Swiss Administrative Law and Administrative Procedure

Introduction to Swiss Law

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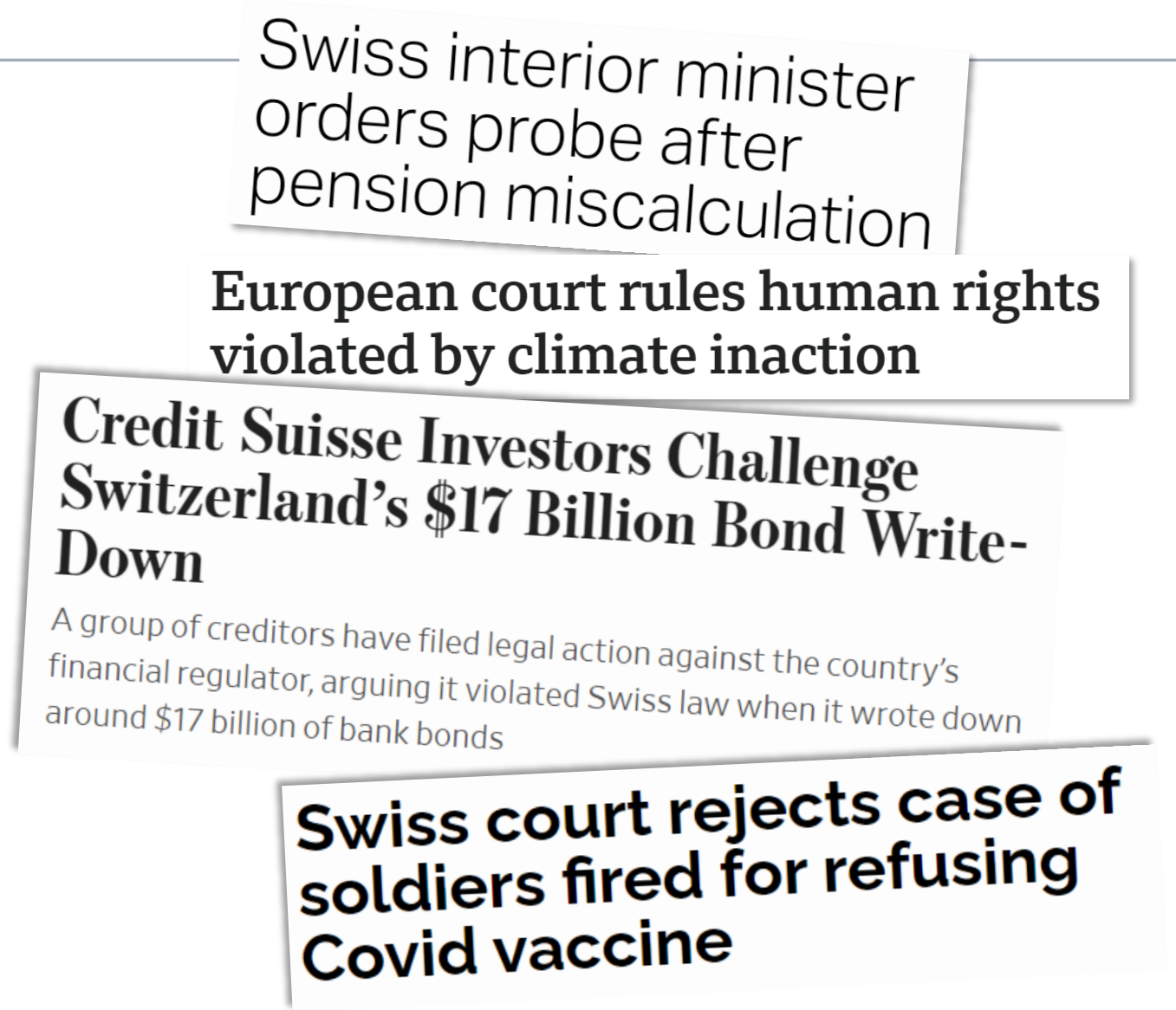
Notion of Administrative Law

- Administrative law is the sum of the legal norms governing the activity, organization and procedure of the administrative authorities as well as the legal position of citizens vis-à-vis these authorities. It is part of public law.
- Administrative law includes all legal norms that do not belong to criminal law or private law.



