrelevant to the population whether the aircraft remains on the ground because the runway is damaged or because there has been a disruption to the airport's IT infrastructure. Extending the scope to include such infrastructure would be particularly in line with the purpose of Art. 81 of the Federal Constitution if its construction exceeded the powers of the cantons but did not fall within the specific competence of the federal government. An understanding that remains stuck in the 19th century concept of relevant infrastructure would contradict the confirmation of the article in the context of the total revision of 1999. It cannot be assumed that the constitutional legislator at that time wanted to retain an article, or to reintroduce it in a new form, which would be meaningless from the outset in view of the specific competences existing in

the infrastructure sector. In its message on the Federal Act on Electronic Identity (E-ID), the Federal Council endorsed an interpretation according to which the provision of a digital “trust infrastructure” as part of a “uniform electronic administrative landscape” could also be covered by the concept of “works” in Article 81 of the Federal Constitution.

Nevertheless, structural infrastructure can continue to play a role, for example in coping with the effects of climate change. In order not to violate the division of powers under the Federal Constitution through an overly broad interpretation, the application of Art. 81 FC must in any case be limited to works that have a connection to infrastructure, albeit in a broad sense. Purely intellectual achievements such as patents or other intellectual property are also not covered, as long as they are not reflected in a specific infrastructure. In addition, the scope of application is limited by the requirement that the work must be in the interest of the whole or a large part of the country (see N. 25 ff. below). 21

It is questionable when a work can be considered “public.” In any case, this must be assumed for works that are operated by the state itself in the public interest. However, historical analysis shows that, based on this provision, private railway companies, for example, were also supported. Ownership is therefore likely to be less decisive, especially since, according to the wording of the provision, the federal government does not have to operate the works itself, but can also simply support their construction. The “public nature” of a work must therefore depend (solely) on whether it serves the public interest. As in the context of Art. 36 para. 2 of the Federal Constitution, police assets such as public safety can be protected, as would be the case, for example, with facilities used for flood protection. However, as the systematic classification in Section 5 shows, the transport infrastructure of parts of the country, for example, must also constitute a relevant public interest. According to one view, works abroad should also be able to be of public interest within the meaning of Art. 81 of the Federal Constitution, as long as their benefits are at least partially felt domestically. This is certainly true for projects near the border that serve to connect Switzerland to foreign infrastructure. Ultimately, the relevant public interests cannot be definitively defined, and the federal government has considerable discretion in this regard. However, projects that primarily serve particular interests (especially of a financial nature) would be excluded. 22

23 Some point out that, given its subsidiary nature and low density of norms, Art. 81 BV is only tailored to individual cases, which is why the construction of an entire category of works cannot be based on it. However, particularly in the case of large-scale infrastructure such as the aforementioned underground transport facilities or CO2 pipelines, it can be assumed that these can only be designed in a meaningful way if they extend across the entire country or at least a large part of it in a network-like manner. In such a constellation, one could at best envisage the establishment of an entire "category" of such works. If this were not covered by the provision, its practical relevance would be significantly reduced. The historical example of railway lines also clearly shows that it would be difficult in practice to distinguish between individual works and categories of works. Here, numerous projects had been established by the federal government on the basis of predecessor provisions of Art. 81 of the Federal Constitution. Overall, therefore, it is hardly possible to speak of individual cases, but according to the materials, the construction of railway lines in particular should be covered by the constitutional provision on public works (see above N. 1).

24 On the other hand, it is likely to be true that the limited *legislative* competence granted by Art. 81 BV (see above N. 11 ff.) may not be used to create general legal framework conditions for entire categories of works, regardless of the specific construction of a work. Against this background, given its comprehensive approach (see Articles 1 and 2 of the Act), the Federal Act on Underground Goods Transport is only unproblematic in terms of competence if Article 87 of the Federal Constitution, which is additionally cited therein, is regarded as a suitable basis for competence.

2. "In the interest of the whole or a large part of the country"

25 The provision requires that the federal government's action be in the interest of the whole or a large part of the country. It is particularly questionable what is meant by a "large part" of the country. In any case, it cannot be required here that the majority of cantons be affected, since there is no mention of a "large part" of the country. At the same time, the interests of more than one canton (even if it covers a large area or has a large population) must be affected, as the provision is intended to enable public works that are not only in the interest of a single canton. Works of purely local or regional interest therefore do not fall within its scope. The federal government is therefore prohibited

from promoting the construction of school buildings, multi-purpose halls, or similar facilities on the basis of Art. 81 of the Federal Constitution. Furthermore, the federal government may only intervene where the private sector or the cantons do not already provide adequate infrastructure. This follows from the principle of subsidiarity, which is only partially standardized in Art. 5a and 43a of the Federal Constitution.

The significance of the interest is not determined by the size and spatial extent of the project, but by its actual impact on the public good. Thus, for example, a project limited to a single canton may be of significance to other cantons. For example, a tunnel system built in the territory of a single canton may provide transport links to several cantons. If the project is part of a larger network of facilities, the contribution of the specific project to this network should be taken into account; however, the overall significance of the network as a whole cannot be used to justify the required interest. 26

Overall, the requirements for interest must not be excessive. From the federal government's point of view, even smaller projects such as individual bridges may be in the interest of “the whole country” under certain circumstances. In this respect, the federal government has considerable discretion. However, purely fiscal interests of the federal government do not justify the application of Art. 81 of the Federal Constitution. 27

3. “Construct and operate”

According to the first variant, the federal government may construct and operate the work itself. The conjunction “and” is to be understood to mean that if the federal government constructs a work itself (and does not merely support its construction), it must then (at least in principle, according to the materials) also operate it itself. In the literature, however, this variant is sometimes understood to refer primarily to the bearing of costs. According to this interpretation, it should be possible to transfer the actual operation to third parties, e.g., within the framework of a *public-private partnership*, as long as the federal government retains ultimate responsibility for the operation. In any case, it is reasonable to agree with the view that the Confederation does not have to act directly as the operator itself and that, in particular, transfer to a federal administrative unit or outsourcing to a private-law company is also possible. 28

29 Some argue that the federal government should only be allowed to build and operate a facility itself if operation by the cantons (with mere support from the federal government) is ruled out. In the case of the Linth enterprise, a facility built and initially operated by the federal government was later transferred by law to an institution established by the cantons concerned. In addition, the principle of economic freedom sets certain limits on the construction of federal facilities in competition with the private sector. With regard to the principle of subsidiarity, this first option raises a more specific question: in the context of the interests of "the whole or a large part of the country" (see N. 25 ff. above), the question arises as to whether, according to the principle of subsidiarity, federal action is necessary at all. In connection with the option of establishing and operating, on the other hand, it must be examined whether it is necessary for the federal government itself to operate the facility, or whether, for example, operation by the canton could be considered, with the federal government merely providing financial support for the establishment of the facility (see below for the second option). It remains to be seen whether the hitherto low relevance of the "construction and operation" option could increase in the future in the context of digital infrastructures (see above N. 20).

4. "Supporting its construction"

30 As a much more practical "minus" to its own construction and operation by the federal government, the latter can limit itself to supporting construction by third parties. This support can be financial, but also logistical, planning, or coordination-related, for example. In addition, the federal government can provide expert knowledge, for example through its specialist authorities. In addition to the cantons, private individuals are the primary third parties that can be considered for constructing and operating the facility, provided that the facility is in the public interest (see above N. 22). Even foreign countries can be potential beneficiaries. This may be relevant, for example, if railway facilities across the border that serve to connect Switzerland are to be promoted.

31 According to the wording, only the construction of the facility can be subsidized, not its operation and maintenance. However, federal support for the acquisition of an existing facility by the cantons or third parties is covered by Art. 81 of the Federal Constitution. The amount of support is largely at the

discretion of the federal government, although the principle of equal treatment (Art. 8 FC), the principle of economic freedom (Art. 94 FC), and the principle of subsidiarity (Art. 5a FC) set certain limits.

5. Borderline cases between the two variants

In relation to the first variant, it should be possible for the federal government 32
to first support the construction by third parties and then later take over the facility for its own operation. It is difficult to subsume the case in which the federal government wishes to support an already constructed facility or take it over – e.g., in the event of financial difficulties on the part of the private operator – under the German and Italian wording of the two variants. With regard to the latter takeover by the federal government, some argue that this is included as a "minus" in the construction variant. In fact, it would seem overly formalistic to prohibit the takeover by the federal government if a hypothetical demolition and subsequent new construction by the federal government were permissible. Ultimately, one can be guided by the principle that where the federal government is committed to long-term operation, it should also bear the costs, but in the form of its own operation and not permanent subsidization of third parties. The French language version, with the variant "exploiter des ouvrages publics," offers the best possibility of subsuming these cases under the wording of the article.

C. Right of expropriation

The previous version expressly provided for the federal government's right to 33
carry out expropriations for the purpose of constructing the facility (Art. 23 para. 2 BV 1874). The reason given for not adopting this part of the provision was that the federal government already had the right of expropriation due to its numerous areas of competence and that the special provision was therefore superfluous. However, since the provision is intended to serve as a catch-all provision in cases where the federal government has no actual competence, this view is certainly open to question. In view of the history of the provision, it seems preferable to allow expropriation on the basis of Art. 81 BV, at least in cases where the federal government has no specific competence that includes the right of expropriation.

D. Relationship to other powers

34 Art. 81 of the Federal Constitution is subsidiary to the specific powers regulated in the Federal Constitution. Although Art. 81 of the Federal Constitution is particularly relevant where the federal government has no specific powers, its application should not serve to circumvent the requirements of such more specific powers. It may be difficult in individual cases to correctly distinguish between a permissible catch-all function and a violation of the constitutional division of powers.

35 The spatial planning article in Art. 75 of the Federal Constitution does not usually give rise to any further powers for the federal government, as the fundamental legislative competence there is not compatible with the case-by-case approach of Art. 81 of the Federal Constitution. In the past, however, the legislature has occasionally invoked the spatial planning competence of Art. 22^{quater} of the 1874 Federal Constitution to promote infrastructure projects in the broadest sense.

36 A possible violation of the constitutional division of powers through an overly extensive interpretation of Art. 81 of the Federal Constitution was discussed above (N. 34). On the other hand, cases in which restrictions on federal powers result solely from a simple statutory provision are likely to be particularly relevant. For example, the Energy Act allows support for geothermal energy projects by means of federal guarantees, but limits the scope of the guarantees. Since this legislation is based on the substantive powers in Art. 64, 74–76, 89, and 91 of the Federal Constitution, the question arises as to whether the federal government may, on the basis of Art. 81 of the Federal Constitution, grant support that goes beyond this simple legal provision. In terms of the hierarchy of norms, this does not appear to be a problem – provided that the requirements of Art. 81 of the Federal Constitution are met – as this restriction does not arise from the powers specified in the Federal Constitution itself. Nevertheless, some argue that even such a simple legal provision, as a concretization of the respective powers, precludes recourse to Art. 81 of the Federal Constitution. Since a simple federal law (despite the de facto effect of Art. 190 BV) cannot change the division of powers in the Federal Constitution, this view must be rejected.

37 Where cantonal powers exist, Art. 81 BV establishes a parallel federal power that does not supersede the cantonal powers. Here, the extent to which the

federal government acts only in a supplementary capacity to the cantons or acts alone depends heavily on the nature of the work in question. Ultimately, however, Art. 81 BV enables the federal government to take over the construction of certain infrastructure. If the federal government does not construct the works, the cantons can continue to build infrastructure of supra-cantonal importance themselves.

E. Competence and procedure

The Federal Assembly, i.e. the legislature, is responsible for the measures to be taken under Art. 81 of the Federal Constitution. Given that federal competence is primarily administrative in nature (see N. 11 ff. above), this is not self-evident. 38

According to Art. 163 of the Federal Constitution, the form in which the decree is issued depends first of all on whether it contains legislative provisions. According to Art. 163 para. 1 of the Federal Constitution, such decrees must be issued as federal laws or ordinances. The remaining decrees are issued as federal resolutions in accordance with Art. 163 para. 2 of the Federal Constitution. According to the simple interpretation of Art. 22 para. 4 ParlG, “legislative” provisions are those that impose obligations, confer rights or define responsibilities in a directly binding and generally abstract manner. This may also include “purely founding and organizational enactments” such as the SBBG. Given the complexity of today's infrastructure projects, legal regulation is often necessary in practice. In any case, it is often difficult to distinguish between legislative provisions and other enactments. 39

A federal law may be necessary in particular if a formal legal basis is required in accordance with the principles governing the level of norms (see in particular Art. 164 para. 1 of the Federal Constitution). This may be necessary, for example, in the case of a serious infringement of fundamental rights within the meaning of Art. 36 para. 1 of the Federal Constitution or in the case of a levy. In addition, in the case of restrictions on constitutional rights pursuant to Art. 164 para. 1 lit. b BV and in the other cases of Art. 164 para. 1 BV, the fundamental provisions must in any case be regulated in a federal law. 40

If, on the other hand, these criteria indicate that the provisions are not legislative and, in particular, that no federal law is necessary, a federal decree may be issued. It is questionable whether this should take the form of a simple fed- 41 eral decree (Art. 29 para. 1 ParlG in conjunction with Art. 163 para. 2 BV) or a federal decree subject to referendum (Art. 29 para. 2 ParlG in conjunction with Art. 163 para. 2 BV).

42 According to the wording in Art. 29 para. 2 ParlG, which has been sharply criticized in some quarters, this depends on whether there is a legal basis for the resolution in the BV or in a federal law. If the supplementary legislative power under Art. 81 of the Federal Constitution (see above N. 13 ff.) is exercised and a federal law is enacted first, a simple federal decree can then be used for the further details.

43 However, if there is no specific legal basis, the question arises as to whether Art. 81 BV itself constitutes a sufficient basis in the Constitution or whether the federal decree is subject to (optional) referendum. Assuming that Art. 81 BV is an administrative power deriving directly from the Constitution (see above N. 11), the application of Art. 29 para. 1 ParlG and thus the choice of a simple federal resolution would seem obvious. In contrast, recent doctrine argues that the vagueness of Art. 81 BV argues against considering it a sufficient basis for a concrete decision within the meaning of Art. 29 para. 2 ParlG; therefore, in accordance with the principle of legality, a decision subject to referendum is required.

44 If Art. 29 para. 2 ParlG is interpreted in the light of Art. 5 para. 1 BV, its purpose is only to waive a referendum if the electorate had the option of a referendum when the legal basis was created in the Federal Constitution or a federal law (Art. 140 para. 1 lit. a FC or optionally under Art. 141 para. 1 lit. a FC). In the case of Art. 81 BV, however, this is largely ineffective due to its vagueness and the multitude of conceivable applications. The constitutional principle of legality is only satisfied if the measure is subject to a referendum.

45 The practice of the Federal Assembly is very inconsistent. Measures based on Art. 81 BV (or its predecessor provisions) have already been enacted in the form of federal laws, federal decrees subject to referendum, and simple federal decrees.

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Art. 96 para. 1 FC

A commentary by Andreas Heinemann

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Art. 96 Competition policy

[1] The Confederation shall legislate against the damaging effects in economic or social terms of cartels and other restraints on competition.

CONTENT

I. OVERALL CONCEPT OF ART. 96 FC AND ITS POSITION IN THE ECONOMIC CONSTITUTION

A. Structure of Art. 96 FC

Art. 96 FC combines federal powers for three important areas of economic regulation in a single article: paragraph 1 of the provision concerns **cartel law**, paragraph 2(a) concerns **price supervision law**, and paragraph 2(b) concerns **law against unfair competition**. In the old Federal Constitution, these three areas were divided between different provisions: responsibility for antitrust law was enshrined in Art. 31bis para. 3 lit. d aBV, which had been adopted in 1947 as one of the "new economic articles." Art. 31^{septies} aBV on price supervision was based on a popular initiative that was accepted in 1982. And federal jurisdiction over unfair competition law was not specifically regulated, but was derived, among other things, from the jurisdiction over the regulation of private-law gainful employment (Art. 31bis para. 2 aBV). 1

The common link between the three areas of competence is their **reference to competition**. The Constitution does not define what is meant by competition, but leaves the details to the legislature. However, the basic understanding of the three areas can be outlined as follows: While antitrust law protects the freedom and effectiveness of competition, the law against unfair competition is concerned with fairness in the economic process. Antitrust law thus combats the "overcooling" of competition, i.e., restrictions that are contrary to its functioning, while unfair competition law combats "overheating," i.e., excesses that are contrary to its functioning. Price supervision law is systematically classified as antitrust law due to its focus on market power and protects market participants from competitive deficits in terms of pricing. Due to the specific legislative mandate in Art. 96 para. 2 lit. a FC, it constitutes an independent pillar of competition policy. The legal classification in paragraph 2 together with the law against unfair competition is not convincing in view of the antitrust nature of price supervision. 2

Art. 96 FC, entitled "Competition policy," can therefore be described as a **competition article** consisting of a **cartel article** (Art. 96 para. 1 FC), a **price supervision article** (Art. 96 para. 2 lit. a FC), and an **unfair competition article** (Art. 96 para. 2 lit. b FC). Typologically, Art. 96 FC is a materially 3 limited competence norm with subsequent derogatory effect, which assigns the (legislative) competence for the aforementioned areas to the Confederation. Insofar as the Confederation does not exercise its legislative competence, the cantons remain competent. In the area of antitrust and price supervision law, the federal legislature has made exhaustive use of its powers, leaving no room for cantonal antitrust or price supervision law. The same applies to the law against unfair competition, except that here the cantons have retained relevant powers in the area of trade regulation.

B. Relationship to economic freedom and the internal market

4 The combination of the three sub-areas in a single article underscores the importance of competition protection in the overall structure of the economic constitution. There is a close link to the **economic freedom** guaranteed as a fundamental right in Article 27 FC and institutionally in Article 94 FC: On the one hand, entrepreneurial initiative must be protected from state restrictions. On the other hand, companies must not damage competition through cartels or other restrictions on competition or distort it through unfair conduct. Both protective measures come together when competition is restricted by public enterprises. It follows from the principle of competition neutrality that antitrust law applies equally to private and public enterprises. The occasionally used formulation that antitrust law has the function of combating "private" restrictions on competition is therefore reductionist. In general, it is a matter of restrictions on competition by companies (in the field of unfair competition law also by other market players), whether private or public. The constitutional legislator tasks the legislature with establishing a market economy based on the **principle of competition** in the economic sphere.

5 Art. 95 FC, in particular para. 2, also serves to dismantle public restrictions on trade. Intercantonal restrictions are to be eliminated by creating a uniform Swiss economic area. The establishment of a nationwide internal market serves to realize economic freedom. The Internal Market Act fulfills these requirements.

C. Consumer protection

6 There is also a close link to **consumer protection**. Only when competition is functioning properly can consumers enjoy products that are as inexpensive, high-quality, and innovative as possible. The competitive economy guarantees

consumer sovereignty, i.e., it gives those at the end of the value chain the power to decide what is produced in the economy. If the competitive mechanism is disrupted by restrictions or distortions, consumers lose their sovereignty. Because of this close connection, the 1995 draft constitution still provided for the federal competence for consumer protection to be integrated into the article on competition (Art. 78 para. 3 VE 95). However, since consumer protection issues go beyond competition issues, it was ultimately decided to include a separate article on consumer protection, namely Art. 97 FC. Nevertheless, the interplay between competition and consumer protection must always be taken into account: protecting competition also protects consumers. And well-informed consumers ensure that competition can fulfill its functions.

D. Further constitutional references

A market economy is not a natural state, but requires various **guarantees** in order to be realized. Property must be guaranteed (Art. 26 FC), including both private and publicly acquired property as well as intellectual property. Freedom of contract must prevail, which is encompassed by the fundamental right and principle of economic freedom. The same applies to the right to pool the resources and means of many, e.g. in companies. The proper functioning of the market economy depends on a stable currency (see Art. 99 FC and the NBA). Finally, there must be equality before the law (Art. 8 FC). 7

There are also tensions between the principle of competition and individual constitutional provisions. For example, Art. 28 FC guarantees employees and employers **freedom of association**, i.e. the right to collectively negotiate employment and working conditions and to conclude collective labor agreements. If the social partners do not exceed these limits, antitrust law does not apply and the competition mechanism is suspended to that extent. 8

Finally, both within and outside the section on the economy, the Federal Constitution contains numerous **policy areas** and **economic sectors** for which special provisions are laid down, e.g. on public works and transport (Art. 81 ff. FC), energy and communications (Art. 89 ff. FC), agriculture (Art. 104 FC) and housing, work, social security, and health (Art. 108 ff.). Only relatively rarely do these provisions allow the Confederation to deviate from the principle of economic freedom (see, for example, Art. 104 para. 2 FC). This 9 does not abolish the principle of competition; for example, the measures must respect the principle of competitive neutrality.

E. Structure of the presentation

10 The three areas of regulation referred to in Art. 96 FC, namely antitrust law, price supervision law and unfair competition law, aim to **protect effective and undistorted competition** or to correct undesirable developments where competition has already been damaged. They do this in different ways and with different instruments, so that the three federal powers integrated into the competition article are presented separately below. In accordance with the order provided for in the constitutional article, the presentation of the **cartel article**, i.e. Art. 96 para. 1 FC, comes first.

II. HISTORY OF ART. 96 PARA. 1 FC

A. The “new” economic articles of 1947: The ‘old’ cartel article

11 The **“new economic articles”** inserted into the Federal Constitution in 1947 were intended to create the constitutional basis for measures that had been based on emergency law until 1947. These included Art. 31^{bis} aBV, which in paragraph 2 granted the Confederation the power to enact regulations on the exercise of professions and to take promotional measures, but only in accordance with the freedom of trade and industry. Paragraph 3 provided for exceptions to this requirement: if justified by the public interest, the Confederation was authorized to enact certain rules “if necessary in derogation from freedom of trade and industry,” including, under lit. d, provisions “against the economically or socially harmful effects of cartels and similar organizations.”

12 The message on the new economic articles set out the **historical background**. According to the message, associations and cartels had, through a “network of ties and restrictions,” “effectively rendered freedom of trade and industry largely ineffective.” In a process of association formation lasting around 100 years, an association had been created for every profession. The formation of associations had “largely eliminated one of the basic prerequisites of economic liberalism, namely that economic life is a free interaction of individual forces of approximately equal strength whose interests balance each other out in the market.” Federal authority to enact rules against harmful

cartels and similar organizations was intended to counteract these phenomena.

In order to understand the **cartel tendency** of the Swiss economy, it is important to note the cartel-friendly stance taken by the Federal Supreme Court during these decades. The Federal Supreme Court's decision in the *Vögtlin* bakery case in 1896 is fundamental. A price-breaking baker was boycotted by the bakers' association. The Federal Supreme Court ruled that “the free agreement of a minimum price below which the members of the association may not sell their goods [...] does not in itself violate good morals or the general legal order,” thereby legalizing cartels in principle. However, this did not prevent the Federal Supreme Court from protecting outsiders by other means: The call for a boycott was to be classified as unlawful damage, namely as an attack on the trader's right to “respect for his personality.” This established a basic pattern: the principle of “freedom from cartels” applied. However, individuals were protected against the worst excesses (e.g., collective boycotts) by means of personal rights. 13

The new economic articles are based on this rule/exception relationship. In line with the cartel-friendly mood of the time, the Federal Council stated in its message that "it cannot be a question of preventing or combating cartels as such, but merely of controlling them, in particular by introducing a certain obligation of disclosure and combating abuses and excesses.“ Respect for the ”complex and difficult“ problem went so far that statements ”on the detailed design of future antitrust legislation“ were considered ”premature." The inclusion of an antitrust article in the Federal Constitution at that time was therefore **on the back burner**. 14

It was not until 1962 that the first antitrust law was passed, which was replaced by the Antitrust Act of 1985. The Antitrust Act of 1995, which has been revised several times in the meantime, is currently in force. While the Cartel Acts of 1962 and 1985 can be considered weak in both substantive and institutional terms, the **Cartel Act of 1995** is a modern cartel law that is consistently geared toward protecting effective competition. All three antitrust laws were based on Art. 31^{bis} para. 3 lit. d aBV. The amendments made since 2000 refer to the antitrust article of the new Federal Constitution, i.e. Art. 96 para. 1 FC. The reference in the preamble to the Cartel Act has been amended accordingly. 15

B. The antitrust article of the revised Federal Constitution

16 The wording of Art. 96 para. 1 FC closely follows Art. 31^{bis} para. 3 lit. d FC, but contains **three differences** of considerable significance. Firstly, the Confederation is no longer merely "authorized" to enact antitrust legislation, but is "required" to do so, i.e., it is obliged to do so. Secondly, the reference is no longer to the harmful effects of "cartels and similar organizations" (as in the old Federal Constitution), but to those of "cartels and other restrictions on competition," thereby removing the organizational restriction (see N. 56 f. below). And thirdly, Art. 96 para. 1 FC is characterized by the fact that the additions "if the general interest justifies it" and "if necessary, in deviation from freedom of trade and industry" have been omitted.

17 While the first two amendments are to be discussed in the individual commentary (below N. 40 f., N. 56 ff.), the significance of the omission mentioned above should be emphasized here. The old Federal Constitution assumed that there was a conflict between freedom of trade and industry on the one hand and antitrust law on the other. If the overall interest justified it and "if necessary," it was possible to deviate from freedom of trade and industry in order to prevent the excesses of cartels (see N. 14 above). It was therefore **not cartels but cartel law** that was interpreted as a deviation from economic freedom.

18 Art. 96 para. 1 FC does not require such caveats. According to the message on the new Federal Constitution, the introductory sentence of the old Federal Constitution is "superfluous and does not need to be retained in the draft, as the aim of competition policy is to secure a free economic order." Since competition law serves to "support and strengthen the principle of economic freedom," there is therefore no deviation from the principle of economic freedom, which is why the reservation that a deviation from this principle is permitted if necessary is no longer necessary. Cartel law does not restrict economic freedom in a manner contrary to fundamental principles, but rather expresses its inherent limits.

19 This established a doctrine that had already been expressed in the old antitrust article, namely that the application of antitrust law should not be regarded as a deviation from the freedom of trade and industry contrary to fundamental principles. Early on, for example, Zaccaria Giacometti had argued that freedom of contract was only covered by the principle of economic freedom "insofar as its exercise does not impair the system of free competition; in

other words, restrictions on private autonomy for the protection of the system of free competition are compatible with freedom of trade and industry." By dispensing with the reservation, the new Federal Constitution expresses in this sense that there is **no contradiction between antitrust legislation and economic freedom**. The fight against cartels and other restrictions on competition, which the legislature is now not only entitled but also obliged to pursue, is therefore not a restriction of economic freedom, but serves to guarantee economic freedom in the long term. Economic freedom does not include the right to abolish this freedom through cartels or other restrictions on competition. This amendment reflects a fundamental change in the understanding of freedom, recognizing the **paradox of freedom** in the economic sphere.

This milestone in antitrust philosophy has reversed the perspective of compe- 20
tition policy. It is no longer simply a matter of combating the excesses of cartels (see N. 14 above). Rather, the constitutional legislator instructs the legislature to protect economic freedom from self-abolition. The tolerance towards restrictions on competition that underpinned the old cartel article has been replaced by a **critical view of cartels**.

It is noteworthy that the assessments in the literature on the significance of 21
this development vary considerably. While some classify the deletion of the introductory sentence as a "paradigm shift," others do not attach any particular significance to the change. On closer inspection, however, there is no difference in substance. For those who did not see any deviation from freedom of trade and industry in antitrust law under the old Federal Constitution, it is logical not to attach any particular significance to the deletion of the reservation in the new antitrust article. This position has probably been the majority view since the mid-1980s. However, not everyone followed the newer interpretation, continuing to assume the principle of freedom from cartels and seeing the antitrust article and legislation as an "encroachment on the principle of private autonomy in economic activity." Since the omission of the introductory sentence has clarified the majority view in this respect, the process as a whole should be accorded **fundamental significance**.

This statement refers to the institutional dimension of economic freedom. A 22
distinction must be made between the *principle* of economic freedom (Art. 94 para. 1 FC) and the *fundamental right* to economic freedom (Art. 27 FC). From a fundamental rights perspective, antitrust law is a restriction of the economic freedom guaranteed by Art. 27 FC, which is subject to the require-

ments of Art. 36 FC. However, this does not mean that there is (still) a – however limited – "**freedom from cartels**." Rather, antitrust law is one example of a **conflict between fundamental rights and the principle of economic freedom**. On the one hand, antitrust law is a restriction of fundamental rights; on the other hand, it supports and strengthens a free competitive order and thus realizes the principle of economic freedom. The antitrust article (Art. 96 para. 1 FC) resolves this ambivalence: It clarifies that the protection of effective competition is a public interest within the meaning of Art. 36 para. 2 FC, so that the interference with the fundamental right is lawful if the other requirements of Art. 36 FC are also met. With regard to the applicable constitutional law, there can therefore no longer be any talk of **"freedom from cartels."**

23 The **popular initiative "Stop the high price island – for fair prices (Fair Price Initiative)"** submitted on December 12, 2017, would have added a second sentence to Art. 96 para. 1 FC with the following wording: "It [scil. the Confederation] shall, in particular, take measures to ensure non-discriminatory procurement of goods and services abroad and to prevent restrictions on competition caused by unilateral behavior on the part of companies with market power." A transitional provision in Art. 197 FC would have obliged the Federal Council to issue implementing provisions by the time the amendments to the law came into force, which would have incorporated, among other things, the concept of relative market power into antitrust law and the guarantee of non-discriminatory online shopping into the law against unfair competition. The legislature implemented the central concerns of the Fair Price Initiative by revising the Cartel Act on March 19, 2021 (AS 2021 576). The initiative was subsequently withdrawn on March 25, 2021, leaving the cartel article of the Federal Constitution unchanged.

III. CONTEXT

A. Scope of Art. 96 para. 1 FC

24 Art. 96 para. 1 FC focuses on competition as an **institution**. However, this does not preclude the provision from also being interpreted as protecting individuals. The **individual protection** of competitors and other market participants is mainly provided by Art. 27 FC, which is therefore also mentioned in the preamble to the Cartel Act. Art. 96 para. 1 FC does not merely grant the

Confederation the power to legislate in the field of antitrust law, but also adds substantive requirements, in contrast to, for example, the competence provision for the law against unfair competition in Art. 96 para. 2 lit. b FC: The provisions to be enacted must be directed "against the economically or socially harmful effects of cartels and other restrictions on competition." Art. 96 para. 1 FC is therefore a **competence provision with a substantive directive**.

The significance of this directive is disputed. A traditionalist school of thought derives from this that Swiss antitrust law is subject to the **abuse principle**. This distinguishes it from most other antitrust legal systems, which follow the **prohibition principle**. This view is opposed by those who argue that Art. 96 para. 1 FC does not contain any commitment to the abuse principle, or which consider the distinction between the prohibition and abuse principles to be obsolete, insignificant or irrelevant. The sometimes rather apodictic discussion suffers from the fact that, in some cases, definitions are chosen which are misguided in their understanding of the concept of abuse and lead to confusion. The terminology must therefore first be clarified. 25

B. The terms "abuse principle" and "prohibition principle"

Originally, there was agreement on the meaning of the term "abuse principle" in antitrust law. For example, the 1962 message on the Cartel Act describes the abuse principle as follows: "A cartel law must in principle allow cartels and similar organizations and limit itself to combating abuses." This is based on a **positive view of cartels**: they are welcomed as a fundamentally good form of economic order. For this reason, they remain permitted (just like other restrictions on competition); only abuses of cartel formation are to be combated. The abuse principle corresponds to the recognition of a principle of "**freedom from cartels**," which may only be violated in justified individual cases. Under the abuse principle, competition has a low priority. 26

This has consequences on the **legal consequences side**: in a cartel law system that follows the abuse principle, cartel agreements are initially effective and only become void once a legal authority has legally prohibited the cartel (*ex nunc* nullity). Under the prohibition principle, however, agreements that violate antitrust law are void from the outset (*ex tunc* nullity). This terminology was well known to the legislators who drafted the 1995 Cartel Act. The message accompanying the 1995 Cartel Act states: "The abuse principle does not allow for ex tunc nullity, but only ex nunc nullity." 27

28 For **sanctions**, this means that since, according to the abuse principle, conduct only becomes illegal at the moment when a legal authority has issued a final prohibition, no direct sanctions can be imposed because the cartel conduct was legal in the past. Direct sanctions are, however, compatible with the prohibition principle because the conduct was contrary to antitrust law from the outset.

29 Some legal scholars, however, give the term “abuse” a **different meaning**: the principle of abuse refers to the substantive directive in Art. 96 para. 1 FC, according to which antitrust provisions must be directed against the harmful effects of cartels and other restrictions of competition. According to this doctrine, abuse therefore consists in the negative effects of competitive behavior. This shift in terminology apparently serves as a lifeline for this part of the doctrine in order to solve its fundamental problem: Art. 96 para. 1 FC does not refer to “abuse.” In deviation from the traditional meaning, they attribute a consequentialist meaning to the concept of abuse, which is itself laid down in the constitutional article, but must be distinguished from the category of “abuse.”

30 A distinction must be made between **two pairs of categories**, namely between the prohibition and abuse principles on the one hand and the form-based and effect-oriented approaches on the other. The prohibition and abuse principles say something about the basic attitude toward cartels and the effectiveness of antitrust rules (negative vs. positive attitude toward cartels; initial vs. subsequent prohibition), while the contrast between form and effect concerns the substantive requirements in antitrust cases (type of restriction of competition vs. effect of the restriction of competition). A glance at US antitrust law shows that it is incorrect to equate the abuse principle with the effect-oriented approach: The most pronounced effect-based approach worldwide is combined with the prohibition principle.

31 Equating the abuse principle with the effect-oriented approach leads to numerous misunderstandings and, due to the use of idiosyncratic terminology, jeopardizes comparative law. The following therefore distinguishes between two questions. First, it must be clarified whether Art. 96 para. 1 FC requires the legislature to apply the **abuse principle** (see below), and second, it must be determined to what extent the constitutional requirements commit the legislature to an **“effects-based approach”** (see N. 44 ff. below).

C. Commitment to the abuse principle?

The abuse principle is characterized by a positive attitude towards cartels. In keeping with the spirit of the time, the 1937 message on the old cartel article (Art. 31bis para. 3 lit. d aBV) was entirely in line with this approach (see N. 14 above). However, it also made it clear that no decision should be made in advance on how a possible cartel law should be structured in concrete terms. A distinction must therefore be made between the broad scope provided by the Federal Constitution and the specific provisions enacted by the ordinary legislature. The Cartel Acts of 1962 and 1985 clearly followed the abuse principle. The legislators who drafted the Cartel Act of 1995, which brought about a paradigm shift toward the protection of effective competition and thus ushered in a “new era of competition policy,” began to have their first doubts. The message accompanying the Cartel Act of 1995 contains, on the one hand, a relativization of prohibition and abuse legislation. In other places, however, the message expressly commits itself to the abuse principle. Despite this ambivalence, it seems correct to also classify the **Cartel Act of 1995 as abuse legislation**. 32

According to the opinion expressed here, however, the Cartel Act **switched to the prohibition principle** with the introduction of direct sanctions by the 2003 revision of the Cartel Act. As already explained, direct sanctions cannot be justified by the abuse principle (see N. 28 above). In addition, the Federal Supreme Court has recognized the *ex tunc* nullity of contracts that violate antitrust law, which is also characteristic of the prohibition principle (see N. 27 above). With these two changes, the Cartel Act has thus abandoned the abuse principle. 33

In the constitutional context at issue here, however, the question is not which principle applies at the level of ordinary law, but whether the **cartel article of the new Federal Constitution** permits prohibitive legislation or, conversely, enshrines the principle of abuse. The recognized methods of interpretation must be applied to answer this question. The **wording** of Art. 96 para. 1 FC does not contain the term “abuse.” **In terms of its historical origins**, it should be noted that Art. 31bis para. 3 lit. d aFC, i.e., the cartel article of the old Federal Constitution, was rooted in the cartel spirit of the time, but the legislature did not want to draw narrow boundaries. The new cartel article in Art. 96 para. 1 FC shows determination on the one hand: the enactment of cartel law is no longer left to the legislature, but becomes an obligation. On 34 the other hand, the message accompanying the new antitrust article states even more clearly than the message accompanying the old antitrust article that the antitrust article does not specify the "means of antitrust policy," that the antitrust legislator has 'considerable' leeway, and that it may "also partially use the means of prohibiting cartels." This is a direct response to and a clear rejection of the previously held principle of "prohibition of prohibitive legislation." The only thing that is ruled out is a general prohibition of competition agreements as such. The history of its development therefore suggests that the antitrust article is **agnostic on the question of principle**: the legislature is free to decide whether it wishes to base antitrust law (which must be enacted) on the abuse principle or the prohibition principle. The message accompanying the new Federal Constitution does not even mention the concept of abuse (in the context of antitrust law). It is true that the message accompanying the Cartel Act of 1995 states that the Federal Constitution prescribes the abuse principle, even if this statement is qualified in other places (see N. 32 above). However, a statement in connection with simple legislation cannot override the standardization at the constitutional level, which grants the antitrust legislator considerable leeway, including the possibility of partial prohibitions. Those who attribute absolute validity to the statement in the 1995 message on the Cartel Act fail to do justice to the hierarchy of norms and also overlook the fact that the statement in the Cartel Act message refers to the old cartel article, whereas more recent doctrine and the constitutional change in 2000 have led to a paradigm shift towards a critical view of the cartel economy (see above N. 18 ff.).

35 From a **systematic point of view**, it should be noted that the Federal Constitution does use the term "abuse" in other places, e.g. in Art. 13 para. 2, 96 para. 2 lit. a, 107 para. 1, 109 para. 1, 119 para. 1 and 120 para. 1 FC. If the constitutional legislator had wanted the legislature to merely prevent abuses of the cartel system, it could have formulated this in line with the aforementioned provisions, as it did, for example, in relation to price supervision (Art. 96 para. 2 lit. a FC: "Prevention of abuses in price formation"), but not in the case of antitrust law (Art. 96 para. 1 FC). Even if it had done so, however, the consequences would not be as articulated by the supporters of the abuse principle, who consider prohibitions based on the abuse principle to be out of the question: For example, the obligation to protect against the misuse of genetic engineering in Art. 120 para. 1 FC has the function of distinguishing between what is permissible and what is impermissible. To implement this, the

legislature may issue prohibitions, which it has done in Art. 6 ff. GTG. There is no contradiction with the principle of abuse prescribed by constitutional law for genetic engineering law. Prohibitions are an instrument for preventing abuse.

From a **teleological perspective**, it is of fundamental importance that the new Federal Constitution no longer contains the addition that, if necessary, deviations from freedom of trade and industry are possible (see above N. 18 ff.). Economic freedom needs protection from self-destruction: it is no longer antitrust law but cartels that are identified as the problem. The positive attitude toward cartels is replaced by recognition of the inherent limits of economic freedom. The legislature is now obliged to enact antitrust regulations and thus to protect effective competition. It is "called upon to oppose all private-law encroachments on power." The objective of the antitrust article therefore also argues against restricting the legislature to a set of principles and, even more so, against an obligation to apply the antitrust-friendly doctrine of abuse. 36

In summary, it can be said that the Cartel Article of the Federal Constitution grants the legislature considerable leeway: Art. 96 para. 1 FC is a **target provision** that sets the goal for the legislature to prevent damage caused by cartels and other restrictions of competition, but leaves it considerable freedom in the choice of means. There is no commitment to the abuse principle. Only a general ban on cartels subject to authorization is excluded by the provisions of the Cartel Article. It would therefore not be constitutional to introduce a notification and approval system such as that which applied in the European Community until 2004. However, this does not alter the high value that the federal legislature must attach to competition. The assumption of any kind of limited "freedom from cartels" must therefore be rejected. Rather, the legislature is required to "protect the good of competition." 37

Accordingly, arguments based generally on the abuse principle are not accepted in court. Although the Federal Supreme Court and the Federal Administrative Court have not yet expressly recognized the validity of the prohibition principle, both courts reject arguments based on the abuse principle as **irrelevant**. 38

D. Conclusion

39 The abuse principle in antitrust law means that cartels are recognized as a **good form of economic order** and that, therefore, only abuses of cartel formation should and may be prohibited. According to some legal scholars, the abuse principle is still constitutionally binding on antitrust legislators today. A methodologically sound interpretation of the cartel article of the Federal Constitution paints a different picture: Art. 31bis para. 3 lit. d aBV, the cartel article of the old Federal Constitution, was already formulated in an open manner in this respect. Despite all the sympathy for cartels at the time, the specific form of future cartel laws should not be prejudged. At the latest with Art. 96 para. 1 FC, i.e. the new cartel article, there is no longer any reference to the abuse principle. The cartel legislator is largely free in its design, apart from the introduction of a notification and approval system (see above N. 37).

IV. COMMENTARY IN THE NARROW SENSE

A. “Adopt”

40 The articles of the Federal Constitution relating to powers are often worded in such a way that a particular matter is “a matter for the Confederation” (e.g., civil law and civil procedure law pursuant to Art. 122 para. 1 FC, criminal law and criminal procedure law pursuant to Art. 123 para. 1 FC). In other contexts, the Constitution goes one step further and stipulates that the Confederation shall “enact” rules on a specific subject (see, for example, Art. 38 para. 2, 74 para. 1, 80 para. 1 and 98 para. 1 and 3 FC). For example, when Art. 98 para. 1 FC states that the Confederation “shall enact” provisions on banking and stock exchanges, this means that it is **obliged to enact provisions** and that non-regulation is not an option.

41 The same applies to Art. 96 para. 1 FC. The provision *obliges* the federal legislature to enact antitrust regulations. The **question of whether antitrust legislation** should be enacted is therefore no longer at its discretion; a “laissez faire” approach to competition policy is consequently ruled out. This is based on the understanding that competition does not maintain itself, but is threatened by self-destruction through cartels and the formation of monopolies (see above N. 19 f.). The state therefore has a responsibility to maintain the competitive system.

B. “Regulations”

Art. 96 para. 1 KG obliges the federal legislature to enact antitrust “provisions,” whereby it remains **free in terms of legislative technique**. The solution actually chosen, namely a separate antitrust law, is not required by constitutional law. It would be constitutional to integrate antitrust law into a market-wide law, as France has done with the Code de commerce. One could also imagine a law that combines antitrust law in the narrow sense and price supervision law under one roof, as long as the integrated antitrust and price supervision law provides for specific price supervision instruments and the institution of a price supervisor. It would also be conceivable to combine antitrust law and unfair competition law in a single law, as some Central and Eastern European countries have done in their transition to a market economy. The Constitution gives the legislature considerable leeway in such matters of legislative technique. 42

The difference in wording between Art. 96 para. 1 (“shall issue regulations”) and para. 2 (“shall take measures”) is purely terminological. This does not mean that the Confederation can only take legislative action in the field of antitrust law (para. 1) and not administrative action. The legislature was therefore right to base the executive provisions on the enforcement of antitrust law by federal authorities on Art. 96 para. 1 FC. 43

C. “Harmful effects”

Pursuant to Art. 96 para. 1 FC, the Confederation must enact provisions against the economically or socially “harmful effects” of cartels and other restrictions on competition. While the message accompanying the previous provision pointed out that “this cannot be a matter of preventing or combating cartels as such, but merely of controlling cartels, in particular by introducing a certain obligation of disclosure and combating abuses and excesses,” the thrust of the new antitrust article is different: “Paragraph 1 does not comment on the means of cartel policy. The scope for maneuver of the cartel legislator is considerable; under certain circumstances, it may also partially use the means of prohibiting cartels.” It may not, however, “generally prohibit competition agreements as such.” 44

Even though the wording “harmful effects” dates back to the old Federal Constitution, **its meaning has been reversed in the context of the new Fed-** 45

eral Constitution: whereas cartels were originally accepted and there was even talk of "freedom from cartels," the aim now is to prevent cartels and other restrictions on competition (see above N. 36 f.). The Cartel Act of 1995 anticipated the constitutional change that occurred a few years later by placing the reference to harmful effects in Art. 1 KG in a competition-friendly context: According to the purpose clause of the Cartel Act, the aim of cartel law is to "promote competition in the interests of a free market economy." The liberal order does not refer to "freedom from cartels," but rather to comprehensive freedom of competition. This understanding had already been developed in constitutional law for the old antitrust article, but it has been part of constitutional law since the new antitrust article came into force. Cartels and the abuse of monopoly power are fundamentally impermissible because they have harmful effects. These effects must not be arbitrarily minor. In accordance with this, the law therefore requires at least a "significant" impairment of competition in connection with competition agreements (Art. 5 para. 1 KG). A special intervention criterion applies to merger control (Art. 10 para. 2 KG). However, no special qualification is required for the abuse of a dominant market position, since competition in such cases is already weakened precisely because of the dominant market position and the markets concerned must therefore be protected against any further impairment.

46 Some voices in the literature go further, inferring from the provision in Art. 96 para. 1 FC that the legislature can only prohibit conduct where **in individual cases harmful effects** have been proven. The Constitution obliges legislators and those applying the law to adopt an "effects-based approach." The constitution is thus interpreted as requiring legislators and law enforcement authorities to resolve individual cases by means of legislation.

47 This view fails to recognize the function of the antitrust article as a constitutional norm of competence. According to the materials, the legislature is granted **wide discretion**, which includes the possibility of prohibitions (see N. 34 above). The "effects-based approach" is an approach developed in the US by representatives of the Chicago School and widespread since the 1970s. The Swiss constitutional legislator, both in the new economic articles of 1947 (when the Chicago School did not yet exist) and in the Federal Constitution of 2000, had no intention of enshrining a specific competition policy theory in the Federal Constitution. Incidentally, the main thrust of the Chicago School was to apply more economic analysis to vertical competition agreements, uni-

lateral conduct, and merger control. The per se prohibition of classic cartels in US antitrust law remained unaffected by this and continues to be consistently enforced. It is therefore not permissible to read into the cartel article a meaning that was foreign to the constitutional legislator using the term "effects-based approach."

The fundamental debate on the **objectives of antitrust law** also argues in favor of a restrictive interpretation. A distinction must be made here between utilitarian approaches, which focus on the objective of efficiency, and deontological or systemic concepts, which protect competition as such ("theory of freedom of competition"). The "effects-based approach" is an efficiency-oriented approach that can be classified as utilitarian and has been promoted (but not absolutized) by the European Commission since the 1990s under the slogan "more economic approach." Even decades later, it remains unclear to what extent the efficiency criterion should be applied in antitrust law. Even leading representatives of the Chicago School were of the opinion that exaggeration of the efficiency criterion should be avoided. There is much to suggest that a synthesis between the fundamental positions is possible and advisable. It is completely inconceivable that the constitutional legislator wanted to resolve the fundamental dispute over competition policy and commit the antitrust legislator to a particular school of thought. The discussion on the objectives of antitrust law also suggests that the Constitution does not impose a general obligation to adopt an "effects-based approach." 48

The key to the correct interpretation of the term "harmful effects" can be found in the message accompanying the Cartel Act of 1995: According to this, the cartel article of the Federal Constitution makes it clear that competition legislation **may not pursue arbitrary objectives**, but must protect against the negative effects of cartels and other restrictions on competition. The balance theory applicable under the Cartel Acts of 1962 and 1985, which recognized non-competitive objectives of public interest, is hereby excluded. Furthermore, the reference to harmful effects expresses something that is self-evident: when formulating antitrust provisions, the legislature is faced with the task of distinguishing between harmful and harmless restrictions on competition. This task is so self-evident that the antitrust article "unnecessarily" mentions the harmful effects. 49

It is the task of the ordinary legislator to carry out the mandate of the Cartel Act. Internationally, it is common for antitrust offenses to provide for a **mix-** 50

ture of form-based and effect-based factors. This is based on the experience that there are particularly anti-competitive behaviors for which a more detailed analysis of the effects would be disproportionate. The solution adopted by the Swiss antitrust legislator, namely a system of general elements, presumptions, and examples of application, is in line with this development. This is consistent with the requirements of the antitrust article of the Federal Constitution. It is the opposing view that is constitutionally questionable: the requirement to carry out a comprehensive impact analysis in each individual case ignores the fact that there are particularly dangerous types of conduct where a more detailed impact analysis is unnecessary. Tying up antitrust resources for an impact assessment in such cases reduces the potential for prosecuting other restrictions on competition. Making the impact analysis absolute thus undermines the requirement laid down in Art. 96 para. 1 FC to provide effective instruments for the protection of competition and thereby ensure a **"functioning competitive order."**

51 In summary, it follows that the objective of Art. 96 para. 1 FC does not require an assessment of harmful effects in each individual case, but rather mandates that the legislature enact antitrust provisions that guarantee **effective protection of competition** in order to prevent harm to the economy and society. The legislature has considerable discretion in choosing or combining form-based and effect-based elements and may also provide for partial prohibi-

tions. However, a general prohibition of cartels subject to authorization (see N. 37 above), which no one would want to introduce, is ruled out by the Cartel Act.

D. "Economically or socially harmful"

52 The discussion about the harmful effects of cartels and other restrictions on competition is generally conducted from an economic perspective. This overlooks the fact that the Cartel Act alternatively refers to **"socially harmful effects"**. Social aspects played a major role in earlier antitrust laws, as according to the balance theory applicable at the time, social aspects had to be included in a comprehensive *bilan économique et social* and weighed against economic interests and competition aspects. For example, Article 29 of the 1985 Cartel Act, which enshrined the balance theory in positive law, listed the effects on the regions of the country and the interests of the employees and consumers

affected as legal interests to be weighed up. With the abolition of the balance theory, social aspects were removed from the ordinary antitrust proceedings, so that they are now only mentioned in connection with the procedure for exceptional approval by the Federal Council.

Such a narrowing of meaning does not do justice to the general requirement 53
in Art. 96 para. 1 FC. The criterion of social harmfulness applies generally to competition law. It underscores the **socio-political function of antitrust law**, which goes beyond economic functions: antitrust law is intended to prevent the bundling and concentration of economic power in the hands of individuals, since experience has shown that cartels and monopolies, as well as their representatives, also exert considerable influence on political decision-making. The prevention of agreements that restrict competition, abuses of market power, and mergers that restrict competition therefore also has a social dimension.

In particular, the mere agreement of cartel agreements, and not just their im- 54
plementation, creates a **cartel-friendly atmosphere** that is poisonous for a competitive economy. In a constitutional interpretation (namely with reference to Art. 96 FC), the Federal Supreme Court ruled: "Agreements, and not just the practice of the types of agreements referred to in Art. 5 para. 3 and 4 KG, create a climate of hostility to competition that is 'economically or socially harmful' to the functioning of normal competition." Potential competition must therefore also be protected.

Ultimately, the reference to the social damage caused by the formation of car- 55
tels establishes a link between a cartel-free market economy and direct democracy: decisions should be taken decentrally, in the economy by the individual players at market level, and in the political sphere ultimately by the citizens. The social dimension of antitrust law thus establishes a link to fundamental principles of statehood and underscores the importance of the mandate in Art. 96 para. 1 FC for the legislature to create a competition-friendly environment.

E. "Cartels and other restrictions on competition"

The **old antitrust article** only referred to "cartels and similar organizations." 56
Originally, the legislation was therefore only intended to cover cartels in the strict sense (i.e., agreements between competitors that restrict competition,

i.e., horizontal competition agreements) and comparable organizations. According to the message accompanying the new economic articles, this was intended to include trusts, for example. Over time, the provision has been interpreted more broadly. The legislators who drafted the 1995 Cartel Act, for example, took the view that the wording allowed for measures "against private restrictions of competition" in general. This included rules against vertical competition agreements (namely those between companies at different market levels, e.g., distribution agreements), the abuse of market power, and anti-competitive mergers, i.e., restrictions of competition that do not necessarily fall under the term "cartels and similar organizations" at first glance.

57 The **new antitrust article** completely overcame the organizational restriction. Cartel law is no longer to be limited to "cartels and similar organizations," but is to regulate "cartels and other restrictions on competition" in general. This wording covers all conduct that is usually covered by the term "cartel law," i.e., rules on (horizontal and vertical) competition agreements, the abuse of market power, and merger control. Furthermore, the wording is sufficiently broad to include new provisions relating to company-specific standards that are aimed at preventing restrictions on competition that are contrary to the functioning of the market. The provision would also be suitable as a basis for competition policy price monitoring if Art. 96 para. 2 lit. a FC did not provide a separate basis for competence, which takes precedence as the more specific rule. This does not exclude price-related restrictions on competition from also falling under general antitrust law, for example in the case of price cartels or abuse of market dominance by dominant players. However, anti-competitive violations of fairness are a matter for unfair competition law. Art. 96 para. 2 lit. b FC is the correct basis for this.

58 EU law provides for **control of state aid** in Articles 107 et seq. TFEU, which is enshrined in the chapter on "Competition rules" as the fourth pillar of European competition law (alongside the rules on agreements restricting competition, the abuse of dominant positions, and merger control). However, state aid control is not directed at companies but at the subsidising Member States or their subdivisions and is therefore not antitrust law in the strict sense. If the federal legislature wishes to introduce subsidy control, Art. 96 para. 1 FC would therefore not be a suitable basis for competence. However, legislative competence under Art. 95 para. 2 FC may be considered for cantonal and mu-

nicipal subsidies; for federal subsidies, an implied federal competence must be assumed.

It follows from the federal legislature's obligation to enact antitrust provisions (see N. 40 f. above), combined with the conjunction "and" between 'cartels' and "other restrictions on competition" in Art. 96 para. 1 FC, that the legislature must enact regulations on **all recognized areas of antitrust law**. It could not therefore confine itself to rules on cartels and omit vertical competition agreements. It is also obliged to enact provisions on unilateral conduct by undertakings and on merger control. 59

The harmful effects of "cartels and other restrictions on competition" can only be avoided if the antitrust rules are effective. Both the substantive rules and the requirements for institutions and procedures must therefore be designed in such a way that the economic and social damage caused by cartels and other restrictions on competition is prevented or remedied. As regards substantive law, the elements of the offense must not impose excessive requirements on the authorities responsible for applying the law. A distinction must be made between **public** and **private enforcement** in relation to institutions and procedures. For public enforcement, there must be adequately resourced authorities and courts with the necessary powers to enforce substantive law within a reasonable time. Effective civil enforcement requires, among other things, that there are no systemic restrictions on standing to sue and that the civil courts respond to the particularly great difficulties of proof in civil antitrust law by making full use of the scope available to them in terms of the standard of proof and the presentation of evidence. Even though Art. 96 para. 1 FC grants the legislature considerable leeway, it must always ensure that the antitrust provisions guarantee **effective protection of competition**. The antitrust article therefore establishes the **principle of effectiveness** as a binding requirement for the legislature and those applying the law: substantive law and procedural law must be designed, interpreted, and applied in such a way that the effective enforcement of antitrust law by administrative and private law is not made practically impossible or excessively difficult. 60

F. "against"

The provisions to be enacted shall be directed 'against' the economically or socially harmful effects of cartels and other restrictions on competition. The legislature did not use this preposition in the title of the Cartel Act, but chose 61 the wording “Federal Act *on* Cartels and Other Restrictions on Competition.” The relative pronoun “über” (about) was taken from the Cartel Acts of 1962 and 1985, and thus dates from a time when there was a positive attitude toward cartels. Although the Cartel Act of 1995 marked a fundamental shift toward the protection of effective competition, this change of direction was not reflected in the title of the Cartel Act. The harmful effects of cartels and other restrictions on competition are combated by adopting rules “against” them, as stipulated in the cartel article of the Federal Constitution. The legislature is therefore called upon to change the title of the law to “Federal Act against Cartels and Other Restrictions on Competition,” just as the UWG is called the “Federal Act against Unfair Competition.”

G. Outlook

62 The 2000 Cartel Act reversed the competition policy paradigm: cartels are no longer recognized as a good form of organization, but are classified as a deviation from economic freedom and thus as a threat to the free market economy. Traditionalist circles dispute this change in meaning and adhere to cartel-friendly principles which they derive from the wording of Art. 96 para. 1 FC (namely the “harmful effects”), which the Federal Constitution of 2000 did indeed adopt from the cartel era. In order to avoid such misinterpretations from the outset, it is time to **amend Art. 96 para. 1 FC**. It is recommended that the provision be worded as follows: “Legislation in the field of antitrust and competition law is a matter for the Confederation.” It is then the task of the legislature to design the rules in such a way that the fundamental public interest in a functioning competitive economy is given appropriate weight.

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COMMENTARY ON

Art. 96 para. 2 lit. a FC

A commentary by Patricia S. Kaiser

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Art. 96 Competition policy

[2] It shall take measures:

a. to prevent abuses in price maintenance by dominant undertakings and private and public law organisations

CONTENT

I. CONTEXT

Art. 96 BV forms the basis for three different federal powers: antitrust law (in para. 1), price supervision law (in para. 2 lit. a) and unfair competition law (in para. 2 lit. b). Although all three powers relate to matters of commercial law, they nevertheless concern different areas of regulation. Prior to the total revision of the Federal Constitution, these were therefore distributed across different articles. They are discussed here in three separate commentaries. 1

II. HISTORY OF ORIGIN

A. First price controls

Switzerland already had price controls in the interwar period, during the Second World War and afterwards. This was based on economic policy. The Federal Decree of 1972 was intended to deal with the overheating of the economy at the time, which led to excess demand and thus caused considerable inflation. Without a proper constitutional basis, the period of validity of this - consequently extra-constitutional (Art. 89bis para. 1 and 3 aBV) - federal decree was limited until the end of 1975. This was followed by the next federal decree, which, however, had to cope with a changed situation: the economic situation had cooled down into a recession, while relatively high inflation still had to be brought under control. 2

B. Popular initiative "to prevent abusive prices"

1. Popular initiative and counter-proposal of the Federal Council

Inspired by the positive result of the 1975 federal decree in the referendum, the consumer protection organizations launched a popular initiative for the permanent establishment of price monitoring, not (any longer) as an economic policy measure, but as a measure motivated by competition policy. The Federal Council, on the other hand, countered the popular initiative with a counter-proposal with price monitoring motivated by economic policy and limited to inflationary phases. In the referendum on November 28, 1982, however, the majority of the people and the cantons voted in favour of the popular initiative and thus in favor of a competition policy motivation. 3

2. First constitutional text

4 The - then - new Art. 31septies aBV read as follows:

"In order to prevent abuses in pricing, the Confederation shall issue regulations for monitoring the prices and price recommendations for goods and services of undertakings and organizations with market power, in particular cartels and cartel-like entities, under public and private law. Such prices may be reduced if the purpose so requires."

5 The purpose of this constitutional provision was to prevent increased prices by cartels and companies and organizations with market power due to a lack of effective competition, but not to create competition. According to the dispatch, it is therefore "a kind of substitute policy for competition [...] which replaces the recognized best price supervisor", namely competition.

6 The creation of competition was reserved for the antitrust article (Art. 31bis para. 3 lit. d aBV) and the implementing legislation. This constitutional provision would also have been sufficient for the establishment of price monitoring in terms of competition policy, as it provided a basis against any form of economically or socially damaging effects of cartels and companies with market power. There was a "parallel" competence of the federal government. However, the newly created basis of Art. 31septies aBV gave the federal legislator a specific legislative mandate: to ensure the effective and rapid monitoring of prices of powerful market entities. This required a specific mandate and thus a very specific instrument.

C. Constitutional revision and new FC

7 The two separate articles were transferred to Art. 96 para. 1 and para. 2 lit. a in the FC of April 18, 1999. The latter paragraph in turn gives the federal legislator the binding mandate to use a specific competition policy instrument, namely price monitoring, in addition to the antitrust instrument. In this respect, Art. 96 para. 2 lit. a FC is a legislative competence with subsequent derogatory effect.

8 Based on the generally applicable rules for the interpretation of constitutional articles, it must continue to be assumed that the antitrust and price control articles are of equal importance. Thus, the total revision of the Federal Consti-

tution has not changed the independent significance of the two articles for the Swiss economic constitution and the old legal status has been retained.

II.COMMENTARY IN THE NARROW SENSE

A. Market power and abuses in pricing (price abuse)

1. Terminology of market power

a. Constitutional evidence

The prerequisite for state action against abusive pricing is the market power of a company or organization. The term market power (or the adjective "market power") is only used by the FC in the aforementioned paragraph. Beyond that, however, the market is hardly mentioned and is only used in agriculture (Art. 104). The word "power" also has no parallel in the FC. It is only mentioned in connection with "power-political or military threats" in the context of national defense (Art. 102). 9

b. Legal indications

At the statutory level, the CartA repeats the concept of market power within the scope of application, but does not elaborate on it. However, it does mention "market-dominant companies" in Art. 4 para. 2 and describes their status as being able to behave independently of other market participants (competitors, suppliers or buyers) to a significant extent. 10

The Price Supervision Act (PrSA) also does not address the concept of market power in its scope of application (Art. 1 f.) and merely repeats that it applies to "companies under private and public law with market power". However, with regard to the competition policy principle of Art. 12, para. 1 contains the statement that price abuse can only occur "if the prices on the market concerned are not the result of effective competition". The connection between the concept of market power and the lack of competitive pressure or the substantive development of competition was also established by the Federal Administrative Court, which stated that, in principle, prices that are the result of effective competition are not abusive. And it went on to say: "This basic economic [s]ystematic understanding derives from the Federal Constitution. Thus, the federal government's competence to take measures against abusive prices is 11 expressly limited to abuses in pricing by companies and organizations with market power (see Art. 96 para. 2 lit. a FC). This definition of competence as well as the fundamental rights of the guarantee of property (Art. 26) and economic freedom (27 FC) are based on a basic understanding of the economic system, which implies that abusive prices can only exist if there is no effective competition on the market concerned. Effective competition automatically limits the scope for price fixing to a non-abusive level [...]." Even if "effective competition" is thus regarded as the guiding principle of competition policy, the PrSA must take into account the specification that the effects of competition must relate to pricing.

12 While Art. 94 FC - the principle of economic order - protects private competition from state deformation, Art. 96 FC primarily refers to the protection of competition from private parties: The unifying element of the two constitutional norms in the common section on the economy is therefore the protection of competition (see, however, n. 12 below). The provisions cannot be separated flawlessly and complement each other. The competition policy intended by Art. 96 FC is intended to ensure a competition-oriented economic order, which means that it basically harmonizes with the principle of economic freedom (Art. 94 FC). The competition policy regulated in Art. 96 FC is also in line with the principle of economic freedom (Art. 27 FC). Thus, the former - measures motivated by competition law - can also restrict the latter - positions protected by fundamental rights: the yardstick is Art. 36 FC. This system makes it clear that competition policy within the meaning of Art. 96 FC constitutes a suitable interest pursuant to Art. 36 para. 2 FC and thus a restriction of individual rights. From this, the majority of the doctrine deduces that the paragraph on price control also protects competition and thus the protection of competition constitutes a legitimate interest within the meaning of Art. 36 para. 2 FC.

13 In my opinion, however, the price control paragraph protects the flip side of effective competition: private and commercial consumers must be protected from the consequences of a lack of competition. The paragraph on price control and consequently the PrSA apply precisely when competition is insufficient, which is primarily the case for legal (statutory monopolies, e.g. buildings insurance) or factual reasons (natural monopolies such as the gas network). However, it is irrelevant whether competition is undesirable due to overriding public interests (such as in the agricultural sector) or not (in which case the

market could theoretically play a role, such as in the case of Wordline's transaction fees, see no. 17 below). Thus, the absence of effective competition is a gateway for the state to intervene pursuant to Art. 36 para. 2 FC.

2. Distinction between market power and market dominance

The FAC has stated that there is a small but significant difference between the price monitoring and antitrust abuse investigations. Because COMCO, unlike the price supervisor, can impose administrative sanctions for price exploitation (Art. 49a para. 1 CartA), the legislator has also "set a significantly higher threshold for intervention". For this reason, the absence of effective competition is sufficient for the price supervisor to intervene in cases of market power. Market dominance as qualified market power, on the other hand, is a prerequisite for intervention by COMCO under Art. 7 CartA. In this respect, market power within the meaning of Art. 2 para. 1 CartA is a criterion for taking action, but not for intervention. This means that the CartA applies to market power (Art. 2 para. 1), but that Art. 7 CartA only applies if there is market dominance (in addition to relative market power) in conjunction with an unlawful practice covered by the Act. This is in contrast to the PrSA, for which market power is the decisive subordination criterion and prerequisite for intervention. Market power therefore lies "between normal market influence and market dominance". 14

3. Abuses in pricing (price abuse)

a. Indeterminate legal term

Price abuse ("abuses in pricing"), which is also mentioned in the constitutional text, is an undefined legal term. As already mentioned, the PrSA does not have a legal definition of price abuse, but links it to effective competition and excludes price abuse if it exists (Art. 12 para. 1 PrSA). 15

b. Price - casuistry

The PrSA "applies to prices of goods and services, including credit. Wages and other benefits arising from the employment relationship and the lending activities of the Swiss National Bank are excluded" (Art. 1). 16

In economic terms, the price is "the exchange value of a good expressed in monetary units". It is an "indicator of scarcity". This shows that taxes, as un- 17 conditionally owed levies, cannot be prices in the sense of the constitutional norm and thus also of the PrSA. Nor, for example, is a private-law reminder fee or a fine a price. In the case of municipal taxes, the question must be clarified as to whether the fiscal portion of the levy dominates: in this case, they also do not constitute a price. On the other hand, user charges of all kinds fall within the material scope of PrSA as remuneration for the use of a service of a public enterprise, facility or institution. These include, for example, municipal supply and disposal companies (electricity plants, gas and waterworks, waste incineration and sewage plants), cabs for parking and market fees as well as transport companies or airport fees. In practice, therefore, the nature and character of the tax in question and the service in question must always be examined.

18 Finally, charges for goods and services provided by companies with market power are also deemed to be prices. Examples include letter or parcel postage from Swiss Post AG, transaction fees from Worldline Schweiz AG (before November 2021 SIX Payment Services AG) or wholesale prices from telecommunications companies such as Swisscom AG.

19 A good overview of the various prices monitored by the price supervisor can be found in the collection Competition Law and Policy (RPW), the fifth part of which contains the annual price monitoring reports.

c. Examination of abuse

20 Art. 13 PrSA provides a list of assessment elements for the abuse test when increasing or maintaining prices. This list is not exhaustive ("in particular") and the individual elements are not in a hierarchical relationship to each other. Furthermore, the price supervisor has a great deal of discretion in their selection and consideration. The "approach to the term [...] must therefore be based on the general purpose of competition policy price monitoring". This is because these criteria are also suitable for the constitutional understanding of price abuse.

21 The requirement of abuse expresses that it is a matter of a certain "exaggeration" of the price. Companies should continue to be entitled to a "reasonable profit" (Art. 13 para. 1 lit. b PrSA). According to the Federal Supreme Court, the profit must include a normal return on equity and a risk premium in line

with the market. Indications of excessively high profits are the amount of provisions and reserves as well as profit distributions to investors.

d. Low prices

Abusively low prices, on the other hand, are not covered by the offense. These can either be an expression of a bait-and-switch policy within the meaning of the UCA or an expression of buyer power and thus fall within the scope of the KG. Consequently, buyer power cannot be subsumed under Art. 96 para. 2 lit. a FC, which is already apparent from the materials. 22

B. Companies and organizations under private and public law

As is clear from the constitutional text, the group of persons covered is extremely broad: price monitoring even includes state-controlled companies as well as the public sector and thus certain public levies (see n. 16). The wording is based on cartel law. 23

However, the powers of the price supervisor in this area are restricted by the PrSA for reasons of direct democracy. If a price is set or approved by a state authority, the price supervisor only has a more stringent right to make recommendations (Art. 14 f. PrSA). 24

C. Organizational form

The question of whether the person of the price supervisor (Art. 3 PrSA) and thus the instruments of price supervision are prescribed by the Constitution is answered inconsistently in the doctrine. Some argue that although the division of tasks has historically been established with the person of the price supervisor, this could also be abolished. The legislator is free to determine the division of tasks between COMCO and price monitoring. This is justified not least by "difficult demarcation issues", as Art. 16 para. 2 PrSA and Art. 3 para. 3 CartA, which regulate the division of tasks between the two authorities, are partially contradictory and would lead to complex parallel procedures and contradictions in the application of the law. Little or nothing of this tragedy can be felt in the day-to-day work of the authorities. For example, the price supervisor and COMCO not only work together (Art. 5 para. 1 PrSA), but also inform each other about important decisions. In this sense, the price supervisor also participates in COMCO meetings in an advisory capacity. In addition, 25 the two authorities refer cases to each other for processing, depending on the circumstances of the case and which aspects are in the foreground.

26 In my opinion, the view that the person of the price supervisor is not required by the applicable constitutional provision is unconvincing. It is reduced to a purely grammatical interpretation. From a systematic and historical point of view, the separate function of price monitoring with the person of the price monitor at its head only becomes clear because the total revision of the Federal Constitution was not intended to make any changes in terms of content and the instrument of competition policy price monitoring was clearly defined. In contrast to other administrative areas in general and COMCO in particular, the price supervisor is a person with "great influence" who should attempt to "contribute to a consensual settlement in discussions". Art. 9 PrSA - the standard for seeking an amicable settlement between the price supervisor and the parties concerned - thus has both a preventive and an educational function. This mediating function cannot be performed by a body such as a competition authority, but requires a mediator personality. Thus, the person of the price supervisor has a special position due to his or her history. Art. 9 PrSA - the core of the PrSA - continues the principles that characterized the emergency economic policy price monitoring of 1973-1978. This shows that the focus is on the person of the price supervisor. Like a kind of delegate, they are at the center between the companies concerned and the consumers. The following aspect should also be mentioned: For the revision of the Cartel Act, which took place at the same time as the popular initiative "to prevent abusive prices" of September 9, 1981, the Commission of Experts proposed the integration of price monitoring articles and their enforcement by COMCO. Following the consultation process, however, the Federal Council deleted these articles, citing the pending popular initiative and parliamentary initiatives. In my opinion, this process underpins the fact that price monitoring should not and cannot be implemented by one body or authority (COMCO or price monitoring) alone. Even if this function could therefore - from a purely systematic point of view - only be created in the law, it is the interplay of systematics and history that prohibits this erroneous conclusion.

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COMMENTARY ON

Art. 110 FC

A commentary by Nicolas Bueno / Yasmin Bellazrak-Dinari

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Art. 110 Employment

[1] The Confederation may legislate on:

a. employee protection;

b. relations between employer and employee, and in particular on common regulations on operational and professional matters;

c. recruitment services;

d. the declaration of collective employment agreements to be generally applicable.

[2] Collective employment agreements may be declared generally applicable only if they take appropriate account of the justified interests of minorities and regional particularities, and they respect the principle

of equality before the law and the right to form professional associations.

3 August 1 is the National Day of the Swiss Confederation. In terms of employment law, it is regarded as equivalent to a Sunday, with equivalent rights to pay.

CONTENT

I. GENESIS

1 The Industrial Revolution considerably transformed the socio-economic situation of 19th century European societies. It gave rise to a working and urban class often subject to difficult living conditions. Ideologically supported by Marxist socialist thought in Europe, the labor movement gradually asserted its need for legal protection, and acquired certain rights that gave rise to labor law.

2 This need for protection was reflected in European labor legislation. In Switzerland, the first legal rules protecting male and female workers emerged in the early 19th century, initially at cantonal level. The cantons had exclusive jurisdiction in this area. Initially, protection extended mainly to women's and children's work, and only in industry, even though the agricultural sector employed around 50% of the Swiss population in 1850. In terms of legislation, the canton of Zurich was a forerunner in Switzerland with the adoption of a cantonal regulation on November 7, 1815, protecting children working in factories. Canton Thurgau followed suit with a similar ordinance on child labor on December 22, 1815. The canton of Glarus was the first to extend protection to adult factory workers.

3 While the Federal Constitution of September 12, 1848 marked the establishment of the Swiss federal state, it wasn't until the adoption of the Federal Constitution of May 29, 1874 (aCst.) that the state acquired legislative powers at federal level for the protection of workers. Art. 34 aCst. first conferred on the Confederation the power to legislate for the protection of workers in certain areas. Paragraph 1 of this provision stipulates that the Confederation is empowered to "lay down uniform regulations on child labor in factories, on the working hours that may be imposed on adults, and on the protection to be afforded to workers against the exercise of unhealthy and dangerous industries".

4 It was on this basis that the Swiss Confederation adopted the Federal Law of March 23, 1877 on work in factories, accepted by the people in a referendum on October 21 of the same year. This law prohibited the employment of children under the age of fourteen in factories, limited the working day to eleven hours, regulated night work and introduced employer liability for workplace

accidents. With its adoption, Switzerland now had some of the most protective legislation in Europe.

However, federal jurisdiction remained limited to work in factories as such. 5
With the entry into force of Art. 34ter aCst. on July 5, 1908, the Confederation's legislative jurisdiction was extended to the arts and crafts, i.e. to activities in the crafts and trades. However, this extension still excluded the agricultural sector.

In the post-war context, the people and the cantons accepted a revision of 6
certain economic articles of the Constitution, which further extended the Confederation's powers in the fields of public labor law and social insurance. The revision of Art. 34ter aCst. gave the Confederation the right to legislate more broadly "on the protection of employees and workers", "on relations between employers and employees or workers, in particular on the joint regulation of matters concerning the company and the profession", and "on the general binding force of collective employment contracts".

The current Art. 110 Cst. essentially reproduces the 1947 version of Art. 34ter 7
aCst. Paragraph 3, on the August 1st holiday, incorporates and clarifies art. 116bis aCst. This paragraph was added to the 1874 Constitution following the acceptance of a popular initiative in 1993. On the other hand, art. 34 aCst. on factory work was deemed obsolete and was not reinstated.

Several popular initiatives have tried in vain to amend art. 34ter aCst. or art. 8
110 Cst. Most were aimed at increasing vacation entitlement or protecting wages, such as the "6 weeks' vacation for all" initiative, the "for shorter working hours" initiative and the minimum wage initiative. The "1:12 - For fair wages" initiative aimed to limit the difference between the highest and lowest wages in a company to twelve times. Finally, the popular initiative "for an unconditional basic income" was rejected on June 5, 2016. A new initiative on the subject, "vivre avec dignité - pour un revenu de base inconditionnel finançable", recently failed at the signature-gathering stage.

II. BACKGROUND AND SYSTEMATICS

Art. 110 of the Swiss Constitution is a central provision of (public) labor law. It 9
is found in Chapter 2 of Title III of the Constitution, which governs the division of powers between the Confederation and the cantons. The purpose of this provision is to empower the Confederation to legislate in certain areas of

public labor law, in particular the protection of workers. In the area of labor law, the power to legislate on economic policy in the field of employment and on unemployment insurance is the subject of more specific provisions, respectively articles 100 and 114 Cst. In addition, art. 122 para. 1 of the Swiss Constitution provides the constitutional basis for private labor law. It confers on the Confederation the power to legislate in matters of civil law and civil procedure.

10 Art. 110 Cst. is therefore not a norm conferring fundamental rights on individuals in matters of employment. Indeed, the Constitution only guarantees freedom of association and the right to strike in the title devoted to fundamental rights. Unlike other national constitutions, the Federal Constitution does not guarantee a fundamental right to fair and equitable working conditions, even though this right is enshrined in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. The International Labour Organization has also recently added safe and healthy work to its list of fundamental principles and rights at work. Generally speaking, the Constitution also emphasizes the individual's responsibility to provide for his or her own needs (art. 6 Cst.), and does not guarantee any right to social security beyond situations of hardship (art. 12 Cst.).

11 While the Constitution guarantees few fundamental labor rights, it does mention certain work-related social goals. For example, under art. 41 para. 1 let. d Cst. the Confederation and the cantons must undertake to ensure that all persons capable of working are able to support themselves by working under fair conditions. However, no subjective right to state benefits can be deduced from art. 41 Cst. This social aim is inspired by the internationally recognized fundamental right to work. Articles 100 Cst. on economic policy and 110 Cst. on labour, which empower the Confederation to take measures in the field of employment and to legislate on the protection of workers, enable the Confederation to put this social goal into practice, without however obliging it to do so. By international comparison, however, the Federal Constitution can be described as "liberal" rather than "social", at least as far as worker protection is concerned.

