

**The Paths to the Swiss Federal
Supreme Court
An Overview of Switzerland's
Judicial System**

Bundesgericht

Tribunal fédéral

Tribunale federale

Tribunal federal





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Preface

The aim of this brochure is to give a brief presentation of the judicial system in Switzerland. Its role is to show, in the simplest possible terms, the existing courts, how they function, what they are competent to do, as well as how to lodge an appeal with them. In doing so, certain simplifications were nevertheless unavoidable.

The judiciary in Switzerland can be divided into three main areas:

- Civil matters;
- Criminal matters;
- Administrative matters.

Legislation in civil and criminal law has long been under the jurisdiction of the Swiss Confederation. However, it is only since 2011 that the same rules are binding for the conduct of civil or criminal proceedings throughout Switzerland. Basically, these procedures are now implemented uniformly in all cantons. Nevertheless, the cantons are still responsible for the organization of their own courts. Hence, their organisation continues to be characterised by considerable variety.

In administrative law, the Confederation and the individual cantons independently determine which laws and procedural rules apply in their specific area of competence.

I. Proceedings and Courts

A At the Cantonal Level

1 Civil Law

a Introduction

Civil law regulates the legal relationship between individuals and essentially equivalent persons. On the one hand, these “private persons” include “flesh and blood” people, and on the other hand so-called “legal persons”, such as associations or corporations. Civil law encompasses, for example, matrimonial and family law, inheritance law, as well as employment, tenancy or stock company law.

A person seeking legal recourse in a civil law case must file a lawsuit with the competent court. In court, the parties to the dispute must explain what they claim, why they are doing so and produce evidence to corroborate their version of the facts. Only in exceptional cases does the court itself conduct investigations in order to determine the decisive facts. This is the case, for example, in divorce proceedings, when the interests of children are involved.

Depending on the nature and amount of the dispute in a civil lawsuit, the plaintiff must first appeal to either the conciliation authority, a court of first instance or the upper cantonal court.

There are specialized courts for certain areas of civil law. These include, for example, landlord tenant courts and labour courts or the commercial courts, which exist in some cantons (Zurich, Berne, St. Gallen and Aargau).

b Conciliation Authority

Before an appeal can be lodged with a court, dispute resolution through a conciliation procedure should usually be conducted (exceptions are possible, e.g. in the case of a divorce). The aim of this negotiation is, if possible, to settle the dispute at an early stage by mutual agreement and in a cost-effective manner. Depending on the canton, a justice of the peace, a mediator or even a court of first instance is responsible for the attempt at conciliation. If the disputed amount is less than SFr. 2,000 and no amicable agreement is reached, the conciliation authority will render an initial decision at the request of the plaintiff.

c Civil Court of First Instance

Anyone wishing to make a civil claim has to file a lawsuit with the court of first instance, after their attempt at conciliation. The defendant party will be informed by the court that a lawsuit has been filed and will be asked to submit their defence answer. Depending on the circumstances, the parties to the dispute may later submit additional written observations on the submissions of the adverse party.

When reaching its decision, the court either completely or partially upholds the claim or rejects it. The court reaches its decision on the basis of its appreciation of the presented evidence and of its legal assessment of the case.

The courts of first instance have different names depending on the canton; in German they are called, for example, *Bezirksgericht*, *Amtsgericht* or *Kreisgericht*. Their decisions may be appealed to the upper cantonal court.

d Civil Court of Second Instance

In the case of an “appeal” (*Berufung*), the court of second instance comprehensively reviews the contested decision. In the case of a “complaint” (*Beschwerde*), the court can only freely examine the correct application of the law, whereas the facts established by the lower court can only be examined to a very limited extent.

Depending on the canton, the cantonal court of second instance carries different names (e.g. in German *Kantonsgericht*, *Obergericht* or alternatively in French *Cour de justice*). In certain areas of law, such as unfair competition or intellectual property disputes, there is only one single cantonal instance.

Decisions of upper cantonal courts can, under certain conditions, be appealed to the Swiss Federal Supreme Court.

2 Criminal Justice

a Introduction

If someone is suspected of having committed a criminal offence, a criminal case is opened. In the pre-trial proceedings, the police initiate criminal investigations and the prosecutor opens an inquiry. If there are no sufficient grounds for suspicion that a crime has been committed, the proceedings are closed. Such a dismissal may, under certain conditions, be contested by the parties or by other participants to the proceedings. If the prosecution concludes that there is sufficient evidence of the commission of a criminal offence, an indictment

is filed with the court. The public prosecutor's office applies the following principle: "In case of doubt, charges are to be filed" (*in dubio pro duriore*).

