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13

The Impact of the Pan-European General Principles of Good Administration on Swiss Law

Between Exemplary Reception of the ECHR and Frictions due to Direct Democracy

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I. Introduction

13.01 The Swiss Confederation[1] is composed of the Swiss people and twenty-six cantons, each with its own numerous communes. The state is organized at three levels, with the confederation and each canton having its own constitution. The confederation has the competences given to it by the Swiss Federal Constitution of 18 April 1999 (*Constitution fédérale de la Confédération Suisse—Cst*). 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 (Article 3 Cst). Communes are autonomous within the limits provided by cantonal law (Article 5 Cst). Federal law takes precedence over any conflicting provision of cantonal law (Article 49 (1) Cst).[2] This report focuses on the impact of the pan-European general principles of good administration at the federal level. The main effects on cantonal legislation and practice will be highlighted.

1. Reluctance to Adhere to the CoE

13.02 Switzerland adhered to the Council of Europe (CoE) on 6 May 1963, becoming its seventeenth Member State.[3] Membership had previously been examined without success. One of

[1] **Preliminary remark:** the four national languages of Switzerland are German, French, Italian, and Romansh. However, when making reference to Swiss official texts, institutions, and their abbreviations this chapter only uses their French versions. Officially-published decisions of the Federal Supreme Court are cited with the official French abbreviation (ATF), the volume number (Roman numeral) and the first page of the decision. If necessary, the exact page number of the part referred to is added in brackets. In this text all cited decisions have been officially published.

[2] See for a general introduction to Swiss constitutional law: P. Egli, *Introduction to Swiss Constitutional Law* (2016); M. Oesch, 'Constitutional Law' in M. Thommen (ed.), *Introduction to Swiss Law* (2018), pp. 135–62. See for a general introduction to Swiss administrative law: F. Uhlmann, 'Administrative Law' in Thommen, ibid., pp. 187–217, and for a general introduction to Swiss administrative procedural law: F. Uhlmann, 'Administrative Procedure' in Thommen, ibid., pp. 219–44.

[3] The SCoE was approved by the *Assemblée fédérale* on 19 March 1963; it entered into force on 6 May 1963. See *Message du Conseil fédéral à l'Assemblée fédérale concernant l'adhésion de la Suisse au Statut du Conseil de l'Europe* of 15 January 1963 (FF 1963 I, p. 109).

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the main reasons for delayed CoE membership was neutrality. Although Article 1 (d) SCoE underlined that matters related to national defence do not fall within the scope of the CoE, Switzerland was very reluctant and careful to avoid compromising its neutrality based on the perception that the CoE's mission was to further political integration. It was feared that political debates taking place at the Parliamentary Assembly of the CoE (PACE)—namely concerning a European army—would produce adverse effects on neutrality.[4]

13.03 Later, this assumption changed. With the CoE being neither a political nor a military alliance its decisions were expected to have the status of non-binding recommendations and not to lead to political or economic sanctions.[5] Furthermore, with the creation of the European Economic Communities it became clear that the CoE was no longer at the forefront of political integration in Europe. This was considered an important element by the Swiss Federal Council (*Conseil fédéral*—the seven-member executive council that constitutes the federal government of the Swiss Confederation) and paved the way for its proposal to the Swiss Federal Assembly (*Assemblée fédérale*—the Swiss Federal Parliament) to join the CoE as a full member.[6]

13.04 Another issue was reluctance to accept the jurisdiction of the European Court of Human Rights (ECtHR). Although—due to the need to change different constitutional provisions (cf. MN. 13.18)—the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was ratified only in 1974,[7] more than ten years after accession to the CoE, it was clear from the beginning that by virtue of Article 3 of the Statute of the Council of Europe (SCoE) membership of the CoE would bring ratification of the ECHR.[8] It was alleged that by ratifying the ECHR Switzerland would be subjected to the

[4] See A. Kley and M. Sigrist, 'Der Beitritt der Schweiz zur EMRK' in T. Jaag and C. Kaufmann (eds.), *40 Jahre Beitritt der Schweiz zur EMRK* (2015), pp. 17–52 (pp. 26 et seq.); D. Thurnherr, 'The Reception Process in Austria and Switzerland' in H. Keller and A. Stone Sweet (eds.), *A Europe of Rights: The Impact of ECHR on National Legal Systems* (2008), pp. 311–91 (pp. 316 et seq.).

[5] See *Rapport du Conseil fédéral à l'Assemblée fédérale concernant les relations de la Suisse avec le Conseil de l'Europe* of 26 October 1962 (FF 1962 II, p. 1073 (pp. 1085 et seq.)).

[6] After having rejected joining the CoE in 1957–59 the *Conseil fédéral* approved joining the CoE in its report of 26 October 1962 (n. 5) and accordingly submitted the *Message du Conseil fédéral à l'Assemblée fédérale concernant l'adhésion de la Suisse au Statut du Conseil de l'Europe* (n. 3).

[7] The main documents concerning ratification of the ECHR and protocols are (chronologically):

- *Rapport du Conseil fédéral à l'Assemblée fédérale sur la Convention de sauvegarde des droits de l'homme et des libertés fondamentales* of 9 December 1968 (FF 1968 II, p. 1069).
- *Rapport complémentaire du Conseil fédéral à l'Assemblée fédérale sur la Convention de sauvegarde des droits de l'homme et des libertés fondamentales* of 23 February 1972 (FF 1972 I, p. 989).
- *Message du Conseil fédéral à l'Assemblée fédérale concernant la Convention de sauvegarde des droits de l'homme et des libertés fondamentales of* 4 March 1974 (FF 1974 I, p. 1020).
- *Message relatif à l'approbation des Protocoles nos 6, 7 et 8 à la Convention européenne des droits de l'homme* of 7 May 1986 (FF 1986 II, p. 605).
- *Message relatif à l'approbation des Protocoles 9 et 10 à la Convention européenne des droits de l'homme* (STE nos 140 et 146) of 23 February 1994 (FF 1994 II, p. 401).
- *Message relatif à l'approbation du Protocole n° 11 à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales portant restructuration du mécanisme de contrôle établi par la Convention* (STE n° 155) of 11 May 1994 (FF 1995 I, p. 987).
- *Message concernant le retrait des réserves et déclarations interprétatives de la Suisse à l'art. 6 de la Convention européenne des droits de l'homme* of 24 March 1999 (FF 1999 III, p. 3350).
- *Message concernant la ratification du Protocole n° 14 du 13 mai 2004 à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, amendant le système de contrôle de la Convention* of 4 March 2005 (FF 2005, p. 1989).

[8] Kley and Sigrist (n. 4), pp. 23 et seq., pp. 35 et seq.

decisions of 'foreign judges'. The 'foreign judges' rhetoric and independence therefrom was popular during the nineteenth century and especially the first half of the twentieth century.[9] The discussion has recently resumed in the context of the popular initiative 'Swiss law instead of foreign judges' (initiative in favour of self-determination), which was, however, rejected by a vote of the people and cantons on 25 November 2018.[10] This initiative aimed to introduce the primacy of the Federal Constitution over international law so that the authorities would not be bound by international treaties that were not subject to referendum and would be contrary to the constitution.[11]

13.05 Another aspect that was less discussed at the time of ratification but repeatedly discussed afterwards is the democratic legitimation of the ECHR. This is linked to the Swiss-specific political system of direct democracy: the facultative or mandatory referendum, the popular initiative, and additional mechanisms at the cantonal and local levels are extensively developed and frequently used.[12] At the time when the ECHR was signed there was no obligation to submit it to a popular vote. The *Conseil fédéral* considered the issue and concluded that, given that a member may withdraw from the CoE at relatively short notice (Article 7 SCoE), this meant that Article 89 (3) of the old constitution of 1874 did not apply and CoE membership was not subject to a facultative referendum either. Membership of the CoE was ratified by the Parliament only. It is argued that this deficit has been compensated for through the new constitution—which was adopted in 1999. Indeed, the ECHR's guarantees and the case law developed thus far were included in the 1999 constitution and thus democratically validated.[13]

2. Awareness of the Potential Influence of 'CoE law'

13.06 Initial assumptions and suggestions that decisions of the CoE are not obligatory, that the ECHR implied no structural changes, and that its minimum rights were already covered by the Federal Constitution did not prove true.[14] Politicians—initially at least—underestimated the ECHR's potential role. Meanwhile, there is an awareness of and (political) discussion on the influence of 'CoE law' in Switzerland. This is also reflected in the research on the impact of the international protection of fundamental rights on Swiss administrative law.[15] Furthermore, the legal profession has played an important role in the successful

[9] Kley and Sigrist (n. 4), pp. 20 et seq.

[10] See on this H. Keller and R. Walther, 'Resistance in Switzerland: Populist Rather Than Principled' in M. Breuer (ed.), *Principled Resistance to ECtHR Judgements—A New Paradigm?* (2019), pp. 161–91 (pp. 185 et seq.).

[11] See on the legal consequences in case of an approval of the initiative: H. Keller and N. Balazs-Hegedüs, 'Paradigmenwechsel im Verhältnis von Landesrecht und Völkerrecht?', (2016) *PJA*, pp. 712–24; Keller and Walther (n. 10), p. 188.

[12] Swiss voters participate directly in decision taking on multiple issues at all levels of the federal state at least three to four times a year. For more on this, including from an international comparative perspective, see B. Kaufmann, R. Büchi, and N. Braun, *Guidebook to Direct Democracy in Switzerland and Beyond* (2010).