III. COMMENTARY

12 Article 110 of the Federal Constitution consists of three paragraphs. The function of Article 110 para. 1 is to confer legislative competence on the Confeder-

ation in certain areas of "labor". These essentially concern public labor law and, secondarily, collective labor law relating to collective labor agreements. On the other hand, art. 110 para. 1 of the Swiss Constitution does not form the basis for the federal authority to legislate on private labor law, which is conferred by art. 122 para. 1 of the Swiss Constitution. Art. 110 para. 2 Cst. then specifies the conditions under which a collective bargaining agreement can become binding for an entire profession or economic sector. Finally, art. 110 para. 3 Cst. regulates the consequences of the national holiday of August 1 from the point of view of labor law.

A. Art. 110 al. 1 Cst. legislative competence

The areas in which the Confederation is empowered to legislate under Art. 110 para. 1 Cst. are worker protection (let. a), relations between employers and workers (let. b), the employment service (let. c) and the extension of the scope of collective labor agreements (let. d). These areas are presented in turn. 13

1. Art. 110 al. 1 let. a Cst. protection of workers

Under art. 110 para. 1 lit. a Cst. the Confederation is empowered to legislate "on the protection of workers". The personal scope of this provision, through the concept of "workers", must first be presented, before the material scope of "protection" in the practice of the Federal Court is considered. 14

With regard to the personal scope of application of art. 110 para. 1 let. a Cst, it has not always been a question of "workers". As mentioned in the genesis of art. 110 Cst. (supra, nos. 4 and 5), federal jurisdiction initially covered only people working in factories, then in "arts and crafts", before applying more generally to "employees and workers" and finally to "workers". Despite this evolution, some workers remain unprotected by public law, either because the Confederation has not exercised its powers, or because they do not qualify as workers. 15

On the one hand, the Confederation did not make full use of its powers when it adopted the Federal Act of March 13, 1964 on Labor in Industry, Craft Trades and Commerce (LTr). This law has become the essential standard of public labor law. It regulates questions of health and working hours, including Sunday work, and contains special protective provisions for young workers, pregnant women and nursing mothers. Although its scope is broad, it does not 16 apply, for example, to people working in agricultural enterprises and private households. Most civil servants are subject to a special federal or cantonal regime.

17 On the other hand, doctrine is unanimous on the fact that protection applies exclusively to salaried employees, i.e. to a person providing a dependent service to an employer in return for remuneration. An employment relationship must exist, and this concept therefore excludes all self-employment and unpaid work such as voluntary work.

18 In this respect, the emergence of new forms of work, sometimes considered "neoliberal", raises questions about the qualification of professional status. This is particularly the case for the professional status of people working in so-called platform activities, for example in passenger transport and home delivery, but also for a whole range of "freelancers". While some of these people are qualified and on high incomes, others are forced to accept new forms of work, perhaps more flexible, but often also less remunerated and lacking the economic benefits that an employer must guarantee for a similar service in an employment relationship. This issue recently prompted the European Commission to propose a directive aimed at clarifying the professional status of platform workers by providing for a legal presumption of an employment relationship. In Switzerland, the Federal Court has also confirmed the existence of an employment relationship and not the self-employment of drivers in Uber cases.

19 As regards the material scope of "protection" of workers, this is interpreted broadly. It encompasses all aspects of personality, including health, the private sphere and the right not to be discriminated against. In addition to the LTr, the Federal Equality Act of March 24, 1995 and the Federal Act of October 8, 1999 on accompanying measures applicable to posted workers were also adopted partly on the basis of art. 110 al. 1 let. a. Cst. In practice, the Federal Court has determined that, by virtue of its scope, the LTr exhaustively regulates the protection of workers. In principle, therefore, the cantons no longer have jurisdiction in this area. However, even when the federal regulations are exhaustive, a cantonal solution is not ruled out when it pursues a different goal than the protection of workers. This has been the case, for example, with the closing of stores on Sundays, the introduction of a cantonal minimum wage and the ban on passive smoking, as described below.

On the question of Sunday store closures, the Federal Court has consistently held that cantonal provisions on Sunday work and store openings cannot be intended to protect workers, as this issue is exhaustively regulated by the LTr. The LTr does, however, reserve to the cantons the right to lay down police regulations on Sunday rest and opening hours, in particular to ensure public order and peace. 20

In the context of the adoption of a cantonal law on minimum wages, the Federal Court has also recognized cantonal competence to legislate, provided that the measure is aimed at combating poverty and does not constitute a measure of economic policy or worker protection. In practice, this means that the minimum wage must be set at a relatively low level, close to the minimum income resulting from insurance or social assistance systems. 21

In addition, the Confederation has used its legislative powers to protect workers' health by adopting the Federal Act on Protection against Passive Smoking. However, art. 4 of this law stipulates that the cantons may adopt stricter "health protection" provisions. The Federal Court has clarified that this reservation authorizes cantons to adopt stricter smoking bans in order to protect the health of consumers, but not to protect workers, as this area is exhaustively governed by federal law. In terms of worker health, the Confederation also intervened during the COVID-19 pandemic by imposing certain obligations on employers. The COVID-19 Act, however, was based more broadly on federal competence in private labor law, without mentioning art. 110 of the Swiss Constitution. 22

Finally, the federal legislature recently affirmed that art. 110 para. 1 Cst. could serve as a complementary constitutional basis to art. 116 Cst. on family allowances with regard to legislation on out-of-school and out-of-family childcare places. 23

2. Art. 110 al. 1 let. b Cst. relations between employers and employees

According to Art. 110 al. 1 let. b Cst., the Confederation may legislate "on relations between employers and workers, in particular on the joint regulation of matters concerning the company and the professional field". Letter b essentially reproduces the corresponding letter of art. 34ter aCst. which was intended to distinguish the Confederation's competence with regard to "individual" relations between an employer and a worker, which are governed by pri- 24 vate law. In fact, individual relationships between an employer and a worker are governed by employment contract legislation (articles 319 to 362 of the Swiss Code of Obligations). The constitutional basis for these provisions is art. 122 para. 1 of the Swiss Constitution, which confers on the Confederation the power to legislate in matters of civil law. On the other hand, art. 110 para. 1 let. b Cst. deals with the manner of participating in or managing a company, and the role assigned to workers collectively in this function.

25 The popular initiative "pour la participation des travailleurs" (for worker participation), tabled in 1971, sought to enable the Confederation to legislate expressly "on the participation of workers and their organizations in decision-making in companies and administrations". The Federal Assembly submitted a counter-proposal specifying that "the Confederation has the right to legislate on appropriate worker participation at operational level, safeguarding decision-making possibilities and the economic management of the company". Both the popular initiative and the counter-proposal were rejected by the people and the cantons in March 1976.

26 In the early 1990s, a controversy arose over the material scope of Art. 110 para. 1 let. b Cst. Some writers felt that the constitutional basis was not sufficient to establish legislation on worker participation not only in the operation of a company, but also in its economic management. For others, this provision did not exclude the Confederation's competence in the matter. It was on the basis of this constitutional provision that the Federal Act on Information and Consultation of Employees in Undertakings (Participation Act, LPart) was passed on December 17, 1993, but it does not deal with participation in the economic management of a company.

27 The Participation Act applies to private companies and guarantees various participation rights for workers, including the right to be informed or to participate in certain matters such as accident prevention. In companies employing at least fifty people, they can elect representatives. These rights apply to all those who work on a long-term basis for the company or its sector, under an employment contract, whatever their function or hierarchical level. Workers must have the necessary time to study the information provided by the employer, formulate concrete proposals and bring them to the employer's attention.

Controversy persists as to whether art. 110 al. 1 let. b Cst. can serve as the basis for a law guaranteeing not only information or consultation, but genuine participation by workers in the management, i.e. decision-making, of the company. 28

3. Art. 110 al. 1 let. c Cst. Placement service

Under Art. 110 para. 1 let. c of the Swiss Constitution, the Confederation may legislate "on the placement service". This provision corresponds to letter e of article 34ter aCst. in its 1947 version. The notion of placement extends to both private and public placement of people. 29

This provision forms the basis of the Federal Law on Employment Services and the Hiring of Services of October 6, 1989 (LSE). This law covers both private placement and leasing of services, as well as the public employment service. Its aim is to protect workers who use these services. With this law, the federal legislator has comprehensively regulated the placement service, which was not the case with the previous Employment Service Act of June 22, 1951. 30

The aim of the LSE is to prevent "black market" placement and improve worker protection, while ensuring that private placement takes precedence over public placement. It also regulates the activities of temporary employment agencies, as well as temporary employment relationships and contracts, which was not the case under the previous law. It is accompanied by the Ordinance of January 16, 1991 on the employment service. The chapter concerning the public employment service was supplemented in 2017 by a section on the obligation to communicate vacancies. This amendment follows the adoption of art. 21a of the Federal Foreign Nationals Act of December 16, 2005, as part of the implementation of art. 121a Cst. relating to immigration management. 31

4. Art. 110 al. 1 let. d Cst. collective labor agreements

With the 1947 constitutional revision on economic articles, the Confederation acquired the power to legislate on "the general binding force of collective labor contracts". The text of the current 1999 Constitution is more precise. It confers on the Confederation the right to legislate "on the extension of the scope of collective labor agreements". 32

A collective labor agreement is an agreement between employers or employers' associations, on the one hand, and workers' associations, on the other. It 33 covers the conclusion, purpose and termination of individual employment contracts between employers and the workers concerned. The special feature of the collective labor agreement is that it is binding on third parties, i.e. members of signatory associations who have not directly entered into the agreement. Its provisions have a direct and imperative effect on the employers and workers they bind. In practice, 581 collective labor agreements covered more than 2.1 million employees in Switzerland on March 1, 2018.

34 On the other hand, a collective agreement is not binding on employers and workers who are not members of a signatory association. The existence of a potential economic advantage for "dissident" competing companies is problematic. Such an advantage could arise, for example, for a non-member employer who is therefore not obliged to respect the minimum wage agreed by the other employers in an industry. To remedy this situation and re-establish fairer competition, the Confederation has the power, under certain conditions, to extend the scope of application of a collective bargaining agreement to an entire economic sector or to a particular profession. It should be noted that compliance with the working conditions and minimum wages laid down in a legally binding collective agreement also applies to companies based abroad that second employees to Switzerland under the terms of the Seconded Workers Act.

35 The Confederation made full use of this power with the adoption of the Federal Act to Extend the Scope of the Collective Labor Agreement of September 28, 1956 (LECCT). This law describes the conditions for extending an agreement, in order to take into account the rights and interests of players not subject to it. These conditions find their constitutional basis in art. 110 al. 2 Cst. as presented in the following section.

B. Art. 110 al. 2 Cst. conditions for extending collective agreements

36 Art. 110 para. 2 Cst. is directly linked to the federal power to legislate on the extension of the scope of application of a collective labor agreement in para. 1 let. d. According to Art. 110 para. 2 of the Swiss Constitution, the Confederation must meet a number of conditions in order to extend the scope of application of a collective labor agreement to an entire branch or profession. These conditions are set out in art. 2 of the LECCT.

Firstly, the extension of an agreement must take fair account of the legitimate interests of minorities and regional particularities. An agreement can only be extended if it already covers a significant number of employers and workers. Art. 2 ch. 3 LECCT provides for a triple quorum system. The agreement must already cover the majority of workers and employers in the branch or profession, and the employers bound by the agreement must already employ the majority of all workers. Several parliamentary initiatives "for a modern social partnership" have called for the deletion of this last condition, on the grounds that this requirement is difficult to meet in economic sectors where a large number of micro-businesses each employ a small number of workers. For the minority that is subject to extension, the law only stipulates that the interests of this minority must be taken into account when they result from the diversity of regional and company conditions. Lastly, extension must respect the principle of equality before the law and freedom of association. On the condition of respect for trade union freedom, art. 2 ch. 5 LECCT specifies only that the players retain their right to join or not to join an association. 37

These conditions must also be respected by the cantons, when the extension is limited to all or part of the territory of a single canton. In practice, the jurisprudence of the Federal Court has thus focused on compliance with federal law when extending a collective agreement, notably by the cantons. 38

C. Art. 110 al. 3 Cst. August 1st

Art. 110 para. 3 Cst. stipulates that August 1st is the national holiday. From the point of view of labor law, it is treated in the same way as Sundays, and is remunerated. To date, it is the only federal holiday. The date refers to the Federal Pact in which the three original cantons (Uri, Schwyz, Unterwalden) entered into a defensive alliance at the beginning of August 1291. August 1st was introduced into art. 116bis aCst. following acceptance of the popular initiative "for a national holiday" of September 26, 1993. Art. 110 al. 3 Cst. is accompanied by the Ordinance of May 30, 1994 on the national holiday, which recalls that August 1st is a non-working holiday that is assimilated to Sundays and cannot be counted as a public holiday under art. 18 al. 2 LTr, and must be fully remunerated. Art. 2 of the Ordinance goes on to specify that the employment of workers on the national holiday is governed by the regulations on Sunday work, subject to cantonal law governing Sunday rest and the opening hours of establishments used for retail, catering or entertainment purposes. 39

40 The fact that this provision has been included in art. 110 of the Swiss Constitution, which relates to labor, is due to its second sentence, which defines the way in which this day is to be treated under labor law. Firstly, August 1st is assimilated to Sundays. Art. 1 of the Swiss National Holiday Ordinance and Art. 20a para. 1 of the Labour Act also make this clear. The provisions on the prohibition of Sunday work and the exceptions to this prohibition therefore apply to August 1st. Secondly, para. 3 enshrines the principle of remuneration. Originally, art. 116bis aCst. did not deal with remuneration. Today, art. 110 para. 3 Cst. directly confers a right to payment of wages. This obligation has not been incorporated into either the Swiss Code of Obligations or the Labor Act. According to the Federal Court, the right to payment of wages is a right deriving directly from the Constitution. Jurisprudence has also clarified that this right to wages also exists with regard to people paid by the hour, provided they worked on August 1st. This right applies to both private and public law relationships.

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COMMENTARY ON

Art. 117a FC

A commentary by Ralph Trümpler / Gregori Werder

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Art. 117a Primary medical care

[1] The Confederation and the Cantons shall within the scope of their powers ensure the adequate provision of high quality primary medical care that is accessible to all. They shall recognise and promote family medicine as an essential component of primary care.

[2] The Confederation shall legislate on:

a. basic and continuing education and training for family medicine professions and the requirements for practising these professions;

b. appropriate remuneration for family medicine services.

CONTENT

I. HISTORY OF ORIGINS

The origins of the provision of Art. 117a FC on "primary health care" can be traced back to the popular initiative "Yes to family doctor medicine", which came into being on 27.04.2010. The initiators had submitted the popular initiative in the form of an elaborated draft out of concern for the future and importance of family doctor medicine in Switzerland. The aim of the initiative was to make the profession more attractive in terms of image and finances, and thus to alleviate the shortage of GPs that had been looming for some time. The initiative aimed to continue to guarantee "sufficient, accessible to all, comprehensive, professionally comprehensive and high-quality outpatient basic medical care for the Swiss population by general practitioners" by making appropriate corrections. 1

Although the Federal Council also considered family medicine to be an important pillar of basic medical care for the population, it rejected the popular initiative for other reasons. In summary, it was of the opinion that the demands of the initiators had already been met at the level of laws and ordinances, and that measures had already been initiated or planned with regard to other demands. Furthermore, it described the mention of a single occupational group and the high level of detail using numerous unclear terms as questionable and problematic. 2

Nevertheless, the Federal Council recognised a fundamental need for action and conceded that a direct counter-draft was needed. In the Federal Councils, this counter-proposal was then modified by the Councils inserting a provision according to which the services of family medicine were to be adequately remunerated. Thus a compromise was sought and found between the concerns of the initiative and the counter-proposal of the Federal Council. This compromise solution led the initiators to withdraw the initiative. In concrete terms, the initiative committee stated on 27 September 2013 that with the adoption of the counter-proposal of 19 September 2013 by parliament and the development of a master plan on "family doctor medicine and primary health care", the main demands of the initiative would be taken up and appropriate measures introduced. The popular initiative was withdrawn for this reason on 26.09.2013. 3

4 In addition to the compromise in the wording of the constitutional provision, the master plan "Family Medicine and Basic Medical Care" also proved to be significant for the withdrawal of the initiative. It aimed to strengthen primary care close to home by promoting family medicine with cantonal implementation measures (such as the creation of practice assistance positions by the cantons) and wanted to focus on education, questions of tariff structure and research at the national level.

5 In the referendum of 18.05.2014, the direct counter-proposal was accepted with a yes-vote share of more than 88% and all cantons.

II. COMMENTARY IN THE STRICT SENSE

A. Primary health care and family medicine (para. 1)

1. Division of competences and focus

6 The Confederation and the cantons must fulfil the programmatic content of the provision "within the scope of their competences" (Art. 117a para. 1 FC, first sentence). Art. 117a FC thus remains largely without influence on the distribution of competences between the Confederation and the cantons in the area of health care. No new competences are established either at federal or cantonal level. The fact that Art. 117a para. 1 FC refers to the federal competences already established according to the enumeration principle and the subsidiary general competence of the cantons according to Art. 3 FC was already emphasised in the run-up to the vote on the federal decree on primary health care. In particular, it was pointed out that the enactment of Art. 117a FC would not shift any competences between the Confederation and the cantons and that the constitutional article was in that sense "compatible with federalism".

7 Even if the provision does not affect the existing division of competences between the Confederation and the cantons, or if Art. 117a para. 1 FC did not intend to shift federal competences in the area of health care, it is nevertheless likely to have an influence on the performance of state tasks and the corresponding structure in Swiss health care: Namely, the statement that the Confederation and the cantons (within the scope of their competences) have to ensure sufficient, high-quality basic medical care accessible to all promotes the idea of a mandatory state and - conversely - insufficient private guarantee

responsibility and mentality. Art. 117a para. 1 FC also applies to (outpatient) health care for the population, which has traditionally not been provided and guaranteed by the state, but by the private sector (e.g. family medicine). With such a focus, the constitutional provision can - intentionally or unintentionally - create new expectations of a state guarantee responsibility that has not existed to this extent up to now.

2. Sufficient access to high-quality primary health care (para. 1, sentence 1)

a. "Basic health care

The term "primary health care" is an indeterminate legal term. At first glance, its content is unclear and must be determined within the framework of interpretation. With regard to the text of the constitution, the only thing that is clear is that primary care provided by private doctors is an "essential component of this primary care" (cf. Art. 117a para. 1 sentence 2 FC), from which it can be concluded that primary care - among other things - is to be understood as primary care medicine. Moreover, the wording contributes little to the understanding of the term as such or its scope - but this statement also applies in principle to the other terms used in the Constitution with reference to medicine, such as "cutting-edge medicine" (Art. 48a para. 1 lit. h FC) or "complementary medicine" (Art. 118a FC) and "reproductive medicine" (Art. 119 FC). 8

It is thanks in particular to Gächter and Renold-Burch that the term "primary health care" has now acquired sharper contours. Their convincing interpretation according to conceptual elements, specialist-related and needs-specific criteria as well as international terms and concepts has become established and provides a good overall understanding of what is meant by primary health care. The following explanations are also based on this. 9

Two conceptual elements are to be distinguished in advance: (medical) health care on the one hand and primary health care on the other. Health care concerns the institutional side of the health care system, i.e. the planning, construction and operation of inpatient health care facilities, but also the outpatient sector in the sense of the operation of doctors' practices and outpatient health care centres. Even if the latter area is predominantly and traditionally organised in the private sector, a certain tendency can be observed that more 10 and more often, for example, public hospitals are entering the outpatient area and operating outpatient health centres. According to Gächter/Renold-Burch, care should be taken not to confuse the concept of health care with that of public health - the former encompasses medical care (diagnosis and treatment of health disorders, illnesses and accidents), the latter has the additional aim of "maintaining and improving" the state of health of the population (which is why care, rehabilitation and areas such as health promotion or prevention are also included).

11 The concept of primary care is to be understood, according to the view expressed here and in view of the Federal Council's Dispatch on Family Medicine, in such a way that primary care services do indeed go beyond the minimum medical assistance to which a person in an emergency situation is entitled on the basis of Art. 12 FC. Nevertheless, not all types of medical services can be claimed under this title without limitation. Rather, a boundary must be drawn where specialists working in the liberal professions (have to) provide treatment or where medical services can only be offered in a concentrated or specialised form for other reasons. For example, the Dispatch also excludes services from primary health care that exist only in isolated cases (e.g. treatment of very rare diseases) or those that can only be offered in concentrated form for other reasons (e.g. availability of specialised knowledge of service providers for individual clinical pictures, quality and safety requirements, e.g. in the area of highly specialised medicine, high technical requirements or financial implications).

12 In the dispatch on its direct counter-proposal, the Federal Council first defines the term "primary health care" in terms of occupational groups and, in addition to general practitioners, also includes nurses, pharmacists, physiotherapists and clinical psychologists. In addition, other medical and non-medical health professionals would also make significant contributions to primary health care. In addition, there is the category of so-called health professions (such as midwives, nutritionists), which today fall within the scope of the Federal Law on Health Professions (GesBG). Accordingly, the "basic medical care" referred to in Art. 117a FC is to be seen as a kind of composite task of various professions with different orientations and functions.

13 The Federal Council then interprets the term in a needs-specific and correspondingly functional manner. The description of what is to be understood by primary health care services is oriented "towards the population's usual need

for basic preventive, curative, rehabilitative and palliative medical goods and services". In this context, it is decisive that the basic services of primary care are regularly used by the general population or individual population groups.

Finally, Gächter and Renold-Burch tend to equate "primary health care" with the English term "primary health care". With reference to the WHO definition, this is understood to mean basic medical services that should be accessible to all people. 14

b. Programmatic obligation of the Confederation and the cantons

Art. 117a para. 1 FC stipulates that the Confederation and the cantons, within the scope of their competences, must provide basic health care that meets the criteria of "sufficient", "accessible to all" and "of high quality". This is a programmatic mandate that neither specifies concrete goals nor establishes individual entitlements to benefits. Even if the terms used are not justiciable, the three criteria mentioned provide a quantitative and qualitative benchmark for the "primary health care" desired in the country. This yardstick must be taken into account in the implementation of the programmatic obligation, whereby the
responsible state organs must be given wide latitude in its implementation. 15

First of all, it is stipulated that primary health care must be "accessible to all". The criterion of accessibility is to be understood geographically, financially and also in terms of time, and obliges the Confederation and the cantons, within the framework of their respective competences, to ensure that the services of primary health care are accessible to the population in all parts of the country within a reasonable time and at a reasonable cost. The form in which accessibility to individual primary health care services is or can be guaranteed - for example, in telemedical, digital or physical form - is variable and accordingly dependent on the respective technical possibilities and the state of science and medicine. Basic health care services must be equally affordable for all, otherwise access would be denied to individual sections of the population. However, it should also be noted here that not all categories of services fall under the term "primary health care". 16

The fact that primary health care must be of "high quality" has implications in three respects. Firstly, the Confederation and the cantons must ensure that the health professionals involved in primary health care have well-coordinat- 17 ed education and training. According to the Federal Council's message on family medicine, high quality also requires that services are provided in a mutually coordinated and networked manner. Finally, the provision also applies at the individual level and requires a high quality of service provision by the individual service providers.

18 What is to be understood by the criterion "sufficient" cannot be explicitly inferred from the Federal Council's message on family medicine. At least it is stated there in the comments on quality that the services must be offered to the "necessary extent". The necessary extent is achieved when both underuse and overuse or misuse are avoided. Interestingly, the provision is not only a programmatic obligation. It also has a limiting effect. This also takes into account the principle according to Art. 43a para. 5 FC, according to which state tasks must be fulfilled according to need and economically.

3. Recognition and promotion of family medicine (para. 1, sentence 2)

19 In addition to the programmatic obligation of the Confederation and the cantons, within the scope of their competences, to provide sufficient, high-quality primary health care accessible to all (Art. 117a para. 1, sentence 1 FC), Art. 117a para. 1, sentence 2 FC also obliges them to recognise and promote family medicine as an essential component of this primary health care. The explicit naming of family medicine as part of primary health care is intended to emphasise its importance as the actual "backbone of primary medical care". In this way, Art. 117a Para. 1 Sentence 2 FC fulfils the mandate addressed to the Confederation and the cantons to recognise family medicine itself. However, it is also clear from the wording of the provision that primary health care is not only guaranteed by family doctor medicine, but that other professional groups - whether medical or non-medical - also make their contribution.

20 The meaning of the term family medicine was unclear for a long time. In the Federal Council's messages on the initiative "Yes to family doctor medicine" and on the revision of the Medical Professions Act, however, the term was then clearly defined. Accordingly, today "family medicine is understood as a medical field of activity with a focus on primary care [...]".

21 The corresponding understanding of the term has now also found its way into the law. Ultimately, a justified concern of the initiative "Yes to family doctor medicine" was taken into account. The Medical Professions Act defines the

central importance and function of family medicine as a profession-specific training objective of human medicine, dentistry and chiropractic. Furthermore, the control function of family medicine is defined there as a further training objective. Finally, it is also specified in the same place that the specific knowledge, skills and abilities in the field of family medicine are to be acquired in part within the framework of practice assistantships.

Moreover, family medicine is one of two specialisations (the other is that of hospital intern) that can be pursued within the framework of further training to obtain the further training title "General Internal Medicine". In order to further define the term, it is therefore appropriate to refer to the competences to be acquired within the framework of this continuing education. At the end of their training, specialists must have the competence to work in the entire spectrum of outpatient care. He or she must be able to assess which investigations, examinations and therapies are indicated and in what period of time, and must - this is crucial to clarify the term - be able to carry out the "most common" of these himself or herself. If necessary, however, a specialist must be consulted. It can be concluded that family medicine is a first point of contact that is more often able to take the medically relevant steps itself. 22

Finally, it can be considered certain that the services of persons with the postgraduate titles of general internal medicine (formerly general medicine and internal medicine), general practitioner and paediatrics and adolescent medicine are to be counted as part of family medicine. These are the persons who were exempt from the licensing restriction when the so-called licensing freeze was reintroduced in 2013 in accordance with aArt. 55a KVG and who were thus recognised by the legislature as primary care providers. 23

B. Legislative mandates for the Confederation (para. 2)

1. General regulatory content and order of competences

While the mandate to the Confederation and the cantons according to Art. 117a para. 1 FC is of a purely programmatic nature, Art. 117a para. 2 FC gives the Confederation a legislative mandate and thus the duty to take regulatory action in the area of initial and continuing training and the practice of the profession as well as with regard to the remuneration of services in family medicine. Since the Confederation already had this competence, at least in the area of private law, on the basis of Art. 95 FC and in the area of health and 24 accident insurance on the basis of Art. 117 FC, the legislative mandate is sometimes ascribed a purely appellative character. Nevertheless, it should be noted that in the area of primary health care, the provision today establishes a comprehensive, subsequently derogatory federal competence both for the private-law sector and for professional practice in the public-law sector. The exact scope of this competence is determined by interpreting the terms "professions of primary health care", "training and further education" and "practice" as well as "services of family medicine".

2. Professions of primary health care

25 As far as the concept of primary health care is concerned, reference should be made to the explanations above. With regard to the question of which professional groups provide the services of primary health care, the Federal Council, when drafting Art. 117a para. 2 FC, assumed in principle that the professions of primary health care were to be defined in detail by the legislature. At the same point, however, it also expressly pointed out that the scope of application was not limited to the primary care physicians classically referred to as general practitioners. Other medical as well as non-medical health professionals (e.g. in the dental, pharmaceutical and nursing fields, nutritional counselling, occupational and physiotherapy, radiology and emergency medical services) also make significant contributions to primary health care and thus fall under this term. The openness of the wording of the provision, which regulates "professions" and not "the professions", explicitly leaves room for subsuming professions other than those known today, depending on medical and social developments. The Health Professions Act, which came into force on 01.02.2020, is likely to be decisive for the definition and inclusion of new health professions, especially since it was enacted on the basis of Art. 117a para. 2 lit. a FC.

3. Provisions on education and training and the exercise of the profession (lit. a)

26 As previously explained, Art. 117a para. 2 lit. a FC grants the Confederation comprehensive competence to regulate the initial and continuing training of the professions in primary health care. Furthermore, the Confederation is given the competence to enact uniform provisions at federal level regarding the practice of these professions. Education and training is to be understood as a "continuum comprising basic vocational training, training at higher technical

colleges, universities of applied sciences and universities, occupation-oriented continuing education and postgraduate academic continuing education. CET serves to deepen and broaden the competences acquired during training or to specialise in a particular field or area of activity."

The Confederation has already fulfilled its obligation by enacting the Medical Professions Act (MedBG) and the Psychology Professions Act (PsyG) and has subsequently created an (additional) constitutional basis for the provisions in these two enactments. In the area of health professions, it has fulfilled the constitutional mandate by enacting the Health Professions Act (GesBG). It should be noted at this point that with the enactment of the Health Professions Act, the ingress of the Medical Professions Act as well as the Psychology Professions Act was supplemented by Art. 117a para. 2 FC. This was a direct consequence of the fact that Art. 117a para. 2 FC extended the federal government's regulatory competence, which had previously been limited to the private law sector, to the public law sector. The purpose of these decrees is to regulate, among other things, the education and training and professional practice of those who fall within their subjective scope. 27

4 Appropriate remuneration for the services of general practitioners (lit. b)

With the obligation of the Confederation to create regulations on appropriate remuneration for the services of family doctors, one, if not the central demand of the initiative "Yes to family doctor medicine" was fulfilled. After all, the financial disadvantage of family medicine compared to specialist medicine was one of the main reasons for its launch. Without this concession in the preparation of the counter-proposal, the initiative committee would probably not have withdrawn its initiative. Although it is basically already clear from the text of the constitution, it should nevertheless be pointed out that explicitly only the services of family doctors benefit from this constitutional privilege and not the "professions of primary health care" according to lit. a of the provision. 28

The compensation does not take place via a system of direct payments. Rather, a way was found via a corresponding design of the social insurance law tariff structures and price lists, such as TARMED and the analysis list. What is to be understood by appropriate compensation, on the other hand, can hardly be specified in an appropriate manner. The constitution leaves the 29 legislature with more room for manoeuvre than it could possibly have. Ultimately, the view of Gächter/Renold-Burch that the appropriateness of the remuneration "must be measured against the goal of strengthening [...] family medicine" must be agreed.

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COMMENTARY ON

Art. 118 FC

A commentary by Ralph Trümpler / Gregori Werder

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Art. 118 Health protection

[1] The Confederation shall, within the scope of its powers, take measures for the protection of health.

[2] It shall legislate on:

a. the use of foodstuffs as well as therapeutic products, narcotics, organisms, chemicals and items that may be dangerous to health;

b. the combating of communicable, widespread or particularly dangerous human and animal diseases; it shall in particular prohibit any form of advertising for tobacco products from reaching children and adolescents;

c. protection against ionising radiation.

CONTENT

I. HISTORY OF ORIGINS

Art. 118 FC is referred to as the Health Article of the Federal Constitution and transferred Arts. 69, 69^{bis} and $24^{quinquies}$ para. 2a FC into the new constitutional text. With the exception of some editorial adjustments - specifically, humans and animals are no longer mentioned in paragraph 1, but in paragraph 2 lit. b of the provision - it corresponds in large parts to E-Art. 109 FC according to the Federal Council's draft of a revised Federal Constitution. Minority motions in the Constitutional Commission of the National Council to add a provision for the promotion of self-help and promotion of "primary" prevention as well as to create a competence to issue regulations on education and training "in the scientific medical professions" were narrowly rejected in the National Council. 1

II. COMMENTARY IN THE STRICT SENSE

A. Measures to protect health (para. 1)

Art. 118 para. 1 FC formulates a very general, programmatic mandate to the Confederation to take measures to protect human and animal health. The addition of "within the scope of its competences" makes it clear that the programmatic mandate as such does not establish any new federal competences. Based on this concept, public health remains fundamentally within the competence of the cantons. However, the fact that Art. 118 para. 2 FC then lists various subject areas that in some respects do grant the Confederation a binding (fragmentary) legislative competence with subsequent derogatory effect with regard to the health protection of the population to be guaranteed, puts this into perspective. The "strategies" enacted by the Confederation in various areas test the state's order of competences insofar as the Confederation is to a certain extent engaged in comprehensive and not disease-specific health promotion - this includes not only the Federal Council's health policy strategy 2020-2030, but also the numerous topic-oriented national health strategies (e.g. in the areas of dementia, eHealth, cancer, non-communicable diseases, palliative care, etc.). 2

The concept of health is central to the understanding of Art. 118 para. 1 FC. Nevertheless, one searches in vain not only in the provision itself, but also in 3 the materials for a definition of this "highly indeterminate term in need of concretisation". In the materials on other provisions of the Federal Constitution, such as Art. 41 para. 1 lit. b FC, as well as in the rest of federal law, a definitional circumscription of the concept of health has also been omitted. This is probably also due to the fact that a concise and universal definition is hardly achievable due to its frame of reference, which depends on the respective context. In contrast, the numerous attempts at definition by the doctrine are almost impossible to keep track of, with part of the doctrine arguing in principle that the concept of health should be circumscribed on the basis of the respective applicable views of contemporary history, while other doctrines argue that it should be concretised on the basis of its purpose in the context of the respective regulatory environment.

4 With regard to international law, it makes sense to understand the concept of health broadly, as does the WHO in the Alma-Ata Declaration of 1978 or in the definitions of the Ottawa Charter for Health Promotion of 1986. In point I of the Alma-Ata Declaration, health is described as a "state of complete physical, mental and social well-being" and is explicitly not understood as a mere state of being "free from disease or infirmity". Irrespective of whether health can ever be correctly and conclusively described conceptually and as a concept, a broad understanding of the term is likely to correspond to a consensus that the concept of health is changeable and must not be reduced to "absence of disease".

5 The object of Art. 118 para. 1 FC is primarily police measures to avert danger, which are generally intended to prevent direct health impairments - it is therefore a matter of concrete and direct dangers to public health and thus to the health of humans and animals in general. Indirect adverse effects, such as those caused by air, noise, water or other environmental influences, are not covered, but are the subject of the so-called environmental protection article (Art. 74 FC). As far as the more specific protection of animals is concerned, Article 80 FC is also relevant. Finally, measures aimed at the individual's state of health and health promotion do not fall within the scope of this provision. Accordingly, there is no constitutional basis for comprehensive and disease-unspecific health promotion in the sense of "promotion of self-help" and promotion for "primary prevention", inter alia because the Constitutional Commission of the National Council and subsequently also the National Council itself rejected a corresponding version of Art. 118 para. 1 FC (but cf. N 2 in

fine). It is obvious that this contrasts with the generally postulated broad concept of health. However, aspects of disease-unspecific health promotion underlie various agreed international guarantees and (social) human rights - in particular the "right to health" according to Art. 12 UN Covenant I . However, such norms do not give rise to any individual rights, for example to disease-unspecific health promotion, but the corresponding guarantees are to be seen as a programmatic requirement for the health care of the signatory states, which in turn can serve as a justification for the Confederation to consider comprehensive and disease-unspecific health promotion where national thrusts are needed (cf. in this regard the above-mentioned theme-oriented national health strategies).

B. Legislative mandates (para. 2)

1. Comprehensive legislative competence with subsequent derogatory effect

In para. 2 of Art. 118 FC, the Confederation is granted the authority and obligation to enact regulations in the exhaustively named health-related sub-areas according to lit. a to c. This is a retroactive derogatory effect. The federal competence is a subsequent and comprehensive competence with derogatory effect. 6

2. Handling of foodstuffs, medicinal products, narcotics, organisms, chemicals and objects hazardous to health (lit. a)

According to Art. 118 para. 2 lit. a FC, the Confederation must issue regulations on the handling of foodstuffs, commodities and consumer goods that are hazardous to health. This provision corresponds to Art. 69bis a FC. Although the regulatory competence is in principle an exhaustive one, it is not possible to enact an exhaustive list of specific goods and objects of a hazardous nature within these categories, with regard to which the Confederation has legislative competence in the sense described above. Instead, it is to be assumed that the Confederation must take regulatory action as soon as an object can be assigned to one of the categories mentioned in Art. 118 para. 1 lit. a FC and appears to be potentially hazardous to health. Consumers and not specialists are to be protected here. POLEDNA rightly points out that Art. 118 para. 1 lit. a FC ultimately also has the character of a consumer protection provision. 7

8 The wording "dealing with" chosen by the constitutional legislator indicates that not only the primary acts - such as the consumption or use in the case of food, medicinal products or narcotics - are covered by the provision. Rather, according to the materials, it is to be assumed that the most diverse processes and actions are covered by the definition, i.e. in particular production, processing, trade (import, storage, distribution, purchase) and use. However, production for personal use is not to be included in the scope of application.

9 In the area of foodstuffs, the Confederation has exercised its competence by enacting the Federal Act on Foodstuffs and Utility Articles (LMG; SR 817.0). Based on this, numerous departmental and some Federal Council ordinances were issued, such as the Ordinance on Foodstuffs and Utility Articles (LGV; SR 817.02) or the Tobacco Ordinance (TabV; SR 817.06). Art. 4 para. 1 LMG then also contains a general definition of food as "any substance or product intended to be, or reasonably foreseeable to be ingested by humans in a processed, partially processed or unprocessed state". This definition is supplemented in Art. 4 para. 2 LMG by a positive list and in Art. 4 para. 3 LMG by a negative list. The federal legislature has dispensed with a general abstract definition of consumer goods and instead defined in Art. 5 LMG eight product categories into which an object may fall in order to be considered a consumer good within the meaning of the LMG.

10 The Confederation has fulfilled its obligation and competence to regulate the handling of medicinal products and narcotics by enacting the Federal Act on Medicinal Products and Medical Devices (HMG, Therapeutic Products Act; SR 812.21). This also applies to narcotics if they are used as therapeutic products (Art. 2 para. 2 lit. b HMG). The federal government also regulates the handling of narcotics in the Federal Act on Narcotics and Psychotropic Substances (BetmG; SR 812.121). According to Art. 2 lit. a BetmG, narcotics are dependence-producing substances and preparations of the effect types morphine, cocaine or cannabis, as well as substances and preparations that are manufactured on their basis or have a similar effect to these. In the case of cannabis, a slowly progressing liberalisation can be observed. For example, the use of cannabis for medicinal purposes was legalised as of 1 August 2022, and Art. 8a BetmG has permitted pilot trials with controlled distribution of this substance for "pleasure purposes" since 15 May 2021.

11 The terms "organisms" and "chemicals" have in common that they have to be interpreted narrowly, since in the final analysis animals and humans are also

organisms and their "components" are chemicals and the competence would be all-encompassing with a broad understanding of the term. It must therefore be assumed that the provision only covers chemical substances and their preparations as such ("chemicals") and microorganisms ("organisms"). Provisions on the handling of microorganisms can be found in various federal laws, such as the Environmental Protection Act (USG; SR 814.01) and the Federal Act on Genetic Engineering in Non-Human Areas (GTG; SR 814.91). Moreover, the term "organisms" is defined in Art. 7 para. 5bis USG and Art. 5 para. 1 GTG: "Organisms are cellular and non-cellular biological entities capable of reproduction or of passing on genetic material. Mixtures and objects containing such units are treated as such".

"Articles which may endanger health" is essentially a catch-all offence. In addition to the above-mentioned LMG, which also contains a list of articles for use (cf. Art. 5 LMG), reference should be made in this regard above all to the Product Safety Act (PrsG; SR 930.11) and the Explosives Act (SprstG; SR 941.41). Objects which, due to their nature, are suitable for threatening or injuring people are also subject to the Weapons Act (WG; SR 514.54). Art. 4 para. 6 of the Weapons Act mentions objects such as "tools, household and sports equipment" and excludes pocket knives, "such as the Swiss army pocket knife". 12

3. Combating disease (lit. b)

Art. 118 para. 2 lit. b FC obliges the Confederation to enact regulations on the control of communicable, widespread or malignant diseases of humans and animals. The provision corresponds to Art. 69 aBV. In the past, the Confederation was entitled to intervene when the spread of a disease impaired the work performance of broad sections of the population and thus indirectly also the economy. 13

According to Art. 118 para. 2 lit. b FC, for a federal competence to be established, a disease must meet the following alternative ("one of the three characteristics") requirements. In many cases, however, a disease is likely to fulfil all of the above criteria. It must be malignant, which is the case if it threatens life or causes severe and permanent impairment of health. In addition to the individual effects, the impact and social as well as economic damage of a disease on society must also be taken into account. Another alternative prerequisite is the widespread spread of a disease. This is the case if the disease is not 14 purely local but has become so widespread that measures at the national level appear to be indicated. As a third alternative criterion, Art. 118 para. 2 lit. b FC mentions the transmissibility of a disease. This is given if the disease is caused by a pathogen that can be passed on, which means that the disease is directly or indirectly contagious.

15 The enactment of regulations that serve to "combat" corresponding diseases of humans and animals does not only mean the spectrum of health police instruments such as prohibitions, behavioural and licensing obligations. Targeted measures of a preventive nature to ward off diseases are also possible, as long as the focus is not purely general prevention.

16 Based on Art. 118 para. 2 lit. b FC, the Confederation has enacted, among other things, the Federal Act on the Control of Communicable Human Diseases (Epidemics Act, EpG; SR 818.101). This defines, for example, what is to be regarded as a "communicable disease" ("disease that is transmissible to humans by pathogens or their toxic products").). In this context, the Federal Act on the Legal Basis for Federal Council Ordinances on the Management of the Covid 19 Epidemic (Covid 19 Act; SR 181.102) should also be mentioned. This was enacted by the Confederation in the wake of the Covid 19 epidemic and regulates special powers of the Federal Council to combat the Covid 19 epidemic and to manage the effects of the control measures on society, the economy and the authorities (Art. 1 para. 1 Covid 19 Act). Furthermore, the Federal Law on the Registration of Cancer Diseases (KRG; SR 818.33) as well as the Federal Law on Protection against Hazards from Non-Ionising Radiation and Sound (NISSG; SR 814.71) and the Law on Epizootic Diseases (TSG; SR 916.40) were enacted on the basis of Art. 118 para. 2 lit. b FC, among others. It is also worth mentioning that the enactment of federal measures to protect against passive smoking, i.e. the Federal Act on Protection against Passive Smoking (SR 818.31), which was enacted in 2008, and the Federal Act on Tobacco Products, which has been planned for some time, are also based on this constitutional foundation. It is questionable whether further (prevention) measures - such as suicide prevention - can also be based on this federal competence.

17 With the adoption of the popular initiative "Yes to the protection of children and adolescents from tobacco advertising (children and adolescents without tobacco advertising)" on 13 February 2022, the Confederation has also been given the mandate to ban any kind of advertising for tobacco products that

reaches children and adolescents. This means that not only tobacco advertising explicitly aimed at children and adolescents will be banned, but also advertising that can be perceived by them or is accessible to them. This means that print media, the internet, posters, cinemas and points of sale as well as events are affected. It thus goes far beyond the indirect counter-proposal that the Federal Council and Parliament had opposed to the initiative. The revised Tobacco Products Act in the version of the indirect counter-proposal will enter into force as soon as the referendum deadline expires on 20 January 2022, but will have to be revised again immediately due to the acceptance of the popular initiative. According to No. 14 of the transitional provisions following the adoption of the Federal Constitution of 18 April 1999, this revision must be completed within three years of the adoption of the popular initiative.

4. Protection against ionising radiation (lit. c)

Art. 118 para. 2 lit. c FC establishes a legislative mandate concerning protection against ionising radiation, whereas non-ionising radiation is covered by the article on environmental protection in Art. 74 FC. Art. 118 para. 2 lit. c FC corresponds to Art. 24quinquies para. 2 aBV. The police regulations to be issued in this regard are primarily found in the Radiation Protection Act (StSG; SR 814.50). They are largely of a preventive nature; economic policy interventions cannot be based on the constitutional foundation. 18

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COMMENTARY ON

Art. 119a FC

A commentary by Franziska Sprecher / Marina Rickenbacher

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Art. 119*a* Transplant medicine

[1] The Confederation shall legislate in the field of organ, tissue and cell transplants. In doing so, it shall ensure the protection of human dignity, privacy and health.

[2] It shall in particular lay down criteria for the fair allocation of organs.

[3] Any donation of human organs, tissue and cells must be free of charge. The trade in human organs is prohibited.

CONTENT

I. HISTORY

Beginning in the 1950s, transplant medicine evolved from an experimental form of therapy into a significant technique in human medicine. In 1952, the world's first living-donor kidney transplant was performed. Eleven years later, both a liver and a lung transplant were performed, and in 1967, the first heart was transplanted. Starting in the mid-1960s, the first organ transplants also took place in Switzerland. 1

Due to the lack of federal authority to establish uniform regulations for transplant medicine, a confusing web of regulations emerged. Where cantonal regulations existed, they sometimes diverged significantly—both in terms of substantive value judgments and the prescribed procedures. At the time of the publication of the dispatch on a constitutional provision regarding transplant medicine in 1997, no canton yet had comprehensive regulations in place. In all cantons, the allocation of available organs remained unregulated. The **incomplete** and divergent **cantonal regulations** on transplantation, coupled with medical advancements, created a need for regulation and left room for private institutions to establish their own rules. 2

The **Swiss Academy of Medical Sciences (SAMW)** took on this task and, in 1969, initially issued medical-ethical guidelines for the definition and diagnosis of death, in which it also addressed the determination of death in the context of transplantation. In 1981, the SAMW issued a medical guideline on transplantation, which was replaced in 1995 by a new guideline for organ transplantation and withdrawn in 2007 following the entry into force of the Federal Act on the Transplantation of Organs, Tissues, and Cells. 3

Since 1992, the **allocation of available organs** has been centrally coordinated by Swisstransplant—a private foundation—in accordance with internally developed allocation rules. This allocation system was voluntary and could only be fair as long as all parties involved adhered to it. The aim of establishing a provision in the Federal Constitution and a federal law was therefore also to set uniform and binding rules for organ allocation. 4

From 1984 until the enactment of Art. 24^{decies} of the Federal Constitution in 1999, seven **parliamentary motions** were submitted requesting that the Federal Council regulate transplant medicine—or at least parts of it—at the federal level; however, the Federal Council initially denied the need for such reg- 5 ulation. In 1994, the Federal Council accepted the Onken and Huber motions, which specifically called on it to ban organ trafficking and enact the necessary constitutional and statutory provisions. The Federal Office of Justice deemed existing federal powers insufficient, which is why a constitutional basis first had to be established to enable comprehensive regulation of transplant medicine.

6 In the referendum held on February 7, 1999, all cantons and a large majority of the electorate approved **the new Article 24^{decies} of the Federal Constitution**. This was incorporated without amendment as Article 119*a* into the completely revised Federal Constitution.

7 The federal government considered it particularly urgent to protect recipients of blood products from infections, which is why it did not want to wait for the foreseeable length of time it would take to enact a transplantation law. Consequently, as early as 1996, it adopted the **Federal Decree on the Control of Blood, Blood Products, and Transplants**, which was partially repealed upon the entry into force of the Therapeutic Products Act in 2002 and completely repealed upon the entry into force of the Transplantation Act in 2007.

II. CONTEXT

8 With the inclusion of Art. 119*a* (initially as Art. 24^{decies} of the former Federal Constitution) in the Federal Constitution, the federal government was authorized and obligated to enact uniform regulations in the field of transplant medicine (N. 13 ff.). Since 1999, the federal government has thus been responsible for comprehensively regulating the transplantation of organs, tissues, and cells, while ensuring the protection of human dignity, personal integrity, and health (N. 21 et seq.). In substance, para. 2 stipulates that the federal government must, in particular, establish criteria for the equitable allocation of organs. Para. 3 contains a constitutional prohibition on organ trafficking and a requirement that human organs, tissues, and cells be provided free of charge.

A. National Context

9 In 2004, based on Art. 119*a* of the FC, the Federal Government enacted the Federal Act on the Transplantation of Organs, Tissues, and Cells, which entered into force in 2007 along with the various associated ordinances. Since then, both the Transplantation Act and the associated regulations have been

revised. Since the demand for available organs exceeds the supply, various attempts have been made to increase the latter. The "Organ Donation Initiative," submitted on March 22, 2019, sought to shift from a consent-based system to an opt-out system. On June 14, 2019, the Federal Council decided to reject the initiative and submitted an indirect counterproposal in which it proposed the introduction of an expanded opt-out system. Parliament approved this and recommended rejecting the initiative, whereupon the initiative committee conditionally withdrew it. Due to the subsequent referendum against the legislative revision, the public voted on the adopted paradigm shift and approved the amendment to the Transplantation Act (TxG) by a margin of 60.2%, with a voter turnout of 40.3 percent.

B. International Context

The development of Swiss legislation on transplant medicine must be viewed 10
within the **international context**. In 1978, the Committee of Ministers of the Council of Europe adopted its first resolution regulating transplant medicine. In regulating transplant medicine, particular attention should be paid to comprehensive information, the anonymity of the donor, the conditions for the donor's consent, and the principle of non-remuneration. This was followed by numerous recommendations from the Committee of Ministers, which addressed, among other things, international cooperation regarding the exchange and transport of human substances, xenotransplantation, waiting lists, and organ trafficking.

Of great significance for transplant medicine is the Council of Europe's **Con-** 11
vention on Human Rights and Biomedicine, concluded in 1997 and ratified by Switzerland in 2008. Among other things, this convention stipulates that individuals must be informed prior to a medical intervention (**informed consent**, Art. 5), and contains provisions relevant to transplantation in Articles 19–22. Switzerland entered reservations stipulating that the principle of subsidiarity does not apply to living donation and that, in exceptional cases, the removal of regenerative tissue or cells may also be permitted for the benefit of a parent of a minor or a person lacking legal capacity. In 2009, Switzerland also ratified the Additional Protocol on the Transplantation of Human Organs and Tissues to the Convention on Human Rights and Biomedicine, which entered into force in 2010. In particular, this protocol establishes a ban on profit-making and sets forth the conditions for the removal of organs and tissues.

Most recently, on February 1, 2021, the Council of Europe Convention against Trafficking in Human Organs entered into force, thereby committing Switzerland to combating organ trafficking.

12 European Union (EU) law is also of practical relevance. Among other things, it regulates quality and safety standards for the handling of transplanted organs, tissues, and cells. Furthermore, the World Health Organization (WHO) and the World Medical Association (WMA) have issued resolutions and guidelines on transplant medicine.

III. COMMENTARY IN THE STRICT SENSE

A. Para. 1: Basis of Competence and Observance of Protective Obligations

13 Art. 119*a* of the FC grants the Confederation **comprehensive authority** to enact regulations in the field of organ, tissue, and cell transplantation (N. 14 ff.) and obligates it to ensure the protection of human dignity, personal integrity, and health (N. 21 ff.).

1. Federal Jurisdiction and Legislative Mandate (1st sentence)

14 Health care traditionally falls within the jurisdiction of the cantons due to the subsidiarity of federal jurisdiction pursuant to Art. 3 in conjunction with Art. 42, para. 1 of the FC.

It was only with the inclusion of Art. 24^{decies} in the FC that jurisdiction over the regulation of transplant medicine was transferred from the cantons to the federal government. Art. 119*a*, para. 1 of the FC not only authorizes the **federal government** but also **obligates** it to legislate in the field of transplant medicine. The federal government's jurisdiction has **retroactive derogatory effect**. Cantonal law therefore remains in effect as long as the federal government has not yet fulfilled its obligation or has not done so comprehensively. With the enactment of the Transplantation Act—which was adopted on October 4, 2004, and entered into force on July 1, 2007—and the associated regulations, the federal government has fulfilled its legislative mandate. The cantons are now responsible only for limited enforcement tasks. In particular, they are responsible for the prosecution and adjudication of criminal offenses (Art. 71 para. 1 TxG).

2. Material Scope of Application (1st sentence)

Art. 119*a* of the FC enables the Confederation to regulate transplant medicine **comprehensively**. The constitutional provision distinguishes between the transplantation of organs, tissues, and cells, thereby defining the material scope of application. 15

Transplantation within the meaning of Art. 119*a* of the FC refers to the transfer of organs, tissues, and cells to a human being for therapeutic purposes. A transplantation may take place within the same species (so-called allogeneic transplantation) or between different species (so-called xenogeneic transplantation). If the donor and recipient are the same individual, it is referred to as an autologous transplantation. A further distinction is made based on whether the organs, tissues, and cells to be used for the transplantation are obtained from a living person (so-called living donation) or a deceased person (so-called postmortem donation). 16

Organs are defined as parts of the body "whose cells and tissues together form a unit with a specific function" (e.g., heart, lungs, liver, kidneys, pancreas) . Also considered organs are, on the one hand, parts of an organ that are functionally equivalent to an organ (e.g., a lobe of the liver) and, on the other hand, body parts composed of various tissues that perform a specific function (e.g., a hand). Distinguishing between organs, tissues, and cells is particularly relevant because only organs are subject to the specific allocation procedure (N. 40 ff.). **Tissues** are structured groups of cells composed of either identical or different cell types that perform a common function in the body (e.g., skin, bone) . These must be distinguished from individual **cells** or unstructured cell masses and cell suspensions. These consist exclusively of identical cells. Cell transplantation can be used to repair tissue defects (e.g., transplantation of skin and cartilage cells) or to replace metabolic products that are not present in sufficient quantities in the body (e.g., insulin and serotonin). Article 119*a* of the FC grants the federal government regulatory authority over all organs, tissues, and cells usable in transplant medicine. This therefore also includes the transplantation of human fetal tissue. Pursuant to Article 38 of the Transplantation Act (TxG), the transplantation of embryonic and fetal tissues or cells requires authorization from the Federal Office of Public Health (FOPH). 17

The material scope of application of Art. 119*a* of the FC covers not only human **but also animal** organs, tissues, and cells, provided that a transfer to hu- 18 mans is intended (so-called **xenotransplantation**). The constitutional legislator thus explicitly did not take a position on xenotransplantation, but left it to the legislature to decide whether, and if so, how xenotransplantation should be permitted. Pursuant to Art. 43 of the Transplantation Act (TxG), xenotransplantations are permitted only with a case-by-case authorization from the Federal Office of Public Health.

19 Organs, tissues, and cells must **be distinguished from implants**. The former consist of living matter, and the latter of dead matter. The question of whether cases in which human or animal organs, tissues, or cells (e.g., human bones, cartilage, or tendons, as well as pig heart valves) are harvested, processed, and devitalized, and then implanted in humans in this devitalized state, should fall under the Transplantation Act or the Therapeutic Products Act was left open in the explanatory memorandum to the constitutional article. Under para. 2(a) of the Transplantation Act (TxG), devitalized transplants were excluded from the scope of the Transplantation Act.

20 However, the provision on jurisdiction in Art. 119*a* of the FC **does not cover** the handling of human and animal substances for purposes other than transplantation into humans (e.g., for the purpose of autopsies, assisted reproduction, or the manufacture of cosmetics).

3. Duties of Protection (2nd Sentence)

a. General Principles

21 Art. 119*a*, para. 1, sentence 2 of the FC (or Art. 24^{decies}, para. 1 of the former FC) conferred upon the Federal Government the **binding mandate** to ensure the protection of human dignity, personality, and health in the regulation of transplantation medicine. The current catalog of fundamental rights did not yet exist in the aBV and thus did not exist at the time of the introduction of Art. 24^{decies} aBV. These protective obligations are primarily based on the fundamental rights of the recipient and the donor. The fundamental rights of both individuals must be protected equally. In a broader context, the fundamental rights of the donor's relatives and hospital staff may also be affected.

22 The list of **protective duties** in Art. 119*a*, para. 1 of the FC is **exemplary in nature**. The legislature must take all fundamental rights into account, with the principle of equality before the law and the prohibition of discrimination being of particular importance, especially with regard to organ allocation (N. 39

ff.). The protection of freedom of religion and conscience (Art. 15 of the FC) must also be considered. Although the constitutional article does not contain an explicit provision regarding the protection of animals required for xenotransplantation, the explanatory memorandum to Art. 24^{decies} of the former FC already points out that the dignity of living beings (Art. 120, para. 2, of the FC) must be respected. Furthermore, Art. 80 of the FC on animal protection applies when organs, tissues, and cells are obtained from animals for use in transplant medicine.

The constitutional provision merely sets forth **general principles** that are binding on the authorities responsible for enacting and applying the law. The legislature retains considerable discretion in how it implements the constitutional requirements and resolves any conflicts of interest between the protective obligations; consequently, no specific rights can be derived from these protective obligations. 23

b. Determination of Death and the Time of Death

With improved technical capabilities in the field of resuscitation—which allow circulation to be maintained despite irreversible brain failure—people no longer die in a manner that is immediately apparent to others. The time of death determines whether a person is (still) a holder of fundamental rights or not. How death is defined and diagnosed is central insofar as a balancing of interests is absolutely impermissible when it comes to holders of fundamental rights. The Constitution contains no provision specifying how death is to be defined. However, the definition must satisfy the minimum constitutional guarantees and, in particular, be **dignified** and **free from arbitrariness**. The legislature defines death in Art. 9 para. 1 of the Transplantation Act (TxG) as the irreversible loss of brain function, including that of the brainstem, and thereby declares the so-called **brain death** to be applicable. Pursuant to para. 2, the legislature delegated the more detailed definition of brain death to the Federal Council, which in turn refers in Article 7 of the TxV to the medical-ethical guidelines of the Swiss Medical Association (SAMW) on “Determination of Death with Regard to Organ Transplants and Preparation for Organ Removal,” as amended on May 16, 2017. In addition to technical instructions for determining death and carrying out preparatory medical measures, these guidelines also include details on the procedure for ascertaining the patient’s wishes, conducting discussions with relatives, and dealing with the dying per- 24 son and the body. The procedure for determining death establishes that death has occurred, but not the exact time of death. The official time of death is recorded as the time at which the physician has completed the diagnosis and documentation of death.

In the case of postmortem organ procurement, the procedure interferes with the dying process. A distinction must be made between primary and secondary brain death. In **primary brain death**, the irreversible loss of brain function is determined according to established criteria; it is only after the cessation of life-sustaining measures that cardiovascular function subsequently fails. Death following prolonged cardiac arrest or **secondary brain death** describes the situation in which circulation fails first—or unsuccessful resuscitation efforts are discontinued—and, after a certain period of time, brain death is determined due to a lack of blood flow to the brain. Uncertainties regarding, on the one hand, whether relatives may be consulted about a possible organ donation even before death is certified, and, on the other hand, whether relatives can consent to preparatory measures prior to death in the absence of a corresponding decision by the person who is still alive but incapable of making such a decision, led to organ donations following secondary brain death being temporarily suspended in Switzerland. These procedures have been performed again in Switzerland since 2011 and have increased since the revised Transplantation Act took effect in 2017, with the aim of increasing the number of organs available for transplantation.

25 The concept of brain death has also long been met with **criticism**. It is argued that the loss of brain function should not be equated with human death; rather, death should be determined by the cessation of circulation. According to the concept of brain death, death is an event that occurs at a specific point in time. Critics, however, view death as a process. Another criticism is that relying on the criterion of brain death serves only the interests of transplant medicine. Furthermore, because circulation is maintained, a brain-dead person cannot be identified as such without a complex determination of death, since the body continues to perform functions that make the person appear, from the outside, to be unconscious but alive (e.g., sweating, hair growth). Others advocate a so-called “partial brain death” concept, according to which it is sufficient for consciousness or the brainstem to have irreversibly ceased functioning. Swiss transplantation law (Art. 8, para. 1, let. b, in conjunction

with Art. 9 of the Transplantation Act) is based on "total brain death," i.e., the complete cessation of brain functions.

c. Protection of Human Dignity

Even before human dignity was introduced into the FC as an independent fundamental right with the 1999 total revision, Art. 24^{decies}, para. 1 of the old FC (or Art. 119*a*, para. 1, sentence 2 of the FC) made its observance in the context of transplant medicine binding on the legislature. According to legal doctrine, respect for human dignity encompasses three elements: equality, integrity, and self-determination. It is considered a minimum guarantee that the state must observe. The government's explanatory memorandum identifies three aspects of transplant medicine in which respect for human dignity is central: the determination of the time of death, organ procurement from the deceased, and the right to die with dignity. This list is not exhaustive. 26

As long as a person is alive, they are the bearer of fundamental rights. In the case of **living persons**, respect for and protection of human dignity are of absolute importance. Human dignity prohibits the removal of organs from a living person capable of making decisions without their free and informed consent, or the exploitation of such a person for the benefit of others. This implies a prohibition on commercialization. In the case of individuals who lack capacity or are minors, organ removal is compatible with human dignity only under very restrictive conditions. 27

It is only with **death** that the status as a holder of fundamental rights ends, and with it the resulting individual legal claims (N. 24). However, based on the objective legal content of the right, the state remains obligated even beyond death to uphold human dignity and to protect the deceased from inhumane treatment. There is no fundamental right belonging to the deceased person; rather, the fundamental right of the living person continues to apply beyond their death (N. 33). The body of a deceased person must be treated with respect. Even in the case of **postmortem donation**, the deceased must not be objectified, and their body parts must not be commercialized. The removal of body parts must be justified even in the case of postmortem donation, and any known wishes must be respected. This addresses the aspect of self-determination. Consent need not necessarily have been recorded by the deceased during their lifetime; other models of consent and objection may be compati- 28 ble with the principle of human dignity, provided that the right to object does not become effectively meaningless due to a lack of information (N. 33).

29 With regard to the **recipient** of an organ, human dignity prohibits arbitrary allocation or a state-sanctioned weighing of the value of different human lives. Organs must therefore be allocated according to criteria that ensure equal treatment (N. 41 ff.).

d. Protection of Personality

30 The protection of personal freedom under Art. 10, para. 2 of the FC encompasses, in particular, physical and mental integrity and freedom of movement. With regard to physical integrity, the **preparatory medical measures** taken for the purpose of a donation while the potential donor is still alive deserve special attention. These preparatory measures have no direct benefit for the patient but are necessary to protect the organs from damage. They may only be performed if informed and free consent has been obtained, and they must not hasten death (Art. 10 of the Organ Transplantation Act).

31 Art. 10, para. 2, also specifically encompasses the protection of **self-determination**. Holders of fundamental rights have the right to independently determine essential aspects of their lives. The protection of self-determination within the meaning of Art. 10, para. 2 of the FC goes beyond the minimum guarantee protected by human dignity (see N. 28) and does not cease upon a person's death. Organ procurement affects the donor's right to self-determination. Therefore, organ procurement must be preceded by comprehensive information so that the donor can be informed and give legally valid, free consent (so-called "informed consent").

32 In principle, the right to self-determination can be guaranteed not only through the donor's explicit consent during their lifetime (**consent model** or "opt-in"), but **opt-out models** are also possible. It is essential here that potential donors (i.e., the entire population) be **objectively, comprehensively, and regularly informed** about the process of postmortem organ removal and the consequences of inaction, so that they can decide for or against organ removal on this basis. In the referendum held on May 15, 2022, Swiss voters approved the amendment to the Transplantation Act, which provides for a shift from the expanded consent model to the expanded opt-out model. The new regulation is expected to take effect in the third quarter of 2027. The ac-

tual implementation of this system change—including ensuring that the public receives the necessary information and establishing a functional registry that meets all technical and legal requirements—poses significant challenges.

The scope of protection of personal freedom encompasses not only the right of a person to effectively consent to or object to **postmortem organ removal** during their lifetime, but also enables individuals to issue **binding instructions** regarding key aspects of their own death. This is not a fundamental right of the deceased, but rather the fundamental right of the living that continues beyond death. Under both the currently applicable expanded consent model (Art. 8, para. 2 and 3, TxG) and the future expanded objection model (Art. 8, para. 2, revTxG), the next of kin must be consulted regarding the presumed will of the potential donor. The personal relationship with the deceased is generally relevant to the authority to make the decision (Art. 8, para. 8, TxG in conjunction with Art. 5, TxV). The minimum age for deciding on postmortem organ procurement is 16 years (Art. 8, para. 7, TxG in conjunction with Art. 5, para. 1, TxV) . For practical reasons, the legislature opted for a strict age limit rather than assessing the capacity to make decisions of a **minor** on a case-by-case basis, as is otherwise customary for medical procedures. This approach is maintained in the amendment to the Transplantation Act (Art. 8a revTxG). In the case of younger children and adolescents, as well as **persons who are permanently or for an extended period of time incapable of making decisions**, the next of kin decide on postmortem organ donation, taking into account the deceased person's wishes. 33

In the case of **living donation**, the right to self-determination means that no transplants may be removed without informed, free consent. According to Art. 12(a) and (b) of the TxG, a **person of sound mind and of legal age** must give written consent to the living donation of organs, tissues, or cells after being informed of the risks. Living donation also falls within the scope of protection of physical and mental integrity. Art. 12(c) and (d) of the Transplantation Act (TxG) stipulate that there must be no serious risk to the life or health of the donor and that no other therapeutic method with comparable benefits is available to the recipient. **Minors or persons lacking legal capacity** may not, as a general rule, have transplants removed (Art. 13 para. 1 TxG). Under restrictive conditions, the removal of regenerative tissues and cells is permitted to save a parent, child, or sibling of the donor (Art. 13 para. 2 TxG). Since 34 the donation of organs, tissues, and cells is not intended to cure the donor but rather the recipient, it constitutes an intervention for the benefit of another.

e. Protection of Health

35 The transplantation of organs, tissues, and cells involves risks that should not be underestimated, depending on the extent of the procedure and the health status of the donor and recipient. The protection of health that the legislature must ensure applies, on the one hand, to the donor and, on the other hand, to the recipient of transplants. In the case of the former, the protection of health must be taken into account, particularly in the case of **living donation**. The latter is permissible only if there is no serious risk to the life and health of the donor. Since the donor must not be exposed to any unnecessary risk, the principle of subsidiarity enshrined in Art. 12(d) of the Transplantation Act (TxG) applies, according to which a living donation may only be performed if no other therapeutic method promises a comparable benefit.

36 The **recipient** must be protected, in particular, from potential pathogens that could be transmitted during a transplant along with the organ, tissue, or cells. In principle, there is a legitimate interest in ensuring an adequate supply of organs. However, the protection of health under Article 119*a*(1), second sentence, of the FC does not give rise to either an individual's right to an organ or an obligation on the part of the state to work toward increasing the organ supply. The constitutional provision does not, however, preclude measures such as information campaigns. These must inform the public not selectively, but comprehensively and as objectively as possible.

37 Furthermore, a broader duty of care may also encompass the mental health of both those directly affected and their **relatives and medical professionals**. The decision for or against organ donation is a matter of conscience that can be emotionally taxing for both the potential donor and their relatives. Preparatory measures are carried out on living individuals who lack the capacity to make decisions, and organ removals are performed on people whose brain death has just been determined and who still appear to be alive and show signs of reaction. Explantations can therefore also be emotionally taxing for medical professionals. This must be taken into account when dealing with all parties involved and in the regulation of transplant medicine.

B. Para. 2: Criteria for Organ Allocation

1. General Principles

Organs are a limited resource. In addition to the actual availability of organs, a successful transplant also requires compatibility (e.g., in terms of size and blood type). This **shortage** means that not everyone who needs an organ can receive one. As previously stated, there is no legal right to an organ (N. 37). However, the affected person has an enforceable right to ensure that the procedure is designed by the legislature in a fair manner (N 41 ff.). Establishing the criteria for fair organ allocation constitutes a **binding legislative mandate**. 38

The legislative mandate under para. 2 **is limited to the allocation of human organs**. This is because there was no chronic shortage of tissues and cells, and—due to the issue of tissue matching—only one recipient is typically eligible anyway, meaning there is no possibility of allocation. While at the time the message was issued, allocation problems arose only in the case of organ donations from deceased donors—since living donations at that time were still required to be directed to a specific person—"altruistic donations," in which allocation is based on a waiting list, as well as cross-donations from living donors, are now also permitted. The explanatory memorandum to the constitutional article does not rule out the possibility that, in the event of a shortage of tissues or cells, their allocation could also be regulated, provided there is a chronic shortage. The federal government's legislative authority thus extends beyond the allocation of human organs. The legislature has exercised this authority, for example, in the allocation of islet cells. Allocation regulations for the transplantation of animal organs would also be conceivable. As a result of new genetic engineering techniques (so-called genome editing), the first therapeutic trials have been conducted in the United States in which animal transplants were transferred to humans. In Switzerland, such procedures require authorization (Art. 43 TxG), and currently, no clinical studies on xenotransplantation in humans are taking place in Switzerland. It is still unclear whether there could be a shortage of animal organs in the future. 39

2. "Fair"

While the preliminary draft of Art. 24^{decies} of the Federal Constitution (aBV) still provided that the federal government must ensure a fair allocation of or- 40 gans, tissues, and cells, this high standard was scaled back during the drafting process; as a result, the legislature is now required to establish criteria for a fair allocation. Little can be inferred from the extremely vague term "fair" for the purpose of establishing a concrete allocation system: It can be interpreted differently depending on which theory of justice is applied and how the various values are weighted. The legislature must **base the allocation criteria on fundamental rights**. In addition to the aforementioned fundamental rights of human dignity (Art. 7 of the FC) and the protection of physical and mental integrity (Art. 10, para. 2 of the FC), particular attention must be paid to equality before the law (Art. 8, para. 1 of the FC), the prohibition of discrimination (Art. 8, para. 2 of the FC), the right to assistance in emergencies (Art. 12 of the FC), and relevant international law must be observed. This helps to define the concept of justice.

41 The allocation rule effectively determines who receives access to a potentially life-saving organ. Art. 119*a* of the FC does not prescribe a specific allocation model. However, a fair allocation must ensure **equal and non-discriminatory** treatment (Art. 8 of the FC) for all patients and therefore requires, at a minimum, that it be carried out **without arbitrariness** and based on "**objective** criteria." It is doubtful whether objectivity is a feasible standard. Ultimately, value judgments are unavoidable. At the very least, allocation must not be based on irrelevant criteria but must pursue the actual purpose of organ transplantation and be guided by sound medical criteria.

42 Within the framework of national legislation, only a **nationwide uniform** allocation system based on **binding** guidelines can meet the requirements for fair organ allocation. Decentralized allocation systems could not guarantee that the most suitable person receives an organ, but might be justified if the country's geographical size effectively precluded a national allocation system —which is not the case in Switzerland. Pursuant to Art. 19 in conjunction with Art. 54 para. 2 lit. a^{bis} of the Transplantation Act (TxG), the legislature is required to establish a **national allocation agency** for this purpose and may delegate the performance of this task to a public or private organization. The federal government opted for the private organization Swisstransplant, which had already been coordinating organ allocation in accordance with internal guidelines prior to the entry into force of the Transplantation Act (N. 4). The delegation of an administrative task to Swisstransplant means that, in per-

forming its duties, it is bound by the Constitution and, in particular, by fundamental rights (Art. 35, para. 2 of the FC).

Allocation based on utilitarian models, in which collective overall benefit is the decisive factor, would be incompatible with the principle of equality before the law according to prevailing legal doctrine. Rather, allocation must be based on **individual health** with regard to the benefit and need for an organ transplant. Any criteria that pit the value of human life against one another (e.g., social status, fault, age, compliance—such as with regard to the medication and follow-up examinations that are absolutely necessary after an organ transplant) must be disregarded. The legislative message cites the **prospect of success** (benefit) and the **urgency** (need). The law currently designates the criteria of medical urgency, medical benefit, and waiting time (Art. 18 para. 1(a) through (c) of the Organ Transplantation Act) as decisive. Organ replacement can be vital to survival; therefore, the legislature must take Art. 12 of the FC (right to assistance in emergencies) into account when regulating organ allocation. It follows that the state must work to ensure that available organs are allocated to as many people as possible who need them to survive. However, no legal claim to an organ can be derived from this. 43

C. Para. 3: Principles: Requirement of Non-Commerciality and Prohibition of Organ Trafficking

Para. 3, of the Constitutional Provision stipulates that the donation of organs, tissues, and cells must be made without compensation and that no trade in organs may take place. The **commercialization** of human organs, tissues, and cells is to be **counteracted** by prohibiting their sale for profit. The two principles—the principle of non-remuneration and the prohibition on organ trafficking—are **directly applicable** due to their detailed formulation. The same applies to Art. 21 of the Biomedicine Convention, which prohibits the use of the human body or its parts for profit. Both principles also have direct horizontal effect (Art. 35, para. 3 of the FC). Art. 69 para. 1(a)-(c) of the Transplantation Act (TxG) criminalize the commercialization of transplants. 44

1. Non-remuneration

When drafting Art. 24^{decies} aBV, the Federal Council assumed that it was already authorized, by virtue of existing federal powers, to regulate the non-remuneration of donations of organs, tissues, and cells; for this reason, the **draft** 45

did not yet contain an explicit prohibition, but merely mandated the legislature to provide for non-remuneration.

46 The principle of non-remuneration **prohibits** only **financial compensation** for the donation of organs, tissues, or cells per se that is intended to generate a profit. The donor may receive financial compensation for expenses directly incurred as a result of the donation (e.g., travel costs and lost wages in the case of a living donation, as well as surgical costs and hospitalization) and for any damages caused thereby. In other words, the donation must not place a person in a better position than they would have been in had they not made the donation, nor must it place them in a worse position. Art. 6 para. 2 lit. a–d of the Tissue Act (TxG) specifies what is not to be considered a financial gain or other benefit. In addition to reimbursement of incurred costs, a subsequent symbolic gesture of gratitude (e.g., a thank-you card, a bouquet of flowers) (lit. c) and cross-donation between living donors (lit. d) are also excluded from the definition of financial benefit.

47 The donation must be made out of **voluntary, altruistic motives**. Financial incentives could undermine this goal, as individuals in more precarious economic circumstances might be inclined to consent to organ removal in exchange for monetary compensation. With regard to the interests of the recipient, the Federal Council argued in the message that the principle of non-remuneration enhances transplant quality, as it creates no incentive to donate low-quality transplants.

2. Donation

48 The use of the term "**donation**" in para. 3 has two consequences. First, the message on Art. 24^{decies} of the FC states that only humans are capable of making a donation. **Animal** organs, tissues, and cells are therefore **not covered** by the principle of non-remuneration in Art. 119*a*, para. 3 of the FC. Second, the question of whether the criterion of voluntariness should be explicitly enshrined led to discussions in the National Council committees and in the Chambers. The majority in the Chambers argued that the term "donation" already implies **voluntariness**.

3. Prohibition of Organ Trafficking

49 The Federal Decree of March 22, 1996, on the Control of Blood, Blood Products, and Transplants had already prohibited the trafficking in transplants. The

prohibition on trafficking in human organs was not yet provided for in the draft constitutional provision but was only incorporated into Art. 24^{decies} aBV as a result of the parliamentary debate. The constitutional provision prohibits only the trade in human organs. Art. 22 of the Protocol to the Biomedicine Convention extends the prohibition to tissues. The legislature went beyond the constitutionally enshrined prohibition on organ trafficking and extended it to human tissues and cells (para. 7 of the Organ Transplantation Act) . As a result of the ratification of the Convention against Organ Trafficking, para. 69(1)(b) of the Transplantation Act (TxG) also prohibits and penalizes trafficking abroad, without requiring that the act or parts thereof take place in Switzerland or from Switzerland to a foreign country.

The term **trade** encompasses all exchange transactions (e.g., purchase, sale, 50
exchange) aimed at personal gain, including advertising and brokerage activities. It thus refers to any form of distribution of human organs. Even the illegal removal of an organ falls under the definition of organ trafficking. Professional structures are not a prerequisite. However, compensation may be paid for the expenses incurred through removal, processing, and implantation. The exchange of organs between transplantation and allocation centers, without the intent to make a profit, does not fall under the definition of trafficking. The TxG defines and penalizes organ trafficking very comprehensively.

The prohibition on organ trafficking aims not only to protect those potentially 51
directly affected, but also to safeguard trust in the transplantation system itself. This objective is also pursued at the international level (N. 10 et seq.).

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Section 10 Civil Law, Criminal Law, Weights and Measures

Art. 122 Civil law

[1] The Confederation is responsible for legislation in the field of civil law and the law of civil procedure.

[2] The Cantons are responsible for the organisation of the courts and the administration of justice in civil matters, unless the law provides otherwise.

