

Patricia Egli

Prof. Dr. iur., LL.M. (Yale), Assistant Professor for Public Law,
European Law and Public International Law,
University of St. Gallen

Introduction to Swiss Constitutional Law

Table of Contents

- Foreword..... V
- Summary of Contents VII
- Abbreviations XV
- Table of Figures..... XVII
- Selected BibliographyXIX
- Chapter A: Introduction 1**
 - 1. TERMS AND DEFINITIONS2
 - 1.1 Constitution in the Formal Sense.....2
 - 1.2 Constitution in the Substantive Sense3
 - 1.3 Constitution in the Formal and the Substantive Sense Compared.....3
 - 1.4 Flexibility of Constitutions.....4
 - 2. FUNCTIONS OF A CONSTITUTION5
 - 2.1 Constitutional Conceptions.....5
 - 2.2 Main Functions6
- Chapter B: Historical Development.....7**
 - 1. HISTORICAL DEVELOPMENT BEFORE 17987
 - 2. HELVETIC REPUBLIC (1798-1803)8
 - 3. MEDIATION (1803-1813)8
 - 4. RESTORATION (1814-1830)8
 - 5. REGENERATION (1830-1848).....9
 - 6. FEDERAL CONSTITUTION OF 18489
 - 7. FEDERAL CONSTITUTION OF 187410
 - 8. DEVELOPMENTS UNTIL 199911
- Chapter C: Sources of Constitutional Law13**
 - 1. FEDERAL CONSTITUTION OF 199913
 - 1.1 Constitution as *Nachführung*13
 - 1.2 Overview14
 - 2. OTHER SOURCES15
 - 2.1 Public International Law15
 - 2.2 Federal Statutes.....16
 - 2.3 Customary Law.....17
 - 2.4 Case Law17
- Chapter D: Constitutional Interpretation.....19**
 - 1. GRAMMATICAL APPROACH20
 - 2. SYSTEMATIC APPROACH.....20
 - 3. HISTORICAL APPROACH.....20
 - 4. TELEOLOGICAL APPROACH21
 - 5. PLURALISM OF METHODS21
 - 6. INTERPRETATION IN CONFORMITY WITH THE CONSTITUTION21
 - 7. INTERPRETATION IN CONFORMITY WITH INTERNATIONAL LAW22
- Chapter E: Constitutional Principles23**
 - 1. PRINCIPLE OF THE *RECHTSSTAAT*.....24
 - 1.1 Concept: Overview24
 - 1.2 *Rechtsstaat* in a Formal Sense26
 - 1.3 *Rechtsstaat* in a Substantive Sense.....27

1.4	<i>Rechtsstaat</i> and Rule of Law Compared	27
1.5	The Principle of Legality	28
	a) Overview: Form of Legal Norms	29
	b) Federal Statutes	29
	c) Federal Decrees	31
	d) Ordinances	31
1.6	Hierarchy of Norms	33
2.	FEDERALISM	35
2.1	Concept: Overview	35
	a) Federalism	35
	i. Term	35
	ii. Functions	36
	b) Subsidiarity	36
	c) Federal State	37
	d) Unitary State	38
	e) Confederation	38
2.2	Three Levels of Government	39
	a) Federation	39
	b) Cantons	40
	i. Cantonal Autonomy	40
	(a) Tasks	40
	(b) Organization	40
	(c) Finances	41
	ii. Participation at Federal Level	41
	(a) Referendum	41
	(b) Initiative	41
	iii. Information and Consultation	42
	iv. Equality	42
	c) Communes	42
2.3	Federal Guarantees	43
	a) Cantonal Constitutions	43
	b) Protection of the Constitutional Order in the Cantons	45
	c) Existence and Territory of the Cantons	45
2.4	Distribution of Competencies	46
	a) General Methods	47
	b) Federal Constitution	47
	c) Extent of the Competency	48
	d) Effect of the Competency	49
	e) Implementation of Federal Law	50
	f) Cooperation	51
	g) Intercantonal Treaties	51
	h) Intercantonal Conferences	53
2.5	Competencies of the Federation: Overview	53
2.6	Primacy of Federal Law	58
2.7	Federal Supervision and Federal Coercion	58
2.8	Limits and Challenges of Swiss Federalism	59
3.	DEMOCRACY	60
3.1	Concept: Overview	60
3.2	Basic Forms of Democracy	61
3.3	Democracy in the Swiss System	63
	a) Characteristics	63
	b) Constitutional Provisions	64
	c) Political Rights	65
	d) Right to Vote	66
	e) Right to Participate in Elections on Federal Level	67
	f) Initiative on Federal Level	67