Under certain conditions, minor offences can be dealt with directly by the prosecutor's office, which issues a penalty order. The purpose of the summary penalty order procedure is to deal efficiently with mass and minor offences (e.g. road traffic offences). It is only if the person concerned files a complaint against the penalty order rendered by the prosecutor that a court reviews the case. Today, more than 90% of all criminal cases are terminated by this summary penalty order procedure.

There is also the possibility of a so-called "summary procedure". If the appropriate conditions are met, the defendant and the public prosecutor's office agree on the concrete criminal charge and punishment. Such agreements must be approved by a court. The summary procedure is excluded, if the public prosecutor's office requests a prison sentence of more than five years.

If the defendant is a minor at the time of the crime, the case is judged by a juvenile court. In certain cantons, there is also a specialized court for economic crimes (fraud, falsification of documents, etc.).

In criminal proceedings, the so-called inquisitorial principle applies. This means that the authorities themselves seek the truth and are not bound by the claims of the persons involved in the proceedings. The authorities are obliged to seek both incriminating and exonerating material.

b Criminal Court of First Instance

If the public prosecutor brings charges, a court decides in the main proceedings, whether the person concerned is guilty of the alleged offence. If the court concludes that this is the case, it imposes a sanction. Possible sanctions are a fine, a monetary penalty or a prison sentence. Fines or imprisonment can be suspended for a probationary period. The punishment can be combined with a measure, for example, the obligation to undergo a therapy. If necessary, the criminal judge decides on the further possible consequences in connection with the offence, such as the confiscation of assets, gained as a result of the crime.

If the court comes to the conclusion that the defendant has not committed any offence, it pronounces a verdict of acquittal. The acquitted person can file for compensation from the state for the wrongful investigative custody.

c Criminal Court of Second Instance

First-instance convictions can be appealed to a second instance court (in German *Obergericht* or *Kantonsgericht*). The convicted person, the public prosecutor and, under certain conditions, the victim or other persons who have been harmed by the crime can all file an appeal. Criminal judgements issued by a second cantonal instance can be appealed to the Swiss Federal Supreme Court.

3 Administrative Law

In an administrative dispute at the cantonal level, private individuals contest rulings issued by a municipal or cantonal authority. These include building permits, taxes, the withdrawal of driving licenses or the collection of fees. Often, but not always, there is initially the possibility of an internal recourse procedure. Subsequently, the persons concerned can file a complaint with the cantonal administrative court. There is only one administrative court in each canton; in most cantons (16), the administrative court is integrated into the cantonal court or the high court of appeal.

B At the Federal Level

1 The Swiss Federal Supreme Court

a Introduction

The Swiss Federal Supreme Court is the highest judicial authority in Switzerland. It adjudicates, in last instance, appeals of rulings of the high cantonal courts of appeal, the Federal Criminal Court, the Federal Administrative Court and the Federal Patent Court. The concerned areas of law are civil law, criminal law and administrative law. The violation of federal law, international law, inter-cantonal law or constitutional rights can be invoked. The facts of the case – that is to say, the facts at the basis of the dispute – can only be contested, if they are established in a manifestly incorrect manner or in violation of federal law.

The Federal Supreme Court's jurisprudence ensures the uniform application of federal law throughout the country. Its decisions contribute to the continued development of the law and its adaptation to changing circumstances. The other courts and the administrative authorities comply with the Federal Supreme Court's case law and adopt its principles.

Proceedings start at the Federal Supreme Court, when an appeal is lodged. Subsequently, the adverse party is invited to comment on the appeal (first exchange of submissions, which, if necessary, is followed by a second exchange). In principle, court hearings in which the parties and witnesses are heard or in which lawyers plead the case no longer take place at the Federal Supreme Court level. In cases where the justices participating in the decision are unable to reach a unanimous decision, a public hearing is held. At the end, the panel of justices votes by show of hands on the various solutions proposed.

In some rare lawsuits (disputes between the cantons or between a canton and the Federal Government), the Federal Supreme Court decides as the first and only instance.

b Appeals in Civil Matters

Before a civil case reaches the Federal Supreme Court, it has usually already been judged by two cantonal courts. In order to file a lawsuit for property disputes, the amount in dispute must equal at least SFr. 30,000. Employment and tenancy law are the exception, where a lower amount in dispute of SFr. 15,000 suffices. Regardless of the amount in dispute, the Federal Supreme Court adjudicates all cases in which a legal question of fundamental importance arises.