CONTENT

I. ORIGINS

Article 64, paragraph 1, of the Constitution of May 29, 1874 (aCst.) first granted the Confederation the authority to legislate in certain areas of **civil law** or **“substantive” private law**, namely legal capacity, all matters of law relating to commerce and transactions involving movable property (law of obligations, including commercial law and exchange law), literary and artistic property, as well as debt collection and bankruptcy. The Confederation’s authority to legislate on the protection of industrial inventions, including designs and models, was added in 1887 and 1905. In 1898, the Confederation also obtained the authority to legislate on “other matters of [substantive] civil law” (Art. 64, para. 2, aCst.) . The entry into force of Art. 64, para. 1, of the Old Constitution in 1874 paved the way for the adoption of the Old Code of Obligations of June 14, 1881, as well as the Federal Act of April 11, 1889, on Debt Collection and Bankruptcy (DEBA). The introduction of Art. 64, para. 2 of the Old Constitution in 1898, in turn, paved the way for the adoption of the Civil Code of December 10, 1907 (CC) as well as for the revision of the aCO, leading to the adoption of the Code of Obligations of March 30, 1911 (CO). 1

Art. 64, para. 3 of the old Constitution provided that civil procedure remained a **cantonal competence**. The same applied to the organization of the judiciary and the administration of justice. 2

During the **comprehensive constitutional revision** that led to the Constitution of April 18, 1999, Art. 64 of the old Constitution (aCst.) was replaced by Art. 122. Paragraph 1 of that article provided that legislation concerning “substantive” civil law was a federal competence. Article 122, paragraph 2, provided that the organization of the judiciary, procedure, and the administration of justice in civil matters fell within the jurisdiction of the cantons. Finally, Article 122, paragraph 3, provided that civil judgments that had become final were enforceable throughout Switzerland. 3

Following the **1999 judicial reform**, the Confederation gained the authority to legislate on civil procedure. As part of this reform, paragraph 3 of Art. 122 of the Constitution—whose usefulness had become questionable following the unification of substantive civil law (N. 1)—was repealed. Article 122 in its current form entered into force on January 1, 2007, and now provides that “legislation in matters of civil law and civil procedure falls within the jurisdic- 4 tion of the Confederation" (para. 1) and that "the organization of the courts and the administration of justice in civil matters fall within the jurisdiction of the cantons, unless otherwise provided by law" (para. 2).

II. BACKGROUND

5 The phased development (N. 1–4) of the unification of civil law (substantive and procedural) perfectly illustrates the Swiss conception of federalism, according to which **original sovereignty** belongs to the cantons and not to the Confederation. The cantons delegate their powers to the Confederation only when absolutely necessary. The fact that original sovereignty belongs to the cantons is also expressed in Art. 3 of the Constitution (supplemented by Arts. 42–43*a* of the Constitution) as well as in Art. 5a of the Constitution. The Confederation has only those powers assigned to it by the Constitution, and the cantons exercise all prerogatives not delegated to the Confederation. The same principle applies, for example, in Germany and Austria, whereas Canada, for instance, operates under precisely the opposite mechanism.

6 Given its major importance in the conduct of private economic activities, we believe it is justified that civil law (like criminal law [Art. 123 of the Constitution]) be subject to uniform regulation at the federal level rather than being governed by 26 disparate cantonal regimes. In the field of civil law, however, the Confederation enjoys only **"concurrent legislative authority not limited to principles"** or **"concurrent authority with subsequent derogatory effect"** (*[konkurrierende] Bundeskompetenz mit nachträglich derogierender Kraft/nachträglich derogierende Bundeskompetenz*) . This means that the mere conferral of legislative authority on the Confederation in matters of civil law (substantive and procedural) does not immediately result in the termination of cantonal authority in this area. As we shall see, the Confederation has made full use of its authority in both substantive civil law (N. 7) and civil procedure (N. 22).

III. COMMENTARY PROPER

A. Federal Jurisdiction in Civil Law (Art. 122, para. 1, 1st part, Const.)

1. General Remarks

As we have seen (N. 1 and N. 3), the Confederation has, since 1898, had full authority to legislate in the area of **substantive civil law**. The Confederation has fully exercised its authority in this area by enacting the Swiss Civil Code (CC) and the Swiss Code of Obligations (CO), as well as various other special laws in the field of private law (e.g., the Federal Act of August 28, 1992, on the Protection of Trademarks [LPM] or the Federal Act of December 19, 1986, against Unfair Competition [LCD]). 7

Consequently, the cantons may now adopt civil law rules only to the extent that federal civil law reserves (explicitly or implicitly) cantonal legislative authority (Art. 5(1) CC). Such **reservations conferring authority** in favor of cantonal law are found, for example, in Art. 688 CC, which authorizes the cantons to determine the distance that landowners are required to maintain between their plantations, or in Art. 359(2) of the Swiss Code of Obligations (CO), which requires the cantons to enact standard employment contracts for agricultural workers and domestic staff. 8

On the other hand, the cantons retain, in principle, the authority to adopt provisions of **cantonal public law** (Art. 6(1) CC). The civil laws of the Confederation thus preserve cantonal jurisdiction in matters of public law. Although it cannot be reduced to this function alone, Art. 6, para. 1 CC thus has a declaratory value, insofar as it reiterates the principle set forth in Art. 3 of the Constitution, which provides that the cantons are sovereign to the extent that their sovereignty is not limited by the Federal Constitution. Cantonal public law may not, however, conflict with the spirit and purpose of federal civil law or even impede its application. 9

It is therefore important to clearly **distinguish** between private law and public law in order to determine what falls under federal jurisdiction and what falls under cantonal jurisdiction. 10

2. General Criteria for Distinguishing Between Civil Law and Public Law

11 In order to distinguish between private law provisions and public law provisions, case law and legal doctrine have developed several **general criteria for distinction**, namely:

- The criterion of interests. According to this criterion, provisions whose purpose is exclusively or primarily to safeguard the public interest fall under public law. Provisions whose exclusive or primary objective is to protect private interests, on the other hand, fall under private law. For example, Art. 18 of the Federal Act of March 13, 1964, on Labor in Industry, Crafts, and Commerce (Labor Act [LTr]) falls under public law, since it aims to protect the general interest of workers by establishing a general prohibition on working on Sundays. Conversely, Articles 21 CO and 23–31 CO are provisions of private law, since they aim to protect the individual interests of the parties entering into a contract.
- The functional criterion. According to this criterion, which is similar to the interest-based criterion, a provision falls under public law when it directly regulates the performance of a public function. Thus, provisions governing the activities of notaries in the exercise of public duties entrusted to them (e.g., the drafting of authentic instruments) fall under public law.
- The subordination criterion. According to this criterion, public law provisions are those that confer on one party a legal position superior to that of the other, whereas private law provisions establish relationships in which the parties act legally on an equal footing. Thus, Art. 319 of the Swiss Civil Code (CO), for example, falls under private law, since this provision governs a situation in which the parties formally deal with each other as equals (regardless of whether, in practice, one party [in this case, the employer] holds a dominant position over the other [in this case, the employee]).
- The Modal Criterion (or Sanction Criterion). According to this criterion, a provision falls under private law or public law depending on whether its violation results in a private-law sanction (e.g., the nullity of a legal act) or a public-law sanction (e.g., the revocation of a permit). Art. 26(2)(a) of the Act of December 16, 1983, on the Acquisition of Real Property by Foreigners

(LFAIE) thus falls under private law, since this provision stipulates that a legal act performed without authorization is void.

According to the Federal Supreme Court, "none of these theories takes precedence *a priori* over the others [...]. Rather, it is necessary to examine **in each specific case** which distinguishing criterion is most appropriate to the concrete circumstances." 12

We may also mention **other distinguishing criteria** between private law and public law. However, these criteria are somewhat outdated today and are therefore primarily of historical interest: 13

- The fiscal criterion. According to this criterion, property disputes between citizens and the government fall under private law, while other disputes fall under public law.
- The subject criterion. According to this criterion, a relationship is considered to be one of public law when the State or a public-law entity is a party to said relationship.
- The mandatory law criterion. According to this criterion, dispositive rules belong to private law, while mandatory rules belong to public law.

3. The Distinction Between Civil Law and Public Law Based on the Theory of Scope of Application

Private law can also be distinguished from public law using the **so-called "theory of scope of application"** (*Sachbereichstheorie*). This theory involves defining the areas that fall under civil law without focusing on the specific rules—which may therefore be either private or public law—that are then used to implement those areas. This approach was used in Art. 64, para. 1 of the former Constitution, which listed areas falling under private law and for which legislation was within the jurisdiction of the Confederation (N. 1). 14

The approach of defining civil law based on its areas of application has the advantage of reflecting the **practical reality** of private law. Indeed, private law contains a multitude of provisions that, although formally linked to civil law, substantively fall under public law. In this context, one speaks of "formal civil law" or "accessory public law " (*formelles Zivilrecht* or *ergänzendes öffentliches Recht*). For example, the civil law governing foundations set forth in Articles 80 through 89*a* of the Swiss Civil Code (CC) also includes provisions 15 addressing state supervision of private-law foundations, namely Articles 84–84*b* CC, which formally fall under public law.

4. Federal Practice in Private Law Based on the Typological Method

16 The **general criteria** set forth above (N. 11) do not allow for an effective distinction between provisions that fall under private law and those that fall under public law. Indeed, none of these criteria is sufficient on its own, as the Federal Supreme Court has acknowledged (N. 12). Furthermore, applying one criterion may lead to classifying a provision as private law, whereas applying another criterion may lead to classifying the same provision as public law. For example, Art. 8 of the Unfair Competition Act (LCD) is a rule of private law according to the criterion of subordination, since it concerns a situation in which neither party is legally subordinate to the other. Conversely, applying the criterion of interests would tend to classify Article 8 of the LCD as a rule of public law, given that this provision generally aims to protect consumers against the risks posed by pre-formulated contracts drawn up by professionals.

17 The **theory of scope of application** (N. 14) is also not entirely satisfactory. Indeed, this theory presupposes, first of all, that the areas to which private law applies are precisely enumerated. Furthermore, while the theory of scope of application could historically be based on Art. 64 aCst., the new wording of Art. 122(1) of the Constitution strips it of any basis.

18 This is why the federal authorities rely neither on general criteria nor on the theory of scope of application to delineate the Confederation's jurisdiction in relation to the public law of the cantons. In fact, the Federal Office of Justice —whose approach is adopted by the Federal Council—interprets federal jurisdiction in civil law matters according to the **so-called "typological" method"** (*typologische Methode*). According to this approach, which constitutes an intermediate method, a provision is considered to be a matter of private law—and thus falls within federal jurisdiction under Art. 122(1) of the Constitution—when it defines the conditions for the autonomous development of private law, is traditionally related to the codification of private law, and pursues objectives that are typically within the scope of private law. All norms aimed at mitigating structural inequalities between contracting parties (protection of the weaker party) are also considered to be matters of private law. Areas that fall outside the scope of civil law's objectives are therefore not

covered by federal jurisdiction in civil law matters and thus require a special constitutional basis to justify federal intervention.

The typological method is therefore based on criteria similar to those underlying the theory of interests (N. 11). This method must **be endorsed** because the distinction between public law and private law necessarily requires a nuanced and pragmatic approach. And by taking into account the purpose pursued by the provision in question, the typological method is more in line with this approach. 19

The typological method can, for example, explain why the Confederation based the **Federal Act on the Acquisition of Real Property by Persons Abroad (LFAIE)** on the federal authority to legislate in matters of private law. Indeed, in the Message on the LFAIE, the Federal Council emphasizes that the restrictions contained in the LFAIE are sufficiently linked to a traditional area of private law—namely, property—to justify basing this law on Art. 64, para. 2, of the former Constitution (now Art. 122, para. 1, 1st part, of the Constitution) . 20

To the best of our knowledge, however, the typological method does not (yet) appear to have been expressly adopted in federal case law. Nevertheless, the Federal Supreme Court, despite not formally endorsing this method, nevertheless adopts reasoning that is **very** close to it. Indeed, in addition to refusing to consider a single criterion for distinction, our High Court examines the context in which a provision is situated in order to classify it as a rule of private law or public law. 21

B. Federal Jurisdiction in Civil Procedure (Art. 122, para. 1, 2nd part, Const.)

Since the judicial reform initiated in 1999 (N. 4), the Confederation has had the authority to legislate in matters of civil procedure. As previously noted (N. 6), the Confederation's jurisdiction is not parallel to that of the cantons. On the contrary, it is a **concurrent jurisdiction with subsequent derogatory effect**. The Confederation has fully exercised this jurisdiction by enacting the Code of Civil Procedure of December 19, 2008 (CPC). Before the Confederation obtained the authority to legislate in matters of civil procedure, however, there was already an " unwritten federal civil procedure" (*ungeschriebenes Zivilprozessrecht des Bundes*) that arose from the case law of the Federal 22

Supreme Court as well as various procedural provisions scattered throughout federal legislation. These norms were based on the unwritten constitutional principle that the Confederation had the authority to legislate in matters of civil procedure, to the extent that this was indispensable for the implementation of substantive civil law.

23 The term **civil procedure** should not be understood to refer solely to proceedings aimed at rendering a final and binding decision on relative or absolute private rights and conducted on an adversarial basis—that is, contentious civil proceedings (generally preceded by a conciliation phase between the parties) (Art. 1(a) CPC)— but also the rules designed to ensure the enforcement of judgments that do not concern monetary payments or the provision of security (the enforcement of decisions ordering the payment of a sum of money or the provision of security being governed by the Federal Act of April 11, 1889, on Debt Collection and Bankruptcy [DEBA] [Art. 38, para. 1 DEBA]). Also falling within the scope of civil procedure—and thus within the Confederation's jurisdiction in this matter—are the rules applicable to judicial decisions in civil matters issued by non-contentious courts (Art. 1(b) CPC).

24 **Arbitration**—whether domestic (see Art. 1(d) and 353 et seq. CPC) or international (see Art. 176 et seq. of the Federal Act of December 18, 1987, on Private International Law [LDIP])—also falls within the scope of civil procedure. By contrast, **civil mediation** is not part of civil procedure. This is, after all, logical, insofar as these two alternative dispute resolution methods pursue different goals: while arbitration results in a binding decision that resolves a dispute —which is treated as a judgment of a state court and produces the same effects (notably res judicata and enforceability [for domestic arbitration, see Art. 387 CPC; and for international arbitration, see Art. 190(1) and 193(2) LDIP]), mediation, on the other hand, aims to reach an amicable settlement of a dispute. Thus, the cantons generally retain the authority to legislate on civil mediation. Some cantons (e.g., Geneva and Neuchâtel) have already adopted special regulations in this regard. In exercising their regulatory powers, however, the cantons must ensure compliance with the requirements of federal law set forth in Art. 213 et seq. of the Swiss Civil Procedure Code (CPC), and in particular the requirement not to restrict the parties' freedom to organize their mediation as they see fit (see Art. 215 CPC).

25 The cantons may now enact rules of civil procedure only if this is **expressly** provided for by the CPC. Such express provisions are found, for example, in

Art. 4 CPC (substantive and functional jurisdiction of the courts), Art. 6 CPC (authority to establish a commercial court), Art. 68(2)(b) CPC (professional representation by licensed business agents and legal agents), and Art. 96 CPC (para. 1: determination of court fees and costs; and para. 2: possibility of providing for the allocation of costs in favor of attorneys).

The cantons, however, retain full jurisdiction to regulate the **administrative proceedings** that must be conducted before a cantonal authority. The same applies to proceedings concerning a civil matter that must be handled by a cantonal administrative authority (Art. 54, para. 3, Final Provisions of the Swiss Civil Code). For example, the cantons have jurisdiction to regulate proceedings concerning a name change (Art. 30 CC) or an adoption (Art. 268 CC), insofar as the competent cantonal authority is an administrative authority. 26

C. Cantonal Jurisdiction Over Judicial Organization and the Administration of Civil Justice (Art. 122, para. 2, Cst.)

1. Scope

Since the 1999 judicial reform (N. 4), we have seen that the Confederation has obtained the authority to legislate on civil procedure in the strict sense. The authority to legislate on the organization of the judiciary and the administration of civil justice, however, has remained within the purview of the **cantons**. 27

In our view, the**administration of justice in civil law matters** has no independent significance with respect to the judicial system, insofar as the former derives from the latter and is therefore encompassed by that concept. Admittedly, the German text of Art. 122(2) of the Constitution, which refers to "*Rechtsprechung in Zivilsachen*," might at first glance suggest that this latter concept has an independent existence with respect to the organization of the judiciary. This is, in fact, the view held by certain scholars. However, a more thorough examination also reveals the cause-and-effect relationship with the organization of the civil judiciary: indeed, it seems logical that civil courts—organized in accordance with cantonal law—must, at the conclusion of civil proceedings, "apply" civil law. 28

29 Cantonal jurisdiction over the **judicial organization**—which is also reiterated in Art. 3 of the Swiss Civil Procedure Code (CPC)—means that the cantons are specifically authorized to regulate the following matters:

- the composition of the courts, namely whether the court consists of a single judge (which is frequently the case in the 1st instance for "minor" cases —that is, cases that do not present significant legal difficulties)—or whether it is a collegial body (which is the rule in the 2nd instance as well as in the 1st instance for more complex cases);
- the professional training required to serve as a judge, although federal constitutional law does not require that a judge necessarily have a legal education. The cantons would thus be free to establish a specific training program for professional judges modeled after a judicial academy;
- the method of electing judges. The cantons are therefore free to set the eligibility requirements for judges (e.g., proficiency in the canton's official languages, residence, etc.) and to designate the authorities (the people, the cantonal parliament, the cantonal government, or a higher court) responsible for electing judges;
- the allocation of cases within the various cantonal courts, e.g., assigning certain complex disputes to a specialized chamber within an ordinary court or establishing special courts for specific types of cases (e.g., labor courts, rent courts, or commercial courts [within the limits set by Art. 6 CPC]); or
- territorial organization (e.g., into judicial districts or districts) and the names of the courts (e.g., "justice of the peace," "cantonal court," "court of justice," etc.).

2. Limitations

a. In general

30 Generally speaking, the cantons' judicial organization must allow for the application of civil law (both substantive and procedural). Consequently, the cantons may not enact rules governing judicial organization that **would prevent** the application of civil law.

b. Constitutional and treaty-based limitations

The **Constitution** as well as the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 (**ECHR**) also contain several provisions that restrict cantonal authority regarding the organization of the civil judiciary. We may, for example, cite the following provisions: 31

- Art. 29(1) of the Constitution, which requires the cantons to establish a judicial system sufficiently efficient to satisfy the principle of prompt adjudication;
- Art. 29*a* of the Constitution, which guarantees every person the right to have their case adjudicated by a judicial authority with full power to review both the facts and the law;
- Article 30(1) of the Constitution and Article 6(1) of the ECHR, which provide that any person whose case is to be adjudicated in judicial proceedings has the right to have their case heard by a court established by law that is independent and impartial; or
- Article 191*b*(1) of the Constitution —which gives concrete effect to Art. 29*a* of the Constitution—which requires the cantons to establish judicial authorities to hear civil law disputes; the cantons may not, therefore, entrust the resolution of such disputes to administrative authorities. This provision does not, however, impose any further restrictions on cantonal sovereignty regarding the organization of the judiciary (N. 27).

c. Limitations Arising from Federal Laws

Specific restrictions on the cantons' jurisdiction regarding the organization of the civil judiciary may ultimately result from a **formal federal law** within the meaning of Art. 164 of the Constitution. Indeed, Art. 122, para. 2 of the Constitution expressly provides that the organization of the judiciary falls within the jurisdiction of the cantons "unless otherwise provided by law ." This reservation in favor of the Confederation must not, however, be understood as a blank check allowing the Confederation to intervene at will in the cantons' judicial organization. Indeed, the Confederation may intervene in cantonal organization only to the extent necessary to ensure the uniform application of civil law (substantive or procedural). In other words, if it wishes to legislate in a matter pertaining to the organization of the civil judiciary, the Confederation must have legitimate concerns that the cantonal organization would pre- 32 vent or at least impede the application of federal civil law. The mere fact that harmonization at the federal level is desirable or more appropriate would therefore not, in and of itself, justify intervention by the federal legislature. Moreover, the federal legislature may only limit—and not completely abolish—cantonal jurisdiction over the organization of the civil judiciary. We can cite, in particular, the following examples of federal legal restrictions on cantonal jurisdiction regarding the organization of the civil judiciary:

- Art. 75(2) of the Federal Supreme Court Act of June 17, 2005 (LTF), which requires the cantons to establish a two-tier system for civil matters;
- Article 200 of the Swiss Civil Procedure Code (CPC), which requires the cantons to establish joint conciliation bodies for disputes concerning residential or commercial lease agreements, as well as for disputes falling under the Federal Act of March 24, 1995, on Gender Equality (Gender Equality Act [LEg]);
- Article 5(1) of the CPC, which requires the cantons to establish a single judicial instance in certain areas;
- Article 6(2) of the CPC, which defines the conditions under which a dispute is considered commercial and may therefore be brought before a commercial court, with the cantons also having the authority to assign certain international commercial disputes to their commercial courts (see Article 6(4)(c) of the CPC);
- Article 8(1) of the CPC, which sets forth the conditions that must be met for an action to be brought directly before the higher cantonal court; or
- Article 47 of the CPC, which prescribes the grounds for recusal of judges.

33 Finally, it should be noted that, although they do not directly affect cantonal judicial organizations, the amendments to the CPC introduced by the latest revision of the CPC (improving the practicability and application of the law) and effective as of January 1, 2025, may in some cases require adjustments in this area (e.g., in cantons that already have commercial courts) . These amendments are therefore **constitutional**, as they are based on the Confederation's exclusive jurisdiction over civil procedure and respect the cantons' general jurisdiction regarding the organization of civil courts.

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COMMENTARY ON

Art. 123a FC

A commentary by Justine Barton / Fabio Burgener

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Art. 123*a*

[1] If a sex offender or violent offender is regarded in the reports required for sentencing as being extremely dangerous and his or her condition assessed as untreatable, he or she must be incarcerated until the end of his or her life due to the high risk of reoffending. Early release and release on temporary licence are not permitted.

[2] Only if new scientific findings prove that the offender can be cured and thus no longer represents a danger to the public can new reports be drawn up. If the offender is released on the basis of these new reports, the authorities granting his or her release must accept liability if he reoffends.

[3] All reports assessing sex offenders or violent offenders must be drawn up by at least two experienced specialists who are independent of each

other. The reports must take account of all the principles that are important for the assessment.

CONTENT

I. FROM THE GENESIS OF ARTICLE 123*A* OF THE CONSTITUTION TO THE PRESENT DAY

1 On May 3, 2000, the self-help group "Light of Hope - Together Against Violence" submitted to the Federal Chancellery **the popular initiative "Life imprisonment for sex offenders or violent** offenders **deemed very dangerous and unrepentant"**, bearing 194,390 valid signatures. This initiative was part of the efforts made since the early 1990s to protect society from the few prisoners who present a risk of reoffending during leave or parole. It called for a partial revision of the Federal Constitution to allow for the introduction of internment without leave for this group of individuals deemed to be very dangerous.

2 In the **Message of 2001 relating to this initiative**, the Federal Council noted that the issue of dangerous individuals lay in the seriousness of the acts committed and the harm inflicted on other people, rather than in their number. The government also recognized that there was an increasingly urgent demand to improve the protection of the community against the risk of reoffending that these individuals represented. However, it was not clear how this objective could be achieved. This was because committing a serious offense did not necessarily imply a risk of reoffending. Although the majority of people did reform their ways, there was still a risk of reoffending upon release. Although psychiatric assessments helped to reduce this risk, they did not eliminate it entirely. This raised the question of whether the community could be required to tolerate this residual risk.

3 According to the Federal Council, the implementation of the proposed constitutional article presented **significant difficulties** and could lead to unfair situations. Nevertheless, the Federal Council considered that Article 123*a* of the Constitution was compatible with the mandatory rules of international law, in particular those of the UN Covenant II and the ECHR. The sticking points with international standards, in particular the ECHR, could be resolved by means of an extensive interpretation that is partially contrary to the will of the initiators of the release procedure provided for by the constitutional standard. On these grounds, the government decided to submit the initiative to the people and the cantons, without a counter-proposal, and to recommend its rejection.

During the **revision of the general part of the Penal Code, also carried out in the early 2000s**, one of the points discussed in Parliament concerned a new form of security detention, applicable to all individuals who have committed serious offenses and are at risk of reoffending (see art. 64 para. 1 and 2 to 4, 64*a* and 64*b* PC). Parliament legislated taking into account the aims pursued by the initiators, moreover presenting this modification of the Penal Code as an indirect counter-project to the initiative. Despite this legislative change adopted in December 2002 and discussions between the members of the Legal Affairs Commission of the National Council and the initiators, the latter refused to withdraw their initiative. In June 2003, both the National Council and the Council of States recommended that the people and the cantons reject the initiative. 4

At the time of the vote, the **main arguments of the initiators** were that (i) the legislator had so far failed to protect society from sexual or violent offenders deemed unamendable and very dangerous, (ii) some of them reoffended after being granted leave or early release due to psychiatric misdiagnosis and (iii) confinement should be reconsidered only if "new scientific knowledge" made it possible to establish that the person could be treated in such a way that they no longer posed a danger to the community. The adoption of the initiative would thus make it possible to fill gaps in the legislation then in force for so-called unamendable offenders, without prohibiting an annual review of offenders considered amendable. Conversely, the **Federal Council** argued that the amendments to the Penal Code adopted in December 2002 provided extensive and effective protection for the community against dangerous offenders. As for the initiative, it missed its target, was incomplete and prevented the release of individuals even if they were no longer dangerous. The majority of the political parties shared the Federal Council's point of view. 5

On February 8, 2004, the popular initiative was **adopted by** 56.2% of the valid ballots and by 19 cantons and 5 half-cantons. 6

Subject to interpretation on several points, Art. 123*a* of the Constitution is **not directly applicable**. After the vote, a working group was quickly formed to draft provisions aimed at implementing the constitutional norm. Led by the director of the Federal Office of Justice and composed of six lawyers, two doctors and two former members of the initiative committee, the working group proposed provisions to supplement the new general part of the Penal Code adopted in December 2002. Following an arduous legislative process to 7

reconcile, as far as possible, the will of the people and Switzerland's international human rights obligations, Articles 56(4), 64(1^{bis}), 64*a*(1)phr.1, 64*c*, 65phr. 1, 84 al. 6^{bis}, 90 al. 4^{ter}, 380*a* and 387 al. 1^{bis} CP finally came into force on August 1^{st}, 2008. Although the subject matter is now found in the Penal Code, mainly in Art. 64 para. $1^{bis\ of}$ the Penal Code, the study of the constitutional provision contributes to the interpretation of the legal text.

8 In 2018, an **interpellation** entitled “Has the time not come to truly implement
the initiative for the life imprisonment of dangerous offenders? “ and the **postulate** entitled “Really implement the initiative for the life imprisonment of dangerous offenders” were submitted to the National Council. The interpellation questioned, following a decision by the Federal Court annulling a life sentence, the adequacy of the implementation standards to achieve the security objective of the initiative. In its response, the Federal Council refused to comment on the court decisions, in accordance with the principle of separation of powers. It then emphasized that the conditions set out in the implementing law were based on those set out in art. 123*a* Cst. Finally, he reiterated that, in addition to life imprisonment, several criminal sanctions (life imprisonment [art. 40 para. 2 CC] and ordinary imprisonment [art. 64 para. 1 CC]) made it possible to deprive a person of their liberty for the rest of their life, if their dangerousness and the protection of the community so required. As for the aforementioned postulate, it asked the Federal Council to present an interim report eleven years after the entry into force of the provisions relating to life imprisonment in the Penal Code. The government has abandoned this idea due to the small number of cases potentially affected by the measure. The National Council has not followed up on these two parliamentary interventions. In June 2022, the lower house rejected a new postulate, submitted in 2020, with the same content as the first.

9 As of the end of March 2025, **only one person had been definitively sentenced to life** imprisonment in Switzerland. This measure was ordered in 2010 by the *Bezirksgericht* of Weinfelden (Thurgau). On the date of publication of this article, the convicted person had served just over half of his 20-year custodial sentence, after which his life imprisonment will begin. Other courts of first and second instance imposed such a sentence before the Federal Supreme Court overturned it for violating federal law. In rulings that were not appealed to the Federal Court, the Bern and Zug courts of appeal and the

Geneva criminal court of first instance also considered that the conditions for life imprisonment, as requested by the public prosecutor, were not met.

II. INCORPORATION OF ART. 123*A* OF THE CONSTITUTION INTO SWISS LAW AND CRIMINAL POLICY ISSUES

Aiming above all to protect the community against a handful of individuals deemed particularly dangerous, life imprisonment reinforces some of the **tensions that run through the Swiss legal system**. Article 123*a of* the Constitution tends to weaken fundamental aspects of criminal law and relegates human rights guarantees to the margins. 10

Like the 2007 revision of the general part of the Penal Code, Article 123*a of* the Constitution and its implementing provisions contribute to distorting the dualistic system devised by Carl Stooss by **further blurring the** concrete **distinction between the various custodial** sanctions provided for in Swiss law. In principle, sentences and measures should complement each other, not overlap. However, the measure of internment (art. 64 para. 1 CP) "is very similar" to the custodial sentence, so that "the separation between them cannot be clearly maintained in practice". For the Federal Court, whose reasoning was confirmed by the European Court of Human Rights (ECHR), ordinary internment differs from punishment in that the former is based on the dangerousness of the perpetrator, while the latter is determined according to his or her guilt. Nevertheless, like the punishment, the measure can only be imposed by a sentencing authority as a criminal sanction following an offense. Furthermore, given its unlimited duration, its regime of execution in a closed penal institution (cf. art. 64 para. 4 and 76 para. 2 CP) and the serious infringements on freedom and personal rights that result from it, internment has an undeniable punitive character. Conversely, the security objective is not limited to the measures (cf. art. 75 para. 1 CP). The penalty is not solely intended to compensate for the perpetrator's offense, as the primary purpose of criminal law is not retribution but the prevention of offenses. 11

The Federal Supreme Court and the European Court of Human Rights have thus qualified ordinary internment as a **"penalty" within the meaning of Article 7(1) of the European Convention on Human Rights**, although the latter is a "measure" under domestic law. In our opinion, because of its "quasi-irreversible" nature, art. 64 para. 1^{bis} CC *a fortiori* meets the criteria for defin- 12 ing the autonomous concept of "penalty" established by Strasbourg case law. Without necessarily referring to the ECHR, the Federal Council and some legal scholars consider that the measure of (life) detention is a penalty for similar reasons.

13 In view of the above, the question arises as to whether the **principle of guilt** (*nulla poena sine culpa;* art. 19 para. 1 CC) and the **rules for determining the sentence** (art. 47 CC) are being respected. If (life) imprisonment is in fact a penalty within the meaning of Article 7 of the ECHR, individuals subject to such a measure "are punished for what they have done (the act) but also and above all for what they are (the being)", because the personal status of the perpetrator is the "determining factor" here. However, when the perpetrator is declared criminally irresponsible, but nevertheless detained (cf. art. 19 para. 3 CP), what remains of their guilt, if not their personality? This "underlying problem, which has not yet been addressed by criminal doctrine and even less resolved", could result in a violation of the principle of the legality of sanctions enshrined in art. 7 para. 1 ECHR, insofar as it is applicable. According to the case law of the ECHR, the absence of a "conviction", i.e. a finding of guilt, does not preclude the classification as a "penalty" within the meaning of the Convention.

14 Art. 123*a* of the Constitution also undermines the coherence of the Swiss sanctions regime insofar as the law authorizes the **pronouncement of a life sentence and a life** imprisonment sentence (art. 40 para. 2, second sentence of the Penal Code; cf. art. 57 Penal Code). Despite the monist nature of the sentence of life imprisonment and the fact that it constitutes a "functional equivalent" of ordinary internment, there is nothing to prevent them from being ordered together in practice, in accordance with case law (cf. art. 64 para. 3, 64*a* para. 1 and 86 para. 1 CP). On the other hand, with regard to their different conditions of execution and release (cf. art. 64*c* and 86 para. 1 CP), the Federal Court has been more critical of the possibility of linking the execution of a life imprisonment with that of the life imprisonment sentence that would precede it, if any (art. 64 para. 2 CP), by stating that a "coordinated solution appears to be ruled out".

15 The Federal Council also considered it necessary to "regulate more clearly the form of execution when a sentence of life imprisonment is pronounced together with internment" as part of the **reform of the sentence of life imprisonment** initiated in response to the Caroni and Rickli postulates. In its

preliminary draft of June 2, 2023, the executive proposed that the deprivation of liberty should first be enforced in accordance with the rules relating to the custodial sentence and then, after a period set at 26 years, "the enforcement [should continue] according to the provisions applicable to (life) imprisonment" (cf. art. 64 para. 3^{bis} and 64*c* para. 7 AP-CP). While the desire to regulate the articulation of these sanctions was welcomed by most of the stakeholders in the consultation, "ambiguities" in the Federal Council's implementation solution remained to be resolved. Taking into account the results of the consultation procedure that ended on October 2, 2023, the Federal Council's draft of February 19, 2025 finally provides for the introduction of an art. 80*a* P-CP so that "certain aspects of the deprivation of liberty [can] be carried out under the conditions of internment". Under the terms of this new provision, formulated in a more restrictive manner than those of the preliminary draft, "when the detainee has been sentenced to life imprisonment, and the judge has also ordered internment within the meaning of art. 64 para. 1 or 1^{bis}, and the detainee has served 25 years of the sentence, he may be placed in a specialized institution for the execution of detention orders". In our opinion, none of these proposals resolves the question of what release conditions apply in the case of a joint sentence of life imprisonment and life detention, although this is precisely the stumbling block identified by case law.

By pursuing the security objective of the **definitive neutralization** of individuals considered dangerous, Article 123*a of* the Constitution also reflects a 16
very old fear of recidivism that is part of the concept of an "enemy criminal law." Particularly in the context of serious offenses against physical and sexual integrity, one of the preferred ways of "defending" society seems to be to definitively remove, through criminal means, "undesirable" members who are not, or no longer, an integral part of society and thereby lose the full and complete protection that the State is supposed to provide. Since there is always a (supposed) collective interest in security, which is *a priori* irreconcilable with the safeguarding of human dignity and (individual) freedoms, the principles of universality and unconditionality of human rights are thus annihilated. Given the suffering and social exclusion imposed on (lifelong) inmates, the adoption of Art. 123*a* of the Constitution reflects a form of indifference towards their fate and their rights, which is justified by the (statistical) risks they represent for the community. This dichotomous and hostile view runs counter to the theory that society is composed of all its members and that no one can be outside the social contract, regardless of their actions. This way of thinking

about and constructing living together and the common good gives rise to a **“paradoxical contradiction” between criminal law and human** rights, which is well illustrated by life imprisonment; it becomes impossible to protect the fundamental values of the system without, at the same time, transgressing them. Consequently, human rights only penetrate the penal system marginally in the sense that, particularly in the case of serious offenses, they only come into play to contain so-called “radical” or “extreme” sentences. Thus, the process of implementing art. 123*a* Cst. has mainly consisted - sometimes in vain - of limiting the scope of a constitutional norm that clearly denied fundamental rights.

17 For some legal theorists, the severity of the sanction, its neutralizing dimension and its irrevocable nature bring life imprisonment closer to the death penalty. Historically, the **“qualitative proximity” between the death penalty and perpetual** sanctions is clearly distinguished in the work of Beccaria, who advocates replacing the death penalty with a life sentence on the grounds that the latter would be more effective in that it is more cruel due to its duration of execution. The processes of abolition of the death penalty in several Western countries have constantly reactivated this link during the 19th and 20th centuries; in the end, a life sentence has replaced the death penalty in most of them, because ” when thinking of an alternative to the death penalty, the main concern is not to take into account the fundamental rights of the condemned, but to avoid 'weakening' the scale of penalties'. Researchers and practitioners also believe that within legal systems in which capital punishment is no longer practiced, only biological death has been abolished, as life sentences, which kill “slowly”, are another kind of death penalty.

18 By updating a model of punishment that still seems unsurpassable today, the adoption of art. 123*a* of the Constitution highlights the lack of renewal of penal ideas since the 18th century. However, the comparison between life imprisonment and the death penalty helps to **normalize other sanctions involving deprivation of liberty for an indefinite period** by presenting the sentence of life imprisonment (art. 40, paras. 1 and 2 of the Penal Code), ordinary internment (art. 64, para. 1 of the Penal Code) and institutional therapeutic measures (art. the sentence **of** life imprisonment (art. 40, paras. 1 and 2, CC), ordinary internment (art. 64, para. 1, CC) and institutional therapeutic measures (art. 59, para. 3, CC). Since it is the “most severe” of these and the *ultima ratio*, life imprisonment tends to overshadow the severity of these other sanc-

tions by capturing a large part of the expectations of its supporters and the concerns of its opponents. The vote in favor of the popular initiative for life imprisonment indicates that the majority of the people and the cantons did not consider the existing penal arsenal to be sufficient and that only this new perpetual measure could protect society. In return, the argument has often been made against Article 123*a of* the Constitution and its implementing provisions that the single - or cumulative (cf. Article 57 of the Penal Code) - pronouncement of other indefinite sanctions already made it possible to neutralize a person deemed dangerous until his death. However, despite their differences, these sanctions all proceed, to varying degrees, from a logic similar to that of life imprisonment; they are constructed from the same "system of ideas" and, given their lack of a time limit, induce effects and risks of infringement of fundamental rights of the same nature. Art. 123*a* of the Constitution thus contributes to broadening the spectrum of penal practices currently considered acceptable for punishing and preventing the commission of serious offenses; beyond its own existence, it perpetuates the principle of recourse to endless sanctions.

III. COMMENTARY PROPER

A. Absence of a marginal title

Art. 123*a* of the Constitution is the only provision of the Federal Constitution 19
that does **not have a marginal title**. Biaggini calls it "*das namenlose Sorgenkind*" (the nameless problem child). This anomaly can be explained by the fact that the initiators did not provide a marginal title for the article (not to be confused with the title of the initiative) when drawing up the draft popular initiative (cf. art. 139 para. 2 hyp. 2 Cst.). During the preliminary examination of the initiative by the Federal Chancellery, this omission - without the slightest formal consequence - does not seem to have given rise to exchanges with the initiators. Following the official publication of the initiative and the concomitant launch of the collection of signatures (art. 139 para. 1 Cst.), the addition of a marginal title - i.e. an element of interpretation of the text that is part of the constitutional article - was no longer possible (see art. 139 para. 5 sent. 1 Cst. and art. 99 LParl, relating to the prohibition on amending the text of a popular initiative).

B. Paragraph 1, sentence 1: conditions for pronouncing life imprisonment

20 Art. 123*a* para. 1 sent. 1 Cst. provides that a "sex offender or violent offender" must be **interned for life** if the expert report on which the judgment is based qualifies him or her as "extremely dangerous" and "non-amendable".

1. A "sex offender or violent offender"

21 According to the constitutional text, life imprisonment is ordered against a **"sex offender or violent offender"**, i.e. the perpetrator of an act of a violent or, alternatively, a sexual nature. Since this notion of "sexual or violent offender" is unknown in Swiss criminal law, it has been transposed in the form of an **exhaustive list of offenses** (art. 64 para. 1bis *in limine* CP), in accordance with the principle of legality (art. 1 CP). Thus, anyone who has committed or attempted to commit an assassination (art. 112 CP), a murder (art. 111 CP), a serious bodily injury (art. 122 CP), a rape (art. 190 CP), robbery (art. 140 CP), sexual coercion (art. 189 par. 2 and 3 CP), false imprisonment (art. 183 ch. 1 CP), kidnapping (art. 183 ch. 2 CP), hostage-taking (art. 185 CP) or the crime of enforced disappearance (art. 185bis CP), or who has engaged in human trafficking (art. 182 PC), participated in genocide (art. 264 PC) or committed a crime against humanity (art. 264*a* PC) or a war crime (art. 264*d* to 264*h* PC). In addition, the person must have caused or intended to cause a **particularly serious** harm to the physical, psychological or sexual integrity of another person (art. 64 para. 1bis let. a CP). The Federal Supreme Court and legal doctrine specify in this regard that the offenses in the catalog do not all have the same degree of seriousness. While there is no doubt, for example, that murder or rape *per se* constitute such an offense, so that the condition required by art. 64 para. 1bis let. a PC will always be met, the examination will have to be more thorough, particularly in the case of sexual coercion. According to the Federal Court, the latter offense does not necessarily imply a particularly serious violation of physical, psychological or sexual integrity. The **two cumulative conditions** relating to the nature of the offense provided for by the Penal Code (art. 64 para. 1bis *in limine* and 1bis let. a PC) thus reflect the desire to restrict the pronouncement of life imprisonment to the most serious cases.

2. An "extremely dangerous" individual

The "**extreme dangerousness**" that characterizes the individual under the terms of art. 123*a* para. 1 Cst. is an indeterminate concept from a legal point of view and imprecise from a psychiatric point of view. At the legal level, several elements of the implementing provision make it possible to concretize this idea, which could not be taken over as it stood. The person's "extreme dangerousness" is mainly deduced from the **high risk of reoffending**, by committing again one of the crimes mentioned in art. 64 para. 1^{bis} *in limine* CP (art. 64 para. 1^{bis} let. b CP). The primary commission (or attempt) of one of the offenses in the catalog as well as the (actual or intended) infliction of a serious attack on the integrity of others (art. 64 para. 1^{bis} let. a CP) are also indications of this. From a medical point of view, the difficulties lie in particular in the controversy surrounding the notion of dangerousness and the uncertainty inherent in the assessment of the risk of reoffending. The high probability of specific or similar reoffending required in art. 64 para. 1^{bis} let. b CP, limits the possibility of pronouncing life imprisonment to exceptional cases. 22

3. An "unamendable" individual

For the purposes of the constitutional provision, the individual must also be considered "**unamendable**" (*nicht therapierbar*; *refrattario alla terapia*). This notion has been widely contested by practitioners and the scientific communities concerned because it touches on a fundamental ethical question. According to the Kantian conception of human dignity, based on respect for individual autonomy, it is not acceptable to treat a person as being definitively incapable of taking control of his or her life, because this is equivalent to considering that he or she is not a rational agent capable of moral judgment. In other words, to postulate the irreversible incurability of a person is to deny their humanity, insofar as autonomy and self-determination, which include the capacity to change, are imprescriptible and inalienable qualities of the human being. The notion of non-amendability therefore appears to be difficult to reconcile with constitutional and conventional standards protecting human dignity, as it is one of the fundamental values of democratic societies. For ethical and scientific reasons based on similar reasoning, the prevailing forensic psychiatric doctrine also considers that it is not conceivable to make a definitive statement on non-amendability; every living being, and *a fortiori* the human being, remains capable of evolving over time. From the point of view of 23 their clinical validity, the vast majority of psychiatrists also specify that prognoses can at most cover a period of one or two decades when the perpetrators concerned generally have a residual life expectancy of forty to fifty years at the time of sentencing.

24 By pitting the majority of the people against that of the experts and practitioners, the notion of "non-amendability" reflects the Gordian knot that is the measure of life imprisonment. It has given rise to considerable discussion as to its legal interpretation. Art. 64 para. 1bis let. c CP provides for the ordering of life imprisonment for a person qualified as "**permanently unamendable**" [(*dauerhaft nicht therapierbar*; *durevolmente refrattario alla terapia*)], insofar as therapy seems doomed to failure in the long term. In the **Message of 2005**, the executive describes the unamendability as **a chronic** condition and explains that it "in fact represents a probability ratio that contrasts the extremely high risk that new very serious offenses will be committed with the very low probability that changes will occur that would reduce the risks". By proposing to add the adverb "permanently" to take account of scientific reservations about non-amendability, the Federal Council took the risk of relaxing the conditions for pronouncing life imprisonment. This choice may come as a surprise insofar as it *a priori* goes against the logic of locking up that guided the implementation of life imprisonment. It reveals the Swiss authorities' difficulty in reconciling the different interests and issues following the adoption of Art. 123*a* Cst.

25 After a meticulous analysis, the **Federal Court** finally ruled in favor of a restrictive approach, holding that "only someone who is **truly unresponsive to treatment for life**" is permanently unamendable within the meaning of art. 64 para. 1bis let. c CP. Its interpretation, more faithful to the will of the legislator than that outlined by the Federal Council, reduces the practical scope of the legal provision to almost nothing since "the initiative is based on a fiction that contradicts reality".

26 According to the Federal Council, the envisaged **treatment process** (*Behandlung*; *trattamento*) must aim to sufficiently reduce the dangerousness of the person, whether it is related to mental disorders in the strict sense or deduced from symptoms or personality characteristics that could be successfully treated by means of therapy. The provisions on life imprisonment therefore apply both to individuals with mental disorders and to those who do not suffer from them, provided that it is established, at the time of sentencing, that

no form of therapy will prevent them from committing another serious offense.

In line with the Federal Council, case law requires that the analysis of the condition **of the individual** be based solely on **structural criteria** that are closely and lastingly linked to the person. Variable criteria - such as lack of motivation, lack of rational recognition of the act, symptoms likely to be modified by the use of medication or the absence of a suitable institution - are not taken into consideration. Moreover, if this were the case, Switzerland would be failing to fulfill its duties under **Articles 3 and 5(1) of the ECHR** in the area of care, particularly mental care, administered in detention. In this respect, an appropriate establishment and care of the person's state of health are precisely part of the indispensable measures. In general, in accordance with the positive obligation to offer all persons deprived of their liberty the opportunity to progress on the path to reform, all means enabling the individual to reduce his dangerousness must be offered to him, whether or not he presents mental disorders. Furthermore, in the event that a person is considered to be "permanently unamendable" within the meaning of federal case law, the Swiss authorities would not be released from their obligations towards that person. 27

C. Paragraph 1, sentence 2: exclusion of relief during the execution of life imprisonment

Art. 123*a* para. 1, second sentence, Cst. **excludes any early release and any leave** for persons serving a life sentence. This prohibition is explicitly included in art. 90 CC – paragraphs 2 to 4bis of which regulate the procedures for preparation for release – which states in paragraph 4ter that "no leave or other relief in the execution is granted during life imprisonment". Art. 84 CC, which regulates the relationship of the convicted person with the outside world, has also been supplemented by a paragraph 6bis which provides for the same exclusion during the execution of the sentence preceding life imprisonment. 28

In the 2001 Message, the Federal Council rightly emphasizes that the regime provided for by the initiative is difficult to reconcile with the **principle of proportionality**. We have two additional reservations regarding the conformity of the system established by Art. 123*a* para. 1 sent. 2 Cst. The first could already have been formulated at the time of the vote on life imprisonment, while the second stems from developments by the ECHR subsequent to 29 the adoption of art. 123*a* of the Constitution and its implementing provisions, but falling under a norm of *jus cogens*. On the one hand, according to established case law since the 1990s, States have an obligation to allow and assist persons deprived of their liberty to maintain contact with their immediate family under **Article 8 of the ECHR**. While this does not result in an unconditional right to temporary leave, it is incumbent on the national authorities to assess each individual request on its merits and to demonstrate that the restriction on the right of the person concerned is justified under Article 8(2) of the ECHR. By ruling out any weighing of interests, art. 84 para. 6^{bis} CP does not meet these requirements. On the other hand, art. 84 para. 6^{bis} and 90 para. 4^{ter} CC appear to contradict the cardinal objective of reintegration and resocialization that governs the execution of Swiss criminal sanctions (cf. in particular art. 74, 75 al. 1 and 3 and 90 al. 2 CC) and that the ECHR elevated to the rank of positive obligation in 2013. According to the Court, this concerns respect for the human dignity of any person deprived of liberty, but also the security of the public community, since the resocialization function of criminal sanctions "aims, as a last resort, to prevent recidivism and, therefore, to protect society". In the context of **Article 3 of the ECHR**, the obligation to promote the resocialization of all persons deprived of liberty, even when they are serving a life sentence, implies in particular guaranteeing the existence of prison regimes that are compatible with the objective of rehabilitation and that enable them to progress along this path. The progressive regime for the enforcement of sentences (cf. art. 75 PC) and measures (cf. art. 90 PC), which includes reductions, is precisely an expression of the resocialization function of criminal sanctions. Similarly, maintaining contact with the outside world is fundamental to promoting the reintegration of persons deprived of their liberty. Thus, although contact may possibly be maintained in another way, the absolute exclusion of leave seems to us to constitute a major obstacle to the social reintegration of persons sentenced to life imprisonment and, therefore, to risk participating in a violation of Article 3 ECHR.

D. Paragraph 2, sentence 1: conditions for the lifting of life imprisonment

30 Under the terms of Article 123*a*, paragraph 2, sentence 1, of the Penal Code, "new expert assessments shall only be carried out if new scientific knowledge makes it possible to establish that the offender can be reformed and that he or she therefore no longer represents a danger to the community". In other

words, only "new scientific knowledge" opens up the possibility of **lifting a life sentence**. The main difficulty in implementing the constitutional provision lies in the fact that it does not consider that the reduction or even disappearance of the dangerousness of the person serving a life sentence can depend on anything other than his or her ability to respond to treatment.

Under the **first three paragraphs of Art. 64*c* CC,** the legislator merely provides for a relatively complex **implementation mechanism**, endorsing the logic of the initiative. Firstly, the competent cantonal authority, either ex officio or at the request of the person committed for life, instructs a specialized federal commission to examine whether there is "new scientific knowledge" that would make it possible to establish that the individual in question can be reformed (art. 64*c* para. 1 CP). Based on the commission's advisory report, the cantonal authority then decides to offer the treatment to the person when it considers that it is sufficiently probable that their dangerousness will disappear (art. 64*c* para. 1 and 2 CP). Finally, if at least two new expert reports conclude that, thanks to the treatment, the dangerousness of the individual has been significantly reduced and can be reduced further to the point that he or she no longer represents a danger to the community, the court that ordered the life imprisonment orders its lifting and replaces it with an institutional therapeutic measure (art. 64*c* para. 3 and 5 CP; cf. art. 59 ff CC). At this stage, the person may be released under the conditions of Articles 62 to 62*d* CC. 31

The notion of "**new scientific knowledge**" that determines the lifting of life imprisonment has fuelled much debate, because, in the unanimous opinion of the parties involved in the legislative process, the compatibility of the measure with Article 5 ECHR depends to a large extent on it. The initiative committee undoubtedly understood this expression in the **objective sense** of "new curative procedures for the treatment of dangerous offenders", thus disregarding the requirements of Article 5 ECHR. With Strasbourg case law in mind, the Federal Council considers in its 2005 Message that the question that arises is whether there are new therapeutic methods, but that these must also take into account the changes in the person concerned, i.e. those of a **subjective nature**. In the same paragraph of the Message, it also describes as "new scientific knowledge [...] all that acquired through methodical processes, which concern the dangerous and (non) amendable nature *of the* offender that led to their internment". It is therefore not clear whether, for the Federal Council, these can concern dangerousness and amendability independently or 32 whether they should only relate to amendability, which may have an impact on dangerousness. The three language versions of the 2001 Messages all agree that the examination relates to dangerousness and amendability. In the 2005 Message, the definition in French is identical, but the German and Italian versions only mention amendability. The doubt raised by the government's definition as to what exactly this indeterminate legal concept covers did not dissipate with the parliamentary debates. It persists at present, since the Federal Court has not settled the question.

33 Pending a decision by the federal judges, we believe that the analysis under **art. 64*c* paras. 1 to 3 CP** only covers developments in the person committed for life **in relation to a form of treatment**. In other words, the examination only concerns the existence of scientific knowledge concerning the (non) amendability of the person interned for life that makes it possible to expect changes in his extremely dangerous nature. In our view, a broader definition, which would include all changes in the dangerous nature of the person, ignores the will of the constituent and strays too far from the text of Articles 123*a* para. 2, first sentence, of the Constitution and 64*c*, paras. 1 to 3, of the Penal Code, emptying the notion of “new scientific knowledge” of its literal meaning. We also reject it because it goes against legal systematics. It prevents the articulation of art. 64*c* paras. 1 to 4 CC insofar as, in absolute terms, the old age and illness mentioned in paragraph 4 also constitute changes influencing the dangerous nature of the person committed for life, changes which should be considered from the perspective of paragraphs 1 to 3 if the concept of “new scientific knowledge” were interpreted extensively.

34 In **art. 64*c* para. 4 CP**, the legislator provides – again with a view to compliance with art. 5 ECHR, but clearly departing from the spirit of art. 123*a* para. 2 phr. 1 Cst. - the possibility for the judge to grant conditional release (cf. 64*a of* the Penal Code), without prior or subsequent treatment, to the person who, because of his or her age, serious illness or for any other reason, no longer represents a danger to the community. The question of treatment thus fades into the background in favor of the broader question of **dangerousness**. The interpretation of this paragraph is uncertain for the time being, but proves decisive for the whole mechanism of lifting life imprisonment insofar as it is a **path of alternative release** to that provided for in the first three paragraphs. For the doctrine, which we agree with, the general clause of art. 64*c* para. 4

CC, which provides for the release of the person for "another reason", is not unequivocal.

The Federal Council's preliminary draft based the conformity of the provision of art. 64*c* CC with art. 5 ECHR on the extensive interpretation of "new scientific knowledge" and an art. 64*c* para. 4 AP-CC providing only for the two variants of old age and serious illness. At the end of the consultation procedure, the government inserted this third "**other reason**" for release in paragraph 4, as some of the stakeholders felt that otherwise the text would be contrary to Article 5 of the ECHR. It is not easy to understand whether, from the Federal Council's point of view, the compatibility of the modalities for lifting life imprisonment with the ECHR is guaranteed by the extensive interpretation of "new scientific knowledge" in Article 64*c*(1) CC, by the addition of the third variant to Article 64*c*(4) CC, or by both. Nor has the executive specified the relationship between the mechanism provided for in paragraphs 1 to 3 and that instituted by paragraph 4, nor their respective scope. It has merely stated that the words "for another reason" allow the competent authority to "ask the court to order conditional release when, on the basis of the report of the specialized commission according to paragraph 1, it comes to the conclusion that, even without prior treatment or after 'trial' treatment within the meaning of paragraph 2, the perpetrator no longer poses a danger to society". In Parliament, opinions also diverged on the interpretation of this clause, so that uncertainty remains. The Federal Court, for its part, has not had the opportunity to rule on the implementation of art. 64*c* para. 4 CP. For our part, we include in the "other reason" of art. 64*c* para. 4 CC **all conceivable grounds for the subsequent disappearance of the dangerousness** of the individual interned for life. 35

Unlike paragraphs 1 to 3 of art. 64*c* CC, paragraph 4 does not detail how the judicial review of parole is initiated. This review may, in all likelihood, be initiated either at the request of the detained person or at the initiative of the enforcement authority. The prior notice of the **federal specialized commission** does not appear necessary in this context. According to the letter of art. 123*a* para. 2 phr. 1 Cst., art. 64*c* al. 1 to 3 CP and the Ordinance of June 26, 2013 (cf. in particular its title and art. 2 let. a), this commission's sole mandate is to rule on the question of the existence of treatment for the individual in question, i.e. on his or her amendability. However, it is not impossible that, in carrying out this analysis in accordance with art. 64*c* para. 1 CP, the commis- 36 sion may find that the person detained for life is no longer dangerous. In such a case, art. 64*c* paras. 2 and 3 CP do not apply and the enforcement authority refers the matter to the judge on the basis of art. 64*c* para. 4 CC. To decide on the lifting of life imprisonment and conditional release, the court relies on two independent and concordant expert reports confirming that the person concerned is not dangerous (art. 64*c* para. 5 CC; cf. also art. 64*a* CC).

37 Our approach, which advocates a broad interpretation of the "other reason" in Article 64*(c)*(4) of the Penal Code, allows **for a logical articulation of all the paragraphs of Article 64*(c)* of the Penal Code** when the person is no longer considered "extremely dangerous". The measure may be lifted in **four scenarios**. The **first** scenario is that of the person whose dangerousness has already decreased significantly thanks to treatment and may decrease further. Their life-long detention order will be lifted and they will be admitted to a secure institution as part of an institutional therapeutic measure within the meaning of Articles 59 to 61 of the Penal Code, from which they will then be released under the conditions of Articles 62 to 62*d* of the Penal Code (Article 64*c* paragraphs 1 to 3 *cum* paragraph 5 of the Penal Code). The **second case** is less clear because of the lack of distinction in Art. 64 para. 1bis CC between persons with mental disorders and those who do not suffer from them. In fact, only the "sick" individual, i.e. the one with a mental disorder, can be "cured" and therefore released. Also, a person who is undergoing therapy under Art. 64*c* para. 1 and 2 CC, but who was not dangerous due to a mental disorder, cannot follow the procedure provided for in Art. 64*c* para. 3 CC, because *a priori* he or she does not meet the conditions for the imposition of an institutional measure (cf. in particular Art. 59 CC). Although fragile, the only possibility we can imagine for overcoming this obstacle and considering the release of this person is that of art. 64*c* al. 4 hyp. 3 CP (*cum* al. 5 CP), considering that his dangerousness has disappeared for an "other reason". From this point of view too, the question of dangerousness must necessarily take precedence over the subsidiary question of amendability. The **third case** is that of a person who is no longer dangerous due to old age, serious illness or any other similar form of disability and who will be released under the conditions of Article 64*a* of the Penal Code (Article 64*c* paragraph 4 *cum* paragraph 5 of the Penal Code). The **fourth,** rare but theoretically conceivable, scenario concerns the individual who is committed for life and whose recognized non-dangerousness is not attributable to the effect of treatment or to the deterioration of his or her physical condition. For this individual, the only way to be

released is to argue, as for the person in the second situation, the existence of an “other reason” (art. 64*c* para. 4 hyp. 3 *cum* para. 5 CP).

Neither interpretation is perfectly in line with the will of the initiators. However, our proposal appears in two respects to be more **solid in terms of conventionality** than the one based on an extensive definition of “new scientific knowledge”, at least with regard to art. 5 ECHR. 38

First, while the latter interpretation may contribute to the compatibility of the provision set out in art. 64*c* paras. 1 to 3 CC with art. 5 ECHR, it raises a **new difficulty** from the perspective of the latter standard. The *contra legem* reading proposed by the Federal Council makes the application of art. 64*c* PC significantly more uncertain. However, according to the ECHR, provisions receiving contradictory interpretations from the internal authorities that are mutually exclusive do not meet the requirement of legal certainty set out in art. 5 par. 1 ECHR. By not emptying the concept of “new scientific knowledge” of its literal meaning and by articulating the two release channels provided for in art. 64*c* PC, our proposal therefore aims to guarantee greater predictability in the application of the legal provision. 39

Secondly, **art. 5 par. 4 ECHR** guarantees the right to have the legality of any deprivation of liberty reviewed promptly and at regular intervals by an impartial and independent court. On the occasion of this review, which constitutes a right in its own right, the court must verify whether the sentence or measure still meets the conditions of art. 5 par. 1 ECHR and order release, if appropriate. In general, it is the person's overall situation at the time of the review that is the only relevant factor for the judge who is reviewing the legality of an indefinite deprivation of liberty, the grounds for which are likely to evolve over time. The court's decision is based in particular on the personality and behavior of the individual, his or her state of mental health and potential dangerousness. More specifically, the deprivation of liberty under art. 64 para. 1^{bis} CP falls, depending on the circumstances, under the grounds of art. 5 para. 1 let. a or let. e ECHR, or both at the same time. 40

In matters of preventive detention, the judge in principle examines the situation of persons who do not present mental disorders and have been declared guilty under the terms of **art. 5 par. 1 let. a ECHR**. Among the criteria governing the analysis is that of the sufficient causal link between the conviction handed down by the trial court and the deprivation of liberty. This link gradu- 41 ally weakens over time and may end up breaking, particularly if the decision not to release is based on an unreasonable assessment of the objectives pursued by the initial conviction. The refusal of release may also become incompatible with the purpose of the original sentence when the person remains in detention "because there is a risk of reoffending while, at the same time, being deprived of the necessary means [...] to enable him or her to demonstrate that he or she no longer presents a danger". In these cases, a sanction that was originally a regular life sentence turns into a deprivation of liberty incompatible with art. 5 par. 1 let. a ECHR.

42 With regard to the person "insane" within the meaning of **art. 5 par. 1 let. e ECHR**, whose mental disorders have motivated the deprivation of liberty, the court must in particular ensure that these persist on the day of the examination for release by considering any possible evolution of his mental health that has occurred after the sentence or measure was pronounced. Deprivation of liberty as referred to in Article 5(1)(e) of the ECHR is considered arbitrary in the absence of such disorders. It is just as arbitrary if the disorders at the root of the sentence are not adequately treated, and this "even when the illness or disorder cannot be cured or the person concerned is not likely to respond to treatment".

43 The **mechanism for lifting life** imprisonment does not meet the requirements of **Art. 5 ECHR** if the review is limited to the sole question of amendability. Since the decisions of the enforcement authority based on art. 64*c* paras. 1 and 2 CC are subject to appeal, the problem is *a priori* not so much that of access to a judge as that of the restriction of the court's power of cognition (art. 5 para. 1 *cum* para. 4 ECHR). By limiting the notion of "new scientific knowledge" to changes in the extremely dangerous nature of the detained person due to treatment, the mechanism provided for in the **first three paragraphs** does not leave sufficient leeway for the court to carry out a review in accordance with the case law of the ECtHR. On the other hand, with the alternative route provided for in **art. 64*c* para. 4 CP**, the release mechanism is more compatible with the ECHR. The court that decides in this context does have all the latitude required to assess the evolution of the individual in question (art. 5 para. 1 *cum* para. 4 ECHR).

44 In **summary,** we consider that the mechanism for lifting life imprisonment violates Article 5 ECHR if we stick to Article 123*a*(2)(1) of the Constitution and its legal counterpart, the sole Article 64*c*(1) to (3) of the Penal Code. Subject to

a problem of predictability of the law that cannot be completely resolved *de lege lata*, paragraph 4 constitutes the only chance to "save" art. 64*c* PC on the grounds of art. 5 ECHR, since it allows the lifelong detention of a person who is no longer "extremely dangerous" to be lifted, for whatever reason.

Under **Article 3 ECHR**, any custodial sentence for an unlimited period must also be **open to reduction** *in law* **and in** *fact*, i.e. there must be the possibility of review and the chance of release as soon as the sentence is passed. On the one hand, the life sentence or life-time measure must be subject to periodic **reviews to** enable the competent authority to determine whether, during the course of its execution, the individual has evolved and progressed on the path to rehabilitation to such an extent that there are no longer any legitimate penological grounds for continuing to detain them. According to the ECHR, it is contrary to human dignity for a "punishment to remain unchanged [...] no matter what the individual does or how exceptional his progress towards reform may be". While leaving a wide margin of discretion to States with regard to the modalities of the review, the ECHR specifies that they must reflect its relevant case law and present a sufficient degree of clarity and certainty. Thus, every person sentenced to life imprisonment has the right to know, as soon as their sentence is handed down, what they must do to be considered for release and under what conditions. In particular, the person concerned has the right to know when a first review will take place or can be requested. Furthermore, Article 3 of the ECHR requires the State to offer all life prisoners **real prospects of early release**. Strasbourg case law considers that respect for human dignity "prevents a person from being deprived of his liberty by coercion without at the same time working for his reintegration and without providing him with a chance to regain that freedom one day". In addition to the positive obligation to ensure the existence of conditions of detention and arrangements, measures or treatments likely to enable the reform of life-sentenced persons, it would seem – in the light of certain judgments of the ECHR – that States must also provide, as a tool for encouraging reform, a mechanism of conditional release for all persons detained. Release on humanitarian grounds alone, such as age or serious illness, is insufficient for the purposes of compressibility and statistically rare in Switzerland. 45

The mechanism for lifting life imprisonment under Article 64*c* of the Swiss Criminal Code does not meet the requirements of the ECHR under Article 3 ECHR already because it does **not provide a sufficient degree of clarity** 46 given the difficulties of interpretation that it raises. These substantial doubts are, in the same way as for art. 5 ECHR, problematic as such with regard to art. 3 ECHR.

47 Moreover, contrary to the result that can be achieved from the perspective of art. 5 ECHR, we consider that the incompatibility of Swiss law with art. 3 ECHR will persist, regardless of the interpretation of domestic law that may ultimately be favored. The notion of "new scientific knowledge", around which the path of **art. 64*c* para. 1 to 3 CP** revolves, does not make it possible to determine the time frame in which the first and subsequent reviews will take place. The existence of a new treatment influencing the person's amendability is a random occurrence, with no time anchor, which in no way reflects the relevant case law of the ECHR. Even if a custodial sentence is imposed jointly (cf. art. 57 para. 1 and 64 para. 2 sent. 1 PC), the person sentenced to life imprisonment cannot know from the outset when his sentence will be reviewed and is forced to spend an indeterminate number of years in detention without any concrete indication as to the possibility of review and, therefore, his prospects of release. Indeed, it seems difficult to us to deduce the existence of such a time limit from Art. 64*c* para. 6 CC, which certainly provides that the lifting of life imprisonment "takes place at the earliest when the perpetrator has served two thirds of their sentence or fifteen years of the sentence in the case of a life sentence", but does not yet mean that the end of the measure, the conditions of which differ from those of the sentence, will be examined on that occasion. Furthermore, given that the possibilities for release under Article 64(1$^{bis)}$ of the Penal Code depend solely on the question of the existence of new treatment, they are largely beyond the control of the person serving a life sentence and the enforcement authorities. Efforts to secure release may thus appear futile and the sentence may appear to have no end. In short, the condition of "new scientific knowledge" makes life imprisonment one of the irreversible sanctions by excessively restricting both the possibility of review and the prospects of release. Our interpretation of **art. 64*c* para. 4 CP** does not guarantee compatibility under art. 3 ECHR either. The overall examination of the person's (non-) dangerousness offers concrete prospects for release, provided that the release is not limited to humanitarian reasons. However, in the absence of a legal deadline for review specifically concerning the lifting of life imprisonment, it remains impossible for the convicted person to know, on the day of his or her conviction, when an authority will check that the measure remains justified.

In conclusion, given the inadequate conditions for the lifting of life imprisonment laid down in Article 123*a*(2), first sentence, of the Constitution, **no solution** for implementation can be fully satisfactory. Our approach seems to us to be the most likely to confer a certain overall coherence on the mechanism for lifting life imprisonment provided for in art. 64*c of the* Penal Code and, after noting that art. 123*a* para. 2 sent. 1 of the Constitution is irremediably incompatible with the ECHR, to take the best possible account of the issues of conventionality. On the other hand, this approach departs from the will of the people insofar as it allows the release of an interned person who is no longer considered dangerous (art. 64*c* para. 4 hyp. 3 CP *cum* art. 64*a* CP), even in the absence of “new scientific knowledge enabling it to be established that the offender can be reformed” (art. 123*a* para. 1, first sentence, Cst.). 48

E. Paragraph 2, sentence 2: responsibility of the authority ordering the release from confinement

According to Art. 123*a*, paragraph 2, clause 2 of the Constitution, the authority that orders the release of the person detained on the basis of the new expert reports is **liable in the event of a repeat offense** (cf. Art. 64*c*, paragraph 5 of the Criminal Code). 49

The initiative aims primarily to establish the **liability of the State**. Within the “internment” working group, the two former members of the initiative committee argued that the letter of the constitutional text clearly provided for the “responsibility of the authority”, which would imply “less of a financial remedy than obliging those who made the decision to release the perpetrator to bear the consequences of that decision”. However, the Federal Council, in line with the vast majority of the working group, considered that the concept of liability was legally clear and could only be understood in the sense of “payment of damages for financial consequences” (cf. art. 41 et seq. CO). 50

The State's liability was specified in art. 380*a* para. 1 CC in the form of **liability under public law on a no-fault basis**, i.e. independent of any fault on the part of an agent when lifting a life sentence. The public authority is thus held liable when one of its affiliated authorities lifts a life sentence or grants parole to a person serving a life sentence and the latter commits one of the crimes referred to in art. 64 para. 1^{bis} PC again. Recidivism is thus understood in its special meaning. The procedure is governed, depending on the authority concerned, by the cantonal laws on state liability or by the Federal Act on the Lia- 51 bility of the Confederation, the Members of its Authorities and its Officials of March 14, 1958 (LRCF). Only the public authority – federal or cantonal – is liable for the damage, to the exclusion of the authority that rendered the decision, which lacks legal personality. As the specialized federal commission only has an advisory function, its conclusions do not result in the Confederation being held liable.

52 The State's liability does not exclude the civil **liability of the person who has committed a repeat offense** (art. 41 et seq. CO). The injured party thus benefits from a combination of actions against the public authority and the repeat offender. Under art. 380*a* para. 2 CC, the provisions of the Code of Obligations on unlawful acts apply, as a supplementary public law, to the recourse of the public authority sought against the perpetrator of the crime (art. 51 CO) as well as to the limitation of the action for damages or compensation for moral injury (art. 60 CO).

53 Art. 380*a of* the Penal Code protects **members of the authority** who have ordered the lifting of life imprisonment from any direct action by the victim of the damage. Under paragraph 3, the community sought, however, has a recourse action, governed by cantonal law or by the LRCF, against its agents.

54 According to the 2001 Message, the text of the initiative fails to specify the type of liability involved, so it should be assumed that the initiators envisaged not only civil but also criminal liability. The **criminal liability** of the members of the authority ordering the (conditional) release would be covered by the provisions of the special part of the Penal Code, in particular the offenses of manslaughter by negligence (art. 117 PC) or serious bodily injury by negligence (art. 125 para. 1 and 2 PC). Following the adoption of the constitutional standard, this form of liability was no longer mentioned by the Federal Council in its 2005 Message and was not discussed in Parliament. It is rightly agreed in legal theory that the liability referred to in art. 123*a* para. 2 sent. 2 Cst. is not criminal in nature.

55 On the **conventional level**, the procedural obligations resulting from art. 2 ECHR do not impose the payment of compensation by the State to a victim on the basis of objective responsibility in the event of recidivism of a person benefiting from a sentence reduction or conditional release. Nor do they preclude making the liability of members of an authority ruling on measures to extend detention dependent on fraud or serious misconduct. On the other

hand, Article 2 ECHR includes the positive obligation of the State to establish the possible liability of these officers if, at liberty, the individual sentenced to life imprisonment commits a new serious offense. The proceedings brought against these officers do not necessarily have to be criminal; they may also be civil or disciplinary.

F. Paragraph 3: requirements for expert reports

According to Article 123*a*(3) of the Constitution, any expert report concerning a person at risk of life imprisonment must be "drawn up by at least **two independent experts** who take into consideration all relevant factors". In support of the German and Italian versions, which are more precise than the French version, it can be concluded that the initiators wanted two experienced (*erfahrene Fachleute*; *periti esperti*) and independent (*voneinander unabhängig*; *reciprocamente indipendenti*) experts to draw up two complete expert reports on the individual in question. 56

Art. 56 para. 4[bis] of the **Penal Code transcribes the essence** of art. 123*a para.* 3 of the Constitution in the law. The legislator has refrained from including the expected competencies of the experts in the Penal Code. In its 2005 Message, the Federal Council specifies, however, that the experts called upon must be specialists in forensic psychiatry, judicial prognostic assessment and the treatment of perpetrators of serious offences against physical or sexual integrity. On the other hand, in relation to the constitutional text, Art. 56 para. 4[bis] PC **adds the condition of the independence of the experts in relation to the person being evaluated**, in the sense that the former must not have treated the latter or dealt with them in any way. In practice, the small number of experts and the long criminal record of persons at risk of life imprisonment complicate the implementation of this requirement.

According to the **Message of 2005**, while the two expert reports do not necessarily have to agree on all points, they should not contain any fundamental contradictions regarding the conclusions concerning the pronouncement of life imprisonment. In the event of a divergence between the experts, the court has the option of requesting a third opinion, since art. 123*a (*3) Cst., reproduced in art. 56 (4[bis)] CP, stipulates that the judge shall rely on "at least" two independent expert opinions. **Case law** has specified that the pronouncement of life imprisonment requires clear, indisputable and convergent opinions from these two experts as to the person's incurability for life. According 58 to the judgments published at the end of March 2025, some experts concluded that the individual in question was truly inaccessible to treatment for the rest of his or her life. The very restrictive conditions imposed by the Penal Code, taken from the constitutional standard, for pronouncing this measure, particularly the request to the experts to predict an "impossibility of lifelong treatment", should nevertheless mean that lifelong detention will only very rarely, if ever, be applied.

59 The **lifting of the measure** also requires the establishment of two expert reports, meeting the same requirements (cf. art. 64*c* para. 5 CC).

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COMMENTARY ON

Art. 123b FC

A commentary by Fabio Burgener

SUGGESTED CITATION

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Art. 123*b* No time limit for the right to prosecute or for penalties for sexual or pornography offences involving prepubescent children

The right to prosecute sexual or pornography offences involving prepubescent children and the penalties for such offences is not subject to a time limit.

CONTENT

I. GENESIS OF THE STANDARD

On March 1, 2006, the "Marche Blanche" association submitted the popular initiative "pour l'imprescriptibilité des actes de pornographie enfantine" to the Federal Chancellery, with 119,375 valid signatures. The proposed text called for "punishable acts of a sexual or pornographic nature against children below the age of puberty" to be imprescriptible (addition of an art. 123b Cst.). 1

The Federal Council considered that this popular initiative was not likely to improve the prevention of paedocriminality. However, in view of the need to reinforce child protection, it submitted an indirect counter-proposal to Parliament in the form of a new special statute of limitations. The 15-year statute of limitations for certain serious offences against sexual integrity (arts. 182, 187 to 191 and 195 of the Swiss Criminal Code) and for the most serious offences against life and limb (arts. 111 to 113 and 122 of the Swiss Criminal Code) committed by adult perpetrators against children under the age of 16 would begin to run on the date on which the victims come of age. Where the perpetrators are minors, the limitation period would expire on the victim's 25th birthday. Parliament proposed that the initiative be rejected, and adopted the indirect counter-proposal. Should the initiative be rejected, the counter-proposal would come into force, subject to rejection by referendum. 2

At the time of the vote, the main arguments of the initiators were that the imprescriptibility provided for by the initiative (i) was justified primarily by the particular nature of the "crime of sexual act on a child", (ii) had a dissuasive effect, encouraged denunciations by victims and thus reduced the number of abused children, and (iii) represented an aid in the victim's therapeutic process, and that (iv) victims' testimonies became more numerous and more credible as time went by. 3

On the other hand, the Federal Council argued that (i) the initiative lacked clarity in its wording and proved difficult to implement, (ii) it presented risks of unequal treatment due to the fluctuating age of puberty among children, (iii) it failed to distinguish between adult and minor perpetrators, (iv) that the passage of time made it difficult to establish the facts, (v) that imprescriptibility gave victims the illusion that the state would be able to prosecute and convict perpetrators decades after the offence was committed, and (vi) that the counter-project provided more effective protection for victims. 4

5 On November 30, 2008, the popular initiative was adopted by 51.9% of valid ballots and 16 cantons and 4 half-cantons.

II. IMPLEMENTATION IN THE CRIMINAL CODE

6 The Federal Council was of the opinion that Art. 123b Cst. was directly applicable. Nevertheless, the solution of entrusting the criminal authorities with the task of interpreting this provision raised several problems, in view of the imprecise concepts contained in the constitutional norm. It could have given rise to different cantonal practices, resulting in legal uncertainty and unequal treatment. This solution would also have placed victims in an uncomfortable position, in that they would not have been in a position to know from the outset whether or not the offences they had suffered were imprescriptible. Finally, it would have undermined the principle of precision of the legal basis.

7 The constitutional norm has thus rightly been the subject of - exhaustive - legislative concretization in art. 101 para. 1 let. e and para. 3 phr. 3 CP, art. 59 para. 1 let. e and para. 3 phr. 3 of the Military Penal Code of June 13, 1927 (CPM) and art. 1 para. 2 let. j of the Federal Law Governing the Penal Status of Minors of June 20, 2003 (DPMin), which came into force on January 1, 2013.

