

European Constitutional Law in Action: Visiting a Public Debate at the Swiss Federal Supreme Court

*by Dr. Marc Forster**

I. THE FUNCTIONS OF THE SWISS FEDERAL SUPREME COURT WITHIN THE SWISS FEDERALIST LEGAL SYSTEM

The Swiss Federal Court is at the same time the highest court of appeal on issues of federal law and the constitutional supreme court of Switzerland.

Somewhat similar to the U.S. system, the Swiss political system is based on a division of powers and competence between the Federation (the Swiss central administration) and the twenty-six Swiss cantons, which are principally sovereign. This division of powers, established by the Federal Constitution of 1848, is called the "Swiss federalist system." The distribution of competence between the cantons and the federal central administration is relatively simple: federal powers must be expressly granted by the Constitution.¹ Examples of federal legislation are the military, the nuclear industry, construction of national highways, the federal railways, and social security matters. The basic civil and criminal statutes are principally federal laws. However, the cantons hold the jurisdiction of lower instance and follow their own procedure. As a result, there are twenty-six different statutes of civil and criminal procedure in Switzerland—making the lives of practicing lawyers difficult. The cantonal law courts do apply the same substantive federal civil and criminal law.

Federal law is legislated by the Federal Parliament (Federal Assembly) and executed by the Federal Government (Federal Council). Also there are several kinds of direct democracy in Switzerland. For example, a petition signed by 50,000 citizens (called a referendum) automatically entitles the petitioners to have a federal statute brought to a vote by all Swiss citizens. In such case, the federal statute is adopted if a simple majority of the citizens vote for it. Any amendment

* Attorney-at-Law, Secretary of the Court, Swiss Federal Supreme Court, Lausanne, Switzerland.

1. BUNDESVERFASSUNG [Constitution] [BV] art. 3 (Switz.).

of the Federal Constitution requires a majority of the voting citizenry and a majority of the cantons.

What is the function of the Swiss Federal Court within this political and legal system?²

In civil and criminal law, the Swiss Federal Court mainly assumes the function of the highest court of appeal. This means the Court reviews how the cantonal law courts apply the substantive federal civil and criminal law. Administrative law matters are more complicated because the power of the cantons is broader. Most of the public services are left to cantonal legislation and organization. Public services include education, social welfare, the police, and private and public construction.

There is a division of legislative and administrative powers between the federal central state and the cantons. The Constitution declares and establishes issues of federal concern, and leaves the rest to the cantons. This dichotomy creates a vast field of possible litigation matters. The first problem may be, What was meant to be a cantonal issue and what a federal issue? Does the Constitution declare the subject federal or not? Also, the application of federal law can be contested, as cantons are often legally obligated to execute the federal law. For example, if the Federation decides to build a national highway, the cantons must keep and control that highway. When litigants disagree on the proper execution of federal law the Federal Court must decide whether federal law was correctly applied.³

Finally, and most importantly, the Swiss Federal Court supervises the strict observation of the human rights and individual liberties guaranteed by the Constitution,⁴ e.g., article 4 of the Swiss Constitution (equal liberty of all people). It does so even in completely cantonal affairs. Where cantonal law is applicable, however, the so-called judicial "cognition" of the Swiss Federal Court is restricted. In other words,

2. There are only a few academic articles existing in English on the functions of the Swiss Federal Supreme Court. See Christoph Leuenberger, *The Swiss Federal Court* (with a special reference to its library), 5 INT'L J. L. LIBR. 339 (1977); Fred L. Morrison, *The Swiss Federal Court: Judicial Decision Making and Recruitment*, in FRONTIERS OF JUDICIAL RESEARCH 133 (Joel B. Grossman & Joseph Tanenhaus eds., 1969).

3. The Swiss Federal Court reviews the application of the federal law by the cantonal and some federal authorities. The federal laws — based on direct democracy — are binding on the Court. The democratic elements in the Swiss political system leave less important significance to the "rule of law concept" established in the United States in decisions like *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Leuenberger, *supra* note 2, at 342.

4. Switzerland adopted the European Convention on Human Rights in 1974 in its constitutional law after the convention's ratification.

the cantons are free in their own affairs, but they must respect elementary constitutional rights. Basically, any person who feels individually wronged by an act of the authorities can appeal to the Swiss Federal Supreme Court and invoke its jurisdiction to protect individual constitutional rights and liberties.

II. THE ORGANIZATION AND APPOINTMENT OF THE SWISS FEDERAL COURT

The thirty federal judges making up the Court are elected for a period of six years by the Federal Assembly. The selection of the federal judges is a product of the typical Swiss pattern of democracy by accordance. This means that the major political parties determine the composition of the Federal Court about the same way as they allot the seats in the Federal Government. In the Swiss Federal government, accordance means that all major political parties are represented at the same time; the same applies to linguistic and cultural regions. In addition, the Federal Constitution stipulates that the Parliament has to consider judges who will represent all three official languages: German, French, and Italian. At present, the Federal Court is made up of nineteen German, nine French and two Italian-speaking judges.

The idea of accordance also explains why the linguistic minorities are over-represented and why an effort is made to select judges from an evenly distributed number of regions. Overrepresentation of minorities means that the French speaking population, for example, is represented by two out of seven members of the Federal government. That number is more than the percentage of the French-speaking Swiss population. The parliamentary control is ensured by the obligation of the Court to report annually to the Federal Assembly and by the requirement of reelection by the Parliament after a period of six years. However, it is extremely rare for a federal judge not to be reelected. Beyond this formal supervision, the Parliament exercises no control over the Court's judgments.

