

Codification of Administrative Law – Switzerland

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1. Definition and Delimitation of Administrative Law



The first function of administrative law is «to help practitioners not to get lost in jungle of administrative legislation» (BIAGGINI).

1. Definition and Delimitation of Administrative Law

(General) Administrative Law

- Doctrinal origin (development of consistent terminology)
- Fills in typical gaps in specific legislation
- Link between constitutional law and administrative practice
- Distillate from federal administrative law and practice and 26 cantonal (state) administrative law and practice

2. Legal Sources of Administrative Law

Principles of Action

101

English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.

Federal Constitution of the Swiss Confederation

of 18 April 1999 (Status as of 23 September 2018)

2. Legal Sources of Administrative Law

Principles of Action

Art. 5 Rule of law

- ¹ All activities of the state are based on and limited by law.
- ² State activities must be conducted in the public interest and be proportionate to the ends sought.
- ³ State institutions and private persons shall act in good faith.
- ⁴ The Confederation and the Cantons shall respect international law.

Art. 9 Protection against arbitrary conduct and principle of good faith

Every person has the right to be treated by state authorities in good faith and in a non-arbitrary manner.

2. Legal Sources of Administrative Law

Principles of Action

Sources

Mainly constitutional but legislator also concretizes constitutional principles in specific legislation (in particular public interest and principle of proportionality)

2. Legal Sources of Administrative Law

Forms of Action

172.021

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Federal Act on Administrative Procedure (Administrative Procedure Act, APA)¹

of 20 December 1968 (Status as of 1 April 2019)

2. Legal Sources of Administrative Law

Forms of Action

Art. 5

B. Definitions
I. Rulings

¹ Rulings are decisions of the authorities in individual cases that are based on the public law of the Confederation and have as their subject matter the following:

- a. the establishment, amendment or withdrawal of rights or obligations;
- b. a finding of the existence, non-existence or extent of rights or obligations;
- c. the rejection of applications for the establishment, amendment, withdrawal or finding of rights or obligations, or the dismissal of such applications without entering into the substance of the case.

² Rulings are also enforcement measures (Art. 41 para. 1 let. *a* and *b*), interim orders (Art. 45), decisions on objections (Art. 30 para. 2 let. *b*, 46 let. *b*, and 74 let. *b*), appeal decisions (Art. 61 and 70), decisions in a review (Art. 68) and on explanatory statements (Art. 69).²³

³ Declarations made by authorities on the rejection or raising of claims that must be pursued by taking legal proceedings do not constitute rulings.

2. Legal Sources of Administrative Law

Forms of Action

Fbis. Ruling on
real acts

Art. 25a⁶²

¹ Any person who has an interest that is worthy of protection may request from the authority that is responsible for acts that are based on federal public law and which affect rights or obligations that it:

- a. refrains from, discontinues or revokes unlawful acts;
- b. rectifies the consequences of unlawful acts;
- c. confirms the illegality of such acts.

² The authority shall decide by way of a ruling.

2. Legal Sources of Administrative Law

Forms of Action

Sources

- Administrative act (decision, ruling) defined by legislator (APA), including administrative procedure
- Enactment of subordinate legislation, administrative contracts, private law contracts are not regulated, forming an amalgam from administrative and court practice, flanked by constitutional principles (principle of legality)

2. Legal Sources of Administrative Law

Administrative Organization

172.010

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Government and Administration Organisation Act (GAOA)

of 21 March 1997 (Status as of 1 January 2018)

2. Legal Sources of Administrative Law

Administrative Organization

Federal Constitution of the Swiss Confederation

of 18 April 1999 (Status as of 23 September 2018)

Art. 178 Federal Administration

¹ The Federal Council is in charge of the Federal Administration. It ensures that it is organised appropriately and that it fulfils its duties effectively.

² The Federal Administration is organised into Departments; each Department is headed by a member of the Federal Council.

³ Administrative tasks may by law be delegated to public or private organisations, entities or persons that do not form part of the Federal Administration.

2. Legal Sources of Administrative Law

Administrative Organization

Sources

Organizational acts flanked by administrative practice and some (but little) constitutional guidance

2. Legal Sources of Administrative Law

Legal Protection

Federal Constitution of the Swiss Confederation

of 18 April 1999 (Status as of 23 September 2018)

Art. 29^{a3} Guarantee of access to the courts

In a legal dispute, every person has the right to have their case determined by a judicial authority. The Confederation and the Cantons may by law preclude the determination by the courts of certain exceptional categories of case.

2. Legal Sources of Administrative Law

Legal Protection

Art. 29 General procedural guarantees

¹ Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.

² Each party to a case has the right to be heard.

³ Any person who does not have sufficient means has the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is necessary in order to safeguard their rights, they also have the right to free legal representation in court.

Art. 30 Judicial proceedings

¹ Any person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited.

2. Legal Sources of Administrative Law

Legal Protection

Sources

APA (and other laws), combined with a robust constitutional background.

3. Preliminary Findings

Theses

1. Growing, certainly more transparent constitutional influence on administrative law (Constitution of 1999)
2. Constitutional law, legislation, court/administrative practice not always clearly distinguished (e.g. right to be heard)
3. Regulation concerns mainly administrative procedure, building around the idea of an administrative act
4. Other general questions are partially addressed in special legislation (e.g. contracts → public procurement, subsidies)
5. No systematic approach by legislator, selective (if not random) interventions, sometimes successful (e.g. restricting legal protection of civil service applicants) sometimes less (e.g. introducing full merits review of the Swiss Federal Administrative Court)