8 According to art. 101 para. 1 let. e CP, sexual acts with children (art. 187 ch. 1 CP), sexual coercion (art. 189 CP), rape (art. 190 CP), sexual acts committed on a person incapable of discernment or resistance (art. 191 CP), sexual acts with hospitalized, detained or remanded persons (art. 192 para. 1 CP) and abuse of distress (art. 193 para. 1 CP), when committed on children under the age of 12. In addition, the perpetrator must be of legal age (art. 1 para. 2 let. j DPMin a contrario). Other acts that might have fallen within the scope of art. 123b Cst. according to a broad interpretation of this norm cannot be considered imprescriptible.

9 According to art. 101 para. 2 of the Swiss Penal Code, the judge may reduce the sentence if the criminal proceedings are statute-barred under arts. 97 and 98 of the Swiss Penal Code. Art. 48 let. e PC, on the mitigating circumstance of the passage of time, does not apply to crimes for which there is no statute of limitations.

10 Art. 101 para. 3 phr. 3 CP governs transitional law. Crimes for which the statute of limitations had not expired on November 30, 2008 - the day the initiative was accepted - under the law applicable at that date, are not subject to

the statute of limitations. This regulation is compatible with art. 2 para. 1 PC and art. 7 § 1 ECHR, which enshrine the principle of non-retroactivity of criminal law. The ECtHR accepts the application of a longer limitation period for offences that were not yet time-barred when the new law came into force.

Art. 59 para. 1 let. e and para. 3 phr. 3 CPM is the counterpart of art. 101 para. 1 let. e and para. 3 phr. 3 CP in military criminal law. Under this provision, acts of sexual coercion (art. 153 CPM), rape (art. 154 CPM), acts of a sexual nature committed on a person incapable of discernment or resistance (art. 155 CPM), acts of a sexual nature with children (art. 156 ch. 1 CPM) and exploitation of a military situation (art. 157 CPM), when committed on children under the age of twelve, are not subject to the statute of limitations. 11

III. COMMENTARY

A. Impubescent child

The notion of "impubescent child" was unknown in the Swiss legal system prior to the adoption of art. 123b Cst. From a medical point of view, puberty is the period of transition from childhood to adulthood, a process accompanied by somatic, psychological, metabolic and hormonal transformations. From a legal point of view, the definition of this notion was elaborated when the constitutional norm was concretized in the Penal Code. There was almost unanimous agreement that the implementing legislation should include a clear and easily applicable criterion, i.e. the age of the victim at the time of the offence, an age to be set according to the understanding of the notion of an impubescent child. The preliminary draft of the Federal Office of Justice proposed the age of 10, the so-called average age at which puberty begins. During the consultation on this draft, the Association of Swiss Cantonal Physicians, the University Psychiatric Services of Berne and the Swiss Federation of Psychologists criticized this choice. After pointing out that the phase of life corresponding to puberty varies from one child to the next, they advocated setting a higher limit, namely 16, 14 or 12 respectively, as the minimum age at which a child should no longer be described as "prepubescent". The age of 12 was finally adopted by the Federal Council in its Message, and subsequently by Parliament (cf. art. 101 para. 1 let. e in fine CP). 12

A motion by National Councillor Jean-Luc Addor of June 18, 2021, entitled "Extending the scope of the non-applicability of the statute of limitations to 13 offences against sexual integrity to better protect children", called into question the implementation in the Criminal Code of the concept of "impubescent child" decided in 2012. It proposed a revision of Art. 101 para. 1 let. e of the Swiss Penal Code, raising the age limit for the imprescriptibility of such offences from 12 to 16. The Federal Council proposed that the motion be rejected. In its view, extending the statute of limitations to cases involving victims over the age of 12 would go beyond the popular initiative that led to the adoption of art. 101 para. 1 let. e CP and the aim pursued by the initiators of protecting the youngest victims, who were unaware of the unlawful nature of the acts committed and could not report them. The National Council rejected this motion.

B. Punishable acts of a sexual or pornographic nature

14 The notion of "punishable sexual or pornographic act" is not well defined in the Penal Code. The question arose as to whether this concept referred only to certain offences against sexual integrity (arts. 187 to 193 and 198 PC) or also to all or some of the punishable acts of pornography (art. 197 PC). The Federal Council's proposal was to apply the rule of imprescriptibility to sexual acts with children (art. 187 ch. 1 PC), sexual coercion (art. 189 PC), rape (art. 190 PC) and sexual acts committed on a person incapable of discernment or resistance (art. 191 PC; cf. art. 101 para. 1 let. e P-CP). Parliament added sexual acts with hospitalized, detained or remanded persons (art. 192 para. 1 PC) and abuse of distress (art. 193 para. 1 PC; cf. art. 101 para. 1 let. e PC). The concept of a "punishable pornographic act" could have been made more concrete by including the offence of pornography (art. 197 PC) in the list in art. 101 para. 1 let. e PC. Parliament decided against this, however, on the grounds that the offence was not sufficiently serious.

15 In the law revising the law on sexual matters, Parliament adapted the list of offences in art. 101 para. 1 let. e PC as follows: sexual acts with children (art. 187 para. 1 and 1bis PC), sexual molestation and coercion (art. 189 CP), rape (art. 190 CP), sexual acts committed on a person incapable of discernment or resistance (art. 191 CP), abuse of distress or dependence (art. 193 CP) and deception concerning the sexual nature of an act (art. 193a CP). The law's referendum deadline is October 5, 2023.

C. Authors

Art. 123b Cst. does not differentiate between adult and minor offenders. Taking into account the usual methods of interpreting constitutional norms, the Federal Council nevertheless considered it appropriate not to extend imprescriptibility to minor offenders. Despite the letter of the provision, this exclusion is fully justified from a systematic (Swiss law provides for a special regime for under-age perpetrators), teleological (the absence of any emotional or economic link between a victim and an under-age perpetrator) and historical (the absence of any public stance taken by the initiators on abuse between minors) point of view. Respect for the principles of proportionality (art. 5 para. 2 Cst.) and equal treatment (art. 8 para. 1 Cst.) also justify this differentiated treatment of minor perpetrators. 16

D. Imprescriptible criminal proceedings and penalties

Art. 123b Cst. expressly states that criminal proceedings and penalties are not subject to any statute of limitations. 17

IV. CRITICAL ASSESSMENT

A. Appropriateness of the norm

A number of studies show that many victims are subjected to offences against their sexual integrity by members of their own family or close circle. Where there is a strong emotional or economic bond between the perpetrator and the victim, the latter often finds it difficult to talk about the acts she has suffered until she has been freed from this hold and undergone psychotherapeutic treatment. This means that they can only come out of their silence many years after the abuse. The disadvantage of an excessively short statute of limitations is that it hinders criminal proceedings, enabling the perpetrator to escape punishment. 18

In its examination of the popular initiative, the Federal Council concluded that a special statute of limitations was required for the offence of "sexual abuse of a child". It noted that art. 70 para. 2 aCP provides for a 15-year statute of limitations for serious offences against the sexual integrity of a child under the age of 16 (arts. 187 and 188 CP), and that the statute of limitations runs in any case until the victim reaches the age of 25. By way of example, the victim 19 had to act before the age of 25 if she had been subjected to acts when she was under 10, and until the age of 32 if she was 17 at the time of the offence. The legislator thus already recognized that victims should be given more time to denounce the facts. The Federal Council nonetheless admitted that this period should be extended, for example by setting the dies ad quo at the date of the victim's majority. On the other hand, it objected to the non-applicability of the statute of limitations, on the grounds that this went beyond what was necessary and was therefore disproportionate.

20 In addition to the Federal Council's justified criticisms, the initiators failed to take into account the fact that a criminal denunciation could also be made by a third party and lead, against the victim's will, to the opening of criminal proceedings. In such a situation, there is a risk that the victim will be tested rather than helped, especially as the passage of time complicates the establishment of the facts.

21 In our view, the indirect counter-proposal submitted to the Swiss electorate in 2008 would have taken sufficient account of the difficulties faced by underage victims in reporting offences, in terms of the statute of limitations for criminal proceedings (arts. 97 and 98 of the Swiss Criminal Code). The arguments put forward by the initiators in support of non-applicability of the statute of limitations do not seem convincing to us, in particular those concerning the dissuasive effects for perpetrators and therapeutic effects for victims, as well as those relating to testimonies. As for the statute of limitations (art. 99 PC) - which begins to run on the day the judgment becomes enforceable (art. 100 PC) - only the seriousness of the offence committed should be taken into account in determining its duration. In our view, non-applicability of the statute of limitations is justified only for genocide, crimes against humanity, war crimes and acts of terrorism (art. 101 para. 1 letters a to d PC).

B. Compatibility with international law

22 The ECtHR considers that statutes of limitation can be interpreted as imposing only a precondition for the examination of a case, and that they do not affect the exercise of the right to a fair trial (art. 6 ECHR). The imprescriptibility of criminal proceedings guarantees the victim access to a judge without temporal limitation (art. 6 § 1 phr. 1 ECHR). Moreover, it does not ipso facto lead to a weakening of the rights granted to the accused in the criminal proceedings brought against him (art. 6 § 1 to 3 ECHR). Once the facts have been re-

ported by the victim, however, the absence of a statute of limitations should under no circumstances lead to a failure by the criminal authorities to respect the principle of expeditiousness (art. 6 § 1 phr. 2 ECHR). The non-applicability of the statute of limitations to very serious offences under ordinary law does not as such contravene the ECHR.

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of October 25, 2007 (Lanzarote Convention; CETS no. 201) entered into force for Switzerland on July 1, 2014. Art. 33 requires member states to take legislative measures to ensure that the statute of limitations for criminal prosecution of the offences of sexual abuse (art. 18) and recruitment or coercion into prostitution (art. 19 par. 1 let. a and b) or pornographic performances (art. 21 par. 1 let. a and b) continues to run for a sufficiently long period to enable effective prosecution, after the child has reached the age of majority, and that this period is proportionate to the seriousness of the offence in question. Swiss law has been amended to make it fully compatible with the Convention. It even goes further than the Convention in the case of offences falling within the scope of art. 101 para. 1 let. e CP. 23

C. Effect on the civil statute of limitations

The imprescriptibility of criminal proceedings also has an effect on the civil statute of limitations. According to art. 60 para. 2 CO, if the harmful event results from a punishable act on the part of the person liable for reparation, the action for damages or for payment of a sum of money by way of moral reparation is time-barred at the earliest on expiry of the limitation period for the criminal action, notwithstanding paragraphs 1 and 1bis; if the limitation period for the criminal action is no longer running because a first-instance judgment has been handed down, the civil action is time-barred at the earliest by three years from notification of the judgment. This provision applies only if the facts giving rise to the loss constitute a criminal offence. If the criminal action is not statute-barred, prosecution is possible without any time limit, and the first-instance criminal judgment has no interruptive effect. The second sentence therefore does not apply, and the victim's civil claims remain imprescriptible. 24

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COMMENTARY ON

Art. 130 FC

A commentary by Claude Grosjean

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Art. 130 Value added tax

1 The Confederation may levy value added tax on the supply of goods, on services, including goods and services for personal use, and on imports, at a standard rate of a maximum of 6.5 per cent and at a reduced rate of at least 2.0 per cent.

2 The law may provide for the taxation of accommodation services at a rate between the reduced rate and the standard rate.

3 If, due to demographic changes, the funding of the Old-Age, Survivors' and Invalidity Insurance is no longer guaranteed, the standard rate may be increased by federal act by a maximum of 1 percentage point and the reduced rate by a maximum of 0.3 of a percentage point.

3bis In order to finance railway infrastructure, the rates shall be increased by 0.1 of a percentage point.

3ter In order to safeguard funding for the Old-Age and Survivors' Insurance, the Federal Council shall raise the standard rate by 0.4 of a percentage point, and the reduced rate and special rate for accommodation services each by 0.1 of a percentage point, provided the principle of standardising the reference age for men and women in the Old-Age and Survivors' Insurance is enshrined in law.

3quater The entire revenue from the increase in accordance with paragraph 3ter shall be allocated to the Compensation Fund for the Old-Age and Survivors' Insurance.

4 5 per cent of the non-earmarked revenues shall be used to reduce the health insurance premiums of persons on low incomes, unless an alternative method of assisting such persons is provided for by law.

Chapter 2 Transitional Provisions

Art. 196 Transitional provisions in terms of the Federal Decree of 18 December 1998 on a new Federal Constitution

14. Transitional provision to Art. 130 (Value Added Tax)

1 The power to levy value added tax is limited until the end of 2035.

2 In order to guarantee the funding of invalidity insurance, the Federal Council shall raise the value added tax rates from 1 January 2011 until 31 December 2017 as follows: ...

3 The revenue from the increase in rates in accordance with paragraph 2 will be allocated in full to the Compensation Fund for Invalidity Insurance.

4 In order to secure the financing of railway infrastructure, the Federal Council shall raise the tax rates under Article 25 of the Value Added Tax Act of 12 June 2009 from 1 January 2018 by 0.1 of a percentage point, in the event of an extension of the time limit under paragraph 1 until 31 December 2030 at the latest.

5 The entire revenue from the increase under paragraph 4 shall be allocated to the fund under Article 87*a*.

CONTENT

I. INTRODUCTION

Alongside direct federal taxes, value added tax is the federal government's **most important source of revenue**. In 2024, around CHF 27 billion, or approximately 30 percent of federal revenue, came from value added tax. Due to its broad tax base, it generates considerable tax revenue despite a relatively low tax burden. For example, an increase in the standard rate of 0.1 percentage points already generates additional annual revenue of over CHF 300 million. Since tax increases are less noticeable in the case of value added tax than with other taxes and therefore tend to meet with less political resistance, it is a **popular source of financing**. For example, it is used for specific purposes to finance social security and the railway infrastructure fund, and is repeatedly discussed as a source of financing for other tasks such as defense, media, etc. An increase in VAT also leads to fewer evasion reactions than other taxes, as VAT is levied in the country of consumption, the so-called country of destination, and not in the country of production, the so-called country of origin, and consumption – apart from shopping tourism – can hardly be shifted compared to production. Against the backdrop that consumption can hardly be shifted, the OECD's efforts in the area of direct taxation should also be seen in the context of taxing the profits of highly profitable multinational companies with very high turnover in the market states where they are generated – instead of in the countries where they are based, as has been the case up to now – even though this principle is foreign to profit tax. 1

II. HISTORY

The predecessor of today's value added tax, the **sales tax**, was introduced by the Federal Council together with other federal taxes on the basis of the **extraordinary powers** of August 30, 1939, “to cover extraordinary defense expenditures and to put the federal finances in order,” initially for a limited period until the end of 1945. It was levied for the first time for the fourth quarter of 1941 on the basis of the Federal Council's decision of July 29, 1941, on sales tax (Sales Tax Decision/WUB). As early as November 20, 1942, the Federal Council decided, among other things, to increase sales tax and extend it until the end of 1949. On December 21, 1949, the Federal Assembly had to extend it for another two years because it was unable to agree on a reorganization of the financial system in time. On June 4, 1950, the people and the cantons sub- 2 sequently rejected a reorganization of the financial system, including sales tax, at the constitutional level. The Federal Council then proposed a transitional arrangement limited to four years, which largely corresponded to the previous law in substance and was finally approved by the people and the cantons on December 3, 1950. Thus, from **1951** onwards, sales tax was regulated in the **Federal Constitution** for the first time, albeit only in the **transitional provisions** due to its limited duration. It was not until **1959** that sales tax was incorporated into the **main part of the Constitution** in Art. 41ter, after the people and the cantons had once again rejected a new draft of the financial regulations in 1953. The **time limit on the authority to levy the tax** has been retained to this day (see N. 28 and N. 86 ff.).

3 As its name suggests, the **sales tax** was levied only **on deliveries**, **but not on services**. Wholesalers were generally liable for tax on their deliveries to retailers (retail deliveries). Any delivery that did not take place between wholesalers was considered a retail delivery. Mere work on an item was also taxed as a delivery. Since services were not taxed, there would otherwise have been an incentive to process the goods only after the taxable sale in order to reduce the tax burden. In contrast to current VAT law, however, the **transfer for use or utilization** was not considered a delivery for practical reasons. It would have been difficult to distinguish between taxable wholesale rentals for subletting and non-taxable retail rentals without subletting; however, in certain cases, particularly in hire purchase agreements, the rental payment was subject to own-use taxation in order to counteract tax evasion.

4 In 1977, 1979, and 1991, the Federal Council and Parliament wanted to replace the goods and services tax with a value-added tax, but this did not find majority support among the people and the cantons and merely led to an extension of the authority to levy the goods and services tax. Due to the failure of the value-added tax in the 1991 referendum and because the authority to levy sales tax was already set to expire at the end of 1994, the Federal Council, in its message of December 18, 1991, wanted to write into the Constitution only the authority to levy a **sales tax** at a maximum rate of 6.2 percent. On this basis, Parliament could have either **introduced VAT** or **extended the goods sales tax**. Until the relevant law came into force, the goods sales tax would have continued to apply on the basis of a transitional provision.

5 Parliament, on the other hand, wanted to **introduce VAT directly**. The decisive factor here was that the federal government's financial situation did not

allow it to abolish the sales tax on capital goods and operating resources, which acted as a shadow tax or so-called "taxe occulte," in order to reduce production costs and thus eliminate competitive disadvantages vis-à-vis other countries. With value added tax, on the other hand, the loss of revenue resulting from the abolition of the tax occulte could be compensated for by **taxing services**. A majority of the political parties and the leading associations agreed to the direct introduction of VAT, but the trade union federation only did so after an increase in the VAT rate in favor of the AHV and IV and the use of 5 percent of the revenue for **relief for lower income groups** had been provided for. The people and the cantons followed suit and voted in favor of the **constitutional basis** for the introduction of **value added tax** on November 28, 1993.

The time between the rejection of value added tax in 1991 and the expiry of 6
the authority to levy sales tax at the end of 1994 was too short to allow for a proper legislative process. For this reason, the constitutional basis for the introduction of value added tax provided for a transitional provision that regulated the basic principles of value added tax in the Federal Constitution itself and was to remain in force until the federal legislation came into effect. The transitional provision authorized the Federal Council to issue the implementing provisions directly on the basis of the Constitution, which it did with the **law-substituting ordinance** of June 22, 1994, on value added tax (**aMWSTV**). This ordinance came into force at the same time as the constitutional provisions at the beginning of **1995**.

Value added tax was regulated alongside other taxes in **Art. 41ter aBV** and in 7
Art. 8–8ter ÜB aBV. It was not until the **new FC** that value added tax was granted its own article, **Art. 130 FC**, with effect from the beginning of **2000**. The content of the regulation corresponded to Art. 41ter aBV insofar as it concerned value added tax. Only the tax rate increase for the AHV and IV was to take the form of a federal law instead of a federal decree subject to referendum, as the new Federal Constitution no longer allowed legislative decrees to take the form of federal decrees. The transitional provisions previously contained in Art. 8–8ter Transitional Provisions aBV were transferred to Art. 196(14) FC and remained unchanged in content, apart from a few linguistic and structural adjustments.

With the **message on the new financial system** of December 9, 2002, the 8
Federal Council wanted to expressly grant the Confederation in Art. 130

para. 1 of the Federal Constitution the power to levy **a reduced rate** of at least 2.0 percent in addition to the previous standard rate of a maximum of 6.5 percent (see N. 62 ff.): “This means that only *one* reduced rate is possible, which greatly simplifies VAT.” The Federal Council also wanted to abolish the **special rate** for accommodation services (cf. N. 73 ff.) not “immediately,” but only after a transition period at the end of 2006, and therefore, although reformulated in accordance with Art. 36 para. 2 of the Federal Act of September 2, 1999, on Value Added Tax (aMWSTG), to leave it in the transitional provisions; it also wanted to **completely waive** the **time limit** on the **authority to levy** value added tax.

9 The **parliament**, on the other hand, wanted, on the one hand, to **not allow the constitutional basis for a special rate for accommodation services to expire** and, on the other hand, to **retain** the **time-limited authority to levy** value added tax as a whole. As the special rate was no longer limited in time in the Constitution, it was transferred to the main part of the Constitution as Art. 130 para. 2 FC; the earmarking of 5 percent of tax revenue not otherwise earmarked for the reduction of health insurance premiums was also transferred to the main part of the Constitution. It was now possible to deviate from this earmarking by law. The **time limit** on the **special rate** was also newly regulated **in the law**. The new financial regulations came into force at the
beginning of 2007. Since its introduction in 1996, the special rate has been **extended six times**, most recently for 10 years until the end of 2027. In the 2025 special session, Parliament referred a motion to the Federal Council calling for the special rate to be continued beyond 2027.

10 From the beginning of 2011 to the end of 2017, the standard rate was increased by 0.4 percentage points, the reduced rate by 0.1 percentage points, and the special rate by 0.2 percentage points for the **temporary additional financing of the IV**. As part of the **additional financing of the AHV and the 2020 pension reform**, the tax rate increases in favor of the AHV and the financing of the railway infrastructure were to be extended. However, as this proposal was rejected at the ballot box on September 24, 2017, there was a **tax rate reduction** at the beginning of 2018 for the first time since the introduction of value added tax (see N. 78).

11 At the beginning of 2016, Art. 130 para. 3bis of the Federal Constitution was added following the adoption of the Federal Council's direct counter-propos-

al to the popular initiative “For public transport.” The previously temporary increase in value added tax by 0.1 percentage points to **finance railway infrastructure** was converted into a permanent increase, which is why it was moved from the transitional provisions to the main part of the Constitution. At the same time, a temporary increase in value added tax of 0.1 percentage points until the end of 2030 to secure the financing of railway infrastructure was added to Art. 196(14)(4) of the Federal Constitution (see also N. 80).

On March 4, 2018, the new financial system was approved by the people and the cantons, and the authority to levy value added tax **was extended until 2035**. On September 25, 2022, the people and the cantons approved the federal decree on **additional financing for the AHV** through an increase in value added tax. Based on the new para. 3ter, the Federal Council raised the standard rate by 0.4 percentage points and the reduced rate and the special rate for accommodation services by 0.1 percentage points each at the beginning of 2024. According to the new para. 3quater, the revenue from the increase will be allocated in full to the compensation fund for old-age and survivors' insurance (see also N. 81). Since the beginning of 2024, a **standard rate** of **8.1 percent**, a **reduced tax rate** of **2.6 percent**, and a **special rate** for accommodation services of **3.8 percent** have therefore applied. 12

To finance the **13th AHV pension**, the Federal Council proposes in its message of October 16, 2024, an increase in value added tax of 0.7 percentage points from the beginning of 2026. 13

III. CONTEXT

Art. 130 of the Federal Constitution is found under Title 3, “The Confederation, the Cantons, and the Municipalities,” in Chapter 3, “Financial System.” As the Federal Council wrote in its message on the reform of the Federal Constitution, "all provisions relating to revenue and expenditure have been grouped together in one chapter, taxes have been classified according to their importance, and outdated provisions have been deleted. Accordingly, the two most important federal taxes, direct federal tax and value added tax, are each regulated in a separate article. [...]. Federal revenues levied for special financing purposes are not included in this chapter, or only partially." These explanations show that although the provisions on financial regulations in Chapter 3 are part of the financial constitution, the **financial regulations** cannot be **equated with the financial constitution**. 14

15 According to Art. 127 para. 2 of the Federal Constitution, the principle of **taxation according to economic capacity** must only be observed "insofar as the nature of the tax permits." Economic capacity **measured in terms of income** means that only income exceeding the minimum subsistence level may be taxed. This cannot be achieved within conventional VAT systems, as even people living at or below the minimum subsistence level pay VAT on their consumer spending. Because the proportion of total expenditure accounted for by VAT is higher for low incomes than for higher incomes, VAT has a **regressive** effect when measured in terms of income. However, this must be put into perspective, as a large proportion of expenditure for low incomes is hardly subject to VAT at all due to VAT exemptions for housing rents and insurance services, including health insurance.

16 The regressive effect of VAT should be countered on the one hand by the **progressive** effect of **income tax** and on the other hand by targeted **transfer payments**, as is the case, for example, with the partial earmarking of revenue for health insurance premium reductions (see also N. 83). As an alternative to transfer payments, a study by the International Monetary Fund proposes making VAT and other transaction-based taxes progressive by means of automated real-time refunds to people on lower incomes, which would better reflect the principle of ability to pay based on income.

17 VAT exemptions and reduced tax rates are not particularly suitable for counteracting the regressive effect of VAT (see also N. 68). In terms of income, economically **well-off households benefit disproportionately** from these **tax breaks** due to their higher consumption expenditure in absolute terms. As a result, the state foregoes revenue and thus also reduces its options for transfer payments. Within VAT, therefore, only the principle of universality and uniformity of taxation should be implemented, while the principle of taxation according to economic capacity measured by income should be observed in conjunction with other taxes and transfer payments. From this perspective, **VAT exemptions** and **reduced tax rates** should be **abolished** as far as possible and the resulting additional burden on people with low incomes should be offset by transfer payments, as was essentially envisaged in the Federal Council's message on the simplification of VAT of June 25, 2008.

18 Questions relating to taxation according to economic capacity as measured by income do not arise if taxation is based on economic capacity as measured by consumption. In this case, **consumption expenditure** is used as a measure

of **economic capacity**. Those who can consume more are economically more capable in terms of consumption and therefore pay more VAT. Since the VAT burden increases linearly in proportion to VAT-taxed consumer spending, VAT does not have a regressive effect, as is the case when compared to income. Measuring economic capacity based on consumption seems to be a **less than convincing concept**. Since, in contrast to economic performance measured in terms of income, the origin of the funds for consumption is supposed to be irrelevant, consumption expenditure is simply equated with economic performance without further explanation of performance. The limited significance of this concept becomes particularly apparent when consumption expenditure is financed by debt. In this case, too, economic capacity would be measured by consumption expenditure, even though debt-financed consumption hardly allows us to assume that consumers have economic capacity. Overall, it is impossible to avoid the impression that the concept of taxation according to economic capacity measured by consumption is intended to show that VAT is also levied on the basis of the principle of taxation according to economic capacity. For Switzerland, as explained above, this is neither necessary from a fiscal policy perspective nor from a constitutional point of view when considering the tax system and transfer payments as a whole, since Art. 127 para. 2 of the Federal Constitution specifically states that taxation according to **economic capacity** is **not to be applied to all taxes**.

IV. COMMENTARY IN THE NARROW SENSE

A. Art. 130 para. 1 of the Federal Constitution

Art. 130 para. 1 of the Federal Constitution refers to value added tax, although 19 it actually concerns **three different taxes**: the tax on services provided for consideration, the tax on own consumption, and the tax on imports. In contrast to **import tax**, the tax on services provided for consideration is referred to below as **domestic tax**, even if it concerns cross-border services provided for consideration. Although **own consumption** is mentioned as a taxable item in the Constitution, since the total revision of the VAT Act in 2009, it has merely been designed as a form of input tax correction, which is why it is treated as a domestic tax (see N. 52). In our opinion, **purchase tax** is not a separate taxable item, but merely a **form of collection of domestic tax**, which is why it is also dealt with under domestic tax (see N. 53).

1. Competence to levy

a. Domestic tax: retroactive derogatory, comprehensive competence

20 According to Art. 130 para. 1 of the Federal Constitution, the federal government may levy value added tax, but is not obliged to do so, as is clear from the use of the word “may.” If the federal government were to refrain from doing so, the competence to levy tax would revert to the cantons in accordance with Art. 3 of the Federal Constitution. However, as soon as the Confederation levies value added tax, the cantons may no longer levy a similar tax in accordance with Art. 134 FC. This means, on the one hand, that the cantons' competence to levy taxes is only superseded when the federal government exercises its competence to levy taxes, which is why it has a **retrospective derogatory** effect, and, on the other hand, that the competence to levy taxes is transferred entirely to the federal government and is therefore a **comprehensive competence**.

b. Prohibition of similar cantonal taxes

21 With the extension of the tax base to services in the context of the introduction of value added tax in 1995, the question arose as to whether existing cantonal and municipal taxes on services, such as ticket and transfer taxes, would also fall within the scope of the prohibition of similar cantonal and municipal taxes (Art. 41ter para. 2 aBV, now Art. 134 FC) would also fall within the scope of the prohibition of similar cantonal and municipal taxes. In the consultation on the draft ordinance on value added tax of October 28, 1993, the film industry in particular raised the question of whether the levying of cantonal and municipal **ticket taxes** was still **constitutional**.

22 In its commentary on the Value Added Tax Ordinance, the **FDF** states that "similar cantonal and municipal taxes may not be levied on transactions that are subject to value added tax or are declared exempt from value added tax, i.e., are genuinely tax-exempt within the meaning of Art. 15. On the other hand, ticket taxes, gambling taxes, and the like may be levied on transactions (such as cultural services) that are exempt from tax under Articles 13 and 14." Accordingly, the tax exemption for turnover from betting, lotteries, and other games of chance was explained by the fact that “such games and gaming equipment are subject to other forms of taxation (in particular, they are subject to a large cantonal levy).” This argument was criticized in **academic cir-**

cles, as services exempt from tax also fall within the scope of VAT, which is particularly evident in the fact that exempt services can be taxed voluntarily or that the related input tax may not be deducted. Consequently, there is no room for similar cantonal or municipal taxation. However, the FDF's argument should be seen primarily in the context of preserving **cantonal sovereignty** and **avoiding resistance** from the cantons to the introduction of VAT.

In its ruling on the Geneva poor tax, the **Federal Supreme Court** also rejected the FDF's argument as too literal an interpretation of the concept of tax exemption and argued instead that the Geneva poor tax was **neither a special excise duty** on goods (Art. 41ter para. 2 in conjunction with Art. 41ter para. 1 lit. b aBV), **nor with a general consumption tax** such as value added tax (Art. 41ter para. 2 in conjunction with Art. 41ter para. 1 lit. a aBV). In doing so, it expressly left open the question of whether other special consumption taxes levied by the cantons should also be considered dissimilar. This ruling was also criticized in some **academic circles**. If the final consumption is taxed and not the company, then both taxes are similar. The focus should therefore be on the tax effect intended by the law, i.e., the tax objective. 23

The **burden objective** as a central criterion for similarity also seems **unconvincing**. If the burden objective intended by the law is taken as a basis, cantons and municipalities are free to structure the tax in such a way that it is not end consumption that is taxed, but the taxpayer itself – for example, the company. Focusing on the actual burden (**tax incidence**) is also not a suitable criterion. All excise taxes burden the consumption of the taxed goods, regardless of where they are levied in the value chain and who they are intended to burden. 24

In order to avoid multiple burdens, taxes linked to turnover or another comparable variable such as volume or weight should therefore generally **be considered as similar taxes**, regardless of their target or actual burden. **Incentive taxes** would still not be included. Apart from the fact that incentive taxes do not pursue fiscal purposes and are therefore not considered taxes in the strict sense, they do not represent a definitive burden, but can even lead to relief if the incentive effect takes hold. However, this is conditional on the incentive taxes being **refunded** to the population. 25

26 What was only explained for the aMWSTV in the commentary by the FDF and with a different justification (see N. 22) was included in Art. 2 aMWSTG as a **fiction**: ticket taxes and transfer taxes are not considered to be of the same type. This verdict by the legislature created legal certainty in practice with regard to these two expressly mentioned taxes, as a judicial review of this provision would have no effect due to the application requirement of Art. 190 of the Federal Constitution. In Art. 2 MWSTG, the repetition of the regulatory content of Art. 134 FC was ultimately dispensed with and only reference was made to the **dissimilarity** of the two taxes. In the explanatory notes, this was justified on the grounds of legal certainty and the continuation of Federal Supreme Court practice.

c. Import tax: exclusive competence?

27 If the federal competence to levy an import tax were based exclusively on Art. 130 of the Federal Constitution, this competence would be retroactively derogatory, as would the competence to levy domestic tax (see N. 20). If, on the other hand, import tax is also understood in a historical context, according to which legislation on taxes on cross-border trade in goods is a matter for the federal government under **Art. 133 of the Federal Constitution**, it would be an exclusive competence. This rather theoretical question seems to have been left open by legal scholars to date.

d. Time limit on the competence to levy taxes

28 The federal government's **competence** to levy value added tax – like its competence to levy direct federal tax – is **limited in time** until the end of 2035 (see N. 86 ff.). After the majority of political parties that commented on the consultation on the New Financial Order 2021 in June 2015 rejected the Federal Council's proposal to remove the time limit, the Federal Council again submitted only an extension of the competence to Parliament.

2. Tax sovereignty and geographical scope

29 Art. 130 para. 1 of the Federal Constitution does not expressly refer to the geographical scope of value added tax. This is derived from the purpose of value added tax as a tax on domestic consumption. For VAT purposes, services are considered to be consumed domestically if they are provided within Switzerland or imported into Switzerland from abroad. Services provided abroad or

exported from Switzerland are considered to be consumed abroad. They should therefore not be subject to Swiss VAT. This is why the **destination principle** is used. Value added tax should not affect the cross-border exchange of goods and services and is therefore referred to as **foreign trade neutral**. Value added tax cannot be **compared to customs duties** because, unlike customs duties, it is levied not only on imports but also, and above all, on domestic deliveries.

Deliveries are considered to be consumed domestically and are therefore **taxed domestically** if the place of delivery is located domestically or if goods are imported from abroad. The place of delivery is generally where economic control is transferred (e.g., where a kitchen is installed). If, in the case of the supply of movable goods, this place is abroad and the goods are transported or dispatched to Switzerland, import tax applies. Conversely, if the place of supply is in Switzerland and movable goods are transported or dispatched abroad, there is a tax exemption in Switzerland. Tax-exempt services entitle the recipient to deduct the related input tax. Otherwise, exports would be secretly subject to Swiss value added tax, the so-called Taxe occulte, which would make them more expensive and lead to a competitive disadvantage for the Swiss export industry (see N. 5). 30

Services are considered to be consumed domestically and therefore **taxed domestically** if the place of service is located domestically. Because the place of actual consumption is often difficult to determine (e.g., in the case of consulting services) or taxation at the place of actual consumption would lead to considerable practical difficulties (e.g., the taxation of electronic services on smartphones at the place where they are actually used), it is generally assumed that consumption takes place where the customer is located (place of receipt). This should only be deviated from if taxation at the **place of actual consumption can be better achieved** through another local connection. This is particularly the case when a service is received and consumed at the same time as it is provided on site, as is the case, for example, with hospitality services or events in front of a physically present audience. Such services are therefore taxed at the place of activity. Other places of taxation may also be used in place of the place of activity, such as taxation at the place of location for services related to real estate, which also includes accommodation services, taxation at the place of transport, or taxation at the place of supply, i.e., where the person providing the service is resident. 31

32 In the case of **taxation at the place of supply**, i.e., where the person providing the service is resident, the taxable person and the place of supply coincide. The taxable person is always located within the tax-collecting territory, which ensures enforcement, but in cross-border situations this means that VAT is not paid in the territory where consumption takes place. Taxation at the place of supply is therefore also referred to as the **country of origin principle**.

33 Within the **EU**, the **country of origin principle** was originally intended to be introduced for harmonized VAT in order to preserve the financial sovereignty of the member states as far as possible. However, the country of origin principle proved impracticable because harmonization of tax rates was politically unfeasible and the differences in tax rates influenced the choice of location for companies within the EU. The current VAT System Directive therefore now largely follows the **destination principle**. The expansion of the one-stop shop system, requires VAT registration in only one Member State for all services within the EU, is a key step towards a consistent switch to the destination principle within the EU internal market. This prevents taxation in the country of destination also leading to tax liability in the country of destination, as is normally the case outside the EU internal market.

34 Just as deliveries abroad should not be subject to Swiss VAT (see N. 30), **services abroad** that are exempt from tax should also, in principle, entitle the related input tax to be deducted in order to prevent services provided abroad from becoming more expensive and thus VAT from becoming a locational disadvantage for Swiss companies. It is therefore questionable whether it is compatible with the destination principle and the principle of foreign trade neutrality of VAT that **services** in the **finance, insurance, and gambling sectors** do not entitle the purchaser to deduct input tax even if they were provided abroad. The decisive factor in continuing this rule, which has been in force since the introduction of VAT, even after the total revision of the VAT Act, in which input tax deduction was explicitly declared permissible for most tax-exempt services abroad, was in particular the fear of tax revenue shortfalls, as foreign business managed from Switzerland remained considerable in the 2000s.

3. Domestic tax

a. Taxation and collection concept

Art. 130 para. 1 of the Federal Constitution gives the Confederation the authority to levy value added tax. According to its **taxation concept**, value added tax is a general consumption tax which, according to its **collection concept**, is levied at every stage of the value chain on the basis of the respective value added. Value added tax differs from the former goods turnover tax levied at the wholesale level (see N. 3) and from the special consumption taxes levied once during manufacture or import, primarily in terms of its collection concept. Since all three types of tax ultimately burden final consumption, they do not differ in terms of their tax burden concept. Although, according to the VAT collection concept, **tax collection at every stage of the value chain** is a key feature, there are also exceptions to this within VAT. Examples include the reporting procedure, where tax collection is replaced by reporting, or the domestic purchase tax procedure for emission rights and similar items, which serves to combat fraud and under which the sale of emission rights remains tax-free, but taxable customers must account for VAT as purchase tax. In both cases, no tax is levied at the stage of the value chain in question for such transactions, which is a departure from the concept of VAT collection. 35

This raises the question of the extent to which the constitutional concept of VAT, based on its collection concept, also covers the collection of tax independently of the creation of added value or value added. In my opinion, this question does not arise if the tax is **exceptionally directly levied** within the value-added chain **on the company** that purchases the service, as is the case, for example, with **purchase tax** or **import tax**. If such services are purchased by taxable persons and the tax is settled directly with the Federal Office for Customs and Border Security (BAZG) or the ESTV, these are usually input services for their own services, on the value added of which VAT is in turn payable. 36

The question arises, however, when VAT is **exceptionally levied directly on the end consumer**. This is particularly the case when persons who do not operate a business, such as **private individuals**, owe **purchase tax** because they purchase services subject to purchase tax for more than CHF 10,000 per year. Taxation of end consumers takes into account the concept of VAT as a 37 burden, but does not correspond to the concept of collection, according to which VAT should be levied indirectly at the value-added stage and not directly at the consumption stage. In my opinion, the objective of **universality and uniformity of taxation** set out in Art. 127 para. 2, which requires the most comprehensive taxation of consumption possible for value added tax, justifies deviating from the collection concept in specific cases and **levying the tax directly in exceptional cases**. In addition, the purchase tax for non-taxable persons has become even less significant since the partial revision of the Value Added Tax Act came into force at the beginning of 2018, as companies are now liable for tax from a global turnover of CHF 100,000 and not just from a domestic turnover of CHF 100,000, which is why the direct collection of VAT from end consumers has been further reduced.

38 If **tax collection** were to be waived not only in exceptional cases but **generally** on **services between taxable persons**, as proposed for discussion in the Caroni interpellation 21.4353, the question arises as to whether this would be compatible with the concept of VAT collection. This is supported by the fact that tax can still be levied at a stage of the value chain prior to final consumption, for example when a taxable person purchases a service subject to tax. At the same time, it is clear that although taxation can still occur prior to final consumption, it can hardly be said that tax is levied at all stages of the value chain. This characteristic element of the **collection concept** of value added tax serves primarily to secure tax revenue. Tax collection at each stage of the value chain, known as **fractional tax collection**, ensures that if a taxpayer in the value chain defaults, only the value added tax on their value added is lost. If tax collection at all stages of the value chain were largely dispensed with and the tax were levied predominantly at the final stage, the risk of tax losses would increase considerably. Against this background, the **collection concept** of tax collection at every stage of the value chain is to be understood as a **central element of the concept of value added tax**. If this collection concept were largely abandoned, it would no longer be a true value-added tax, but rather a **single-phase tax**, which the constitutional framers deliberately rejected in 1995 when introducing value-added tax. It would be questionable whether Art. 130 of the Federal Constitution would be sufficient as a constitutional basis for such taxation.

b. Taxable entity for domestic tax

Art. 130 of the Federal Constitution does not expressly refer to the **taxable entity**. The only way to deduce who is subject to tax is from the concept of value added tax. According to the concept of value added tax collection, the tax is payable on the added value created by entrepreneurs at each stage of the value chain (see N. 35). This means that, in principle, persons who operate a **business** are subject to value added tax. 39

When VAT was introduced at the beginning of 1995, the Federal Council had already introduced a **minimum turnover threshold** of CHF 75,000 for tax liability, even though Art. 8 of the transitional provisions of the aBV, on which the first VAT Ordinance was directly based, did not contain a minimum turnover threshold. In the course of the total revision of the VAT Act, which came into force at the beginning of 2010, the turnover limit for tax liability was increased to CHF 100,000 in order to relieve even more companies of their VAT obligations. Minimum turnover limits for tax liability are justified on the grounds of cost-effectiveness in terms of payment and collection: The low VAT amounts incurred on relatively low turnover are disproportionate to the effort required by companies to pay them and by the administration to collect them. This argument is based on the constitutional principle of **proportionality** of state action (Art. 5 para. 2 of the Federal Constitution). Depending on its level, however, the minimum turnover for tax liability is more or less at odds with the constitutional principles of **equality before the law** (Art. 8 FC) and, more specifically, the **universality and uniformity of taxation** (Art. 127 para. 2 FC). Particularly in light of technical developments in digital accounting for companies and online VAT accounting, I believe it is questionable whether the current turnover limit of CHF 100,000 for exemption from tax liability is still proportionate. Particularly in the case of services with low input tax, such as in the cosmetics or transport industries, sole proprietorships in particular are not liable for tax, which leads to VAT-related disadvantages for companies with employees. In addition, the high turnover limit may increase the incentive for bogus self-employment under social security law if VAT liability is also waived. 40

c. Tax object of the domestic tax

i. The service

41 Art. 130 para. 1 of the Federal Constitution cites the supply of goods and the provision of services as the objective basis for the domestic tax. The two terms "supply" and 'services' are complementary: what is not a supply is a service. Supplies and services are therefore also summarized under the term "**service**." Since both supplies and services are subject to VAT if certain additional conditions are met, the distinction between supply and service is only relevant in cross-border situations, where double taxation or non-taxation may occur in individual cases, particularly due to different places of performance.

42 The Constitution does not define either supply or service. This raises the question of what constitutional requirements should be imposed on the two terms. Based on everyday language usage, it can be said that a delivery without an object is difficult to imagine, whereas services can certainly also include objects. Many foreign VAT systems also follow this logic, although this raises difficult **distinction issues**. Particularly in the case of repairs, the question arises as to when the addition of new parts transforms the repair service into a supply of goods.

43 In order to avoid such demarcation difficulties, Swiss VAT law has deviated from everyday language since its introduction in 1995: If a service is related to an item, it is referred to as a **delivery**. Thus, not only mere **work** on an item, such as cleaning an office, but also the mere **transfer for use**, such as the rental of office space, constitutes a delivery of buildings for the purposes of Swiss VAT. Only when a service is independent of an item is it considered a **service** under Swiss VAT law. Since animals, unlike humans, are considered objects, medical treatments for humans are classified as services, while those for animals are classified as supplies. Even if these classifications may seem strange from the perspective of everyday language usage, they have the advantage of **simpler distinction** and thus contribute to legal certainty and take into account the principles of **Art. 5 FC**. For example, repairs are always supplies under Swiss VAT, regardless of whether it is simply an exhaust emission test on a car or a complete rebuild of a collector's vehicle.

ii. Remuneration

Art. 130 para. 1 of the Federal Constitution does not address the issue of remuneration. However, it is clear from the concept of value added tax that supplies and services are only subject to tax if they are provided in return for **consideration**. Otherwise, there would be no added value to which value added tax could be linked in accordance with its collection concept (see N. 35). The consideration may be paid by the **person receiving the service** or, in whole or in part, by a **third party**. 44

Difficult questions of demarcation arise in particular in connection with **subsidies**, which under certain conditions can be understood as a) consideration for a service to the paying community, b) consideration for a service to third parties, or c) non-consideration, with which no service is compensated at all. If the payments create added value and thus make services cheaper or even possible in the first place, the view expressed here is that extensive taxation of subsidies as (partial) remuneration for the subsidized service would be in line with the constitutional concept of value added tax (see N. 71). In order to simplify the distinction between remuneration and subsidies and thus create greater legal certainty, Parliament has chosen a different approach: since the beginning of 2025, anything designated as a subsidy by the paying public authority is generally considered a subsidy (Art. 18 para. 3 MWSTG). This tends to lead to an expansion rather than a restriction of the scope of application of subsidies. The requirements of public accounting are intended to counteract excessive use of this standard. In particular, what would be remuneration among private individuals cannot be designated as a subsidy. 45

iii. Remuneration and service expectation instead of economic link

Art. 130 para. 1 of the Federal Constitution does not specify the relationship that must exist between the service and the remuneration in order for it to be considered a service relationship subject to VAT. In legal literature, the relationship between service and remuneration is described as an internal **economic link**, which, in addition to service and remuneration, is also a constituent element of the tax object. A distinction is made between a final and a causal link. In the case of a **final link**, the remuneration is paid in order to receive the service; in the case of a **causal link**, there is a cause-and-effect relationship between the remuneration and the service, i.e., it is not merely a coincidental exchange. Neither of these two theories can conclusively de- 46 scribe the service relationships subject to VAT. For this reason, a different approach to the interaction between service and remuneration is proposed below.

47 According to the VAT Act, a **service** is defined as the granting of a consumable economic value in expectation of remuneration (Art. 3 lit. c VAT Act). The service consists of an **objective criterion** – the granting of a consumable, economic value – and a **subjective criterion** – the expectation of remuneration. Accordingly, if no remuneration is expected, as is the case with a **gift** or a **favor**, this does not constitute a service within the meaning of the VAT Act. If there is no **expectation of remuneration**, voluntary compensation should not lead to an unintended service relationship. If remuneration is expected, this constitutes a service within the meaning of the MWSTG, even if the service can also be obtained without paying the remuneration.

48 **Consideration** is defined as an asset that the recipient or a third party acting on their behalf spends in order to receive a service (Art. 3 lit. f. MWSTG). Remuneration within the meaning of the VAT Act thus also consists of an **objective element** – the expenditure of assets – and a **subjective element** – the **expectation of a service**. A **donation**, for example, is an expenditure of assets without any expectation of a service.

49 In addition to the two objective criteria of **performance** and **financial expenditure**, **expectation of remuneration and performance** must also always be present as subjective criteria in order for a **service relationship to be considered a taxable object**. If, in addition to the objective element of performance, the subjective element of expectation of remuneration is also present, it is irrelevant whether a service is also available free of charge. As soon as an asset is expended to obtain the service, the subjective element of expectation of remuneration is fulfilled in addition to the objective element of expenditure of assets, and a service relationship exists as a taxable object of value added tax. This applies, on the one hand, to the well-known cases of **street music**, **toilet coins**, and probably also to the remuneration of service through **tips**, but on the other hand also to the economically more significant circumstances in which online applications or content are made available free of charge, combined with a request for “donations,” or to the so-called “donations” to influencers. This is to be distinguished from **fundraising**, where, for example, postcards, a calendar, or a book are enclosed. The aim is not to receive voluntary payment for the goods sent, but to collect donations for the

idealistic purpose pursued. The goods are merely a form of advance collective acknowledgment of the potential donation. In the absence of an expectation of payment, one of the elements of the service relationship is missing, which is why taxation does not come into consideration even if someone wants to use their assets to pay for the service instead of making a donation.

If the taxable object "service relationship" is understood as a service in return for remuneration with the respective objective and subjective requirements, the constituent element of the **economic link** between service and remuneration can be **waived**. At the same time, this eliminates the controversy surrounding the nature of this link, namely whether the consideration is paid with the aim of receiving the service (finality) or whether it is sufficient that the consideration was paid because the service was received (causality) (see N. 46). If finality is required, there is no economic link between service and remuneration and thus no taxable object, particularly in all those areas where a service can also be obtained free of charge, even if – as explained above in N 49 – a service was provided in expectation of remuneration, which is particularly disruptive in view of new online business models. If, on the other hand, only causality were required, taxation would occur in cases where there is no expectation of remuneration, for example in the case of fundraising, which is also mentioned in N. 49. This also renders moot the question of whether the economic link should be assessed from the perspective of the person providing the service or the person receiving it. For a **service relationship** to be subject to VAT, it must be **desired by both parties**. As is always the case with subjective elements of an offense, their existence must be inferred from externally observable actions. For reasons of generality and neutrality of the tax, no excessive evidentiary requirements should be imposed on the existence of the subjective expectation of remuneration on the part of the person providing the service. 50

A distinction must be made between the taxable service and **other conditions for the taxability** of a service, such as the **place of performance in Germany**, the **tax liability** of the person providing the service, or the **absence of a tax exemption**. As the term "object" suggests, this refers to the material basis of the tax, which is independent of the subjective characteristics of the persons involved or the local connection. The object of taxation is a necessary but not sufficient condition for taxation. Only when the service 51 relationship as the object of VAT is subjectively realized by a taxable person in the country and no tax exemption applies does taxation generally occur.

iv. Own consumption

52 The Constitution expressly mentions own consumption because it was originally designed as a separate tax object. Since the total revision of 2009, a correction of the input tax deduction has been referred to as own consumption. Originally, own consumption was to be removed from the Constitution. However, as Parliament did not adopt the flat tax bill in 2013, the Constitution was ultimately not amended, which is why own consumption is still mentioned as a taxable item. This raises the question of whether the waiver of own consumption as a separate taxable item is constitutional. Primarily for reasons of simplification, Parliament waived **own consumption of manufactured and processed goods** as a separate taxable item as part of the 2009 total revision. In terms of tax systematics, it would still be justified. If a person withdraws a self-manufactured item from their sole proprietorship, they can only claim the related input tax. However, if a person withdraws the same item from their corporation, of which they are the sole shareholder, they must pay the third-party price for it. If own consumption is no longer a taxable item but merely an input tax adjustment, the own value added remains untaxed in the first case, whereas in the second case it is taxable. This means that the current law is not legally neutral, which is why, regardless of the mention of own consumption as a taxable object in Art. 130 of the Federal Constitution, questions arise as to the constitutionality of current own consumption in light of the **principle of equality** and the principles of **Art. 127 para. 2 of the Federal Constitution**.

v. Withholding tax

53 The constitutional provision does not mention **withholding tax**. Since withholding tax, like domestic tax, is based on the service relationship as the tax object, it does **not constitute a separate tax object**. It differs from domestic tax primarily in that, in the case of withholding tax, VAT is not payable by the person providing the service, but by the person receiving the service. German sales tax law also refers to this as a change or transfer of tax liability. Swiss legislation, on the other hand, opted for the term “purchase tax” because, when the VAT Act was completely revised in 2009, purchase tax applied exclusively to the **purchase of services from abroad**. It is only with the partial

revision of the MWSTG, which came into force at the beginning of 2025, that the purchase tax is also being applied for the first time to the transfer of **emission rights** and similar rights within Switzerland in order to combat abuse.

d. Assessment basis

Just as with consideration, the Constitution does not comment on the assessment basis. Like consideration, the assessment basis can only be derived from the concept of value added tax (see N. 44). Questions of the **(minimum) basis of assessment** arise above all when services are provided below their value. Although value added tax is referred to as a general consumption tax, the objective of taxation is not consumption itself, but the use of funds for consumption. For this reason, value added tax is not assessed on the objective value of a service, but in principle on the consideration actually received for the service. The actual consideration received as the basis of assessment should only be deviated from where its amount was influenced by reasons other than business reasons. Thus, services to **closely related persons** are generally assessed at the value that would also have been agreed between independent third parties (Art. 24 para. 2 MWSTG). As with own consumption in a single-party relationship, where the input tax deduction must be reversed, this ensures that there is no undertaxed end consumption in a multi-party relationship (see N. 52). 54

e. Assessment

Art. 130 FC does not specify the procedure for levying value added tax. In my opinion, no conclusions can be drawn from the concept of value added tax regarding a specific assessment procedure. Since the administration is not involved 55

in the assessment of value added tax, value added tax is referred to as a **self-assessment tax**, in contrast to the mixed assessment of direct taxes, where the administration finally determines the tax claim. However, this should not lead to the conclusion that the taxpayer **finally determines** the tax claim instead of the administration. Although the taxpayer determines the tax claim, as long as the five-year **statute of limitations** has not expired, the tax claim can be adjusted both by the FTA as part of an audit and by the taxpayer. A tax claim therefore only becomes final once the limitation period for assessment has expired. If an **audit** is carried out by the FTA, a switch to the **mixed assessment procedure** takes place, as the FTA determines the tax claim in its assessment notice and this becomes legally binding and thus final either through unconditional payment or written acknowledgment by the taxpayer. These measures are intended to increase legal certainty for taxpayers as part of the total revision of the Value Added Tax Act. This also includes the separation of **tax assessment and collection procedures**, which is why it is also referred to as a **modified self-assessment**. This also addressed the isolated demands for a change to a **mixed assessment** of value added tax, which, in our opinion, would be **constitutionally permissible**, as the constitution does not contain any references to the assessment procedure.

4. Import tax

56 Conceptually, import tax is the **counterpart to tax exemption on the export** of goods. It is intended to ensure that expenditure on domestic consumption is subject to VAT in accordance with the **destination principle**, regardless of whether the goods are of domestic or foreign origin. This is intended to ensure that domestic companies are not at a competitive disadvantage compared to foreign companies due to VAT (see N. 5).

57 According to Art. 130 para. 1 of the Federal Constitution, the import of goods is subject to VAT. According to the law, any movement of goods across the customs border is considered an import (see Art. 52 para. 1 lit. a MWSTG in conjunction with Art. 7 Customs Act, ZG, SR 631.0). It is irrelevant whether this movement of goods is based on a legal transaction, as in the case of a **service relationship**, or merely a real act, as in the case of the **transport** of goods into the country. Given that import tax is conceptually the counterpart to tax exemption on exports in order to ensure taxation in the country of destination, the question arises as to whether bringing one's own goods into the country should also be subject to import tax in all cases. This is undoubtedly correct if **newly purchased goods** are collected abroad instead of being sent by mail. Shopping tourism is also included. Apart from de minimis regulations abroad, such newly purchased items can generally be exempted from VAT, which is why Swiss VAT must be levied on importation in accordance with the destination principle. However, it is questionable whether the levying of import tax is also conceptually correct when goods are imported that were subject to foreign VAT but can no longer be exempted from tax, e.g. due to the **long period of ownership**. This results in multiple taxation, which is contrary to the destination principle. It is questionable whether the levying of im-

port tax in this case is covered by Art. 130 of the Federal Constitution. The reason for levying import tax on all imports is probably to be found in the fact that, for reasons of practicability, import tax was closely aligned with customs law. Conceptually, this could only be countered by a fictitious tax exemption in the country of origin, which would be modeled on the fictitious input tax deduction. Conversely, however, a fictitious tax exemption would also have to be granted in Switzerland if import tax is payable in the country of destination.

Art. 130 para. 1 of the Federal Constitution does not specify who is liable for 58
import tax and thus who is a **tax subject**. For practical reasons, the law links this to the **customs debtor** (Art. 51 para. 1 MWSTG). This means that practically anyone involved in bringing goods into the customs territory is eligible. From a VAT perspective, the taxable person is also broadly defined here and is closely linked to customs law and its focus on the collectability of claims (see N. 57).

Art. 130 FC does not provide any information on the **procedure for import** 59
tax. Since the object of taxation is the importation of goods, it is logical that the tax is levied by the Federal Office for Customs and Border Security (FOCBS). In contrast to domestic tax, import tax is finally assessed by the FOCBS in a **mixed assessment procedure** and is not determined in a self-assessment procedure and settled with the FTA (see N. 55). An exception is the **transfer procedure**, in which the import tax is not first paid to the FOCBS and then reclaimed from the FTA as input tax, but can be declared in the tax return to the FTA and claimed as input tax at the same time. Demands that this procedure, which was originally intended only for the import *and* export of high-value items such as jewelry for exhibitions and auctions, should apply to all imports by taxable persons fail to recognize that this would result in VAT-related **competitive disadvantages for domestic companies**. VAT would only have to be paid on purchases from domestic companies and could later be reclaimed as input tax. When purchasing from foreign companies through imports, on the other hand, VAT could be deducted as input tax in the same statement in which it is declared. This would result in a **liquidity advantage** on imports, if not a tax advantage, which should not be underestimated, especially in times of rising interest rates.

5. Tax rates

60 In Art. 130 para. 1 of the Federal Constitution, the Constitution only stipulates that the Confederation may levy a value added tax at a standard rate of no more than 6.5 percent (see N. 61) and a reduced rate of at least 2.0 percent (see N. 62). Apart from accommodation services (see N. 73 ff.), the Constitution does not specify which services are subject to the standard rate and which to the reduced rate.

a. Standard rate

61 The standard rate of 8.1 percent, which has been in effect since the beginning of 2024, is based on a combination of the provisions in Art. 130 para. 1, 3, 3bis, and 3ter of the Federal Constitution and the transitional provision in Art. 196 no. 14 para. 4 of the Federal Constitution (see N. 78 ff.). This relativizes the clear wording of Art. 130 para. 1 of the Federal Constitution, according to which the standard rate **may not exceed** 6.5 percent. To enable the applicable VAT rates to be taken from the Federal Constitution without having to calculate them, they are listed in the official publication in the footnotes to paragraphs 2 and 3.

b. Reduced rate

62 Like the standard rate, the reduced rate of 2.6 percent is also derived from a combination of the provisions in paragraphs 1, 3, and 3bis and the transitional provision in Art. 196(14)(4) of the Federal Constitution (see N. 78 ff.). In contrast to the standard rate, Art. 130 para. 1 of the Federal Constitution provides for a **minimum rate** of 2 percent for the reduced rate, which is why increases in the reduced tax rate, unlike increases in the standard rate, are easily compatible with the wording of the Constitution. However, it would no longer be compatible with the wording of the Constitution to align the reduced rate with the standard rate and thus effectively merge the two rates without amending the Constitution, as the Constitution expressly mentions a reduced rate. The legislature must therefore provide for a reduced rate in accordance with the Constitution. A uniform VAT rate would therefore require a constitutional amendment subject to a mandatory referendum, as the Federal Council had also envisaged in its 2008 single rate bill.

63 Although Art. 130 of the Federal Constitution expressly provides for a reduced rate, it does not specify to which services it should apply. The best indication

of this can be found in the history of the reduced tax rate. When the goods and services tax was introduced in 1941, certain foodstuffs were exempted from taxation in order to relieve the burden on households in modest economic circumstances. In several steps, the tax exemption was extended to all foodstuffs and non-alcoholic beverages. This is why there is often talk of **everyday necessities** or essential goods being taxed at the reduced rate, but on closer inspection this is only very partially the case. For example, hygiene products, clothing, energy, and mobility are undoubtedly everyday necessities, but are taxed at the standard rate. Instead, Swiss VAT distinguishes between **four groups** of services subject to reduced taxation: **food** and services related to primary production, **medicines**, **media**, and voluntarily taxed services in the areas of **sports and culture**. The reduced taxation of these services pursues various non-fiscal objectives.

Social policy objectives are pursued primarily through the reduced taxation 64
of **food**. Since the share of food taxed at the reduced rate in total household expenditure has fallen from around 35% in 1941 to less than 10% today, the reduced tax rates on food are providing less and less relief to households in modest economic circumstances. Agriculture and other primary producers also benefit from reduced taxation, either through lower hidden taxes in the absence of tax liability or through lower taxes on sales in the case of tax liability. The level of hidden taxation in agriculture was also a decisive factor in setting the reduced rate, which is why the reduced rate corresponds to the flat-rate input tax deduction for agricultural products (Art. 28 para. 2 MWSTG) and not vice versa. Social policy concerns are also at the forefront of the reduced taxation of **medicines**. However, it would be necessary to examine whether, in such a heavily regulated market, the reduced tax rate is passed on to end consumers or whether it results in a higher margin for the manufacture and trade of medicines, thereby failing to achieve the objective of reducing the burden on consumers.

The reduced taxation of **media** was originally intended to promote **media** as 65
a steering objective. In order to ensure equal treatment under VAT law between the predominantly public audiovisual media of the time and the private print media, the Council of States requested that, when VAT was introduced, the non-commercial services of radio and television companies also be taxed at a reduced rate instead of being exempt from VAT. In doing so, the legislature created a taxable object by law and thus levied VAT on the “Billag fees” in

particular. Whether there was a taxable object in the sense of a service relationship between the licensed radio and television companies and the persons paying the radio and television license fee was irrelevant. It was politically desirable for the radio and television license fee to be taxed at a reduced rate for reasons of equal treatment. However, it is questionable whether this legally created taxable object is covered by Art. 130 of the Federal Constitution, as the concept of value added tax always presupposes a service relationship as the taxable object. On the other hand, given the history of the reduced taxation of radio and television license fees, the Federal Supreme Court should not have examined in its ruling of April 13, 2015 whether there is a service relationship between the persons liable to pay the fees, the federal government, and the radio and television companies, since in this particular case, taxability was politically desired regardless of the existence of a taxable object in the form of a service relationship. By examining this and denying the existence of a service relationship, the Federal Supreme Court indirectly disregarded the requirement to apply federal laws in accordance with Art. 190 FC.

66 Finally, the reduced taxation of voluntarily taxed services in the areas of **sports and culture** promotes these activities: where the tax on input at the standard rate is higher than the tax at the reduced rate on turnover, the taxable persons receive money from the tax administration. In addition to avoiding a hidden tax on services between taxable persons, this is an important reason why someone becomes voluntarily taxable.

6. Tax exemptions

67 Although Art. 130 of the Federal Constitution refers to the number and level of tax rates, it does not mention anything about tax exemptions. Only from the concept of value added tax, which, unlike the special consumption taxes under Art. 131 of the Federal Constitution, is a general consumption tax, can it be inferred that the tax base should be as broad as possible. This raises the question of whether tax exemptions pursue **non-fiscal objectives** that themselves have constitutional status. This would justify deviating from the constitutional requirement of equal treatment in general and from the requirement of general and uniform taxation under Art. 127 para. 2 of the Federal Constitution in particular (see N. 68).

7. Pursuit of non-fiscal objectives

Reduced tax rates and tax exemptions, known as tax breaks, are only of limited use in pursuing non-fiscal objectives such as social, cultural or media policy concerns. Tax breaks do provide relief for households in modest economic circumstances. But that's not all: households in good economic circumstances receive even greater relief in absolute terms because they consume significantly more. This results in a loss of tax revenue that is needed, for example, to provide targeted support to households in modest economic circumstances through transfer payments. This shows that tax breaks can at least partially achieve the non-fiscal goals pursued, but in an inefficient way, as **tax breaks** are **not sufficiently targeted**. For this reason, **reduced tax rates** mentioned in the Constitution and **tax exemptions** not mentioned in the Constitution should only be used **with restraint** at the legislative level. 68

Tax breaks are inefficient, but they do mitigate the additional burden associated with tax rate increases. In particular, tax exemptions for insurance premiums and housing rents, one of the largest budget items for households in modest economic circumstances, mean that such households are less affected by **tax rate increases** than households for which these expenses account for a smaller proportion of the budget. Increases in VAT rates therefore perform better in terms of **distribution policy** than is often claimed. 69

8. Sovereign activities

Article 130 of the Federal Constitution does not comment on the VAT treatment of sovereign activities, as VAT does not apply to sovereign activities or, more generally, to government services, unless a public authority exceptionally engages in economic or entrepreneurial activities. This is supported by the fact that these are state tasks and not voluntary consumption, and that public services should **not be marketable** and therefore should not be in direct competition with services provided by the private sector, which is why there should be no distortion of competition. Since government services are not normally subject to payment by the persons who use them or by third parties, VAT would not apply to government services due to the lack of a taxable object in the form of a service relationship. Another consequence of the fact that government services do not fall within the scope of VAT is that they are subject to hidden taxation, as VAT on services used to provide government services cannot be deducted as input tax. 70

71 However, the question arises as to how the non-taxation of government services relates to the constitutional requirement of **equal treatment** in general and the requirement of **general and uniform taxation** under Art. 127 para. 2 of the Federal Constitution in particular. Which services should be offered by the state is primarily a political question. However, as soon as the state offers tax-financed services, these services are in principle already excluded from the scope of VAT due to the lack of remuneration and thus the lack of a taxable object, and can therefore be offered at a lower price than if this were done in return for taxable remuneration. In Switzerland, for example, VAT is also payable on public transport tickets. However, as soon as this is offered free of charge to users, as is partly the case in the city of Geneva, for example, VAT is no longer applicable. VAT thus creates a financial incentive to offer services financed by tax revenue even if they could be financed in whole or in part according to the polluter pays principle. VAT therefore influences the decision as to whether services should be financed by general tax revenue or by the persons using the service, which affects the constitutional requirement of equal treatment and the requirement of general and uniform taxation under Art. 127 para. 2 of the Federal Constitution.

72 This effect does not apply in the area of **tax exemptions**, as both tax-financed and non-taxable services are only subject to the hidden tax. Against this background, tax exemptions in the areas of **health** and **education** in particular lead to **equal treatment for VAT purposes**, regardless of how they are financed. If, on the other hand, the public authorities were able to eliminate their hidden tax through an input tax deduction or tax-free procurement of services, as is occasionally demanded, so that the federal government no longer imposes VAT on the cantons and municipalities, this would also result in VAT privileges for the public sector. The price of equal VAT treatment of public and private service providers in the area of tax exemptions is the burden placed on the cantons and municipalities by the federal government in the form of the hidden tax.

B. Art. 130 para. 2 FC

73 **Accommodation services** were initially regarded as part of hospitality services. Since the goods and services tax did not tax services and catering was considered a tax-exempt supply of food and beverages on the one hand, while alcoholic beverages were taxed at the preliminary stage on the other, hospi-

tality businesses, which also included all **accommodation businesses**, were **subjectively not taxable**. Although the **expert commission** in 1974 and the Federal Council in the first failed bill to introduce value added tax in 1977 wanted to tax the hospitality and accommodation industry at the **standard rate**, the **Federal Assembly** provided for a **special rate** because of fears of competitive disadvantages vis-à-vis other countries and the risk of the bill failing politically. In the equally unsuccessful proposals of 1979 and 1991, the **Federal Council** had already provided for the **special rate** in its message. When drafting the 1993 proposal, the Federal Assembly refrained from including a special rate in the Constitution, but provided for the authority to introduce a **special rate at the legislative level** in the **transitional provisions** (Art. 8ter aBV) .

According to Art. 8ter aBV, the federal government could set a lower sales tax rate for certain **tourism services** provided domestically by means of **legislation**, provided that these services were consumed to a significant extent by persons from abroad and that competitiveness required it. In its message of August 16, 1995, the Federal Council considered these conditions to be fulfilled. On the one hand, the number of overnight stays had been stagnating since the early 1980s and reached a negative record in 1995, which was interpreted as a sign of a lack of competitiveness. On the other hand, in contrast to hospitality and transport services, for example, accommodation services were predominantly in demand by foreign guests. "A reduced rate for accommodation services, more than half of which are statistically requested by foreigners, is therefore certainly constitutional." The **special rate for accommodation services** was first introduced on October 1, 1996, for a limited period of five years and has since been extended six times, most recently for 10 years until the end of 2027. In the 2025 special session, Parliament referred a motion to the Federal Council calling for the special rate to be continued beyond 2027. 74

In its message, the Federal Council merely states that the **setting of the special rate** at 3 percent takes into account the fact that a significant proportion of overnight stays are accounted for by foreign guests. Since, according to the Federal Council, the constitutional provision does not seek to privilege the tourism industry but rather to recognize its export-like character, it is conceivable that accommodation services demanded by foreign guests should be tax-exempt and only those demanded by domestic guests should be taxed. However, in order to save the industry administrative effort, the Federal 75

Council deliberately refrained from distinguishing between domestic and foreign guests. As it further explained, around two-thirds of overnight stays were requested by foreign guests. If these services were to be exempted without distinguishing between domestic and foreign guests, this would result in a special rate that was two-thirds lower than the standard rate of 6.5 percent applicable at the time, i.e., around 2.2 percent. This rate would have been practically equivalent to the reduced rate of 2 percent applicable at the time. It is therefore questionable whether such considerations were decisive.

1. Accommodation services

76 Art. 130 para. 2 of the Federal Constitution refers to accommodation services without describing them in more detail. Since, historically, accommodation services were considered part of hospitality services (see N. 73), the legal definition of accommodation services as the provision of **lodging**, including the provision of **breakfast**, even if this is charged separately (Art. 25 para. 4 MWSTG), does not appear to be constitutionally problematic. Somewhat more difficult to reconcile with the concept of accommodation is the fact that, under Swiss VAT law, long-term rentals are also considered accommodation services. According to the practice of the FTA, tax-exempt **rentals** only apply if a weekly stay or residence or registered office or permanent establishment is established. As with the distinction between supplies and services (see N. 42), the focus here is on a simpler and more legally secure distinction between taxable accommodation services and tax-exempt rentals, which is why the everyday understanding of the term “accommodation service” has been deviated from. From a tax system perspective, however, it would be better to make the distinction with regard to the **service component**, as this is what distinguishes accommodation services from mere rental (supply). This is partially implemented in the practice of the FTA, in that **hotels** always provide accommodation services, even if a guest takes up residence there. Consequently, this would also have to apply to **serviced apartments**.

2. Special rate

77 According to Art. 130 para. 2 of the Federal Constitution, the law may set a rate between the reduced and normal rates for the taxation of accommodation services. The word “may” in this provision has two meanings: Since Art. 130 of the Federal Constitution as a whole is a subsequently derogatory federal competence (see N. 20), on the one hand, para. 2, like para. 1, must also be

formulated as a discretionary provision. On the other hand, Art. 130 para. 2 of the Federal Constitution gives the legislature the freedom to make use of this competence or not. If the legislature makes use of this power, the only special rate that can be applied to accommodation services is a rate between the **reduced rate** and the **standard rate**, as is currently the case with the special rate of 3.8 percent. However, based on the history of the provision, the legislature could not tax accommodation services at the reduced rate (see N. 73 ff.). If the legislature did not make use of this constitutional power or allowed the current time limit to expire at the end of 2027, accommodation services would be taxable at the standard rate.

C. Art. 130 para. 3 FC: Earmarking for the financing of the AHV

78 When VAT was introduced in 1995, Art. 41ter para. 3bis aBV already provided that the sales tax rate could be increased by a maximum of one percentage point by means of a federal decree subject to an optional referendum in order to ensure the financing of old-age, survivors' and disability benefits if this could no longer be guaranteed due to the development of the age structure. At the beginning of 1999, Parliament made use of this provision and raised the standard rate by one percentage point, the reduced rate by 0.3 percentage points, and the special rate by 0.5 percentage points. Until the end of 2019, the Federal Council also had the option of using a maximum of 10 percent of the total revenue from the increase to finance disability insurance. This delegation provision was deleted as part of the Federal Act on Tax Reform and AHV Financing (STAF) initiated by Parliament following the rejection of Corporate Tax Reform III. Since then, the **entire amount** from the increase in VAT rates has gone **to the AHV**. A **further increase** in VAT rates in favor of the AHV and IV is provided for **from the beginning of 2024** in Art. 130 para. 3ter of the Federal Constitution (see N. 81), the proceeds of which, according to Art. 130 para. 3quater of the Federal Constitution, will also be allocated in full to the AHV compensation fund (see N. 82).

79 In contrast to the financing of the AHV through wage percentages, the additional financing of the AHV through value added tax also involves the households of pensioners contributing to the financing. This takes account of **demographic change**, whereby fewer people in employment have to pay for a growing amount of pensions due to the baby boom and longer life expectancy.

D. Art. 130 para. 3bis of the Federal Constitution: Earmarking for the financing of railway infrastructure and transitional provision Art. 196 no. 14 para. 4 and 5 of the Federal Constitution

80 At the beginning of 2001, the Federal Council was given the authority to raise VAT rates by 0.1 percentage points across the board in order to finance major railway projects. As this was a temporary increase, it was included in the **transitional provisions** of the Federal Constitution, but not in Art. 130 FC, but **in Art. 87 FC** concerning railways and other modes of transport. At the beginning of 2016, the Federal Council's direct counterproposal to the popular initiative “For public transport,” which was approved by the people and the cantons on November 28, 2014, converted the previously temporary increase of 0.1 percentage points **into a permanent increase**, which is why the regulation was moved from the transitional provisions in Art. 130 para. 3bis of the Federal Constitution. On the other hand, Art. 196 no. 14 para. 4 of the Federal Constitution once again **raised** the VAT rates linearly by a further **0.1 percentage points** until the **end of 2030** in order to finance the additional expansion of the railway infrastructure.

E. Art. 130 para. 3bis of the Federal Constitution: Earmarking for additional financing of the AHV

81 In the referendum of September 25, 2022, the federal resolution of December 17, 2021, on additional financing for the AHV through an increase in value added tax was accepted by the people and the cantons. This was intended to secure the financing of AHV pensions in the medium term with the aim of maintaining the level of old-age pension benefits and ensuring the financial equilibrium of the AHV. Art. 130 para. 3ter expressly links the Federal Council's authority to increase value added tax to the principle of **standardizing the reference age** for women and men in old-age and survivors' insurance at the legislative level. With the simultaneous adoption of the amendment of December 17, 2021, to the Federal Act on Old Age and Survivors' Insurance (**AHV 21**), against which a referendum was launched by left-wing circles, this condition was fulfilled and, at the beginning of 2024, the standard rate was raised proportionally by 0.4 percentage points to **8.1 percent**, the reduced tax rate by 0.1 percentage points to **2.6 percent**, and the special rate for accommodation services also by 0.1 percentage points to **3.8 percent**.

F. Art. 130 para. 3quater FC: Allocation to the AHV compensation fund

Para. 3quater, which was inserted at the same time as para. 3ter, clarifies that the **entire proceeds** from the increase in tax rates under para. 3ter are allocated to the AHV compensation fund. This provision should be seen in the context that, until 2019, only 83 percent of the revenue from the tax rate increase under para. 3 was earmarked directly for financing the AHV, while 17 percent went to the federal government to finance the demographically-driven increase in the federal contribution to the AHV (see N. 78). 82

G. Art. 130 para. 4 of the Federal Constitution: Earmarking for premium reductions in health insurance

When value added tax was introduced in 1995, it was already stipulated in the Constitution that **five percent** of the tax revenue from value added tax should be used for measures to relieve the lower income groups (Art. 41ter para. 3 aBV), namely for premium reductions in health insurance during the first five years after the introduction of value added tax. After that, the Federal Assembly could decide how this earmarked portion should be used (Art. 8 para. 4 Transitional Provisions aBV). The aim was to alleviate the **higher burden of VAT** (see N. 68) on households in more modest economic circumstances in relation to their income, in order to win over the trade union federation to the introduction of VAT (see N. 5). 83

Both provisions were incorporated into the main part and the transitional provisions of the new Federal Constitution in 1999 without any substantive changes (Art. 130 para. 2 FC, Art. 196 no. 14 para. 3 FC). As the five-year period had expired when the new Federal Constitution came into force at the beginning of 2000, the newly competent Federal Assembly decided in December 1999 to **extend** the earmarking of funds for **health insurance premium reductions** by ordinance until the end of 2003. In June 2004, a further extension was granted retroactively from the beginning of 2004 and limited until the new financial regulations came into force, but no later than the end of 2006. 84

With its message on the new financial system of December 9, 2002, the Federal Council wanted to continue these regulations. However, the Federal Assembly rejected this and decided to regulate the earmarking of funds for 85 health insurance premium reductions directly **in the main part of the Constitution**, unless another use for the relief of lower income groups is specified by law. The earmarking of funds for the benefit of lower income groups was also to be determined by the Federal Assembly **by means of a law subject to referendum** and not merely by means of an ordinance, as had been the case until then. The earmarking of funds has been maintained unchanged for health insurance premium reductions.