[13] See H. Aemisegger, 'Probleme der Umsetzung der EMRK im schweizerischen Recht' in Jaag and Kaufmann (n. 4), pp. 201–30 (p. 204). See also: *Rapport du Conseil fédéral: 40 ans d'adhésion de la Suisse à la CEDH: Bilan et perspectives* of 19 November 2014 (FF 2015, p. 353 (p. 369)).

[14] Kley and Sigrist (n. 4), pp. 40 et seq., pp. 46 et seq.

[15] See, e.g., B. Schindler, '100 Jahre Verwaltungsrecht in der Schweiz', (2011) II *ZSR*, pp. 331–437 (pp. 409 et seq.); A-C. Favre, 'Cent ans de droit administratif: de la gestion des biens de police à celle des risques environnementaux', (2011) II *ZSR*, pp. 227–330 (pp. 318 et seq.).

implementation of the ECHR in Switzerland. A number of attentive lawyers—among whom the most known is Ludwig A. Minelli[16]—have pushed for implementation of the ECHR by introducing and winning numerous cases on their own behalf and as lawyers supporting others.[17] All of this has helped to increase general awareness about the potential of the ECHR to protect individuals against the administration.

13.07 At the official level awareness of the instruments of the CoE is equally high. Since 1977 the *Conseil fédéral* has produced a report on the CoE Conventions at the beginning of each legislative period.[18] The report contains information on CoE conventions that Switzerland has not ratified and on those that it plans to ratify. It provides arguments for ratifying the conventions of interest. Furthermore, following Article 146 of the Federal Act on the Federal Assembly of 13 December 2002 (*Loi sur le Parlement—LParl*) the *Conseil fédéral* proposes a legislature programme at the beginning of the legislature term to be approved by the newly elected Parliament. This document offers political orientation to the government on how to organize its activities. The government reports yearly to the Parliament on the progress and fulfilment of the objectives identified, as well as on the objectives for the following year (cf. Article 144 LParl). For each objective the programme contains a number of implementing measures. Part of such measures can be the ratification and implementation of CoE instruments.[19]

13.08 An additional occasion for showing awareness of the potential influence of 'CoE law' is connected to the direct democratic procedures. Regarding popular initiatives that infringe conventional rights (but respect *jus cogens*) and that are submitted to a popular vote, the *Conseil fédéral* informs the population about the infringement and regularly recommends that the popular initiative be rejected.

II. Status of International Treaties in the Swiss Legal Order

13.09 The old Swiss Federal Constitution of 29 May 1874—which was in force when joining the CoE and the ECHR—contained no provision on the relationship between international law and internal law. However, the primacy of international law was generally recognized from the very beginning of the confederation based on the hierarchically superior nature

[16] Minelli was one of the first Swiss nationals to appeal to the ECtHR (his first case was the second one concerning Switzerland): *Minelli v. Switzerland* (8660/79) 25 March 1983 ECtHR. He later successfully advised others. See Kley and Sigrist (n. 4), pp. 43 et seq. (with references in n. 130).

[17] All decisions involving Switzerland before the ECtHR are published on the TF's webpage at https://www.bger.ch/ext/eurospider/live/fr/php/clir/http/index_atf.php?lang=fr. By clicking on CrEDH, under the most recent year period (e.g. 2018), one can see all cases. Furthermore, since 2008, the Federal Office of Justice has provided a summary of the ECtHR's most important case law concerning Switzerland and other countries (https://www.bj.admin.ch/bj/fr/home/staat/menschenrechte/egmr.html). See for a discussion of these decisions, e.g., M. Hertig Randall, 'Auswirkungen der EMRK auf andere Rechtsgebiete' and F. Schürmann, 'Wichtige Schweizer Fälle vor den EMRK-Organen'. Both articles can be found in Jaag and Kaufmann (n. 4), pp. 115–72 and pp. 173–200.

[18] 1st report: FF 1977 III, p. 899; 1st additional report: FF 1980 II, p. 1547; 3[d] report: FF 1984 I, p. 792; 4th report: FF 1988 II, p. 280; 5th report: FF 1992 II, p. 651; 6th report: FF 1996 I, p. 405; 7th report: FF 2000, p. 1083; 8th report: FF 2004, p. 3597; 9th report: FF 2008, p. 4077; 10th report: FF 2013, p. 1915; 11th report: FF 2016, p. 6823.

[19] The documents related to the 2015-2019 legislature programme can be found at: https://www.admin.ch/gov/fr/accueil/conseil-federal/agenda-politique.html.

of international rules.[20] Further arguments related to the *pacta sunt servanda* principle and the unenforceability of provisions of internal law contrary to the treaty.[21]

13.10 Nevertheless, the *Schubert* decision of the Federal (Supreme) Court (*Tribunal fédéral—TF*) of 2 March 1973[22] introduced an exception for cases where the legislator intentionally wanted to depart from an international treaty.[23] Accordingly, domestic legislation introduced afterwards (*lex posterior*) may exceptionally take precedence (subsequently referred to as the *Schubert practice*). However, according to the *Tribunal fédéral*, international guarantees of human rights (especially those of the ECHR) take precedence over internal laws (cf. MN. 13.39; referred to as the *PKK practice*).[24] When looking at the more recent *Tribunal fédéral* decisions[25] it is doubtful whether the court still follows the *Schubert practice*[26] or not.[27]

13.11 Furthermore, Switzerland has a monistic tradition, meaning that it recognizes immediate internal validity for international treaties that it has ratified.[28] Treaty provisions can be directly invoked by citizens before national courts provided that they are sufficiently precise; otherwise, they need to be implemented into domestic law before they are applicable. If a treaty provides for important new obligations for the state or when it has political implications an implementing national act is usually needed. The guarantees of the ECHR are directly applicable—with no exceptions.[29]

13.12 The new Swiss Federal Constitution of 1999 (cf. MN. 13.26 et seq.) contains provisions regarding the status of international law. Article 5 (4) Cst states that the confederation and the cantons shall respect international law. Moreover, Article 190 Cst stipulates that the *Tribunal fédéral* and other judicial authorities apply the federal acts and international law. Accordingly, federal acts and international law are binding on all authorities.

13.13 However, the relationship between federal acts and international law is not explicitly regulated.[30] In cases of contradictions between a federal law and international law that cannot

[20] See Office fédéral de la justice/Direction du droit international public, 'Rapports entre le droit international et le droit interne au sein de l'ordre juridique suisse', (1989) nº 53.54, *JAAC*, section 6 and cited references.

[21] Articles 26 and 27 of the Vienna Convention of 23 May 1969 on the law of treaties (approved by the *Assemblée fédérale* on 15 December 1989 and entered into force for Switzerland on 6 June 1990).

[22] ATF 99 Ib 39.

[23] See on this and the following Keller and Walther (n. 10), pp. 163 et seq.

[24] ATF 125 II 417 (424 et seq.). See also *Message du Conseil fédérale concernant la révision totale de l'organisation judiciaire fédérale* of 28 February 2001 (FF 2001, p. 4000 (p. 4118)); *Rapport du Conseil fédéral sur la relation entre le droit international et le droit interne* of 5 March 2010 (FF 2010, p. 2067); *Rapport additionnel du Conseil fédéral au rapport du 5 mars 2010 sur la relation entre droit international et droit interne* of 30 March 2011 (FF 2011, p. 3401 (pp. 3442 et seq.)).

[25] Especially ATF 139 I 16. In this decision the TF confirmed the unconditional precedence of international human rights provisions over internal laws (see especially pp. 28 et seq.) but also said in a more general way that Switzerland cannot rely on national law in order to justify non-compliance with the obligations of an international treaty. See on the political consequences of this judgment Keller and Walther (n. 10), pp. 186 et seq.

[26] See S. Schürer, 'Hat die PKK-Rechtsprechung die Schubert-Praxis relativiert?', (2015) *ZBl*, pp. 115–32.

[27] Y. Hangartner, 'Bundesgerichtlicher Positionsbezug zum Verhältnis Bundesverfassung und Völkerrecht', (2013) *PJA*, pp. 698–707 (p. 702). At least it seems that the TF moved away from the *Schubert practice*, however, without formally revoking it. See ATF 117 Ib 367 (373); 122 II 485 et seq.

[28] G. Biaggini, 'Das Verhältnis der Schweiz zur internationalen Gemeinschaft, Neuerungen im Rahmen der Verfassungsreform', (1999) *PJA*, pp. 722–29 (pp. 726 et seq.); Keller and Walther (n. 10), p. 163.

[29] FF 2015, p. 357 (p. 380). First, scholars differentiated depending on the relevant article, see, e.g., G. Haller, 'Die innerstaatliche Anwendung der europäischen Menschenrechtskonvention in der Schweiz', (1977) *ZBl*, pp. 521–31 (pp. 523 et seq.).

