

Legislation and Evaluation in Switzerland*

Felix Uhlmann**

Ladies and Gentlemen,

I must admit that my knowledge of Korean legislation and of your Institute is very limited. I am very grateful for the introduction today and would welcome any possibility to deepen my knowledge.

Overview (Slide 2)

The difficult question for my lecture was the following: What could possibly be of interest for you from such a small country like Switzerland whose population is already outnumbered by the population of Seoul? I was informed that all your activities concern evaluation and Regulatory Impact Assessments (IRA). In the second part of my lecture, I will therefore speak a little bit about how “evaluation” is understood and applied in Switzerland.

In the first part of my lecture, I would like to highlight some particularities of the Swiss legislative process. I have selected three issues: 1) Laws – as

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** Chair for Constitutional and Administrative Law, Legislation

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defined by the Swiss constitution, 2) the role of the government In the legislative process and 3) Referendum and initiative.

I will start with the provisions of the Swiss constitution. All three issues certainly concern constitutional questions but I will try to focus on the questions that are relevant for the legislative process.

Swiss Legislation (Slide 3)

Practical Note:

Most of the legal texts I am quoting in my lecture are easily accessible on the following site:

<http://www.admin.ch/dokumentation/gesetz/index.html?lang=en>

Many Swiss legal texts have been translated into English. However, English is not an official language of Switzerland. Only the texts in German, French or Italian have legal binding force. If you are interested in an overview over Swiss legislation, the official site of the Swiss government www.admin.ch provides an excellent offer.

Legislation (Definition) Art. 164 (Slide 4)

The first provision of the Swiss constitution I would like to have a closer look on is Art. 164. It may be interesting for you that our constitution contains a provision that actually defines the term legislation. In Art. 164 you can read:

“All significant provisions that establish binding legal rules must be enacted in the form of a federal act.”

The constitution further gives you examples where you might find

significant provisions that must be enacted in the form of a law. Don't get confused by the detail that Art. 164 speaks of significant provisions on one hand and fundamental provisions on the other. In the opinion of most legal scholars, significant and fundamental provisions are basically the same. This means that the message of Art. 164 of the Swiss constitution is quite simple: Every provision that is deemed significant must be enacted as a law. "Federal act" means an act adopted by the Swiss Parliament, in contrast to legal ordinances which may be enacted by the Swiss Federal Council, the executive branch, only.

"Legislative powers may be delegated", as you can read in Paragraph 2 of Art. 164. However, if a provision is considered significant, it must be clearly stated within the law.

From a legislative (and also from a constitutional) standpoint, the tricky question is to find out which provisions are really significant. As I have already stated, Art. 164 only gives you examples of areas where you might find significant or fundamental provisions. It does not offer a basis how to assess which provisions are significant and which are not.

Legislative theory and practice have developed several criteria for this assessment. It is certainly relevant how strongly we are affected by a legal provision. It is no coincidence that Art. 164 lists the rights and obligations of a person as a typical area where provisions may be significant. Important criteria are also the number of people affected by a legal provision as well as the financial and political consequences.

As a footnote, it may be discussed whether the Swiss Parliament can also

adopt insignificant provisions or provisions that are clearly unimportant. The answer is yes. Art. 164 prohibits as an expansion of the rule of the law that every significant provision must be enacted as a law. It does, however, not forbid the Parliament to enact provisions that are not deemed important.

If I am not mistaken, I have not found any provision in the South Korean constitution comparable to Art. 164 of the Swiss Constitution. The constitution simply states that the legislative power is vested in the National Assembly (Art. 40 of the South Korean Constitution). I assume, however, that there exists constitutional theory and practice to the question how the term "legislative power" is to be understood in Art. 40 of the South Korean constitution.

Executive Branch and Legislation (Slide 5)

Art. 181 of the Swiss Constitution is an innocent-looking provision which reads as follows:

“The Federal Council shall submit drafts of Federal Assembly legislation to the Federal Assembly.”