H. Art. 196 para. 14(1) FC

86 The federal government's authority to levy value added tax is limited until 2035, as is its authority to levy direct federal tax (Art. 128 FC). The **time limits** that apply today can be explained primarily by their historical origins. The sales tax, the precursor to value added tax, was introduced for a limited period during the Second World War and was subsequently extended for the first time by the Federal Council until 1949 and then by the Federal Assembly until the end of 1951. In December 1950, a transitional provision in the Constitution, limited until the end of 1954, was approved by a majority of the people and the cantons. In 1953, the people and the cantons rejected a proposal for a new draft of a financial regulation, which would have regulated the goods and services tax in the main part of the Constitution and would have been limited to twelve years. In 1954, however, the continuation of the existing regulation for a further four years until 1958 was approved by a majority. It was not until the financial regulations that came into force in 1959 that the sales tax was included in the main part of the Constitution for the first time as Art. 41ter (see N. 2), but only for a limited period of six years until 1964 and not for 12 years, as the Federal Council had requested. Three further extensions followed until the end of 1974, the end of 1982, and the end of 1994, after which the sales tax was replaced by the value-added tax at the beginning of 1995, which in turn was limited until the end of 2006. The authority to levy value-added tax was then extended until the end of 2020 and again until the end of 2035. In both cases, the **waiver of the time limit was discussed** but ultimately rejected. In 1977, 1979, and 1991, the waiver of the time limit was rejected by the people and the cantons together with the introduction of value added tax.

87 Although the FDF comprehensively explained in its explanatory report on the consultation draft for the 2021 financial regulations why a **time limit** on the two most important sources of federal revenue was **not expedient**, the con-

sultation process showed that waiving the time limit would fail in Parliament, which is why the Federal Council ultimately decided against waiving the time limit. The **arguments in favor of the time limit** were very general: for example, it was argued that it was an expression of respect for the sovereign to ask them from time to time whether taxes should still be levied, or that it was an opportunity to fundamentally reflect on the tax system. Federal Councilor Ueli Maurer probably expressed most clearly what the time limit is all about, saying that waiving it would be “a break with our tradition and perhaps also a slight break with our understanding of the relationship between the state and its citizens.” All of this leads to the conclusion that the time limit on the power to levy taxes is primarily a **ritual** rooted in a long **tradition**. From a political perspective, there is also a desire to avoid accusations of undermining the rights of the people. **Objectively**, however, the time limit is **difficult to justify**, as the Federal Council explained in its explanatory report on the consultation draft of the 2021 financial regulations.

About the author

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COMMENTARY ON

Art. 136 FC

A commentary by Karl-Marc Wyss

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Title 4 The People and the Cantons

Chapter 1 General Provisions

Art. 136 Political rights

[1] All Swiss citizens over the age of eighteen, unless they lack legal capacity due to mental illness or mental incapacity, have political rights in federal matters. All citizens have the same political rights and duties.

[2] They may participate in elections to the National Council and in federal popular votes, and launch or sign popular initiatives and requests for referendums in federal matters.

CONTENT

I. HISTORY OF ORIGIN

Since 1848, the current Federal Constitution has regulated who has and may exercise political rights in federal matters in Switzerland. Initially, only Swiss men over the age of 20 were allowed to vote - in the popular election of the National Council, the popular initiative for the total revision of the Federal Constitution, the mandatory popular vote on the principle of total revision and the mandatory constitutional referendum with a majority of the people and the cantons. The Federal Constitution of May 29, 1874 (aBV) added the optional referendum against federal laws and against generally binding federal decrees. This was followed by the popular initiative for a partial revision of the Constitution (1891), the change to proportional representation in National Council elections (1918), the referendum on state treaties, the new right of urgency (1939 and 1949), the creation of a constitutional basis concerning the Swiss abroad (1966; implementing legislation 1977 and 1992), the right to vote for women (1971 - late by European standards), the increase in the number of signatures for popular initiatives and referendums (1977), the new voting procedure for popular initiatives with a counter-proposal (1987) and the lowering of the voting age to 18 (1991). 1

Art. 136 BV has remained unchanged since the constitutional reform of 1999 2 and essentially transposes Art. 74 aBV into the current constitution. Paragraph 1 follows on from the first two paragraphs of the predecessor provision, with the exclusion ground of incapacitation due to "mental illness or mental deficiency" in accordance with the former adult protection law now being anchored in the constitutional text. Paragraph 2 now provides an overview of political rights in the Confederation. Paragraphs 3 and 4 of the previous standard, on the other hand, were not included: when the cantons were still able to provide for grounds for excluding voters from voting on federal matters, an explicit allocation of powers was required (Art. 74 para. 3 aBV), as was the related counterpart in Art. 66 aBV (barriers to the exclusion of voting rights). Legislative competence for political rights in federal matters now lies solely with the Confederation. The reservation of cantonal law for votes and elections of cantons and communes (Art. 74 para. 4 aBV), on the other hand, is continued by the Constitution in Art. 39 para. 1. The wording of Art. 136 largely corresponds to the Federal Council's draft (Art. 127 VE-96). While the constitutional committees of both chambers approved the content of Art. 127

VE-96 unchanged, the National Council and the Council of States replaced the terms "right to vote" and "entitled to vote" with "political rights".

II. CONTEXT

A. Change of terminology

3 Instead of the term "right to vote and elect" or "right to vote" - as still used in the predecessor standard and first drafts - Art. 136 BV now refers to "political rights", conceptually in line with Art. 34 BV, Art. 39 para. 1-3 BV, Art. 40 para. 2 BV and Art. 164 para. 1 lit. a BV. The change is meaningless in factual terms, but makes sense insofar as it captures the individual political rights more accurately: After all, the catalog of political rights includes not only participation in elections and votes, but also the taking and signing of popular initiatives and referendums (Art. 136 para. 2 Cst.); it also links Art. 136 Cst. better conceptually with the guarantee and warranty of political rights (Art. 34 Cst.). However, the Constitution continues to refer to the holders of political rights as "voters".

B. System and purpose

4 Following the chapters on the Confederation, cantons and communes (Title 3), Art. 136 Cst. together with Art. 137 Cst. - subject heading "Political rights" or "Political parties" - form Chapter 1 "General provisions" of Title 4 "People and cantons". The 2nd chapter standardizes initiative and referendum in Art. 138 to and with Art. 142 BV, followed by the 5th title on the federal authorities. Above and beyond the Constitution, Art. 136 of the Federal Constitution is incorporated into the legal system as a binding basic provision of national law, substantiated by the implementing legislation, in particular the Federal Act on Political Rights (CPR) and the Swiss Abroad Act (ASG). The primary purpose of Art. 136 FC is to define who is the holder of political rights in federal matters (composition of the electorate [voters]) and to symbolically clarify that these rights apply equally to all. At the same time, it is intended to provide an overview of political rights in the Confederation.

C. Legal nature and scope

5 In terms of its legal nature, Art. 136 BV is one of the organizational provisions of the Constitution. Only the first sentence of the first paragraph confers in-

dependent rights (constitutive effect): On the one hand, it defines who is the holder of political rights in federal matters; on the other hand, it forms the basis of competence for statutory implementation norms on technical aspects of political rights - unless the legislator rather relies on Art. 39 BV for the exercise of political rights. By contrast, the second sentence of the first paragraph, according to which everyone has the same political rights and duties, is primarily symbolic in nature. The second paragraph provides information on the existing political rights in federal matters, from the National Council elections to the referendum, without enshrining them in law.

The scope of Art. 136 Cst. must be distinguished from the individual political rights (including the protection of fundamental rights) on the one hand and from cantonal powers on the other: Art. 136 Cst. alone standardizes the prerequisites for who is entitled to political rights in federal matters, whereas their existence results from Art. 138-142, 143 and 149 Cst. How and where these rights are to be exercised - once they have been granted - is determined by Art. 39 Cst. and the associated implementing legislation. The prerequisites for political rights in cantonal matters are governed by cantonal law. The cantons have considerable leeway, for example in determining the voting age or the political rights of foreign nationals. The constitutional protection of political rights is guaranteed by Art. 34 of the Federal Constitution. The equality of rights with regard to political rights arises from Art. 8 BV. Art. 136 BV does not offer any independent or even further-reaching protection claims in this regard. 6

The Federal Statistical Office counted around 5.5 million voters at federal level in 2022, which corresponds to around 63% of the permanent resident population of around 8.7 million. On average, 47.1 percent of voters took part in federal votes in the years 2011-2022. 7

III. COMMENTARY IN THE NARROW SENSE

A. Capability and eligibility requirements (para. 1 sentence 1)

In the first paragraph, Art. 136 BV conclusively lists three requirements for political rights in federal matters, which must be fulfilled cumulatively: (i.) Swiss citizenship, (ii.) completion of the 18th year of age and (iii.) no incapacitation due to mental illness or mental deficiency. Anyone who fulfills these requirements is entitled to political rights in federal matters. By their very nature, the 8 first two requirements are positive, while the third is negative. All three are based on formal criteria that are easy to apply, but also allow for certain objections: for example, as Tschannen aptly points out, foreigners are not necessarily less familiar with political affairs in Switzerland, 16-year-olds can be more intelligent than certain elderly people, and cognitive impairments do not always lead to complete incapacity to judge.

1. Swiss citizenship

9 Only Swiss citizens within the meaning of Swiss citizenship legislation are entitled to political rights. This also includes Swiss-foreign dual and multiple citizens. The acquisition and loss of Swiss citizenship is governed by the Federal Citizenship Act (BüG). Most Swiss citizens have acquired their citizenship by law at birth due to their ancestry (Art. 1 BüG). However, the method of acquiring citizenship is irrelevant: once naturalization has become legally binding, newly naturalized citizens are subject to the same rules as other Swiss citizens. A waiting period or other limitation of their political rights, as was the case under the Constitution before 1874, is not permitted. Attempts to extend political rights in federal matters to resident foreigners have had little success to date.

2. Completion of the 18th year of age

10 The second requirement under Art. 136 para. 1 of the Federal Constitution is that Swiss citizens must have reached the age of 18. They can therefore exercise their political rights in federal matters from the age of 18 - i.e. from their 18th birthday - provided there is no reason for exclusion (see n. 12 f. below). As mentioned above, this is a purely formal criterion. Accordingly, the age of political or constitutional majority is not determined by the onset of personal political judgment, but by the age of majority as provided for in civil law from the age of 18 (Art. 14 ZGB). Like any age limit, there is something arbitrary about setting the age limit at 18. Although a reduction to 16 years of age has been debated several times in the recent past, there has been no political majority at federal level or in any canton except the canton of Glarus.

11 With regard to political rights and federal offices, the Constitution does not set any further age limit, neither lower (minimum age) nor higher (maximum age). Anyone who meets the requirements of Art. 136 Cst. is therefore eligible

for election to the National Council (Art. 143 Cst.), the Federal Council and the Federal Supreme Court.

3. No permanent incapacity of judgment

Art. 136 of the Federal Constitution excludes persons from political rights in federal matters who are "incapacitated as a result of mental illness or mental deficiency". The reason for exclusion corresponds conceptually to the Civil Code (CC) in the version valid until the end of 2012. Since then, both the revised adult protection law of the Civil Code and the Federal Act on Political Rights (CPR) have dispensed with the pejorative terms "incapacitation due to mental illness or mental deficiency" and refer to comprehensive guardianship. "Incapacitated" within the meaning of Art. 136 BV is therefore defined as "persons who are under comprehensive guardianship due to permanent incapacity of judgment or who are represented by a person entrusted with guardianship" (Art. 2 BPR; see also Art. 17 ASG). The terms used here are based on the Swiss Civil Code: a person is deemed to be permanently incapable of judgment if, as a result of mental incapacity or mental disorder, they continually lack the ability to act rationally (Art. 16 CC e contrario). The competent child and adult protection authority (KESB) sets up a comprehensive guardianship if the person who is permanently incapable of judgment is in particular need of help (Art. 398 ZGB), as is often the case with a person suffering from severe dementia, for example. In the case of representation by a guardian, the represented person is also permanently incapable of judgment. However, before becoming incapable of judgment, they have appointed another natural or legal person in accordance with Art. 360 para. 1 CC to represent them in the event of their incapacity (Art. 360 ff., in particular the mandatory validity check of incapacity in accordance with Art. 363 para. 2 no. 2 CC). Insofar as the advance care directive fully covers the care of persons and assets as well as representation in legal transactions, it largely corresponds to a comprehensive guardianship. The exclusion from political rights in federal matters in accordance with Art. 136 para. 1 BV in conjunction with Art. 2 BPR. Art. 2 BPR primarily concerns people with cognitive impairments, i.e. people who are so impaired in their overall mental development and learning ability as a result of an organic-genetic or other impairment that they are likely to require lifelong social and educational assistance. 12

13 As mentioned above, the terms "mental illness or mental deficiency" have negative connotations, are legally outdated and therefore need to be adapted when the opportunity arises. At best, the latest developments in the cantons, particularly in Geneva, provide an opportunity for a corresponding debate at federal level. In line with the UN Convention on the Rights of Persons with Disabilities (CRPD), the general withdrawal of the political rights of mentally disabled persons should be questioned and their improved participation in political and public life welcomed. The quasi-"automatic" exclusion of political rights for mentally disabled people based on their status under civil law - comprehensive guardianship or representation by a person authorized to provide care - as provided for in Art. 136 BV in conjunction with Art. 2 BPR as well as most cantonal constitutions, is not compatible with the requirements of Art. 29 CRPD.

4. Legal consequence: legal entity and entry in the electoral register

14 Anyone who meets the three requirements is, as mentioned above, the holder of political rights in federal matters. It follows from Art. 3 para. 1 CPD (and not from Art. 136 FC) that such a person must be entered in the electoral register of the commune of residence: if the person is resident in Switzerland, this is done ex officio (Art. 4 para. 1 CPD); in the case of Swiss nationals abroad, this is done only after entry in the register of Swiss nationals abroad and registration in the commune of residence (Art. 11 et seq. and 18 et seq. ASG).

15 Entry in the register is a procedural requirement for exercising political rights at federal level and is therefore of central importance. The electoral register is therefore publicly accessible to voters and incorrect entries can be challenged in the Federal Supreme Court in the last instance. Anyone who no longer meets the requirements of Art. 136 BV is deleted from the electoral register: If the child and adult protection authority (KESB) places a person under comprehensive guardianship due to permanent incapacity of judgment or if a precautionary mandate becomes effective for a person with permanent incapacity of judgment, the KESB notifies the competent civil registry office (Art. 449c ZGB), which in turn must forward the notification to the municipal residents' registration office responsible for the electoral register.

B. Generality and equality of political rights (para. 1 sentence 2)

The subject of the second sentence is the holders of political rights, as outlined in the first sentence. They "all have the same political rights and duties." The second sentence thus takes up the democratic principle that all voters have equal political rights and must therefore be treated equally by the state without exception (generality and equality). This concretization of the general principle of equality for political rights is historically conditioned and does not convey any independent legal claims that go beyond Art. 8 BV (equality of rights), but is primarily symbolic. The promised equality of rights is in fact limited to a pure equality of counting value in the sense of "one person equals one vote", whereas the Swiss constitutional system allows for certain deviations in the equality of voting power and success value: For example, the requirement of a majority of the cantons (Art. 142 para. 2 of the Federal Constitution) - the result within a canton counts as a popular vote (Art. 142 para. 3 of the Federal Constitution) - means that the vote of a voter in a smaller canton carries more weight (greater voting power) than the vote of a voter in a larger canton. In the current procedure for National Council elections, voters vote according to proportional representation. As the cantons form the constituencies (Art. 149 para. 3 BV), but there is no proportional representation across constituencies, not all votes can contribute equally to the election result, which further distorts the equality of votes. However, in BGE 147 I 194, the Federal Supreme Court described the "restriction of equal voting power", which is associated with the regulation on the majority of the cantons in popular initiatives, as "constitutionally intended [...] and binding for the Federal Supreme Court". 16

The fact that the second sentence of Art. 136 para. 1 BV also mentions the duties in addition to the rights is due to historical reasons and, according to the dispatch, was done "[a]fter reasons of symmetry". This includes a possible obligation to vote, possibly combined with a penalty for non-performance (compulsory voting), and the obligation to accept and perform certain secondary offices (compulsory office). However, federal law does not provide for any such individual political duties - unless one includes the disclosure obligations for transparency in political financing that have been in force since October 23, 2022 (Art. 76b et seq. BPR). If the federal legislator wanted to introduce a duty to vote or a duty to hold office, Art. 136 para. 1 sentence two BV and the term "duties" would certainly also be in focus. The cantons, on the 17 other hand, are free to introduce a voting obligation and associated sanctions for cantonal and federal votes, as the canton of Schaffhausen has done.

18 There are indications that the second sentence should be deleted if the opportunity arises. However, the National Council's Political Institutions Committee recently decided not to do so in its preliminary draft. Instead, it opted for the smallest possible change and the greatest possible traditional link to the current constitutional text, even though lowering the voting age to 16 - without the right to stand for election - in the first sentence would have increased the tension between the promised equality in the second sentence. In view of the new disclosure obligations in Art. 76b ff. BPR, this certainly made sense.

C. Overview of the individual political rights (para. 2)

19 The second paragraph lists the political rights in federal matters individually. It is not constitutive: The enumeration has no independent meaning, but informs the readership to which political rights the first paragraph entitles them. The nature and scope of the enumerated rights, on the other hand, are determined by separate constitutional norms: Thus, the right to actively participate in National Council elections arises from Art. 149 BV, the right to stand as a candidate from Art. 143 BV, and with regard to federal votes from Art. 140-142 BV; Art. 138, 139 and 141 BV then regulate the taking and signing of referendums and popular initiatives. Since a launching or signing obligation is absurd for the latter, the second paragraph uses the verb "may" for all the rights of participation listed - presumably for reasons of linguistic economy, the materials say nothing about this - without, however, ruling out a legal obligation to participate in federal votes and elections. The elections to the Council of States as cantonal elections (Art. 150 para. 3 BV) are rightly not mentioned. If the constitutional legislator were to extend political rights in federal matters in the future, the second paragraph of Art. 136 BV would have to be amended accordingly due to its informational nature.

IV. DEMANDS FOR REFORM

20 In the recent past, political initiatives at national level have called for an extension of voting rights in three areas that required an amendment to Art. 136 FC, namely with regard to the inclusion of foreign nationals (A.), the inclusion

of people with intellectual disabilities (B.) and the lowering of the voting age (C.)

A. Inclusion of foreign nationals

At the **federal level**, the Constitution denies foreigners political rights. The introduction of the right to vote for foreigners would require a revision of the conclusive regulation in Art. 136 para. 1 FC. The parliamentary initiative of the Green faction (21.405) "Dare to be more democratic. Voting rights for foreigners" of March 1, 2021, to amend Art. 136 FC to the effect that foreigners who have been legally resident in Switzerland for five years also have political rights in federal matters. The National Council rejected the initiative by a clear majority on June 7, 2022. In line with this, legal scholars consider the chances of such initiatives *in the foreseeable future* to be *politically unrealistic*. The federal popular initiative "For a modern civil code (democracy initiative)", which came into being on January 24, 2025, takes a slightly different approach. It calls for an amendment to Article 38, para. 2 FC, so that foreigners can obtain citizenship upon application after just five years of legal residence in Switzerland, provided they have a basic knowledge of a national language and have not been sentenced to a long-term custodial sentence or pose a threat to Switzerland's internal security. There are no international obligations for Switzerland to grant political rights to foreign nationals. 21

The Federal Constitution allows the cantons to grant political rights to the foreign population at the **cantonal and municipal level** (Art. 39 para. 1 FC). Whether the cantons need a corresponding basis in their constitution for this is disputed. To date, the cantons of *Neuchâtel and Jura* grant foreigners political rights at the cantonal level, with both cantonal constitutions explicitly providing for this. In the canton of Appenzell Ausserrhoden, the right to vote for foreigners is up for debate in the new draft constitution. In addition, the cantonal constitutions of *Fribourg, Jura, Neuchâtel and Vaud* stipulate political rights for foreigners in municipal affairs in all municipalities – by contrast, the new draft constitution (2023) in the canton of *Valais*, which included such a provision, was rejected at the ballot box in March 2024. The canton of *Geneva* goes less far, allowing foreigners to vote and stand for election in municipal affairs, as well as to sign initiatives and referendums, but not to be elected themselves. Among the German-speaking cantons, only *Appenzell Ausserrhoden, Basel-Stadt and Graubünden* authorize their municipalities to introduce 22 political rights for foreigners, excluding regulations concerning the state churches; so far, only a small number of municipalities have made use of this. In all the cantons mentioned, certain preconditions apply, such as a specific residence status, a minimum period of residence in Switzerland (often 10 years) and a minimum period of residence for municipal matters. While some scholars advocate extending political rights to foreigners, at least at the municipal level, the National Council (lower house of the Swiss Parliament) rejected a parliamentary initiative by Atici (21.414) "Voting rights for all in municipal matters after five years of residence in Switzerland" from March 11, 2021, by a large majority in the summer of 2022.

B. Inclusion of people with intellectual disabilities

23 The Federal Constitution and implementing legislation exclude Swiss citizens of legal age from political rights in federal matters if they are under comprehensive guardianship due to permanent incapacity of judgment or are represented by a guardian. The exclusion is quasi "automatic" - i.e. without individual examination - on the assumption that those affected are also permanently incapable of judgment in political matters. In contrast, the UN Convention on the Rights of Persons with Disabilities (CRPD) guarantees political rights for people with disabilities (Art. 29) regardless of the type of disability. The CRPD requires the state party to take appropriate action; it does not provide for exclusion. Voices in teaching and politics therefore rightly criticize the quasi "automatic" exclusion of political rights for people with intellectual disabilities in Swiss law, and not without effect:

- At the **federal level**, the Federal Chancellery (FC) prepared a report on the political participation of Swiss citizens with intellectual disabilities as a result of the Carobbio postulate (21.3296) "People with intellectual disabilities should be able to fully participate in political and public life" and the Baume-Schneider interpellation (21.3295) "Political rights for people with a mental or intellectual disability", both dated March 18, 2021. The *report Po. 21.3296* was published on October 25, 2023. According to its final consideration, the current regulation on the exclusion of voting rights is in conflict with legal equality and international legal obligations; the question of the necessity of voting right exclusions and the associated balancing of interests are to be clarified at the constitutional level. The Federal Assembly took note of the report and its demands and dealt with the postulate and the new initiatives associated with it. On October 24, 2024, the National Council's Political Institutions Committee submitted the *motion (24.4266) "Political Rights for Persons with Disabilities"*, thereby following the petition of the 2023 Disability Session (23.2019) "Autonomous and Unimpeded Right to Vote and to Be Elected". The Federal Council is to submit a draft amendment to Art. 136 para. 1 FC, amending the first sentence as follows: "Political rights in federal matters shall be granted to all Swiss citizens who have reached the age of 18". On November 27, 2024, the Federal Council proposed the adoption of the motion. The National Council, or rather its Political Institutions Committee, will deal with the motion next (probably in March 2025).

- At the cantonal level, *Geneva and Appenzell Innerrhoden* stand out: since the end of 2020, Geneva has completely abolished restrictions on the voting rights of people who are permanently incapable of judgment (Art. 48 KV/GE). The new constitution of the *canton of Appenzell Innerrhoden*, which was adopted by the Landsgemeinde in April 2024 and is expected to come into force in 2027, also completely dispenses with any restriction (Art. 9 KV/AI^{2027}). Similar initiatives and projects are currently being considered by politicians in the cantons of *Basel-Stadt, Solothurn, Neuchâtel, Vaud, Zurich and Zug.* Less inclusive, but already in force, are the regulations in the cantons of *Vaud* and *Neuchâtel,* which, instead of the criticized automatic mechanism, provide for special review procedures when excluding persons from cantonal political rights.
- Further reform impulses could also arise in the *church communities*. For example, the planned mergers of the Protestant Reformed church communities in the city of Bern would offer an opportunity to design any new organizational regulations in accordance with the BRK.

Switzerland's obligations under international law, the developments in the 24
canton of Geneva and the numerous projects and initiatives underway at federal and cantonal level show that there seems to be political momentum for a CRPD-compliant design of political rights. The future will show whether the legal basis for this will adopt the Geneva solution or provide for an individual review process, continuing to establish itself first at cantonal level and only then at federal level. Regardless of this, the thrust is to be welcomed.

C. Lowering the voting age

25 Since 1991, initiatives have launched the parliamentary debate on lowering the voting age to 16 approximately every five to seven years, most recently the Arslan parliamentary initiative (19.415) "Giving young people a voice" of 21 March 2019. In some cases, these initiatives even called for a minimum voting age to be waived altogether. The Convention on the Rights of the Child guarantees children and young people the right to form and express an opinion on matters that affect them, as well as the right to be taken into account in accordance with their age and maturity. However, as things stand at present, international law does not provide for equal voting rights for children and young people. For a purely active right to vote in federal matters from the age of 16 (or from an even younger age), at least Art. 136 of the Federal Constitution and the associated implementing legislation would have to be adapted. The number of voters would increase by around two and a half percent if the voting age of 16 were introduced. In the **federal government**, *all initiatives have so far failed* – most recently the aforementioned parliamentary initiative by Arslan (19.415).

26 As at federal level, the initiatives have so far also failed in the cantons, with one exception in the canton of Glarus. It was the only canton to introduce the voting age of 16 on May 6, 2007. In the last federal consultation on the voting age of 16 at the end of 2022, seven cantons were nevertheless in favor of lowering the voting age to 16 or at least welcomed a national debate - despite some opposing voting results. The cantons of Appenzell Ausserrhoden, Aargau, Basel-Stadt, Lucerne and Graubünden are currently (spring 2024) considering proposals or initiatives that include or call for a voting age of 16. In addition, certain cantons already allow the circle of voters for national churches, parishes and other public-law bodies to be extended by law, or transfer the power to determine the voting age directly to these organizations by law. In many Protestant Reformed regional churches, for example, the voting age is 16.

27 The formal criterion of the minimum age is based on the idea that the exercise of political rights requires the maturity and ability to form a political opinion. It is not based on the individual's development. In the political debate, supporters of the voting age of 16 emphasize that the earlier involvement of young people in political decision-making processes could promote and help maintain political engagement among young people; at the same time,

lowering the age would reduce the under-representation of young people in political bodies and lower the median age among voters. Opponents, on the other hand, often justify their rejection with the age of majority under civil law of 18 years and the argument that young people already have specific opportunities to participate in politics, such as the youth session. Furthermore, all recent attempts at cantonal level have failed. The legal literature occasionally speaks out in favor of the voting age of 16; often - as in the present case - it remains with a description of the legal situation. The Federal Council has not yet taken a clear position on the voting age of 16. However, it has declared its willingness to carry out further clarifications (e.g. by means of a report) and considers it at least possible to lower the voting age.

In an international comparison, the voting age at national level is 18 in the majority of countries. However, there are exceptions: Austria introduced the voting age of 16 over 10 years ago. Within Europe, Scotland, Wales, Slovakia and Malta also have such regulations. Non-European countries primarily include Argentina, Brazil, Ecuador and Cuba. In New Zealand, the Supreme Court also ruled in November 2022 that the voting age of 18 was discriminatory against sixteen and seventeen-year-olds. The developments abroad, the ongoing cantonal initiatives and the regularity of initiatives at federal level show that the discussion about lowering the voting age in Switzerland is unlikely to die down in the future. 28

The author gives his personal assessment in this commentary.

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COMMENTARY ON

Art. 164 FC

A commentary by Leo Tiberghien

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Art. 164 Legislation

[1] All significant provisions that establish binding legal rules must be enacted in the form of a federal act. These include in particular fundamental provisions on:

a. the exercise of political rights;

b. the restriction of constitutional rights;

c. the rights and obligations of persons;

d. those liable to pay tax as well as the subject matter and assessment of taxes and duties;

e. the duties and services of the Confederation;

f. the obligations of the Cantons in relation to the implementation and enforcement of federal law;

g. the organisation and procedure of the federal authorities.

[2] Legislative powers may be delegated by federal act unless this is prohibited by the Federal Constitution.

CONTENT

I. INTRODUCTION

A. Background

1 Article 164 of the Constitution defines when a rule of law must take the form of a law and when it may, on the contrary, take the form of an ordinance. In this respect, it had no equivalent in the **former Constitution**. Nevertheless, this provision codifies the case law of the Federal Supreme Court (FSC) on legislative delegation developed during the 20th century; in addition, it is based on provisions that have been part of many cantonal constitutions since the 1980s. Nevertheless, the adoption of Article 164 of the Constitution was turbulent. Its final version is the result of a process marked by various compromises and alterations. This is why the current wording of Article 164 of the Constitution is somewhat unfortunate. Its history partly explains the controversies surrounding its interpretation.

2 The **Expert Commission** appointed by the Political Institutions Committees of both Councils was the first to suggest enshrining in the Constitution a provision reserving the power to adopt important legal rules to the legislature. This provision stipulated that “the Federal Assembly shall enact important legal rules, which must take the form of a federal law.” The Expert Commission also proposed defining the concept of importance by means of a list of criteria, which it wished to codify in a law. It also dispensed with the concept of legislative delegation. The latter was considered superfluous because the separation of powers was strictly defined: the adoption of important rules was the responsibility of the legislature, while all other rules of law were the responsibility of the Federal Council.

3 The **Federal Council** departed from the expert commission's proposal. The 1996 draft (P-1996) thus dispensed with the current Art. 164 para. 1. Rather than retaining a reserve of powers for the legislature, P-1996 merely regulated the issue of legislative delegation. However, this provision merely reiterated the principles developed by case law and legal doctrine. Article 154(2) P-1996 thus provided that "a federal law or federal decree of general application subject to referendum may provide for the delegation of the power to enact rules of law, unless the Constitution excludes this. The delegation provision must set out, in broad terms, the content of these rules.“ As for Art. 154 para. 1 P-1996, it merely stated that ”[t]he Federal Assembly enacts federal laws and

federal decrees of general application," which is now Art. 163 of the Constitution.

However, the **Committees on Political Institutions** (CIP) revived the Expert Committee's proposal, with two differences. First, they wanted to define the concept of importance not by a list of criteria, but by a list of particularly sensitive areas. The proposed provision then specified that the “fundamental provisions” of these different areas were always important. Second, the CIP report abandoned the strict separation of legislative powers. It maintained the Federal Assembly's power to adopt rules of law of lesser importance. The legislature was thus responsible for determining which rules should be adopted by the Federal Council, by analogy with the rules on legislative delegation. 4

Despite the Federal Council's repeated reluctance, the **Constitutional Commissions** and the **Chambers of Parliament** adopted the CIP's version with regard to the reservation of the law, the criterion of importance, and the list of areas, without much debate. These elements correspond to the current Art. 164 para. 1 of the Constitution. On the other hand, the second paragraph gave rise to heated controversy. Both Councils agreed on the principle of a provision reintroducing legislative delegation. However, in addition to the first sentence, which states that "a federal law may provide for the delegation of the power to enact legal rules, unless the Constitution excludes this ,“ the National Council was keen to retain the second sentence of P-1996, which stated that ”[t]he delegation provision must set out, in broad terms, the content of these rules .“ The Council of States considered this addition to be redundant in light of the first paragraph: the ”fundamental provisions“ of the areas referred to already covered the ”broad outlines" of the relevant rules. The disagreement persisted until the Conciliation Conference, where the Council of States' version prevailed. 5

B. Foundations

The decision to reserve the adoption of important legal rules to the legislature is based on three foundations. First, Art. 164 of the Constitution preserves **democracy (both representative and direct)** by ensuring that major political and social decisions are made by the most representative body and are subject to mandatory or optional popular referendums. Article 164 of the Constitution also contributes to the establishment and observance of the principle of the separation of powers by reserving (part of) legislative power 6 to the legislature to the exclusion of any other body. Finally, this provision gives concrete expression to the principle of the **rule of law** by guaranteeing its applications, such as the principles of equality and predictability of state action.

C. Context

1. Formal legislative power

7 Art. 164 Cst. is part of a broader constitutional framework relating to the powers of the Federal Assembly. While Art. 163 Cst. defines the forms of action available to the Federal Assembly, Art. 164 Cst. grants it **formal legislative power**. However, Art. 164 Cst. does not confer any powers on the Confederation: it merely divides legislative powers between different federal authorities when these powers result from a constitutional provision (see Art. 3 of the Constitution). Art. 164 para. 1 of the Constitution defines which legal rules must be adopted by the Federal Assembly and submitted to a mandatory or optional referendum, by reference to Art. 163 and Art. 141 para. 1 lit. a and b of the Constitution. This is why Art. 164 Cst. actually concerns the powers of the Federal Assembly and the people, even though it is located in the section of the Constitution relating to the powers of the Federal Assembly.

8 Art. 164 Cst. must be read in conjunction with Art. 182 Cst., which governs the **legislative powers of the Federal Council**. According to the latter, “the Federal Council shall enact rules of law in the form of ordinances, insofar as the Constitution or the law authorizes it to do so” (para. 1), and “shall ensure the implementation of legislation, decrees of the Federal Assembly, and judgments rendered by federal judicial authorities” (para. 2). A cross-reading of Articles 164 and 182 of the Constitution allows us to distinguish between three normative levels: legal rules whose delegation is prohibited, those whose delegation is permitted, and those whose delegation is superfluous. This three-way division is based on two criteria, the contours of which remain undefined: the distinction between prohibited and permitted delegation is made according to the importance of the rule of law; the distinction between permitted and superfluous delegation corresponds to that between primary rules of law and implementing rules.

The Federal Council also has legislative power under Articles 184(3) and 185(3) of the Constitution when the interests of the country so require, or in order to counter existing or imminent disturbances that seriously threaten public order, external security, or internal security (*infra* N. 50). Finally, the transitional provisions of certain popular initiatives require the Federal Council to legislate by ordinance in place of the legislature when the latter has not implemented the initiative within a certain period of time (e.g., Art. 197(9)(1) and (11) (2) of the Constitution; *infra* N. 51). 9

2. General and special reservations of the law

By requiring that all important rules of law be set out in a law, Art. 164 para. 1 of the Constitution establishes a **general reservation** of the law. In contrast, the Constitution provides for various **special** or **sectoral** reservations, i.e., provisions that require the form of a law on a specific basis, for a particular subject or type of rule of law. Within their respective scope of application, these sectoral reservations are specific to Art. 164 para. 1 Cst. because they impose an independent and stricter requirement of form. This applies to serious restrictions on fundamental rights (Art. 36 para. 1 2nd sentence Cst.), restrictions on certain specific fundamental rights (Art. 28 para. 4, 29*a*, second sentence, 30(2) and (3), second sentence, and 31(1) of the Constitution) or general principles governing the tax system (Art. 127(1) of the Constitution). Furthermore, certain constitutional provisions merely refer to the law for the regulation of certain areas or issues (e.g. Art. 58 para. 2, second sentence, 59 para. 1, first sentence, 144 para. 3, 162 para. 2, 153, 178 para. 3 and 188 para. 2 Cst.). These do not go beyond what is required by Art. 164 para. 1 Cst., i.e., that important rules of law take the form of a law. It is therefore less a matter of a special relationship than a reference to Art. 164 para. 1 Cst. 10

D. Structure

Art. 164 comprises two paragraphs: the first deals with the **reservation of the law**, the second with **legislative delegation**. The first paragraph is in turn composed of two sentences. The first stipulates that “important provisions establishing rules of law shall be laid down in a law.” The second sentence lists areas whose “fundamental provisions” “belong in particular” to the category of important provisions. The wording of this paragraph is unfortunate, and the articulation of its two sentences is controversial. According to the minority 11 position we adopt, the requirements set out in the two sentences of Article 164(1) are of a different nature. The first sentence establishes a formal requirement; the second, a substantive requirement, namely normative density. The formal requirement depends on the importance of the provision, which is a function of its consequences. The content requirement is based on the fundamental nature of a provision, which relates to the degree of precision of the law. In other words, according to the first sentence, any important rule of law must take the form of a law; according to the second sentence, the fundamental provisions of a law are always important because they constitute its minimum normative density.

II. LEGAL RESERVATION (PARA. 1)

A. Requirement of legal form (para. 1, first sentence)

1. Form of "federal law"

12 Art. 164 para. 1 Cst. reserves a certain form (that of federal law) for certain provisions (those that establish important rules of law). Thus, Art. 164 para. 1 of the Constitution gives concrete expression to the principle of legality (Art. 5 para. 1 of the Constitution) and reinforces it, as it requires not only a legal basis for certain acts, but a qualified legal basis. This provision refers to Art. 163 para. 1 and Art. 141 para. 1 lit. a and b. Cst. and establishes a reservation in favor of **law in the formal sense**, i.e., an act adopted by the Federal Assembly with the mandatory or optional participation of the people. However, urgent laws that are (temporarily) exempt from any referendum, in accordance with Art. 165 Cst., are reserved. It should also be noted that Art. 164 para. 1 of the Constitution does not exclude important legal rules from being included in the Constitution or in international treaties whose democratic legitimacy is equivalent to that of federal laws (for the former: Art. 139, 194, and 195 of the Constitution; for the latter, Art. 140 para. 1 let. b, 141 para. 1 let. d and para. 2, and 166 para. 2 Cst.), or even in an independent ordinance (*infra* N. 50 ff.). Draft laws that fall under Art. 164 para. 1 of the Constitution must also be subject to a consultation procedure in accordance with Art. 3 para. 1 let. b LCo. The consultation procedure allows the cantons, political parties and interested parties to be involved in the drafting of such bills.

While Art. 164 para. 1 Cst. reserves the form of law for important provisions establishing rules of law, it does not limit the content of the law to these provisions. Art. 164 para. 1 Cst. does not provide a definition of the content of the law; in other words, the Constitution does not recognize any "**reservation of ordinance**." The law may indeed contain provisions of lesser importance, including implementing provisions, or even individual and/or specific provisions. The power to adopt implementing provisions lies primarily with the Federal Council (Art. 182 para. 2 Cst.), but remains shared with the legislature. 13

2. "Important provisions that establish rules of law"

Art. 164 para. 1 Cst. limits the reservation of the law to "important provisions that establish rules of law." The provisions concerned are limited to those that have a certain normative structure, i.e., those that lay down **rules of law**. This concept refers to Art. 163 para. 1 of the Constitution and Art. 22 para. 4 of the Parliament Act and refers to "general and abstract provisions of direct application that create obligations, confer rights, or assign powers." Implementing provisions such as those provided for in Article 182(1) and (2) of the Constitution and individual and specific decisions are thus excluded from the scope of the reservation of law, even when they are important. 14

Article 164(1) of the Constitution then restricts the reservation of law to **important** provisions. This material criterion is the touchstone of Art. 164 para. 1 Cst., as it distinguishes between rules of law that must take the form of a law and those that are not subject to this requirement. This is why legal doctrine refers to the concept of the "material definition of the reservation of law" or, more commonly in German, the "*materieller Gesetzesvorbehalt*." However, the Constitution does not provide a definition of the concept of importance, so it is necessary to refer to a set of criteria or indicators (or variations) developed by case law and doctrine. The importance of a provision is thus measured (1) by the circle of persons or situations affected; (2) the intensity of its consequences on the legal position of those affected; (3) its financial impact on individuals or the State; (4) its effect on the formation of political will or the organization of federal authorities; (5) the politically controversial nature of the issues it seeks to resolve; (6) its novelty and divergence from previously accepted principles; (7) the extent of the political controversy it generates. 15

The various indicators relate primarily to the **consequences** of the rule of law: in turn, these consequences may be significant because of their quantita- 16 tive scope, as they apply to a wide range of recipients and situations, or because of their qualitative scope, in that they affect recipients with a certain intensity. These indicators do not have to be satisfied cumulatively; a norm may already be significant in relation to a single element. The importance of a provision cannot be determined in the abstract, but only in relation to the subject matter and purpose of the regulation. The assessment of the importance of a provision always depends on the specific circumstances and an overall assessment that does not lend itself to any simplistic approach. It therefore involves a significant margin of discretion in favor of the legislator.

17 The interpretation of the concept of importance must be guided by the **fundamentals** of Art. 164 of the Constitution, namely the guarantees of the rule of law, democracy, and the separation of powers. Legal doctrine also argues that these foundations must be accommodated, or even balanced, with other, sometimes divergent, public interest imperatives: the efficiency, speed, or flexibility of public activity, particularly in the case of technical rules. This would therefore involve taking into account **practical considerations**. In our view, however, this assertion should only be accepted with caution in view of the letter and spirit of Article 164 of the Constitution. Admittedly, case law recognizes that the expected level of normative density is reduced to the extent of the requirements of legal and practical reality. However, these considerations relate to the density of the rules, i.e., the degree of precision in the wording of a provision, and do not in themselves say anything about the importance of a rule of law. Moreover, the technical nature of a rule of law does not necessarily deprive it of its possible political and ethical dimensions. The ratio legis of Article 164(1) of the Constitution is precisely to ensure that an important rule of law is included in a law in the formal sense, even if considerations of expediency would argue in favor of its delegation. It cannot be accepted that the reservation of the law only applies when the law appears to be the appropriate instrument – otherwise the reservation of the law would be largely meaningless.

B. Requirement for the law to be normatively dense (para. 1, 2nd sentence *i.i.*)

1. "Fundamental provisions"

The second sentence of the first paragraph lists areas whose "fundamental provisions" belong "in particular to [the] category [of important provisions]". The combination of the adjectives 'important' (para. 1, 1st sentence) and "fundamental" (para. 1, second sentence) raises difficulties of interpretation. According to the majority opinion, they are synonymous. The difference is said to be aesthetic. The phrase "in particular" thus refers to the list of areas, suggesting that it is not exhaustive. We agree with the minority view, defended in particular by Dubey, that the qualifier "fundamental" should not be read as a synonym for 'important' but rather as a reference to the "broad outlines" of the areas concerned. Art. 164 para. 1 2nd sentence of the Constitution thus establishes a requirement of content, i.e. **a minimum level of normative density**. It follows from Art. 164 para. 1 2nd sentence of the Constitution that when the law addresses one of the areas mentioned, the law must define the broad outlines or the basis of the regulation—i.e., its purpose, its object, its scope, and its main principles. In other words, while importance defines the issues—however specific they may be—that must be regulated by law in the formal sense (*what*), the qualifier "fundamental" serves to determine the precision with which the law must regulate the various areas of social life when the law addresses them (*how*). 18

This interpretation derives primarily from the **letter** and **syntax** of Art. 164 para. 1 Cst., both in terms of the terms used and the grammatical position of the phrase "in particular ." In the primary sense, something is fundamental if it serves as the basis for something else. In a normative context, this term refers to the basis on which all rules of law are founded; in Swiss law, this means a formal law that defines the broad outlines. The **preparatory work** for Art. 164 para. 1 Cst. supports this interpretation. The CIP, which first introduced the term "fundamental," stated in this regard that "five key areas have been identified, the broad outlines of which must be enacted in the form of federal laws," and that the definition of these "fundamental principles" can be "determined, to a large extent, by analogy with the current rules on delegation ." Thus, while they considered that they could dispense with the concept of legislative delegation (*supra* N. 4), the CIP retained the requirements relating to 19 legal basis and normative density. Then, when the concept of legislative delegation was expressly reintroduced, the constituent commissions and then the councils abandoned the second sentence of Article 164(2) of the Constitution, considering that it was already covered by the first paragraph: they deemed it superfluous to specify that the law should describe the "broad outlines" of the delegation since it had to contain the "fundamental provisions." This awkward wording can be explained by the historical context: the expert committee wanted to dispense entirely with legislative delegation in favor of the criterion of importance; the CIPs retained this version, but added, in parallel with the criterion of importance, the requirements relating to legislative delegation through the requirement relating to fundamental provisions. The Federal Assembly added a second paragraph that explicitly reintroduced legislative delegation, without however amending the first paragraph of the CIP draft, which implicitly reiterated the conditions. It follows that Art. 164 para. 1, second sentence, of the Constitution has less of a dogmatic link with the first sentence of the first paragraph (the criterion of importance) than with the second paragraph (legislative delegation).

20 Furthermore, the committees deliberately retained the terms "important" and "fundamental." The CN committee unanimously rejected a motion to retain only the former, as it was unable to distinguish between the two: it considered instead that 'fundamental' referred to the basis ("*die Grundlage*") on which the Federal Council is called upon to adopt ordinances. This law-ordinance dialectic and the associated requirements for normative density emerge more broadly from the deliberations within the constituent committees and in plenary session. This is also evidenced by the numerous parliamentary references to the relationship between the qualifier "*grundlegend*" in the current Art. 164 para. 1 of the Constitution and the term "*Grundlage*" in Art. 170 para. 1 of the German version of the CIP draft. The latter provided that the Federal Council should adopt ordinances "on the basis of and within the framework of [...] laws" ("*auf der Grundlage und im Rahmen von [...] Gesetzen*") .

21 Finally, this is also the meaning given to the term "fundamental" by the **case law** of the Federal Supreme Court relating to cantonal legislative delegations, which Art. 164 para. 1 was also intended to codify. Similarly, in its case law on Art. 127 para. 1 of the Constitution, which enshrines a specific legal reserve in tax matters, the Federal Supreme Court affirms that the requirement that the law must contain the fundamental provisions relating to the collection of a fee

constitutes a requirement of normative density. It ultimately concludes that if a rule of law falls under one of the subparagraphs (a) to (g) of Article 164(1) of the Constitution, its delegation remains possible, but that the clause on which this delegation is based must "be sufficiently precise to define the fundamental lines of the delegated regulation, i.e., the purpose, object, and scope of the delegated powers." This is indeed the core of the requirement of normative density.

2. "In particular"

Art. 164 para. 1 2nd sentence Cst. requires that all legal acts be based, directly or indirectly, on a formal legal basis that defines their broad outlines. According to this interpretation, the fundamental provisions therefore constitute a **subgroup** of the important provisions, which justifies linking the phrase "in particular" to the articulation of the two sentences of Art. In this sense, the phrase "in particular" has a quantitative dimension. It also has a qualitative dimension: fundamental provisions are *particularly* important. It follows from these considerations that fundamental provisions are always important, but the reverse is not true: not every important provision is fundamental. Indeed, the importance of a provision is measured both in terms of its scope and generality and in terms of the concrete intensity of its effects. Therefore, a rule could prove to be important without being part of the broad outlines of a certain area in that it would be precise, detailed, individualized, costly, unprecedented, and/or controversial. This is the case with a serious infringement of the fundamental rights of a limited group of people, such as an obligation to build up reserves imposed on certain companies that produce essential goods (Art. 11 LAP), the introduction of a targeted exception to a general rule, such as the exclusion of certain companies from the Labor Act (Art. 2 LTr), the introduction of a hardship clause, such as the financial support provided in response to the COVID-19 epidemic (Art. 12 COVID-19 Act), or specific conditions governing access to a benefit, such as the information requirements for grant applications (Art. 15c SuA). 22

3. Normative density of other important provisions

Art. 164 para. 1 2nd sentence of the Constitution thus establishes a requirement for normative density, according to which the law must contain the fundamental provisions of various areas because they are particularly important. In this respect, Art. 164 para. 1, second sentence, of the Constitution specifies 23 and reinforces the **requirement of general normative density** of the law, which already derives from Art. 164 para. 1 of the Constitution and, more generally, from Art. 5 para. 1 of the Constitution. The requirement of normative density is in fact the corollary of the reservation of the law. Any important legal provision, even if it is not fundamental, must demonstrate a sufficient degree of normative density. Otherwise, the reservation of law would have no normative scope: the legislature could adopt a provision that effectively gives carte blanche to other authorities. Thus, the law must not only contain the broad outlines of the areas mentioned in Art. 164 para. 1, second sentence, of the Constitution, but its important provisions must also always demonstrate sufficient normative density.

24 To determine the expected normative density of the law, reference should be made to the principles developed by case law. The normative density of a norm refers to the degree of **precision, clarity, and determination** of its wording. The law must therefore be worded with sufficient precision to enable individuals to adapt their behavior and to foresee the consequences of a particular behavior with a degree of certainty appropriate to the circumstances. However, the degree of precision expected cannot be determined in the abstract. Case law notes that the legislator cannot entirely refrain from using indeterminate concepts whose scope is not precisely defined; this may be justified by the diversity of the facts to be regulated, by the need to be able to take decisions that are sufficiently adapted to the specific case, or by the adaptation of the rules to a constantly changing context. The degree of precision expected also varies depending on the multiplicity of situations to be regulated, the complexity or predictability of the decision to be taken in the particular case, the addressees of the norm, or the seriousness of the infringement of constitutional rights. It also depends on the assessment that can be made objectively when a specific case of application arises. Highly technical or complex areas can accommodate a lower level of regulatory density. The rules of law governing the administration of benefits are subject to lower regulatory density requirements than those governing the administration of restrictions. In the case of police measures implemented in response to threats that are difficult to predict and must be adapted to the specific circumstances of each case, it is inevitable that the legal basis will be less precise. Finally, low normative density can be compensated for by strengthening procedural safeguards or even by strengthening proportionality controls.

C. List of areas (para. 1, 2nd sentence *i.f.*)

Art. 164 para. 1, 2nd sentence *i.f.* of the Constitution lists areas whose fundamental provisions are always important. Legal scholars are critical of the principle of such a list, arguing that it misses the mark. Whether or not a rule of law belongs to one of these areas says nothing in itself about its importance or fundamental nature. On the one hand, these areas certainly include rules that are not important. On the other hand, it is doubtful that fundamental provisions in other areas are less important. Nevertheless, this list is not without interest, provided that it is placed in the context of the function of Art. 164 para. 1 of the Constitution. The list thus serves in particular to guide parliamentary debates and to create the conditions for a rational and transparent discussion of the powers of the federal authorities, both within the Federal Assembly and in public debate. The list acts as a safeguard, reminding the legislature of sensitive areas that require greater attention. The list of areas therefore effectively fulfills this function whenever reference is made in parliamentary debates to the various letters of Art. 164 para. 1, second sentence, of the Constitution. 25

With regard to the areas covered, the list includes areas in which the Federal Supreme Court has invalidated ordinances due to insufficient legal basis. It is not exhaustive, even though it already covers more or less the entire range of state activity. The various areas frequently overlap. Furthermore, the required level of regulation varies from one area to another. Art. 164 para. 1 2nd sentence *i.f.* Cst. mentions the **following areas**. 26

The exercise of political rights (let. a). Political rights consist of the forms of **participation by citizens** in the formation and expression of the will of the people (Art. 34 Cst.). These rights are defined by the Constitution itself, but must be put into practice. Political rights can only be exercised within a substantive, procedural, and institutional legal framework, such as the provisions defining the electoral district, the voting system for the National Council, political domicile, or electronic voting. 27

Restriction of constitutional rights (letter b). The concept of **constitutional rights** refers to constitutional provisions that protect citizens against state intervention or those that, although primarily pursuing a public interest, also protect private interests. The provision is therefore broader than just “fundamental rights.” . Similarly, the concept of “restriction” goes beyond that enshrined in Art. 36 para. 1 of the Constitution. This is all the more true given 28 that the majority of legal scholars, in our view wrongly, reduce the concept of "restriction" in Art. 36 para. 1 of the Constitution to fundamental freedoms, to the exclusion of social rights. The regime of Art. 36 Cst. should also apply to the latter, if not directly, then at least by analogy: social rights impose both positive and negative obligations on the State, which lend themselves to the dialectic of rights and restrictions in the same way as fundamental freedoms. For the purposes of applying Art. 164 para. 1 Cst., however, the practical scope of the controversy is limited, since letter c includes any right that does not fall under letter b.

29 *The rights and obligations of persons (letter c).* Letter c tends to merge with the definition of "rule of law" (supra N. 14) and largely overlaps with letters a, b, and d, which has given rise to some criticism. It is primarily a **subsidiary clause**. However, its scope is limited and the areas it covers are uncertain. Examples include rights and obligations under federal personnel law, social insurance law, nationality law, and even criminal law. Some also mention private law, which others criticize.

30 *Taxpayer status, the purpose of taxes, and the calculation of tax amounts (letter d)* . Letter d reflects the **principle of legality in tax matters**, which is also enshrined in Art. 127 of the Constitution. This principle is based on an important case law practice according to which the law must set out the essential rules concerning the circle of taxpayers (tax subject), the object (tax object) and the method of calculating the contribution (calculation basis and rate), as well as exemptions and exceptions or the purposes of causal fees. Letter d is not exhaustive. The regime also applies to causal fees and not only to taxes, even if it allows for certain reductions in such cases. However, it does not apply to administrative fees.

31 *The tasks and services of the Confederation (letter e).* The **tasks** of the Confederation are set out in the Constitution (Art. 3 and 42 para. 1 Cst.). In this context, the reservation of law refers to their definition and implementation. It includes the purpose, object, and scope of the Confederation's tasks, as well as the instruments and procedures used to implement them, or their delegation to a decentralized entity. The term "**services**" is used to confirm that the principle of legality applies not only to restrictive administration but also to service administration, even though its requirements are less stringent in view of the less incisive consequences of service administration.

The obligations of the cantons in the implementation and enforcement of federal law (letter f). Letter f refers to Article 46 of the Constitution, which requires the cantons to implement federal law in accordance with the Constitution and the law. By requiring that the cantons' implementation obligations be provided for by law, this provision enshrines a **federalist dimension** of the principle of legality. The concept of "implementation" encompasses any measure aimed at ensuring compliance with or application of federal law; therefore, the term "enforcement" is redundant. 32

The organization and procedure of federal authorities (letter g). The concept of "**federal authority**" includes any entity entrusted with a federal public task, whether legislative, executive, or judicial, centralized or decentralized, titular or delegated. The specific organizational requirements depend on the type of authority, but they include, in particular, legal status, autonomy, powers, supervision, the appointment of officials, incompatibilities, and issues of coordination and collaboration. The concept of "procedure" covers the adoption of any rule or decision that has legal effects, whether at the legislative, judicial, or administrative level. This includes federal procedural laws, certain specific areas such as public procurement, and procedures for the adoption of international law. While Art. 164 para. 1 let. e refers to federal authorities, the same requirements apply to procedures before cantonal authorities, as the list is not exhaustive. This is the case, for example, with a federal ordinance that submits a dispute to civil jurisdiction regardless of its public law nature, even if it involves cantonal courts. 33

III. LEGISLATIVE DELEGATION (PARA. 2)

A. Principle of legislative delegation

1. Concept

Art. 164 para. 2 Cst. enshrines and, at the same time, limits **legislative delegation**, i.e., any act by which the legislature (the Federal Assembly, with the possible participation of the people, *supra* N. 7 and N. 12) confers on another authority (or even another institution or person) the right or obligation to enact a rule of law that falls within its competence. The concept of delegation did not appear in the old Constitution, although it was already practiced and sanctioned by the Federal Supreme Court. Legislative delegation is a practical 34 measure, as it allows the legislature to set aside detailed or minor issues in order to focus on the important ones. Legislative delegation is justified when it is necessary for the flexibility and speed of government action, when it avoids the need for the law to regulate details, or when technical issues are likely to evolve. However, each legislative delegation affects the separation of powers and the democratic quality of the law. On the one hand, it allows the legislature to relinquish a power assigned to it by the Constitution to another body; on the other hand, it removes the adoption of rules of law from the participation of the people. This is why legislative delegation is subject to various conditions, which are examined below.

35 The rule of law adopted on the basis of legislative delegation takes the form of a so-called dependent substitute ordinance. In this constellation, the ordinance depends on a law that provides for legislative delegation and replaces it because it contains primary rules of law (*supra* N. 8). Legislative delegation only concerns the general legislative power of the Federal Assembly. It does not apply to cases where a federal authority adopts an ordinance on the basis of a power directly provided for by the Constitution, i.e., an original power (see Art. 84 para. 2, 182 para. 2, 184 para. 3 and 185 para. 3 Cst. for the Federal Council, Art. 159 para. 4 and 173 para. 1 let. c Cst. for the Federal Assembly and Art. 188 para. 3 Cst. for the Federal Supreme Court). In the latter case, the ordinance is said to be independent if it is based not on a federal law (and does not depend on it), but on the Constitution. That being said, certain original powers of the Federal Council may conflict with Art. 164 para. 1 Cst. because they sometimes lead to the adoption of important legal rules. This tension is examined below (*infra* N. 51 s.).

2. Subdelegation

36 The Constitution does not mention the issue of **sub-delegation**. Sub-delegation occurs when the delegatee in turn transfers the power delegated to it. Legal doctrine deduces from the silence of the Constitution that it does not exclude sub-delegation. Art. 48 LOGA governs this issue for the Federal Council. According to the first paragraph, the Federal Council may delegate to the **departments** the power to enact legal rules, but must then take into account "the scope of the proposed rule." Such a limitation is justified because subdelegation further weakens the link between citizens and the adoption of law. Furthermore, sub-delegation to a department affects the distribution of pow-

ers within the administration because it weakens the participation of other departments. Finally, the right of parliamentary committees to be consulted applies only to Federal Council ordinances (Art. 151 ParlA), excluding departmental ordinances. The message on the LOGA states that the attribution of the power to issue an ordinance to the Federal Council or to a department depends on the importance of the matter and that delegation is all the more justified when it concerns a technical provision. Similarly, the FOJ mentions the importance of the matter, the group of addressees, the consequences of the provision, and the technical nature of the subject matter. These criteria are reminiscent of the assessment of the importance of a provision within the meaning of Art. 164 para. 1 of the Constitution. However, the assessment of the degree of importance is independent of Art. 164 para. 1 of the Constitution, since provisions that are important within the meaning of that article cannot be delegated to the Federal Council. As for the Federal Supreme Court, it appears to limit sub-delegation based on Art. 48 para. 1 LOGA to implementation rules, which it equates with technical requirements, even though it adopts a broad definition of the concept of implementation.

While delegation to departments does not require a specific formal legal basis, 37 the same does not apply to delegation to **associations and offices**. Art. 48 para. 2 LOGA stipulates that the delegation of legislative powers to associations and offices is only permitted "if a federal law allows it ."

Art. 48 LOGA does not mention **second-degree subdelegation**, whereby 38 departments or offices and groups delegate powers to administrative entities subordinate to them. According to Sägesser, its constitutionality should be affirmed as long as it is not excluded by the (sub-)delegation clause. However, it is doubtful whether a department that has been delegated powers on the basis of Art. 48 LOGA can delegate them to an office without a formal legal basis, at the risk of circumventing Art. 48 para. 2 LOGA. For reasons of legal certainty, it would be advisable for the delegation clause to explicitly provide for the authorization or prohibition of sub-delegation.

3. Recipients

The Constitution does not mention the **possible recipients** of legislative del- 39 egation. These are primarily the Federal Council or the administration, but also the Federal Supreme Court or the Federal Assembly (when it adopts an ordinance, in accordance with Art. 163 para. 1 Cst., with the effect of removing the adoption of a rule of law from the optional referendum within the meaning of Art. 141 para. 1 of the Constitution). From a federalist perspective, Art. 164 para. 2 of the Constitution governs “horizontal” delegation, as opposed to “vertical” delegation; the former relates to relations between federal authorities, the latter to those between authorities at a different federal level.

40 Furthermore, the legislature may delegate the power to issue ordinances to **autonomous public law institutions**. This raises the question of the relevant conditions and, in particular, the normative density of the delegation clause. A case-by-case analysis, institution by institution, is necessary. According to the Federal Supreme Court, legislative delegation to FINMA is subject to strict conditions, as its Board of Directors is not elected by Parliament, unlike the Federal Council. The democratic legitimacy of FINMA's standards is therefore weaker. Consequently, the basis in a formal law must be all the more clear. In the absence of specific legal requirements, the delegation clause is limited to what is, within the framework of legal regulation, indispensable for the achievement of the legal objective, i.e., the minimum necessary. On the other hand, the Federal Supreme Court considers that the management of an ETH has considerable discretion with regard to the course system, examinations, and related requirements. The autonomy of the ETHs is explicitly guaranteed in Article 63a of the Constitution, in addition to deriving from the freedom of science (Article 20 of the Constitution). In short, the conditions for delegation to an autonomous public-law institution are flexible when it comes to access to an institution with a specific function; they are strict when the delegated rules have significant consequences for the rights of citizens.

41 The constitutionality of **legislative delegations to private** bodies or individuals is controversial. Art. 164 para. 2 of the Constitution must be contrasted with Art. 178 para. 3 of the Constitution. The latter explicitly provides for the delegation of public tasks incumbent on the administration to private bodies or individuals, whereas Art. 164 para. 2 Cst. does not mention it. Notwithstanding the absence of a constitutional basis, such legislative delegations to private entities are common in practice. While a legislative delegation to a private body may be explicit, it often results from a “**dynamic reference**.” The technique of referring to private standards is becoming increasingly important, particularly in technical fields. A legislative act includes a reference when it refers to regulations issued by a private body and thereby refrains from regulating the subject in question. The reference constitutes the link be-

tween the legislative act and the private standard. A reference is said to be static when it relates to existing rules and does not create or modify standards. A reference is said to be dynamic when it does not refer to a specific version of the private standard, so that the latter can evolve as the private body makes changes to it. A dynamic reference is equivalent to a legislative delegation. The classification of a reference is a matter of interpretation that is decided on a case-by-case basis. The constitutionality of static references is in principle accepted, since they involve the adoption of standards rather than delegation. On the other hand, dynamic references are subject to the conditions of legislative delegation and its controversies.

The **majority opinion** is that legislative delegation to private bodies or individuals is permissible insofar as it concerns secondary and technical rules. 42
The delegation of a rule of law that goes beyond simple enforcement is in principle excluded; on the other hand, rules that could be included in implementing ordinances may be delegated to private bodies by analogy with Art. 178 para. 3 of the Constitution. From a functional point of view, this would then be an administrative rather than a legislative exercise. On the other hand, some legal scholars, the Federal Council, and the FOJ completely rule out the constitutionality of legislative delegation to private bodies due to the lack of an explicit constitutional basis.

The **case law of the Federal Supreme Court** is somewhat inconsistent, but 43
seems more generous than the latter opinion. Initially, the Federal Supreme Court stated that delegation to a private body was subject to the requirement of a constitutional basis and compliance with the conditions relating to legislative delegation. Nevertheless, if the standards could be the subject of an implementing ordinance (primarily purely technical standards), this constituted a delegation of administrative tasks and Art. 178 para. 3 of the Constitution applied by analogy. Subsequently, however, the Federal Supreme Court ruled, without reference to its aforementioned decision, that a legislative delegation was subject to the conditions relating to legislative delegation within the meaning of Art. 164 para. 2 of the Constitution, namely a legal basis and not a constitutional one. In a subsequent ruling, the Federal Supreme Court explicitly restricted the scope of its initial ruling, stating that the reservations expressed with regard to dynamic referral were limited to the field of taxation; in other areas, delegation could take place without a constitutional basis. In a final ruling, the Federal Supreme Court reaffirmed that delegation to a private

body was to be analyzed from the perspective of Art. 178 para. 3 of the Constitution, without however indicating whether the latter applied directly or by analogy, nor addressing its relationship with Art. 164 para. 2 of the Constitution.

44 In our view, legislative delegation to private individuals should only be **permitted in a restrictive manner**. The text of Art. 164 of the Constitution and its interpretation in conjunction with Art. 178 para. 3 of the Constitution, as well as the preparatory work, rule this out. Furthermore, the ratio legis of Art. 164 Cst. lies in guaranteeing the democratic legitimacy of federal law and the separation of powers. The silence of the Constitution cannot justify a practice that undermines these foundations. The question of the application by analogy of Art. 178 para. 3 Cst. is another matter. Such delegation must be limited to implementing rules, and the interpretation of this concept must be restrictive. Thus, private standards can only clarify the will of the legislator without repealing or amending the law and without restricting the rights of citizens or subjecting them to any additional obligations, even if this is in line with the purpose of the law. In addition to strict application of the conditions relating to legislative delegation, delegation to a private body or individual must in all cases pursue a public interest and satisfy the requirements of the principle of proportionality (Article 5(2) of the Constitution). Furthermore, the accessibility of the standards must be guaranteed. Finally, it would be wise to subject the private body to minimal state supervision.

45 It must be noted that **federal law** includes delegations to private bodies whose constitutionality is questionable. This is the case, for example, with a delegation to “self-regulatory bodies” in the area of money laundering, whereby the latter "issue regulations [specifying] the due diligence obligations [...] for financial intermediaries affiliated with them and regulate the terms of application" (Art. 25 para. 1 and 2 AMLA). Thus, a “self-regulatory body” is an association recognized by FINMA, to which financial intermediaries not directly subject to its supervision may affiliate in order to meet their anti-money laundering obligations, and which issues rules of conduct in accordance with the AMLA, monitors compliance by its members, and has disciplinary power over them. Secondly, with regard to vocational training, the law stipulates that “the competent professional organizations shall define the conditions for admission, the required level, the qualification procedures, the certificates issued, and the titles awarded” (Art. 28 para. 2 LFPr). Such delegations go beyond

mere execution, as they affect the rights and obligations of individuals. They therefore require a constitutional basis, which is lacking in federal law.

B. Admissibility of legislative delegation

1. General conditions

Legislative delegation has important consequences in terms of democratic legitimacy and the separation of powers. That is why the Federal Supreme Court has imposed a series of **four cumulative** conditions on the practice: the delegation must (1) be set out in a formal law; (2) not be excluded by higher law; (3) be limited to a specific subject matter; and (4) contain the main points of the regulation, particularly when the legal situation of individuals is significantly affected. This case law concerns legislative delegations at the cantonal level, since Art. 190 of the Constitution prevents effective review of a delegation clause contained in a federal law, but is applicable mutatis mutandis at the federal level. Of these four conditions, Art. 164 para. 2 of the Constitution explicitly mentions only the first two. However, the framers of the Constitution did not intend this wording to depart from previous practice. The conciseness of Art. 164 para. 2 Cst. is explained rather by its genesis and its systematic nature. As mentioned above, the Federal Assembly explicitly abandoned the second sentence of the second paragraph proposed by the National Council, which provided that the delegation clause should set out the broad outlines (*supra* N. 5). It considered this addition to be superfluous in view of the first paragraph, which stipulates that the fundamental provisions of the areas referred to must be included in the law. Furthermore, in its final version, Art. 164 para. 2 of the Constitution refers to its first paragraph, which implicitly covers the two remaining conditions. In this respect, Art. 164 para. 2 of the Constitution already implicitly contains the last two conditions. 46

2. "Provided for in a federal law"

First, Art. 164 para. 2 Cst. requires that the delegation be **provided for** in a "**federal law**," i.e., a law in the formal sense. The purpose of this condition is to safeguard popular rights by allowing a referendum to be held (by reference to Art. 163 and 141 Cst.). If the people are unable to call a vote on the delegated regulation, they may vote on the principle of delegation. This is why the delegation rule must always be explicit. Implicit legislative delegation would also conflict with the requirements of legal certainty. Art. 141 para. 2 let. b 47

LParl also serves this function by requiring the Federal Council to state, in its message on a draft act, the powers that the draft proposes to delegate.

3. "Unless the Constitution excludes it"

48 Secondly, a delegation is permissible "**unless the Constitution excludes it**." With this wording, Art. 164 para. 2 Cst. refers to general or special legal reservations (*supra* N. 10). When the Constitution reserves the form of the law, it excludes delegations. In this respect, Art. 164 para. 2 Cst. refers first to its first paragraph. The reservation of the law in the formal sense enshrined in Art. 164 para. 1 Cst. thus constitutes a case of exclusion of legislative delegation. The articulation of the two paragraphs of Art. 164 Cst. raises certain difficulties of interpretation, but the majority opinion rightly considers that legislative delegation relating to important rules of law is inadmissible, a view corroborated by the case law of the Federal Supreme Court. Special reservations also constitute cases of sectoral exclusion of legislative delegation. This is the case for serious restrictions on fundamental rights (Art. 36 para. 1 Cst.) or deprivation of liberty (Art. 31 para. 1 Cst.) (*supra* N. 28).

4. Implicit conditions

49 By referring to its first paragraph, Art. 164 para. 2 Cst. excludes legislative delegations relating to fundamental provisions in the areas listed in letters a–g. It follows that Art. 164 para. 2 Cst. already implies the last two conditions developed by the Federal Supreme Court. These two conditions relate to the normative density of the law. They tend to prohibit delegations that give the delegatee "carte blanche." In other words, they ensure that fundamental provisions are adopted by the legislature. This is precisely the requirement set out in Art. 164 para. 1, second sentence, of the Constitution. By referring to the latter provision, Art. 164 para. 2 of the Constitution therefore covers the last two conditions developed by the Federal Supreme Court. Thirdly, the delegation must be **limited to a specific** matter. Delegations whose scope of application would be too broad are excluded. Finally, the law must set out the main rules in **broad terms**, namely the purpose, object, and scope of the delegated powers. In order to serve as a legal basis, the delegation provision must be sufficiently detailed; reference should be made to the case law cited above (*supra* N. 24). The legislature cannot relinquish a matter without defining, to a certain extent, the content of its regulation. In this regard, it is essential that the provisions of the delegated rule can be linked or related to its formal legal basis.

In other words, the law must clearly constitute the basis for any state act derived from it (*supra* N. 19).

C. Conflict with the original powers of the Federal Council

Art. 164 para. 2 of the Constitution deals with the delegation of powers provided for in a law. However, the Constitution does not specify the relationship between **original powers** – i.e., the provisions of the Constitution that empower (in particular) the Federal Council to adopt rules of law – and the reservation of law within the meaning of Art. 164 of the Constitution. When the Federal Council adopts legal rules on the basis of an original power, it is required to adopt important legal rules. This is primarily the case with Articles 184(3) and 185(3) of the Constitution, which grant the Federal Council legislative powers when the interests of the country so require, or in order to counter existing or imminent disturbances that seriously threaten public order, external security, or internal security. This emergency or necessity right seems set to gain in importance in view of the broad interpretation given to it by the Federal Council in the context of the recapitalization of UBS and the COVID-19 pandemic. However, it is accepted that these provisions are specific to (and therefore take precedence over) Art. 164 of the Constitution, particularly in view of the public interest at stake and the temporary nature of the measures. 50

Certain transitional provisions adopted in connection with popular initiatives require the Federal Council to issue provisional **“implementation” or “enforcement” ordinances** in the event of inaction by the Federal Assembly within a specified period (see, for example, Art. 197(9)(1) and (11)(2) of the Constitution). This mechanism serves to exert pressure on the Federal Assembly and ensure the effective implementation of the constitutional initiative. However, this creates a tension with Art. 164 of the Constitution, since the implementation of a popular initiative potentially leads to the adoption of important legal rules. This tension must be resolved by way of interpretation. In such a situation, the Constitution must be interpreted harmoniously, favoring the most respectful reading possible of the various provisions and ensuring “practical concordance.” The interpretation must take into account the overall constitutional context: the will of the initiators and the subsequent nature of a provision alone are not sufficient to establish a relationship of specificity. 51

52 Legal doctrine considers that such transitional provisions grant the Federal Council the power to adopt important rules of law and take precedence over Article 164 of the Constitution. According to Rausch, this primacy is justified by the temporary nature of the ordinances thus adopted. This approach is unconvincing, insofar as the democratic deficit of the ordinance is amplified by the prejudicial effect it has in practice: for reasons of legal certainty, the federal law is likely to incorporate all or part of the ordinance. Furthermore, the temporary nature of a rule of law does not necessarily diminish its importance. This is why the Constitution limits the Federal Council's ability to adopt important rules of law on a temporary basis to emergency situations and those that serve a particular public interest (Art. 184 para. 3 and 185 para. 3 of the Constitution). Wyss considers that Art. 164 para. 1 must give way because the transitional provisions would be meaningless if they did not allow the Federal Council to adopt important legal rules. In practice, the Federal Council would be unable to fulfill its mandate. In our view, however, this position gives too much weight to the will of the initiators and the subsequent nature of the transitional provisions, to the detriment of the faithful expression of the will of the people.

53 An initiative that allows the Federal Council to adopt important legal norms always has two objectives: one relates to the substance of the initiative, the other modifies the constitutional architecture of the separation of powers. The Constitution provides that important legal rules are adopted by the Federal Assembly; it subjects federal laws to referendum; it states that laws, unlike ordinances, are not subject to constitutional review; as for any pressure exerted on the Federal Assembly, this is the responsibility of the people through elections. To consider that the Federal Council can adopt important legal rules by means of ordinances is to undermine the entire **constitutional balance**. It cannot therefore be assumed that the constituent assembly intends to depart from this constitutional structure when deciding on the substance of a popular initiative, unless the constituent assembly expresses itself unambiguously in this regard. This is all the more true given that the messages relating to these initiatives do not mention the relationship between the transitional provisions and Article 164 of the Constitution. This omission can be contrasted with Art. 141 para. 2 let. b LParl, which, as indicated above, requires the Federal Council to clarify any legislative delegation in its message relating to a bill. This obligation exists even though important rules of law cannot be delegated in any case (*supra* N. 15). This is not to say that such initiatives should be

invalidated on the grounds of a violation of the principle of unity of subject matter – which is unlikely given the practice of the authorities – but rather to suggest that the **principle of unity of subject matter** should guide the interpretation of constitutional provisions because it guarantees the faithful expression of the will of the people. Thus, in the absence of an unequivocal expression of a contrary will – which should be based in particular on a clear text and an explicit message to that effect – the transitional provisions must be interpreted in such a way that they do not alter the constitutional architecture. The legislative mandates granted to the Federal Council by such transitional provisions confer the power to adopt substitute ordinances, but not important rules of law.

IV. JUSTICIABILITY

The 54
question of the justiciability of an ordinance arises primarily in relation to **ordinances of the Federal Council**. While abstract review is excluded (Art. 189 para. 4 Cst.), the Federal Supreme Court may review Federal Council ordinances in the context of a preliminary review. The review of an ordinance therefore only takes place in the context of an individual and concrete act of application. A citizen may invoke a violation of the separation of powers when an ordinance lacks sufficient legal basis or contains provisions that should be included in a law. In such cases, the Federal Supreme Court refuses to apply the ordinance and annuls the decision based on it. It is then up to the Federal Council to amend or repeal its ordinance.

The Federal Supreme Court may freely review the Federal Council's **independent ordinances**. 55 These are based on the Constitution, but this does not exempt the Federal Council from complying with federal law, in particular the Constitution and federal statutes. It is for the Federal Supreme Court to ensure that the independent ordinance does not conflict with other constitutional norms, unless the constitutional norm conferring powers itself provides for or accepts such infringements. That being said, the Federal Supreme Court does not encroach on the political discretion that belongs to the Federal Council within the scope of its original powers.

The situation is more complex, however, when it comes to a **dependent ordinance**, 56 which is based on a law. The review of a legislative delegation is analyzed differently depending on whether the subject of the review is the law on which it is based or the ordinance itself. Under federal law, the Federal Supreme Court is required to apply **a law that provides for legislative delegation** under Article 190 of the Constitution, even if it violates the above-mentioned conditions (Anwendungsgebot). However, the obligation to apply federal law does not prevent it from reviewing compliance with those conditions (kein Prüfungsverbot). On the other hand, the Federal Supreme Court may review both the legality and constitutionality of **dependent substitute ordinances** on a preliminary basis. The Federal Supreme Court first examines the conformity of the ordinance with the law on which it is based, i.e., whether the delegated authority has remained within the limits of the powers conferred upon it. When an ordinance complies with the law, the Federal Supreme Court then checks its compliance with the Constitution, provided, however, that the legislative delegation authorizes the delegate to derogate from it. Insofar as a delegation clause gives discretionary power to the Federal Council, this clause is binding on the Federal Supreme Court pursuant to Art. 190 of the Constitution. In such a case, the Federal Supreme Court must limit itself to examining whether the provisions in question clearly exceed the scope of the delegation of powers granted by the legislature to the executive authority or whether, for other reasons, they are contrary to the law or the Constitution; it is not empowered to substitute its own assessment for that of the Federal Council. The review of the constitutionality of an ordinance is therefore indistinguishable from the review of arbitrariness and equal treatment.

57 Finally, the constitutionality and legality of an ordinance adopted on the basis of a **subdelegation** are assessed according to the principles applicable to a Federal Council ordinance based on a delegation of law.