The thirty judges never all join to sit on the same case. Instead, the Court is divided into six permanent chambers or divisions, each of which has jurisdiction over cases pertaining to a specific subject matter. There are two public law divisions: one for constitutional law and one for administrative law, composed of seven and six judges, respectively. There are two civil (private) law divisions of six judges each, which function mainly as courts of appeal in civil matters. There is a debt execution and bankruptcy law chamber of three judges and, finally, a criminal law division, which is composed of five judges and which mainly hears appeals in criminal law matters.

III. ORAL ARGUMENT AND THE DECISION MAKING PROCESS

The procedure in the Court is almost exclusively based on written statements. Once the parties have filed their statements, the presiding judge appoints a judge-reporter for the case. The presiding judge or a judicial clerk under the judge's supervision prepares a report containing the essentials (facts, jurisdiction, etc.) of the case and an outline of the reporter's opinion. This report is submitted to the other judges who are assigned to hear the case. About two weeks later, the case comes up for oral argument, usually in a public session. Unlike in most of the rest of the world, the discussions and deliberations among the judges are held in public. This is unique to the Swiss Federal Supreme Court, which might provide interesting insights to foreign constitutional lawyers. In most other European supreme courts, only the hearings of the parties are public and the judges withdraw for private deliberation.

The Swiss Federal Court's session is opened by the presentation of the judge-reporter's view, followed by a general discussion. After each judge has given a final statement, a vote is taken by show of hands. In non-controversial cases, however, a summary procedure is carried out without any debate.

During the sessions, the judges and clerks wear dark suits, not the robes traditionally worn by judges in many other countries. This custom is a reflection of Switzerland's democratic tradition: the federal judge is expected not to differ from ordinary people.

The Federal Court usually proclaims its decision in the language of the lower court from which the appeal came. In debates and written statements, each member of the Court uses his native language, and judges and clerks are expected to read and understand all three of Switzerland's official languages. There are no facilities for translation.

A session of the first public law division on constitutional law shall now be described. The disputed matter is a conflict of competence between a Swiss municipality and the Swiss Canton of Grisons.

IV. MUNICIPALITY OF VELLA V. CANTON OF GRISONS⁵

Vella is a small village situated in the Swiss mountains in the Canton of Grisons. E.G. owns an apartment house in Vella, which has six rental units. When he built this house in 1989, he had to apply for a building permit with the local authorities of Vella. He was issued

5. See 1P.160/1991 (Jan. 15, 1992) (conflict of competence in building law).

a permit, but it was restricted by specific conditions. The main condition was that the apartment on the ground floor had to be rented to persons living in the community of Vella. The authorities of Vella wanted to avoid the village being sold out to foreigners. Many Swiss holiday villages in the Alps are facing the problem of their houses and apartments being sold as vacation homes to non-resident city dwellers and foreigners. This results in the native inhabitants of these villages being unable to find apartments, and the villages being deserted when holiday season is over. The local authorities are attempting to remedy the situation by imposing building restrictions which require that a certain percentage of housing space be reserved for those who live and work in the community.

When E.G. constructed the house, he violated the conditions of the building permit. Instead of reserving the whole apartment on the ground floor for a local renter, he divided the apartment into two flats and leased one of them to a foreigner. The local authorities of Vella ordered E.G. to immediately restore the apartment to its former state and to comply with the provisions of the building permit. E.G. appealed the Community of Vella's order to the Cantonal Administrative Court. The Cantonal Court vacated the order of the municipality. The cantonal judges stated that the order to restore the apartment building to its former status and to reserve the entire ground floor apartment for a native citizen was not adequate and too restrictive. They also stated that there was no legal basis for such restrictions.

The Municipality of Vella appealed the decision of the cantonal court to the Swiss Federal Court. The community argued that the cantonal judges had interfered in a sphere of local concern and that the cantonal court was wrong in stating that the order to restore was not proportional. In other words, the Community of Vella objected to a violation of its freedom to regulate as a legal entity, i.e., its communal autonomy.

According to Swiss constitutional law, a Swiss municipality can appeal to the Federal Supreme Court when the canton violates its legal autonomy. A Swiss local community has the right to regulate if there is no substantive cantonal law to the contrary. If the cantonal legislature leaves a legal issue to the municipalities, the municipalities have the authority to decide the issue. As a result, the Federal Court in this case only had to decide whether the disputed matter was left to the municipality and, if so, whether the order of the Community of Vella was in accordance with constitutional law.

The reporting judge, Mr. Justice Spühler, was of the opinion that the local communities in the Canton of Grisons are free to apply the

communal building law as long as cantonal and federal building laws are respected. The cantonal court therefore violated the Constitution because the order to respect the building restrictions was in accordance with the cantonal and federal law. The reporting judge found that the order was in accordance with the constitutional principle of proportionality. The federal judges of the First Public Law Division⁶ discussed this aspect in public. The judges considered the fact that the landlord did not act in good faith when he disregarded the restrictions in the building permit. In the judge-reporter's opinion, E.G.'s argument that the restrictions in the permit had no legal basis was invalid. E.G. appealed the order to restore the apartment, not the restrictions in the building permit. He had the option to take legal action against these restrictions, but failed to do so. The judges also took into consideration that the objective of reserving apartments for the housing of native citizens responds to a legitimate interest of the mountain villages. Based on this reasoning, the Federal Supreme Court admitted the petition and found for the Community of Vella.⁷ E.G. was ordered to restore his apartments to their former state.

This example demonstrates that the Swiss federalist system leads to a very broad competence and autonomy of cantonal, regional and local authorities. Some constitutional lawyers consider this to be a democratic quality which other European nationalist and centralist systems are still lacking, and an example for others to aspire to.

6. Justices Egli (President of the Chamber), Kuttler, Schmidt, Spühler (Reporting Judge) and Aemisegger.

7. In its decision of January 15 1992 (1P.160/1991) the Swiss Federal Court cancelled the sentence of the Cantonal Administrative Court.