Art. 182 of the Swiss Constitution states that the Federal Council shall enact legislative provisions in the form of ordinances. We have already discussed this topic when looking at para 2 of Art 164, i.e. the delegation of power. The provision I would like to look at is Art. 181.

Looking at the origin of Swiss laws, you will discover that clearly over 90% of the bills are introduced by the Swiss Federal Council. The Swiss Federal

Council and the administration play a very important role in drafting legislation and preparing it for a parliamentary discussion. In South Korea, if my understanding is correct, bills may also be introduced by members of the National Assembly or by the Executive (Art. 52 South Korean Constitution).

I have also seen that the President may return a bill to the National Assembly and request it to be reconsidered (Art. 53 South Korean Constitution). Such rights are not known to the Swiss Constitution. However, it would certainly be interesting to discuss how many laws are of administrative origin and how many come from Parliament. In Switzerland, most laws clearly bear the handwriting of the administration.

Why is this so? The answer is not to be found in the constitutional text. It is a practical question. The Swiss parliament is one of the “cheapest” parliaments, at least in Europe. The Swiss parliament is not very well staffed. There are only a few working for the parliament compared to the large number working for the administration. (It is also true that members of the Swiss Parliament are relatively low paid. I do not say that their salaries are too low but you clearly don't get rich by becoming a member of the Swiss parliament.)

These practical aspects tip the balance of power in favour of the Executive branch. Its power to prepare laws and to introduce bills to the parliament is very significant. It is also noteworthy that in our legislative courses we spend much more time discussing the preparation of law within the administration, whereas the parliamentary process covers only a relatively small part of the education.

It is true that the parliament tries to extend its powers towards the administration. It was lately discussed whether the parliament should have a veto power over ordinances of the Federal Council. It is also true that the Federal Assembly is better equipped with staff than maybe 10 or 20 years ago. However, there are still many more people working for the administration than for the parliament.

Referendum (Slide 6)

I would like to speak on the referendum and the initiative. Popular voting rights are certainly one of the key features of the Swiss constitutional design. We could certainly spend hours discussing the advantages and disadvantages of this system. As stated at the beginning, I would like to focus on a few aspects relevant for the legislative process.

The referendum basically allows an optional referendum against any piece of Federal legislation enacted by the Swiss parliament. According to Art. 141 of the Swiss Constitution, you basically need 50'000 persons willing to sign your request in order to start the referendum process. 50'000 persons is even for Switzerland not a great number. It is a little more than 1% of the Swiss population with voting rights. Powerful interest groups can easily mobilize this number.

What are the effects on Swiss legislation? It strengthens the need for consensus. New laws are often passed in the Swiss parliament with a huge majority in order to prevent a referendum which is time-consuming, costly and risky for the political parties. Therefore, political parties try to forge alliances across party lines. This may lead to a law which is the product of many compromises and does not answer all crucial points of a regulation in

order to satisfy everybody. I personally consider consensus as a good thing in the political process; however, it may sometimes affect the clarity and consistency of the law.

Initiative (Slide 7)

Even more important, if not notorious, is the right of the popular initiative. According to Art. 139 of the Swiss Constitution, any 100'000 persons eligible to vote may request a partial revision of the Swiss constitution. Please note that we are not discussing revisions of federal laws and statutes here. The popular initiative does not target Swiss laws, it targets the Swiss constitution, i.e. the supreme legal text of Switzerland. It is also important to point out that a popular initiative can be submitted as a specific draft, which means that textual changes can be introduced directly into the constitution. There are practically no restrictions for popular initiatives. The constitution prohibits an infringement of peremptory international law (or *ius cogens*) only. Popular initiatives may not be in contradiction with peremptory international law or *ius cogens*. However, as you know, *ius cogens* concerns a very small piece of legislation only. Everything else is up to constitutional revision by popular initiatives.

Art. 139 of the Swiss Constitution is an expression of great trust in the results of direct democracy. In many cases this trust proved fully correct. However, if you accept the idea of popular initiatives, you must also live with initiatives and constitutional provisions you disagree with. As a proposal for a popular initiative is often drafted by politicians and laymen, the continuity and consistency of the constitutional text may suffer. It is no coincidence that Switzerland fully revised its constitution in 1999 by clarifying and condensing a constitution that has seen many changes.

