

Federal Office of Justice



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Introduction

The Federal Office of Justice is one hundred years old. That in itself would be reason enough for a publication describing the agency and its operations to the wider public. But the idea was also motivated by the increasing demand for transparency and information. More and more, it is being recognised that the general public has a legitimate interest in finding out about what goes on behind the scenes in the public service.

When the five staff members of the Justice Division of the Federal Department of Justice and Police took up their duties on 1 April 1902, a long-standing demand of the Department's management had finally been met. The Department had been struggling to cope with a huge workload which made it necessary "to recruit skilled and hardworking legal staff", to quote from the Federal Council Message to Parliament of June 1901. Over the past 100 years, the Justice Division of the Federal Office of Justice (FOJ) – as it has been called since 1979 – has developed from one small office into a major administrative unit employing approximately 300 staff.

Since its inception, the FOJ has been the Confederation's specialist legal agency and provider of legal services. Despite the reference to "Justice", the agency has no judicial functions. The FOJ is today in charge of important legislative activities in public and administrative law, private law and criminal law. It provides advice to the rest of the Federal administration in all legal matters and drafts advisory opinions. It performs supervisory functions in relation to the registers of businesses, civil status and land, and the purchase of land by foreign residents. It also keeps the central criminal records and provides details of entries in that register to courts and other official bodies and to private individuals (in relation to their own records only). In the international arena, the FOJ represents Switzerland before the European Court of Human Rights and in several other international organisations and it is also the central authority in Switzerland for cases of international child abduction. The FOJ works hand in hand with national and foreign courts and prosecution services in mutual legal

assistance and extradition matters, and it prepares the draft decisions of the Federal Council on administrative appeals.

The number and range of its duties has greatly expanded over the past hundred years. But the job requirements are much the same as they have always been: skilled, hardworking lawyers are what the job demands, now and in the future. Likewise, the goals pursued in the daily work of the agency have remained more or less the same: the creation of legal structures to regulate the activities of communal life in a fair and just manner and to promote the successful economic development of the country; maintaining the availability of legal expertise in the federal administration and the promotion of an understanding of the law (Article 6 of the organisational ordinance for the Federal Department of Justice and Police).

The question of whether our agency is up to the task of fulfilling these high expectations is explored in a round-table discussion among senior officials of the FOJ: is the FOJ the legal department of the enterprise of state, the guardian of the constitution or even the "legal conscience of the nation"? The section after that illustrates the work of the FOJ in five areas. The activities described span a wide range, including an essential background task, that of the ongoing preparation of legislation, the modernisation of the law of guardianship, the fight against international crime, the question as to what is the function of the criminal law today, human rights and European integration, and the department dealing with appeals to the Federal Council – a part of the agency that is destined to disappear but for that reason is going through a particularly interesting phase right now. Inevitably, other divisions had to be omitted – including the Central Services Division which constitutes in a sense the logistical backbone of our operation and incorporates such interesting units as the Centre for Legal Data Processing and Computer Law. Finally, there is a chronology section that catalogues key milestones in the history of the FOJ.



This publication is aimed primarily at those entering into contact with our agency whether as a "client" or as a prospective employee. It is also intended to serve as a guide to members of the public interested in finding out about us and the work we do. To all of you, I hope it makes for interesting reading and to the Office itself, I say "keep up the good work!" .

Director of the Federal Office of Justice

Prof. Dr. iur. et lic. oec. Heinrich Koller

Aspiration and reality

Senior FOJ management in conversation

"Our agency has two functions. On the one hand we act as a sort of guardian of the constitution. On the other hand, though, we are also the legal department of the enterprise that is the state." This succinct and rather blunt assessment gets the ball rolling early in the morning in the conference room of the Bundeshaus West. It's a promising start. For today all the lawyers' characteristic caution and reticence are to be left at the door. That at least was the instruction given in the e-mail invitation to this open round-table discussion for the seven senior officials who, together with the Director, make up the management team.

Does this dual role really generate a "natural tension" that galvanises the work of this legal think-tank? The discussion is now in full swing. One of the participants picks up on another emotionally-charged expression, rejecting the portrayal of the FOJ as "the legal conscience of the nation". "That description makes us into moral apostles, which we are absolutely not. But I wouldn't like to be a corporate lawyer either. I probably wouldn't make a very good one anyway!"

The work of the FOJ

But what exactly does the Federal Office of Justice do? What is its special role and how does it differ from other federal agencies? The group of senior managers see it something like this: "Our agency is primarily a provider of legislative tools. It also offers a sort of legal infrastructure. Unlike most of the other agencies, the work of the FOJ is not focused on a single sector. Instead, we help to devise the basic approach and framework for action in virtually all areas."

Genetic engineering, healthcare reform, e-commerce, privatisation of the public service, cybercrime, hospital lists and charges, international mutual legal assistance: the areas to be dealt with are as complex as they are contentious. As a body consisting mainly of lawyers, participants all agree, the FOJ is unlikely to have

sufficient inhouse specialist expertise over such a wide range of sensitive areas. "Lawyers on their own can provide only legal solutions to problems. They rely on the support of specialists in other fields to deal with specific issues."



*Philippe Boillat, lic. en droit,
Head of the International Affairs Division
"Our work here puts us at the hub
of the current issues facing society.
That gives us the chance to help shape
the future legal landscape in
important areas."*

Inter-disciplinary approach

In practice, therefore, FOJ staff do most of their work in inter-disciplinary expert groups. Depending on the subject matter, representatives of various interest groups must also be brought into the discussion before a proposal is ready to go to the Federal Council and subsequently to Parliament. The main role of the FOJ officials in this process tends to be to devise methods and procedures by which to forge a consensus. "Particularly with controversial and contentious topics the ongoing task is to create a basis for compromise." That is one of the most important functions of the FOJ and, according to the participants in the discussion, makes working in the FOJ highly stimulating, varied and challenging. Ultimately it is the job of the FOJ to ensure that proposals for legislation, which are usually drafted very much from the perspective of the

sector concerned, are consistent with the existing legal framework. In particular, there must be no conflict with the Federal Constitution, constitutional laws or international treaties and conventions.

But while the FOJ does to some extent play the role of legal watchdog in this sense, the FOJ's senior officials do not see themselves as the nation's moral and legal arbiters. "We are not the referees of the nation's affairs and we cannot show the red card to anybody. We simply don't have the authority and powers. And that is just as it should be." The agency must confine itself to providing legal services. "Part of your job is to put forward your ideas and recommendations as convincingly as possible. But there is no guarantee that they will be taken on board!"

The role of politics

Discussion and debate. These are two of the terms that come up again and again in the course of the round table. In theory at least, different viewpoints are allowed to compete freely. But there is no getting away from the realities of politics and power. There can be no illusions on that score: "Of course the law is the handmaiden of politics to some extent and it is by nature an instrument of policy. But these days politicians tend to play by the rules much more than was the case previously." This is due in no small measure to the revised Constitution, which uses clearer and more direct language than its predecessor. Another factor has been the growing influence of international law, which is also becoming an increasingly important parameter for the work of the FOJ.



*Rudolf Wyss, Fürsprecher,
Head of the Division for International
Legal Assistance
"The best results can be achieved only
through teamwork!"*

The mediation function

The FOJ does not normally play the role of advocate for any side and it holds a brief for nobody. Its "clients" are the Federal Council, parliamentary committees, departments of state, other federal agencies or very often the Federal Office of Justice itself. As a result, it may happen that the FOJ lawyers are asked for an opinion on the very same legal issue by two different departments who are themselves in disagreement on the matter in question. Or that a parliamentary committee seeks an advisory opinion on an issue on which the Federal Council – to which the FOJ is ultimately answerable – has already taken a position.

It was recently claimed in parliament that when it comes to expert opinions it is a case of "he who pays the piper calls the tune". The people at the FOJ want to avoid being cast in the role of piper. In the words of one of them, speaking for the whole group, "We must regard it as our duty to take a global, objective view and must not allow ourselves to be used as the legal pawns of any player in the political game!"

Changed perception of the law

The law can be said to have come down off its high horse in recent years. The misconceived notion of legislation as something carved in stone and handed down from on high is no longer anything like as widespread as before. The days are

certainly gone when political debate could be cut short abruptly and everything left to be solved by legal means. There is consensus among the participants on that point. "There is now more open debate and the law has thankfully relinquished something of its false authority."

This changed perception is also a consequence of changes in society. Some of the participants see certain dangers in this: "We are living in an extremely pluralistic society, even an à la carte society in some respects. For example, these days decisions of the Federal Supreme Court are no longer automatically binding on lower courts. That is not the case in common-law jurisdictions where the doctrine of precedent is much more strictly observed." In Switzerland, by contrast, the courts have considerable scope for interpretation and in the longer term the legal system suffers because of the loss of transparency. "The public no longer understands certain decisions of the courts. The legislature must move back to a stricter approach in this regard. What we need are more generally recognised and accepted rules not this constant reinterpretation of the law!"