An appeal in civil matters may also be filed to contest decisions in debt collection and bankruptcy cases, as well as administrative decisions, directly related to civil law, for example, a decision by an authority to grant or refuse a name change.

c Appeals in Criminal Matters

The Federal Supreme Court adjudicates appeals in criminal cases, which are brought against judgements of the high cantonal courts of appeal and against decisions of the Federal Criminal Court. As in civil matters, the facts of the case, which the lower court has found to be proven, can only be reviewed to a very limited extent by the Federal Supreme Court. Civil claims related to the criminal case (for example claims for damages or compensation for pain and suffering) may be invoked in the same appeal.

d Appeals in Public Law Matters

Rulings handed down by the cantonal administrative courts, by the cantonal social insurance courts and (with some exceptions) by the Federal Administrative Court can be contested by filing an appeal in public law matters with the Federal Supreme Court.

e Constitutional Jurisdiction / Subsidiary Constitutional Appeal

Within the framework of the appeals submitted to it, the Federal Supreme Court also reviews complaints relating to infringements of people's constitutional rights. The European Convention on Human Rights (ECHR) and other international treaties complete the guarantees of fundamental rights contained in the Federal Constitution. If no ordinary appeal is admissible (e.g. because the dispute does not reach the threshold of the contested amount), cantonal judgements may be challenged for violation of constitutional rights with the subsidiary constitutional appeal.

Federal laws must also be applied by the Federal Supreme Court, even if they violate the Federal Constitution. Nevertheless, in such cases the Federal Supreme Court is allowed to declare their incompatibility with the Federal Constitution. On the other hand, the Federal Supreme Court may fully review the compatibility of cantonal laws with constitutional law.

2 The Federal Administrative Court

The Federal Administrative Court came into existence in 2007 and replaced the former Federal Commissions of Appeal and the complaints bodies of the different federal departments. Since mid-2012, its headquarters are in St. Gallen. The Federal Administrative Court adjudicates, in the first instance, appeals against rulings of federal authorities. It deals with legal issues from a variety of areas such as the environment, transport, energy or taxes; education and economy; competition, social security or health care; through to citizenship, aliens and asylum law. Its rulings can, in some cases, be appealed to the Federal Supreme Court.

3 The Federal Criminal Court

The Federal Criminal Court in Bellinzona is comprised of a Criminal Chamber, a Lower Appeals Chamber and a Higher Appeals Chamber. In the first instance, the Criminal Chamber rules on criminal offences that fall under federal jurisdiction (including terrorism, offences involving explosives and illegal intelligence activities, money laundering, organized crime, cross-border economic criminality). The new Higher Appeals Chamber constitutes the second instance for criminal matters at the federal level. Final criminal judgements of the Federal Criminal Court can be appealed to the Federal Supreme Court.

The Lower Appeals Chamber is competent to hear appeals against procedural decisions or acts of federal law enforcement authorities, as well as against decisions by the coercive measures courts. It is also competent to decide on conflicts of jurisdiction between law

enforcement authorities and to adjudicate appeals on international legal assistance in criminal matters. Decisions concerning legal assistance can only be appealed, to a limited extent, to the Federal Supreme Court.

4 The Federal Patent Court

The Federal Patent Court adjudicates, in the first instance, civil disputes concerning patents. Its decisions can be appealed to the Federal Supreme Court. The Federal Patent Court commenced its activity in 2012 in St. Gallen.

5 Military Courts

Military courts essentially deal with crimes committed by members of the army when on duty. They apply military criminal law.

II. Judges, Lawyers and Fees

A Judges

Judges preside over trial proceedings. After examining the case file, hearing the parties and their lawyers, witnesses or experts, they review the complaint, the appeal or the accusation brought before them.

Depending on the nature of the matter to be reviewed and the instance, either a single judge or a panel of judges delivers a judgement.

In Switzerland, there is no compulsory basic training for judges. Although studying law is not a necessary requirement, it is the general rule. Justices of the peace are often persons who do not have a legal background but who, because of their common sense, enable parties to reach a mutually agreed solution. For the rest, people who hold the office of judges have generally completed a law degree. Federal justices are consistently accomplished jurists who look back on a long professional career, although this is not required by the Federal Constitution. As a rule, they previously served as judges in lower courts, as law professors, lawyers or as senior legal clerks.

At the cantonal level, the judges are elected by the people or the parliament or appointed by the court, depending on the canton and the type of function. They must be re-elected or reappointed periodically. Federal justices as well as judges of the Federal Criminal Court, the Federal Administrative Court and the Federal Patent Court are elected by the United Federal Assembly for a period of six years. They are re-eligible.