V. CONCLUSION

58 Art. 164 Cst. is a pivotal provision of Swiss constitutional law, in that it articulates the requirements of democracy and the separation of powers with the need for flexible and effective state action. While the pursuit of efficiency, promoted in particular by New Public Management, tends to prevail today, Art. 164 Cst. must continue to preserve the "dignity of the law" and the democratic principles on which it is based. The tension inherent in Art. 164 of the Constitution continues to remind us of this. For example, the initiative "for direct democracy and the competitiveness of our country – against Switzerland

becoming a passive member of the EU (Compass Initiative)", submitted to the Federal Chancellery in August 2025, proposes introducing a new paragraph 3 to Art. 164 of the Constitution, according to which "the adoption of important provisions laying down rules of law must be expressly provided for in a federal law or in an international treaty subject to a mandatory referendum and restricted to a narrowly defined area." It also provides for an amendment to Art. 140 para. 1 of the Constitution, submitting "to the vote of the people and the cantons [...] international treaties that provide for the adoption of important provisions establishing rules of law." However, as we have seen, the Constitution already subjects international treaties to an optional referendum when they contain important provisions establishing rules of law (Article 141(1)(d) of the Constitution). Furthermore, neither Art. 164 nor Art. 140 of the Constitution provides for a double majority of the people and the cantons for the adoption of laws establishing important rules of law – nor, for that matter, for a mandatory referendum. One may therefore question the appropriateness of establishing stricter requirements for international treaties than for federal law: such asymmetry may reflect less a concern for democracy than a fundamental reluctance to accept international law (or, in particular, European law). Democratic legitimacy must be preserved, not exploited.

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COMMENTARY ON

Art. 166 FC

A commentary by Jelena Protic

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Art. 166 Foreign relations and international treaties

[1] The Federal Assembly shall participate in shaping foreign policy and supervise the maintenance of foreign relations.

[2] It shall approve international treaties, with the exception of those that are concluded by the Federal Council under a statutory provision or an international treaty.

CONTENT

I. BACKGROUND

The Federal Constitution of 1848 already enshrined in Article 74, para. 5 the competence of the Federal Assembly to approve alliances and treaties with foreign states. Despite the absence of a general provision on the involvement of the Federal Assembly in foreign affairs in the Constitution of 1874 and the dominant role of the Federal Council in practice between the end of the 19th century and the end of the 20th century, the executive did not have exclusive competence in this area. 1

The current Art. 166 FC was the subject of heated debate during the last total revision of the Federal Constitution. Following criticism during the consultation procedure, the Federal Council proposed a new Article 156 FC in its 1996 draft. The first paragraph of the new article expressly stated that the Federal Assembly had the power to exert considerable influence on foreign policy, providing that "the Federal Assembly shall participate in the formulation of foreign policy and shall supervise foreign relations". Paragraph 2 reaffirmed the Federal Assembly's competence to approve treaties, except in cases where the Federal Council was empowered to conclude them alone on the basis of the Constitution, a law or an international treaty. In 1997, the two constitutional review commissions proposed a more direct formulation of the general competence ("the Federal Assembly shall determine the fundamental orientations of foreign policy"), which the Federal Council opposed. In addition, both commissions considered that international treaties that fall solely within the competence of the Federal Council and therefore do not require approval by the Federal Assembly should be defined in law. 2

After intensive discussions, the Federal Council's proposal was adopted with regard to the current paragraph 1 of Article 166 FC. Thus, a general and explicit provision on the involvement of the Federal Assembly in foreign policy matters was adopted, without however granting the Federal Assembly the power to set guidelines in this area in a binding manner. With regard to para. 2, the proposal that the Constitution could give the Federal Council the power to conclude certain international treaties on its own was quickly rejected and the committees' proposal was accepted. 3

II. SYSTEMATIC AND CONTEXT

4 Article 166 FC is part of the general theme of the competences of the Federal Assembly (Title 5, Section 3, Chapter 3 FC) and deals specifically with the separation of powers in the area of foreign policy. Article 166 FC is closely linked to Article 184 FC, which states that "the Federal Council shall be responsible for foreign affairs subject to the rights of participation of the Federal Assembly" as defined in Article 166 FC. This intrinsic link between the two provisions demonstrates the intertwining of the competences of the legislative and executive branches in this area. Furthermore, the inclusion of shared competences and intensive cooperation between the Federal Council and the Federal Assembly in the field of foreign policy in the 1999 Constitution marks an important step in the general trend towards the erosion of the executive's monopoly in foreign relations.

5 At the root of this intertwining of competences are two major challenges facing the federal authorities in charge of foreign affairs. On the one hand, the internationalisation of politics and law, which has gained in intensity especially since the second half of the 20th century, and the effects that international norms have directly on the public and on national law, have highlighted an increased need for democratic legitimacy in the international sphere. On the other hand, the Federal Council needs to be able to maintain a margin of manoeuvre and a degree of flexibility and efficiency in the conduct of foreign policy, needs that can be undermined by the often time-consuming processes of parliamentary involvement. This tension is particularly delicate for a globalised state like Switzerland, whose "constitutional DNA" includes democratic participation in law-making.

III. ART. 166: FOREIGN RELATIONS AND INTERNATIONAL TREATIES

6 Art. 166 FC concerns the horizontal division of competences in the field of foreign affairs between the Federal Council and the Federal Assembly.

A. Participation in the definition of foreign policy and supervision of foreign relations (paragraph 1)

While the Federal Council is "responsible for foreign affairs" (Art. 184 para. 1 FC), the Federal Assembly has certain rights of participation under Art. 166 and 184 para. 1 FC. The doctrine considers that the Federal Council and the Federal Assembly have concurrent powers in foreign affairs. The Federal Council's message on a new Federal Constitution of 20 November 1996 notes a parallelism and overlap in the respective competences of the executive and the legislature which "encourage [...] the two powers to combine their efforts" and that they act like "the fingers of a single hand" in the field of foreign policy. The federal legislature thus has a strong position in foreign policy that is unique in international comparison. According to Article 166 paragraph 1 FC, the Federal Assembly "participates in the definition of foreign policy" (inter alia by approving international treaties, paragraph 2) and "supervises foreign relations". 7

1. Participation in the definition of foreign policy

a. Terminology

"Participation" in the definition

"Participation" means taking part in something, in an action, in this case in the definition of foreign policy. Article 166 paragraph 1 FC thus establishes a right and an obligation for the Federal Assembly to participate. Ehrenzeller refers to this as a "co-responsible decision-maker" ("mitverantwortlicher Entscheidungsträger"). 8

The current wording goes further than the 1995 draft ("it can contribute to the orientation of foreign policy"), but less than the proposal of the two commissions in 1997 that "the Federal Assembly determines the fundamental orientations of foreign policy". We conclude from this that the Federal Assembly cannot set binding goals in the field of international policy. However, in June 2021, the EPC of the National Council requested in a parliamentary initiative that 'the Federal Council should clarify the institutional rules for the continuation and facilitation of relations with the European Union within the framework of the structured political dialogue with the European Union, in such a way as to safeguard Switzerland's interests' and that 'the main lines of the dia- 9 logue as well as the role of parliament and the cantons and their involvement in the process should be defined in a federal law'. In Baumbacher's view, such a law would not be compatible with the division of competences established by the Constitution. In our opinion, it would be justified for the Federal Assembly to legally define the strategic orientations and guidelines of European policy. However, an obligation to enter into negotiations and the impossibility for the Federal Council to break off negotiations, as proposed in the initiative, would go beyond the participation of Art. 166 para. 1 FC and would thus infringe the prerogative of the executive. The Federal Court has expressly held that the Federal Assembly cannot oblige the Federal Council to undertake certain foreign policy measures under Art. 166 para. 1 FC and that it is the sole competence of the Federal Council to refrain from further negotiations.

10 By "participating" in the sense of Art. 166 para. 1 FC, the Federal Assembly must not merely legitimise the action of the Federal Council in the area of foreign policy, but must act proactively on its own initiative and in accordance with the procedures in force.

"Definition" of "foreign policy"

11 The concept of "foreign policy" should be understood broadly, in the sense that it includes all activities carried out in the context of Switzerland's external affairs. In general, it is considered that the notion of "foreign policy" is narrower than the notion of "foreign affairs". However, these terminological distinctions have little practical significance.

12 The Federal Assembly "participates in the definition", "sich an der Gestaltung beteiligen", "participa all'elaborazione" of foreign policy. The French version simply speaks of "definition", while the German version uses the term "Gestaltung" and the Italian version "elaborazione". It can be deduced from this that the Federal Assembly must participate in the shaping, the elaboration of foreign policy, i.e. in its formation and its mature preparation. The Federal Assembly must therefore be associated with the formation of political will on fundamental issues and be involved in the taking of important decisions and thus have the possibility of exercising an effective influence on the orientation of Swiss foreign policy. The operational aspects of the conduct of this policy, in particular its implementation, are the responsibility of the Federal Council alone.

Article 24 of the Federal Act defines the concept of "foreign policy definition". According to paragraph 1, "the Federal Assembly [...] shall participate in the decision-making process on important foreign policy issues". The doctrine considers that the notion of "important issues" is of a material and non-formal nature, in the sense that formal criteria such as the form or nature of a foreign policy act are not decisive and that it must be assessed on a case-by-case basis taking into account all the circumstances. 13

In conclusion, the Federal Council is obliged to involve the Federal Assembly before taking decisions on "important issues" in the field of foreign policy. However, this involvement also entails a responsibility for the Federal Assembly to "follow international developments" in accordance with Art. 24 para. 1 of the Federal Act and to take positions and initiatives in this regard. 14

b. Actors of participation

Art. 166 FC includes the participation of the plenum and the parliamentary committees. The most relevant committees are the two foreign policy committees (FPC), but other thematic committees also participate depending on the area concerned. The FPCs act as a link between the Federal Council and the Federal Assembly thanks to the specific rights granted to them under Article 152 of the Federal Law on Parliament. 15

c. Forms of participation

The Federal Assembly performs the tasks defined in Art. 166 FC and Art. 24 para. 1 FL (i.e. monitoring international developments and participating in the decision-making process on important foreign policy issues) mainly in four forms: exchange of views, right to information, right to consultation and parliamentary foreign relations. 16

Exchange of views and right to information

According to Art. 152 para. 1 of the Federal Act, "the committees responsible for foreign policy and the Federal Council shall maintain mutual contacts and regularly exchange views". 17

Para. 2 of the same article requires the Federal Council to inform the Presidential Colleges of Councils and the FPC regularly, promptly and comprehensively of important developments in this area, whether these concern Switzerland's foreign policy alone or have implications for its domestic policy. 18

Ehrenzeller considers that in order to ensure effective participation of the Federal Assembly, it is the responsibility of the FPC and not the Federal Council to sort out important and less important developments. Furthermore, the general information rights of the Federal Assembly under Art. 150 para. 1 letters a to c of the Federal Act and their limitations under para. 2 letters a and b also apply to foreign policy.

Right of consultation

19 Article 152 paragraph 3 of the Federal Act establishes an obligation to consult the FPC on the main foreign policy guidelines, on planned changes to the Swiss diplomatic and consular network abroad, and on directives or guidelines concerning the adoption or amendment of a mandate for important international negotiations to be issued by the Federal Council. The Federal Council is also obliged to inform the FPC about the progress of work in view of the guidelines and negotiations. The broad formulation of important international negotiations includes not only negotiations within international organisations, but also all bilateral and multilateral negotiations. The notion of major policy is even broader and also includes soft law. This concept was clarified by Art. 5b OLOGA, which entered into force on 1 August 2016. Main orientations" and "important international negotiations" are indeterminate legal concepts and should therefore not be defined in the abstract, but assessed on a case-by-case basis by the committees and the Federal Council. In the event of a conflict between the Federal Council and the FPC on such an assessment, the FPC may at any time request consultation with the Federal Council on the basis of Art. 152 para. 5 of the Federal Act.

20 On the one hand, a lack of sufficient information and consultation of the FPCs, and of course of the Federal Assembly as a whole, has been alleged on several occasions by the members concerned. For example, numerous parliamentary interventions have criticised the Federal Council for not having sufficiently involved Parliament in the elaboration of international soft law instruments and led to the introduction of the above-mentioned Art. 5b OLOGA. Nevertheless, other parliamentary interventions on the same issue were tabled in the course of 2018, focusing particularly on the UN Pact on Migration. In our opinion, these various challenges were not only motivated by the legal nature of the instrument, but also and above all by the political significance of its content.

On the other hand, the EPC of the Council of States refrained from expressing an opinion when the Federal Council consulted it during the final stage of negotiations on the institutional framework agreement between Switzerland and the European Union in April 2021. Both EPCs were consulted on the Federal Council's assessment that the conditions for continuing the negotiations or signing the agreement were not met for Switzerland. The EPC of the Council of States took the view that it was solely up to the Federal Council to decide whether to interrupt, suspend or continue the negotiations on the basis of the constitutional division of powers. The EPC of the National Council, on the other hand, took a position and demanded that the negotiations be continued with the rapid adoption of a message to parliament. 21

Parliamentary external relations

Article 24 paragraph 4 of the Federal Act states that the Federal Assembly "shall participate in the work of international parliamentary assemblies and shall maintain regular relations with foreign parliaments". Foreign parliamentary relations are dealt with in Art. 60 PA and in the Ordinance of the Federal Assembly on the International Relations of Parliament (ORInt). The aim of this form of participation is not only to have an effect on the outside world of the Federal Assembly, but also to enable it to be more effectively involved in the internal decision-making process. The Federal Assembly can thus present itself to the Federal Council as more informed and competent thanks to the individual international experiences of its members. Today, the members of the Federal Assembly participate in the work of the Inter-Parliamentary Union and in the parliamentary assemblies of international organisations such as the Council of Europe, the OSCE, EFTA, NATO and the International Organisation of the Francophonie (Art. 1 and 2 ORInt). Art. 60 of the Federal Law on Parliament provides for the creation of parliamentary delegations to maintain bilateral relations with foreign parliaments. At present, such permanent delegations exist for relations with the parliaments of all neighbouring states (Art. 4 ORInt). These various contacts contribute, on the one hand, to the democratisation of international organisations and, on the other hand, to the legitimacy of foreign policy by enabling a more effective exercise of the participation mandate of the Federal Assembly under Article 166 FC. 22

d. Instruments of participation

23 The range of instruments through which the Federal Assembly participates in the definition of foreign policy is broad. The first instrument available is the federal law (Art. 164 FC). However, it is not used much because of the often unpredictable nature of foreign policy, which creates a need for rapid action. Federal decrees, simple federal decrees, decisions of principle and plans (Art. 28 LParl) are more suitable instruments for "one-off acts relating to the conduct of the state, for activities limited in time, for important procedural acts or for provisional decisions". In addition, the Federal Assembly can make use of various parliamentary interventions (Art. 118 LParl) and budgetary decisions. Finally, the rights of participation, in particular the right to information, are given concrete form in various reports: the Federal Council's reports on the foreign policy strategy for each legislature (Art. 148 para. 3^{bis} LParl), the Federal Council's ordinary annual reports on Switzerland's foreign policy activities (Art. 148 para. 3 LParl), the quarterly lists informing the EPC of foreign and European policy activities and the Economic and Fiscal Affairs Committees of foreign financial policy activities, as well as other specific or thematic reports.

e. Effects of participation

24 Article 166 paragraph 1 FC gives the Federal Council the right and duty to take note of the various opinions of the Federal Assembly and to examine them in depth. Schmid speaks of an obligation on the part of the Federal Council to 'reflect sincerely on the content of the positions taken by the Federal Assembly and its committees'. Without such consideration, the participation rights of the Federal Assembly would not be respected. However, the Federal Council is not obliged to follow the views of the Federal Assembly; it may deviate from them if it has duly and concretely weighed up the interests at stake and if the circumstances so require, but must then justify the direction of its foreign policy actions.

2. Monitoring of foreign relations

25 According to Article 166 paragraph 1 FC, the Federal Assembly shall supervise foreign relations. In view of the systemic nature of this paragraph, a close link between supervision and participation can be deduced. The explicit mention of supervision in this paragraph shows that the role of the Federal Assembly is

not limited to a political control a posteriori, but is an aspect of the general competence of participation, namely a proactive participation of the Federal Assembly.

Beaufsichtigung does not only refer to the way the Federal Council handles foreign affairs, which is already subject to the supreme supervision of the Federal Assembly (Art. 169 FC), but also to Switzerland's relations with foreign countries in general, including the activities of the various public actors in this area, including those of the cantons (Art. 56 FC) and its own foreign policy (Art. 24 para. 4 FL). We agree with Aubert that the word "ensure" would have been more appropriate, in that the Federal Assembly must "ensure" that foreign relations are "as good as possible" overall. Its role is not limited to passive observation, in the sense that it must "look after" these relations when it acts itself. In addition, the Federal Assembly ensures that it is effectively involved in the definition of foreign policy. 26

B. Approval of international treaties (paragraph 2)

Art. 166 para. 2 FC provides for a particularly extensive right of participation of the Federal Assembly in foreign affairs. In principle, the Federal Assembly is responsible for approving international treaties prior to their ratification by the Federal Council. This role of the legislature in approving "hard" international law is similar to the main function of the legislative body, namely lawmaking. An exception to the above principle concerns treaties the conclusion of which is the sole responsibility of the Federal Council by virtue of a law or an international treaty. 27

1. General

The material scope of application of Art. 166 para. 2 FC is limited to international treaties. A treaty is an international agreement between two or more subjects of public international law (states and international organisations) by which they express their concurring wills and thereby create, for their benefit or at their expense, rights or obligations governed by international law. According to the majority doctrine, Art. 166 para. 2 FC applies only to international treaties in the narrow sense and not to decisions of international organisations or to flexible law. However, it should be mentioned that some international instruments that do not correspond to this definition of an international treaty have already been submitted to the Federal Assembly for ap- 28 proval, for example the UN Global Compact on Migration, which is an instrument of soft law.

29 In contrast to signature, ratification and denunciation, approval is the expression of explicit consent through an act of national law rendered within the framework of the internal decision-making procedure. From a legal point of view, approval is not a mandate, but a mere authorisation for ratification. This means that the Federal Council may not ratify a treaty despite prior approval by the Federal Assembly. However, there are dogmatic differences in the doctrine. Schmid considers that the approval contains an authorisation for the Federal Council to ratify, but that under Art. 184 para. 1 FC, the Federal Council can waive this authorisation, particularly in the event of a major change in the factual situation. Epiney, on the other hand, considers that approval constitutes an obligation to ratify, but that exceptions are possible in the event of a substantial change in circumstances.

30 The question of parliamentary participation in the conclusion, amendment and termination of international treaties is part of one of the central issues in constitutional law in recent years, namely how to make international law more democratically legitimate and how to better involve the legislature. In 2019, this debate led to the adoption of the new Federal Act on the Competence to Conclude, Amend and Denounce International Treaties, which is discussed in point 4 of this section.

2. Approval by the Federal Assembly (so-called ordinary procedure)

31 Approval takes place between the time of signature and the ratification of the treaty by the Federal Council. It takes the form of a federal decree subject to a mandatory referendum if the treaty concerns Switzerland's membership of a collective security organisation or a supranational community (Art. 140 para. 1 let. b FC), or of a federal decree subject to a mandatory referendum if the treaty concerns Switzerland's membership of a supranational community.), or a federal decree subject to an optional referendum if the treaty is of indefinite duration and cannot be terminated, provides for membership of an international organisation, contains important provisions establishing rules of law (Art. 22 para. 4 LParl) or if its implementation requires the adoption of federal laws (Art. 141 para. 1 let. d FC). In all other cases, it is a simple federal decree (Art. 24 para. 3 PESA).

On 6 December 2021, the National Council rejected a draft revision of the Constitution aimed at extending the mandatory referendum to international treaties containing provisions of constitutional rank or whose implementation requires an amendment to the Constitution. This case of application of the compulsory referendum was already part of unwritten constitutional law according to a widely held interpretation. The draft revision was proposed following the adoption of motion 15.3557 Caroni by Parliament, which in turn referred to the report drawn up in execution of postulate 13.3805 in which the Federal Council supported the idea of a mandatory referendum for international treaties of a constitutional nature. According to National Councillor Caroni, the inclusion of this popular right in the Constitution did not create a new case for the application of the mandatory referendum, but simply introduced already existing unwritten constitutional law in order to guarantee clarity and legal certainty. However, it cannot be excluded that the motion 15.3557 Caroni and the draft were also motivated by the absence of a referendum before the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 in 1974 and the numerous developments that this has brought about in Swiss law. In 2018, Schmid considered that the change to the mandatory referendum was not an adequate solution to the general unease about the normative intertwining between Swiss national and international law. She also considered that the new wording of Art. 140 FC as proposed by the Federal Council would have posed a number of interpretation problems as well as a risk of introducing a mandatory referendum for all treaties dealing with fundamental rights. 32

Depending on the parliamentary debates in both chambers, the Federal Assembly can either accept or reject the treaty, i.e. either grant or reject approval in the final vote. The latter must cover the entire treaty and be unconditional. Insofar as reservations are permitted by the treaty and by the general rules of international law (Art. 19 VCLT), the Federal Assembly may approve a treaty provided that a reservation is made upon ratification by the Federal Council. 33

Article 141a FC provides that decrees approving an international treaty subject to a mandatory or optional referendum may also contain constitutional or legislative amendments related to the implementation of the treaty. It is controversial whether the Federal Assembly can include other elements ("enrichments") than the approval itself, such as modalities of application or interpre- 34 tation of the treaty, in a simple decree. In this respect, Epiney takes the view that, due to Swiss monism, treaties also become binding in domestic law as soon as they enter into force at the international level and that such interpretative declarations would not be binding on the courts. Schmid, on the other hand, considers that art. 166 para. 2 FC refers only to the approval of international treaties and not to the modalities of their application or interpretation.

35 The effect of the approval of an international treaty by the Federal Assembly is not an obligation of the Federal Council. According to Art. 184 para. 2 FC, it is up to the Federal Council to subsequently ratify or not to ratify the treaty, while giving reasons for its choice. Furthermore, the Federal Assembly cannot oblige the Federal Council to ratify (or not to ratify) a treaty by means of a motion, postulate or initiative even when the approval decree has been validly adopted, due to the purely enabling nature of the latter and the limits of the effects of these instruments. At the international level, non-compliance with a provision of domestic law concerning the competence to conclude a treaty such as Art. 166 para. 2 FC does not invalidate the ratification, unless "the violation was manifest and concerned a rule of domestic law of fundamental importance" (Art. 46 VCLT).

36 According to Art. 7b LOGA, the Federal Council may decide to apply a treaty whose approval falls within the competence of the Federal Assembly on a provisional basis without the latter if "the safeguarding of essential interests of Switzerland and a particular urgency require it" (para. 1) and if the competent committees of the two councils do not oppose it (para. 1^{bis}). Lammers, Schenker and Schmid speak of a real veto right of the parliamentary committees. The Federal Council must submit a draft approval decree to Parliament within six months, failing which provisional application will cease (paragraph 2).

3. Conclusion by the Federal Council alone (simplified procedure)

37 Article 166 paragraph 2 FC authorises the Federal Council to conclude international treaties without the approval of the Federal Assembly in two cases: if this is provided for by a federal law or an international treaty (delegation clause, art. 7a paragraph 1 LOGA), or if the international treaty is of minor importance (art. 7a paragraph 2 LOGA). Thanks to this competence to conclude treaties, the Federal Council can independently commit Switzerland at the in-

ternational level. Although the simplified procedure is the exception to the principle, in practice it represents the majority of cases.

Art. 166, para. 2 FC reflects the principle that important provisions at federal level are enacted by the Federal Assembly (Art. 164 FC) and aims to ensure the democratic legitimacy of treaties concluded by the Federal Council alone by requiring that the Federal Council's own competence is based on a treaty or a federal law that the Federal Assembly has already approved or adopted respectively. 38

The first (and most common) case of the simplified procedure is specified in Art. 7a para. 1 LOGA. Many international treaties and special laws contain delegation clauses that allow the Federal Council to conclude a treaty on its own. These clauses must not grant a general authorisation to the Federal Council to conclude international treaties on its own and must therefore be sufficiently delimited and precise. 39

The Federal Council may also conclude minor international treaties on its own in accordance with Art. 7a para. 2 LOGA. In Schmid's view, this paragraph constitutes a general clause that is subsidiary to paragraph 1, in that it does not require the Federal Council to conclude international treaties. 1, in that it establishes the autonomous competence of the Federal Council in the absence of a special legal basis. Para. 3 of this article lists, in a non-exhaustive manner, the treaties that may be qualified as minor in scope (positive definition, letters a to c). Para. 4 also contains an exemplary list of cases in which minor scope is excluded (negative definition, letters a to c). However, the Federal Council remains free to submit such treaties to the Federal Assembly. 40

The competence to conclude international treaties may be delegated by the Federal Assembly to the Federal Council (Art. 7a para. 1 LOGA), but also to subordinate administrative units. The Federal Council may also delegate its competence to conclude treaties solely to a department (Art. 48a para. 1 lett. 1 LOGA), to a grouping or to an office in the case of an express legal basis or a treaty of minor importance (Art. 48a para. 1 lett. 2 LOGA). 41

4. Amendment and denunciation

The new Federal Act on the Competence to Conclude, Amend and Denounce International Treaties entered into force on 2 December 2019. In the legal literature, the question has been raised whether the concept of 'approval' within 42 the meaning of Art. 166 para. 2 FC already includes denunciation and whether a constitutional amendment would otherwise have been necessary.

43 The core of this legislative amendment is to be found in Art. 24 para. 2 LParl, according to which the Federal Assembly 'shall approve the conclusion, amendment or denunciation of international treaties insofar as the Federal Council is not authorised to conclude, amend or denounce them on its own under Art. 7a and 7b^{bis} LOGA'. According to the principle of the contrary act, there are parallel competences for the conclusion and modification or denunciation of international treaties. This is an important clarification of the legal situation at the level of the law, as the Federal Council previously considered the denunciation of treaties to be within its exclusive competence under the Constitution. Since a considerable proportion of international treaties are the basis for individual rights and obligations, it was crucial that amendment and denunciation be given sufficient democratic legitimacy. A shift in the distribution of competences in favour of Parliament, which follows the current trend towards greater involvement of Parliament in foreign policy, was clearly formulated. Thus, the amendment or denunciation must, in principle, be approved by the Federal Assembly with a potential submission to a referendum according to the constitutional criteria relevant to the conclusion which apply by analogy. The approval of the denunciation or amendment thus constitutes an authorisation for the Federal Council to execute the act under international law. The question of whether the approval of the Federal Assembly is required must be re-examined for each amendment or denunciation according to its material importance, even if this amendment is provided for in the basic text (parallelism of powers according to the importance of the content or material parallelism). According to Art. 24 para. 2 of the Federal Act, the Federal Council may therefore autonomously amend or terminate a treaty according to the criteria of Art. 7a para. 1 and 7b para. 1bis and 2 of the Federal Act on the Law of Treaties. It should be emphasised that Art. 7a para. 1bis LOGA provides for a case of autonomous denunciation by the Federal Council that is not parallel to the cases of conclusion or modification, in that the Federal Council may also denounce international treaties when "the Constitution prescribes their denunciation", for example in the event of the acceptance of a popular initiative.

44 The new Art. 7b^{bis} LOGA provides for the case of urgent denunciation. The Federal Council may denounce a treaty without the approval of the Federal

Assembly, even if such approval is in principle required, if "the safeguarding of essential interests of Switzerland and a particular urgency require it" (para. 1) and if none of the competent parliamentary committees objects (Art. 7b^{bis} LOGA, Art. 152 para. 3bis LParl). The competent committees thus have a right of veto. This procedure allows the Federal Council to act quickly and to denounce an international treaty definitively.

Article 166 paragraph 2 FC does not give the Federal Assembly the power to force the Federal Council to terminate a treaty. However, the Federal Assembly may request the Federal Council to denounce a treaty by means of its general powers under Art. 166 para. 1 FC, such as a motion, without the Federal Council being obliged to act on it. In our view, the Federal Assembly should not force the Federal Council to terminate existing treaties or prohibit it from breaking off negotiations by means of a possible new Federal Act on the continuation and facilitation of relations between the Swiss Confederation and the European Union, in view of the principle of the contrary act and the case law of the Federal Court. 45

5. Annual report

Art. 48a para. 2 LOGA requires the Federal Council to report annually to the Federal Assembly on the treaties concluded, amended and terminated by itself, its departments, groups or offices. A special section for international treaties in the Directorate of Public International Law of the FDFA coordinates the submission of the annual report to the Federal Assembly. As a result, the Federal Assembly has a right of review over the agreements concluded by the Federal Council. This control procedure enables it to verify whether each treaty concluded falls within the sole competence of the Federal Council, particularly if it is a treaty of minor importance. In the event of disagreement, the Federal Assembly may request a posteriori approval by means of a motion. In this case, the treaty remains in force during the parliamentary procedure and must be denounced as soon as possible if it is rejected by parliament. In practice, however, the risks to Switzerland's international image and reputation as a result of such a denunciation should not be overlooked. This is due in particular to the fact that a treaty concluded without respecting the national norms on competence to conclude remains validly concluded under international law and that many treaties simply do not allow for denunciation. 46

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COMMENTARY ON

Art. 170 FC

A commentary by Carl Jauslin / Gabriel Gertsch

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Art. 170 Evaluation of effectiveness

The Federal Assembly shall ensure that federal measures are evaluated with regard to their effectiveness.

CONTENT

PURPOSE, SYSTEM, HISTORY, AND TERMINOLOGY

Purpose. Article 170 of the FC mandates the Federal Assembly to ensure that the effects of government measures are reviewed. The effects are to be measured using method-based studies (effectiveness reviews or evaluations). This is intended to provide the constitutional bodies with the necessary basis for performing their state governance tasks (in particular Art. 163-173 of the FC, Art. 180-187 of the FC) as effectively as possible. Effectiveness assessments are intended to trigger learning processes by incorporating the findings into future decisions, in particular legislation. The effectiveness of government action should contribute to its legitimacy ("output legitimacy"; on the functions: N. 6 f.). From an institutional perspective, Art. 170 FC aims to assign **ultimate responsibility** for this task in the sense of a guarantee mandate (norm type: N. 17 and N. 21) (for the specific purpose in relation to supreme supervision: N. 2). The Federal Assembly may delegate the implementation of the mandate to the Federal Council and call on auxiliary bodies (for implementation, see N. 20 and 21). The fulfillment of the mandate remains non-justiciable (low normativity: N. 22 and N. 51). 1

Systematically, Art. 170 FC is located in Section 3 ("Competencies") of Chapter 2 on federal authorities. The provision establishes a competence and a mandate of the Federal Assembly. The mandate overlaps with the supreme supervision under Art. 169 FC in terms of the standard (effectiveness) and the subject matter (in particular the Federal Council and the Federal Administration). In **relation to supreme supervision**, Art. 170 FC aims, on the one hand, to emphasize the criterion of effectiveness (to which Art. 169 of the FC is not limited). On the other hand, the provision aims to extend the Federal Assembly's audit mandate beyond the subject matter of Art. 169 of the FC, in particular with regard to measures taken by the constitutional and legislative authorities (N. 23 ff., N. 40). Although Art. 180 ff. does not contain a corresponding mandate, the Federal Council may also initiate effectiveness reviews at any time (N. 18). Art. 170 FC refers to provisions that oblige the state to act in a manner that is proportionate and geared towards public interests and the realization of fundamental rights (Art. 5, 35, and 36 FC), equal before the law (Art. 8 FC), or rational (Art. 9, Art. 43a para. 5, Art. 126 para. 1, Art. 178 para. 1 FC) (N. 49). In legal doctrine, these **systematically related provisions** are sometimes used to derive a "constitutional principle of the effectiveness of 2 state measures." However, the specific legal consequences of such a principle remain largely undefined (N. 50 ff.).

3 *Historically,* Art. 170 has **no equivalent in the aBV** (1874). The explicit anchoring of the effectiveness review was only included late in the revision process for the new FC; the draft constitutions of 1995/96 did not yet contain a corresponding provision. After the expert commission of both SPK had proposed the creation of an independent body for the evaluation of state measures, the SPK instead linked the effectiveness review in its supplementary report (1997) to the supervisory authority of the Federal Assembly. This concept remained in the Councils, but effectiveness testing was removed as a separate provision from the current Art. 169 of the FC.

4 *In terms of terminology*, the German version of the FC uses the constitutional term **"Wirksamkeit"**, while the French and Italian versions use **'efficacité'** and **"efficacia"** respectively. The term is to be understood in a broad sense: effectiveness assessments examine the extent to which a government measure is being implemented, its objectives are being achieved, and what resources are necessary to do so (cost-benefit; for the assessment standard: N. 29 ff.). Both the mandate ("ensures that" or "ensure that") and the assessment standard ('effectiveness' or " effective") are also used in the German version in Art. 35 para. 3 of the FC (realization of fundamental rights among private individuals). The wording limits the mandate to measures "of the Confederation," which also includes measures taken by the Federal Assembly itself, the constitutional legislator, or federal courts, or measures that are not implemented by the Confederation itself (N. 23 ff.). According to the German version, effectiveness is to be "reviewed." The Italian version uses the similar term "verificare." In contrast, the French version requires "que l'efficacité [...] fasse l'objet d'une évaluation," thus using the term "evaluation," which is commonly used in practice.

I. CONTEXT

A. Fundamentals

5 *Definition.* Effectiveness reviews or evaluations are method-driven investigations based on scientific criteria with the aim of identifying, measuring, and assessing the effects of government action. They analyze the extent to which

government measures contribute to the achievement of legally established goals and to public welfare.

Function. The main purpose of effectiveness assessments is to enable authorities to account for government action, gain insights into causal relationships, enable optimization through better decision-making bases and learning processes, and improve the strategic orientation of government action. Effectiveness assessments are therefore both past- and future-oriented. They are intended to provide **accountability** for past measures in the present and promote **confidence** in future measures. They are intended to allow a better understanding of the effects of government action and thereby optimize the strategic orientation of future measures. This is intended to ensure that government action is geared toward the constitutional and statutory goals of the common good and does not become entangled in its own logic, divorced from reality. 6

Output legitimacy. The legitimacy of government action is increasingly based not only on constitutional principles **("input")** and democratic procedures **('throughput')**, but also on its effects **("output")**. Traditionally, the law determines the conditions for legality and legitimizes government action that follows the prescribed procedure (cf. Niklas Luhmann: "Legitimacy through procedure"). This understanding of law is rooted in the legal philosophy of deontological ethics (Immanuel Kant). With the shift toward the effectiveness of measures, ideas of consequentialist ethics, namely utilitarianism (Jeremy Bentham, John Stuart Mill), are finding their way into the discourse on legitimacy. The intended consequences of a measure thus gain importance as a yardstick for legitimate state action. Rule utilitarianism in particular, which applies the criterion of the greatest general happiness to rules of action rather than to individual actions, shares certain basic convictions with the effectiveness test. However, the output legitimacy of state action must not come at the expense of input legitimacy. The basis and limit of state action remains the law (Art. 5 para. 1 of the FC). Effectiveness considerations are intended to ensure that legally enshrined goals do not remain a dead letter. 7

Effectuation of powers. From a state theory perspective, the focus on effectiveness is an expression of an understanding of the separation of powers that emphasizes cooperation **("model of cooperating powers"**) rather than the separation and inhibition of powers. State power should not only be limited, but also exercised effectively and efficiently. The state should be organized in 8 such a way that the tasks assigned to it by the constitution and the law are fulfilled as effectively as possible, whereby the tasks can also be fulfilled cooperatively or by third parties (guarantee state).

9 *Impact-oriented administrative management.* Instruments for planning, implementing, and reviewing impact-oriented administrative management are therefore an expression of the demand for effective state action. From the 1990s onwards, the **New Public Management** school of thought was particularly influential, introducing business management elements into public administration with the aim of reducing costs and increasing efficiency. Instruments such as integrated task and financial planning, legislative programs, final legal provisions, and global budgets are intended to give governments entrepreneurial freedom with regard to the means (not the objectives) of task fulfillment. The New Management Model for the Federal Administration (NFB) implements aspects of impact-oriented administrative management across the board for the central administration, in particular control through performance mandates and global budgets. In academic discourse, schools of thought have since gained importance which, although also impact-oriented, place greater emphasis on the public value of government task fulfillment rather than its economic efficiency.

10 *Empirical legal research.* The increasing impact orientation of government action is also reflected in jurisprudence. Effectiveness reviews are a form of legal fact-finding. While jurisprudence understands and analyzes legal norms as components of a normative order (**"law-in-books"**), empirical legal research descriptively examines the causes and effects of legal norms (legal facts, **"law-in-action"**). In practice, data collection sometimes serves as the basis for both an effectiveness assessment with primarily practical interest and a scientific contribution. Legal fact research is now conducted in particular in social science disciplines such as sociology, economics, and political science, as well as in the interdisciplinary fields of law and economics, empirical legal studies, criminology, and sociology of law. The trend toward impact-oriented law is thus introducing social science methods into legal discourse. While it is undisputed that empirical findings should be incorporated into the drafting of new legislation, it has not yet been clarified in detail what significance findings from legal fact research should and can have in terms of legal methodology when it comes to the application of law.

Evaluation research. In addition to research on the causes and effects of legal norms, there is extensive empirical literature on the **functioning of effectiveness assessments** themselves. These studies examine, for example, how often and in what contexts evaluations are carried out, the influence and use of evaluation results for policy-making, and the influence of clients on the independence and results of external evaluators. 11

B. Evaluation and lawmaking

All government measures require a sufficient legal basis. Therefore, effectiveness testing is particularly closely related to lawmaking. Considerations regarding effectiveness can and should be made both before and after the enactment of a legal provision: while prospective evaluation (*ex ante*) examines the expected consequences of a legislative project, retrospective evaluation (*ex post*) analyzes the actual effects of the legal provision (for specific forms of retrospective and prospective evaluation: N. 35 and 36 ff.). Prospective evaluation is often carried out as part of the work on a draft decree. Ideally, the results can provide information on whether a planned decree should be pursued at all and facilitate the choice between different forms of government action, in particular legislation and legally non-binding forms of action ("soft law") such as information or warnings. However, prospective evaluations can also serve as a basis for the design of a decree, for example when choosing between different regulatory options such as rules of conduct, licensing and reporting requirements, or criminal or liability provisions, or when implementing "differentiated regulation" that is as economically friendly as possible through instruments such as exemption clauses and options ("opting out" and "opting down") and regulatory incentive structures for the voluntary adoption of regulations ("opting in" and "opting up"). **Retrospective evaluation** is aimed at revising and improving the legislation in question and effectively designing other future legislation. The two forms of evaluation are complementary to each other: The findings from the prospective evaluation, which serve as a basis for decisions on the enactment, must later be incorporated into the retrospective evaluation of the same enactment. Conceptually, in the sense of an evidence-based "*better regulation*" approach, (prospective and retrospective) evaluations are to be understood as an integral element of the legislative process and quality assurance in legislation. This is illustrated in legislative theory by the concept of the legislative cycle and in political science by the analogous concept of a "policy cycle." However, this does not always corre- 12 spond to reality. In practice, prospective evaluations in particular are often of low quality, and the influence of evaluations on the legislative process is generally rather limited.

C. Comparative law

13 *International.* Art. 170 is the **world's first provision** on effectiveness testing at the constitutional level. In 2008, policy evaluation ("évaluation des politiques publiques") was enshrined in Art. 47 and 48 of the French Constitution. Switzerland and France remain special cases with their constitutional evaluation requirements. In Germany, however, there is a selective evaluation clause in the area of financial assistance. According to Art. 104b para. 2 GG, federal financial assistance to the states is to be granted for a limited period and reviewed at regular intervals with regard to its use.

14 *Cantonal.* The cantons have **comparable provisions** on effectiveness testing in their constitutions: e.g., Art. 27 para. 2 KV AR, § 16 KV BS, Art. 151 KV GE Art. 78 KV GR, § 13 and 15 KV LU, Art. 30 SG Constitution, Art. 95 para. 2 and 3 ZH Constitution. These provisions typically define effectiveness testing as a task of the canton without specifically assigning the task to the legislature (exception: Art. 55 para. 3 SH Constitution). In the canton of Geneva, specialized authorities are responsible for effectiveness testing in the form of a court of auditors and an independent evaluation commission (Art. 128 para. 3 in conjunction with Art. 151 KV GE). Various cantons provide for (additional) effectiveness assessments specifically for the area of **financial regulation**: e.g., § 116 para. 3 KV AG, § 129 para. 3 KV BL, Art. 101 para. 4 KV BE, Art. 82 para. 2 KV FR, Art. 93 para. 1 KV GR, § 76 para. 1 KV LU, Art. 82 para. 2 KV SG, Art 34 para. 3 KV TI, Art. 166 KV VD.

15 *European*. The EU treaties provide for effectiveness reviews in numerous areas. As a Schengen state, Switzerland is affected by the evaluations of the application of the Schengen acquis pursuant to Art. 70 of the Treaty on the Functioning of the European Union (TFEU) (so-called **Schengen evaluations**). Under this provision, the Member States, in cooperation with the Commission, must carry out an objective and impartial evaluation of the implementation of Union policies in the area of freedom, security, and justice. The basis for **evaluations in other sectoral policies of the EU** can be found, for example, in Article 85 TFEU ("evaluation of Eurojust's activities") for activities of the Agency for Criminal Justice Cooperation; in Article 156

TFEU ("periodic monitoring and evaluation") for social policy; in Article 168 TFEU ("periodic monitoring and evaluation") for health policy; in Article 173 ("periodic monitoring and evaluation") for industrial policy; in Article 181 TFEU ("periodic monitoring and evaluation") for research, technological development, and space. The Commission is also required to submit an evaluation report on the Union's finances to the European Parliament and the Council (Article 318 TFEU). Finally, the European Commission's Better Regulation Guidelines 2021 contain recommendations on the development and implementation of new regulations (including fitness checks), impact assessments, and monitoring. The idea of impact orientation also underlies the European Court of Justice's (ECJ) consistent effet utile case law, according to which the Court interprets Community law in such a way as to give it the greatest possible practical effect.

Organization for Economic Cooperation and Development (OECD). Since the 16
OECD Council Recommendation on Regulatory Policy and Governance (2012), the OECD has regularly published best practice principles for regulatory impact assessments, with the particular aim of reducing regulatory costs for SMEs.

II. COMMENTARY I.E.S.

A. Addressee ("The Federal Assembly...")

Federal Assembly as addressee. The constitutional mandate is addressed to 17
the Federal Assembly. This emphasizes the democratic dimension of the effectiveness review. The representatives of the people in Parliament bear the **ultimate responsibility** for ensuring that government measures serve the people and promote the common good. The organs of the Federal Assembly (Art. 31 ParlA) are tasked with ensuring that effectiveness assessments are carried out. To this end, they may instruct the Federal Council to carry out effectiveness assessments (including on the basis of statutory evaluation clauses: see N. 46), review assessments carried out by the Federal Council, or commission effectiveness assessments themselves, in particular with regard to their auxiliary bodies (Art. 27 ParlA). The parliamentary committees are responsible for effectiveness assessments in their areas of competence (Art. 44 para. 1 lit. e ParlA) and take the results of effectiveness assessments into account (Art. 44 para. 1 lit. f ParlA).

18 *Evaluations by the Federal Council.* Although Art. 170 of the FC is addressed to the Federal Assembly, the Federal Council also has the power to initiate effectiveness reviews at any time and **without a specific legal basis**. This follows from its constitutional powers: the Federal Council “proactively, independently, and continuously” manages the entire state (Art. 174 FC), plans and coordinates state activities (Art. 180 para. 1 FC), can submit draft legislation to the Federal Assembly on its own initiative (Art. 181 FC), issues ordinances and ensures the implementation of legislation (Art. 182 FC), takes measures to maintain internal and external security (Art. 184 and 185 FC), and supervises the federal administration and other bodies responsible for federal tasks (Art. 187 para. 1 lit. a FC). The Federal Council would hardly be able to perform these tasks effectively if it did not have the power to evaluate the effectiveness of government measures. This is particularly evident in the embedding of effectiveness testing in the government's legislative function (N. 12). The administrative units of the federal government subordinate to the Federal Council also have the authority to initiate effectiveness assessments in their respective areas of responsibility without an independent legal basis. In practice, the Federal Council and the federal administration play a much more active role than Parliament and its committees.

19 *Auxiliary bodies.* The Swiss Federal Audit Office (**EFK**) and the Parliamentary Control Committee (**PVK**) are permanent auxiliary bodies that help to ensure effectiveness testing. In its audits, the EFK focuses on the aspect of economic efficiency and clarifies whether (a) funds are being used sparingly, (b) costs and benefits are in a favorable ratio, and (c) financial expenditures are having the expected effect (Art. 5 para. 2 Financial Control Act [FKG, SR 614.0]). The Parliamentary Administrative Control (PAC) carries out evaluations on behalf of the Audit Commissions within the framework of parliamentary supervision and draws the Audit Commission's attention to issues that require clarification (Art. 10 para. 1 lit. a Parliamentary Administration Ordinance [ParlVV, SR 171.115]). It also reviews the evaluations carried out by the Federal Administration and their use in decision-making processes (Art. 10 para. 1 lit. b ParlVV). On behalf of the relevant parliamentary committee, the PVK may carry out evaluations within its area of responsibility and review evaluations carried out by the Federal Administration and their use in decision-making processes, provided that the Business Audit Commissions agree (Art. 10 para. 2 ParlVV).

Use of experts. Federal bodies regularly commission external bodies such as private firms or university institutes to carry out evaluations. This has the particular advantage that external experts have a high level of methodological expertise and greater independence, which gives the evaluation increased credibility. An external evaluation is particularly appropriate when the issue is politicized and there is a risk that the office concerned may not be entirely impartial in its evaluation. In contrast, internal evaluations can usually be carried out more quickly and with less effort. In addition, internal administrative staff typically have more expertise and experience in relation to the subject matter being evaluated. If an administrative unit decides to conduct an external evaluation, it is crucial that a contractor without any **conflicts of interest** is selected and that the client does not unduly influence the outcome of the evaluation when communicating the assignment, supporting the evaluation process, and making any requests for additions or improvements. To this end, it is crucial that the commissioning office formulates the questions for the contractor precisely and at the same time in an open-ended manner in the specifications. Careful preparation, supervision, and follow-up of the evaluation are also central to external commissioning. 20

B. Mandate ("...ensures that ...")

Warranty mandate and delegation. The wording of the Constitution ("ensures that") expresses that although the Federal Assembly is responsible for ensuring that the effectiveness of federal measures is reviewed, it **does not have to carry out** the reviews itself, but can delegate them. The Federal Assembly may assign a task to the Federal Council (Art. 27 lit. a ParlA), review effectiveness assessments carried out on behalf of the Federal Council (Art. 27 lit. b ParlA) or commission effectiveness reviews itself (Art. 27 lit. c ParlA). In addition, the Federal Assembly regularly fulfills its guarantee mandate by enacting evaluation clauses (see N. 46), which oblige the Federal Council under special law to carry out effectiveness reviews. Evaluation clauses may also be used in the context of temporary experimental legislation (so-called "sunset legislation") (N. 39) . Furthermore, the Federal Assembly has obliged the Federal Council to explain, among other things, the planned implementation and evaluation of the decree, the cost-benefit ratio, and the effects on the economy, society, the environment, and future generations in messages on draft decrees (Art. 141 para. 2 lit. d, f, and g ParlA). Finally, the Federal Assembly uses politi- 21 cal initiatives such as postulates to request evaluation reports from the Federal Council.

22 *Justiciability*. As a norm of competence, the guarantee mandate is legally binding on the Federal Assembly. However, the norm is **not justiciable**. Consequently, individuals cannot derive any direct subjective claim to the performance of effectiveness reviews from Art. 170. The Federal Assembly therefore has considerable discretion in deciding whether, when, and for what purpose a measure should be reviewed for effectiveness. In its judgment 1C_104/2017, the Federal Supreme Court did not address the complainant's allegation that the effectiveness of the Walchwil double track approved by the FOT for SBB had not been reviewed in accordance with Art. 170 of the FC due to the late complaint. It thus left the question open and did not comment on the complaint regarding the lack of effectiveness of the double track. However, legal doctrine unanimously rejects the claim to demand effectiveness reviews, citing a lack of justiciability (N. 51). Such an individual claim would not be practicable, particularly in view of economic considerations. Whether the lack or inadequate implementation of effectiveness reviews could have direct legal consequences, for example in the specific review of a Federal Council ordinance, has not been conclusively clarified (see N. 47 ff. on the question of a constitutional principle of effectiveness).

C. Subject matter ("...the measures of the Confederation...")

23 *All government action*. The subject matter of effectiveness reviews is the measures taken by the Confederation. These may be general measures or measures taken in individual cases. The legal form of government action is irrelevant in this context. The wording implies that measures taken by all branches of government are covered ("of the Confederation"/"par la Confédération"/"della Confederazione"). The constitutional mandate to review effectiveness includes **legislation** (including the enactment of constitutions and the conclusion of international treaties), but is not limited to this. The term "measures taken by the Confederation" covers all government action by the Confederation.

24 *Case law and measures taken by other independent bodies.* This also includes all measures taken by the judiciary, including case law, and the activities of other federal bodies that are guaranteed legal independence (e.g., Swiss National Bank (SNB), Federal Data Protection and Information Commissioner

(FDPIC), Supervisory Authority for the Office of the Attorney General (AB-BA)). However, it must be ensured that impact assessments do not impair the independence of the judiciary or other bodies. The substantive review of court decisions is excluded (Art. 26 para. 4 ParlA).

Own actions of the Federal Assembly. With regard to the object of evaluation, it is clear that Art. 170 of the FC **goes beyond Art. 169 of the FC**: the Federal Assembly should not only evaluate the other powers, but also its own measures. Art. 170 of the FC therefore obliges Parliament not only to evaluate others, but also to evaluate itself. 25

Implementation by cantons and private entities. The implementation and enforcement of federal measures by cantons and private entities also falls within the scope of effectiveness reviews pursuant to Art. 170 FC. However, measures taken by cantons and private entities are only subject to effectiveness reviews pursuant to Art. 170 FC insofar as they can be classified as the enforcement or implementation of federal measures. Measures that enforce cantonal law are excluded. Cantonal law regularly provides for effectiveness reviews for such measures (see N. 14). 26

Failure to act. Failure to act, i.e., the absence of measures, may also be subject to an effectiveness review. This applies in particular to the failure to take mitigating measures (so-called accompanying measures) for particularly affected or vulnerable groups of people, for example in the case of crisis management. The wording of the FC therefore defines the subject matter ("measures taken by the Confederation") too narrowly. It encompasses any behavior or inaction that can be attributed to the Confederation. Breaches of duty can have just as serious consequences as actions, given their impact. However, evaluating omissions is challenging because it is (even) more difficult to estimate what effect a hypothetical measure *would have had* than to measure the (causal) effects of a measure that was actually taken. In this respect, there is a certain similarity to prospective evaluation in terms of the uncertainty of the expected effects. 27

Measures without measurable effects. Art. 170 should not be understood to mean that every government action must have a specific, measurable effect. Measures that do not intend to have a measurable effect are also constitutionally permissible (and, in some cases, required by law). These include measures of a symbolic nature, whose effect is primarily emotional. Recognized exam- 28

ples of **symbolic legislation** include programmatic declarations in the Constitution, legal recognition of historical injustices, or measures that have intrinsic value regardless of their effect. As an example, under the Federal Act on the Reappraisal of Compulsory Social Measures and Placements before 1981 (AFZFG, SR 211.223.13), the federal government recognizes "that injustice was done to the victims, which had an impact on their entire lives" (Art. 3 AFZFG). In addition, victims are entitled to a solidarity contribution, which is "a sign of recognition of the injustice inflicted" and is intended to "contribute to redress" (Art. 4 para. 1 AFZFG). It is necessary to determine, through interpreta-
tion, whether the objectives of a measure are measurable according to its *ratio* and whether its effects can be evaluated methodically or not.

D. Standard ("...on their effectiveness...")

29 *Effectiveness as a standard*. The German version of the FC refers to the "effectiveness" of the measure as an evaluation standard. In the French and Italian versions, the FC refers to 'efficacité' and "efficacia" respectively. The term is **to be understood broadly**, because the standard for effectiveness assessments varies depending on the context, as will be shown below. The history of the term's development also points to a broad understanding of the term.

30 *Subcriteria*. The benchmark for effectiveness assessments is not uniformly defined in the implementing legislation (see, for example, Art. 26 para. 3 lit. d and e ParlA; Art. 5 para. 2 FKG; Art. 58 para. 3 FHG; Art. 5 and Art. 36 para. 3 GAOA). In practice, the relevant evaluation criterion often results from a special legal evaluation clause (see N. 46) and is therefore context-dependent. The variety of assessment criteria used in practice can be grouped into three sub-criteria, all of which fall under the constitutional concept of "effectiveness":

a. *Implementation status* (or *effectiveness*): The extent and manner of implementation of a measure are examined. The criterion refers to the extent to which a measure is actually implemented, a legal rule or recommendation is followed, or a service is used, for example by comparing the implementation status in the cantons or through surveys.

b. *Degree of target achievement* (or *effectiveness in the narrower sense*): This criterion refers to the extent to which the regulatory objective to be achieved through the implementation of the measure is actually achieved. The intended effect must be determined in each individual case, in particular by interpreting the relevant legal basis and overarching purposes and constitutional objectives. For example, the provision of a service is not usually an end in itself, but pursues a specific goal, such as improving the quality of life of the people who use the service. The aim is to compare the intended effect of a measure with the actual effect in order to assess the appropriateness of the measure. In addition to the intended main effects of a measure, any (undesirable) side effects must also be taken into account. The degree to which the objective has been achieved is at the heart of evaluations.

c. *Economic efficiency* (or *efficiency*): This criterion refers to the regulatory costs of the measure and their relationship to the effect achieved (cost-benefit analysis). In addition to direct and indirect financial costs, regulatory costs also include lost profits and lost benefits (known as opportunity costs) as well as costs to society as a whole. Regulatory costs can arise for different actors (e.g., companies) and can be one-time or recurring.

Context dependency. What these criteria have in common is that effectiveness 31
should be based on a regulatory objective to be determined by interpretation. Which test criteria an evaluation uses as a benchmark and how they are weighted depends on the context. For example, cost considerations are likely to play a more important role in a policy area with a stronger economic and financial focus than in policy areas with a stronger ideological focus (although financial aspects can also be central here, for example in the case of fundamental rights that confer entitlement to benefits). Not all public tasks have the same priority in terms of economic fulfillment. Basic services (service public) must be available to all persons in a comparable manner (cf. Art. 43a para. 4 of the FC). The fulfillment of public tasks in line with needs is decisive here, which means that economic efficiency or efficiency cannot be used as the sole criterion in this area.

E. Scope ("...be reviewed.")

1. Methods and instruments

Review authority. The mandate grants the Federal Assembly review and in- 32
vestigation powers without conferring additional decision-making powers or rights to information. The FC does not specify the methods and instruments

to be used to carry out effectiveness reviews. Nor does it comment on the frequency (regular or only in special cases), the level of aggregation (policies, laws, programs, projects), or the depth of the review (summary or detailed). Impact reviews can be conducted before the measure (*ex ante*), after the measure (*ex post*), or alongside the measure. The timing of the evaluation determines its objectives and influences the methods and instruments to be used.

33 *Methods.* Evaluation research essentially uses traditional social science methods of **data collection and analysis**. Document analysis, interviews, surveys, and analysis of existing or newly collected quantitative data are among the most common research techniques. Controlled experiments are methodologically attractive but demanding: a randomly selected group of people is exposed to the measure and compared with a control group that is not exposed to the measure in order to assess its effects. Examples include a group of people with and without flu vaccinations, restaurants with and without night or Sunday work, or companies with and without incentive taxes. Depending on the research design, analyzing variations in measures in different countries or regions can also provide insights into causal relationships. However, the findings from international or intercantonal studies cannot be readily transferred to federal measures.

34 *Instruments.* The primary instrument for testing effectiveness is the implementation of a method-based investigation, not unlike a scientific study (see also N. 11 on evaluation research). Depending on the context, other instruments may also be used. Observation, control, and investigation instruments can be used in particular to gather information: **Monitoring** is an observation instrument for continuously collecting data. It allows the implementation status and implementation difficulties to be identified. Reporting obligations on implementation and statistics are important cornerstones. Policy field observation is a specific form of monitoring. Controlling is a control instrument that management uses to accompany, control, and further develop projects. It allows the implementation of measures to be monitored. An **audit**, on the other hand, is an investigative tool used in quality management to improve organizational structures and processes. It focuses on the internal organization and processes (internal relationships) that are decisive for the impact of the measure on third parties (external relationships).

2. Timing

Retrospective evaluation (ex post). Retrospective evaluation focuses in particular on the implementation status, the degree to which objectives have been achieved, and the cost-effectiveness (N. 30) of a measure that has already been implemented. It can be divided into the following phases: Ideally, a concept for effectiveness testing is first developed in collaboration with the agencies responsible for implementation and enforcement. The concept includes considerations regarding the impact model of the measure or decree, the affected parties and their involvement (consultation of interest groups), the information tools to be used (monitoring and controlling), as well as the target audience (e.g., Federal Assembly) and the objective of the effectiveness assessment (e.g., steering implementation). Data collection and controlling are then ensured during the implementation of the measure before the evaluation is carried out or commissioned, so that the controlling and evaluation data can ultimately be used. 35

Prospective evaluation (ex ante). Art. 170 also covers the prospective prediction of the effectiveness of a measure, even though the French version refers to "mesures prises." The purpose of prospective evaluations is to create a descriptive, fact-based basis for decision-making in order to inform the decision on the measure to be taken. To this end, the various consequences of a measure are compared with each other so that, in addition to deciding on the measure itself, the political decision-maker can also determine any measures to offset the consequences and thus distribute the costs and benefits of the regulation as fairly as possible. Prospective evaluation is therefore closely related to the state function of lawmaking and is often carried out as part of the work on a draft decree (N. 12). According to Art. 141 para. 2 ParlA, the Federal Council is obliged to include information on the effects on the economy, society, the environment, and future generations (letter g) or gender equality (letter i) in its messages to Parliament on draft legislation. This requires the implementation of prospective evaluations. The basis for a prospective evaluation is the creation of an impact model that conceptualizes the presumed effects of a measure by analyzing, for example, the administrative bodies responsible for implementation, the directly addressed addressees of the standard, other affected groups, and the side effects and costs for the federal government and the economy associated with the regulation. Naturally, evaluat- 36 ing measures that are still in the future involves considerable uncertainty and methodological challenges.

37 *Regulatory impact assessment (RIA).* RIA is a prospective evaluation tool that focuses specifically on compliance costs, the need for regulation, and the economic impact on individual groups and the economy as a whole. In addition to their primary intended effect (e.g., product safety and protection of public health), regulations often have secondary consequences (e.g., production delays, trade barriers, regulatory costs for obtaining permits and training employees, etc.) that can restrict the economic activity of companies. An RIA is intended to measure these side effects and weigh them against the intended effects. The Business Relief Act of September 29, 2023 formally enshrines aspects of the RIA that were previously regulated in an RIA guideline, as well as new review obligations. Among other things, the Act lays down principles and review obligations for lawmaking (Articles 1 and 4 UEG), namely obligations to estimate the regulatory costs and economic efficiency of a decree, both during its drafting and in the context of regular reviews (Articles 3 and 5 UEG).

38 *Other instruments of prospective evaluation.* In addition to RFA, there are other instruments of prospective evaluation that have specific content and methodological focuses. Human rights impact assessments are becoming increasingly important for analyzing the effects of government measures on human rights. Against the backdrop of uncertain causal chains and new technologies, they can help to ensure compliance with human rights due diligence and protection obligations. The Federal Council is obliged to address the impact on fundamental rights in its messages on legislation (Art. 141 para. 2 lit. a ParlA). Specific forms of human rights impact assessments are data protection impact assessments and gender equality impact assessments. Another form of prospective evaluation is the **environmental impact assessment**. According to Art. 10a of the Environmental Protection Act (EPA), before deciding on the planning, construction, or modification of facilities, an authority must assess their environmental compatibility at the earliest possible stage. Anyone wishing to construct or modify a facility must submit an environmental impact report to the authority, which forms the basis for the authority's environmental impact assessment. In future, greater attention could be paid to **crisis compatibility assessments**. Government measures and regulations are regularly based on normal situations; however, the recent past has been marked by experiences of crisis. Notable examples include the UBS recapitalization in

2008, the COVID-19 pandemic in 2020, the Axpo bailout in 2022, and the CS emergency merger in 2023. In these cases, the Federal Council resorted to constitutional emergency powers under Art. 184 para. 3 and Art. 185 para. 3 of the FC to overcome the crisis. Against this background, government measures should also be assessed for their crisis resilience.

Accompanying evaluation. Accompanying evaluations take place during the drafting or implementation phase. Examples of such test regulations are pilot projects and regulatory sandboxes. **Trial regulations** are temporary decrees that are linked to an evaluation clause. Based on a sufficient legal basis, they allow for a temporary deviation from the legal framework in order to test the regulation in question through impact assessments and optimize it if necessary. Such pilot projects thus provide a suitable information basis for the subsequent, definitive legislative solution, for example in the regulation of new technologies. Closely related to the experimental regulation is the idea of regulatory sandboxes, which can be used, for example, to facilitate market entry for start-ups and SMEs and to remove regulatory barriers to innovation. However, the promotion of innovation must not lead to unjustified unequal treatment and abusive distortion of competition. 39

3. Relationship to supreme supervision

Effectiveness reviews pursuant to Art. 170 of the FC constitute a **form of supreme supervision** pursuant to Art. 169 of the FC. This follows from the systematics (see N. 2) and legislative history (see N. 3) of the FC and from the ParlA (see N. 17). With regard to the standard by which the Federal Assembly is to exercise supervision, the mandates under Art. 169 and 170 of the FC overlap, with supreme supervision involving a greater variety of control standards. Art. 26 para. 3 of the ParlA cites legality, regularity, appropriateness, effectiveness, and economic efficiency as standards of supreme supervision. In this respect, the Federal Assembly is also obliged under Art. 169 of the FC to ensure that the effectiveness of federal measures is assessed. However, Art. 170 of the FC places particular emphasis on the specific standard of effectiveness. With regard to the subject matter to be supervised by the Federal Assembly, the mandate under Art. 170 of the FC goes further than supreme supervision. While supreme supervision is limited to the management of the Federal Council and the Federal Administration, the federal courts, the supervisory authority over the Office of the Attorney General, the Office of the At- 40 torney General, and other bodies performing federal tasks (cf. Art. 26 para. 1 ParlA), the effectiveness review potentially covers all federal measures (cf. Art. 27 para. 1 ParlA). This also includes measures taken by Parliament itself, measures taken by the people or by the people and the cantons, and measures taken by the cantons that are financed by the federal government (see N. 23 ff.).

III. IMPLEMENTATION

A. Forms of evaluation

41 *Diversity.* Effectiveness reviews can take various forms, depending on who carries out the evaluation (Federal Assembly, Federal Council, external parties), when it is carried out (prospective, retrospective, ongoing), which methods and instruments are used (monitoring, controlling, auditing, etc.), how detailed it is (summary or detailed), and what its primary purpose is (accountability, knowledge gain, optimization, strategy).

42 *Complexity.* The added value of evaluations is undisputed; however, they are methodologically complex. ("L'évaluation, une nécessité évidente mais lourde"). For evaluations to add value, they need to have clear objectives. The more precisely the objective of the measure and the objective of the evaluation are defined, the more concrete and useful the evaluation can be. With clear objectives, evaluations can successfully complete a policy cycle and provide the impetus for a new cycle (see N. 12). In this way, they contribute to a continuous optimization process.

43 *Effort*. Conducting evaluations involves a considerable amount of personnel, financial, and time resources. The necessary personnel and financial resources depend in particular on whether an evaluation is carried out by the state itself or commissioned externally. While implementation analyses can usually be carried out within a period of six months and with a budget of around CHF 60,000, impact analyses generally cost at least CHF 100,000 and take at least a year. In the case of cost-effectiveness analyses, the costs and time required vary greatly depending on whether only an analysis of the optimization potential (approx. CHF 30,000 within 3–6 months) or a detailed comparison of the costs and benefits (more than CHF 100,000, more than one year) is desired.

Network Evaluation in the Federal Administration. Various organizational units within the Federal Administration are involved in evaluations. Since 1995, the Network Evaluation in the Federal Administration has served as a forum for the exchange of experience and information among evaluators, clients, and users in the Federal Administration. More than 110 employees from all departments, the Parliamentary Control Committee, and the Swiss Audit Office take part in the meetings, which are held twice a year. 44

B. Evaluation standards

The Swiss Evaluation Society (SEVAL), a private association, publishes **SEVAL standards**, which are aimed at evaluators and their clients. They are intended to provide assistance in the planning and implementation of evaluations, the awarding of contracts (in particular tenders and evaluation agreements), and the accompanying assurance or subsequent assessment of the quality of evaluations. The SEVAL standards specify criteria for assessing the quality of evaluations, general basic principles, standards for the planning, implementation, and evaluation of evaluations, and standards for communicating results. In addition to ethical principles, they also contain practical recommendations for the various evaluation phases that can be applied regardless of the institutional context, approach, or subject area. 45

C. Evaluation clauses

Evaluation clauses are legal norms that oblige the addressee to review the impact of a particular law or specific measures. The Federal Assembly regularly fulfills its constitutional mandate to review effectiveness by enacting such **special legal evaluation clauses**. There are different types of evaluation clauses. Even without an evaluation clause, the Federal Council and the Federal Administration are authorized and required to carry out evaluations when necessary (N. 18). However, evaluation clauses enable the legislature to oblige the Federal Council, for example, to carry out evaluations at a specific time or at specific intervals, to provide for an independent, external implementing body and specific methods, subjects of investigation or evaluation criteria, or to regulate the consequences to be drawn from specific evaluation results. 46

IV. EFFECTIVENESS AS A CONSTITUTIONAL PRINCIPLE?

47 *Definition.* There is controversy in legal doctrine as to whether the FC contains a constitutional principle that requires the effectiveness of state measures. “Constitutional principles” (also: “constitutional foundations”) without their own legal source character are constitutional contents that are not expressly designated as such in the text of the Constitution, but can be derived interpretatively from several constitutional norms as the guiding principles underlying the FC. In this respect, they are similar to the “structural principles” or “fundamental decisions determining structure” of the FC, but do not need to run through the entire FC and may therefore be less abstract.

48 *Derived from Art. 170 FC.* According to Flückiger and Mastronardi, a constitutional principle of effectiveness can be derived from Art. 170 FC: According to Flückiger, the provision implicitly contains a “principe d'efficacité” which obliges the addressees to review state measures using the evaluation method; however, the resulting findings are recommendations and not legally enforceable. According to Mastronardi, the mandate to review effectiveness only makes sense if output legitimacy is a goal recognized by the Federal Constitution. Uhlmann/Bussmann take the opposite view. They argue, among other things, that Art. 170 FC is not justiciable. Furthermore, from a systematic point of view, it is not convincing to derive a principle of such general scope from a competence norm. Finally, a constitutional principle that is limited to federal measures makes little sense. In our opinion, the negative doctrine should be agreed with, according to which the competence norm of Art. 170 FC *alone* does not give rise to a constitutional principle of the effectiveness of state measures.

49 *Derivation from related provisions.* In addition to Art. 170 FC, a constitutional principle of effectiveness could also be based on systematically related provisions. For example, Lienhard/Mächler/Zielniewicz argue that effectiveness and efficiency have become “actual constitutional principles” that are given concrete form in financial and organizational law (Art. 12 para. 4 FHG and Art. 5 para. 2 lit. c FKG). Several provisions of the FC are indeed based (at least in part) on the requirement that government measures must be effective. Uhlmann/Bussmann and Flückiger cite the principle of public interest and the principle of proportionality (Art. 5 para. 2 FC), equality before the law (Art. 8 FC) and the prohibition of arbitrariness (Art. 9 FC), the realization of fundamental rights (Art. 35 para. 1 and 3 FC), the requirement that state tasks be

performed in a needs-based and economical manner (Art. 43a para. 5, Art. 126 para. 1, Art. 178 para. 1 of the FC) and the competence to apply the law. In our opinion, the principle of legality (Art. 5 para. 1 of the FC) should also be mentioned. Insofar as the principle of legality requires the substantive realization of the law, it necessarily also includes a requirement for the substantive effectiveness of the law. The question arises as to whether a constitutional principle of effectiveness can be derived from an overall view of these systematically related provisions.

Independent content in relation to other constitutional principles. In our opinion, the aforementioned provisions, which are systematically related to the requirement of effectiveness, clearly reflect the common guiding principle that state measures should, in principle, be as effective as possible: once the substantive scope of protection of a fundamental right has been established, there is a justiciable claim that restrictive state measures must be appropriate and necessary for the realization of a public interest. The principle of equality before the law, the prohibition of arbitrariness, and the requirement that state tasks be performed in accordance with needs also contain postulates related to the effectiveness of state measures in all areas of state task performance. Together with Art. 170 of the FC, these provisions contribute to a "culture of justification" of legislation based on considerations of effectiveness. However, it is not yet clear what specific constitutional content a constitutional principle of the effectiveness of state measures would have. If ineffective state measures always prove to be disproportionate or non-compliant with the principle of legality or equality before the law, for example, the normative added value of an independent constitutional principle of effectiveness, whose constitutional content does not go beyond the content of other constitutional principles, would be low and dispensable. This raises the question of what specific constitutional consequences an unwritten constitutional principle of the effectiveness of state measures could have. It is conceivable, for example, that such a constitutional principle could confer a justiciable right to have effectiveness reviews carried out, that it could justify the unconstitutionality of certain state measures, or that it could at least be taken into account in the interpretation of the constitution. 50

Justiciable right to an effectiveness review. Art. 170 of the FC does not confer an enforceable right on individuals to demand an effectiveness review in a specific case (on this question, see N. 22). If the text of the Constitution does 51 not confer an enforceable right to have effectiveness reviews carried out, it is hardly conceivable that such a right could arise from an interpretatively derived, relatively abstract constitutional principle that has not yet been recognized in practice or by prevailing doctrine. However, other provisions and principles of the FC are also not justiciable, or at least not in every constellation, and are implemented through channels other than judicial review, but nevertheless claim validity as part of substantive constitutional law.

52 *Unconstitutionality of ineffective measures.* If there is a constitutional principle of the effectiveness of state measures, the question arises as to whether ineffective state measures must be considered unconstitutional. Uhlmann/Bussmann discuss the question on the basis of a recent landmark decision by the Federal Supreme Court (BGE 147 I 16) concerning a fee. In this case, the Federal Supreme Court upheld the legality of a connection fee, the effectiveness of which was in doubt, on the grounds that the legislature had only introduced the regulation on a trial basis and had made it subject to an evaluation requirement. Uhlmann/Bussmann therefore conclude that a legal norm is also provisionally proportionate and thus constitutional even if its effectiveness is doubtful, at least as long as it is subject to an evaluation requirement. So far, no cases can be identified in which a measure that had proven ineffective in an effectiveness test has been classified as unconstitutional by a law enforcement authority solely for this reason and therefore not applied or at least criticized from a constitutional point of view (without there having been, for example, a violation of fundamental rights due to non-compliance with the principle of proportionality). This cannot be solely due to the fact that federal laws must be applied even if they are unconstitutional (Art. 190 FC). This is because even federal laws are not exempt from review by the Federal Supreme Court, whereas the Federal Supreme Court could sanction any unconstitutionality due to a violation of the principle of effectiveness in the case of federal ordinances and cantonal implementing decrees. If even ineffective measures are constitutional, a constitutional principle of the effectiveness of state measures could still be given the meaning that it contains a procedural requirement for the legislative process, according to which a legal basis is only constitutional if its effectiveness (depending on the context, ex ante, ex post, and/or accompanying) is reviewed to an appropriate extent. In fact, in its recent decision in KlimaSeniorinnen Schweiz and others v. Switzerland (53600/20 of April 9, 2024), the ECtHR derived from Article 8 of the ECHR an actual quality standard for legislative quality in the area of climate protection,

particularly with regard to the quantitative data bases as a rational basis for Swiss climate policy. However, this is not a requirement arising from a fundamental right or other norm of the FC. On the contrary, Swiss courts have so far been very reluctant to derive requirements from the Constitution with regard to the effectiveness tests (and other quality assurance measures) required in the legislative process, which could call into question the constitutionality of a decree if they are not complied with.

Effectiveness orientation as a method of interpretation. The guiding principle that government measures should be as effective as possible could be put to good use in legal methodology. An effectiveness-oriented element of interpretation would consist of interpreting a norm in such a way that it achieves the greatest possible effectiveness. This element of interpretation would be closely related to the teleological element. While the teleological method established in Swiss law is primarily directed *inward*, toward the *ratio legis* underlying the norm, effectiveness orientation would mean opening up the method to the external effects of the norm. In international and European law, the effet utile principle (efficiency requirement) establishes a corresponding requirement, according to which a norm must be interpreted and applied in such a way that its objective is achieved in the best and simplest way possible. Such an element of interpretation would also be related to the economic theory of law established in the US methodological discourse, according to which legal norms must be interpreted in such a way that the greatest possible efficiency in the economic sense is achieved. In Swiss methodology, an element of interpretation of maximum effectiveness has not yet been established. Nevertheless, in BGE 140 II 384, the Federal Supreme Court referred to the "constitutional concern for the effectiveness of substantive law" and referred to Art. 170 of the FC in order to prevent the protection of the parties to the proceedings from becoming absolute in connection with the procedural guarantees under Art. 6 of the ECHR. In doing so, it brought the two concerns of protecting the parties to the proceedings (procedural guarantees under Art. 29 of the FC) and the effectiveness of substantive law (effectiveness reviews under Art. 170 of the FC) into practical concordance. However, it is not yet clear from previous case law whether the concern for the effectiveness of state measures has an independent significance in the interpretation of the constitution, or whether, like other public interests, it is taken into account in the weighing of interests or, like other constitutional provisions, in the establishment of practical concordance, and is thus absorbed by established 53 methodological figures, in particular proportionality, public interest, and *ratio legis*. An impact-oriented element of interpretation could, for example, serve as a "gateway" for empirical findings from evaluations and the social sciences into legal methodology when concretizing open constitutional provisions. However, many methodological questions remain unresolved, for example with regard to the relationship between an impact-oriented and a teleological element of interpretation, with the result that a constitutional principle of the effectiveness of state measures has so far had little concrete legal impact in the context of interpretation.

54 *Limits of output legitimacy.* The above considerations show that the assessment of the effectiveness of measures and decrees in Switzerland is primarily left to political discretion. For several reasons, this is to a certain extent inherent in the system. On the one hand, evaluations are rarely able to provide reliable findings on complex social chains of effects. Even in social science disciplines, which in recent decades have prioritized methodological advances in measuring causal relationships, such research results are usually subject to considerable uncertainty. In practice, evaluations often do not correspond to the ideal type of a comprehensive ex post evaluation with scientific quality standards, but are limited in their questions and methods to process-oriented implementation analyses. Even if evaluations could measure the effects of government measures with absolute certainty, deriving political consequences would still require political judgment. Assuming that an evaluation could reliably show that a government measure, excluding other factors, has reduced unemployment by 0.5%, the result would not answer the normative question of whether the effect justifies the costs (financial and otherwise) associated with the measure. The Constitution establishes a procedure that transfers the authority to answer such evaluative questions to certain constitutional bodies, in particular the Federal Assembly. These bodies are also free to take purely symbolic measures that are unsuitable from the outset for achieving a measurable effect (N. 28). As a result of the democratic "input procedure," which involves the political assessment of evaluation results, the "output legitimacy" of state action is limited. "Output legitimacy" must not relativize or even undermine the guarantees of the rule of law and democracy. The latter themselves form a benchmark for the achievement of objectives and require the realization of the democratic constitutional state.