Current affairs and a faster pace of work

But overall, how have the operation and workings of the FOJ changed in response to changes in society at large? In the discussion of this issue, a point that was made again and again was the increasingly international dimension to the FOJ's work. "Today it is more important than ever to set our domestic legal system and legislation in an international context. It has become a key task of the FOJ to achieve the compatibility between Swiss and international law."

There have been many changes at the FOJ over the course of recent years. The adoption of information technology in the legal domain has given rise to new working methods and processes. And in today's fast-moving world the tempo has also increased in much of the FOJ's

activity. For example, the legislative compromises which the agency facilitates are increasingly short-lived. This is where some of the participants see the main difficulties and challenges of the job today. "We often need to be able to react quicker. We are constantly being called upon to come up with answers at short notice to questions concerning the operation of legislation in particular. That can sometimes make it difficult to keep your own work on schedule." The job is often at the mercy of current events – as was the case recently with the attacks of September 11 or the crisis at Swissair. And in the international



*Monique Jametti Greiner, Dr. iur.,
Fürsprecherin, Head of the International
Affairs Division
"There is great scope for creativity in
international affairs, if you know how to
use it, and that is one of the most satis-
fying and rewarding aspects of my job."*

arena, the agency has to fit in with the timetables adopted by international organisations or by their component states. "In such circumstances, it is often difficult for us to get our work done efficiently and on time."

Quality of work

Is it true to say then that the way that the world as a whole has speeded up has led to pressure on the FOJ to achieve a higher, faster and more flexible output? Participants were agreed that the demands are greater than before. "We are having to operate to increasingly tight deadlines." But the faster tempo and the higher stress levels are seen as something affecting society as a whole rather than as problems peculiar to the FOJ. "The whole pace of life today has speeded up. Twenty years ago it would never happen that a bill would be due to go to parliament before the summer recess if the consultation procedure had been adopted only in March.



Luzius Mader, Prof., Dr. iur., LL. M., Head of the Main Division of Constitutional and Administrative Law
"I find working in the FOJ very stimulating. I'm more interested in public affairs than in the private sector, and acting as an advocate isn't a priority of mine."

A lot of things have become more hectic – although much of the rush is unnecessary and artificially induced."

But what impact has this had on the quality of the FOJ's output? On this issue, opinions divide fairly sharply. One group believes that at times it is no longer possible to give the work the care and attention it demands. "Lack of time means that decisions are being taken without

having been properly thought through". But others disagree strongly with this view: "In the files of our predecessors from the 60s, 70s and 80s, you find notes such as 'I just can't manage any more', 'we never have enough time', 'everything has become so hectic', 'our work isn't properly appreciated any more', and so on. The discussion is a long-standing one. If the complaints were justified the situation would have long since become untenable. Yet we are still producing the goods. Of course, like all the other state agencies, we would like to have more time, more money and more staff. But given the time and resources available to us the FOJ is still able to deliver!"

Impressive level of job satisfaction

In any case, as the final session made clear, at least the situation is not so desperate as to prompt any of the participants in the round table discussion to look for another job. Far from it in fact. On the subject of personal working conditions there was nothing but praise.

What's more, the participants have notched up an impressive tally of years of service. Yet there is not the slightest trace of cynicism or resignation to be detected. Everybody seems motivated and dedicated: "I have been with the FOJ for over thirty years and I haven't been bored a single day yet", says one of the participants, to nods of agreement all round. "There were always fresh challenges and so many opportunities. And there was little I had to do that I really didn't like doing". These sentiments too are generally echoed. Most of the group empathised with the point made by one participant who turned down the offer of a better-paid job – because of his belief that nowhere else in the legal profession is the work as interesting as in the state civil service!



*Urs Bürge, lic. iur.,
Head of the Central Services Division*
"'Legally, it won't work!' That used to be a standard line. But that sort of attitude won't wash any more. You wouldn't get away with it now! We have to propose a solution."

Good working conditions

One of the most rewarding aspects of working in the FOJ, according to participants, is being at the hub of the issues currently facing society. There is the opportunity to use your own initiative and you are constantly confronted by new intellectual challenges, according to one participant, for whom the high-powered environment was a key factor: "I doubt there is anywhere else where you could find so much legal expertise in one place as here at the FOJ". Other factors mentioned included the family-friendly set-up, whereby even senior personnel can opt to work part time, the mix of cultures and languages, and of course the sense of serving the common good. All agree that the best part of the job is not having to act as advocate for any side but being able to devote their energies to the interests of the community as a whole.

The level of contentment is remarkable. It certainly has much to do with the stability and security of the job and with the spirit of camaraderie that manifested itself during the discussion. Evidently a case of the right people in the right place.

Not a deliberate career choice

And yet, all but one of them ended up in the FOJ by chance. And then stayed for longer than they had ever intended: "When somebody suggested to me to go for a job in the FOJ it was the last thing I had in mind: the idea of becoming a civil servant in some musty bureaucracy, and in Bern at that, was simply inconceivable for me", is how the participant from the French-speaking part of Switzerland describes his initial attitude. "I never regretted my decision though", he adds, "on the contrary". "I was planning to spend just two years in the FOJ," says his colleague, who has now been here for over 30 years. She continues: "I belong to a generation that has enjoyed all sorts of wonderful opportunities in this agency". And the second woman member of the group also admits frankly that it was difficult for her in the beginning to come to terms with the idea of being a civil servant. Having to clock in every morning still grates "But the opportunities I've enjoyed here as a working mother have been simply extraordinary!"



Ruth Reusser, Dr. iur., Deputy Director of the FOJ, Head of the Main Division of Private Law

"I have been working in the FOJ for over thirty years and I haven't been bored a single day yet!"

What's on offer for the next generation

How would the members of the group, who gravitated to the FOJ more or less by accident, describe the attractions of working in the FOJ to the young lawyers of today? – "In the FOJ you get to manage and influence projects from their inception right up to their enactment." "As a lawyer in the FOJ you can make a real difference." "The environment is highly professional." "Young graduates can learn a great deal here and have the opportunity of working alongside very experienced lawyers." "In the FOJ you can build up a really good network for yourself." "The working atmosphere is simply terrific." "The agency is really multi-faceted." "You can learn a lot here about how Switzerland is run and the work transcends the linguistic divides." "The FOJ is an excellent employer, especially for young women." "A job in the FOJ opens up exciting vistas – both nationally and internationally."

Nobody is short of convincing arguments, it seems. And you get the impression that each of these men and women would heartily and enthusiastically recommend this agency that they call their own. Which is probably the warmest tribute of all and the greatest strength of the Federal Office of Justice.

Postscript

This discussion took place in mid-December 2001. In addition to the seven members of the management team who took part in it, the Federal Office of Justice employs approximately 300 further staff. They share 240 full-time positions.



Peter Müller, Dr. iur., Försprecher, Head of the Main Division of Criminal Law and Appeals

"I find it very rewarding to work in such a high-powered environment. I doubt very much that there is anywhere else where you could find so much legal expertise in one place as here at the FOJ."



Behind the scenes in lawmaking

Every year, the Federal Council submits some thirty bills to Parliament and approves between 100 and 150 regulations. In the main, they are revisions of existing legislation. The two Legislation Divisions, which form part of the Main Division of Public Law, are actively involved in the preparation of these laws and regulations. Legislative support is the ultimate in all-embracing work. This article casts a ray of light on a little-known sphere.

Under the Federal Council ordinance on the organisation of the Federal Department of Justice and Police, the Federal Office of Justice deals with law-related matters and is the Confederation's service centre for such issues. It provides legal information and prepares legal opinions for the Federal Assembly, Federal Council and the administration. In doing so, it acts as a legal department, in particular as regards constitutional law, for Parliament, government and the administration.

The Federal Office of Justice is responsible in particular for examining whether or not all drafts of legislation are constitutional and lawful, are compliant and compatible with current national and international law, and accurate in substance. In cooperation with the Federal Chancellery, the Office also examines the relevance of legislation from the legislative technique and drafting stand-points. This is the core of the Legislation Divisions' work.

The people who work in the Legislation Divisions

The Legislation Divisions are staffed mainly by lawyers, backed up by a number of administrative personnel who provide the necessary logistical support. The legal staff consists of approximately twenty men and women with a generalist legal training and a specialisation in legislative technique. The range of legislation spans such diverse areas as social insurance, agricultural law, economic law and international agreements. These different areas are assigned to different members of the legal staff who, by this process, become a little less generalist and acquire more specialised knowledge of a particular subject. The Legislation Divisions also take on law graduates as interns for periods of approximately six months – other divisions as well.

Key functions

The two principal functions of the legislation divisions are to prepare legal opinions and to carry out ex ante reviews of the legality of proposed legislation. Legal opinions are prepared on important or fundamental questions of law that arise either from the operation of a law or during the preparation of legislation.