Sources and Constitutional Principles of Administrative Law

Sources of Administrative Law

Statutory law → Codes (federal and cantonal)

- Constitution ← People and Cantons
- Acts (Laws) ← Parliament (and People)
- Ordinances ← Government (typically)

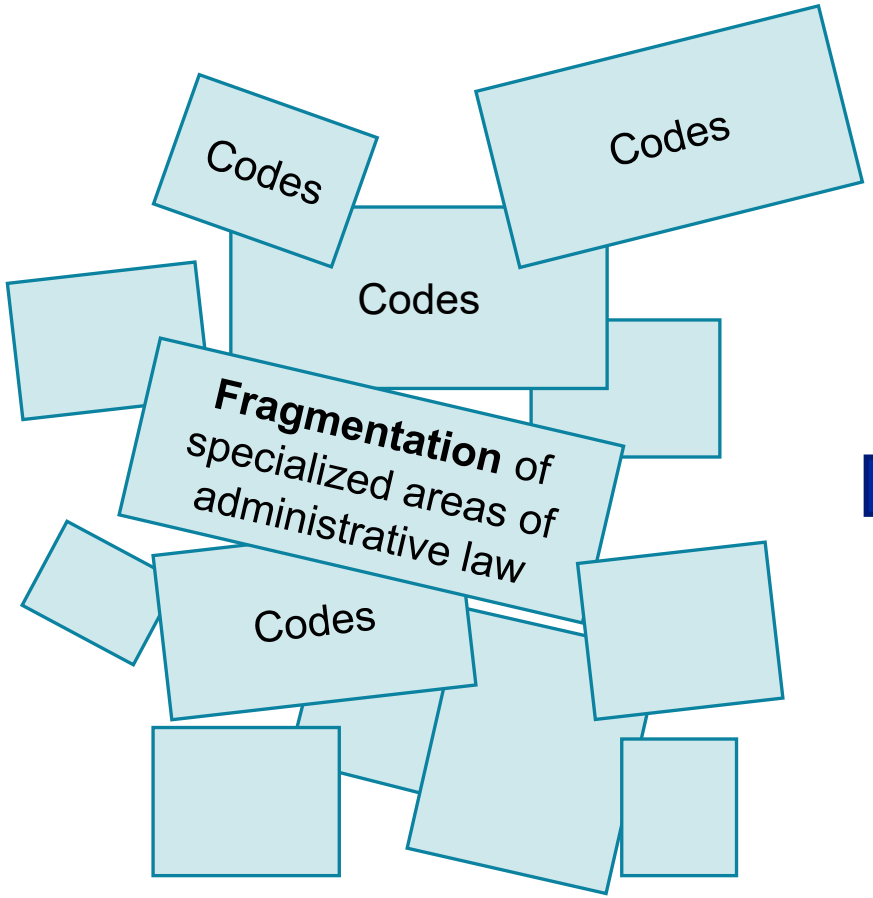
Other sources

- International treaties
- Domestic treaties
- General legal principles (≠ general constitutional principles)
- Customary law

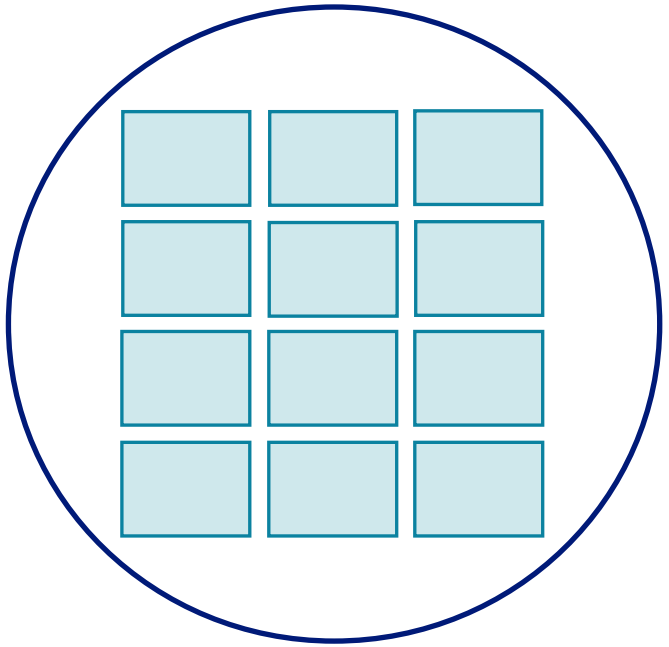
Myriad of Statutory Administrative Law

- No general codification of administrative law
- High quantity of federal and cantonal codes
  - 4,768 codes (over 65,000 pages) on the federal level (2013)
  - 16’788 codes on the cantonal level (2013)
- Codes concern specific subject matters, e.g.:
  - Taxation, immigration, zoning and construction law, public liability, administrative organization, public procurement, competition, environmental protection, banks, transportation, telecommunication, energy, military forces, social security, etc.