[30] Biaggini (n. 28), p. 728.

be solved through interpretation the *Tribunal fédéral* therefore follows its established case law,[31] according to which international public law has precedence as a matter of principle, especially when the international norm deals with human rights protection.[32] As a result domestic legislation contrary to international law cannot be applied.[33] The *Conseil fédéral* usually defends the precedence of international law over federal and cantonal laws.[34] More recently it has nuanced this position by stating that international law has precedence unless the legislator intentionally decided to go against it (referring to the *Schubert practice*, cf. MN. 13.10).[35] In this case the *Tribunal fédéral* is bound by federal law by virtue of the separation of powers. However, the *Conseil fédéral* also affirms that the ECHR cannot be contradicted by national law.[36]

13.14 In practice the alignment of domestic legislation with international treaties, including CoE conventions, starts as early as when drafting new legislation[37] at the federal or cantonal level. In the course of so-called 'preventive legal control' the conformity of the draft act with superior national legislation and with international law is examined. It is integrated into the political procedure of drafting the law. The aim is to inform the lawmaker on the legal limitations to be respected whenever drafting a constitutional provision or a law in order to avoid conflicts between the norms.[38]

13.15 Furthermore, all authorities must respect international law (Articles 5 (1), 35 (2) Cst). This means that to the greatest extent possible national legislation has to be interpreted in conformity with international treaties. This is an obligation for all authorities, similar to the obligation to interpret internal law in conformity with the constitution. Again, the aim is to prevent conflicts between international and national legal provisions.[39] However, the principle of interpretation in conformity is not a panacea and reaches its limits when it cannot prevent conflict.[40]

13.16 Finally, the Swiss direct democratic system, more specifically the instrument of the popular initiative to modify the constitution, poses a particular challenge.[41] Popular initiatives must respect the imperative norms of international law (Article 139 (3) Cst).[42] However, 'imperative norms' are interpreted in a restrictive way and limited to *jus cogens*, thus covering only

[31] See, e.g., ATF 125 II 417 (424).
[32] ATF 122 II 485 (487).
[33] ATF 136 II 241 (255).
[34] See *Message du Conseil federal à l'Assemblée fédérale concernant l'approbation de huit conventions du Conseil de l'Europe* of 1 March 1965 (FF 1965 I, p. 445 [p. 447]). See also Office fédéral de la justice/Direction du droit international public (n. 20).
[35] *Rapport du Conseil fédéral sur la relation entre le droit international et le droit interne* (n. 24), pp. 2112 et seq.
[36] *Rapport du Conseil fédéral sur la relation entre le droit international et le droit interne* (n. 24), p. 2068.
[37] See with respect to this *Rapport du Conseil fédéral, Renforcement du contrôle préventif de la conformité au droit* of 5 March 2010 (FF 2010, p. 1989).
[38] In the message of the *Conseil fédéral* on each proposed draft federal law there is a dedicated chapter on its conformity with international law. e.g., the report on the modification of the 'Loi sur les allocations familiales' contains a Chapter 5.2 on conformity with international commitments. In this case conformity with the CoE's Code of Social Security is audited; see https://www.admin.ch/ch/f/gg/pc/documents/2908/LAFam_Rapport-expl_fr.pdf.
[39] See *Rapport du Conseil fédéral sur la relation entre le droit international et le droit interne* (n. 24), p. 2106 et seq.
[40] ATF 125 II 417 (pp. 424 et seq.).
[41] See *Rapport du Conseil fédéral sur la relation entre le droit international et le droit interne* (n. 24), p. 2068).
[42] The same restriction applies to changes of the constitution initiated by the parliament, see Articles 193 (4) and 194 (2) Cst.

a small fraction of human rights.[43] For instance, the *Tribunal fédéral* has stated that none of the procedural guarantees of the ECHR are part of *jus cogens*.[44] The *Assemblée fédérale* also interprets the mentioned constitutional articles in a restrictive way and has agreed to submit to the popular vote initiatives that are contrary to the ECHR.[45] When accepted these initiatives are difficult to implement. The *Assemblée fédérale* tries to concretize them (materialize into law) in a way that respects international commitments—namely the ECHR—while doing its utmost to take into account the will of the constituent.[46] If implementation cannot be done in a way that respects international commitments the *Conseil fédéral* can try to renegotiate the treaties.[47]

13.17 In order to mitigate the problem of implementing popular initiatives that are in contradiction with international law the *Conseil fédéral* presented a number of proposals in March 2011. It suggested broadening the scope of the preliminary review of the text of initiatives (before the collection of signatures) and widening the invalidity grounds to include—in addition to *jus cogens*—norms that reflect the essence of fundamental rights, putting an upper limit on the constituent that would include fundamental values laid down in the constitution and the ECHR.[48] These proposals were criticized by all parties[49] and have not been implemented to date.

III. Reception of the Pan-European General Principles of Good Administration through Application of the ECHR

13.18 As already mentioned (cf. MN. 13.04), due to the need to change different constitutional provisions Switzerland ratified the ECHR (only) in 1974. Furthermore, ratification was

[43] e.g., right to live, freedom from torture or human trafficking or prohibition of collective punishments. See ATF 133 II 450 (461).

[44] ATF 133 II 450 (462).

[45] e.g., the prohibition against building minarets, accepted in a popular vote on 29 November 2009 (FF 2010, p. 3117), and the automatic expulsion of foreigners that have committed certain crimes or offences, without their individual cases being heard, accepted in a popular vote on 28 November 2010 (FF 2011, p. 2593). Another initiative which aimed at allowing popular votes in relation to decisions to naturalize foreigners was submitted to the vote on 1 June 2008 but was not accepted (FF 2008, p. 5599). The *Conseil fédéral* admits that the number of popular initiatives that do not respect international law has increased recently (see *Rapport du Conseil fédéral sur la relation entre le droit international et le droit interne* (n. 24), p. 2067).

[46] See *Rapport du Conseil fédéral sur la relation entre le droit international et le droit interne* (n. 24), p. 2069. See also M. Hottelier, H. Mock, and M. Puéchavy, *La Suisse devant la Cour européenne des droits de l'homme* (2nd edition 2011), pp. 15 and 20 et seq.

[47] After the approval on 9 February 2014 of the popular initiative 'Stop Mass Immigration' (FF 2014, p. 3957), aimed at autonomously controlling and limiting immigration, the Directorate of International Law of the Federal Department of Foreign Affairs published a report evaluating the impact of the new constitutional provisions. It lists the treaties that need to be renegotiated as a consequence. See *Auswirkungen der neuen Verfassungsbestimmungen Art. 121a und Art. 197 Ziff. 9 auf die völkerrechtlichen Verpflichtungen der Schweiz, 26. Mai 2014*. The document, partly in German, partly in French is available at https://www.eda.admin.ch/dam/eda/de/documents/das-eda/organisation-eda/Rapport-DDIP_initiative-immigration-de-masse_DE.pdf. More information on the implementation of this initiative: https://www.admin.ch/gov/en/start/documentation/dossiers/implementation-initiative-stop-mass-immigration.html.

[48] *Rapport additionnel du Conseil fédéral au rapport du 5 mars 2010 sur la relation entre droit international et droit interne* (n. 24), p. 3401.

[49] See the results of a public consultation procedure on introducing rules for enhancing compatibility between international law and national law, available at https://www.admin.ch/ch/d/gg/pc/documents/2303/Vereinbarkeit-von-Voelkerrecht-und-Initiativrecht_Ergebnisbericht_de.pdf.

accompanied by three reservations and two interpretative declarations thereto.[50] The reservations and interpretative declarations related

- to cantonal laws on administrative internment (of mentally-disordered persons or those reduced to vagrancy) and their incompatibility with Article 5 ECHR,
- to the non-application of the principle of publicity as laid down in Article 6 (1) ECHR to procedures that—according to cantonal authorities—are conducted by administrative authorities,
- to the non-application of the same principle of publicity of judgment to situations where cantonal laws on civil or criminal procedures foresee that the judgment is not to be pronounced in a public hearing but communicated in writing to the parties.

13.19 Interpretative declarations included one on Article 6 (1) ECHR stating that only the right to final judicial control was recognized, and one on Article 6 (3) (c) and (e) ECHR stating that free legal assistance and free translation do not mean that the beneficiary does not have to pay any of the ensuing costs.[51]

13.20 Whereas, after a modification in the Civil Code introducing provisions on administrative detention, the reservation on administrative internment could be withdrawn on 1 January 1982,[52] the other reservations and interpretative declarations were partly 'invalidated' by the ECtHR in 1988 and 1990 in the *Belilos v. Switzerland* case[53] (cf. MN. 13.30) and the *Weber v. Switzerland* case[54] (cf. MN. 13.31). With respect to this 'invalidation' some authors speak of 'involuntary full accession' (*unfreiwilliger Vollbeitritt*).[55] Eventually, this led to the withdrawal of reservations and interpretative declarations of Switzerland on Article 6 ECHR.[56]

13.21 Furthermore, Switzerland has ratified the additional Protocols No. 6, No. 7, and No. 13 as well as Protocols No. 11 and 14[57] amending the ECHR.[58] Protocol No. 1 was already signed on 19 May 1976. However, it has not since been ratified. While there is certainly a contradiction between the secret ballot (Article 3 of the Protocol) and the local and cantonal method of voting by raising hands (assembly voting), this is not the main reason for not ratifying

[50] See *Rapport du Conseil fédéral à l'Assemblée fédérale sur la Convention de sauvegarde des droits de l'homme et des libertés fondamentales* (n. 7), p. 1069; *Rapport complémentaire du Conseil fédéral à l'Assemblée fédérale sur la Convention de sauvegarde des droits de l'homme et des libertés fondamentales* (n. 7), p. 989; *Message du Conseil fédéral à l'Assemblée fédérale concernant la Convention de sauvegarde des droits de l'homme et des libertés fondamentales* (n. 7), p. 1020.