i. Forms: Overview	67
ii. Popular Initiative Requesting the Complete Revision of the Constitution ...	68
iii. Popular Initiative Requesting a Partial Revision of the Constitution	68
iv. Functions	71
v. Initiative and Public International Law	72
g) Referendum at the Federal Level	73
i. Forms: Overview	73
ii. Mandatory Referendum	74
iii. Optional Referendum	74
iv. Functions	75
h) Political Rights on the Cantonal Level	75
3.4 Swiss Citizenship	76
a) General Concept	76
b) Obtaining Swiss Citizenship	76
i. Overview	76
ii. Acquisition of Citizenship by Law	77
iii. Acquisition of Citizenship by Naturalization	77
c) Loss of Swiss Citizenship	78
4. SOCIAL JUSTICE	79
4.1 Concept: Overview	79
4.2 Constitutional Concept	80
4.3 Social Objectives	80
4.4 Competencies in Social Matters	81
4.5 Social Rights	82
5. OTHER CONSTITUTIONAL PRINCIPLES	82

Chapter F: Parliament, Government and the Judiciary85

1. SWISS SYSTEM: OVERVIEW	85
1.1 Organizational Division of Powers.....	86
1.2 Personnel Division of Powers.....	86
1.3 Functional Division of Powers	87
1.4 Importance of Democracy	87
1.5 Overview of the Federal Authorities	87
2. FEDERAL ASSEMBLY AS HIGHEST AUTHORITY	88
2.1 Bicameral Parliament	88
2.2 Composition.....	89
a) National Council	89
b) Council of States	89
2.3 Elections	90
2.4 Organization, Procedures and Powers	91
a) Sessions	91
b) Organization.....	91
c) Powers	92
3. FEDERAL COUNCIL	94
3.1 Composition.....	94
3.2 Election.....	95
3.3 Organization	96
3.4 Federal Administration	96
3.5 Powers	97
4. FEDERAL SUPREME COURT AND OTHER JUDICIAL AUTHORITIES.....	98
4.1 Federal Supreme Court.....	99
a) Composition	100
b) Election	100
c) Organization.....	100
d) Duties	101
4.2 Other Federal Judicial Authorities.....	102

a) Federal Criminal Court	103
b) Federal Administrative Court	103
c) Federal Patent Court.....	104
Chapter G: Fundamental Rights	107
1. GENERAL CONCEPT: OVERVIEW	107
1.1 Definition.....	107
1.2 Categorization.....	108
a) Civil Liberties.....	108
b) Equality Before the Law	109
c) Social Rights	109
d) Procedural Rights.....	109
e) Political Rights	109
1.3 Legal Sources	110
a) National Level.....	110
b) International Level.....	110
1.4 Dimensions	112
1.5 Beneficiaries	113
1.6 Addressees.....	113
1.7 Restrictions	114
a) Legal Basis	115
b) Public Interest or Protection of Others.....	116
c) Proportionality.....	117
d) Essence of Fundamental Rights.....	117
e) Method for Solving Cases.....	117
2. HUMAN DIGNITY.....	119
2.1 Legal Basis	119
2.2 Scope of Application	119
2.3 Beneficiaries	120
2.4 Essence	120
3. CIVIL LIBERTIES AND FREEDOMS	120
3.1 Right to Life and Personal Liberty	121
a) Legal Basis	121
b) Scope of Application.....	121
i. Right to Life	121
ii. Right to Personal Liberty	123
c) Beneficiaries.....	125
d) Essence.....	125
3.2 Right to Privacy	126
a) Legal Basis	126
b) Scope of Application.....	126
c) Beneficiaries.....	128
d) Essence.....	128
3.3 Right to Marriage and Family	128
a) Legal Basis	128
b) Scope of Application.....	129
c) Beneficiaries.....	129
d) Essence.....	129
3.4 Freedom of Religion and Conscience.....	130
a) Legal Basis	130
b) Scope of Application.....	130
c) Beneficiaries.....	131
d) Essence.....	132
3.5 Freedom of Expression, of Information and of the Media	132
a) Legal Basis	132
b) Scope of Application.....	133