“Taming” the Codes



General administrative law
(*in particular*: constitutional principles)



Constitutional Principles in Administrative Law

- **Principle of Legality**
- **Principle of Public Interest**
- **Principle of Proportionality**
- **Principle of Good Faith**
- **Prohibition of Arbitrariness**
- **Equality Before the Law**

Federal Constitution:

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.

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.

Art. 8 Equality before the law

[1] Every person is equal before the law.

Principle of Legality

Rationale:

- Rule of law
  - Legal certainty
  - Equality before the law
- Democratic legitimation of administrative action (acts are issued by parliament)

Two-tier Test:

Requirement of a Legal Provision

- General and abstract structure
- Sufficiently precise (not unduly vague)

Sufficient Level of the Statute

- Important questions must be regulated in a law enacted by parliament, i.e. a governmental ordinance does *not* suffice

Principle of Legality

- Different standards for the legal provision
  - Stricter standard: Significant restrictions (fundamental rights)
  - Less strict standard: Technical areas, etc.

- Arguments
  - „There is no statutory provision at all!“
  - „Statutory provision was applied in a wrong manner!“
  - „Statutory provision is unduly vague!“
  - „The provision should have been contained in a law, not in an ordinance!“

Example 1

New Billboard

You apply for a permit for a billboard. The applicable law was enacted by parliament. It states that billboards must be “esthetically satisfying.”

The competent authority rejects your request for a new billboard. It argues that the billboard is not “esthetically satisfying.”

How would you argue in order to challenge the rejection?

Example 2

Headscarf (BGE 139 I 280)

A public school barred two girls from wearing the Islamic headscarf based on the following provision in the school regulations:

> „Students attend school neatly dressed. The trustful interaction requires the attendance of school without headgear. Hence, wearing caps, headscarves, and sunglasses during class is forbidden.“

The school regulations were *not* enacted by parliament. There is no provision in the applicable law on the dress code for students.

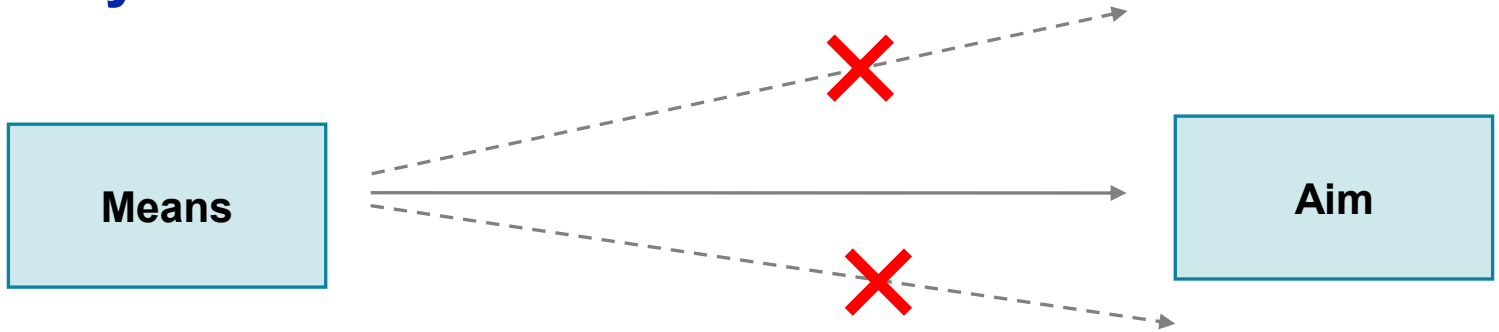
Principle of Public Interest

- All state activities must be conducted in the public interest
  - Rather comprehensive interpretation:
    - Security
    - Public peace
    - Environmental protection
    - Fiscal interests
    - Social policy
    - etc. etc.
  - Often unproblematic

- *Essentially:* Benchmark for proportionality test

Principle of Proportionality

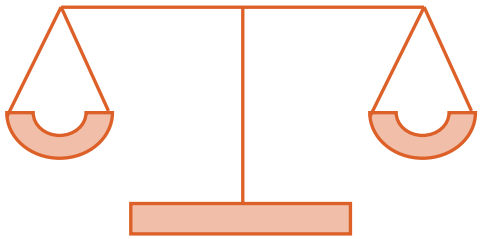
1 **Suitability**



2 **Necessity**

3 **Reasonableness**

Aim of the means (public interest)



Effect of the means (private interest)

Example 3

Hooligans (BGE 140 I 2)

The so-called “Hooligan-Concordat” stipulates, inter alia, that exclusion orders from sport stadiums must last *at least* one year in *any* case and under *any* given circumstances.