[51] See *Rapport du Conseil fédéral: 40 ans d'adhésion de la Suisse à la CEDH* (n. 13), p. 368, pp. 370 et seq.

[52] *Rapport du Conseil fédéral: 40 ans d'adhésion de la Suisse à la CEDH* (n. 13), pp. 384 et seq.

[53] *Belilos v. Switzerland* (10328/83) 29 April 1988 ECtHR [Plenary].

[54] *Weber v. Switzerland* (11034/84) 22 May 1990 ECtHR.

[55] Kley and Sigrist (n. 4), pp. 46 et seq. After the *Belilos v. Switzerland* decision (n. 53) a postulate was introduced at the *Conseil des États* (the smaller chamber of the *Assemblée fédéral* representing the cantons) which invited the *Conseil fédéral* to temporarily withdraw from the ECHR. Similar to a moratorium the temporary withdrawal was meant to offer time to regularize the situation after the *Belilos* decision. The postulate was rejected with only one vote difference (preponderant vote of the President of the *Conseil des États*) and was not transmitted to the *Conseil fédéral* (BO 1988 E 554 et seq.; for a summary, see *Rapport du Conseil fédéral: 40 ans d'adhésion de la Suisse à la CEDH* (n. 13) at [7.1] (pp. 397 et seq.); see further Keller and Walther (n. 10), pp. 170 et seq.

[56] Schürmann (n. 17), p. 185.

[57] Protocol No. 14 is the only one to have been submitted to the facultative referendum. However, there was no vote on it since no required signatures for a referendum vote were collected. See *Message du Conseil fédérale concernant la ratification du Protocole n° 14 du 13 mai 2004* (n. 7), pp. 2008 et seq.

[58] See https://www.bj.admin.ch/bj/fr/home/staat/menschenrechte/emrk.html.

Protocol No. 1.[59] That seems to be the opposition of certain cantons to the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions, as foreseen by Article 2 of Protocol No. 1.[60]

13.22 Protocol No. 4 has not been signed due to incompatibilities between its Article 2 (1) on the freedom to choose residence and Swiss legislation limiting the freedom of foreigners to settle in cantons other than the one issuing a residence permit.[61]

13.23 Protocol No. 12 contains a general prohibition against discrimination (Article 1). While recognizing the importance of the protocol and the prohibition of discrimination the *Conseil fédéral* notes that its possible implications for national law are difficult to evaluate. However, it continues to analyse the possibility of implementing the protocol and will at some point consult the cantons.[62]

1. The ECHR as an Impulse for Constitutional Changes

13.24 In 1963, when adhering to the SCoE, the absence of voting rights for women (with the exception of a few cantons/communes in their own matters) in the Swiss Federal Constitution of 1874 (in force at that time) as well as its 'confessional articles' 51 and 52 (forbidding Jesuits, related societies, and the founding of religious congregations and convents or the reinstatement of abolished ones) were not considered problematic with respect to ratifying the SCoE.[63]

13.25 However, these issues seemed to preclude the planned ratification of the ECHR and of Protocol No. 1 to the ECHR.[64] Therefore, at the end of the 1960s, a large process of ensuring the conformity of the Federal Constitution with the ECHR started.[65] As changes to the constitution require a majority of the people and the cantons in a popular vote preparations to ratify the ECHR were accompanied by several popular votes.[66] On 7 February 1971 a majority of the people and the cantons approved the introduction of women's suffrage at the federal level by modifying Article 74 of the 1874 Constitution.[67] While not being the principal reason for introducing women's suffrage[68] the still-planned ratification of Protocol No. 1 to the ECHR (containing in Article 3 the right to free elections) pushed for such a

[59] Indeed, Switzerland has ratified the UN Covenant on Social and Political Rights, whose Article 25 contains a similar provision, and has introduced a reservation on secret ballots.

[60] See *Onzième rapport du Conseil fédéral sur la Suisse et les conventions du Conseil de l'Europe* of 24 August 2016 (FF 2016, p. 6823 (pp. 6831 et seq.)).

[61] See *Onzième rapport du Conseil fédéral sur la Suisse et les conventions du Conseil de l'Europe* (n. 60), pp. 6832 et seq.

[62] See *Onzième rapport du Conseil fédéral sur la Suisse et les conventions du Conseil de l'Europe* (n. 60), p. 6833.

[63] See *Rapport du Conseil fédéral à l'Assemblée fédérale concernant les relations de la Suisse avec le Conseil de l'Europe* (n. 5), p. 1088.

[64] See O. K. Kaufmann, 'Frauen, Italiener, Jesuiten, Juden und Anstaltsversorgte. Vorfragen eines Beitritts der Schweiz zur Europäischen Menschenrechtskonvention' in *St. Galler Festgabe zum Schweizerischen Juristentag 1965* (1965), pp. 245–62; Thurnherr (n. 4), pp. 316 et seq.

[65] Hottelier, Mock, and Puéchavy (n. 46), pp. 18 et seq.

[66] See D. Schindler, 'Die Bedeutung der Europäischen Menschenrechtskonvention für die Schweiz', (1975) I *ZSR*, pp. 357–72 (p. 358).

[67] FF 1970 I, p. 61; RO 1971 I, p. 61.

[68] Women's suffrage was a long-standing issue on the political agenda. See N. Braun Binder and H-U. Wili-Luginbühl, '"Die ersten werden die letzten sein" und 'Die Frau soll in der Versammlung schweigen'. Direkte

change.[69] Furthermore, on 20 May 1973 the 'confessional articles' 51 and 52 of the old constitution were deleted.[70]

13.26 After ratification of the ECHR the updating of the Federal Constitution offered the possibility of including principles of the ECHR in the constitution. The update lasted decades, from 1959 to 1999,[71] and was initiated independently of the ECHR. Its main objective was to update ('*mettre à jour*') the constitution by including the written and—most importantly—unwritten constitutional law. The unwritten elements were found in the *Tribunal fédéral*'s case law and—since the 1980s—also in the ECtHR's case law concerning Switzerland. This is especially reflected in the (almost) exhaustive catalogue of fundamental rights (Articles 7 to 36 Cst), which was a major novelty of the new Swiss Federal Constitution of 18 April 1999[72] and which includes several principles of general administrative law.

13.27 Furthermore, some of the provisions of the ECHR clearly served as models for drafting certain provisions of the new constitution.[73] Regarding the general principles of administrative law in the new constitution, this is particularly apparent in the case of Article 31 Cst. This provision sets forth the preconditions for the deprivation of liberty and the rights of the persons concerned, especially the right of access to a court and the right of any person in pre-trial detention to have their case decided within a reasonable time. Article 5 ECHR influenced the structure, wording, and content of Article 31 Cst.[74]

2. Landmark Decisions of the ECtHR Concerning Switzerland and their Impact on Swiss Legislation

13.28 The second case in which the ECtHR condemned Switzerland[75] was the case *Zimmermann and Steiner* of 1983[76] related to the duration of the procedure before the court, an important

Demokratie und Frauenstimmrecht' in L. P. Feld, P. M. Huber, O. Jung, C. Welzel, and F. Wittreck (eds.), *Jahrbuch für direkte Demokratie 2012* (2013), pp. 9–40 (pp. 26 et seq.).

[69] The cantons, however, continued to determine for themselves the extent of voting rights. The last one to introduce women's suffrage at the cantonal level was Appenzell Innerrhoden. The move was dictated by the TF, which ruled that women's suffrage is an application of the constitutional and fundamental right to equality (which had been recognized as a constitutional right in 1981): ATF 116 Ia 359. See Braun Binder and Wili-Luginbühl (n. 68), pp. 27 et seq.

[70] FF 1972 I, p. 101; RO 1973, p. 1455. Article 50 (4) Cst, also known as the 'diocese article', which provided that no new dioceses could be established in Switzerland without authorization from the *Conseil fédéral*, was considered during the renewal of the constitution. Despite a majority opinion in favour of repeal the *Conseil fédéral* and finally the Parliament did not do so because it would have gone beyond a mere updating of the constitution. It was abolished through a separate vote on 10 June 2001 (cf. FF 2000, p. 3719).

[71] R. Kiener, 'Der Einfluss der EMRK auf die BV 1999' in Jaag and Kaufmann (n. 4), pp. 53–89 (p. 56) suggests, as the starting point of the update effort, a document presented as a 'juristische Utopie' by Max Imboden and his students at the faculty of law at Basel University in February 1959. See also M. Imboden, *Verfassungsrevision als Weg in die Zukunft* (1966). The official updating work started in 1973 with the working group '*Wahlen*' whose report recommended the updating of the constitution.

[72] See *Message du Conseil fédéral relatif à une nouvelle constitution fédérale* of 20 November 1996 (FF 1997 I, p. 1 (pp. 34, 121, 140, and 187)).

[73] *Message du Conseil fédéral relatif à une nouvelle constitution fédérale* (n. 72), pp. 187 et seq. See also *Rapport du Conseil fédéral: 40 ans d'adhésion de la Suisse à la CEDH* (n. 13), pp. 383 et seq.

[74] *Message du Conseil fédéral relatif à une nouvelle constitution fédérale* (n. 72), pp. 187 et seq. See also *Rapport du Conseil fédéral: 40 ans d'adhésion de la Suisse à la CEDH* (n. 13), p. 384.

[75] The first one was *Minelli* case (n. 16).