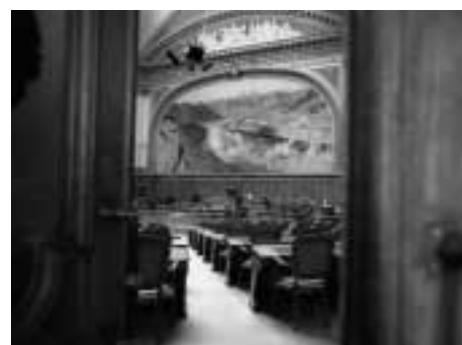
Opinions are generally prepared for and at the request of other Federal Offices or other divisions of the Office, the Federal Department of Justice and Police or other departments, the Federal Council or for parliamentary or extra-parliamentary committees. When they involve clarifying legal questions of general interest, the Legislation Divisions may also have to prepare legal opinions for cantonal authorities or even for private individuals.

Various examples

Legal opinions prepared by the Legislation Divisions cover such varied fields as family taxation, the possibility of putting general approvals for nuclear power stations to a referendum, the question of whether the Confederation and its employees can be obliged to join a canton's maternity insurance scheme, the authorities competent to prosecute and rule on breaches of administrative criminal law, the funding of archaeological excavations during highway construction, whether or not advertising and sponsorship are permitted on the Confederation's web sites, or even the scope of the constitutional right to marry.

Legal scrutiny of legislative acts

The legislation divisions vet the legality of both bills to be introduced in parliament and regulations to be adopted by the Federal Council and the various departments of state. This review process takes place ex ante, that is before the



Seven plus seven: A new formula for government

The Main Division of Public Law assists other federal offices in the preparation of legislation and in certain cases takes the lead role itself. A specialist section, the Legislation Projects and Methodology Division (LPMD), deals primarily with proposed legislation concerning the institutions of state. This includes legislation such as the Publicity Bill, the Ombudsman Bill and the Government Reform Bill.

The Government Reform Bill is a particularly interesting example of a legislative proposal handled by the LPMD. The Bill proposes a restructuring and expansion of the government, which at present is made up of seven Federal Councillors. In future, it is planned that the federal government will consist of the Federal Council plus seven Delegated Ministers (one for each Department of State).

According to the proposals, the executive will consist of two circles: an inner circle to which only the Federal Councillors will belong and a larger group that will also include the Delegated Ministers as well. These Delegated Ministers are to hold political responsibility for their

respective portfolios. However, government decisions are to continue to be taken by the Federal Council alone, since it is this body that bears overall political responsibility. This arrangement will preserve the principle of collegiality, which is a fundamental element of the Swiss system of government. But political leadership will be strengthened and the government's capacity for external action increased.

A project team in the LPMD carried out the preparatory work for this legislative proposal by drafting the constitutional and statutory provisions and preparing the draft message of the Federal Council. The Federal Council has now adopted the proposal and submitted it to Parliament and the members of the team are currently assisting in the deliberations of the parliamentary committees and the various Confederation-level councils. They advise and assist the relevant Heads of Department with opinions, reports, evaluations and any other materials required for the political process in parliament.

draft legislation goes to the Federal Parliament, in the case of a bill, or before the regulation is adopted by the Federal Council, in the case of secondary legislation. The Legislation Divisions are involved in both of the internal consultations that are held before the decision is taken: the procedure for consulting offices and the procedure for consulting departments. Occasionally, the Legislation Divisions act in an advisory capacity, within the framework of expert committees or working groups, when a draft is being produced.

Wide ranging

The legal review of draft legislation covers a wide range of disciplines and includes all documents prepared by other offices. Documents prepared in-house by the Office of Justice are, of course, reviewed in exactly the same way. To fulfil their remit, the lawyers and legal experts have to ask themselves a whole series of questions, among them, the following in particular:

- Does the draft legislation comply with higher ranking law? – National law must comply with international law, federal statutes must comply with the constitution, regulations must comply with federal statutes.
- Does the draft legislation only contain provisions that the higher ranking law does not

prohibit from enactment? Specifically: does it encroach on fundamental rights guaranteed by the constitution? Does it breach any international obligations?

- Is the Confederation competent to enact the proposed legal provisions? – The Confederation must comply with the division of authority as regards cantons. Within the Confederation, it is the competent body that must act.
- Is the form of the draft legislation correct?
- Does the draft legislation fit into the existing framework of regulations?
- Does the draft legislation settle major issues without contradiction?
- Is every provision in the draft legislation necessary, i.e. not already included in another regulation?
- Will the draft legislation be workable?
- Do provisions appear in systematic sequence in the draft legislation?
- Does the draft legislation use simple, clear, understandable language, suitable for the intended audience? Is terminology used consistently throughout?

Networking

To properly fulfil their remit, the Legislation Divisions operate as a network, not just to follow fashion but to be sure of using all available expertise. Networking primarily involves the Office of Justice's internal network. Compliance with European law is examined by the International Affairs Division. The relevance of criminal provisions is examined by the Main Division of Criminal Law and Appeals. Private law aspects are examined by the Main Division of Private Law. The network is also external. To examine international law aspects, the Legislation Divisions work with the Directorate of International Law at the Federal Department of Foreign Affairs. Questions of legislative technique are examined – in the light of directives on legislative technique – jointly with the General Law section of the Federal Chancellery. The language used in

draft legislation is checked in cooperation with the Federal Chancellery's language department, under the auspices of the internal drafting commission.

Service providers or legal watchdogs?

Service providers, of course. The Legislation Divisions' role is first and foremost to provide support to offices responsible for producing draft legislation. By constructive criticism, the Divisions primarily aim to enable their "clients" to provide a good "product" complying with the constitutional principles and requirements of legislative technique. In the process, there is naturally sometimes resistance. "Two lawyers, three opinions," the saying goes. And this does arise from time to time when a document is being drafted. The role of the legislation lawyers is to put across their point of view persuasively while remaining mindful of the concerns of the subject matter specialists responsible for drafting the proposals.

If agreement cannot be reached, the Federal Department of Justice and Police may, within the procedure for consulting departments, submit the Federal Office of Justice's legal objections to the Federal Council, suggesting corresponding amendments. So in the final instance, it is up to the Federal Council to decide the matter.

Absence of judicial review

This ex ante scrutiny of legislative acts takes on added importance given the lack of any mechanism for the judicial review of federal statutes. As part of the reform of the administration of justice, the Federal Council proposed that jurisdiction to review federal statutes should be conferred on the Federal Supreme Court but this was rejected by the Parliament in 1999. The courts do have power, however, to review the constitutionality and legality of regulations. It is rare in practice for a regulation to be held contrary to a

federal statute. Modesty aside, this may be seen as a tribute to the effectiveness of the ex ante reviews carried out by the Legislation Divisions.

In-depth discussions

In parallel with their core duties, the Legislation Divisions are also committed – by means of in-house seminars – to exploring particular issues in depth. These discussions cover themes as diverse as the principles governing the State's profit-making enterprises, legislative delegation in the updated federal constitution, outsourcing public authorities' work to the private sector and remuneration policies. These in-depth considerations are essential to the quality of legislative support.

The guiding principle

In his work "De l'esprit des lois" (On the essence of law) Montesquieu wrote: "Laws should never be subtle... no more are they an exercise in logic, but simple paternal common sense".

In the 21st century, we can of course no longer grant fathers a monopoly on common sense. What is more, in highly technical fields, the notion of simplicity is entirely relative. Nonetheless, simplicity continues to be an ideal we can aim at. In fulfilling their reviewing remit, the Legislation Divisions keep this ideal in mind.





Balancing the needs of weak and strong

Private law looks after the individual from the cradle to the grave. It ensures that each newborn child receives an identity – first name and surname, details of parentage – that is protected. Later, it regulates their dealings with others, whether starting a family, as with a marriage, or more mundane matters such as buying something in a shop. It is private law that also regulates property and its protection, the exchange of performance and governs contractual relations in the most varied of fields, such as renting a home, starting a new job or going to the doctor. Finally, it determines who receives an individual's assets when they die.

"I am human, therefore nothing human is alien to me." This quotation from the Roman dramatist Terence is a good starting point for an introduction to the Main Division of Private Law and its scope, as wide-ranging as it is varied. While "public" law represents the interests of society as a whole, private law is concerned with individuals and their needs. Its aim is create a certain balance – not primarily between the individual and society, but rather between individuals themselves in their dealings with each other. It is these relationships, however mundane they may be, that ultimately represent the fabric of our society.

Freedom and self-determination: key values

Private law attempts to create structures and take into account the needs of the weakest members of society. It offers one and all protection and the means to advance their own interests without compromising the interests of others. Private law espouses freedom and self-determination as valuable goods and important drivers of personal, social and economic growth. Restrictions imposed under private law serve only to maintain a level of trust – without which good interpersonal relationships would be unthinkable – and to guarantee a measure of fairness.

These values and the quest for a balancing of interests shape the formulation and application of the law. They are the clearest manifestation of a sense of unity that pervades the various activities of the Main Division of Private Law. This article will illustrate the work of the Division more closely using two specific legislative amendments, namely guardianship law and the provisions concerning limited companies.