Art. 72 para 3 Const. (Slide 8)

I can show you an example which, I am afraid, has made Switzerland infamous in many parts of the World. 8 months ago, Switzerland voted on the following provision in Art. 72 of the Swiss Constitution. "The building of minarets is prohibited". By 57.5% to 42.5%, Swiss citizens as well as the Cantons have accepted this provision. This picture gives you a good impression of how the supporters campaigned. Even if you don't speak German, you easily understand the allusion of a veiled woman and the minarets that look like rockets. Switzerland will have to live with this provision. However, it may lead to a constitutional crisis if the European Court of Human Rights may strike this provision down. This, however, goes beyond the questions of legislation.

Evaluation - Cartoon (Slide 9)

I will now come to the second subject. I would like to speak on evaluation. For Switzerland, evaluation is a relatively new subject. 20 years ago, scientific evaluations (or regulatory impact assessment) were practically unknown in Switzerland. Today, many areas are evaluated. That is, by the way, the reason I brought this cartoon with me. To avoid any misinterpretation, I am happy to tell you that Switzerland does not know the death penalty.

Constitution - Evaluation Art. 170 (Slide 10)

The evolvement of evaluation as a now widespread technique in Swiss legislative process is, at least in some part, also a product of the revision of the Swiss Constitution in 1999. According to Art. 170 of the Swiss Constitution, the Federal Assembly shall ensure that federal measures are evaluated with regard to their effectiveness. However, the constitutional text

does not clearly say what we should understand when we speak about evaluation. At least in legal terms, evaluation (of effectiveness) has no fixed, predetermined meaning. Ideally, it should be specified by the legislator. It has done this for a great number of laws.

If you should be interested in these clauses, I recommend that you visit the internet site you find on the next slide. The Swiss Federal Office of Justice has listed more than 100 evaluation clauses of federal acts. They are very diverse and some are older than the constitutional provision. I will of course not go through hundreds of legal clauses on evaluation.

Evaluation clauses (example) - Art. 59a (Slide 11)

As an example, I would like to show you Art. 59 of the Federal Act on Cartels and other Restraints of Competition. Art. 59a of the Federal Act on Cartels reads "that the Federal Council shall arrange for the evaluation of the effectiveness of the measures and the application of this Act". You can also read in para 2 "that the Federal Council shall report to Parliament and submit proposals for further action", typically amendment of laws, based on the results of the evaluation. Art. 59a answers some of the important questions we may have when dealing with evaluation.

Evaluation clauses (Slide 12)

What can be regulated in an evaluation clause? Evaluation clauses should state what should be evaluated. Is it the law as a whole or are there only some aspects of the law we are interested in? It is also important to know who is actually conducting or at least bearing the responsibility for the evaluation. Is it the Federal Council? Is it the administration that may evaluate its own practice? Do we need experts? Sometimes, evaluation

clauses also state on the methods we should apply. It is undisputed that an evaluation must satisfy scientific standards. The clause may also describe specific methods such as citizen participation. We should know whether we will have one evaluation only or repeated evaluations.

Also, it will be interesting to know who will receive the results. Typically and in accordance with Art. 170 of the Swiss Constitution, evaluations are addressed to the Parliament or to the Federal Council or both, as they bear the supreme political responsibility. Often, the results of the evaluation must be made public.

As a last point, evaluation clauses sometimes state on the consequences of their results which you have seen in Art. 59a of the Swiss Act on Cartels.

A practical example: Evaluation BBG (Slide 13)

How must an evaluation be carried out? In Switzerland an evaluation is a typical field for political scientists. As a lawyer, I have only limited knowledge in this area.