[76] *Zimmermann and Steiner v. Switzerland* (8737/79) 13 July 1983 ECtHR.

aspect of the guarantee of judicial protection of Article 6 (1) ECHR. The decision prompted concrete measures to alleviate the burden on the *Tribunal fédéral*, namely by increasing the number of substitute judges. The decision of the ECtHR on *Zimmermann and Steiner* on the duration of an expropriation procedure resulted in the *Assemblée fédérale* introducing an ordinance to temporarily increase the number of deputy judges and courts clerks to discharge the *Tribunal fédéral* and thus shorten the excessively long procedures.[77]

13.29 The ECHR and ECtHR's case law also played an important role in the evolution of the control of the constitutionality of federal laws by the *Tribunal fédéral*. The *F. v. Switzerland* case of 1987[78] showed that the ECtHR controlled national laws' compliance with the convention (*control of conventionality*). On its side the *Tribunal fédéral* refused to give the ECHR precedence over federal laws. This was based on a strict interpretation of then-Article 113 (3) of the (old) constitution, which made it impossible for the *Tribunal fédéral* to control the constitutional conformity of federal laws together with the fact that, quite early on, the *Tribunal fédéral* had assimilated conventional rights to constitutional rights.[79] The decision of the ECtHR showed the inadequacy of Swiss constitutional control (absence of it for federal laws) with respect to conventional rights. A few years later the ECtHR even said that, given that the *Tribunal fédéral* does not review the constitutionality of federal laws based on its interpretation of Article 113 (3) of the constitution of 1874, it is not necessary to require the exhaustion of domestic remedies.[80] This decision triggered a new interpretation of Article 113 (3) of the constitution of 1874 and contributed to the consolidation of the primacy of international law over Swiss law.[81]

13.30 Another very important case that influenced administrative and judicial organization and procedure at the cantonal and federal level is the aforementioned ECtHR judgment in *Belilos* of 1988.[82] The applicant was fined by an administrative authority—the municipal Lausanne Police Board—for participating in an unauthorized demonstration. She contested this fact but neither of the two courts in which she subsequently sought review (the Criminal Cassation Division of the Vaud Cantonal Court and the *Tribunal fédéral*) was able to verify the fact. The applicant held that the Police Board was not an 'independent and impartial tribunal' and that neither of the two courts had provided sufficient 'ultimate control by the judiciary' as required by Article 6 (1) ECHR, given that they were unable to reconsider the findings of facts that had been asserted by a purely administrative body, namely the Police Board. The ECtHR found a violation of Article 6 (1) ECHR (cf. also MN. 1.45). This decision prompted the reorganization and development of cantonal administrative jurisdictions. Ultimately, Article 29*a*[83] was introduced in the constitution in the context of the reform of

[77] RO 1984 I, p. 748; FF 1983 IV, p. 488.
[78] *F. v. Switzerland* (11329/85) 18 December 1987 ECtHR [Plenary].
[79] ATF 101 Ia 67.
[80] *Burghartz v. Switzerland* (16213/90) 22 February 1994 ECtHR. Switzerland objected that the applicant had not introduced, before the TF, an appeal challenging the conventionality of civil code articles on marriage regarding Articles 8 and 14 ECHR.
[81] Office fédéral de la justice and Direction du droit international public (n. 20), See also Hottelier, Mock, and Puéchavy (n. 46), pp. 27 et seq.
[82] *Belilos* case (n. 53).
[83] Adopted by the popular vote on 12 March 2000, in force since 1 January 2007, RO 2002, p. 3148.

justice.[84] Article 29*a* Cst provides for a guarantee of access to the courts and goes beyond Article 6 ECHR as it applies to all matters, including administrative law ones.[85] The judge is competent for reviewing the facts as well as the law. Furthermore, the decision provoked important changes at the federal and cantonal levels.[86] Given the fact that the jurisdiction of the *Tribunal fédéral* is limited it was necessary to (newly) introduce first-instance courts to hear public law disputes at the federal level (Article 191*a* (2) Cst) and first-instance judicial authorities to hear public law disputes at the cantonal level (Article 191*b* (1) Cst), which required changes to cantonal administrative judiciary laws.[87] The Federal Court Act of 17 June 2005 (*Loi sur le Tribunal federal—LTF*)—in force since 1 January 2007—generalizes access to a judge at both the federal and cantonal levels.[88]

13.31 In the aforementioned *Weber* case of 1990 the ECtHR considered null and void the reservation of Switzerland to Article 6 (1) ECHR (cf. MN. 13.20) since it did not fulfil one of the requirements of Article 57 (then: 64) ECHR. The Swiss Government did not append 'a brief statement of the law [or laws] concerned' to the reservation. The ECtHR considered this lack as a breach not of 'a purely formal requirement' but of 'a condition of substance'. The material reservation by Switzerland therefore had to be regarded as invalid.[89] Consequently, the applicant was in principle entitled to a public hearing in the determination of the 'criminal charge' against him.

13.32 In the case *Niederöst-Huber* of 1997[90] the unconditional reply right was discussed (Article 6 (1) ECHR). The previous practice of the *Tribunal fédéral* was only to allow for a second exchange of replies if the reply of the other side introduced new elements, with the decision being taken by the court. However, the ECtHR held the opinion that the party had a right to have access to all elements submitted to the court and to be able to express its own position on them. The *Tribunal fédéral* tried to adapt to this new practice. However, there followed several other cases and condemnations by the ECtHR on this issue.[91] Since 2005 the *Tribunal fédéral*'s practice[92] has been in conformity with the ECHR.[93] According to the *Tribunal fédéral* the right to an unconditional reply—in the meanwhile interpreted as

[84] For a summary of the reform of justice, see https://www.bj.admin.ch/dam/data/bj/staat/gesetzgebung/archiv/justizreform/grundzuege-reform-f.pdf. More related documents: https://www.bj.admin.ch/bj/fr/home/staat/gesetzgebung/archiv/justizreform.html.

[85] Article 29*a* reads: 'In a legal dispute, every person has the right to have their case determined by a judicial authority'.

[86] See the various contributions in: S. Besson and E. M. Belser (eds.), *Die Europäische Menschenrechtskonvention und die Kantone* (2014).

[87] See Kiener (n. 71), pp. 77 et seq.

[88] Hottelier, Mock, and Puéchavy (n. 46), pp. 24 et seq.

[89] *Weber* case (n. 54) at [38].

[90] *Niederöst-Huber v. Switzerland* (18990/91) 18 February 1997 ECtHR.

[91] See *F. R. v. Switzerland* (37292/97) 28 June 2001 ECtHR; *Ziegler v. Switzerland* (33499/96) 21 February 2002 ECtHR; *Contardi v. Switzerland* (7020/02) 12 July 2005 ECtHR; *Spang v. Switzerland* (45228/99) 11 October 2005 ECtHR; *Ressegatti v. Switzerland* (17671/02) 13 July 2006 ECtHR; *Kessler v. Switzerland* (10577/04) 26 July 2007 ECtHR; *Werz v. Switzerland* (22015/05) 17 December 2009 ECtHR; *Schaller-Bossert v. Switzerland* (41718/05) 28 October 2010 ECtHR; *Ellès and Others v. Switzerland* (12573/06) 16 December 2010; *Locher and Others v. Switzerland* (7539/06) 30 July 2013 ECtHR. However, no violation was found in: *Joos v. Switzerland* (43245/07) 15 November 2012 ECtHR; *Wyssenbach v. Switzerland* (50478/06) 22 October 2013 ECtHR and *Schmid v. Switzerland* (49396/07) 22 July 2014 ECtHR.

[92] ATF 132 I 42.

[93] See Schürmann (n. 17), pp. 187 et seq.

a constitutional right based on Article 29 (2) Cst[94]—is not limited to cases related to Article 6 (1) ECHR but applies to all judicial procedures.[95] In this case as well (similarly to 29*a* Cst) the *Tribunal fédéral* goes beyond the conventional guarantee.[96]

13.33 Finally, the right to effective access to the court implies access without overly formalistic use of procedural provisions. In *Verein gegen Tierfabriken (VgT) No. 2* (2009)[97] the VgT did not agree with the outcome of the revision procedure (introduced before the *Tribunal fédéral* after a first ECtHR decision[98]). The ECtHR criticized the use of procedural requirements in connection to the revisions procedure related to Article 122 LTF as being too formalistic. At least in cases where the appellant is not represented by a lawyer the procedural steps are not to be used mechanically but '*avec une certaine souplesse*' according to the ECtHR.