Conclusion. Art. 170 of the FC and several systematically related provisions share the guiding principle that state measures should be as effective as possible (N. 49). The question of whether it is justified to interpret this common concern of various constitutional provisions as an independent constitutional principle of the effectiveness of state measures should, in our opinion, be decided primarily with a view to the specific constitutional consequences of this constitutional principle (N. 50). It is undisputed that the constitutional principle does not confer a justiciable right to have effectiveness reviews carried out (N. 51). Nor are there any known cases to date in which a law enforcement authority has classified a measure as unconstitutional solely on the grounds that it had no effect or that its effectiveness had not been sufficiently reviewed (N. 52). It is conceivable that the trend toward effectiveness-oriented law could find its way into legal methodology, in the sense of interpreting norms with a view to maximizing their effectiveness. One development in this direction is the incorporation of the efffet utile principle of European and international law into Federal Supreme Court case law. The recognition of effectiveness as an independent element of interpretation has not yet been achieved, but could possibly contribute to a fair, realistic, and legitimizing application of the law (N. 53). Ultimately, the assessment of the effectiveness of measures and decrees in Switzerland remains primarily a matter of political discretion. Otherwise, the principle of effectiveness would take precedence over the constitutional and democratic "input legitimacy" of state action (N. 54). It would be conceivable to describe effectiveness as a purely programmatic constitutional principle, similar to narrative declarations or appeals in the constitution. Other elements of the FC referred to in the literature as "constitutional principles" also exhibit a high degree of normativity. Given these developments, the practical effectiveness of substantive law as a whole can be understood as an emerging constitutional principle. 55

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COMMENTARY ON

Art. 176 FC

A commentary by Christoph Raess

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Art. 176 Presidency

1 The President of the Confederation chairs the Federal Council.

2 The President and the Vice-President of the Federal Council are elected by the Federal Assembly from the members of the Federal Council for a term of office of one year.

3 Re-election for the following year is not permitted. The President may not be elected Vice-President for the following year.

CONTENT

I. ORIGINS AND HISTORICAL EVOLUTION OF THE OFFICE OF THE PRESIDENT OF THE CONFEDERATION

The wording and substance of Art. 176 of the FC date back to the **founding of the federal state**. Compared to its two predecessor provisions, Art. 176 of the FC has undergone no substantive changes, only linguistic ones. The phrase "presides over" even dates back to the draft of a federal charter of the Swiss Confederation revised by the Diet in May 1833. The wording of Art. 176 of the FC thus stands—like the other provisions concerning the Federal Council—as an example of the *institutional stability* that has prevailed in Switzerland since 1848. 1

The Federal Assembly adopted the purely linguistic amendment to Art. 176 of the FC proposed by the Federal Council as part of the latest **constitutional revision** without any fundamental changes and practically without discussion. In the course of the reform of the federal government, attempts to extend the term of office of the Federal President to two years failed on several occasions (see N. 27 and N. 32). 2

The virtually unchanged wording of Art. 176 of the FC stands in contrast to the changed significance of the office of the President of the Confederation. Thus, the **significance of the office** of the President of the Confederation and, closely related to this, the *election practice* of the Federal Assembly for the office have *changed significantly*. Until the beginning of the 20th century, the office of the President of the Confederation was fundamentally linked to the chairmanship of the Political Department. The Political Department encompassed both foreign policy and internal security. It was thus of great political significance. This great significance of the Political Department meant that the office of Federal President was reserved for those members of the Federal Council who were considered to possess statesmanlike qualities. Consequently, the Federal Assembly did not elect all Federal Councilors as Federal President. However, the annual rotation principle already applied at that time (see N. 29). Due to the circumstances mentioned, the Federal President is said to have enjoyed a "significantly stronger and elevated position" relative to the other Federal Council members at the inception of the federal state. 3

4 Since the separation of the office of Federal President from the chairmanship of the Political Department and the associated establishment of the current Department of Foreign Affairs in 1920, the office of Federal President has lost its significance. Since then, the Federal President has held the position of first among equals (see N. 11). Due to this change, the Federal Assembly today customarily elects members of the Federal Council as President of the Confederation without requiring proof of special "statesmanlike" qualifications. It is customary practice that a member of the Federal Council only becomes President of the Confederation after having served under the presidency of all senior colleagues.

5 Completely independent of the changed significance of the office, the Federal Assembly's election practice underwent another important change at the end of the last century: Since the election of former Federal Councilor Ruth Dreifuss at the end of 1998 as the first Federal President, the Federal Assembly has regularly elected women to the office.

II. STRUCTURAL FRAMEWORK

6 Art. 176 of the FC consists of three para.s. Only para. 1 contains a substantive provision—albeit a rather vague one—stipulating that the Federal President presides over the Federal Council. However, the constitutional text leaves open which powers are associated with the presidency. Para. 2 and 3 primarily contain provisions regarding electoral law. Viewed purely in terms of scope, the entire Art. 176 of the FC thus contains **primarily electoral provisions and only a few substantive provisions**. This is consistent with the fact that, even according to its heading, Art. 176 of the FC does not deal with the powers or competences of the Federal President, but merely with the "presidency" of the Federal Council. The wording of the FC and the heading of Art. 176 of the FC thus symbolize the rather modest position of the President of the Confederation within the Swiss state organization.

7 Para.2 stipulates that, in addition to the President of the Confederation, there is also the office of the Vice President—which is not mentioned in para. 1. Furthermore, it is stipulated that the United Federal Assembly elects the President of the Confederation as well as the Vice President. Only incumbent members of the Federal Council are eligible for election. It is also stipulated that the term of office of the President of the Confederation lasts one year.

Para. 3 then excludes re-election for the following year. For the President of the Confederation, this prohibition also applies to the office of Vice President.

III. CLASSIFICATION IN THE CONTEXT OF CONSTITUTIONAL LAW

Art. 176 of the FC is part of the first section of the third chapter of the fifth title **"Federal Authorities"** of the FC. This section contains the provisions on the organization and procedures of the Federal Council, the Federal Administration, and the Federal Chancellery. Art. 176 of the FC follows the two provisions dealing with the Federal Council as such, as well as its composition and election (Art. 174 et seq. of the FC). This is followed by Art. 177 of the FC, the final provision addressing the organization of the Federal Council, which establishes the collegial and departmental principles as the basis for the Federal Council's mode of operation. 8

Art. 176 of the FC bears certain **similarities** to Art. 152 of the FC, which regulates the presidency of the National Council and the Council of States. It is notable that the wording of Art. 152 of the FC also primarily reflects the electoral law provisions of that article (see N. 6). For the Federal Supreme Court, the third branch of the federal government, there is no comparable provision, as the presidency of the Federal Supreme Court is not prescribed by the FC (see Art. 188 of the FC, Art. 14 of the BGG). However, the cantonal constitutions contain numerous provisions similar to Art. 176 of the FC that regulate the presidency of the respective cantonal government. Para. 2 of Art. 176 of the FC also shows similarities to Art. 175, para. 2–4 of the FC, which concern the authority to elect members of the Federal Council and the corresponding eligibility requirements. 9

The **function** of Art. 176 of the FC is primarily to regulate the presidency of the Federal Council (see N. 12). Art. 176 of the FC assigns this task to the President of the Confederation and regulates the President's powers as well as their position within the Federal Council. Furthermore, Art. 176 of the FC regulates the election of the President of the Confederation and the Vice President and, in doing so—supplementing the (apparently incomplete) list of the Federal Assembly's electoral powers in Art. 168 of the FC—provides in particular that the Federal Assembly shall conduct this election. 10

11 The non-prominent role of the President of the Confederation is closely linked to the **principles of collegial government and concordance** that prevail in Swiss democracy. It follows from the collegial principle enshrined in para. 1 of Art. 177 of the FC that all members of the Federal Council are equal, which also has implications for the structure of the office of the Federal President. This is linked—as rightly pointed out in the literature—to a strong distrust of the accumulation of power in a single person, which is also reflected in the structure of the Federal Presidency. Fritz Fleiner had already observed that Switzerland has a preference for collegial bodies, which provide space for a majority of people and prevent and limit the overwhelming influence of any single individual. Finally, “concordance” refers to “the endeavor to ensure that values and interests are taken into account to the greatest extent possible in the political process.” Against this backdrop, the office of the Federal President can be characterized today as follows: she or he is merely the *first among equals* and holds no actual position of primacy over the other members of the Federal Council (see N. 12). In accordance with the collegial principle, the office of the President of the Confederation is also associated with only limited powers. However, the collegial principle would not preclude a slight strengthening of the President’s role, as the scope of the collegial principle must not be overstretched.

IV. “(...) PRESIDES OVER THE FEDERAL COUNCIL.”

12 The wording of Art. 176 para. 1 of the FC is extremely concise. Furthermore, the President of the Confederation often performs his or her duties not in public but within the collegium. This makes it difficult to determine whether and how the President of the Confederation performs his or her duties in each instance. These circumstances also complicate the **interpretation of Art. 176 of the FC**. One point of reference for this is the Federal Assembly’s interpretive practice regarding Art. 176 of the FC, as it emerged, for example, during the enactment of Art. 25 et seq. of the GAOA. This must be taken into account in the following analysis of the content of Art. 176 of the FC. However, it is not acceptable to derive the meaning of Art. 176 of the FC from its legislative implementation; this would amount to a reversal of the hierarchy of norms.

13 The wording of the FC does not explicitly specify either the exact function or the duties of the President of the Confederation. The Constitution merely

states that the President of the Confederation **presides over the Federal Council** (Art. 176 para. 1 of the FC). But what exactly does this mean? Generally speaking, the role of presiding can be described as follows: The President of the Confederation "only" *presides over the Federal Council, not over the Confederation*. Nor does he or she lead the Federal Council, but merely presides over it. He or she is responsible for ensuring the "operational capacity and system-appropriate performance of the [Federal Council] and bears primary responsibility for this." Thus, the office of the Federal President confers "neither power nor a position of legal and political hegemony." As the legislature has succinctly and convincingly formulated in Art. 19 para. 3 GAOA, she or he is the presiding member of the Federal Council. However, to deny the President of the Confederation any real authority goes too far. Rather, due to her or his presidential duties, she or he holds *a certain additional position of power* compared to the other members of the government.

In principle, a distinction must be made between the **management and coordination function** of the President of the Confederation on the one hand, and his or her other formal "functions within the Federal Council" as regulated by law (see, for example, N. 20 and N. 22) on the other. The exercise of the leadership and coordination function constitutes the main task of the Federal President. In this leadership and coordination function, "chairmanship" refers to "executive management." Leadership here includes "initiating, coordinating, steering procedures, mediating, bringing together, driving forward, and monitoring," and thus refers to the leadership of the College (see N. 18). All these tasks must be performed in accordance with the Constitution, whereby the President must bear in mind that the office of the President does not confer upon him or her the powers of a head of government. In the wake of the Libya affair, it ultimately became clear that the President—by signing an international treaty on her or his own authority—can do more under international law than she or he is permitted to do under domestic law. 14

Due to the limited scope of responsibilities, constitutional scholars have rightly concluded for over 140 years that the Federal President is more of a **President of the Federal Council**. The title "Federal President" "Federal President" thus obscures the actual lack of substance of the office in question or promises more than it can deliver. Furthermore, the office does not relieve the Federal President of the obligation to simultaneously head one of the seven departments (see Art. 175 para. 1, Art. 177 para. 2, and Art. 178 para. 2 of the 15

FC) . Nevertheless, political science literature notes that, even in recent times, Federal Presidents have been able to set certain political priorities despite their non-prominent role.

16 The Federal President generally possesses a **specific democratic legitimacy** based on a separate election by the United Federal Assembly. However, given the existing electoral practice, under which the election tends to degenerate into a routine appointment, this additional legitimacy is minimal. Consequently, this additional legitimacy does not necessarily imply a broad interpretation of the federal president's duties. In particular, no such indications can be found in the text of the Constitution. Nevertheless, in the Protocol Regulations of the Swiss Confederation approved by the Federal Council, the Federal President is listed as rank 1a, following the Federal Council as a whole, which is classified as rank 1. In terms of protocol, the Federal President thus ranks above both the other Federal Councilors and the President of the National Council (rank 2) as well as the President of the Council of States (rank 3). The FDFA justifies this departure from the domestic hierarchy of powers with the "hierarchical ranking of officeholders with regard to the external representation of our country."

17 The role of the Federal President is frequently described in negative terms in academic literature and by the Federal Council itself. Thus, one repeatedly reads that the Federal President is **neither head of state nor head of government**. As brief and catchy as this description may be, it adds little. While these catchphrases do rule out two (theoretically) possible functions for the Federal President, they offer no further insight regarding the concrete division of powers. However, a negative description of the role of the President of the Confederation, based on the concrete structure of the office, is helpful. The President of the Confederation has no influence over the composition of the Federal Council. This is determined for her or him by the United FC Assembly (see Art. 175 para. 2 of the Federal Constitution). Furthermore, under the Constitution, the Federal President does not hold a hierarchical position vis-à-vis the other members of the Federal Council. He or she is not their superior. In the absence of this superior position, the Federal President has no substantive authority to issue instructions to the other members of the Council. This would be alien to the system in a multi-party government bound by the principle of concordance, such as the Swiss Federal Council (see N. 11). Finally,

the constitutional framers did not confer any substantive decision-making powers on the President of the Confederation through the chairmanship.

The most important task of the chairmanship of the Federal Council is the **management of the College** as such (see Art. 25 para. 1 GAOA). The President "holds the College together as a body and drives it forward, keeps it running, and safeguards it through [her or] his leadership." This includes presiding over Federal Council meetings (see Art. 18 para. 1 GAOA), which also encompasses their preparation and the casting of a deciding vote in the event of a tie (a situation that, in practice, likely occurs rarely due to the odd number of Federal Council members) (Art. 25 para. 2 let. b and Art. 19 para. 3 GAOA). The powers of the President of the Confederation are thus closely linked to the formal handling of business. Since 2014, the President of the Confederation has been able to formally instruct a member of the Federal Council to submit a specific matter to the Federal Council by a set deadline (Art. 25 para. 2 let. b^{bis} GAOA). Politically, however, it is difficult to imagine that a Federal President would instruct another Federal Councilor to place a matter (which may not yet be ready for a decision) on the agenda of a Federal Council meeting. Whether the powers arising from these tasks are exercised with restraint in practice—as posited by legal doctrine—is difficult to assess from the outside. The assessment is likely accurate, however, as no examples from Federal Council practice indicating the contrary have yet been reported in the media. Leading the College, however, involves more than just the formal task of chairing meetings. Leading the College means that the President of the Confederation initiates important discussions in the Federal Council, works toward a consensus-based proposal, but also strives for a decision when no compromise can be reached in the Federal Council. Social skills are also required here. Through thoughtful and goal-oriented leadership of the Council, the President is likely to be able to exert the greatest influence on the body today—in the absence of a prominent position and substantive decision-making authority. 18

Legal scholarship further posits that the primary task of the President should be to bring about a **unified and coherent government policy** both domestically and internationally (see Art. 180 of the FC). In this sense, one could argue that the President of the Confederation must ensure the fundamental function of the Federal Council—the political leadership of Switzerland. In this way, the President of the Confederation could review and ensure that the 19 goals set forth in the legislative program (see Art. 146 of the ParlA) or other planning instruments are achieved. While such demands appear fundamentally reasonable from a theoretical perspective, they are likely to be difficult to fulfill in practice with the tools currently available to the President of the Confederation.

20 The President of the Confederation **represents the Federal Council both domestically and abroad** (Art. 28 GAOA). These representative duties include, for example, participating in international conferences and undertaking state visits abroad upon invitation, as well as delivering the annual New Year's and August 1st addresses. State receptions in Switzerland, on the other hand, are conducted by the Federal Council as a whole, since the representation of the Confederation both domestically and abroad is the responsibility of the Federal Council as a collegiate body (see Art. 174 para. 1, Art. 184 para. 1, and Art. 186 para. 1 of the FC). Despite these responsibilities, the President of the Swiss Confederation is often not viewed by the Swiss public—in line with their legal powers—as a leader. However, this also depends on current events and the character of the incumbent President. For example, former Federal Councilor Simonetta Sommaruga was very much in the public eye as Federal President at the start of the COVID-19 pandemic in the spring of 2020, which even earned her the title of "Mother of the Nation" in certain media outlets.

21 The office of Federal President is associated with **prestige**, particularly due to the aforementioned representative duties. This prestige and the media presence associated with it today—even if it has diminished compared to that of the other Federal Council members—should still not be underestimated. Accordingly, Federal Councilors often view a presidential year as the (crowning) conclusion of their time in the Federal Council and step down from office shortly thereafter. The prestige and increased media presence are likely also two of the reasons why a revision of the provisions regarding the President of the Confederation has not yet been successful. However, it is likely not only the individual members of the Federal Council who covet the prestige associated with the office of President of the Confederation, but also their political parties, which presumably also wish to bask in the office's glory.

22 Finally, the President of the Confederation has **other minor duties**, including, among other things, presidential decisions in urgent cases under Art. 26 GAOA, maintaining relations with the cantons under Art. 29 GAOA, and decisions in interdepartmental conflicts of jurisdiction under Art. 47 para. 3

GAOA. Pursuant to Art. 9 of the Ordinance on the Organization of the Federal Council of November 29, 2013 (SR 172.111, OV-BR), the President of the Confederation represents the Federal Council in parliamentary deliberations on the legislative program, on the Federal Council's annual objectives, and during the annual reporting on matters concerning the Federal Council as a collegiate body.

The President of the Swiss Confederation is primarily supported in the performance of his or her duties by the Federal Chancellor (see Art. 30 para. 2 let. a GAOA). In addition, pursuant to Art. 29*a* para. 1 of the GAOA, the President of the Confederation has a **Presidential Service** at their disposal to carry out their special duties, in particular regarding international relations, communication, protocol, and organizational matters. The Presidential Service is located within the Federal Chancellery (Art. 29a para. 2 GAOA). The Presidential Service has existed in this form since 2015. The idea behind this was that continuity and efficiency in the performance of the Federal President's diplomatic duties could be enhanced if these duties were concentrated within a dedicated service. Support is provided solely for the performance of the aforementioned specific tasks. Consequently, the Presidential Service is not intended to support the Office of the President in the management of the Federal Council per se. However, strengthening and expanding the Presidential Service in this direction would be worth considering (see N. 34). 23

V. VICE PRESIDENT

The **role of the Vice President** of the Federal Council is not defined in the Constitution. Nor did the Federal Council comment on the position of the Vice President in its message on a new Federal Constitution. Nevertheless, Art. 27 GAOA provides that the Vice President shall act as deputy and assume all presidential duties if the President of the Federal Council is unable to perform his or her duties. This provision is intended to ensure the Federal Council's ability to act. The Vice President may also, for example, chair a Federal Council meeting if the President recuses themselves from a matter (Art. 20 GAOA, Art. 4 para. 1 OV-BR). 24

VI. ELECTION PROVISIONS (PARA. 2 AND 3)

25 Under Art. 176, para. 2 of the FC, the Federal Assembly elects the President and the Vice President **from among the members of the Federal Council**. This provision does not entitle any member of the Federal Council to be elected as President. The principle of rotation, which is strictly observed in current electoral practice (see N. 29), is not mandated by the Constitution. This also applies to the custom that the President must previously have served as Vice President. The latter requirement cannot be met in any case, particularly if the Vice President resigns or is voted out of office as a Federal Councilor. This was most recently the case when Federal Councilor Joseph Deiss became President in 2004 after Federal Councilor Ruth Metzler, who was serving as Vice President, was voted out of office in December 2003. Current electoral practice also cannot establish a customary right to election to one of the aforementioned offices, particularly since Art. 176, paras. 2 and 3 of the FC (and presumably also Art. 148, para. 1 of the FC) leave no room for this due to their exhaustive nature.

26 The Federal Assembly elects the President of the Confederation and the Vice President for a **term of one year** (see Art. 176 para. 2 of the FC). This *short term of office makes it difficult to meet the demands of the office*, as there is little time to grow into this coordinating leadership role. The term of office thus stands in a certain contradiction to para. 1. At the same time, the one-year term prevents the "legal development of a dominant role within the Council and a prominent standing among the people," which corresponds to the collegial principle that governs the structure of the office of the President of the Confederation (see N. 11).

27 Para. is regularly the **subject of proposals to reform the organization and strengthen the Federal Council**. In the supplementary message of October 13, 2010, on government reform, the Federal Council itself proposed—ultimately unsuccessfully (see N. 3)—to extend the term of office of the President of the Confederation to two years. It justified this, among other things, by arguing that a two-year term would strengthen the leadership and coordination functions of the President of the Confederation. In addition, the President's duties of presence and representation, particularly vis-à-vis foreign countries, could thus be better managed.

According to Art. 176 para. 3 of the FC, **re-election** to the office of Federal President or Vice President **is excluded for the following year**. Furthermore, the Federal President may not be elected as Vice President for the following year. The prohibition on immediate re-election is intended to prevent the dominance of individual members of the Federal Council and to protect the balance within the college. The wording of para. 3 would, however, allow three members of the Federal Council to take turns holding the presidency in succession. The question of whether such an electoral practice by the United Federal Assembly would be compatible with the collegial principle under Art. 177 para. 1 of the FC is of a theoretical nature. However, it is likely to be answered in the affirmative, as the scope of the collegial principle must not be overstretched. 28

Today—as already explained (see N. 3)—the **election practice** is that a member of the Federal Council only becomes President of the Confederation after having served under the presidency of all senior colleagues. However, the United Federal Assembly is not constitutionally obligated to follow this **rigid rotation principle**. The rotation of the office of President among all members of the Federal Council is, on the one hand, a consequence of the diminished political significance of the office. On the other hand, the rotation principle is likely also linked to the prestige of the presidency, which is intended to be distributed evenly among the parties. These arguments make the rigid rotation principle currently in practice appear reasonable. However, they do not justify it, as the constant rotation weakens the leadership function of the office of the Federal President (see N. 32 ff. for reform proposals). At the same time, the rotation principle also has the advantage of serving justice, collegiality, and concordance, thereby contributing to the stability and thus the legitimacy of the system. 29

The annual election of the Federal President is often "*abused*" by members of the United Federal Assembly to **express** their **displeasure** with the policies of the Federal Council member due for election by casting a blank or invalid ballot. Since the members of the United Federal Assembly are free to decide whom they elect as Federal President, such political games appear rather petty. 30

VII. REFORM PROPOSALS

31 As already explained, the prestige associated with the office of Federal President is likely one of the **reasons why no reform of the relevant provisions has succeeded to date**. Under the current system, every Federal Councilor—regardless of their suitability for the office—has the opportunity to assume it. This also brings a bit of prestige to the respective Federal Council party. In this system, the members of the United Federal Assembly also spare themselves the discussions about which sitting Federal Councilors actually possess the necessary competencies to assume the presidency of the Federal Council and the associated duties. Moreover, the parties represented in the Federal Assembly would have to hold such a discussion as early as when compiling their "tickets" for the Federal Council elections, which they would likely prefer to avoid.

32 A look at the cantons shows that **other (electoral) systems** would also be conceivable. For example, in the canton of Basel-Stadt, the president of the government is directly elected to office for a four-year term and assumes the associated leadership role. In such a system, candidates must consciously face the question of whether they possess the leadership and interpersonal skills required for the office of President. The disadvantage of such an electoral system is the increased competition for the presidency, which could jeopardize successful cooperation and collegiality within the body. It is also conceivable that the political discussions arising around the election of the Federal President in such a system could be detrimental to the political climate. These disadvantages do not outweigh the associated advantage—the strengthening of the leadership function of the Federal Presidency.

33 Such an *"election based on suitability"* therefore represents a desirable system for the Office of the President. This would entail **abandoning the automatic election process** or the rotation principle and placing greater emphasis on members of the Federal Council with enhanced leadership skills. The Federal Assembly could implement such a system change by modifying its election practices without altering the legal framework. To further strengthen the leadership role of the Office of the President, an **extension of the term of office** also appears sensible. However, a four-year term for the President seems too long, given the principle of collegiality. Instead, a two-year term would be appropriate. On the other hand, the creation of a **Presidential Department** does not appear to be effective. The fact that the Federal President is simulta-

neously the head of a specialized department and is thus on an equal footing with the other Federal Council members from a professional standpoint appears appropriate in light of the collegial principle (see N. 11).

What should be sought, however, is the **creation of an administrative unit (or the strengthening of the existing Presidential Office)** that reports directly to the Office of the President or the Federal Council as a whole and is thus not part of the rest of the administration. This would ensure that, at least within this administrative unit, the collegial perspective prevails over the departmental one. The administrative unit could support the Federal President in his or her leadership tasks and in ensuring a long-term, coherent government policy. The creation of such an administrative unit would, moreover, make sense even without further strengthening of the presidential powers, since *strengthening the collegial perspective is desirable* even in the current system. 34

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COMMENTARY ON

Art. 178 FC

A commentary by Dominique Hänni / Marine Albertini

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Art. 178 Federal Administration

1 The Federal Council is in charge of the Federal Administration. It ensures that it is organised appropriately and that it fulfils its duties effectively.

2 The Federal Administration is organised into Departments; each Department is headed by a member of the Federal Council.

3 Administrative tasks may by law be delegated to public or private organisations, entities or persons that do not form part of the Federal Administration.

CONTENT

I. BACKGROUND

Article 178 was adopted in its current form during the total revision of the Federal Constitution in 1999. From a formal point of view, it is a new feature, in that **an entire constitutional provision is devoted to the federal administration** for the first time. 1

In its **first two paragraphs**, Article 178 consolidates several scattered provisions of the 1874 Constitution (Article 102, item 12, Article 103, paragraph 1, Article 104 of the old Constitution) and, apart from a few more explicit and intelligible formulations, does not contain any new fundamental elements. Paragraph 1 now expressly mentions the executive power (first sentence) and the organizational power (second sentence) of the Federal Council and refers to a rational organization. Paragraph 2 essentially reproduces the principle of departmental division enshrined in Art. 177 para. 2 Cst. (itself derived from Art. 103 para. 1 of the old Constitution). The first two paragraphs of Art. 178 of the Constitution are thus fully in line with the objective of updating, clarifying and systematically organizing written and unwritten constitutional law that guided the revision of the 1874 Constitution. It is not surprising that they were accepted by both chambers without discussion during the parliamentary debates on constitutional revision. 2

On the other hand, **paragraph 3** introduces for the first time into the constitutional text **a general authorization to outsource administrative tasks** and is, in this sense, an innovation. It gave rise to considerable discussion during the debates on the new Constitution, not because the principle of outsourcing was contested, but because the committees had proposed going further and granting the Federal Council more power and flexibility in this area (see footnote 96). The more modest version ultimately prevailed (see N. 44 below). 3

II. BACKGROUND

A. The federal administration in the constitutional system

Within Title 5 on "Federal Authorities," Art. 178 of the Constitution is part of Chapter 3 on "The Federal Council and the Federal Administration." The mention of the federal administration in the title of the chapter is new and 4 marks its connection to the executive branch. Within this chapter, Art. 178 of the Constitution provides the federal administration with **a comprehensive and specific constitutional provision** for the first time.

5 It is tempting to see this as recognition of the place that this organization now occupies within the modern state, or even the establishment of a "fourth branch of government." However, this must be qualified. From a formal point of view, Article 178 of the Constitution is the only one of the fourteen articles in the chapter to deal with the federal administration, with the exception of a passing reference in Article 187(2) of the Constitution, all the others being devoted to the Federal Council. In substance, the federal administration exists in Article 178 of the Constitution only through the tasks assigned, on the one hand, to the Federal Council (administration management) and, on the other hand, to the legislature (supervision of outsourcing). The administration as such is not assigned any specific tasks or powers, and the legal status of its personnel is not specified. Article 178 of the Constitution is therefore **far from establishing the federal administration as a state** body. Rather, it must be noted that the central role played by the federal administration in the day-to-day functioning and stability of the state is not fully reflected in the Federal Constitution.

B. The concept of federal administration

6 Two dimensions are commonly attributed to the term "administration." "Administration in the functional sense" refers to the performance of administrative tasks; this will be discussed below (N. 33 ff.). However, the three paragraphs of Article 178 of the Constitution—like other constitutional provisions—refer to "administration in the organic sense." This refers to all those who perform these administrative tasks (also known as *Verwaltungsträger*). In order to comment on Art. 178 of the Constitution, it seems necessary to briefly describe the organization of the federal administration (1.) so as to understand which parts of it are referred to in the three paragraphs of Art. 178 of the Constitution (2.).

1. The organization of the administration

7 Over the past few decades, the federal administration, which used to be more compact and centralized, has changed into a multifaceted administration whose tasks are carried out by hundreds of entities with a wide variety of legal

forms and degrees of autonomy. Admittedly, at the heart of this structure still lies the **central federal administration**, the traditional model of administrative organization, whose departments and subdivisions form a hierarchical, pyramid-shaped unit. It is also customary to include the armed forces and the Federal Chancellery, although this is not apparent from the structure of the Constitution.

Beyond this lies a **variety of actors**, all of which share the characteristic of not being subject to the hierarchical subordination of the central core. These entities generally take one of the following forms, listed here in order of proximity to the central core: 8

- Administrative units without legal personality (e.g., the Federal Data Protection and Information Commissioner [FDPIC] or the Federal Audit Office [CDF]) and extra-parliamentary commissions (e.g., the Competition Commission [COMCO] or the Federal Electricity Commission [ElCom]), although some authors consider these units to belong to the central administration because they do not have separate legal personality;
- Outsourced public-law entities controlled by the Confederation:
  - Autonomous public-law institutions with legal personality (e.g. Swissmedic, FINMA or the MNS);
  - Public-law foundations (e.g. Pro Helvetia or Swiss National Park);
  - Public corporations, in particular public limited companies (e.g. Swiss Post or Swiss Federal Railways) and public cooperatives (e.g. Swiss Hotel Credit Company), wholly or partly owned by the Confederation, or public corporations structured in a similar way to private associations (e.g. ISDH);
- Outsourced private-law entities controlled by the Confederation:
  - Private-law foundations (e.g. the SNSF);
  - Private-law associations (e.g. SRG SSR);
  - Private-law limited companies (e.g. RUAG MRO Holding AG);
- Private-law entities not controlled by the Confederation that are delegated administrative tasks, sometimes referred to as private entities proper.

Some authors consider that all of these entities together make up **the decentralized federal administration** (hereinafter: decentralized administration 9 in the broad sense); this view corresponds to a **two-tier division** of the federal administration into central administration and decentralized administration. However, the Government and Administration Organization Act of March 21, 1997 (LOGA; RS 172.010) and its implementing ordinance of November 25, 1998 (OLOGA; RS 172.010.1) establish a **three-part division**, distinguishing between decentralized units administratively attached to the central administration (decentralized administration in the narrow sense) and organizations or persons outside the administration that perform administrative tasks (Art. 2 para. 4 LOGA; Art. 6 OLOGA). However, such a three-way division is not required by the Federal Constitution. It would certainly be tempting to interpret Art. 178 Cst. in light of these two normative acts, whose respective drafting procedures partially overlapped. Nevertheless, we do not consider it advisable to interpret the constitutional text solely in the light of the lower-ranking texts, namely the LOGA and OLOGA, which are easier to amend, particularly in line with developments in public management concepts; however, they may be taken into account from a historical and systematic perspective when interpreting the constitutional text.

2. The concept of “federal administration” as used in Art. 178 Cst.

10 On the basis of these general considerations, it is now necessary to determine, by interpretation, to which entities of the federal administration the constituent body wished to refer when drafting Art. 178 Cst. To this end, the three paragraphs will be dealt with separately, starting with the one that is most clearly worded, i.e. **paragraph 2**. A literal interpretation of this paragraph makes it possible to conclude that it is indeed the *central* federal administration, as defined above, that is divided into departments.

11 The exercise proves to be both more delicate and more far-reaching for **paragraph 3**, insofar as it requires a formal legal basis for the performance of administrative tasks by entities “outside the federal administration.” A literal interpretation does not yield a clear meaning, nor does one emerge from a reading of the other provisions of the Constitution that refer to “other bodies entrusted with federal tasks.” However, the historical interpretation of paragraph 3 is more clear-cut, as the Federal Council states specifically in its message that this paragraph is intended to remove tasks of the Confederation from the departmental services of the general administration, i.e. the *central* federal administration. The parliamentary debates confirm this view (N. 44) and also

give an indication of the objective pursued by this paragraph, namely to give outsourcing greater parliamentary legitimacy (N. 43). A legal basis is therefore necessary whenever an administrative task is entrusted to an entity outside the *central* federal administration.

Finally, the meaning of the term “federal administration” contained in **paragraph 1**[(1)] cannot be derived from a simple reading of that paragraph or from consultation of the preparatory work. From a systematic point of view, it would seem consistent and intelligible to attribute the same meaning to the term in the three paragraphs of Article 178 of the Constitution, i.e. the *central* federal administration. However, the issue of interpretation remains limited, since other provisions of the Constitution make it clear that the Federal Council's power of direction is not limited to the central federal administration. Article 174 of the Constitution confers supreme executive power on the Federal Council, thereby placing it at the head of all bodies performing administrative tasks. Furthermore, Article 187 para. 1(a) of the Constitution entrusts the Federal Council with the supervision of “the federal administration and other bodies or persons entrusted with federal tasks,” supervision being one of the essential components of the Federal Council's power of direction (N. 16). It is therefore important to understand what the power of direction encompasses for each part of the federal administration, which will be detailed below (N. 16 ff.). 12

III. COMMENTARY

A. Paragraph 1

Despite its laconic wording, Art. 178 para. 1 has real normative significance. 13

It confers on the Federal Council the power to direct the federal administration (1.) – which is also provided for in Art. 174 of the Constitution (N. 12) – and explicitly guides it in this task by entrusting it with the rational organization of the federal administration (2.) and assigning it responsibility for the proper performance of the latter's tasks (3.).

1. Management of the federal administration

As mentioned above (N. 12), a combined reading of Articles 174, 178 para. 1[and] 187 para. 1(a) of the Constitution indicates that the general power of manage- 14 ment entrusted to the Federal Council applies **both to the central administration and to the decentralized administration**. Indeed, since the Federal Council is responsible for the federal administration before the Federal Assembly, it is necessary that it has the management and supervisory instruments enabling it to fully assume this responsibility. It also follows from the articles cited that this power of direction cannot be exercised with the same intensity in relation to all entities of the administration, if only because the Constitution uses the term “supervision” in relation to bodies and entities outside the central administration. That said, the Constitution does not provide any further details on the concept of management or on the specific instruments for implementing it.

15 The term “manage” is semantically associated with “guide, lead or direct.” It symbolizes the action of a certain driving force in a given direction. The Federal Council is therefore constitutionally responsible for **directing** the federal administration in the performance of its tasks. It follows that it does not, in principle, perform these tasks itself, but rather lays down the broad guidelines for their implementation. This creates a division between strategic aspects – which are the responsibility of the Federal Council and often overlap with the most political or politicized issues – and operational aspects, which are entrusted to the administration. However, the boundary between politics and administration is often blurred, as the way in which the administration performs its tasks tends to feed back “upwards” and influence the (strategic) decisions taken by the government. The power of direction provided for in Article 178(1) of the Constitution also includes the power to **organize** the administration and to **supervise** it *a posteriori*. These two elements are explicitly mentioned in the second sentence of this paragraph: the Federal Council is responsible for ensuring the rational organization of the administration and for supervising the proper execution of the tasks entrusted to it; This will be discussed in more detail below in N. 19 ff and N. 22 ff.

16 The precise form of management in the broad sense and the instruments used for this purpose vary according to the degree of autonomy of the entity responsible for performing the task. **Within the central administration** (N. 7), the Federal Council's management authority is part of the hierarchical structure, which is generally represented as a pyramid with several levels. This structure assumes that each unit belongs to a specific level and is subordinate to the unit immediately above it. It is characterized by a division of labor and

a succession of delegations of files and means of action along the levels according to their degree of importance. This hierarchical framework provides the Federal Council with specific powers and means of direction, generally grouped under the term **hierarchical power**. Hierarchical power includes the following powers, which may be limited by other constitutional articles or special legislation:

- **The power to issue instructions** to lower levels in the performance of their tasks, in particular by means of administrative orders of various kinds – general instructions, directives, circulars, communications, service orders, etc. These orders have no direct legal effect on citizens and are intended exclusively for departments, their subdivisions and their officials, for whom they are binding by virtue of the hierarchical relationship. Administrative orders may contain general objectives and principles as well as specific instructions for handling cases.
- The **power of control** or **supervision**, which enables the Federal Council not only to ensure that the law is properly applied (legality control) and that its instructions are carried out (appropriateness control), but also to monitor, as an extension of its task of providing guidance and strategic direction, the effectiveness and usefulness of administrative action as a whole.
- The **power of revocation** allows the Federal Council, in principle, to replace any administrative unit to which a matter has been entrusted in order to exercise its decision-making functions in its place. However, this power is limited in certain cases, in particular if revocation would deprive citizens of the right of appeal to an independent body. The **power of revocation** allows the Federal Council to invalidate any act of the federal administration.

On the other hand, the Federal Council's power of direction is less incisive **towards decentralized administrative entities**, which have greater autonomy and are not subject to hierarchical authority. The Federal Council may therefore use **ex ante** *steering instruments* (e.g. power to approve statutes, regulations or other specific acts or decisions, setting strategic objectives, particularly in a service contract) or *ex post* supervisory instruments and **means** (e.g. through the obligation to provide information, approval of activity reports, accounts, discharge of bodies, the right of representation within the bodies of the decentralized entity, or the establishment of effective legal pro- 17 tection against decisions of the decentralized entity), but generally does not have the power to issue specific instructions to decentralized entities. It should be noted that some of the management and supervisory measures used in relation to decentralized administration have also been introduced in central government in the name of New Public Management (e.g., management by budget or by objectives).

18 It should also be noted that Article 169(1) of the Constitution confers on the Federal Assembly the power of "high supervision of the Federal Council and the federal administration." Unlike the supervisory power of the Federal Council, this **high supervision** is not a means of managing the administration and is therefore not equivalent to the power of direction under Article 178(1) of the Constitution. It simply gives substance to the political responsibility of the Federal Council. In practice, parliamentary control is directed only at the Federal Council as the supreme executive body.

2. Rational organization of the federal administration

19 The first key element of the power of direction expressly mentioned in Article 178(1) sentence 2 of the Constitution is the task of ensuring the rational organization of the federal administration. However, this power is **strictly limited**.

20 On the one hand, the Federal Council is bound by the **organizational requirements** expressly laid down in the Constitution, namely the division into departments (Art. 178 para. 2 of the Constitution; see N. 25 ff below) and the requirement for a formal legal basis for the outsourcing of administrative tasks (Art. 178 para. 3 of the Constitution; see N. 29 ff below). On the other hand, the legislature has the power to enact fundamental provisions on the organization of federal authorities (Art. 164 para. 1 lit. g Cst.). Since the constituent assembly did not specify further what constitutes fundamental provisions, in practice only those powers remain within the competence of the Federal Council that the legislature has seen fit to leave to it. It should be noted that, although not required by the Constitution, the legislation currently in force grants the Federal Council the power to create offices, assign them tasks and powers, and distribute them among the departments according to criteria determined by the legislature (Art. 43 para. 2 and 3 LOGA). The power to structure the offices, on the other hand, is entrusted to the lower level, i.e. to the heads of departments (Art. 43 para. 4 LOGA).

The constituent also specifies that the organization established by the Federal Council must be **rational ("zweckmässig"; "appropriata")**. The preparatory work does not provide any clarification on these terms. According to various French, German, and Italian dictionaries, the terms used in the three language versions refer to what appears logical, appropriate to the circumstances, suitable, reasonable, in accordance with common sense, adequate, and based on a sound method. When determining the organization of the administration, the Federal Council will therefore endeavor to choose the organizational model that enables the administration to best achieve its objectives, or in other words, the most efficient organization. 21

3. Proper execution of federal administrative tasks

The second task explicitly mentioned in Art. 178 para. 1, second sentence, is closely linked to rational organization: the Federal Council shall ensure that the tasks of the administration are performed properly (see N. 33 for the concept of administrative tasks). The instruments at its disposal for this purpose, which relate in particular to supervision, have already been mentioned above (N. 16 and 17). it is necessary to consider **how the tasks of the administration are to be performed**. As the three language versions differ considerably ("bonne exécution," "zielgerichtete Erfüllung," "corretto adempimento"), it is necessary to find a meaning for the constitutional provision that satisfies all of them. 22

In our view, the Italian version requires the Federal Council to ensure that the administration performs its tasks in accordance with the principle of legality and other traditional principles of the rule of law. The German term, on the other hand, indicates that the tasks of the administration must be performed with a primary focus on the objectives set; thus introducing a dimension of efficiency. Finally, the term used in the French version refers, in our opinion, to the concept of **"good administration"**, which is familiar in several foreign legal systems and in the legal system of the European Union, and which aims to reconcile the requirements of legality and efficiency in state activity. The English version thus synthesizes the Italian and German versions and can serve as the basis for a genuine principle of good administration. It can be concluded that the tasks of the administration must be carried out in accordance with **both the principle of legality and that of efficiency**, without neglecting the former in favor of the latter. The Federal Council's message confirms this 23 interpretation, while adding the term "cost-effectiveness," which does not, however, derive from the constitutional text and should not, in our opinion, constitute a requirement for the performance of administrative tasks.

B. Paragraph 2

24 Article 178(2) of the Constitution states, on the one hand, that the federal administration is **divided into departments** and, on the other hand, that each department is headed by a member of the Federal Council. It thus echoes Art. 177 para. 2 of the Constitution, and one cannot help but notice a certain redundancy between these two articles.

25 However, Art. 178 para. 2 of the Constitution has the merit of highlighting the **tension** that exists between the **principle of collegiality** on the one hand and the **departmental principle** on the other: each member of the Federal Council is both a member of the government and head of their own department. They are therefore responsible for defending proposals from their department individually before the government and for expressing their opinion on these proposals as a member of the Federal Council. In practice, there is a risk that each member of the government will tacitly recognize the freedom of action of the others in order to preserve their own, so that a certain de facto primacy of departmentalization over collegiality emerges. This tendency is also reflected in the distribution of political responsibilities: although the Federal Council is accountable as a collegiate body to the Federal Assembly (Art. 169 para. 1 and Art. 187 para. 1 let. b Cst.), it is often its members who publicly and individually bear responsibility for the failures and shortcomings of their respective departments. Nevertheless, the interaction between these two principles ensures a certain balance.

26 More specifically, the power to **create these departments** is a fundamental provision relating to the organization of the federal administration and therefore lies with the Federal Assembly (Art. 164 para. 1 letter g of the Constitution). Insofar as the Constitution sets the number of members of the Federal Council at seven (Art. 175 para. 1of the Constitution) and each of them heads a department, the constituent formally imposes a minimum number of **seven departments**. There is no need to debate whether the Constitution allows for an increase in the number of departments, since their underlying structure is flexible: the Federal Council is free to allocate tasks and powers by creating and distributing offices among the departments, while ensuring their material

and political balance (Art. 43 para. 3 LOGA). However, this numerical stability results in disparate activities being grouped together in the same federal department, which in neighboring countries would normally be divided among several *ministries*. For example, the Federal Department of Home Affairs (DFI) is responsible for culture, public health, statistics, food safety, and social insurance.

It should also be noted that the Constitution is silent on the **specific allocation of departments** among the members of the Federal Council. It is customary for the Council to decide on this matter, with each member expressing their preferences in order of seniority. 27

Finally, Article 178(2) of the Constitution does not mention what the **management of a department** entails. Reference should be made here to the above comments on the Federal Council's power of direction over the central federal administration (N. 14 ff.): Similarly, and since the principle of hierarchical subordination permeates the entire central federal administration, members of the Federal Council shall direct their departments by means of powers of guidance, instruction, supervision and, where appropriate, referral and dismissal. It should be noted, however, that this management is carried out within the framework laid down by the higher authority, i.e. the Federal Council, which manages the federal administration as a whole (N. 14 ff). 28

C. Paragraph 3

Paragraph 3 of Art. provides for the **conditions under which the central administration may refrain from performing the tasks** entrusted to it and delegate them either to entities controlled by the Confederation, i.e. to the decentralized administration in the narrow sense (decentralization of task execution, *Ausgliederung*), or to private individuals (privatization of task execution or functional privatization of tasks; *Auslagerung; Beleihung*). However, Art. 178 para. 3 of the Constitution does not deal with the privatization of the task itself, i.e., the abandonment of administrative tasks. 29

In the following, after a brief introduction to the topic (1.), the task of the administration will be defined (2.), possible recipients will be identified (3.), and the conditions for outsourcing will be discussed (4.). 30

1. The objectives of decentralization in the broad sense and efforts at systematization

31 Over the last few decades, the federal administration has undergone a relatively significant process of decentralization and functional privatization, particularly in the name of New Public Management (see footnote 39). While this transformation began before the adoption of the Federal Constitution of 1999, the Constitution provides no information on the extent of the change, nor on the reasons that would require or at least justify it, nor on the possible legal forms of the decentralized entities. However, there are many **objectives** generally cited for outsourcing administrative tasks: efficiency, competitiveness, bringing the administration closer to the people it serves, cooperation between the state, the private sector, and citizens, flexibility, and responsiveness. Now that the New Public Management movement has passed its zenith, scholars are beginning to doubt that outsourcing administrative tasks can deliver on all these promises. A recent report on the unsuitability of the private limited company form for RUAG MRO Holding SA may be a sign of a trend toward re-internalization.

32 As for the choice of the **legal and organizational form** of a decentralized entity, at the turn of the 20th century, the Federal Council, again influenced by New Public Management, referred to the so-called four-circle model. This model—which is "purely descriptive"—divides the various forms of decentralization into four circles according to their level of autonomy. In its 2006 report on corporate governance and its 2009 supplement, the Federal Council refined this model by proposing a typology of state tasks that was intended to provide greater guidance and rationalize decentralization. However, these efforts to systematize the process did not produce the desired results. No remedy has yet been found for the "growing dissatisfaction" with the lack of uniform criteria for decentralization. On the contrary, it is clear that the choice of organizational or legal form is still often based on ideological or psychological criteria, or on current trends in administrative science. Particularly in the name of greater flexibility, management autonomy, depoliticization of task execution, or "better market orientation," there is still a preference for private law forms, even though public law forms are capable of achieving the same objectives. There is therefore currently no general theoretical framework or system for decentralization in Switzerland.

2. The task of the administration: the object of outsourcing

In the absence of a constitutional definition of the tasks of the administration, which are the object of outsourcing under Article 178(3) of the Constitution, they should be defined as all **tasks entrusted to the state by the Constitution or by law that are not assigned to the legislative or judicial** branch. It is by interpreting the law that one can deduce that a certain task constitutes a task of the administration. The creation or existence of such a task also implies, for the administration, the obligation and responsibility to carry it out itself or to delegate its execution. 33

The tasks of the administration can be summarized as traditional executive activity, i.e., the application of rules of law to specific situations. However, they may also include **normative activities**, which raises the question of whether the latter can be outsourced. The answer is *a priori* positive: neither Art. 178 para. 3 of the Constitution nor other provisions of the Constitution, in particular Art. 164 para. 2 of the Constitution, exclude the outsourcing of normative activities. However, case law and doctrine only allow this for secondary norms, i.e., provisions of minor importance that could be included in an implementing ordinance. 34

For the classification as an administrative task, it is irrelevant *how*, i.e. by what means and instruments of public action, the task is or will be performed. Nor is it important to know the type of task or to classify it in one of the categories defined in the Report on Corporate Governance (see N. 32). The more specific nature of the task may, however, influence the choice of supervisory measures to be put in place, particularly in the case of tasks of an economic nature. 35

This inevitably raises the question of whether certain tasks, although "administrative," are **excluded from outsourcing**, in particular from delegation to private entities proper. While the Constitution itself does not set any express material limits on the outsourcing of administrative tasks, legal doctrine seems fairly unanimous in favor of the existence of tasks that are so intrinsically linked to the State—in particular those related to the monopoly of legitimate force—that they cannot be delegated, although there is no consensus on which specific tasks cannot be delegated. However, this theory is often not followed in practice, which appears to be more liberal with regard to tasks 36 that can be outsourced. For example, the power to impose fines, air traffic control and the task of accommodating asylum seekers have been outsourced.

37 It should also be noted that, in addition to the concept of administrative tasks, the Federal Constitution refers in other places to “state tasks” (Art. 5*a*, 43*a* Cst.), “tasks of the state” (Art. 6, 35 para. 2, 43*a* para. 5 Cst.) and “tasks of the Confederation” (Art. 187 I a Cst.). Federal legislation contains other **terminological variations**, such as “administrative task,” “public task,” and “public law task.” Having defined above the concept of administrative task contained in Art. 178 para. 3 of the Constitution, it is not necessary here to examine in detail the relationships and overlaps between the various terms. It suffices to clarify the links between Art. 178 para. 3 and Articles 35 para. 2 and 187 para. 1(a) of the Constitution. Thus, the concept of “administrative task,” if not understood as a synonym, is at least part of the concept of “state task” used in Article 35 para. 2 of the Constitution: indeed, it is undisputed that any decentralized entity and any person delegated a public task is required to respect fundamental rights and contribute to their realization (see below N .47). Similarly, the Federal Council is undoubtedly empowered under Art. 187 para. 1 lit. a Cst. to supervise the bodies and persons entrusted with administrative tasks, even though this article refers to tasks of the Confederation.

38 Finally, the task of the administration must be distinguished from other, partly related concepts. Firstly, when the state chooses to acquire goods or services (e.g., computer equipment, cleaning services, or legal services), the *production* of the goods or the *provision* of the services by the contractor constitutes **auxiliary administrative activities** (*Hilfstätigkeit*, *Bedarfsverwaltung*) and not administrative tasks. Although more or less intelligible in theory, the distinction between administrative tasks and auxiliary administrative activities is not so clear in practice. Secondly, the outsourcing of monopolized activities is generally done through **concessions**. The activities thus concessioned may, but do not necessarily, constitute public tasks. In the former case, the doctrine refers to public service concessions; the conditions for outsourcing administrative tasks then apply in full. Finally, the granting of a **subsidy** to a private individual for the performance of a certain task does not in itself provide any information about the nature of that task: it may be an administrative task delegated to the private sector, but it may just as well be a task in the public interest where the state's involvement is limited to granting the subsidy.

3. Recipients of outsourced administrative tasks

Article 178(3) of the Constitution deals with the outsourcing of tasks to bodies or persons that are "external to the federal administration." This wording is unfortunate: as soon as they perform administrative tasks, all bodies or persons, whether governed by public or private law, under state control or not, are "holders of administrative power" i.e. *Verwaltungsträger* (see above N. 6) and are therefore part of the decentralized administration in the broad sense. For the sake of clarity, it should therefore have been specified that the bodies and persons referred to in Art. 178 para. 3 of the Constitution are external to the *central* federal administration (see above N. 11). 39

As mentioned above, among the recipients of outsourced administrative tasks, a distinction is generally made between **entities controlled by the Confederation** (decentralized administration in the narrow sense) and private entities proper. With regard to the former, it should be noted that the Constitution does not expressly provide for the possibility of creating such entities; but their existence is implicitly provided for in several places in the Constitution, including in particular in Art. 178 para. 3 Cst. Furthermore, there is no doubt that the creation of decentralized entities is subject to the same legal requirement as the outsourcing of administrative tasks to them. It is also entirely conceivable that an administrative task may be created by the same legislation that establishes the decentralized entity and transfers the task to it; Art. 178 para. 3 of the Constitution therefore does not require that an administrative task be performed by the central administration before being transferred. Finally, for the forms of decentralized entities, we refer to N. 8 ff above. 40

When the entity is not controlled by the state, we speak of a delegation of administrative tasks to **private entities proper** (*Auslagerung; Beleihung*). The initial question is not the same here: private delegates generally exist prior to the delegation of tasks. However, this form of outsourcing raises other questions, in particular those already addressed concerning the performance of tasks intrinsically linked to the State or normative tasks (N. 34 and N. 36). *In principle*, any natural or legal person may be delegated administrative tasks. However, it is generally legal persons (all types of companies, associations or foundations under private law) that are entrusted with such tasks, if only because the relevant legislation requires it. 41

4. Conditions for outsourcing administrative tasks

a. Formal legal basis

42 Art. 178 para. 3 of the Constitution stipulates that any outsourcing must be provided for by “law.” The requirement for a legal basis applies regardless of the legal form of the entity to which the task is outsourced and whether or not it is controlled by the Confederation. Beyond the constitutional text, the requirement for a legal basis reflects, according to the Federal Court, “**a general principle of public law**” that applies throughout the Swiss legal system.

43 The outsourcing of administrative tasks must be based, at the very least, on a **law in the formal sense**, i.e., a federal law or a constitutional provision. The constituent assembly thus intended that any outsourcing be discussed and approved by the Federal Assembly and subject to an optional or even mandatory referendum. This strict requirement for a formal legal basis is justified by the fact that, in the event of outsourcing, both the Federal Assembly and the Federal Council lose some of their powers of control: the former is limited in its power to supervise the government, and the latter loses its hierarchical power over the entity to which the task is delegated. The people, for their part, retain the possibility of opposing externalization through a referendum. The requirement for a formal legal basis thus ensures strong democratic legitimacy for any externalization of administrative tasks.

44 During the preparatory work on the new Constitution, **a relaxation of the basic legal requirement was discussed**. Specifically, the political institutions committees of both chambers proposed a version of Art. 178 para. 3 of the Constitution – previously suggested in the “Müller” expert report – which provided for the adoption by the Federal Assembly of a framework law allowing the Federal Council to outsource administrative tasks itself by means of an ordinance. However, this proposal was not accepted during the debates, and the original version, that of the Federal Council, was incorporated into the current Constitution. Although the theories of New Public Management were at the height of their popularity at the time, they did not find their way into Art. 178 para. 3 of the Constitution.

45 According to case law and doctrine, the legal basis must be **sufficiently precise and specific**, i.e. it must refer to a specific area of law. It follows without further ado from the constitutional text that the legal basis must contain, as a

minimum, the principle of outsourcing itself – which often consists of an authorization, a *Kann-Bestimmung*, rather than an obligation to outsource – as well as the task of the administration that is the subject of the outsourcing. With regard to the task to be outsourced, the principle of legality and the principle of specificity, which derives from it, require that it be sufficiently described and delimited. This is to prevent a body outside the central administration from acquiring too many responsibilities and becoming a truly autonomous center of power. Beyond this minimum content, the **normative density** required by the Constitution for the relevant legal basis depends on the type of task to be outsourced. In general, the requirements will be higher if the task involves public powers or affects fundamental rights or the rights and obligations of citizens. Thus, the requirements for a legal basis are particularly high in the case of the delegation of police tasks. Similarly, where the recipient must be empowered to take administrative decisions—a privilege of public authority—the legal basis must in principle provide for this explicitly; according to case law, however, such power may exceptionally be inferred by interpretation of the text. In our opinion, however, such a deduction by interpretation should only be admissible within extremely narrow limits in order to guarantee legal certainty. Beyond these genuine constitutional requirements, it would be desirable for the legal basis to contain any other elements that the legislature deems necessary in the specific case, such as principles or implementing provisions. Secondly, the **recipient** may be specified directly in the legal basis: this will often be the case when outsourcing is to decentralized entities under the control of the Confederation, which may themselves have been created by the same legislative text. When the task of the administration is delegated to a private individual, the (formal) law will often only contain the possibility of delegating the task to a third party. Once the private individual has been selected, their identity will be recorded in an administrative decision or contract. Finally, the requirement for a formal legal basis does not preclude the legislature from delegating to the executive power, in accordance with Art. 164 para. 2 of the Constitution, the power to enact rules of law to specify the modalities of outsourcing, in particular the tasks to be outsourced.

If the formal law does not contain sufficient elements for the outsourcing of 46
administrative tasks, in particular regarding the manner in which the task is to be performed, it is generally supplemented by an administrative decision, a concession or a contract; the latter will often be referred to as a mandate or service contract.

b. Other conditions

47 While Art. 178 para. 3 of the Constitution provides that a formal legal basis is the only condition for outsourcing administrative tasks, other conditions arise from the constitutional text.

- Thus, outsourcing must be justified by a **public interest** (Art. 5 para. 2 Cst.), a condition that can lead to conflicts of interest, particularly if the recipient is a commercial company that (also) pursues a profit-making objective.
- It must be **proportionate to the objective pursued** (Art. 5 para. 2 Cst.). This means, in particular, that the recipient chosen must be able to perform the administrative tasks for the entire period required.
- The recipient of the outsourcing must be chosen in accordance with the principle of **state neutrality in competition** (Art. 94 of the Constitution) and the principle of **equal treatment** of competitors (Art. 27 of the Constitution).
- When outsourcing administrative tasks, the centralized administration must ensure that **fundamental rights** (Art. 35 para. 2 of the Constitution), including **general procedural rights** (Art. 29 of the Constitution) and **access to a judicial authority** (Art. 29a of the Constitution), are guaranteed when the tasks are performed by the recipient.
- Finally, when administrative tasks are outsourced, they are performed by entities that are not subject to hierarchical authority. Adequate supervision of the recipients and the manner in which they perform the tasks (Art. 187 para. 1(a) of the Constitution) must therefore be guaranteed.

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RECOMMENDED FURTHER READING

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COMMENTARY ON

Art. 189 FC

A commentary by Jérôme Gurtner

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Art. 189 Jurisdiction of the Federal Supreme Court

1 The Federal Supreme Court hears disputes concerning violations of:

a. federal law;

b. international law;

c. inter-cantonal law;

d. cantonal constitutional rights;

e. the autonomy of the communes and other cantonal guarantees in favour of public law corporations;

f. federal and cantonal provisions on political rights.

1bis ...

[2] It hears disputes between the Confederation and Cantons or between Cantons.

[3] The jurisdiction of the Federal Supreme Court may be extended by law.

[4] Acts of the Federal Assembly or the Federal Council may not be challenged in the Federal Supreme Court. Exceptions may be provided for by law.

CONTENT

I. GENESIS

1 The powers of the Federal Supreme Court were already listed in the Federal Constitution of 1848 (Art. 101 to 105 aCst.), then in that of 1874 (Art. 110 to 114bis aCst.) . As part of the total revision of the Federal Constitution in the 1990s, the Federal Council successively presented several drafts, designated by the letters A, B, and C. This method was intended to allow progress to be made in stages: draft A consisted of an update to the Constitution, draft B addressed certain institutional reforms, in particular popular rights, and draft C aimed at reforming the justice system. The **draft A** federal decree provided for **three provisions** relating to the powers of the Federal Court (Articles 177 to 179 of the draft): Art. 177 concerned constitutional jurisdiction, Art. 178 concerned civil, criminal and administrative jurisdiction, and Art. 179 concerned federal assizes. However, only the first two were incorporated into the 1999 Constitution, as Art. 179 was considered to fall within the scope of ordinary legislation. The text of the new Constitution, adopted by the Federal Assembly on the basis of draft A, was accepted in a popular vote on April 18, 1999, and entered into force on January 1, 2000. At this stage, the powers of the Federal Court remained divided between **two provisions**: they were set out in Art. 189 aCst. ("Constitutional jurisdiction") and Art. 190 aCst. ("Civil, criminal and administrative jurisdiction").

2 However, the update made by the 1999 Constitution was only a transitional step. It was in the context of **draft C** of the federal decree on **the reform of the judiciary** that the Federal Council proposed to consolidate the powers of the Federal Supreme Court into a **single provision** (Art. 177 of the draft), which listed the grounds for appeal without distinguishing between the different

areas of law. The Federal Assembly adopted this provision, but introduced **two amendments**. The first, of a editorial nature, consisted of replacing the reference to "guarantees granted by the cantons to the communes" (Art. 177 para. 1 let. e of the draft) with an explicit reference to "the autonomy of the communes " (Art. 189 para. 1 let. e Cst.). The second, more substantial change concerned Art. 177 para. 4 of the draft: to the rule that "[a]cts of the Federal Assembly and the Federal Council may not be brought before the Federal Supreme Court," the Federal Chambers added a second sentence specifying that "[e]xceptions are determined by law" (Art. 189 para. 4 Cst.). In its amended form, Art. 189 Cst. was accepted in a popular vote on March 12, 2000, and entered into force on January 1, 2007.

The evolution of Art. 189 Cst. was then marked by an aborted revision linked to the introduction of the general popular initiative into the Constitution. On February 9, 2003, the people and the cantons accepted the federal decree on the revision of popular rights. This introduced a new instrument into the Constitution, the **general popular initiative** (Art. 139*a* of the Constitution), which would have allowed 100,000 citizens with voting rights to propose a project drafted in general terms and aimed at constitutional or legislative change. According to Art. 189 para. 1bis of the Constitution, in the version resulting from this revision, complaints regarding non-compliance with the content and objectives of a general popular initiative by the Federal Assembly could have been brought before the Federal Supreme Court. However, on September 27, 2009, the people and the cantons accepted a new federal decree abolishing the general popular initiative, which was considered too complex to implement. These provisions therefore never came into force. 3

II. CONTEXT

Art. 189 of the Constitution is found in Chapter 4 ("Federal Court and Other Judicial Authorities") of Title 5 ("Federal Authorities") of the Federal Constitution, which contains seven provisions (Art. 188 to 191*c* of the Constitution). Entitled "Jurisdiction of the Federal Court" ("Zuständigkeiten des Bundesgerichts," "Competenze del Tribunale federale"), it defines the **jurisdictional powers** of this authority. Its location, immediately after Art. 188 Cst., which establishes the Federal Court as "the supreme judicial authority of the Confederation" (para. 1), highlights the particular importance that the framers of the Constitution wished to confer on it. 4

Before examining the powers of the Federal Court in detail, it should be noted that these are limited by **three important restrictions**, two of which derive from provisions other than Art. 189 of the Constitution: 5

- on the one hand, acts of the Federal Assembly and the Federal Council cannot be brought before the Federal Court (Art. 189 para. 4 of the Constitution) (see N. 78 ff. *infra*);
- secondly, the Federal Court and other authorities are required to apply federal laws and international law (Art. 190 Cst.) (see N. 79 ff. *infra*);

- finally, although access to the Federal Supreme Court is guaranteed by the Federal Constitution, it may be restricted by the legislature (Art. 191 Cst.) through the introduction of a minimum value in dispute, the exclusion of certain specific areas, or the establishment of a simplified procedure for manifestly unfounded appeals.

6 It should also be noted that, with the exception of Art. 189 para. 4, first sentence, Cst., this provision is primarily addressed to the **federal legislature**, which must ensure its implementation. Thus, procedural issues—such as minimum amounts in dispute, previous authorities, standing to appeal, the form and content of briefs, and time limits for appeals – have been regulated in the LTF.

III. COMMENTARY

7 The powers of the Federal Court are defined in **positive terms** (paras. 1 and 2: the Federal Court "hears disputes"; see N. 12 ff. and N. 55 ff. *infra*), by a **delegation** rule (para. 3: "the law may confer other powers on it"; see N. 73 ff. *infra*), and **negatively** (para. 4: certain acts "may not be brought" before it; see N. 78 ff. *infra*).

8 Paragraph 1 lists the **grounds for** appeal allowing "disputes" ("Streitigkeiten," "controversy") to be brought before the Federal Court. These concern violations of federal law, international law, intercantonal law, cantonal constitutional rights, municipal autonomy, and political rights (see N. 17 ff. *infra*). These grounds are included in the LTF, some in a different order (Art. 95 LTF), while violations of municipal autonomy are relegated to the provision on standing to appeal (Art. 89 para. 2(c) LTF).

9 Paragraph 2 specifies that the Federal Supreme Court has jurisdiction over **disputes** between the Confederation and the cantons or between the cantons (see N. 55 ff. *infra*). This provision is specified in Art. 120 LTF, which provides that the Federal Supreme Court shall hear these disputes "by way of a single proceeding" (para. 1(a) and (b) LTF), unless another federal law empowers an authority to rule on such disputes (para. 2).

10 The list of powers of the Federal Supreme Court set out in paragraphs 1 and 2 is not exhaustive; paragraph 3 allows the legislature to confer **other powers** on it (see N. 73 ff. *infra*).

Finally, paragraph 4 **limits the** possibility of challenging acts of the Federal Assembly and the Federal Council before the Federal Supreme Court (see N. 78 ff. *infra*). 11

A. Jurisdiction and powers of the Federal Supreme Court (para. 1)

1. General

Before examining in detail the grounds for appeal that may be brought before the Federal Supreme Court, four preliminary general remarks should be made. 12

The introductory sentence of paragraph 1 specifies that the Federal Supreme Court has jurisdiction to rule on "**disputes** ." These disputes are of a legal nature, even if the law does not expressly state this. This has three consequences. First, the Federal Court does not have jurisdiction to examine abstract or theoretical questions (see N. 77 *infra*): the dispute must be a concrete one between two or more parties. In its primary sense, the term "dispute" is defined as a "dispute giving rise to litigation or arbitration." Second, the Federal Court does not intervene ex officio, as would a supervisory authority for lawyers becoming aware of facts that could constitute a breach of professional rules, but only at the request of one of the parties to the dispute. Thirdly, in the absence of a legal basis, the Federal Court does not have jurisdiction to conduct a conciliation hearing, in the sense of a formal procedure conducted by the judge with a view to actively bringing the parties together. While amicable settlements may be reached between the parties during the proceedings, these do not constitute judicial conciliation per se. 13

As the Supreme Court, the Federal Court is the judge of **law**, as confirmed in paragraph 1. On the other hand, complaints relating to facts are, in principle, not admissible before it. It rules on the basis of the facts established by the previous authority (Art. 105 para. 1 LTF), subject to the cases provided for in Art. 105 para. 2 LTF. The appellant may only criticize the findings of fact in the contested decision if they were made in violation of the law within the meaning of Art. 95 LTF (see N. 8 *supra*) or in a manifestly inaccurate manner, i.e. arbitrarily, and if the correction of the defect is likely to influence the outcome of the case (Art. 97 para. 1 LTF). The appellant must explain in detail to what extent these conditions are met. Otherwise, it is not possible for the Federal Supreme Court to take into account facts that differ from those con- 14 tained in the contested decision. There is another exception to the inadmissibility of factual complaints, namely when the decision under appeal concerns the granting or refusal of cash benefits from accident insurance or military insurance; in such cases, the Federal Court is not bound by the facts established by the previous authority (Art. 97 para. 2 and 105 para. 3 LTF). Nor does the Federal Court's power of review extend, in principle, to the appropriateness of the decision brought before it. The message relating to the new Federal Constitution is clear on this point. It first states that "with a few exceptions, any dispute may in future only be referred to the supreme court after having been submitted to a *lower judicial authority*," and then adds that this is "the condition for the Federal Court to be able to limit itself to reviewing the law, without further dealing with questions of fact and assessment, the review of which requires a great deal of time." An examination of the administrative procedure provisions applicable to the Federal Administrative Court (FAC) and the cantonal courts illustrates the difference between the jurisdiction of the aforementioned authorities and that of the Federal Court. In addition to violations of the law, including the excessive or abusive exercise of discretionary power, appellants may in principle invoke two other grounds before the FAC and the cantonal courts: inaccurate or incomplete findings of fact, and impropriety (among others: Art. 49 PA; Art. 76 LPA/VD; Art. 80 LPJA/BE; Art. 122 LPJA/JU). Such an appeal, which allows these three categories of grievances to be invoked, is sometimes referred to as a "complete legal remedy."

15 The Federal Court has a dual role: that of guardian of federal law, on the one hand, and that of guardian of the Federal Constitution and the cantonal constitutions, on the other. Thus, subject to the cases referred to in Art. 189 para. 1 let. c, d, e, and f of the Constitution, its review does not extend to **cantonal** or **municipal** law as such. However, as the Federal Supreme Court often points out, the incorrect application of cantonal or municipal law may constitute a violation of federal law, particularly when it is arbitrary within the meaning of Art. 9 of the Constitution or contrary to other constitutional rights. Violation of cantonal legal provisions may also constitute a violation of international law within the meaning of Art. 189 para. 1 let. b Cst. . Furthermore, it should be added that when the Federal Supreme Court examines cantonal law independently of any infringement of a fundamental right, it does not review the principle of proportionality freely, but only from the perspective of arbitrariness. With regard to the review of cantonal law from the perspective of

arbitrariness, the chances of success of such a complaint remain “very limited.” As François Chaix points out, “it is one of the consequences of federalism [that] it does not intervene too incisively in the areas of competence of the cantons.”

Paragraph 1 does not impose a specific system of appeal on the federal legislature. It should be noted, however, that the revision of the federal judicial system has simplified the work of litigants by replacing the multiple avenues of appeal that existed with a **unified appeal** in each area of law: an appeal in civil matters, an appeal in criminal matters, and an appeal in public law matters. According to this concept, " there must be only one legal remedy before the Federal Court to challenge an act of a lower authority, regardless of the grounds for appeal or the nature of the authority." 16

2. Federal law (let. a)

The Federal Court has primary jurisdiction to rule on disputes relating to violations of federal law (Art. 189 para. 1 let. a Cst.; see also Art. 95 let. a LTF). According to the Federal Council's message on a new Federal Constitution of November 20, 1996, the term “federal law” must be understood in a **broad sense**. It includes all rules of law enacted by the organs of the Confederation at all levels, in particular the Federal Constitution, federal laws, and various types of ordinances (of the Federal Assembly, the Federal Council, the federal administration, and the federal courts) in all areas of law (civil law, criminal law, administrative law, debt collection law, and social insurance law, in particular). 17

The concept of federal law encompasses **federal constitutional rights**, which is not explicitly stated in the text of the Constitution, since only cantonal constitutional rights are mentioned therein (Art. 189 para. 1 let. d Cst.). The message relating to the new Federal Constitution explains that the complaint of violation of the Constitution and that of violation of federal law itself are now merged into a single complaint of violation of “federal law,” “in order to express the idea of a single remedy.” Malinverni et al. rightly describe this shortcut as “unfortunate”: litigants could indeed mistakenly believe that only violations of cantonal constitutional rights can be invoked before the Federal Supreme Court. This imprecision is regrettable, as it could mislead litigants who are not lawyers, especially since the assistance of a lawyer is not mandatory for proceedings before the Federal Supreme Court. 18

19 Neither the Federal Constitution nor the LTF defines the concept of constitutional rights. According to Federal Supreme Court case law, this category includes constitutional provisions that aim to protect citizens from state intervention or that, although enacted primarily in the public interest, also protect individual interests. In determining the existence of constitutional rights, the Federal Court bases its decision in particular on the **interest in legal protection** and **justiciability**. It sometimes also refers to the concept of direct applicability ("unmittelbare Anwendbarkeit"), although this criterion is more commonly used in international law (see N. 26 ff. *infra*). A constitutional provision is directly applicable (or justiciable) when the facts and legal consequences are formulated with sufficient precision to form the basis for a court decision. In domestic law, these are norms that "do not need to be concretized by implementing provisions, like certain fundamental rights enshrined in the Constitution." . According to Mathias Kaufmann, justiciability refers to the legitimacy of judicial review of a rule of law invoked by an individual. In other words, it is a question of determining whether the rule invoked is subjective in nature, such that its violation could constitute grounds for an admissible appeal. This author also emphasizes that a legal rule is never partially justiciable: it is either justiciable in its entirety or not at all. Finally, direct applicability and justiciability are two "general and abstract" characteristics of norms, which do not depend on the circumstances of the case. On this last point, we agree with Kaufmann's position.

20 By definition, at least in principle, all the fundamental rights listed in Articles 7 to 36 of the Constitution are **justiciable**, in particular the principle of equality before the law (Article 8(1) of the Constitution), protection against arbitrariness and protection of good faith (Art. 9 Cst.), protection of children and young people in terms of protection against state interference (Art. 11 para. 1 *ab initio* Cst.), the right to emergency assistance (Art. 12 Cst.), protection of privacy (Art. 13 Cst.), freedom of conscience and belief (Art. 15 Cst.), freedom of opinion and information (Art. 16 Cst.), freedom of the media (Art. 17 Cst.), freedom of language (Art. 18 Cst.), the right to basic education (Art. 19 Cst.), freedom of science (Art. 20 Cst.), freedom of art (Art. 21 Cst.), freedom of assembly (Art. 22 Cst.), freedom of association (Art. 23 Cst.), freedom of establishment (Art. 24 Cst.), protection against expulsion, extradition and refoulement (Art. 25 para. 1 and 2 Cst.), guarantee of property (Art. 26 para. 1 Cst.), economic freedom (Art. 27 Cst.), freedom of association (Art. 28 Cst.), procedural guarantees (Art. 29 ff. Cst.) and the principle of proportionality (Art. 36

para. 3 Cst.). Other constitutional rights and principles are also directly applicable, such as the principle of legality (Art. 5 Cst.), the principle of the primacy of federal law (Art. 49 Cst.), the (unwritten) principle of the separation of powers, and the prohibition of inter-cantonal double taxation (Art. 127 para. 3 Cst.). According to legal doctrine, the prohibition on the construction of minarets provided for in Art. 72 para. 3 Cst. is directly applicable. The Federal Court also held that Art. 75*b* para. 1, in conjunction with Art. 197 no. 9 para. 2 Cst., provides for an immediately applicable ban on the construction of second homes in municipalities where the 20% limit has already been reached or exceeded.

On the other hand, organizational requirements or purely programmatic provisions are **not justiciable**. The Federal Constitution also expressly excludes the justiciability of social goals (Art. 41 para. 4 Cst.), which has been confirmed by the Federal Supreme Court with regard to Art. 41 para. 1 let. e Cst.. In a case where the appellant complained of a violation of Art. 121 Cst., the Federal Court ruled that this provision "is a programmatic norm that requires implementation by the legislature and therefore does not confer any constitutional right on the appellant to appeal." Art. 121*a* Cst. is not directly applicable. The same applies to the principle of sustainable development in Art. 73 Cst.: according to the Federal Court, "this concept – the content and contours of which are still vague – is currently essentially programmatic in nature and does not have the status of a constitutional right that could be directly invoked as such before a court." The maxims of state action that require a high degree of concretization (e.g., Articles 5*a* and 6 of the Constitution) are also not justiciable. Similarly, the Federal Court has held that Article 106 of the Constitution concerning gambling does not contain any directly applicable provisions. 21

The concept of federal law naturally includes **federal statutes**. According to Art. 164 para. 1 of the Constitution, all important provisions that lay down rules of law must be enacted in the form of a federal law. This category includes, in particular, the fundamental provisions relating to the areas expressly mentioned in Art. 164 para. 1, second sentence, letters a to g of the Constitution. For example, according to case law, essential procedural provisions such as the substantive jurisdiction of the courts and legal remedies must be enacted in a formal law. However, the Federal Assembly may also enact less important legal rules in the form of a federal law (Art. 22 para. 2 ParlA). 22

23 Legislative **ordinances** ("*Rechtsverordnungen*"), which are addressed to all authorities and individuals and contain rules of law, constitute federal law (Art. 22 para. 2 ParlA; Art. 7 and 48 LOGA) . This is not the case, however, for administrative ordinances ("Verwaltungsverordnungen"), which in principle have no legal effect and do not create rights and obligations for individuals; they are simply a working aid and support for the authorities. According to the Federal Court, Circular No. 26 of December 16, 2009, issued by the Federal Tax Administration (FTA) concerning changes relating to self-employment following the adoption of the Corporate Tax Reform II Act, is an administrative order that does not have the force of law. This means that the court may deviate from it if it considers it to be contrary to the law or the ordinance. The same applies to the guidelines and comments issued by the State Secretariat for Migration (SEM), the National Civil Aviation Security Program issued by the Federal Office of Civil Aviation (FOCA), the communications adopted by the Competition Commission (Comco) concerning the assessment of vertical agreements, or brochures and other instructions issued by the FTA on VAT – even if the latter have an external effect.

24 Standards established by **private law associations** do not constitute federal law either. This applies to the Swiss Code of Professional Conduct (CSD) issued by the Swiss Bar Association (FSA).

25 Finally, **customary law** (Art. 1 para. 2 CC), which is currently extremely rare, may also constitute federal law.

3. International law (letter b)

26 The Federal Supreme Court also has jurisdiction to rule on disputes concerning violations of international law (see also Art. 95(b) LTF). The message relating to the new Federal Constitution explains that it is justified to mention the complaint of violation of international law **separately**, as it does not simply overlap with that of violation of federal law. Although treaties concluded by the cantons with foreign countries (Art. 56 Cst.) are not part of federal law, they are included in the concept of international law, in the same way as treaties concluded by the Confederation.

27 According to the Swiss conception, international treaties concluded by Switzerland form an **integral part** of the Swiss legal order, without it being necessary to specifically transform them into domestic law (monist system).

The Federal Constitution also requires the Federal Court and other authorities to apply international law (Art. 190 Cst.).