However, I would like to give an example of a recent evaluation in Switzerland. The Swiss Parliament gave the Federal Council - in accordance with the Swiss Supreme Court - the mandate to evaluate the new federal act on the Swiss Supreme Court. In a study group, political scientists discussed how to evaluate this new law. It is indeed a tricky question to evaluate a law that typically deals with procedural questions. When is such a law effective? This question was quite new. There were studies over the work load of courts in Switzerland but not on specific law.

The starting point was relatively easy. We had to find out what were actually the goals of the new law. And, indeed, when we went through the materials, especially the preparatory report by the Federal Council, we could distinguish three goals, namely, 1) to diminish the work load of the Swiss Supreme court, 2) to improve the legal protection in some specific fields and 3) to simplify some procedural rules that were understood only by few

Supreme Court judges and probably even fewer lawyers. You can easily see that these goals are contradictory, especially the improvement of the legal protection typically will not diminish the work load of the Supreme Court judges but to the contrary.

The more difficult task is how to assess these goals. How do you measure legal protection or the complexity of procedural rules? It was very interesting to see how the political scientists proceeded in this matter. They advised and the group followed their advice that first documents, e.g. law literature, newspaper articles etc. and annual reports of the court should be analysed. Documents and reports are easily accessible and especially for lawyers easy to read. These documents should give a first impression of the current state of the Swiss Supreme Court in respect to the three goals in question.

After having established a basic knowledge of the situation, the study group conducted 33 interviews, some of them lasting more than an hour. The group selected not only Supreme Court judges as interview partners but also lawyers and other people involved with the procedure before the Supreme Court. These interviews gave quite a good picture of what specific questions should be asked in respect to legal protection and simplicity of procedural rules. These questions were the basis for polls conducted within the Swiss Supreme Court and with lawyers that regularly brought

cases before the Swiss Supreme Court. These interviews allowed quite detailed questions about the assessment of the Federal Act on the Swiss Supreme Court in specific areas.

Further, it was very important to involve the Swiss Supreme Court in this process. The judges in charge fully cooperated and supported the study. The response rate in the polls was quite high.

In addition, statistics were clearly helpful. They were particularly relevant to assess the first goal, i.e. the work load of the Swiss Supreme court. However, they can only give a first impression, because one case before the Swiss Supreme Court may be easy to decide, whereas some other cases may keep the Supreme Court busy for weeks. The polls were mainly conducted in 2009 and 2010. For 2011 some of the polls and interviews will be repeated. This allows not only a static picture of the Supreme Court at a specific date but it may also show some evolvement over time.

It is also planned to analyse a selected number of Swiss Supreme Court decisions, especially to find out whether one can say that the new procedural rules have really been simplified the procedure. How this will be conducted and how one should select these cases is still an open issue and I certainly appreciate any input from your side if you have any experience in this matter.

A practical Example: Evaluation BGG (Slide 14)

For the details of this evaluation I refer to the Government internet site. The results are published in German, French or Italian only. To summarise the results in one or two sentences, one may say that the Supreme Court can

be quite satisfied with the first two goals. Especially the work load has indeed diminished and we also know which measures were particularly effective. There is also a clear indication that some areas which lacked the necessary legal protection are now fully covered by the Swiss Supreme Court's power to decide on these cases. However, we have some doubts on the third goal. It is true that some questions have now been solved by the new procedural rules but it will not be surprising for lawyers that new laws also raise many new questions. It will be interesting to see in 2011 and later on whether these are only difficulties we typically find with the implementation of a new law or if these problems persist. If we agree that the procedural rules before the Swiss Supreme Court are still difficult to understand, this picture of the Swiss Supreme Court might be quite adequate. There are still many stairs to climb before your case is actually before the Swiss Supreme Court.....

I thank you for your kind attention.

Legislation and Evaluation in Switzerland

Prof. Dr. Felix Uhlmann

(felix.uhlmann@rwi.uzh.ch)

Chair for Constitutional and Administrative Law, Legislation



University of Zürich

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Overview

1. Introduction

2. Some particularities of the Swiss legislative process

- a) Laws – as defined by the Swiss constitution
- b) The role of the government in the legislative process
- c) Referendum and initiative

3. Evaluation

- a) Art. 170 Swiss Constitution
- b) Evaluation Clauses
- c) Example: How to evaluate a law on procedural questions?