3. Impact of the ECHR on the Case Law of the Tribunal Fédéral

13.34 Despite the political discussion on the ratification of the ECHR (cf. MN. 13.04) the *Tribunal fédéral* referred to the ECHR even before ratification and, therefore, applied it in advance. For instance, in 1971 the *Tribunal fédéral* referred to Article 4 (2) ECHR to clarify the content and the conditions for limiting personal freedom,[99] and in 1973 the *Tribunal fédéral* decided on an extradition by considering the requirements of Articles 3 and 6 ECHR.[100]

13.35 After ratification the role of the ECHR in the national case law evolved. Three main periods can be distinguished.[101] During the first phase the *Tribunal fédéral* assimilated conventional rights to constitutional rights from the perspective of procedures. The old federal law on the organization of justice (*Loi fédérale d'organisation judiciare*) of 16 December 1943 (repealed on 31 December 2006), required the exhaustion of cantonal remedies before seizing the *Tribunal fédéral* for violations of constitutional rights. One interpretation of this law would have led to the conclusion that exhaustion of cantonal remedies was not required in cases of alleged violations of ECHR rights. However, in the landmark decision *Diskont—und Handelsbank AG*[102] the *Tribunal fédéral* decided to follow another path of interpretation and applied the exhaustion of cantonal remedies rule to alleged violations of conventional rights. It did so to avoid the increased workload that would have resulted for the *Tribunal fédéral* if cantonal exhaustion was not required. Appellants would have tended to claim violations of conventional rights instead of violations of equivalent constitutional rights to avoid the longer path of exhausting cantonal remedies.[103] Thus, it recognized constitutional

[94] See M. Lanter, 'Formeller Charakter des Replikrechts—Herkunft und Folgen', (2012) *ZBl*, pp. 167–82 (pp. 171 et seq.).
[95] ATF 133 I 100 (104).
[96] Hertig Randall (n. 17), p. 128.
[97] *Verein gegen Tierfabriken (VgT) v. Switzerland (No. 2)* (32772/02) 30 June 2009 ECtHR [GC].
[98] *Verein gegen Tierfabriken (VgT) v. Switzerland* (32772/02) 3 October 2007 ECtHR.
[99] ATF 97 I 45.
[100] ATF 99 Ia 547.
[101] Hottelier, Mock, and Puéchavy (n. 46), pp. 37 et seq.
[102] ATF 101 Ia 67. See also ATF 102 Ia 201, decision of 17 August 1976 in the case *Minelli v. Canton Nidwalden*.
[103] G. Malinverni, 'L'application de la Convention européenne des droits de l'homme en Suisse' in *Quinzième Journée Juridique* (1976), pp. 1–51 (p. 19).

rank for conventional rights with respect to procedures. This was confirmed by subsequent decisions and is now well established.[104] The entry into force on 1 January 2007 of the LTF (cf. MN. 13.30) has maintained the cantonal remedies exhaustion rule. Also, typically during this first phase, the *Tribunal fédéral* said that in general the rights granted by the ECHR did not go beyond those granted by the Federal Constitution. By virtue of the principle of favourability it referred to the constitution (with a few exceptions in criminal matters where ECtHR's case law on Articles 5, 6, or 8 was considered).[105]

13.36 The second phase started after the first condemnations of Switzerland by the ECtHR in the second half of the 1980s.[106] At that time the ECHR became very popular in Switzerland and the number of publications in the specialized literature notably increased. This period is characterized by an increasing awareness in the legal scholarship on the potential impact of the ECHR. To avoid further condemnations the ECHR had to be applied by all internal judicial authorities. The *Tribunal fédéral* changed its case law, e.g., by agreeing to review the (federal) constitutionality of cantonal constitutions approved by the *Assemblée fédérale* before the ratification of the ECHR (which it had so far refused to do). One constitutional provision that excluded any publicity of debates during a criminal law procedure was declared contrary to Article 6 (1) ECHR.[107] This approach was confirmed in later cases, namely by the one that obliged the last remaining canton to recognize voting rights for women.[108] During this period the *Tribunal fédéral* increasingly referred to the ECHR and the ECtHR's case law, which were seen as complementary to the constitution.

13.37 Since the end of the 1980s a third period has started which continues until today: the systematic enforcement of the ECHR. This is linked to the dramatic progress seen in the area of procedural guarantees stemming from Article 6 ECHR. One element of importance is the entry into force of the revision procedure (cf. Article 122 LTF) for *Tribunal fédéral* decisions found to breach the ECHR by the ECtHR.[109]

13.38 Another element of this systematic enforcement is the aforementioned role of the ECHR and ECtHR's case law in the evolution of the control of the constitutionality of federal laws by the *Tribunal fédéral*, (cf. MN. 13.29) even if it still remains impossible for the *Tribunal fédéral* to check the constitutionality of federal laws. In fact, Article 190 Cst provides that the *Tribunal fédéral* and other judicial authorities apply federal acts and international law. Federal acts are binding but so is international law. Possible conflicts between these two remain to be decided by the judge. In the 1990s the *Tribunal fédéral*'s case law established that, first, the *Tribunal fédéral* can check the conformity (*conventionality*) of federal laws with the ECHR and, second, the *Tribunal fédéral* can *refuse to apply federal laws* if they conflict with

[104] See ATF 116 Ia 433; 117 Ia 522; 131 I 366.
[105] e.g., ATF 102 Ia 279 (284).
[106] The judgments in *Minelli* case (n. 16), *Zimmermann and Steiner* case (n. 76), *F.* case (n. 78) and *Belilos* case (n. 53) were followed by the judgments in *Müller and Others v. Switzerland* (10737/84) 24 May 1988 ECtHR; *Groppera Radio AG and Others v. Switzerland* (10890/84) 28 March 1990 ECtHR [Plenary]; *Weber* case (n. 54); *Autronic AG v. Switzerland* (12726/87) 22 May 1990 ECtHR [Plenary]; *Quaranta v. Switzerland* (12744/87) 24 May 1991 ECtHR.
[107] ATF 111 Ia 239.
[108] ATF 116 Ia 359.
[109] This procedure entered into force on 15 February 1992, RO 1992, p. 288.

the ECHR.[110] In cases of conflicts that cannot be resolved through interpretation the ECHR has precedence over federal laws.

13.39 This new vision reflects the hierarchical supremacy of international law, in particular of norms that protect human rights.[111] In the PKK decision (cf. MN. 13.10) the *Tribunal fédéral* decided not to apply a federal law considered to be contrary to the ECHR, thus initiating *partial control of the constitutionality* of federal laws.[112] The decision increased judicial protection in cases related to inner and external security. Before the PKK case law it was thought that for political issues no access to a judge was available. This decision was later codified in Article 83 (a) LTF.[113]

13.40 Furthermore, the *Tribunal fédéral* has introduced a revision procedure to follow up on a condemnation by the ECtHR. According to Article 122 LTF[114] revision is possible if there is no other way to ensure complete reparation (cf. Article 41 ECHR).[115] On the occasion of such a revision the *Tribunal fédéral* has said that it can no longer apply a federal law that infringes a right guaranteed by the ECHR.[116] Following this reasoning, and to avoid further condemnations by the ECtHR, the *Tribunal fédéral* reviews the conventionality of federal laws and has declared some of them to be (in part) inconsistent with the ECHR.[117] This can be seen as a form of indirect control of constitutionality.

IV. Reception of the Pan-European General Principles of Good Administration through Ratifying Other CoE Conventions

13.41 Besides the ECHR and Protocols No. 6, 7, 11, 13, and 14 thereto (cf. MN. 13.21 et seq.). Switzerland has to date ratified about half of the more than 220 CoE conventions (cf. MN. 1.06). It has ratified the European Code of Social Security,[118] the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (cf. MN. 13.44 et seq.), the European Charter of Local Self-Government (cf. MN. 13.42 et seq.) and the Convention on Mutual Administrative Assistance in Tax Matters.[119] Switzerland has signed (but not ratified) several treaties, including the European Social Charter.[120] It has not signed, e.g., the European Convention on Social Security, the Convention on the Participation of Foreigners in Public Life at Local Level, or the Convention on Access to Official Documents (cf. MN. 13.48 et seq.). Furthermore, it has entered into a few partial agreements, among them notably those regarding the Group of States against Corruption

[110] ATF 129 III 656 (662); 130 I 312; 129 II 193; 128 III 113; 125 II 417; 124 II 480.
[111] ATF 136 II 241; 131 V 66; 129 III 656; 128 III 113; 125 II 417; 122 II 485. See also cf. MN. 13.13.
[112] ATF 125 II 417 (424 et seq.).
[113] See *Message du Conseil federal concernant la révision totale de l'organisation judiciaire fédérale* of 28 February 2001 (FF 2001, p. 4000 (p. 4184)); furthermore Keller and Walther (n. 10), pp. 164 et seq.
[114] This procedure entered into force on 15 February 1992, RO 1992, p. 288.
[115] See ATF 123 I 283 (286 et seq.).
[116] *A. P., M. P., T. P. v. Switzerland* (19958/92) 29 August 1997 ECtHR; ATF 124 II 480.
[117] Hottelier, Mock, and Puéchavy (n. 46), pp. 30 et seq.
[118] This convention entered into force in Switzerland on 17 September 1978, RS 0.831.104.
[119] This convention entered into force in Switzerland on 1 January 2017, RS 0.652.1.
[120] See *Onzième rapport du Conseil fédéral sur la Suisse et les conventions du Conseil de l'Europe* (n. 60), pp. 6830 et seq.

(GRECO) (cf. MN. 13.54 et seq.) and the European Commission for Democracy through Law (the 'Venice Commission').