c) Beneficiaries.....	135
d) Essence.....	136
3.6 Freedom of Assembly, Association and to Form Professional Associations.....	136
a) Legal Basis.....	136
b) Scope of Application.....	137
c) Beneficiaries.....	138
d) Essence.....	138
3.7 Freedom of Domicile.....	139
a) Legal Basis.....	139
b) Scope of Application.....	139
c) Beneficiaries.....	139
d) Essence.....	140
3.8 Protection Against Expulsion, Extradition and Deportation.....	140
a) Legal Basis.....	140
b) Scope of Application.....	140
c) Beneficiaries.....	142
d) Essence.....	142
3.9 Right to Property.....	142
a) Legal Basis.....	142
b) Scope of Application.....	142
c) Beneficiaries.....	144
d) Essence.....	144
3.10 Economic Freedom.....	144
a) Legal Basis.....	144
b) Scope of Application.....	145
c) Beneficiaries.....	147
d) Essence.....	147
4. EQUALITY BEFORE THE LAW AND OTHER PRINCIPLES.....	148
4.1 Equality Before the Law.....	148
a) Legal Basis.....	149
b) Scope of Application.....	149
c) Beneficiaries.....	152
4.2 Protection Against Arbitrariness and Observance of Good Faith.....	152
a) Legal Basis.....	152
b) Scope of Application.....	152
c) Beneficiaries.....	153
5. BASIC SOCIAL RIGHTS.....	154
5.1 Right to Assistance when in Need.....	154
5.2 Right to Primary School Education.....	155
6. BASIC PROCEDURAL RIGHTS.....	155
6.1 Procedural Safeguards in General.....	156
6.2 Guarantee of Access to the Court.....	158
6.3 Special Guarantees for Judicial Proceedings.....	158
6.4 No Deprivation of Liberty Without Due Process.....	159
6.5 Criminal Proceedings.....	159
Chapter H: Protection of Fundamental Rights.....	161
1. CONSTITUTIONAL JURISDICTION.....	161
2. REMEDIES UNDER THE CURRENT SYSTEM IN SWITZERLAND.....	162
2.1 Overview.....	162
2.2 Admissibility Criteria.....	163
a) Appeal in Public Law Matters.....	163
b) (Subsidiary) Constitutional Appeal.....	164
3. DECISIVENESS OF FEDERAL STATUTES.....	167
4. INTERNATIONAL PROTECTION OF FUNDAMENTAL RIGHTS.....	168
4.1 Proceedings Before the European Court of Human Rights.....	168

4.2 Individual Applications	169
4.3 Admissibility Criteria	170
4.4 Judgments	172
Index	175

Table of Figures

Figure 1: Hierarchy of legislation.....	3
Figure 2: Constitution in the formal and substantive sense.....	4
Figure 3: Constitutional principles	23
Figure 4: Principle of the <i>Rechtsstaat</i>	25
Figure 5: Hierarchy of federal norms	33
Figure 6: Hierarchy of norms in the federal state.....	33
Figure 7: Requirements for the federal guarantee of cantonal constitutions.....	44
Figure 8: General forms of government	61
Figure 9: Procedure regarding popular initiative.....	71
Figure 10: Overview of the federal authorities.....	88
Figure 11: Method for solving cases	118
Figure 12: Key aspects of the right to life and personal liberty	125
Figure 13: Right to privacy.....	128
Figure 14: Economic freedom	147
Figure 15: General procedural guarantees.....	157
Figure 16: Remedies before the Federal Supreme Court	163
Figure 17: Individual application to the ECtHR.....	173