The term **international law** is traditionally defined by reference to Art. 38(1) of the Statute of the International Court of Justice of June 26, 1945 (RS 0.193.501): it is based on international conventions, whether general or special, on international custom, and on the general principles of law recognized by civilized nations; judicial decisions and doctrine are auxiliary means of determining the rules of law. This provision sets out the traditional sources of international law. In addition, decisions of international organizations that are binding on Switzerland but not mentioned in Art. 38 para. 1 of the aforementioned Statute are also part of international law. On the other hand, international norms that only have the status of "soft law," such as recommendations or comments, are not part of international law. 28

The provisions of international law can only be invoked in specific disputes if they confer **individual rights**, which presupposes that the content of the standard invoked is sufficiently precise and clear to serve as a basis for a decision in a particular case. This also implies that the rights and obligations of individuals are described and that the standard is addressed to the authorities responsible for applying the law. The criterion of direct applicability corresponds to the requirement of justiciability (see N. 19 *supra*). In general, a norm is directly applicable if the following three conditions are cumulatively met: (1) the norm in question establishes rights and obligations for natural and legal persons; (2) it is sufficiently precise and clear, without requiring internal implementation or concretization measures for its enforcement; and (3) it is addressed to law enforcement authorities. As Ammann points out, in some cases, the Federal Court only mentions some of these conditions, which she considers problematic in terms of predictability, clarity, and consistency. That said, a distinction must be made between directly applicable (or "self-executing") standards (see N. 30 *infra*), which can be invoked in court by an individual,
and standards that are not directly applicable (or "non-self-executing"; see N. 31 *infra*), which cannot be invoked in court by an individual without being implemented in domestic law through the adoption of Swiss legal standards that make them justiciable. The Federal Court does not hear appeals based on standards that are not directly applicable. 29

30 The Federal Court has considered the following to be **directly applicable**, meaning that any individual may invoke them directly before any national administrative or judicial authority:

- the rights guaranteed by the Convention of November 4, 1950, for the Protection of Human Rights and Fundamental Freedoms (ECHR; RS 0.101);
- the rights guaranteed by the International Covenant of May 9, 2022, on Civil and Political Rights (UN Covenant II; RS 0.103.2);
- several provisions of the Agreement of June 21, 1999, between the Swiss Confederation, on the one hand, and the European Community and its Member States, on the other hand, on the free movement of persons (AFMP; RS 0.142.112.681) ;
- Art. 12 of the Convention of November 20, 1989, on the Rights of the Child (CRC; RS 0.107), which guarantees the right of the child to be heard;
- Art. 14 para. 1 let. b of the Convention of May 16, 2005, on Action against Trafficking in Human Beings (RS 0.311.543), which stipulates that each Party shall issue a renewable residence permit to victims when the competent authority considers that their stay is necessary for the purposes of cooperation with the competent authorities in an investigation or criminal proceedings;
- Article 24(1)(b) of the Convention of July 28, 1951, relating to the Status of Refugees (RS 0.142.30), which provides that Contracting States shall accord refugees lawfully staying in their territory the same treatment as nationals in respect of social security (in particular the legal provisions relating to disability), subject to certain reservations provided for in subparagraphs (i) and (ii);
- Article 1(1) of the Agreement of November 22, 1950, on the importation of educational, scientific, or cultural items (RS 0.631.145. 141), which specifies that the contracting states undertake not to apply customs duties and other taxes on importation or on the occasion of importation to objects covered by the Agreement.

31 However, the Federal Court has **denied the direct applicability** of:

- several provisions of UN Covenant I;

- provisions of the CRC, such as Art. 2 CRC, which aims to guarantee non-discrimination and the protection of all children against any form of discrimination, regardless of their personal characteristics or those of their parents or legal representatives, Art. 3 para. 1 CRC, which establishes that the best interests of the child must be a primary consideration in all decisions concerning the child, and Art. 26 CRC, the objective of which is to guarantee the right of every child to social security, including social insurance, by obliging States Parties to take the necessary measures to ensure the realization of this right in accordance with national legislation;
- Art. 2(1)(a) of the Paris Agreement (Climate Agreement) of December 12, 2015 (RS 0.814.012), which aims to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C;
- Article 5(3) of the Convention of December 13, 2006, on the Rights of Persons with Disabilities (RS 0.109), which provides that, in order to promote equality and eliminate discrimination, States Parties shall take all appropriate measures to ensure that reasonable accommodations are made;
- Article 22(2) of the Convention of July 28, 1951, relating to the Status of Refugees (RS 0.142.30), which specifies in short that Contracting States must grant refugees treatment at least as favorable as that accorded to foreigners in general with regard to secondary and higher education;
- Article 15 of the Council of Europe Convention of May 16, 2005, on Action against Trafficking in Human Beings (RS 0.311.543) and in particular paragraph 3, which provides that the parties must provide in their domestic law for the right of victims to be compensated by the perpetrators of offenses;
- the Convention of November 14, 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (RS 0.444.1; UNESCO Convention), insofar as its implementation requires the contracting states to legislate and transpose it into their national legislation;
- Article 5(1)(b) of the United Nations Convention of December 20, 1988, against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which provides that each Party shall adopt such measures as may be necessary to enable the confiscation of, inter alia, narcotic drugs and psychotropic sub-

stances. This provision only contains a mandate given to the States Parties and does not create any direct rights or obligations for individuals;

- Art. 22(3) of the Convention of February 21, 1971, on Psychotropic Substances (RS 0.812.121.02), which provides that any psychotropic substance, any other substance, and any equipment used or intended to be used to commit any of the offenses within the meaning of the Convention may be seized and confiscated.

32 It is worth mentioning a **special category** of obligations that does not fall within the usual categories of direct or indirect applicability of standards, using the following two examples:

- the Convention of October 3, 1985, for the Protection of the Architectural Heritage of Europe (RS 0.440.4) requires the adoption of appropriate measures for the protection of historic monuments and obliges each Party to establish appropriate control and authorization procedures. According to the Federal Court, these are not provisions addressed to the authorities responsible for applying the law, but legislative mandates. It also clarified that even when the legislature has room for maneuver and direct application of relevant higher-level standards is excluded in a particular case, it may still be required to act in accordance with those standards. It also emphasized that legislation is based on a political process that takes time and whose content may vary. Thus, in his view, judicial intervention is justified only if the cantonal legislature's obligation to act under international or constitutional law appears sufficiently precise and measurable in terms of content and time frame. If this is the case, compliance with it may be invoked in the context of an abstract review of cantonal standards. He specified that this applies not only when the cantonal legislature fails to act within the prescribed time frame, but also when it acts without sufficiently implementing higher-ranking law. It was in this context that the Federal Court ruled that a provision of the cantonal law of the canton of Zug on the preservation of historical monuments, archaeology, and the protection of cultural property (RS/ZG 423.11) was incompatible with the aforementioned Convention;
- Article 34 of the Convention of July 28, 1951, relating to the Status of Refugees (RS 0.142.30) provides, in particular, that Contracting States shall facilitate, as far as possible, the assimilation and naturalization of refugees. The Federal Court ruled that a refugee did not have an individual right to

> naturalization under Article 34 of this Convention. However, it specified that this did not preclude recognizing this provision as decisive, in the sense that it should be taken into account as an aid to interpretation and assessment when examining the conditions for naturalization in a particular case.

Finally, it should be borne in mind that the requirement of direct applicability or justiciability is decisive when a litigant relies on a norm to derive a right in the context of a specific dispute. This situation must be distinguished from an appeal in public law against a **cantonal normative act** (abstract review of a norm). The Federal Court reiterated this in a ruling in which the dispute arose in the following context. The appellants challenged the compatibility of an amendment to a provision of the Geneva wine regulations with the provisions of Annex 7 to the Agreement of June 21, 1999, between the Swiss Confederation and the European Community on trade in agricultural products (RS 0.916.026.81; hereinafter: Bilateral Agreement). The Geneva Council of State argued that the appellants could not complain of a violation of the Bilateral Agreement and its annex, as these were not directly applicable. The Federal Court pointed out that, under Article 5(4) of the Constitution, the Confederation and the cantons must comply with international law. In its view, the question of whether the relevant provisions of the Agreement are directly applicable is not decisive in this case, as it is not a matter of discussing rights or obligations that the appellants could invoke directly in court, but of examining a cantonal regulation in the light of the Agreement in question. 33

4. Intercantonal law (letter c)

The Federal Supreme Court has jurisdiction to examine violations of intercantonal law (see also Art. 95(e) LTF). This is the first specific case in which a violation of cantonal law can be invoked as such before the Federal Supreme Court. The message relating to the new Federal Constitution specifies that this is a “service” provided by the Confederation to the cantons. According to the Federal Supreme Court, this jurisdiction is justified by the fact that, in the absence of a supra-cantonal court, it seemed appropriate for the Federal Supreme Court to be able to develop a **single interpretation** of inter-cantonal agreements, “in order to avoid them being applied differently from one canton to another, which could cause inter-cantonal tensions.” It freely con- 34 trols its application, unlike cantonal law, which is reviewed from the perspective of arbitrariness (see N. 15 *supra*).

35 Intercantonal law includes **intercantonal agreements** (Art. 48 para. 1 Cst.) and legal norms enacted by intercantonal organizations or institutions established by intercantonal agreements. Intercantonal customary law is also included. Intercantonal agreements must not conflict with the law and interests of the Confederation or with the law of other cantons; they must also be brought to the attention of the Confederation (Art. 48 para. 3 Cst.). . In this context, the Federal Court ruled that the Latin Concordat of October 29, 2010, on the cultivation and trade of hemp violated the principle of the primacy of federal law enshrined in Art. 49 para. 1 of the Constitution and should therefore be annulled, since it pursued the same objectives as federal legislation on agriculture and narcotics.

36 As Andreas Auer points out, inter-cantonal agreements are far from anecdotal: their number is estimated to have reached **nearly 800** in 2016. We can mention, for example, the Intercantonal Agreement of May 8 and 9, 2012, on data protection and transparency in the cantons of Jura and Neuchâtel (CPDT-JUNE; RSN 150.30), the Intercantonal Agreement of October 25, 2007, on cooperation in the field of special education (AICPS), the Intercantonal Agreement of February 18, 1993, on the recognition of diplomas, the Intercantonal Agreement of June 18, 2009, on the harmonization of student grant schemes, the Fire Protection Standard of January 1, 2015 (AEAI standard), enacted by the Association of Cantonal Fire Insurance Institutions, and the Intercantonal Agreement of September 22, 2005, harmonizing terminology in the field of construction (AIHC).

37 Individuals may only invoke **directly applicable** intercantonal legal standards, which is notably the case for the CPDT-JUNE, Art. 2(b) AICPS, and the AEAI standard.

38 Disputes between cantons concerning intercantonal law may be brought before the Federal Supreme Court by means of an **action** (Art. 189 para. 2 Cst.; Art. 120 para. 1 let. b LTF) (see N. 55 ff. *infra*).

5. Cantonal constitutional rights (let. d)

39 The violation of cantonal constitutional rights is the second specific case in which the violation of cantonal law may be invoked independently before the

Federal Supreme Court (see also Art. 95(c) LTF). As we have seen above (see N. 15 *supra*), the Federal Supreme Court also acts as the **guardian of** the cantonal constitutions.

According to the Federal Supreme Court, the concept of cantonal constitutional rights within the meaning of Art. 95(c) LTF does not extend to any cantonal constitutional provision, but only to those that guarantee **individual rights**. The above can also be inferred from the use of the plural ("constitutional rights"), which suggests that the reference here is not to the cantonal constitution as a whole, but only to those provisions that guarantee rights. Cantonal constitutional rights only have their own scope if they grant more extensive protection than the corresponding guarantees in the Federal Constitution or the ECHR. 40

In particular, Art. 17 Cst./ZH (RS 131.211), which provides that everyone has the right to consult official documents, unless this is contrary to an overriding public or private interest, and Art. 40 para. 1 Cst./ZH, which specifies that anyone who has the right to vote in cantonal matters is eligible for election to the supreme courts of the canton; or § 75 para. 1 Cst./AG (RS 131.227), which stipulates in particular that the canton and the municipalities are liable for damage caused without right to third parties by their authorities or by their officials or other employees in the exercise of their official duties. The same applies to Art. 17 para. 2 Cst./FR (RS 131.219), which provides that anyone who addresses an authority whose jurisdiction extends to the entire canton may do so in the official language of their choice. According to the Federal Court, this provision allows a litigant to address the cantonal court in the official language of their choice, regardless of the language of the proceedings. Finally, the rights to an offline life and to be forgotten, mentioned in Art. 21A para. 2 Cst./GE (RS 131.234) and 10a para. 2 Cst./NE (RSN 101), also appear to be justiciable. 41

On the other hand, § 35 Cst./LU (RS 131.213), which requires the authorities to inform the public in a timely manner about their objectives and activities, and Art. 60 Cst./SO (RS 131.221), which provides that public office must be conferred on the most qualified persons and that, as far as possible, equitable consideration must be given to the various population groups, in particular the different regions and political tendencies, when assigning positions, do not constitute constitutional provisions conferring rights that can be directly invoked in court. 42

43 Case law does not exclude the existence of a **constitutional custom**. In a 2012 ruling concerning the canton of Geneva, the Federal Court denied the existence of such a custom that would have allowed the State Council to extend its legislative powers to regulate the field of sworn translators. On the other hand, it ruled, in a 2010 ruling concerning the canton of Zug, that it was permissible to grant small municipalities, on the basis of a cantonal customary rule, a minimum right to two seats in the cantonal parliament.

6. Municipal autonomy and other cantonal guarantees (letter e)

44 The Federal Supreme Court hears cases concerning violations of municipal autonomy and other guarantees granted by the cantons to public corporations (see also Art. 89 para. 2 let. c LTF in relation to standing to appeal). This is the third specific case in which a violation of cantonal law can be invoked as such. Although appeals for violations of municipal autonomy were not mentioned in the old Federal Constitution of May 29, 1874, the Federal Supreme Court had nevertheless recognized their existence in consistent case law. Letter e thus represents a **codification of case law**.

45 The guarantees mentioned in letter e are not specifically indicated in the list of grounds for appeal in Art. 95 LTF. However, the possibility of such an appeal is not called into question, as indicated in the text of Art. 89 para. 2 let. c LTF. The Federal Supreme Court also considers that municipal autonomy is part of **cantonal constitutional rights** within the meaning of Art. 95 let. c LTF.

46 The **Federal Constitution** guarantees municipal autonomy “within the limits set by cantonal law” (Art. 50 para. 1 Cst.). Most cantonal constitutions also guarantee this. According to the case law of the Federal Supreme Court, municipalities are autonomous in a given area when cantonal law does not regulate it exhaustively, but delegates its regulation entirely or partially to them and grants them a relatively high degree of freedom of decision. Furthermore, as explained in the message on the new Federal Constitution, appeals for violation of municipal autonomy "differ from appeals for violation of constitutional rights in terms of the status of the appellant (the appeal is brought by a public body and not by an individual) and the nature of the grievance invoked (even if the autonomy of municipalities and other public law corporations serves to guarantee a freedom, it does not constitute a fundamental right of individuals against the state) ."

The **extent of municipal autonomy** varies considerably from one canton to another. Case law has, for example, recognized that municipalities that consider their autonomy to have been infringed by a cantonal master plan may—unlike individuals—challenge it directly or, in certain circumstances, on a preliminary basis on the basis of Art. 89 para. 2 let. c LTF. They therefore have standing to appeal on the grounds of a violation of their autonomy. In another ruling, the Federal Court held that Art. 84 para. 2 Cst./ZH, which provides that the dissolution of a school district—which, like a political municipality, is an autonomous public entity (Art. 83 para. 3 Cst./ZH)—may be decided by a majority vote within that municipality, confers a guarantee of cantonal law on school districts. This guarantee, which is enshrined in the cantonal constitution and guaranteed by the Confederation, is protected by the latter. School districts may therefore argue, where appropriate, that a cantonal legal provision that contravenes this guarantee violates higher-level law (Art. 89 para. 2 let. c LTF). Furthermore, in the canton of Fribourg, cantonal legislation authorizes, and even requires, municipalities to regulate the distribution of drinking water and the collection of a connection fee within their territory. They can therefore claim a certain degree of autonomy in this area. 47

The protection of constitutional rights granted to municipalities to defend their autonomy has only been extended to certain **public law corporations**, such as the Evangelical Church of the Canton of St. Gallen, whose organization can be compared to that of a municipality, and the University of Lausanne. However, it has been denied to the Geneva Industrial Services, the Hospice général of the same canton, the canton of Vaud (CHUV), the cantonal insurance and prevention establishment of the canton of Neuchâtel, the canton of Geneva, and Geneva International Airport. 48

7. Political rights (letter f)

The Federal Court has jurisdiction to examine challenges for violation of federal and cantonal provisions on political rights. This is the last case in which a violation of cantonal law can be invoked independently (see also Art. 95(d) LTF) . As Pascal Mahon points out, this ground for referral to the Federal Supreme Court in a separate letter was not absolutely necessary, since political rights are protected by **Art. 34 Cst.**, a provision that constitutes federal law within the meaning of Art. 189(a) (see N. 17 ff. *supra*). 49

50 Under Art. 34 para. 1 Cst., political rights are guaranteed. This guarantee protects the **free formation** of citizens' opinions and the **faithful and reliable** expression of their will (Art. 34 para. 2 Cst.). The concept of political rights includes the right to vote and to stand for election (active and passive), the preparation and conduct of polls (votes and elections), the right of initiative and referendum, and other forms of democratic participation. Appeals in matters of political rights protect not only the individual political rights of each citizen, but also the proper functioning of the democratic decision-making process.

51 It is interesting to note that under the old Federal Constitution, the Federal Court had only marginal powers in the area of political rights at the federal level. The reform of the judiciary introduced an appeal in matters of political rights at the federal level. Letter f thus provides for a "**significant substantive innovation** " in that the powers that had been granted to the Federal Council and the National Council are now assumed by the Federal Court (see Art. 80 LDP).

52 Although, according to the message relating to the new Federal Constitution, the aim was "to grant the same *judicial* protection for political rights at the federal level as at the cantonal level," this aim has not been achieved, as François Chaix rightly points out: there is in fact **no parallelism**, since appeals against acts of the Federal Assembly concerning the validity of a popular initiative (Art. 139 para. 3 Cst.) (see N. 83 *infra*) and information provided by the Federal Council to voters (Art. 10*a* LDP) is excluded by Art. 189 para. 4 Cst. (see N. 84 *infra*).

53 The PFA does not provide for any legal remedy to challenge irregularities that only become known after a federal vote. However, the Federal Supreme Court has held in its case law that a "retrospective judicial review" is linked to Art. 189 para. 1 let. f Cst. . It therefore has jurisdiction, as the court of last resort, to hear appeals in which the constitutionality of a federal vote and its conformity with federal legislation are called into question on the grounds of serious irregularities discovered subsequently (on this issue, see also N. 92 *infra*).

54 According to the Federal Court, irregularities in a federal vote must first be challenged before the **cantonal government**, in accordance with Art. 77 LDP, even if the conclusions reached or the facts contested exceed the juris-

diction of the cantonal authority, which will in such cases issue a decision of inadmissibility. This situation is unsatisfactory; in our opinion, in the interests of procedural economy, the filing of an *omisso medio* appeal (or "Sprungbeschwerde") directly with the Federal Court should be allowed. It should be noted that the Message of April 30, 2025, on the amendment of the Federal Act on Political Rights takes this problem into account. The Federal Council proposes to relieve the cantons by providing, in such cases, the possibility of appealing directly to the Federal Supreme Court, which would also require an amendment to the LTF. This revision is welcome. It should also be mentioned that in a case concerning an appeal against the withdrawal of a popular initiative, the Federal Supreme Court ruled that there were important reasons for applying Art. 80 para. 2 and 3 LDP and to allow the possibility of direct appeal to the Federal Supreme Court.

B. Jurisdiction of the Federal Supreme Court in disputes between the Confederation and the cantons or between cantons (para. 2)

1. General

The jurisdiction of the Federal Supreme Court to rule on disputes between the Confederation and the cantons or between the cantons could have been inferred from Art. 189 para. 1 of the Constitution, in particular letters a and c. It was considered important enough to be mentioned separately in the Constitution. As explained in the message relating to the new Federal Constitution, it is "important for a federal state that conflicts between it and its member states or between the member states themselves are dealt with in the context of ordinary judicial proceedings." It is logical that the Federal Supreme Court should have jurisdiction to rule on such disputes, which will be brought before it by way of **action**, provided that no other legal remedy is available. 55

Art. 189 para. 2 Cst. is a mandate addressed to the legislature. It is implemented in Art. 120 LTF (on the relationship between these two provisions, see N. 71 ff. *infra*). Paragraph 1 of this provision lists the disputes that may be the subject of an action in **single instance** before the Federal Court. These are conflicts of jurisdiction between federal and cantonal authorities (letter a), as well as civil or public law disputes between the Confederation and the cantons or between cantons (letter b). Art. 120 para. 1 letter a LTF (which deals 56 with conflicts of jurisdiction) is a subcategory of Art. 120 para. 1 letter b LTF (which concerns civil or public law disputes). Art. 120 para. 1 LTF letter c has a different scope: it concerns liability actions against the State that fall within the category of other powers of the Federal Supreme Court (Art. 189 para. 3 LTF; N. 75 ff. *infra*).

57 The action is **inadmissible** if another federal law empowers an authority to rule on such disputes (Art. 120 para. 2 LTF). In other words, the subsidiarity of the appeal within the meaning of Art. 120 para. 2 LTF prevents direct proceedings before the Federal Supreme Court. On the other hand, when proceedings by way of action are admissible, there is no longer any room for appeal proceedings. It should also be noted that the action is also inadmissible when brought by private individuals, as the wording of Art. 189 para. 2 Cst. and Art. 120 para. 1 let. a and b LTF clearly refer to the Confederation and the cantons.

58 The particularity of the action lies in the fact that the Federal Supreme Court is not seized as the final appeal instance, after all legal remedies have been exhausted, as is generally the case, but as the sole instance. It is thus required to investigate the cases itself and establish the facts, which does not correspond to its traditional role as a supreme court (Art. 188 para. 1 Cst.), and is also likely to contribute to its overload. One of the objectives of the reform of the judiciary (revision of the Federal Constitution) and the total revision of the federal judicial organization was precisely to **relieve the** Federal Court of these direct proceedings. Thus, "it should no longer function as the sole instance in cases where general policy considerations so require [...]," namely in the disputes listed in Art. 120 para. 1 LTF.

59 The action procedure under Art. 120 para. 1(a) and (b) LTF is **rarely used**. Instead of bringing an action, the federated entities attempt to resolve their differences informally on the basis of Art. 44 para. 3 Cst. This provision stipulates that disputes between cantons or between cantons and the Confederation shall, as far as possible, be settled through negotiation or mediation.

2. Disputes

60 As indicated above, disputes within the meaning of Art. 189 para. 2 Cst. may concern conflicts of jurisdiction or civil or public law disputes. These disputes are **important** from a constitutional law perspective. With regard to conflicts

of jurisdiction, the role of the Federal Supreme Court is to examine whether the division of powers within the federal state has been respected, or to determine which authority is entitled to act in a particular area. Disputes within the meaning of Art. 189 para. 2 of the Constitution are specific in that they pit the Confederation against the cantons (letter a) or the cantons against each other (letter b).

a. Between federal and cantonal authorities

In relations between federal and cantonal authorities, there are numerous federal laws within the meaning of Art. 120 para. 2 LTF that empower a federal authority to settle a conflict of jurisdiction or a dispute by means of a decision that is subject to appeal. In procedural terms, the main difficulty lies in identifying and, where applicable, interpreting the relevant legal bases in order to determine whether the action should be admitted or whether the appeal route should be preferred. In general, in the relationship between federal and cantonal authorities, the Federal Supreme Court considers that the action should only be admitted in a **restrictive manner** and that **the appeal route should be preferred**. Below, we present three judgments in which the Federal Supreme Court was seized of a dispute between a federal authority and a cantonal authority (see N. 62 to 64). 61

ATF 136 IV 139 concerned a negative conflict of jurisdiction between the Ticino Cantonal Court and the Federal Criminal Court (FCC), both of which had declared themselves incompetent to rule on a request to unseal documents seized from a law firm's offices by the Ticino Public Prosecutor's Office. When the FPC brought an action before the Federal Supreme Court, the latter did not hear the case, considering that the conflict of jurisdiction should have been resolved by means of a **decision of inadmissibility** by the FPC, which could be challenged before the Federal Supreme Court within the meaning of Art. 120 para. 2 LTF (see N. 57 *supra*). 62

In a judgment not published in the Official Compilation, the Federal Supreme Court **considered** a conflict of jurisdiction concerning the setting of a single grid connection fee, a dispute between the Swiss Confederation (the plaintiff), acting through the Department of the Environment, Transport, Energy and Communications (DETEC), represented by the Federal Electricity Commission (ElCom), and the Canton of Lucerne (the defendant). On the merits, the Federal Court **upheld the action**, holding that ElCom did not have jurisdic- 63 tion to set or control network connection costs and network contributions; this task fell to the cantonal authorities. It was therefore the canton of Lucerne that was competent to examine the claim brought by the network operator against an end consumer.

64 ATF 150 II 273 deals with a public law dispute between the Confederation and a canton (Art. 120(1)(b) LTF). The dispute arose from a decision by the State Secretariat for Migration (SEM) to no longer pay lump-sum allowances to the Republic and Canton of Neuchâtel in connection with the care of an asylum seeker, on the grounds that the canton had failed in its duty to transfer the asylum seeker to another country within the prescribed time limit under the Dublin Regulation. On the question of its jurisdiction, the Federal Supreme Court points out that, under Art. 120 LTF, proceedings before the Federal Supreme Court are in principle the ordinary judicial remedy in disputes between the Confederation and the cantons; However, it becomes subsidiary to the public law appeal procedure (Art. 82 ff. LTF) when a special law assigns jurisdiction to an authority other than the Federal Supreme Court to rule on such a dispute by way of a decision. It emphasized that case law had already recognized that it was the responsibility of the Federal Office for Migration, now the SEM, to rule by **way of decision** on the reimbursement by the Confederation of the costs incurred by the cantons for the accommodation of asylum seekers. The SEM does indeed have such jurisdiction pursuant to Art. 16 of the Federal Act of October 5, 1990, on Financial Assistance and Compensation (LSu; RS 616.1). Consequently, the Federal Supreme Court finds that this is a situation in which a federal law empowers an administrative authority, in this case the SEM, to rule on a public law dispute between the Confederation and a canton, so that this dispute cannot be brought before the Federal Supreme Court within the meaning of Art. 120 para. 1 let. b LTF, but only to a public law appeal in the final instance within the meaning of Art. 120 para. 2 LTF. It also held that an appeal based on Art. 120 para. 2 LTF must satisfy only the conditions set out in Chapter 4 of the LTF, and that there was no need to examine the conditions set out in Art. 83 and 89 LTF. The Federal Supreme Court's decision is based in particular on the fact that a ruling of inadmissibility based on Art. 83 or 89 LTF would prevent the highest court in the country from ruling on certain types of disputes arising between the Confederation and the cantons or between cantons, contrary to the provisions of Art. 189 para. 2 Cst.

b. Between cantons

It should first be noted that although the LTF does not mention in Art. 120 para. 1 let. a LTF only refers to conflicts of jurisdiction between the Confederation and the cantons, the Federal Supreme Court may also be seized of an intercantonal conflict of jurisdiction by **an action** within the meaning of Art. 120 LTF, in the absence of jurisdiction of another authority ruling by way of a decision that may be appealed before it. This is clear from the wording of Art. 189 para. 2 Cst. and from the fact that, as indicated above, a conflict of jurisdiction is nothing more than a dispute. It should also be noted that decision-making powers appear to be more delicate in relations between cantons than in relations between federal and cantonal authorities (see N. 61 *supra*). Indeed, it is difficult to imagine that a canton, in the context of a dispute with another canton, would be empowered to issue a decision that is binding on the other canton concerned. This situation is illustrated by the two judgments presented below (see N. 66 and 67). On the other hand, as shown by the last judgment mentioned (see N. 68 *infra*), it should be borne in mind that a federal authority may be empowered to issue a decision that is binding on a canton in the context of a dispute between two cantons. 65

In ATF 141 III 84, the Federal Supreme Court considered the designation of the child and adult protection authority (hereinafter: CAPA) with jurisdiction at the inter-cantonal level. The canton of St. Gallen and the CAPA of that canton (hereinafter: the appellants) had appealed to the Federal Supreme Court against a decision of the High Court of the canton of Schaffhausen, which had found that the CAPA of Schaffhausen was not competent to establish a guardianship in favor of A. and referred the case back to the APEA of the canton of St. Gallen for further examination. In their conclusions, the appellants asked the Federal Supreme Court to find that the APEA of the canton of St. Gallen did not have jurisdiction; alternatively, they requested that their appeal be treated as an action by the canton of St. Gallen against the canton of Schaffhausen. In this case, the Federal Supreme Court ruled that Art. 444 para. 4 CC could not be considered as a federal authorization within the meaning of Art. 120 para. 2 LTF, allowing the judicial appeal authority of one canton to determine, with binding effect, the jurisdiction of an APEA of another canton, and thus rendering inadmissible an action in matters of inter-cantonal conflicts of jurisdiction between APEAs. It concluded that when APEAs located in different cantons disagree on their jurisdiction, their dispute 66 must be settled by means of an **action** within the meaning of Art. 120 para. 1 let. b LTF (consideration 4.7). It therefore did not consider the appeal. Finally, leaving open the question of whether an action and an appeal can be filed in the same brief or whether they must be filed separately, it also did not consider the action, since neither the plaintiff (represented by the head of the Department of the Interior of the canton of St. Gallen) nor the defendant (represented by the APEA of the canton of Schaffhausen) had explicitly justified their power to represent the cantons concerned.

67 The Federal Court confirmed the solution adopted in ATF 141 III 84 in a judgment dating from 2022. It specified that, when the APEA first seized of the case submits the question of its jurisdiction to the judicial appeal body, pursuant to Art. 444 para. 4 CC, there are two possible outcomes. First, if the judicial appeal body considers that an extra-cantonal APEA has jurisdiction within the meaning of Art. 444 para. 4 CC, there is a negative intercantonal conflict of jurisdiction and the only possible legal remedy is the **action** provided for in Art. 120 para. 1 let. b LTF; the Federal Court does not hear appeals against the decision of the judicial appeal body. Secondly, if the judicial appeal authority confirms the territorial jurisdiction of the APEA that submitted the question of its jurisdiction to it, there is no longer an inter-cantonal conflict of jurisdiction and the APEA is bound by the decision of the cantonal judicial appeal authority, as is the case for intra-cantonal conflicts of jurisdiction.

68 Finally, ATF 136 IV 44 shows that, in the context of a dispute between cantons, it is always necessary to examine whether a federal law empowers an authority to rule on such a dispute. In this case, the canton of Bern had brought an action against the canton of Appenzell Ausserrhoden before the Federal Court concerning the the enforcement in Switzerland of a criminal judgment handed down abroad. The canton of Bern concluded that the canton of Appenzell Outer Rhodes was competent to enforce a custodial sentence imposed on X by a judgment of a court in Madrid and declared enforceable by a decision of a Bernese court of first instance. The Federal Court **refused to hear the case**. It held that the Federal Office of Justice would have to decide the question of jurisdiction on the basis of Art. 104 para. 1 IMAC, by means of a decision against which the canton concerned could appeal to the Federal Court, in accordance with Art. 120 para. 2 LTF.

3. Some remarks on case law

The case law of the Federal Supreme Court mentioned in the previous chapter shows that proceedings concerning disputes within the meaning of Art. 189 para. 2 of the Constitution can pose difficulties for the cantons and federal authorities concerned. Indeed, identifying the correct legal remedy in a particular case is not always straightforward, and errors are frequent. In case of doubt, it is recommended to take action both by way of legal action and by way of appeal in two separate documents. 69

With regard to the examination of jurisdiction within the meaning of Art. 444 CC, some authors suggest that the legislator should supplement para. 4 of this provision to explicitly indicate that the decision of the judicial authority is binding on the other cantons. For the reasons mentioned above (see N. 65 *supra*), such a solution seems to show little respect for the sovereignty of the cantons. This sovereignty is precisely preserved by the action, which allows the cantons to appear before the Federal Supreme Court on an equal footing. 70

4. Constitutionality of Art. 120 para. 2 LTF

According to Zheni Luks, Art. 189 para. 2 Cst. **prescribes only legal action**, and not appeals, as the procedure to be followed to settle disputes between the Confederation and the cantons or between the cantons. She deduces this in particular from the importance and nature of the disputes in question, which require that only the Federal Supreme Court be competent to settle them by way of action, in a single instance. She therefore considers that Art. 120 para. 2 LTF, which provides that an action is inadmissible if another federal law empowers an authority to rule on such disputes and an *appeal* against that decision is admissible in the final instance before the Federal Supreme Court, is not in accordance with Art. 189 para. 2 Cst.. Thus, according to its interpretation of this provision, the constituent assembly would not have allowed the legislature to provide for any other remedy than legal action in respect of these disputes. 71

We do not share this view. It is for the federal legislature to decide whether these disputes should be settled by legal action or by appeal. This is a matter of judicial organization that has no place in the Federal Constitution and must be regulated in the LTF. Admittedly, the solution proposed by this author, who advocates legal action for disputes provided for in Art. 120 para. 1 let. a 72 and b LTF, offers greater clarity and reduces legal uncertainty. However, as we have seen above, it can sometimes be difficult to determine whether another federal law empowers an authority to rule on such disputes; in fact, the Federal Court may decline to hear cases brought before it (see N. 62 and N. 66 *supra*). However, the appeal procedure provided for in Art. 120 para. 2 LTF is in line with the desire to relieve the Federal Supreme Court, as expressed on numerous occasions in both the message on a new Federal Constitution and the message on the total revision of the federal judicial system. Art. 120 para. 2 LTF is therefore, in our opinion, **consistent with Art. 189 para. 2 Cst**.

C. Other powers (para. 3)

73 Art. 189 para. 3 Cst. allows the legislature to extend the powers of the Federal Supreme Court. Legal doctrine is not unanimous as to the nature of these other powers, which is not surprising given that this provision provides **little guidance**. Pascal Mahon considers that this provision does not seem to refer exclusively to judicial powers, but also to other powers of a legislative or executive nature. In addition to judicial powers, Goran Seferovic does not seem to exclude regulatory or executive powers, insofar as they are linked to judicial powers (Art. 189 Cst.) or to the Federal Court's right to administer itself (Art. 188 para. 3 Cst.). Giovanni Biaggini reaches the same conclusion, but does not mention executive powers.

74 The legislature has made use of paragraph 3 in the **LTF** as well as in **other federal laws**. It has given the Federal Supreme Court the power to examine, with full jurisdiction, violations of foreign law (Art. 96 LTF), as well as incomplete or erroneous findings of fact in matters relating to the granting or refusal of cash benefits under accident insurance or military insurance (Art. 97 para. 2 LTF). Other powers deriving from paragraph 3 include the fact that the Federal Supreme Court is the sole instance of appeal and review of arbitral awards (Art. 191 LDIP), that it supervises the management of the Federal Criminal Court, the Federal Administrative Court, and the Federal Patent Court (Art. 1 para. 2 LTF), and that it appoints the members of the assessment commissions (Art. 59 para. 2, first sentence, LEx).

75 The jurisdiction of the Federal Supreme Court has also been extended in the context of **direct proceedings** (see N. 55 ff. *supra*) . It hears, by way of a single-instance action, claims for damages or compensation for moral injury resulting from the official activities of persons referred to in Art. 1 para. 1 let. a

to c^{bis} of the Federal Act of March 14, 1958, on the Liability of the Confederation, its Authorities and its Officials (LRCF; SR 170.32) (Art. 120 para. 1 let. c LTF), namely the members of the Federal Council and the Federal Chancellor, the members and substitutes of the federal courts, and the members of the Supervisory Authority of the Office of the Attorney General of Switzerland. Art. 10 para. 2, first sentence, LRCF has the same content as Art. 120 para. 1 let. c LTF. The procedure to be followed in these situations is as follows. After filing a claim for compensation with the Federal Department of Finance (Art. 20 para. 2 FCA), the person who considers themselves aggrieved must bring an action before the Federal Supreme Court (Art. 120 para. 1 let. c LTF) when this request is contested by the Confederation or if the latter has not taken a position within three months. They must then bring an action before the Federal Supreme Court within six months (Art. 20 para. 3 LRCF, Art. 3 of the Ordinance of December 30, 1958, relating to the Law on Liability [OLRCF; RS 170.321]).

Since the LTF came into force in 2007, the Federal Supreme Court has been 76 seized of approximately 39 **liability actions against the Confederation** based on Art. 120 para. 1 let. c LTF (as of March 2025). Of these 39 judgments, 22 actions were declared inadmissible, 12 were dismissed (including on the grounds of admissibility), and the rest were removed from the docket because they had become moot or had been concluded by withdrawal or settlement. It is worth noting the significant number of actions declared inadmissible and the lack of admissions. The most frequent cases of inadmissibility concern actions for State liability brought by individuals against members of a cantonal authority, which should have been filed not directly with the Federal Court but with a cantonal authority. Other cases of inadmissibility concern plaintiffs who do not allege unlawful conduct by a member of an authority belonging to the group of persons mentioned in Art. 1 para. 1 let. a to c^{bis} LRCF.

Finally, legal doctrine emphasizes that the extension of the Federal Court's ju- 77 risdiction has **limits**. Art. 189 of the Constitution presupposes the existence of a dispute (see N. 13 *supra*), which means that paragraph 3 is not a legal basis that would allow the legislature to extend the Federal Court's jurisdiction to the issuance of legal opinions. Several authors therefore consider that the practice of *obiter dictum*, a Latin phrase meaning literally “in passing,” i.e., an opinion that is not necessary for the resolution of the dispute, is questionable, even incompatible with the mission of the Federal Court, which is to rule only on disputes submitted to it by the parties. However, research shows that the Federal Court often resorts to this practice. It is true, however, that it can sometimes be useful in practice to use it to set out the legal issue to be decided in a comprehensive manner, to define its scope, or to provide additional explanations to a litigant, even if restraint should be exercised.

D. Acts of the Federal Assembly and the Federal Council (para. 4)

1. Principle: non-justiciability (first sentence)

78 Under Art. 189 para. 4, first sentence, of the Constitution, acts of the Federal Assembly and the Federal Council cannot be brought before the Federal Supreme Court. The English version of this text differs from the German and Italian versions, which specify that these acts cannot be “contested” (“angefochten,” ‘impugnati’). This difference is not significant; however, it would have been more precise to use the verb “contest” in the English version as well, in reference to the other two language versions.

79 The **consequence of** this provision is as follows: if such acts are challenged before the Federal Supreme Court in a particular case, the latter must rule that the case is inadmissible. Art. 189 para. 4, first sentence, Cst. thus differs from Art. 190 Cst. The latter provision provides for an obligation to apply federal laws and international law, and not a prohibition on review. According to case law, it is possible to examine the unconstitutionality of a federal law on a preliminary basis; but if such unconstitutionality is found, the law must nevertheless be applied. On the other hand, the application of Art. 189 para. 4, first sentence, Cst. prohibits any substantive review and can only lead to the Federal Court declining to hear the case.

80 This limitation of the Federal Court's powers is based on the idea that the Federal Assembly and the Federal Council primarily make political decisions, which must not be reviewed by the judiciary for reasons of **separation of powers**. During parliamentary debates, it was pointed out that the Federal Court should not be placed above the Federal Council and the Federal Assembly. Paragraph 4 thus draws a line between the Federal Supreme Court and the two supreme political authorities of the Confederation. There is also a close relationship between Art. 189 para. 4, first sentence, Cst. and Art. 190 Cst., which pursue the same goal: to guarantee the separation of powers.

The term “**acts**” of the Federal Assembly and the Federal Council refers not only to individual and specific decisions, but also to general and abstract norms (normative acts), i.e., ordinances of the Federal Council and legislative acts of Parliament. Art. 189 para. 4, first sentence, Cst. also includes acts of the organs of the Federal Assembly (Art. 31 LParl) and delegations of the Federal Council (Art. 23 LOGA), it being specified that the latter have no decision-making power in any case (Art. 23 para. 2, second sentence, LOGA). 81

It is important to note that Art. 189 para. 4, first sentence, Cst. excludes direct or abstract review of the normative acts of the Federal Assembly or the Federal Council, independent of their application. It should be noted that the National Council refused to follow up on a parliamentary initiative calling for the creation of legal bases enabling the courts to carry out rapid abstract review of the norms relating to emergency ordinances of the Federal Council (Art. 185 para. 3 Cst. in conjunction with Art. 7*d* LOGA) and the Federal Assembly (Art. 173 para. 1 let. c Cst. in conjunction with Art. 7*d* para. 3 LOGA). On the other hand, it does not exclude the possibility that these normative acts may be reviewed for their conformity with the Constitution or the law when **examining a specific case** (indirect or concrete review). Art. 189 para. 4, first sentence, Cst. must, however, be read in conjunction with Art. 190 Cst., which provides that the Federal Court and other authorities are required to apply federal laws and international law. This provision prohibits the refusal to apply a federal law that is contrary to the Constitution, but does not prevent the review of its conformity with the Constitution (“Anwendungsgebot und kein Prüfungsverbot”). 82

According to Art. 189 para. 4, first sentence, Cst., and subject to any federal law to the contrary (para. 4, second sentence; see N. 86 ff. *infra*), ordinances of the Federal Assembly or the Federal Council are **not challengeable** before the Federal Supreme Court (see, however, the possibility for the cantons to challenge them by means of a direct action within the meaning of Art. 120 LTF, cf. N. 93 *infra*), federal laws, declarations of the National Council, the Council of States or the Federal Council (Art. 32 and 33 RCN; Art. 27 and 28 RCE), electoral acts of the Federal Assembly, in particular the election of members of the Federal Council, the Chancellor of the Confederation, judges of the Federal Supreme Court and the Attorney General (Art. 168 para. 1 Cst.), but also judges of the Federal Administrative Court, the Federal Criminal Court and the Federal Patent Court (Art. 168 para. 2 Cst. in conjunction with 83

Art. 5 para. 1 LTAF, 42 para. 1 LOAP and 9 para. 1 LTFB), the approval of international treaties by the Federal Assembly (Art. 166 para. 2 Cst.) and their ratification by the Federal Council (Art. 184 para. 2, first sentence, Cst.), the guarantee of a cantonal constitution by the Federal Assembly (Art. 172 para. 2 Cst.), the declaration of validity or invalidity of a popular initiative by the Federal Assembly (Art. 139 para. 3 Cst.), decisions by the National Council's Immunity Committee (Art. 13*a* RCN) or the Council of States' Legal Affairs Committee (Art. 28*a* RCE) concerning requests to waive the immunity of members of the Federal Assembly (Art. 17*a* para. 5 LParl), and messages from the Federal Council on draft legislation (Art. 141 para. 1 ParlA).

84 The following are also considered **immune acts** within the meaning of Art. 189 para. 4, first sentence, Cst.: explanations by the Federal Council relating to popular votes (Art. 11 para. 2 PFA), the voting videos published by the Federal Chancellery to supplement the Federal Council's explanations of its vote, insofar as they correspond to the explanations of the vote adopted by the Federal Council (which would amount to an unlawful verification of the explanations of the vote themselves), the Federal Council's approval of master plans (Art. 11 Spatial Planning Act), entry bans or expulsions pronounced by the Federal Council when the interests of the country so require (Art. 184 para. 3 Cst.) or in order to avert existing or imminent disturbances that seriously threaten public order, external or internal security (Art. 185 para. 3 Cst.), decisions by the Federal Assembly to dismiss judges of the Federal Administrative Court, the Federal Criminal Court or the Federal Patent Court (Art. 40*a* para. 1 let. a and para. 3 LParl; Art. 10 LTAF; Art. 49 LOAP; Art. 14 LTFB), as well as the Federal Council's decision to open a consultation procedure and bring into force the partial revision of the Hunting Ordinance of November 1, 2023 (RO 2023 622, ch. IV p. 4).

85 Finally, it should be noted that there is a **tension** between the principle of non-contestability derived from Art. 189 para. 4, first sentence, of the Constitution, on the one hand, and – among others – Articles 6 and 13 of the ECHR and Article 29*a* of the Constitution, on the other. The former prohibits recourse to the Federal Court for certain acts, while the latter guarantee the right of access to a court, the right to an effective remedy, and access to a judge.

2. Exceptions: contestability (second sentence)

Art. 189 para. 4, second sentence, Cst. allows the legislature to provide for **exceptions** to the non-contestability of acts of the Federal Assembly and the Federal Council. This exception was not included in the Federal Council's draft. It was introduced by the Council of States Committee and then adopted by the Council itself at its meeting on March 5, 1998. The rapporteur emphasized that this gave the federal legislature the option of leaving jurisdiction where it deemed politically appropriate. Furthermore, the debates were particularly intense in the National Council. A minority proposal, which was ultimately not adopted, sought to allow individual and specific decisions of the Federal Council to be reviewed by the Federal Court. One parliamentarian who supported this proposal pointed out that it was necessary to accept a departure from the principle of separation of powers, because one of the basic rules of our constitutional state is that individual and specific acts of the executive authorities, i.e., decisions in cases of dispute, must at least be reviewed by a judicial body. Another member of parliament argued, on the contrary, that it should be possible for the Federal Council to take purely political decisions that are not subject to review, which would no longer be possible under the minority proposal. In the end, the intervention of Federal Councilor Arnold Koller, who assured that the Federal Council wanted in principle to rid itself of all judicial tasks, was undoubtedly decisive in narrowly defeating the minority proposal. It should be noted that the exception provided for in Art. 189 para. 4, second sentence, of the Constitution can be linked to the reform of the judiciary, which was accepted in a popular vote on March 12, 2000, and which notably introduced a new fundamental right guaranteeing access to the courts (Art. 29*a* of the Constitution, in force since January 1, 2007). 86

For political reasons, the legislature has largely refrained from providing for exceptions within the meaning of Art. 189 para. 4 of the Constitution. As an exception to the non-contestability of acts of the Federal Assembly and the Federal Council, mention may be made of **Art. 33 let. a and b LTAF**, which provides that certain decisions of the Federal Council and the organs of the Federal Assembly may be appealed before the FAC. These include, in particular, decisions taken in the field of employment relationships of federal personnel, including the refusal to authorize criminal prosecution (letter a). 87

The infringement of the guarantee of access to the courts (Art. 29*a* Cst.) is thus **mitigated** by the possibility for the legislature to provide for exceptions. 88

The Federal Court also emphasized that, while the legislature does not intend to open the way for appeals to the Federal Court against entry bans issued by the Federal Council under Art. 189 para. 4, second sentence, of the Constitution, it is incumbent on the Federal Council, where the existence of a right of appeal is required by Art. 13 ECHR, to relinquish the decision-making power conferred on it by the Constitution and to leave the responsibility for taking the first-instance decision to the department or the Federal Office of Police.

89 However, it is clear that the mechanisms mentioned above do not make it possible to fill all the gaps in terms of **judicial protection**. On the one hand, it is unrealistic to think that the legislature can foresee all cases in which a challenge before a judicial authority must be made possible. On the other hand, the Federal Council could decide to exercise itself a decision-making power conferred on it by the Constitution, and not leave the decision of first instance to the department or the Federal Office of Police, wrongly considering that international law does not impose any right of appeal in a particular case. It is therefore important to emphasize that a right of appeal against decisions taken by the Federal Assembly or the Federal Council may arise from the application of international law, in particular Art. 6 para. 1 ECHR or Art. 13 ECHR, even if no exception within the meaning of Art. 189 para. 4, second sentence, Cst. is provided for in the law. We will mention the following three examples (see N. 90, 91, and 92 *infra*).

90 In the so-called "PKK" judgment, the Federal Court was seized of an appeal against a decision by the Federal Council to confiscate propaganda material belonging to the Kurdistan Workers' Party. The question arose as to whether the Federal Court could hear the appeal, as its jurisdiction was excluded under the provisions of the former Federal Act of December 16, 1943, on the organization of the judiciary (OJ; RO 60 269). The Federal Court held, in particular, that the confiscation of propaganda material on grounds of external and internal security concerned civil rights and obligations within the meaning of Article 6(1) of the ECHR. It then ruled that, in the event of a conflict, international law takes precedence over national law as a matter of principle, particularly when the international law provision is intended to protect human rights. Thus, despite the provisions of the former OJ, the Federal Court considered that it had to hear the appeal on the basis of Art. 6 para. 1 ECHR.

91 The Federal Assembly has the power to **dismiss judges of the federal courts of first instance** (Art. 10 LTAF; Art. 49 LOAP; Art. 14 LTFB). However,

as we have seen, decisions taken by the Federal Assembly cannot be challenged under Art. 189 para. 4 of the Constitution. No exception has been provided for by the legislature in this area. According to the criteria set out in the judgment in *Vilho Eskelinen and Others v. Finland*, which apply to the dismissal of a judge, two conditions must be cumulatively fulfilled in order to exclude the protection of Art. 6(1) ECHR: first, the domestic law of the State concerned must expressly exclude access to a court in relation to the position or category of employees in question; second, this derogation must be based on objective grounds related to the interests of the State. The second condition will not, in principle, be met. Indeed, as the ECtHR has already ruled in Grzęda v. Poland, the impossibility for a judge "to access a fundamental guarantee for the protection of a defensible civil right closely linked to the preservation of the independence of the judiciary cannot be considered to be in the interest of a state governed by the rule of law." Dismissal therefore constitutes a disciplinary procedure falling within the scope of Article 6(1) of the ECHR. Legal doctrine and the Administrative Commission of the Federal Court emphasize that this finding could prove problematic, insofar as the dismissal of a judge would fall within the scope of acts of the Federal Assembly that are not subject to judicial review. In this case, the primacy of international law should then take full effect and compel the Federal Court to hear such a challenge. It should be noted that the only disciplinary measure provided for by current law against judges of the federal courts of first instance is their dismissal by the Federal Assembly, which is unsatisfactory. In view of this, on January 23, 2025, the Control Committee of the Council of States (supported by the Control Committee of the National Council) tabled a parliamentary initiative aimed at developing the legal basis for introducing disciplinary supervision of federal court judges. In a legal opinion commissioned by the Control Committees to determine the constitutional and legal scope for introducing such oversight, it was proposed, among other things, to create a High Council of the Judiciary, which "would make it possible [...] to resolve the thorny issue of appeals against any decision to dismiss."

As we have seen above (see N. 84 *supra*), the **explanations of the Federal Council** cannot be directly challenged before the Federal Court on the basis of Art. 189 para. 4, first sentence, of the Constitution. However, the Federal Court considered that "the overall state of information prevailing at the time of a popular vote may [...] be challenged." It clarified in a subsequent ruling that this exception only applied in exceptional cases, when retrospective pro- 92 tection equivalent to reconsideration was possible. According to its case law, a right to review the regularity of a federal vote and to retrospective legal protection can be inferred directly from Art. 29 para. 1 Cst. (in conjunction with Art. 29*a* of the Constitution) "when a massive and decisive influence on the popular vote has become apparent later, after any appeal proceedings and after the Federal Council's decision to validate the vote." At the stage of admissibility of the appeal, the existence of a serious error must be made plausible. Nevertheless, the Federal Court has extended its judicial review of political rights to this particular complaint. According to this case law, the subject of the dispute is therefore not the Federal Council's explanations, but the overall state of information prevailing at the time of a popular vote. While one author points out that the Federal Court has "pushed the limits of Art. 189 para. 4 of the Constitution," another goes further, noting that it has exercised the power of discretion that belongs solely to the federal legislature under paragraph 4.

93 Finally, the majority of legal scholars agree that, in the context of **direct proceedings** (see N. 55 ff. *supra*), a canton may directly bring a decision or order of the Federal Council or the Federal Assembly before the Federal Supreme Court. The principle of non-contestability in Art. 189 para. 4, first sentence, of the Constitution would thus not apply to direct proceedings. It could indeed be considered that Art. 189 para. 2 of the Constitution and Art. 120 para. 1(a) and (b) of the Federal Supreme Court Act are exceptions within the meaning of Art. 189 para. 4, second sentence, of the Constitution.

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This publication reflects only the views of its author and not those of the Federal Administrative Court.

RECOMMENDED FURTHER READING

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COMMENTARY ON

Art. 191 FC

A commentary by Ivan Gunjic / Natascha Kords

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Art. 191 Access to the Federal Supreme Court

[1] Access to the Federal Supreme Court is guaranteed by law.

[2] For disputes that do not relate to a legal issue of fundamental importance, the law may stipulate a threshold for the amount in dispute.

[3] The law may exclude access to the Federal Supreme Court in relation to specific matters.

[4] The law may provide for a simplified procedure for appeals that are manifestly unfounded.

CONTENT

I. HISTORY

The comprehensive regulation of access to the Federal Supreme Court in Art. 191 FC dates back to the **judicial reform** that was approved by the people and the cantons on March 12, 2000, and came into force on January 1, 2007. The constitutions of 1848 and 1874 expressly assigned individual areas of jurisdiction to the Federal Supreme Court in accordance with the principle of enumeration. Art. 191 FC now instructs the legislature to guarantee access to the Federal Supreme Court and at the same time authorizes it to establish barriers to access (see n. 3). 1

Art. 191 FC was one of the **most controversial** aspects of the judicial reform and is the result of a balance between the desire to keep access to the Federal Supreme Court as open as possible and the need to protect it from overload. The Federal Council originally proposed that access to the highest national court should only be guaranteed under constitutional law in cases where legal issues of fundamental importance arise or where the outcome of the proceedings has serious consequences for one of the parties. The Constitutional Commission of the Council of States, on the other hand, wanted to guarantee access only in disputes concerning legal issues of fundamental importance. The National Council's Constitutional Commission took the opposite view, wanting to grant the legislature the power to restrict access to the Federal Supreme Court only in cases of minor importance or in the case of manifestly futile appeals. It took two difference resolution procedures before Art. 191 FC was finally adopted. 2

II. BASIC PRINCIPLES

A. Purpose

Art. 191 FC provides the constitutional framework for the legislature to establish barriers to access to the Federal Supreme Court. **Barriers to access** are procedural hurdles in the appeal process that are intended to prevent appellate courts from being seized of disputes that are unsuitable for assessment by the appellate court or that could overburden it. Procedural and substantive rules enacted on the basis of Art. 188 para. 2 FC – such as formal requirements for legal documents under Art. 42 BGG – may serve the same purpose. 3

However, they primarily serve to formalize proceedings before the Federal Supreme Court by establishing uniform rules. Barriers to access do not have a comparable formalizing function. Rather, they are actual procedural hurdles designed to exclude certain types of disputes from the Federal Supreme Court.

B. Constitutional context

4 The question of which disputes are unsuitable for consideration by the Federal Supreme Court or could overburden it is assessed on the basis of a preliminary understanding of its **functions**, which arise from the constitutional context of Art. 191 FC. The legislature takes this as its starting point when restricting access to the Federal Supreme Court.

5 The starting point is the position of the Federal Supreme Court as the "highest judicial authority of the Confederation" (Art. 188 para. 1 FC) and thus its specific functions as the **highest court**. With this designation, the Constitution assigns the Federal Supreme Court a central role in safeguarding the unity of the law and the development of the law. Its practice should therefore serve as a guideline for the rest of the judicial system (guiding function). On the other hand, this designation means that the Federal Supreme Court is responsible for providing legal protection in individual cases as the court of last instance. In particular, when important legal interests or gross violations of the law are at issue in proceedings, the Federal Supreme Court should be able to intervene in individual cases to correct errors (residual function). The functions of the Federal Supreme Court are further defined by its subject-matter jurisdiction under Art. 189 FC.

6 Furthermore, as the highest domestic court, the Federal Supreme Court has a special role to play in giving concrete form to and enforcing the **fundamental legal order**. Since the legislature is required to take fundamental rights into account when enacting legislation, it must also take this function of the Federal Supreme Court into account when restricting access to the courts. Furthermore, the special guarantees of legal recourse, which are not actually tailored to supreme courts with limited jurisdiction, may require the legislature to keep access to the Federal Supreme Court open as long as the proceedings before the lower court do not meet the relevant requirements. For example, the guarantee of legal remedy in criminal law guaranteed access to the Feder-

al Supreme Court as the second instance federal criminal court until the Appeals Chamber of the Federal Criminal Court was established.

The judicial reform was based on the assumption that the functioning of the Federal Supreme Court was jeopardized by an excessive caseload. However, an increase in the number of court staff was categorically rejected. The constitutional legislator feared that this would jeopardize legal uniformity and that the Federal Supreme Court could degenerate into a "judicial factory." It assumed that its supreme judicial functions could instead only be guaranteed by a stronger **focus on** its core tasks. Art. 191 FC enables the legislature to direct the attention of the Federal Supreme Court to disputes that are essential in this context, thereby serving the interest of effective and economical performance of its tasks. 7

C. Implementation in law

With the enactment of the Federal Supreme Court Act (BGG) – which was drafted after the adoption of the judicial reform but came into force at the same time as it on January 1, 2007 – the legislature established barriers to access in accordance with Art. 191 FC. As the table below shows, the BGG restricts access to the Federal Supreme Court exclusively to the three **ordinary appeals** in Chapter 3 of the BGG. It provides for limits on the value of claims for appeals in civil matters and in areas of public law related to civil law. Certain areas are excluded from appeal, in particular those listed in the catalogue of exclusions from public law appeals. 8

	Appeals in civil matters	*Appeals in criminal matters*	*Appeals in public law matters*
Exclusion of subject areas	Decisions against trademarks in opposition proceedings (art. 73)	Decisions of the Appeals Chamber of the Federal Criminal Court ... with the exception of coercive measures (art. 79)	List according to art. 83 International mutual assistance in criminal matters (art. 84) International administrative assistance in tax matters (art. 84a)

Limits on the value of the matter in dispute	General limit on the value of the matter in dispute ... with special provisions for labor and tenancy law ... with exceptions (art. 74)	-	State liability and public employment relationships ... with the exception of fundamental questions of law (art. 85)

Table: Barriers to access in the BGG

9 **There are no barriers to access** for subsidiary constitutional complaints under Chapter 5 of the BGG, which was created solely to fill gaps in legal protection under ordinary appeals (see n. 27). No restrictions are provided for actions and extraordinary legal remedies in Chapters 6 and 7 of the BGG. Furthermore, the restrictions of public law appeals do not apply to abstract reviews of norms and voting rights appeals (Art. 82 lit. b and lit. c BGG).

III. COMMENTARY I.E.S.

A. Guarantee of access (para. 1)

10 Art. 191 para. 1 FC formulates a **mandate to the legislature** to guarantee access to the Federal Supreme Court. Paragraph 1 does not establish any individual rights and is not directly justiciable. However, the materials show that the mandate to guarantee access was intended to “limit” the legislature's scope for action. It is a ‘substantive’ mandate that offers a “certain guarantee.” Originally, access to the Federal Supreme Court was only to be guaranteed in cases involving fundamental legal issues and serious disadvantages for the parties to the proceedings. However, Parliament soon elevated the guarantee mandate from an exception for these two cases closely related to the exercise of supreme judicial functions to a general principle, without at the same time limiting its binding effect.

11 The practical significance of the guarantee mandate is disputed in legal doctrine. In our opinion, this primarily gives rise to a principle of **access-friendly interpretation** of barriers to access. The principle of interpretation is based on the assumption that the legislature guarantees access to the Federal

Supreme Court unless it clearly states that it intends to deviate from its constitutional mandate under paragraph 1. Therefore, if no clear meaning of access barriers can be determined in the law using recognized methods of interpretation, we believe that these should be interpreted in such a way that access to the Federal Supreme Court remains as open as possible. This principle is particularly important when interpreting the list of exceptions under Art. 83 BGG, which sometimes allows considerable room for interpretation (see N. 25).

It is also disputed whether the legislature may restrict access to the Federal Supreme Court by **other means** than the limits on the value of the claim and the exclusions of certain areas of jurisdiction specified in Art. 191 para. 2 and para. 3 FC. This power is contradicted by the fact that a motion expressly authorising the legislature to enact "special conditions of access" failed in the deliberations. Furthermore, the National Council committee was of the opinion that paragraphs 2 and 3 were to be understood as exhaustive. However, in our view, these historical considerations are outweighed by the functional argument that the admissibility of a restriction must be determined primarily by its effect on access to the Federal Supreme Court. Other means of restriction are therefore permissible provided they are less severe than the expressly permissible exclusions of subject matter, which is likely to be the case in most instances. 12

Special provisions apply to two specific forms of access restriction. The first is the so-called "**admission procedure**," in which a court only accepts legal disputes that it considers admissible at its own discretion or according to specific legal criteria. In international comparison, there are some supreme courts that decide on questions of admissibility autonomously, such as the U.S. Supreme Court. In our opinion, the statutory transfer of such extensive autonomy to the Federal Supreme Court would not be compatible with paragraph 1, which assigns the task of guaranteeing access to the legislature – and not to the Federal Supreme Court. During the constitutional deliberations, concerns were also expressed that the Federal Supreme Court could restrict access more than intended in Art. 191 FC. However, we see scope for creating an acceptance procedure in the law, provided that it is linked to predefined criteria for admission and limited to specific areas. This applies in particular to the so-called "**referral procedure**," which entitles or obliges lower courts to refer certain legal questions to a higher court for a ruling, as is the case, for exam- 13 ple, with the Court of Justice of the European Union. The creation of such a procedure at the constitutional level has been thoroughly examined in Switzerland – in contrast to the adoption procedure, which was merely mentioned in the dispatch as a conceivable option but was not pursued further – and ultimately rejected. In our view, its introduction into law is therefore out of the question. Preliminary examination procedures for dismissing manifestly unfounded complaints are, incidentally, permissible without further ado. They fall within the scope of Art. 191 para. 4 FC.

B. Limits on the value of claims (para. 2)

1. Principle

14 Art. 191 para. 2 FC authorizes the legislature to set limits on the value of claims – i.e., minimum values – for the Federal Supreme Court. The **value of the claim** is the monetary value of the subject matter of the dispute in court proceedings. The purpose of limits on the value in dispute is to exclude disputes over minor amounts of money. Only property matters can be quantified in monetary terms. According to the Federal Supreme Court, a property matter exists "if the legal basis of the disputed claim lies in property law and the appeal ultimately and predominantly pursues an economic purpose." The pursuit of an economic purpose does not presuppose a claim for payment of a sum of money by the parties. In such cases, the Federal Supreme Court may instead determine the value in dispute at its discretion. The calculation of the value in dispute in the law is based on Art. 51 BGG.

15 Under constitutional law, limits on the value in dispute are permissible in all **areas of law**. However, the BGG only provides for limits on the value in dispute in civil law and in areas of public law that are closely related to civil law. A proposal by the Federal Council to exclude appeals against minor fines from access to the Federal Supreme Court was rejected by Parliament. Limits on the value in dispute in public law are indeed not without problems. The administration of public justice serves to enforce public interests and thus fulfills functions that go beyond the clarification of the respective dispute. The value in dispute in public law disputes cannot therefore be quantified on a regular basis. In criminal proceedings, the monetary value of a penalty is not always related to its severity.

According to Art. 74 para. 1 BGG, a general value limit of CHF 30,000 applies to appeals in **civil law matters** (lit. b). Exceptions are disputes under labor and tenancy law, where the limit is set at CHF 15,000 (lit. a). The privileged status of these two areas stems from the concept of social protection. According to the Federal Supreme Court, a "labor law dispute" is a dispute between an employer and an employee based on an employment relationship. "Tenancy law disputes" include disputes arising from the rental of business or residential premises. However, disputes arising from lease agreements or from the rental of movable property are not covered. 16

Art. 85 para. 1 BGG provides for limits on the value of claims for appeals in **public law matters** in the areas of state liability (CHF 30,000) and public law employment relationships (CHF 15,000). "State liability" refers to the liability of public-law entities for damage caused. State liability law is modeled on civil liability law and encompasses both general state liability law and special liability provisions. "Public-law employment relationships" are employment relationships that are not based on private law but on public personnel law. 17

2. Exception: legal issues of fundamental importance

According to Art. 191 para. 2 FC, no limits on the value of claims may be set for disputes that raise legal issues of fundamental importance. Art. 74 para. 2 lit. a and Art. 85 para. 2 BGG implement this exception. However, the Constitution and the law deliberately refrain from providing a legal definition of the term. It is clear, however, that "legal question" refers to the disputed interpretation of a norm whose violation can be challenged before the Federal Supreme Court. The message accompanying the BGG states that the legal question must be of "fundamental importance" for the legal system in general – and not only for the specific proceedings. A fundamental question must therefore be capable of serving as a **precedent** for many similar cases, even if the individual case appears to be trivial. It is irrelevant whether the decision is of high subjective importance to one party or whether the threshold value in dispute was narrowly not reached. 18

The message on the BGG distinguishes **three groups of cases** involving legal questions of fundamental importance. The first group of cases comprises legal issues that have never been assessed by the Federal Supreme Court. These are of fundamental importance for the unity of the legal system if they have been assessed inconsistently by the lower courts or if they are groundbreaking 19 for the practice of the lower courts – i.e., if they are likely to be assessed in many similar cases. Secondly, a legal issue is of fundamental importance for legal unity if the lower court has ruled on it in contradiction to the practice of the highest court. Finally, a legal issue that has already been decided once is of fundamental importance for the substantive content of the legal system if the Federal Supreme Court sees reason to review its previous practice on the issue in question.

20 The Federal Supreme Court is more restrictive in its **practice**. According to this, a legal question is only of fundamental importance for legal uniformity "if there is a general and urgent interest in having a disputed question clarified by the highest court in order to bring about uniform application and interpretation of federal law and thus remove considerable legal uncertainty." However, a question is not fundamental simply because the Federal Supreme Court has never ruled on it or because there are contradictions in the case law of the lower courts. The Federal Supreme Court considers, for example, whether the question could be relevant in a large number of other cases and whether there is consensus on the legal issue in legal doctrine. Grounds for reviewing existing case law may arise in particular from significant criticism in legal doctrine, changes in the law, or international developments.

21 The Federal Supreme Court also takes into account the **hypothetical course of proceedings**. If a legal question could be reviewed in the context of a subsidiary constitutional complaint with the same jurisdiction, there can be no question of a fundamental issue according to case law. Furthermore, the Federal Supreme Court tends to affirm the fundamental significance of a legal question if there is a very low probability that the question will be brought before the Federal Supreme Court in another case. Conversely, as the doctrine correctly states, a high probability that the same legal question will come before the Federal Supreme Court in the future with a higher value in dispute does not speak against its fundamental significance.

22 The BGG contains two **special procedural provisions** for legal questions of fundamental significance. Firstly, the Federal Supreme Court should not have to search for indications of the existence of a legal question of fundamental importance itself, but should be able to rely on the arguments put forward by the party. The party claiming that a legal question of fundamental importance exists must therefore justify why the legal question is significant (Art. 42 para. 2 BGG). Secondly, special rules apply to the composition of the court. Legal

issues of fundamental importance are decided by five federal judges instead of the usual three, with the exception of appeals against decisions of the cantonal supervisory authorities in debt enforcement and bankruptcy matters (Art. 20 para. 2 BGG).

C. Exclusion of subject areas (para. 3)

1. Constitutional basis

Art. 191 para. 3 FC authorizes the legislature to exclude certain subject areas from access to the Federal Supreme Court. In the BGG, excluded areas of jurisdiction are often defined by legal concepts based on a uniform source of substantive law (e.g., decisions on the “type approval of vehicles” under Art. 12 SVG or on “inclusion in the waiting list” for organ transplants under Art. 21 TPG). However, the Constitution does not impose any restrictions on the legislature when choosing the possible **points of reference** for determining a subject area. Exclusions of subject matter in the BGG therefore also refer to undefined legal concepts with a cross-jurisdictional character (“internal or external security of the country”) and to lower courts of the Federal Supreme Court (“decisions of the Appeals Chamber of the Federal Criminal Court”). 23

The **limits** of the authorization in paragraph 3 are controversial. In any case, there is agreement that the legislature may not exclude entire branches of law – such as criminal law as such – from access to the Federal Supreme Court, because paragraph 3 only authorizes it to exclude “certain” subject areas. In our opinion, a stricter standard must apply. An exclusion of a specific area can significantly impair the constitutional status of the Federal Supreme Court (see n. 4 ff.) even before it affects an entire branch of law. The legislature is not free to undermine this position, especially not because of its duty to guarantee rights. In our opinion, no clear limit for subject matter exclusions can be derived from the vague constitutional basis. However, the Constitution does at least provide a frame of reference for assessing the constitutionality of specific exclusions in the applicable law. 24

2. Assessment of the applicable law

The BGG excludes certain areas from access to the Federal Supreme Court, particularly in the area of **public law appeals**. These exclusions do not follow a uniform logic, but are the expression of loosely related individual deci- 25 sions by the legislature. Some of them were taken over from the old law. The list of exceptions in Art. 83 BGG is of particular practical importance, as it broadly covers exclusions in the areas of migration and infrastructure, as well as exclusions relating to property rights, politics, and other matters. In addition, there are exclusions in the area of administrative and legal assistance under Art. 84 and Art. 84a BGG, as well as certain exclusions for the Federal Administrative Court under Art. 32 para. 1 VGG, which go beyond the BGG and thus indirectly also exclude access to the Federal Supreme Court. Furthermore, Art. 79 BGG largely excludes the decisions of the Appeals Chamber of the Federal Criminal Court from the jurisdiction of the Federal Supreme Court. In civil law, only the selective exclusion of trademarks under Art. 73 BGG applies.

26 The compatibility of a specific exclusion of a subject area with the Constitution depends primarily on its **scope**. The decisive factor is, on the one hand, how significant the legal issues covered by the exclusion are and how strongly they relate to the fundamental order of law. The more significant the legal issues covered and the stronger their connection to fundamental rights, the more problematic the exclusion is with regard to preserving the supreme judicial functions of the Federal Supreme Court (qualitative consideration). On the other hand, the relief sought by the constitutional legislator for the Federal Supreme Court depends on the caseload associated with the cases covered by the exclusion. From this perspective, the more an exclusion relieves the Federal Supreme Court, the more desirable it is from a constitutional point of view (quantitative consideration). The caseload in a subject area is also related to the nature of the legal issues that arise. However, it is primarily determined by other factors, such as the number of cases arising in the area in question. The qualitative and quantitative approaches are therefore independent approaches to assessing the constitutionality of exclusions. In our opinion, restricting access to the Federal Supreme Court to important legal issues is best compatible with both approaches. The BGG already excludes “legal issues of fundamental importance” and “particularly significant cases” within the scope of certain exclusions in the form of countermeasures. The reform efforts within the framework of the 2018 revision of the BGG were aimed in the same direction (see N. 30).

27 Exclusions based on subject matter have different effects in the BGG's system of legal remedies, depending on whether the excluded decision was made by a

cantonal or a federal court of first instance. The reason for this is the **subsidiary constitutional complaint**, which allows decisions of the highest cantonal courts to be reviewed for violations of constitutional rights if ordinary appeals are excluded (Art. 113-119 BGG). The subsidiary constitutional complaint is an actual exception to barriers to access, which stems primarily from the legislature's concern for the supervisory function of the Federal Supreme Court over the cantonal authorities in the area of constitutional rights. “Constitutional rights” are constitutional provisions that guarantee individuals protection against state interference or, at least in addition to public interests, protect individual interests. These include, in particular, cantonal constitutional provisions and certain principles of the rule of law.

The **motive for exclusion** on the part of the legislature is also relevant to the 28
constitutionality of exclusions. The protection of the Federal Supreme Court from excessive workload almost always plays a role here. Another frequent motive for exclusion is the unsuitability of a matter for judicial review, for example because it is of a political nature or involves a significant degree of discretion. The aim of speeding up proceedings is particularly important in the area of administrative and legal assistance between authorities, where access to the Federal Supreme Court is largely excluded in order to facilitate the implementation of auxiliary measures. All these grounds constitute constitutionally legitimate reasons for excluding certain areas from jurisdiction. On the other hand, occasional references by the legislature to the technical nature of certain areas, to the wide discretion of the lower courts, or to the quality of the proceedings before the lower courts are constitutionally questionable. The reference to existing legal traditions is only convincing in the case of military jurisdiction, whose exclusion was clearly intended by the constitutional legislator.

Based on the above, the question of whether specific subject matter exclu- 29
sions are compatible with the Constitution can be assessed using the **test scheme** below. We see two problems in particular in the current law. First, due to the far-reaching exclusions under Art. 83 lit. b-d BGG, the Federal Administrative Court effectively replaces the Federal Supreme Court in parts of migration law in the absence of a constitutional complaint. This circumstance is in clear tension with the constitutional role of the Federal Supreme Court, especially since migration law has a close connection to fundamental rights.

The second problem we see is the increasing workload of the Federal Court, especially in criminal appeals.

i. How far does the exclusion extend?

- Materiality and relevance to fundamental rights of the legal issues covered?
- Relief effect

ii. Is the exclusion compensated for?

- Counter-exceptions?
- Constitutional complaints?

iii. What are the legislative motives behind the exclusion and what constitutional weight do these motives carry?

Test criteria: Compatibility of subject matter exclusions with the Constitution

3. Reform efforts

30 The Federal Council had the administration of federal justice evaluated in 2008–2013. It concluded that legal issues of fundamental importance did not consistently reach the Federal Supreme Court and that the latter had to deal with some minor cases. At the same time, there were gaps in the jurisdiction of the Federal Supreme Court. The Federal Council therefore proposed a fundamental revision of the BGG in 2018. On the one hand, existing exclusions of subject areas were to be broadened. In return, the Federal Supreme Court was to retain a so-called "**residual jurisdiction**" for the assessment of "legal issues of fundamental importance" and "particularly significant cases," with the exception of foreign and security policy, asylum matters, and certain disputes under telecommunications law. The exact meaning of these two terms was to be defined in more detail in a list in the law (see Art. 89b E-BGG). Originally, the Federal Council had also planned to abolish subsidiary constitutional complaints. However, due to fierce criticism during the consultation process, where there were fears that legal protection in the area of constitutional rights would be restricted, it withdrew this proposal. Nevertheless, the major revision of the BGG failed in 2020 due to opposition in the National Council to the extension of subject matter exclusions.

31 Shortly after the revision failed, reform efforts were resumed. In response to the Caroni postulate of December 2, 2020, the Federal Council presented a

report on January 24, 2024, in which it advocated a **two-stage approach**. On the one hand, it stuck to the major revision of the BGG, but decided to wait for the parliamentary debate and not to take any steps in this direction for the time being. On the other hand, it initiated a minor revision of the BGG, which is intended to bring about selective, politically uncontroversial improvements to the BGG. On December 6, 2024, the Federal Council opened the consultation procedure on the minor revision of the BGG. It proposes only editorial changes to access to the Federal Supreme Court.

D. Simplified procedure (para. 4)

Art. 191 para. 4 FC authorizes the legislature to provide for a simplified procedure for obviously unfounded appeals. This is not a barrier to access, but merely a **special type of procedure**. A complaint is "manifestly unfounded" if it is clear from the outset that the alleged violation of law does not exist. This is particularly the case if there is no doubt about the interpretation of the law, either because of the clear wording of the law or because of established court practice. Originally, para. 4 was intended to empower the legislature to exclude manifestly unfounded appeals from access to the Federal Supreme Court altogether. The current version of para. 4 was chosen to ensure that, in such cases, those seeking justice receive at least a brief statement of reasons that satisfies the requirements of Art. 29 para. 2 FC. 32

The BGG recognizes **two types** of simplified proceedings. The Federal Supreme Court first decides on its own whether to dismiss obviously inadmissible, obviously unfounded, abusive, or vexatious appeals, stating briefly the grounds for inadmissibility (Art. 108 BGG). Secondly, it decides with summary reasoning – but in a regular three-judge panel (see Art. 20 para. 1 BGG) – on certain decisions not to hear a case and, if unanimous, on the dismissal of manifestly unfounded appeals and on the granting of manifestly well-founded appeals (Art. 109 BGG). In doing so, the BGG goes beyond the wording of para. 4, which provides for the simplified procedure only for manifestly unfounded appeals. However, Art. 188 para. 2 FC already provides a sufficient constitutional basis for the solution chosen by the legislature. 33

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