Guardianship law and its development

Individuals who experience a degree of difficulty, to whatever extent, in managing their own affairs as a result of a debility such as a mental disability, addiction, or simply because of diminishing physical and mental capabilities, are reliant on help from others. The help often comes from within the person's family, but is also available from the volunteer social services. If this is impossible or this type of assistance is insufficient, guardianship law ensures that the necessary support is provided and that the person in need is represented before the law.

Current legislation offers three alternatives. The relevant authorities may appoint an assistant (under a Beistandschaft order), an advisor (Beiratschaft) or a guardian (Vormundschaft) for the individual in question. Each of these three arrangements is subject to very specific provisions that are laid down by law. Beistandschaft allows the individual to retain their legal capacity. Beiratschaft is restricted to specific matters concerned with the person's money and assets. Finally, Vormundschaft involves the withdrawal of a person's legal capacity to act on their own behalf. An individual under a guardianship order of this nature can no longer enter into contracts on their own or manage their own assets. They are also represented by their guardian in personal matters.

Removing stigma and promoting self-determination

Guardianship law no longer meets modern needs and attitudes. It is too inflexible and confers an unnecessary stigma on its subjects. It is thus being completely revised under the auspices of the Main Division of Private Law. The planned new adult welfare act makes no mention of guardians and guardianships, providing instead only for a variety of forms of Beistandschaft, or assistance. The tasks that the assistant must fulfil in each individual case is to be determined by the relevant authority in accor-



www.zefix.admin.ch: Finding the right register

The Main Division of Private Law is involved in managing three major registers: the civil status register, containing data on natural persons (in contrast to legal entities, such as joint stock companies), the land register, which records details of land ownership and other land-related rights, and the central business names index, which gives information about the commercial identity of companies.

All three registers are run as public services that are available to anyone who wishes to refer to them. The three registers are governed by federal law, but operated by the cantons on a largely local basis and supervised by the Federal Government.

Every canton thus has to maintain a register of companies. It can opt to keep one for the whole canton, or a separate register for each district. This explains why a search for more information on a particular company – even by the relevant canton or registry office – used to be a complicated matter. Now, with the advantages offered by information technology, the Federal

Commercial Registry Office and cantonal registries have set up a single Internet portal (Zefix) which offers access to virtually all registers in the country.

Today, the most important information is available immediately at the click of a mouse – information such as whether or not a company actually exists, key data about it and, above all, who to contact for more details. The Zefix portal (www.zefix.admin.ch) now logs over 10,000 hits a day. Anyone who has access to the Internet can therefore gain a general picture of whether or not a potential partner will live up to expectations. The information is fast and easy to access, and it is free.

The Main Division of Private Law is currently also working on complex, labour-intensive IT projects connected with the civil register (Infostar) and the land register (eGRIS). Specifically, the civil status register is to be managed electronically in the future, with the Confederation running a central database for the cantons.

dance with the welfare needs of the person concerned. With this tailor-made approach, the individual's rights are restricted only in those areas in which it is genuinely necessary to do so. The new act is also intended to introduce a "welfare order" to allow a person who still has legal capacity to decide themselves who should be appointed to safeguard their interests and represent them in the event they lose that capacity. With a patient's order, a person can also determine the medical treatment that they wish to receive or refuse if the time comes that they are no longer able to decide for themselves.

Limited companies and changing business needs

Private law also determines legal forms for businesses. The needs of both multinational corporations and small business must be considered and an effective balance of framework conditions created for commercial activity. Companies should be offered a suitable contemporary legal mantle, but should also be permitted to restructure or merge.

The Main Division of Private Law and the Federal Commercial Registry Office are currently working on a large number of legislative projects aimed at bringing our system of law better into line with today's economic dictates.

The most suitable form

The various legal forms of company that are provided for in the Swiss Code of Obligations are designed to cater for the widest range of needs. If the business is a large one, the Aktiengesellschaft (AG), or public limited company, is generally the most suitable form. If the business is small, other structures are more appropriate, such as the Gesellschaft mit beschränkter Haftung (GmbH), or limited company, the Kollektivgesellschaft (partnership), or the Einzelunternehmen (sole trader).

However, the current regulations which apply to the GmbH type of limited company have a number of shortcomings and must therefore be revised as a matter of urgency in order to offer smaller companies a genuinely sound and attractive legal form. Even after its revision, the legislation will still be geared to companies in which there are close personal relationships between the people involved but which require only modest capital, yet where a legal entity is to be set up nonetheless.

Regulations for the new GmbH

A modernised GmbH is potentially a very attractive solution for certain commercial undertakings. The current legislative revision process will ensure that a GmbH is still simple and inexpensive to set up, but many of the drawbacks of the present law will be eliminated. In particular, the new arrangements will avoid the present pitfalls connected with shareholder liability, they will simplify the transfer of shares, improve the protection afforded to minority shareholders and will lay down clear regulations governing "divorces" between partners. These improvements will make the GmbH – for many years a relatively rare form of company in Switzerland – a valuable instrument for all those who wish to go their own way in business.

Reflecting reality

These examples highlight just two areas of the Main Division of Private Law's field of activity. Countless issues which affect human beings directly – such as genetic engineering, legislation on medicines or patient rights, civil status, the consumer credit act, landlord–tenant law and other aspects of commercial law – cannot be addressed in greater detail here. Particularly topical are the legal foundations governing electronic signatures and corporate mergers.

Private law is part of the daily lives of all of us and often has a much greater impact on us than we are aware. Private law is a true reflection of matters bound close to individuals and their relationships with each other. If it succeeds in creating a good legal framework for each one of these individuals, society as a whole will benefit. That is the guiding principle of the work of the Main Division of Private Law.





Why do we need criminal law?

The sense and purpose of punishment will always be one of humanity's enduring concerns. Today, however, there is a broad consensus that criminal law is an indispensable regulating element in society. Drafting criminal and criminal procedure legislation is the responsibility of the Main Division of Criminal Law and Appeals. Its aim is to ensure that criminal justice is enforced appropriately and that new penal provisions are formulated concisely and comprehensibly. It develops and refines the tools used to apply sanctions under criminal law. It works towards a national code of criminal procedure in Switzerland which enables crime to be fought effectively while guaranteeing that alleged offenders are treated fairly. Finally, it supports the cantons in their efforts to execute sentences and measures in a way that maintains human dignity.

Over 30 years ago, a lively debate was unleashed by a book calling for the abolition of criminal law. The book, which proposed that a society could do without a system of criminal justice, centred around an unusual issue but nonetheless attracted considerable interest. Nowadays, no state could be built on such a basis, as calls for the criminal law to be expanded and tightened up are all-too loud – in everyday life, the media and above all in politics.

Criminal law and the law of criminal procedure are expanding

Criminal law has effectively been a huge construction site for more than 20 years now as it is continuously expanded and revised. Changes in society are also changing the focus of criminal activity, creating new challenges for the criminal justice system. Today, resources are concentrated on the fight against organised crime, money laundering, corruption, cybercrime and trafficking in persons, as well as against international terrorism and its financing. But criminal law also has to define binding rules on such fundamental issues as abortion and assisted suicide. Where criminal procedure and mutual legal assistance are concerned, legislators are confronted with topics as wide ranging as telephone tapping, undercover investigation, DNA testing and cooperation with the International Criminal Court.

Why is criminal legislation so extensive?

Why this continual recourse to criminal law? Criminal law is an indispensable regulating element in society. It protects the fundamental values of human communities and gives them a framework, determining what is permitted and what is forbidden and marking the dividing line between good and bad. As the embodiment of a society's moral constitution, it ostracises those who break its rules. It apportions blame for which the offender must atone.

By depriving them of liberty and imposing other sanctions, criminal law places severe restrictions on offenders. As such, it has a deterrent effect which helps to prevent criminal offences in the future. Criminal records also ensure that past offences are not forgotten and thereby offer a further safeguard for society.

Criminal law has several lines of defence and a powerful enforcement organisation: thousands of police officers, as well as a large number of public prosecutors, examining magistrates, judges, law enforcement officials and probation officers. It is this "strong arm" more than anything that makes criminal legislation a major part of law and order in society.

Criminal law is not a cure-all

Criminal law is not a multi-purpose tool that can be used to tackle all the problems of the modern world. In a highly technological, complex and globally intertwined society, it is often very difficult to distinguish between right and wrong, the permissible and the prohibited. Relatively simple criminal law sanctions, imposed after the fact, are a much less sophisticated means of shaping social development than the instruments of administrative law, such as subsidies and regulation. And even though law enforcement capacity might seem great at first glance, it is limited in terms of both quality and quantity and cannot simply be expanded at will. A free society centred on the integrity of the individual must exercise restraint in its use of the coercive powers of the criminal law.



Appeals to the Federal Council

Since 1974, the Federal Council Appeals Division has been part of the Federal Office of Justice. As its name suggests, the Division's role is to process appeals brought to the Federal Council and to prepare draft decisions in respect of the same. Since 1996, more than two thirds of its work has been taken up with appeals arising out of the new law on compulsory health insurance. From an average of five a year at the beginning of the nineties, the number of these appeals mushroomed to between 100 and 120 a year in the years 1996, 1997 and 1998. The number has since levelled off but is still volatile given that the law in question and the decisions based on it are still the target of wide-ranging and frequent challenges.