1. European Charter of Local Self-Government

13.42 Switzerland only joined the Charter of Local Self-Government (cf. MN. 1.58) twenty years after its adoption by the CoE. The reason can be found in the general Swiss restraint with regard to the European unification process, the country's federalist state structure, and the defensive attitude of the Swiss cantons.[121] Although the Charter and the Swiss cantons follow the same purpose—protecting communal autonomy—the cantons perceived the minimum standards contained in the Charter as interference with their own independence. However, in its eighth report on Switzerland and CoE conventions the *Conseil fédéral* wrote that the European Charter of Local Self-Government was part of the conventions of prime importance to be ratified during that legislature term.[122] The Charter entered into force in Switzerland on 1 June 2005[123] without having been submitted to a facultative referendum.[124] The Additional Protocol to the Charter on the right to participate in the affairs of a local authority has also been ratified following a parliamentary motion asking for it. It entered into force in Switzerland on 1 November 2017.[125] The majority of cantons and the umbrella organization of communes and cities approved the ratification.[126] Swiss cantons are members of the Congress of Local and Regional Authorities (CLRAE), where they are represented by a delegation of six members at each of the two chambers (the chamber of local authorities and the chamber of regions).[127]

13.43 The Charter is a binding international treaty. All organs at all levels of the government must respect it (Article 5 (4) Cst). Furthermore, the Charter takes precedence over cantonal law (Article 49 Cst). Therefore, the standards on communal autonomy contained in the Charter apply in all Swiss cantons. The main question that remains open is whether the provisions of the Charter are self-executing and therefore internal law enforcement bodies have to apply them. This question has to be answered for each provision separately by assessing whether it is sufficiently precise. Basically, justiciability can be affirmed for the provisions on the scope of local self-government (Articles 4 (2) and 6 (1) of the Charter), consultation rights (Articles 4 (6), 5, and 9 (6) of the Charter), guarantees of administrative supervision (Article 8 (1) and (3) of the Charter), financial guarantees in their defensive dimension (Article 9 of the Charter), the right to associate (Article 10 of the Charter) and legal protection (Article 11 of the Charter).[128]

[121] See K. Meyer, *Gemeindeautonomie im Wandel* (2011), pp. 101 et seq.
[122] *Huitième rapport du Conseil federal sur la Suisse et les conventions du Conseil de l"Europe* of 26 May 2004 (FF 2004, p. 3597 [pp. 3618 et seq.]).
[123] RS 0.102.
[124] Some authors argue that a facultative referendum should have been possible. See Meyer (n. 121), pp. 112 et seq.
[125] The Additional Protocol to the European Charter of Local Self-Government entered into force in Switzerland on 1 November 2017, RS 0.102.1.
[126] See *Onzième rapport du Conseil fédéral sur la Suisse et les conventions du Conseil de l'Europe* (n. 60), p. 6841.
[127] See the dedicated page http://www.congressdatabase.coe.int/WebForms/Public/Country.aspx?id=11.
[128] Meyer (n. 121), pp. 116 et seq.

2. Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data

13.44 The CoE's Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data (cf. MN. 1.60 et seq.) has applied since 1 February 1998 in Switzerland,[129] which has also accepted the amendments of 15 June 1999. The Additional Protocol to the Convention No. 108 regarding supervisory authorities and cross-border data flows entered into force on 1 April 2008 in Switzerland.[130] The Federal Data Protection Commissioner is the competent authority for rendering assistance in the implementation of the convention.

13.45 Switzerland has declared that the Convention No. 108 also applies to personal data concerning legal persons and personal data files that are not processed automatically, while it does not apply to files of federal and cantonal parliaments set up and used during their deliberations or to files of the International Committee of the Red Cross, as well as files established by individuals for their exclusive use.[131]

13.46 The Federal Act on Data Protection of 19 June 1992 (*Loi fédérale sur la protection des données—LPD*) pre-dates the ratification of the convention. The message that accompanied the law mentions the Convention No. 108 as being the most extensive international law document in the field of protecting automatically processed data.[132] It underlines the harmonization role of the convention in national legislations on this topic, which facilitates international transfers of data, and its contribution to regulating international cooperation and mutual aid in the field. The law took into account and referred to provisions of the Convention No. 108. Examples include the definition of sensitive data, the communication of data abroad and the competences of the Information Commissioner (*Préposé à la protection des données*).[133]

13.47 In 2003, when proposing a review of the LPD, the *Conseil fédéral* noted that Swiss law is in conformity with the Convention No. 108, and that the draft modified law takes on board a number of provisions laid down in the recommendations of the Committee of Ministers of the CoE (CM) in the field of data protection.[134] In 2015 the *Conseil fédéral* issued a mandate to the Department of Justice on the preparation of a complete revision of the LPD. It emphasized that the new law should take into account recent developments at the EU and CoE levels.[135] The *Conseil fédéral* also referred to the updating of the Convention No. 108 and

[129] This Convention entered into force in Switzerland on 1 February 1998, RS 0.235.1.

[130] RS 0.235.11.

[131] *Message du Conseil federal concernant l'adhésion à la Convention du Conseil de l'Europe pour la protection des personnes à l'égard du traitement automatisé des données à caractère personnel* of 13 November 1996, FF 1997, p. 701 (pp. 707 et seq.).

[132] *Message du Conseil fédéral, concernant la loi fédérale sur la protection des données* of 23 March 1988, (FF 1988 II, p. 421 (pp. 431 et seq.)).

[133] FF 1988 II, p. 421 (pp. 453 et seq., 458 et seq., 487 et seq.).

[134] FF 2003, p. 1915 (pp. 1926 et seq.). The recommendations include Recommendation R(95)4 on the protection of personal data in the area of telecommunication services, with particular reference to telephone services; Recommendation R(97)5 on the protection of medical data; Recommendation R(97)18 concerning the protection of personal data collected and processed for statistical purposes; Recommendation R(90)19 concerning the protection of personal data used for payment and other related operations; Recommendation Rec(2002)9 on the protection of personal data collected and processed for insurance purposes.

[135] See press release of the *Conseil fédéral* of 1 April 2015 https://www.bj.admin.ch/bj/fr/home/aktuell/news/2015/ref_2015-04-010.html. See also J-P. Walter, 'La révision de la Convention du Conseil de l'Europe pour la protection des personnes à l'égard du traitement automatisé des données à caractère personnel (Convention 108) et les

said that the updated convention should be ratified, otherwise adverse consequences on the international data traffic could be expected. In the draft project that the *Conseil fédéral* finally adopted on 15 September 2017[136] several adaptations were proposed to harmonize Swiss law on data protection with the provisions of the Convention No. 108. These included the proposal that data protection for legal persons should be abandoned[137] and the (repeated) recommendation that the updated Convention No. 108[138] should be ratified.[139] The draft revision of the LPD contains proposals for adaptations of national legislation that are necessary to ratify the revised convention.[140] At the time of writing the draft project on the revision of the LPD has not yet been adopted by the *Assemblée fédérale*. It is planning to adopt it in winter 2019.[141] In October 2019 the *Conseil fédéral* signed the Protocol of Amendment to the Convention No. 108 and communicated that it will submit the corresponding message on the approval of the Protocol to the *Assemblée fédérale* before the end of the year.[142]

3. Convention on Access to Official Documents

13.48 Switzerland has not signed the Convention on Access to Official Documents (cf. MN. 1.59) of 18 June 2009. In its tenth report on CoE conventions the *Conseil fédéral* considered it to be priority C,[143] meaning that the convention holds interest yet its ratification in the near future would cause problems at the legal, political, or practical level. The reasons are the following: the Federal Freedom of Information Act of 17 December 2004 (*Loi fédérale sur le principe de la transparence dans l'administration—LTrans*)—in force since 1 July 2006—provides for a similar regulation. However, there are a few significant differences between the two: whereas the convention applies to the administration and the government the federal act only applies to the federal administration.

13.49 Furthermore, the LTrans is only applicable to documents produced or received after its entry into force. For these reasons the *Conseil fédéral* did not envisage signing in 2013. In its eleventh report on CoE conventions[144] the Convention on Access to Official Documents is

repercussions pour la Suisse' in A. Epiney and D. Nüesch (eds.), *La revision de la protection des données en Europe et la Suisse* (2016), pp. 77–98.

[136] *Message du Conseil fédéral concernant la loi fédérale sur la révision totale de la loi fédérale sur la protection des données et sur la modification d'autres lois fédérales* of 15 September 2017 (FF 2017, p. 6565).

[137] *Message du Conseil fédéral concernant la loi fédérale sur la révision totale de la loi fédérale sur la protection des données* (n. 136), p. 6595.

[138] At the time of adopting the message the updated Convention had not yet been adopted by the CM. The *Conseil fédéral* based its proposals on the draft—'Texte consolidé des propositions de modernisation de la Convention 108 finalisées par le CAHDATA (réunion des 15–16 juin 2016)'.

[139] *Message du Conseil fédéral concernant la loi fédérale sur la révision totale de la loi fédérale sur la protection des données* (n. 136), p. 6970.

[140] *Message du Conseil fédéral concernant la loi fédérale sur la révision totale de la loi fédérale sur la protection des données* (n. 136), p. 6996.

[141] See L. Mäder, 'Weil ein Konflikt mit der EU droht—der Ständerat gibt beim Datenschutz Gas', *Neue Züricher Zeitung* of 24 October 2019 (https://www.nzz.ch/schweiz/datenschutz-staenderat-beschleunigt-um-konflikt-mit-eu-zu-meiden-ld.1516350).

[142] See press release of the *Conseil fédéral* of 30 October 2019 (https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-76861.html).

[143] FF 2013, p. 1915 (p. 1939).

[144] *Onzième rapport du Conseil fédéral sur la Suisse et les conventions du Conseil de l'Europe* (n. 60).

not included in the group of conventions of interest to be signed and therefore it is not commented on at all. However, in its message accompanying the LTrans the *Conseil fédéral*[145] refers to and takes into account the Recommendation Rec(2002)2 on access to official documents (cf. MN. 1.65).