Judges must take utmost care when exercising their duties in order to decide impartially. If there is the mere impression of a conflict of interest, for example if judges are on friendly terms with a party to the proceedings, they must recuse themselves from the proceedings either on their own initiative or at the request of the adverse party.

B Lawyers

In Switzerland, persons seeking justice can represent themselves in all courts; there is no obligation to be represented by a lawyer in court. An exception applies only in certain criminal cases. In practice, representation by a lawyer is the rule, as soon as a dispute proves to be complex in nature.

Anyone who wants to work as a lawyer must have successfully completed a law degree and a bar examination. In order to represent clients, lawyers need to be registered in the official cantonal register of attorneys, which is then valid for the whole of Switzerland. Lawyers are often specialized in one or more areas of law, such as business, criminal, family or tax law. Lawyers must show restraint in the promotion of their professional activity. In many cases, several lawyers associate themselves in a law firm. Lawyers must be able to carry out their work independently and be free from conflicts of interest.

C Fees

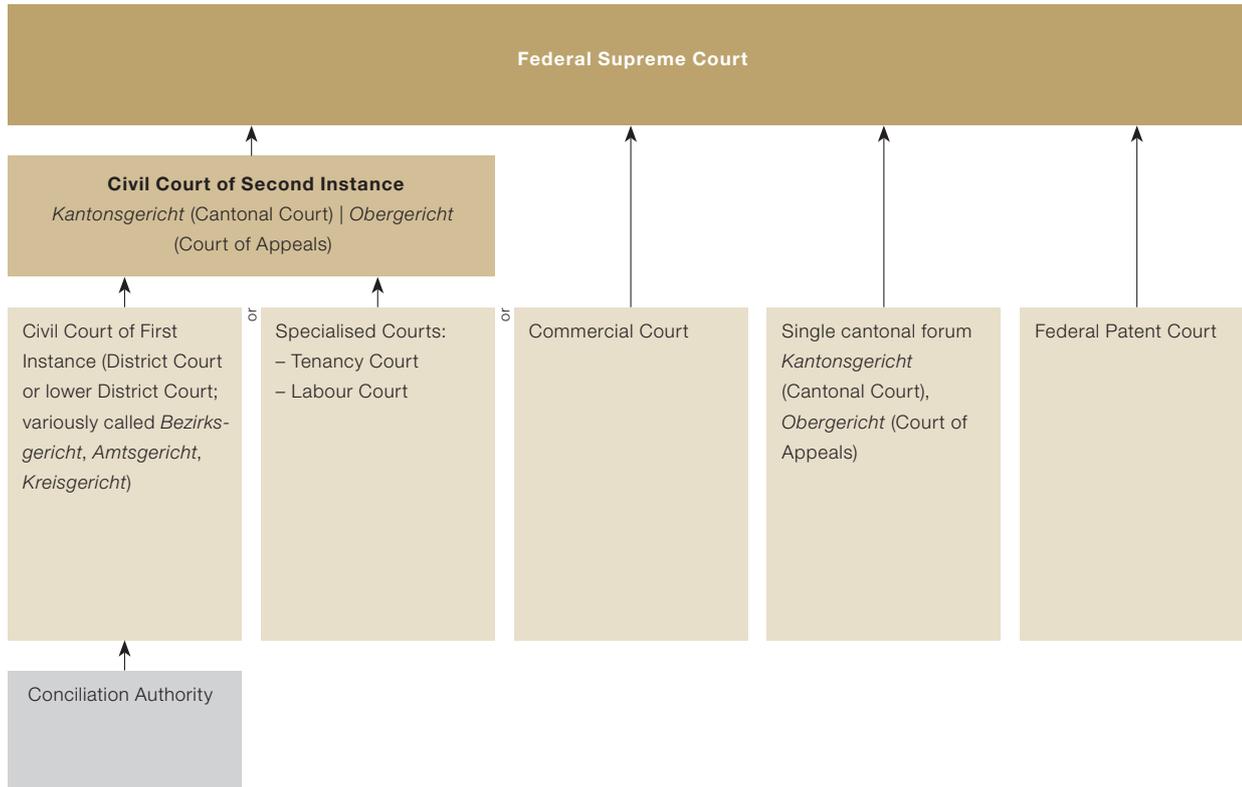
Costs are incurred when taking a case to court. They consist of court fees – the costs for the court's work – and the legal fees. In civil proceedings, with only a few exceptions (such as a divorce), the party who loses the case bears all the costs. Anyone taking legal action can be requested to pay an advance on costs. The court costs are governed by cantonal or federal law and vary according to the value in dispute as well as to the complexity of the case. If the adverse party does not have sufficient financial means, then the plaintiff runs the risk of not being reimbursed for his or her expenses, even if the outcome of the court case goes in their favour. Legal protection insurance can be taken out to protect oneself against the risk of costs incurred by a lawsuit.