From 1996 to the end of 2001, the Division had registered 482 appeals and had dealt with 429, of which 346 were resolved by means of draft decisions adopted by the Federal Council.

A little over half of these decisions relate to cantonal hospital planning, the others concern the tariffs set or approved by the cantons. Of these the majority concern hospital tariffs followed by out-patient tariffs (doctors, physiotherapists, chiropractors, midwives, homecare and community health centres).

The role of the Federal Council as an appeals body will soon be coming to an end, however. The abolition of this course of law in several situations is in line with one of the fundamental objectives of the reform of the administration of justice which is to ensure every citizen's right of access to a court of justice. The majority of the appeals that now go to the Federal Council will in future be heard by the Federal Administrative Court, the decision of which will either be final or subject to an appeal to the Swiss Federal Supreme Court.

Differentiation and internationalisation

Criminal law is advancing all the time. As part of the revision of the general part of the Swiss Federal Penal Code, for example, the range of sanctions is to be expanded and refined. Short unconditional custodial sentences will largely be replaced by a sophisticated system of fines and community service. There will also be new regulations governing custody arrangements for dangerous offenders. The new rules will make the punishment more closely fit the crime, helping to guard against repeat offences while at the same time making society more secure.

Recent years have seen an intensifying trend towards fighting serious and cross-border crime at an international level. Criminal law and its enforcement structures are no longer seen as autonomous matters for individual countries. There is a growing belief that the prosecution of the most serious crimes – particularly genocide and crimes against humanity – is a task for the international legal community as a whole. This is why a permanent International Criminal Court has been created and why the relevant criminal offences are now defined more precisely in international treaties. Switzerland must implement these international obligations and determine rules for cooperation with the new Court.

A further trend is the reapportionment of criminal responsibility. In a highly sophisticated social and economic environment which is part of the international community, it is often no longer possible to ascribe criminal acts to individual persons. As small cogs in the workings of complex organisations, they bear only a small proportion of the responsibility for a crime and their share of the "spoils" is correspondingly small. Increasingly, then, criminal law is being applied not only to individuals but also to legal entities, in particular corporations.

Criminal law carries into effect in criminal proceedings and sentencing

These days, the enforcement of criminal law is almost exclusively the prerogative of the State. The authorities must prove that the alleged offender has committed an offence and impose the appropriate sanction. The law of criminal procedure determines the steps involved in this process.

At present, criminal procedure in Switzerland is governed primarily by cantonal law. But a Swiss code of criminal procedure is currently being drawn up in order to enforce substantive criminal law more rapidly, evenly and effectively. This code sets out rules governing the methods that may be used to investigate suspected criminal activity, it will put control mechanisms in place to guarantee that the basic rights of offenders and their human integrity are respected as far as is possible, and it will ensure that defendants are given the right to a defence. At the same time, the judiciary is being strengthened. As the prosecution of organised crime and, to some extent, white-collar crime recently passed to the federal authorities, a criminal court of first instance has had to be set up at federal level.

Once a guilty verdict has been passed, the sentence must be enforced. In Switzerland, this is the responsibility of the cantons, albeit within certain guidelines set by the federal authorities. There is also federal financial support for the construction of penal institutions and the operation of youth correctional facilities.

The remit of the Main Division of Criminal Law

The Main Division of Criminal Law operates where science and politics meet. It draws up proposals for the Federal Council and Federal Parliament about how criminal law and the law of criminal procedure might develop, with the aim of demonstrating what criminal law can achieve and what it cannot. The Division attempts to de-

termine whether or not a planned penal provision will actually have the desired effect or whether, on the contrary, there will be unanticipated side-effects. It defines new criminal offences so that undesirable conduct can be punished. It also takes part in drafting international texts on criminal law with the aim of incorporating Swiss values. In modelling exercises, it tests new forms of sanction and sentence execution, such as electronic monitoring. It subsidises the construction and operation of cantonal penal institutions and reform schools with the aim of guaranteeing the proper humane standards demanded in international treaties. It also administers Switzerland's criminal records.

The Main Division of Criminal Law aims to create the right conditions for the state to deploy the machinery of criminal law swiftly and decisively against wrongdoers. But it also strives to ensure that criminal law is applied with circumspection and restraint and that all defendants are guaranteed a fair trial.





Europeanisation and globalisation

Globalisation, combined with the multiplicity of international relationships and activities, has led to an enormous increase in the scope and importance of international law in recent years. This expansion of diverse and often complicated legal frameworks has taken place primarily in the context of international and European initiatives and organisations. Setting the global standard, the most active of these is the United Nations (UN) with its many special bodies and aid organisations.

The completion of the single market and currency union in Europe have created a de facto single legal and judicial area. The extensive system of law of the European Union (EU) and European Community (EC) is binding on all of Switzerland's neighbouring countries, so we have a vital interest in aligning our own legal system with these regulations to the greatest possible extent for reasons of practicality and legal certainty. Particular importance is attached to the European Convention on Human Rights (ECHR), which was drawn up and refined by the Council of Europe. The Federal Office of Justice (FOJ) operates a far-reaching programme of alignment and harmonisation projects affecting all areas of private, criminal and administrative law. Both qualitatively and quantitatively, this work has become an increasingly important part of the Office's activities.

Securing interests

Switzerland cannot escape these dynamic developments in law, nor does it wish to, not least because our country is closely integrated into the international economy and thus has a crucial interest in the viable regulation of international exchange and movement. In 1989, the FOJ set up its own International Affairs Division to safeguard the relevant expertise and establish the necessary contacts in Switzerland and abroad. It is divided into five sections: Human Rights and the Council of Europe, Community Law (EU/EC), Private International Law and International Civil Procedure, International Child Protection and Social Aid for Swiss Citizens Resident Abroad. Attached to these sections are the Swiss representations at the European Court of Human Rights and on the UN Committee Against Torture (CAT).

Examining compatibility

The Division's tasks, which have gained in scope and responsibility in recent years as the legal sphere becomes more international and comparative, are concerned particularly with examining the compatibility with international law of draft primary and secondary legislation from the Federal Council. To date, European law has been the first point of reference. An example here would be the Federal Council's draft bill for a new federal law aimed at eliminating the disadvantages experienced by disabled people. At the very beginning, it lists UN recommendations and programmes, as well as the bans on discrimination applicable to Switzerland that are laid down in UN human rights packages and the Convention on the Rights of the Child.

Example: The ban on discrimination

The draft bill then goes on to examine European law, with reference to the Council of Europe and, in particular, the rights enshrined in the European Convention on Human Rights (ECHR). The situation within the EU is subsequently presented and compared with the Federal Council's draft. This draft is largely in line with the new non-discrimination clause in Article 13 of the EC Treaty, as well as with the content and applicability of Directive 2000/78/EC on establishing a general framework for ensuring equal treatment in employment and professional life.

Negotiations in international organisations

Another focus of the Division's work is its involvement in negotiations in international organisations, particularly the Council of Europe, the Hague Conference on Private International Law and the UN Commission on International Trade Law (UNCITRAL). Switzerland's accession



Child protection and aid for Swiss citizens abroad

The International Affairs Division is also Switzerland's central authority in connection with international child abductions. Every year it handles between 100 and 150 applications in which children are taken by one parent from Switzerland to another country, or are prevented from leaving that country, or vice-versa, are brought to Switzerland or prevented from leaving. The central authority is the point of contact and liaison for such cases and makes every effort to reach an amicable settlement between the parents. If a solution cannot be reached by mutual consent, the decision lies with the courts. The entry into force of the Hague Convention on Intercountry

Adoption also gives the Division a much stronger role in international adoption cases.

In concert with Switzerland's representative bodies abroad, the International Affairs Division also provides support to Swiss citizens in emergency situations abroad. In certain cases, it offers them assistance to return to Switzerland. The Division also looks after Swiss tourists abroad who find themselves in financial difficulties. Every year, around CHF 7 million is spent on support of this type. It is granted on a loan basis and must be repaid by the recipients.

to the UN in 2002 will result in a corresponding increase in the Division's preparatory tasks and negotiation mandates.

Harmonious parallels

The examination of the compatibility of Swiss law with the European system is becoming ever more important. It is based on a single resolution, taken by the Federal Council on 18 May 1988 at the instigation of the National Council. According to this resolution, the aim of the compatibility examination is to "ensure the greatest possible compatibility between our legal provisions and those of our European partners in areas of cross-border importance and in these areas alone". To a certain extent, then, the aim in practice is a system of law which works in harmonious parallel with European legislation. However, rather than an automatic adjustment of Switzerland's laws, this means a properly thought-out and autonomous response on a case-by-case basis.