V. Reception of the Pan-European General Principles of Good Administration through the Swiss Legislator

13.50 Aside from the aspects discussed above—e.g., the influence of the ECHR on the revision of the Constitution (cf. MN. 13.24 et seq.) or the influence of the ECtHR's case law on federal and cantonal judicial administrative provisions (cf. MN. 13.30)—Swiss administrative law does not contain too many gaps. The Swiss administrative provisions had already been adopted or were just being developed when the CM started its work on administrative law issues in the 1970s (cf. MN. 1.63 et seq.). Many aspects of the pan-European general principles of good administration were already part of the national written law. Therefore, the recommendations of the CoE on good administration have not played a major role in Swiss national legislation (cf. MN. 31.19 et seq.).

13.51 Furthermore, today, a well-established practice ensures the compatibility of new legal provisions with the pan-European general principles of good administration. Pertinent treaties and conventions are regularly scrutinized by the authorities when elaborating and proposing new pieces of legislation. Recommendations and other soft-law instruments are also taken into consideration, especially in technical and fast-evolving areas.[146] This practice can be observed, e.g., in case of preparing the most recent revision of the LPD (cf. MN. 13.47).

VI. Direct Application of the Pan-European General Principles of Good Administration '*faute de mieux*'

13.52 Soft law is an interesting support when interpreting the principles, namely those stemming from ratified conventions. The *Tribunal fédéral* regularly refers to CoE (and other international) recommendations as well as their commentaries when interpreting the provisions of international treaties, namely the ECHR. In a recent case it looked at the CM Recommendation Rec(2006)2 on the European Prison Rules and its commentary to assess the requirements for body-searches.[147] Although the court is aware of the non-binding nature of this recommendation it nevertheless takes into account that it is rather mandatory on the authorities ('*relativement contraignante pour les autorités*').[148]

[145] See *Message du Conseil fédéral relatif à la loi fédérale sur la transparence de l'administration (Loi sur la transparence, LTrans)* of 12 February 2003 (FF 2003, p. 1807 [pp. 1880 et seq.]).
[146] A. Flückiger, 'Soft Law im Öffentlichen Recht' in A. Ladner, J.-L. Chappelet, Y. Emery, P. Knoepfel, L. Mader, N. Soguel, and F. Varone (eds.), *Handbuch der öffentlichen Verwaltung in der Schweiz* (2013), pp. 301–16 (pp. 310 et seq.).
[147] ATF 141 I 141 (pp. 145 et seq.).
[148] ATF 141 I 141 (146). See also ATF 140 I 125 (135).

13.53 With this approach the *Tribunal fédéral* is following a long tradition of taking into account the CM recommendations on the treatment of prisoners.[149] In a ruling on the abstract review of legal provisions of a cantonal law on the removal and transplantation of human organs and tissue the *Tribunal fédéral* referred to the CM Recommendation R(79)5 concerning international exchange and transportation of human substances. Moreover, in a ruling on access to dossiers of the Swiss Federal Police ('Fichenaffäre') it based its interpretation of Article 13 ECHR—among others—on the CM Recommendation R(87)15 regulating the use of personal data in the police sector and PACE Recommendation 1181 (1992) Police co-operation and protection of personal data in the public sector.[150]

13.54 This shows that the soft law of the CoE is well-known in the Swiss legal system although its effectiveness is quite disparate. While some are considered *de facto* binding[151] others, like the GRECO recommendations to Switzerland on the transparent financing of political parties, seem more difficult to implement. One of the main difficulties lies in the functioning of the direct democracy system, which is quite specific to Switzerland.

13.55 Interestingly, direct democracy may bring a satisfactory solution given the reticence of the *Conseil fédéral* and the *Assemblée fédérale*. As noted in GRECO's fourth interim compliance report on Switzerland of June 2017 a federal popular initiative 'for greater transparency in the funding of politics (initiative on transparency)' was launched. According to the report the initiative is broadly in keeping with its recommendations on the funding of politics, and GRECO greatly hopes that the initiative will be supported by the competent authorities.[152] The initiative has collected the necessary 100,000 signatures and its submission was declared successful by the federal chancellery on 31 October 2017.[153] At the time of writing the initiative has not yet been submitted to a popular vote. In Autumn 2019, the State Policy Commission of the *Conseil des États* (one of the two Chambers of the *Assemblée fédérale*) decided to submit an indirect counter-proposal to the Transparency Initiative.[154] Should the counter-proposal be adopted and enter into force, the committee of the initiative might be willing to withdraw the Transparency Initiative.

VII. Conclusion

13.56 General principles of administrative law have evolved in a specific way in Switzerland. They have been established at the federal level by the *Tribunal fédéral*'s case law through public law appeals in an effort to ensure harmonization between different cantonal laws and practices. Their development was strongly influenced by ECtHR's case law in the 1980s and

[149] See, e.g., ATF 118 Ia 64 (70), taking into account the Recommendation R(87)3 on the European Prison Rules (the predecessor-recommendation of the Rec(2006)2).

[150] ATF 118 Ib 277 (pp. 284 et seq.).

[151] See, for instance, those on money laundering and other financial issues issued by the Financial Action Task Force (FATF), http://www.fatf-gafi.org/publications/fatfrecommendations/ and the respective report and legal modification FF 2011, p. 6341 and p. 6368.

[152] GRECO, *Third Evaluation Round—Fourth Interim Compliance Reporton Switzerland 'Transparency of Party Funding'* (GrecoRC3(2017)10) of 24 August 2017 at [12] to [18].

[153] FF 2017, p. 6519.

[154] See press release of 25 October 2019 (https://www.parlament.ch/press-releases/Pages/mm-spk-s-2019-10-25.aspx?lang=1036).

1990s. Eventually, they were codified in the 1999 Federal Constitution and the federal and cantonal legislations.

13.57 ECHR principles and the ECtHR's case law have been adopted in an exemplary way by Swiss authorities,[155] both administrative and judicial ones. Attention to conformity with CoE instruments starts as early as when drafting new legislation thanks to so-called 'preventive legal control'. It is also embedded in the everyday work of all authorities which are required to interpret national legislation, to the greatest extent possible, in conformity with international treaties in order to prevent conflict. Furthermore, it is reflected in a number of governmental instruments (e.g., reports on CoE conventions, the legislature programme, and information in the context of direct democracy procedures) which aim at ensuring conformity with international, including CoE, instruments. Finally, it is also reflected in the extensive research in this field.

13.58 Swiss case law on the ECHR is rich thanks to its capacity to incorporate not only the convention but also the case law of the ECtHR. This has evolved gradually, from the initial view that ECHR rights did not go beyond those granted by the federal constitution, to a period of increasing awareness after the first condemnations of Switzerland by Strasbourg and finally to the current practice of systematic enforcement of the ECHR. A revision procedure for *Tribunal fédéral* decisions found to breach the ECHR by the ECtHR was introduced as early as in 1992.

13.59 It should be noted that changes in legislation and practice following ECtHR case law, for instance the reorganization and development of cantonal administrative jurisdictions, were not introduced simply because 'Strasbourg' said so but rather out of a conviction that reasonable solutions had been found.[156] This has allowed for an *original application* of ECHR likely to go well beyond its 'minimum standards'.[157] This is shown for instance by Article 29*a* Cst (cf. MN. 13.30) which guarantees access to court in all matters, including administrative law ones.

13.60 The Swiss exemplary integration of CoE instruments does not exclude heated debates, however, which take place on occasions of condemnations by the ECtHR or of popular initiatives that risk fuelling future condemnations.

List of Swiss Abbreviations Used in this Chapter

ATF	*Arrêts du Tribunal Fédéral* (Official Collection of Judgments of the Federal Tribunal)
Cst	*Constitution fédérale de la Confédération Suisse* (Swiss Federal Constitution of 18 April 1999)
FF	*Feuille Fédérale de la Confédération Suisse* (Federal Gazette)
JAAC	*Jurisprudence des autorités administratives de la Confédératon* (Federal Bulletin)

[155] *Rapport du Conseil fédéral: 40 ans d'adhésion de la Suisse à la CEDH* (n. 13), p. 381: 'Le processus de réception est décrit dans de nombreuses publications. On parle, dans ce contexte, souvent de la réussite de Strasbourg («Erfolgsgeschichte von Strassburg»), que ce soit sur un plan général ou plus spécifique, à propos de la mise en oeuvre de la CEDH en Suisse.'

[156] Schürmann (n. 17), p. 184.

[157] Hottelier, Mock, and Puéchavy (n. 46), p. 16.

LParl	*Loi sur le Parlement* (Federal Act on the Federal Assembly of 13 December 2002)
LPD	*Loi fédérale sur la protection des données* (Federal Act on Data Protection of 19 June 1992)
LTF	*Loi sur le Tribunal fédéral* (Federal Court Act of 17 June 2005)
LTrans	*Loi fédérale sur le principe de la transparence dans l'administration* (Federal Freedom of Information Act of 17 December 2004)
PJA	*Pratique juridique actuelle* (Swiss law journal)
RO	*Recueil Officiel* (Official Compilation of Federal Legislation)
RS	*Recueil Systématique* (Classified Compilation of Federal Law)
TF	*Tribunal fédéral* (Federal Court)
ZBL	*Schweizerisches Zentralblatt für Staats—und Verwaltungsrecht* (Swiss law journal)
ZSR	*Zeitschrift für Schweizerisches Recht* (Swiss law journal)