Swiss Legislation

Practical Note:

<http://www.admin.ch/dokumentation/gesetz/index.html?lang=en>



[Classified Compilation of Federal Legislation](#)
[Official Compilation of Federal Legislation \(in German\)](#)

English is not an official language of the Swiss Confederation. These translations are provided for information purposes only and have no legal force.

a) Legislation (Definition)

Legislation (Art. 164)

¹ All significant provisions that establish binding legal rules must be enacted in the form of a federal act. These include in particular fundamental provisions on:

- a. the exercise of political rights;
- b. the restriction of constitutional rights;
- c. the rights and obligations of persons;
- d. those liable to pay tax as well as the subject matter and assessment of taxes and duties;
- e. the duties and services of the Confederation;
- f. the obligations of the Cantons in relation to the implementation and enforcement of federal law;
- g. the organisation and procedure of the federal authorities.

² Legislative powers may be delegated by federal act unless this is prohibited by the Federal Constitution.

b) Executive Branch und Legislation

Federal Council (Executive Branch)

Art. 181 Const. (Right to initiate legislation)

The Federal Council shall submit drafts of Federal Assembly legislation to the Federal Assembly.

Art. 182 Const (Lawmaking and implementation)

¹ The Federal Council shall enact legislative provisions in the form of ordinances, provided it has the authority to do so under the Constitution or the law.

² It shall ensure the implementation of legislation, the resolutions of the Federal Assembly and the judgments of federal judicial authorities.

c) Referendum

Optional Referendum (Art. 141 Const.)

¹ If within 100 days of the official publication of the enactment any 50,000 persons eligible to vote or any eight Cantons request it, the following shall be submitted to a vote of the People:

a. federal acts; ...

c) Initiative

Popular initiative requesting a partial revision of the Federal Constitution (Art. 139 Const.)

¹ Any 100,000 persons eligible to vote may within 18 months of the official publication of their initiative request a partial revision of the Federal Constitution.

² A popular initiative for the partial revision of the Federal Constitution may take the form of a general proposal or of a specific draft of the provisions proposed. ...

c) Initiative

Art. 72 para. 3 Const.

"The building of minarets is prohibited."



II. Evaluation



a) Constitution

Evaluation

Art. 170 Evaluation of effectiveness

The Federal Assembly shall ensure that federal measures are evaluated with regard to their effectiveness.

→ Evaluation (of effectiveness) has no fixed, predetermined meaning. It must be defined, ideally by the legislator.

b) Evaluation clauses* (example)

Art. 59a Federal Act on Cartels and other Restraints of Competition

¹ The Federal Council shall arrange for the evaluation of the effectiveness of the measures and the application of this Act.

² After conclusion of the evaluation and at the latest five years after this provision has come into force, the Federal Council shall report to Parliament and submit proposals for further action.

*for an extensive list visit www.bj.admin.ch/bj/de/home/themen/staat_und_buergern/evaluation/materialien_aebersicht.html

b) Evaluation clauses

Content of evaluation clauses

1. What (law as a whole or special questions)?
2. Who (Federal Council, administration, experts etc.)?
3. How (methods, citizen participation etc.)?
4. When and how often?
5. For whom (Parliament, Federal Council, the public etc.)?
6. Consequences (legal changes, funding etc.)?

c) A practical example: Evaluation BGG

**Evaluation of the effectiveness of the new
Federal Act on the Swiss Supreme Court (BGG)**

1. What are the goals of the law?
(Diminish work load; improve legal protection;
simplification of procedural rules)
2. How to assess these goals?
 - Documents and reports; interviews; polls; statistics
 - Analysis of selected court decisions (2011)

c) A practical example: Evaluation BGG



For details of this study see (In German, French or Italian)
<http://www.ejpd.admin.ch/ejpd/de/home/dokumentation/mi/2010/2010-06-180.html>