Autonomous response

Any adjustment must be in the spirit of the federal and directly democratic system of law in Switzerland. Differences are entirely permissible, as is only partial incorporation of European provisions. The Federal Council's resolution goes on to state, however, that care should be taken in Switzerland's own interests to "avoid creating unwanted and unnecessary differences in law which would hinder the fundamental objective of the mutual recognition of legal provisions at European level". The objective of parallel systems of Swiss and European law is set out in the Europe sections of the Reports sent out to the Federal Chambers, as well as in the proposals for secondary legislation which have a cross-border impact. With the entry into force of the sectoral agreements between the EC and Switzerland on 1 June 2002, it makes sense for these voluntary efforts towards a parallel system to be continued in respect of the many sectors which are not covered by the agreements.

From autonomous response to legal obligation

There will, however, be a genuine paradigm shift in those areas which are now formally regulated. From now on, all authorities and courts at federal, cantonal and commune level in Switzerland are obliged to comply with the agreements and – in line with the Federal Supreme Court's practice on national treaties – give them priority. They govern sectors and subsectors of such vital importance as the freedom of movement for goods, individuals and air traffic, trade in agricultural products and the mutual recognition of standards, as well as research and public purchasing.

New areas of regulation

This is only the beginning. New areas are being included in the "Bilateral II" negotiations currently under way between Switzerland and the EC. This places a particular onus on the International Affairs Division of the Federal Office of Justice with regard to regulations on combating fraud, refined agricultural products, the environment, statistics, the taxation of interest, services, education, professional training, youth, the media, pensions, cooperation between the courts and the police (the Schengen agreement), cooperation on asylum issues (the Dublin agreement), etc.

The Council of Europe's contribution

International cooperation in the field of law, and the importance of international law to Switzerland is nothing new, however. A particularly striking example here is the Council of Europe, the continent's oldest international organisation. In its constitution, adopted on 5 May 1949, it states that it is "convinced that the pursuit of peace based upon justice and international cooperation is vital for the preservation of human

society and civilisation". One of the means by which the Council of Europe aims to achieve closer relations between its members is the "maintenance and further realisation of human rights and fundamental freedoms".

The European Convention on Human Rights

In the light of these aims, the European Convention on Human Rights was presented for signature on 4 November 1950. The Convention's enormous success rests on the collective control mechanism – unique anywhere in the world – which it introduced. For the first time, international law enabled people to enforce their fundamental rights by taking legal action against a state – even their own – before an international court. The judgments of the European Court of Human Rights are binding on national governments. Its adjudications have created a system of European law on fundamental rights which impacts on the member states' internal legislation. Today, the Convention occupies a key place in the framework of European law and has thus rightly been designated a constitutional instrument at European level.

The subsidiarity principle

The system of controls that the Convention set up is based on the principle of subsidiarity. The obligation to protect fundamental rights is incumbent primarily on individual countries' internal courts and authorities, and it is at this level that any infringement of these rights can – and must – be prevented or remedied.

The subsidiarity principle is extended by the rule that all internal national legal channels must be exhausted. There can be no recourse to the European Court of Human Rights unless the complainant has made use of all the legal options available to him under national law. In proceedings instituted against Switzerland, it is the

Federal Council that must answer to the Court for any breach of the Convention. It accepts this liability not only for legal acts for which it can be held directly responsible, but also for the legal acts of other state bodies at federal, cantonal or communal level. The government is represented before the Court by the International Affairs Division of the Federal Office of Justice.

The Federal Government's responsibility

The authorities responsible for applying the law are very much aware that, in today's world, there is a close association between liability at national and international levels. For example, should a prison governor intercept a letter between a lawyer and his client, or should a district judge refuse to assign official defence counsel in a criminal case, their actions may be pursued at the international level. It can therefore be said that every government body bears de facto joint and several liability for Switzerland under international law. In the case of a breach of the Convention, the Court is not obliged to state which national authority is responsible for the infringement. At issue is only the international responsibility of the state.

The International Affairs Division is also responsible for promulgating as widely as possible among the legal community judgments made in Strasbourg and affecting Switzerland. It also examines all drafts of new legislation. This preventative role is extremely important in keeping to a minimum the number of complaints against Switzerland that may be lodged in Strasbourg.





Crossborder crime fighting

In the age of crossborder criminal activity, international cooperation often determines the success or failure of the fight against crime. International mutual legal assistance acts as the oil in the machinery of law enforcement and criminal justice. It helps to ensure that justice can be administered, and it closes loopholes so that criminals cannot escape unpunished or hide the proceeds of their activities abroad.

Throughout history, there have repeatedly been major, complex crimes such as serial thefts, huge fraud and large-scale embezzlement. Yet for some time now, law enforcement agencies have been confronted with new forms of criminal activity that are characterised specifically by their international nature. Offenders have become highly mobile and no longer confine their operations within national borders. Structured strictly according to the division of labour principle, criminal organisations foster international "business" links. The internationalisation of crime has also been encouraged by greater mobility and new technologies such as electronic funds transfers.

Mutual assistance between states

Whereas borders do not create barriers for criminals, they do present obstacles to prosecuting authorities, as evidence or suspects may not lie within their jurisdiction. For example, an Italian judge cannot order a bank in Switzerland to freeze a defrauder's accounts and hand over the relevant banking documents as evidence. Equally, his Swiss counterpart cannot himself arrest a murderer in Italy. Sovereignty precludes the exercise of such powers in a foreign state.

The system of international mutual legal assistance means that governments can help each other to fight crossborder crime. If a judge has to investigate a case abroad, he will ask the judicial authorities of the country concerned to handle the case on his behalf.

Key elements of cooperation

The following are the main pillars of international mutual assistance in criminal matters:

- Extradition (transfer of a wanted person to the requesting state to face charges or serve a sentence)
- Legal assistance in the narrower sense (specifically the procurement of evidence such as

bank documentation and other papers, interviewing witnesses, suspects and informants, conducting searches of premises and the handing over of property)

- Prosecution of offences and the enforcement of sentences on behalf of the authorities of another state
- Transfer of sentenced persons to their country of origin

Switzerland is a signatory to the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters. It has also concluded bilateral agreements with many states. Under the terms of the Swiss law on mutual legal assistance, the Federal Act on International Assistance in Criminal Matters, there are also circumstances in which Switzerland may collaborate with other governments, even where no formal agreement exists. Nonetheless, the FOJ (International Treaties section) is extending the network of treaties across the world to further improve cooperation and close gaps.

Asset-sharing

The seizure and expropriation of funds of criminal origin is one of the most effective weapons in the fight against crime. Bribes or money from drug dealing are often not held in the country where the offence was committed. Collaboration between two or more governments is therefore needed to recover these funds. In such cases, the money that has been seized may be distributed among the countries involved in a process known as asset sharing. Since the 1990s, Switzerland has concluded a large number of sharing agreements with the USA and Canada. Under a new bill to regulate the sharing of expropriated assets, the FOJ is to be responsible for concluding such international sharing agreements and for deciding on how the assets in question are to be divided internally between the Confederation and the cantons.



Serving a sentence one's home country

On 1 March 1999, the young Swiss, S, is sentenced in Tonga (South Pacific) to 20 years in prison for drug dealing. After sentence has been passed he informs the Swiss mission that he wishes to serve the rest of his sentence in his home country. The matter is referred to the FOJ, which is unable to comply with the application owing to the absence of any treaty. No bilateral agreement has been concluded because Tonga is able to accede to the Council of Europe Convention on the Transfer of Sentenced Persons. In fact, Tonga ratified the Convention shortly afterwards. A number of other non-European countries have also acceded to it. The Extradition section is then soon able to institute transfer proceedings. Tonga notifies the judgement and

how much of the sentence has already been served, S's home canton approves the transfer and determines the remaining sentence, after which S can be transferred to Switzerland.

The Council of Europe Convention on the Transfer of Sentenced Persons enables those imprisoned abroad to serve their sentence in a familiar social and cultural environment. This makes their reintegration into society easier. Every year, around a dozen Swiss who have been sentenced to imprisonment abroad are transferred back to Switzerland. Similarly, around a dozen foreigners who have been convicted in Swiss courts return home to serve out their sentences.

Two fictitious examples – based on real events – show the importance of mutual support among prosecution authorities in fighting crime, as well as the various forms of legal assistance that may come into play.

Bern bank robbery...

A Bern branch of one of the major banks is raided by five masked robbers. They threaten the counter staff with firearms and take hostages. The robbers flee unrecognised with more than ten million Swiss francs. However, the police quickly succeed in arresting two of the robbers and several accomplices in Switzerland. The other suspects' trails lead to Italy, Canada and France. Upon application from the investigating judge, the FOJ (Extradition section) circulates an international search warrant for the fugitive bank robbers.

A month later, the first – a Lebanese suspect – is arrested in Italy. The FOJ responds with an extradition request. After receiving information about a bank account held by the suspect in Rome, the in-

vestigating judge submits an application for legal assistance via the FOJ. The suspected stolen money can thus be frozen and later handed over. As the Lebanese man does not raise objections to his extradition, he can soon be transferred to Switzerland by the Italian authorities.