If a party does not have sufficient financial means to take legal action, he or she may request free legal aid. The prerequisite is that the person concerned is effectively indigent and that the cause does not lack any prospect of success. In this case, the court costs incumbent to the petitioner are waived. If legal representation appears necessary, the person can also be provided with a free lawyer. The court and attorney's fees may later be reclaimed by the state, if and when the formerly needy party is able to reimburse them.

In criminal proceedings, if convicted, the defendant must pay the costs of the proceedings and his own legal fees. Even in the case of an acquittal, defendants may be obliged to pay the costs, if they have unlawfully and culpably caused the initiation of the proceedings or if they have obstructed their conduct. Otherwise, in the case of a full or partial acquittal, the defendants will be entitled to a reimbursement of their expenses for the appropriate and necessary exercise of their procedural rights. They may also claim compensation for economic losses, which result from the criminal proceedings and, if necessary, compensation for pain and suffering.

III. Schematic representation

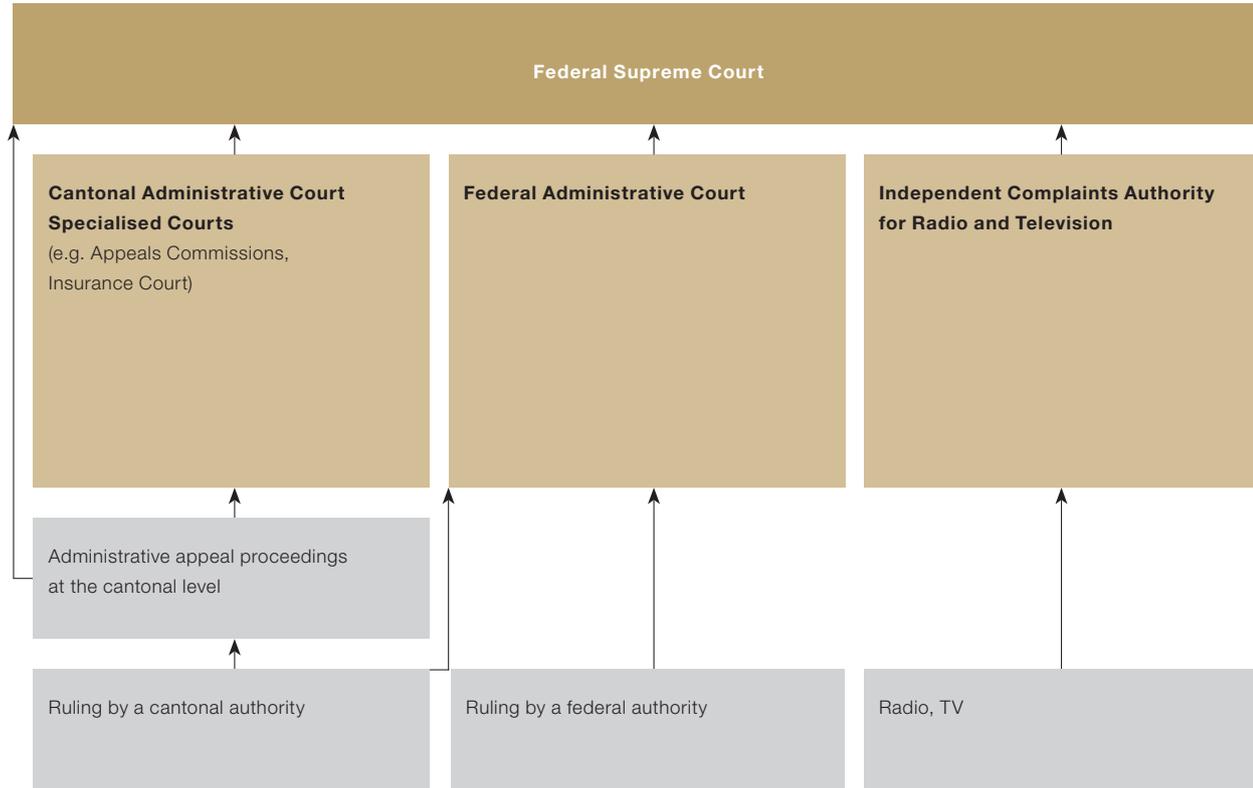
Civil Proceedings



Criminal Proceedings



Administrative Proceedings



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