... arrests abroad

Another suspect, a Canadian citizen, is arrested in his home country. Like other common-law countries, Canada will extradite its own citizens, subject to strict conditions and providing there is appropriate evidence. The FOJ advises the investigating judge on drawing up the extradition documents, as well as what papers must be included. After the Canadian authorities have received the extradition request and a variety of additional information, they ultimately agree to extradition to Switzerland.

The third suspect, a French citizen, is located in France. Like Switzerland, France does not extradite its own citizens. To ensure that suspects do not avoid prosecution in such cases, it is possible to apply to delegate legal proceedings to another authority. The FOJ submits the relevant application at the request of the investigating judge. The suspect will then have to answer the charges before a French court.

Drug dealer with a Swiss bank account

On 1 March, the FOJ receives a request for mutual legal assistance from the USA. The US authorities request that several accounts be frozen at one of the major banks in Geneva, that bank documents be handed over and that witnesses be interviewed. The case concerns multi-million-dollar drug dealing and money laundering. The Mutual Legal Assistance section orders the accounts to be frozen and the bank documentation to be handed over. It also instructs the investigating judge's office in Geneva to interview the witnesses.

Two months later, Ms M goes to the bank, with the necessary powers of attorney, and asks to withdraw more than USD 100 million from the frozen account. The bank reports the incident to the FOJ, which then notifies the US authorities and the investigating judge's office in Geneva. After further enquiries, the investigating judge's office in Geneva institutes criminal proceedings against Ms M on suspicion of drug dealing and money laundering. She is arrested on her next visit to the bank.

A week later, the FOJ receives an arrest warrant from the USA. The reason given here, too, is that Ms M is suspected of drug dealing and money laundering. The FOJ issues an extradition order.

Transfer to the USA and conviction

A meeting between representatives of the US authorities, the FOJ and the Geneva authorities concludes that there are insufficient grounds to pursue criminal proceedings in Switzerland. The Geneva authorities therefore apply to the FOJ to assign the Swiss proceedings to the USA. The FOJ approves the extradition of Ms M, as well as the transfer of the alleged proceeds of the crime and the evidence, and officially requests the US authorities to pursue the case on its behalf. An appeal against this decision is rejected by the Federal Supreme Court on 1 November. Ms M is handed over to the US authorities a few days later.

On 1 June the following year, the US authorities announce that Ms M has been convicted and sentenced and that the proceeds of the crime have been confiscated. They offer Switzerland half of the proceeds in acknowledgement of its efforts (asset sharing). The Swiss federal authorities accept this offer and in turn agree with the Canton of Geneva how the assets will be divided.

Faster, simpler process

In the early 1980s, Switzerland was one of the first European countries to make statutory provision for international mutual legal assistance. At the time, this step was by no means uncontroversial. There were fears not only that foreign countries might use legal assistance as a cover to spy for commercial and manufacturing secrets, but also that the partial lifting of banking secrecy associated with international legal assistance might damage the Swiss banking sector's reputation.

This pioneering move had to be traded off against complex procedural safeguards that gave those involved an arsenal of legal remedies. Conflict and controversy surrounding the Marcos money, as well other high-profile cases, highlighted the weaknesses in this system. By lodging appeals, those involved could delay or even halt both the legal assistance procedure and the criminal proceedings abroad. The law was amended in the mid 1990s to restrict the options and grounds for appeal and thereby simplify and speed up the legal assistance process. In the future, too, Switzerland will have to face new challenges in the field of mutual legal assistance, such as the expanded fight against fraud and European arrest warrants.

In itself, the International Mutual Legal Assistance Act cannot prevent crime. However, the foundation provided by the law allows the International Legal Assistance division and federal and cantonal prosecuting authorities to play their part in an effective and efficient fight against international crime.



Chronology



1902

The Federal Department of Justice and Police organisation act organises the Department into a Justice Division and four further divisions. "In addition to the considerable workload generated by the project to unify civil and criminal law, the number of motions being introduced with a view to enacting new Federal legislation or amending existing legislation has mushroomed in recent years", noted the Federal Council in its Message to Parliament. However, the new bill makes no provision for the creation of any additional posts for the time being. In 1902, the Justice Division consisted of the Divisional Head for Legislation and Administration of Justice, one Grade I Deputy, one Grade II Deputy, the Secretary for the Commercial Register, the Secretary for Civil Records and a Registrar.



1905

In 1905 Professor Walther Burckhardt (1871–1939) takes over as Head of the Justice Division. In the same year, his major commentary on the Federal Constitution is published. Burckhardt's predecessor, Alexander Reichel (1853–1921), the first head of the Justice Division, is appointed a judge of the Federal Supreme Court. Before entering the federal administration, Reichel too was a university professor alongside his other activities as first president of the Swiss social democrat party music theorist and composer (!). Burckhardt and Reichel early on established a tradition of close interaction between practice and theory that still characterises the staff of the FOJ today. Over twenty law professors in Swiss law faculties have been drawn from the ranks of the FOJ.



1912

In 1907, following several years of consultations in various commissions and committees, Parliament enacts the Civil Code, setting out the law of persons, family law, the inheritance law and the law of property. After the cantons adopted the necessary implementing legislation, this "product of years of aspiration and perspiration" finally entered into force in 1912, thereby unifying the whole of civil law throughout Switzerland. One of the hallmarks of the Civil Code is its democratic and down-to-earth style. It was the intention of its author, Eugen Huber, that it should be addressed to the common man. He wanted it to be read and understood by the ordinary citizen and to be expressed in clear and plain language. The Swiss Civil Code has had considerable influence on the legal systems of other jurisdictions. A case in point is Turkey, which adopted a slightly modified version in 1926.



1923

The Federal Office for Land Registry (including the Surveyor's Office) – previously a separate division within the Federal Department of Justice and Police – is incorporated into the Justice Division. This takes place following the enactment of land survey legislation, the systematisation of land surveys and the introduction of land registries in the cantons. The Federal Surveyor's Office was subsequently moved twice more in the interests of synergy, first to the Federal Office for Spatial Development (1991) and finally to the Federal Office of Topography (1999).



1929

In the civil records field, 1929 sees the introduction of the family register. Thanks to a comprehensive official information system, it is now possible for the civil registry of every Swiss national's birthplace to keep an up-to-date record of his or her current civil status. The family register contains details of current family relationships and establishes who is a citizen of the municipality and canton and is thus entitled to Swiss citizenship. With this new register, the keepers of the civil records provide a service that is unique in the world to assist private individuals and official authorities where proof of civil status is required for the exercise of rights or the performance of obligations.



1936

After the adoption by Parliament in 1919 of the revised versions of the first two parts of the Contract Law (general provisions and individual contractual relations), the Federal Council undertakes a reform of the law of companies and securities. It introduces a bill in Parliament to amend Titles 24 to 33 (commercial companies, cooperatives, commercial register, company names, commercial accounting and securities) and subsequently proposes further amendments in the field of cheques and bills of exchange, in order to give effect in Swiss law to the Geneva Convention providing a uniform law for cheques and bills of exchange. The proposed amendments are adopted by Parliament in 1936.



1942

With the entry into force of the Swiss Penal Code, the patchwork of cantonal codes is replaced by a single body of criminal law. As late as 1941, just one year previously, the last civil execution to take place in Switzerland had been carried out in Sarnen. In its first review of the operation of the new system two years later, the Federal Council concludes that the transition from the diversity of cantonal law to a uniform Swiss system of criminal law had proceeded without disruption being caused by legal uncertainty. "Everywhere one finds goodwill and the desire to make the new law a success, although for courts and prosecution authorities alike it frequently means breaking with old and ingrained practices".



1967

This year sees the introduction of new legislation on federal funding for penal and reform institutions, which makes provision for reformatories to be approved and funded by the Confederation. Subsequently, as part of a reallocation of functions between the Confederation and the cantons, the operating subsidies are brought within the scope of the amended Federal legislation on the funding of prisons and detention centres. The aim is to improve the quality of reform institutions and to coordinate the availability of places in reformatories. As from 1985 there is provision for the Confederation to fund pilot projects in prisons and reformatories and youth services.



1968

After many years of preparatory work by a review commission (from 1958 to 1965), in 1968 the Federal Council decides to appoint a committee of experts to undertake a stage-by-stage reform of the family law sections of the Civil Code. The aim is to bring the family law provisions, which had remained unchanged since 1912, into line with the profound changes in society and in attitudes that had taken place since the Civil Code was first introduced.



1971

In 1971, the general part of the Penal Code is amended so as to provide for alternative forms of criminal punishment (semi-freedom, semi-detention) and for the possibility of suspending prison sentences of up to 18 months. A revision of the law applicable to juvenile offenders introduces the concept of community service for young people. New forms of crime necessitate the creation of new offences and changes to the special part of the Penal Code: insider trading (1988); money laundering (1990); membership of a criminal organisation, power to seize criminal assets and reporting right for financial intermediaries (1994); cybercrime and cheque and credit card abuse (1995). The main emphasis in the new sexual offences legislation (1992) is on the protection of the sexual autonomy of adults and the undisturbed sexual development of the young.



1973

In line with the easing of tension between Church and State, the special church-related provisions dating from the era of the Kulturkampf are abolished one by one. In 1973 the removal of the Jesuits and monasteries article is approved by the people and by the cantons. With the entry into force of the new Federal Constitution, the rule barring members of the clergy from standing for election to public office becomes a thing of the past. Finally, in 2001 the electorate and the cantons vote to abrogate the diocese article, which provides that dioceses can be established only with the authorisation of the Confederation. This removes the last special church-related provision from the Federal Constitution.



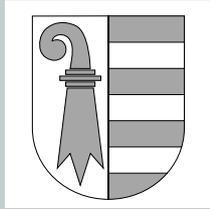
1974

The Justice Division is reorganised into three new main divisions. The first main division is responsible for legislation in the field of public and administrative law and performs an advisory role in the preparation of all major legislation by any section of the Federal administration. The second main division is primarily concerned with the operation of the existing law. A special unit within the division prepares the appeal decisions of the Federal Council. This division is also responsible for legislation in the field of criminal law. The third main division is responsible for legislation in the field of civil law, civil procedure law and execution. Attached to this division are the Commercial Registry Office, the Federal Office of Civil Status and the Federal Office for Land Registry.



1974

Following Switzerland's ratification of the European Convention on Human Rights in 1974, a Council of Europe affairs unit is established within the FOJ with responsibility for advising on any cases brought against Switzerland and representing Switzerland before the European Court of Human Rights. In 1989 this function and the other international functions of the agency – private international law and European Community law – are brought together in a new International Affairs Division.



1978

In 1978, by a large majority, the people and the cantons approve the creation of Switzerland's 23rd canton and in 1979, the Canton and Republic of Jura becomes sovereign. However the establishment of the new canton does not put an end to the Jura question. In 1994, in order to resolve the Jura conflict politically, the Federal Council and the governments of the cantons of Bern and Jura sign an agreement on the institutionalisation of the inter-Jura dialogue and the establishment of the *Assemblée Interjurassienne*. At Federal level, it is the FOJ that has responsibility for this issue.



1978

Following the comprehensive overhaul of adoption law with a view to making the welfare of the child the paramount consideration (1973), the remaining parts of the Swiss children's act are amended in 1978. The abolition of the distinction between "legitimate" and "illegitimate" children attracts interest beyond Switzerland's borders. The concept of "paying paternity", whereby the father of a child born out of wedlock is merely obliged to pay maintenance until the child's 18th birthday, becomes a thing of the past. The legal position of the child is substantially improved in other respects also. Furthermore, married parents are now placed on an equal footing in relation to the exercise of parental responsibility.



1979

The administration organisation act does not include provision for the creation of the proposed "Federal Office for Legislation". This new agency would have taken over responsibility for legislation at constitutional level and would have fulfilled an advisory and coordinating role for all Federal legislation. However, the Federal Council takes the view that the Justice Division should be involved from the outset in all legislative proposals under preparation at Federal level so as to ensure consistency in legislation. An important step in this direction had been taken with the reorganisation of the Justice Division in 1974. The administration organisation act changes the titles of the Federal agencies: the Justice Division is renamed the Federal Office of Justice.



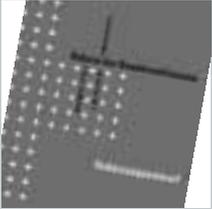
1988

The revision of the laws governing marriage (general legal effects of marriage and matrimonial property law) and divorce constitute another two important stages in the reform of family law. The new marriage act (1988) enshrines the principle of the legal equality of husband and wife in marriage and makes both spouses responsible for their joint well-being. The new divorce act (2000) introduces the possibility of divorce by mutual agreement. In addition, either spouse can petition unilaterally for a divorce after four years' separation. The grounds of divorce and its effects are made independent of the issue of which spouse is to blame. The final step in the reform of family law legislation is a radical overhaul of the law of guardianship.



1991

In 1991, following many years of preparatory work – the first report on the reform of company law was submitted to the Federal Council in 1966 – the revised Title 26 of the Contract Law is passed by Parliament. The amended provisions, which are found to work well in practice, have five objectives: increased transparency, greater shareholder protection, improving the structure and function of corporate governance, easier capital-raising for companies and the prevention of abuse. With the exception of the aim of achieving greater transparency in the accounts of limited companies, where further amendments to the law are now in progress, all these objectives have been achieved.



1999

The text of the Federal Constitution of 1874, which after 163 amendments has lost its coherence and become difficult to understand, and which contains many antiquated and superfluous provisions, is replaced by a completely new document. The new Federal Constitution approved by the people and the cantons in 1999 reflects the modern constitutional realities. Previously unwritten law is now set forth explicitly in the Constitution, including a number of fundamental rights and the concept of partnership-based federalism that is practised in Switzerland today. The existing constitutional law is set out clearly and in meaningful sections. Legal certainty is substantially enhanced. The language of the provisions is in line with current usage and the provisions are formulated in terms that are easier to understand than was previously the case. A number of amendments were also added by Parliament.



2000

The reform of the justice system approved by the people and by the cantons paves the way for several fundamental changes to be made to the rules of procedure and the courts system: it provides the constitutional basis for the unification of both civil and criminal procedural law, it confers a constitutional right of access to an independent court on all citizens involved in a legal dispute of any kind, subject to certain qualifications, and it provides the basis for a reform of the courts system. It proposes to restructure the Federal judiciary completely in order to bring about an effective and lasting reduction in the workload of the Federal Supreme Court and the Federal Insurance Court.



2000

As part of the reorganisation of the police system at Federal level, the Federal Office of Police is restructured as an agency responsible solely for police matters. The units not concerned with police matters are transferred to the FOJ. These are the Division for International Mutual Legal Assistance, the Swiss Criminal Records unit, the Gaming and Lotteries unit and Social Aids for Swiss Citizens Resident Abroad.

Quotations: reports of the Federal Council

FOJ keywords

Constitutional and Administrative Law

- Legislative support
- Legal opinions
- Government reform
- Ombudsman
- Equal treatment of disabled
- Public access to documents
- Lotteries and gaming
- Victim assistance
- Data protection
- Federalism
- Guarantee of cantonal constitutions
- Jura, Conférence tripartite
- Citizens' rights
- Freedom of movement of attorneys
- Church-State relations
- Federal Constitution
- Legislation methodology
- Legislative guidelines
- Legislative training
- Law evaluation

Private Law

- Swiss Civil Code
- Adoptions
- Marriages
- Matrimonial property law
- Divorce
- Recognition of same-sex couples
- Inheritance law
- Guardianship law
- Reproductive medicine
- Human genetic testing
- Law of contract
- Liability law
- Labour law
- Landlord and tenant law
- Consumer protection law
- Consumer credit act
- Electronic business
- Digital/electronic signatures
- Insolvency law
- Law of civil procedure, unification
- Federal Office of Civil Status
- Infostar
- Federal Office for Land Registry and Real Estate Law
- Acquisition of real estate by non-Swiss
- Agricultural real estate and rental law
- Federal Commercial Registry Office
- Company law
- Merger act
- Limited liability company act
- Accounting
- Zefix: Central Business Names Index
- Company research

Criminal Law and Appeals

- Penal Code, general part
- Penal Code, special part
- Juvenile criminal law
- Supplementary penal provisions,
- Abortion
- Sexual offences
- Assisted suicide
- Trafficking in persons
- Organised crime
- Corruption
- Money laundering
- Cybercrime
- Terrorism
- Genocide
- International criminal law
- Law of criminal procedure, unification
- Execution of sentences and measures
- Construction funding to correctional institutions
- Operating funding to youth correctional facilities
- Financing for pilot schemes
- Central criminal records
- Extracts from central criminal records
- Administrative procedure law
- Federal administration of justice, full revision
- Federal Criminal Court, creation
- Federal Administrative Court, creation
- Appeals to the Federal Council (esp. under health insurance law and the grant of licences)

International Affairs

- European Court of Human Rights
- UN Covenant on Civil and Political Rights
- UN Committee Against Torture
- Council of Europe
- French-speaking countries, legal collaboration
- Community law (EU/EC)
- European compatibility examination
- Schengen
- Legal assistance in civil matters
- Private international law and international law of civil procedure
- International law of persons and family law
- Int. child protection
- Int. adoptions
- Int. child abductions
- Int. trade and procedural law
- Lugano Convention
- Social aid for Swiss citizens resident abroad

International Legal Assistance

- Extradition
- International search
- Assumption of prosecution
- Execution of sentence
- Transfer
- Legal assistance in criminal matters
- Sharing
- Treaties
- International Court of Justice
- elorge: database of Swiss localities and courts

Central Services

- Personnel
- Finance
- Operations
- Records management
- IT planning
- IT procurement
- Legal data processing
- Computer law
- eGovernment