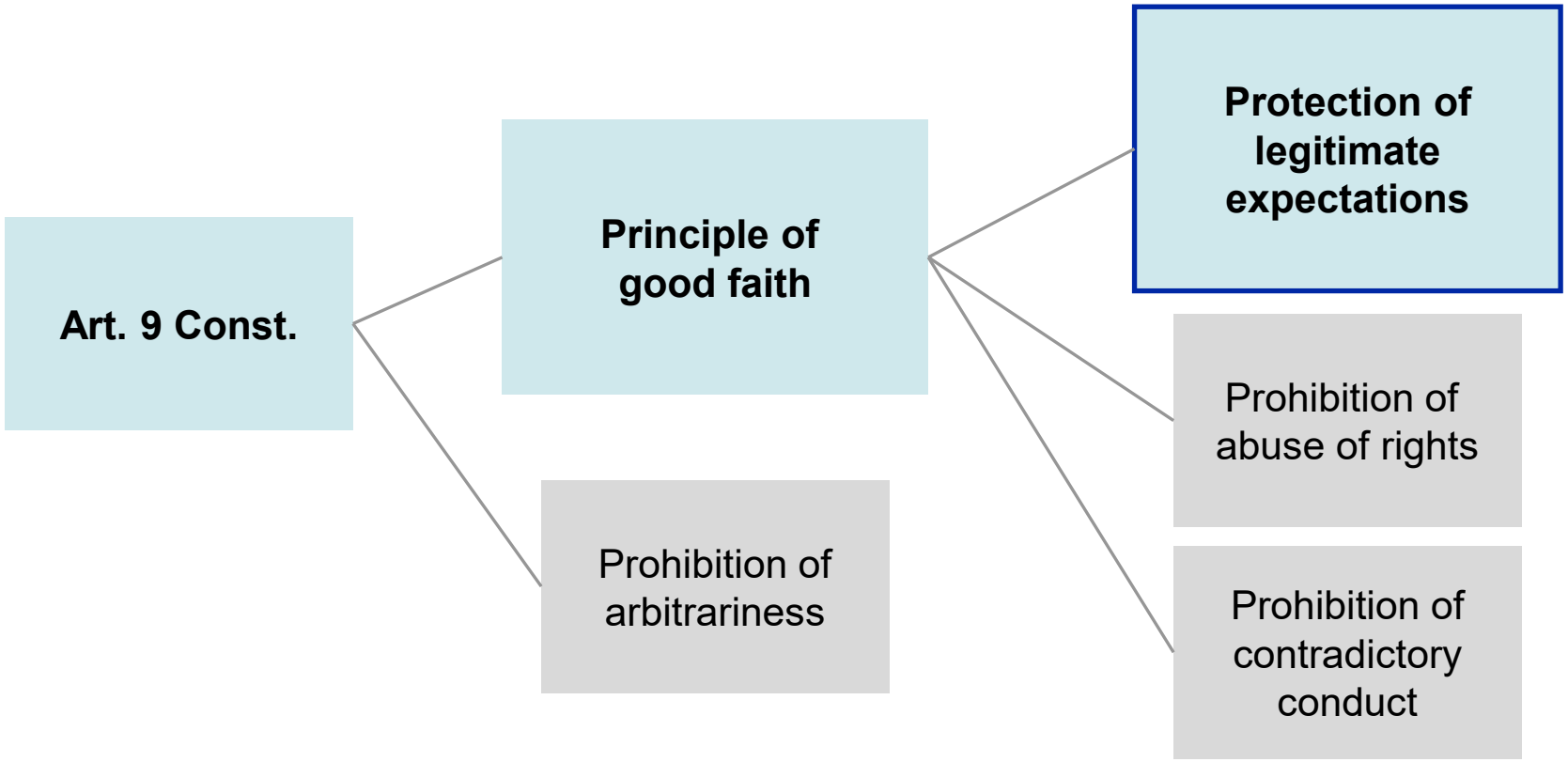
Is such a provision proportionate?

Example 4

“Lemonade clause” (BGE 103 Ia 33)

A cantonal law requires bars and restaurants to sell their cheapest non-alcoholic drink for less than beer.

Principle of Good Faith



Principle of Good Faith (Protection of Legitimate Expectations)

Requirements

1. Basis of trust
   - Administrative decisions, administrative contracts, etc.
   - *In particular:* Governmental misinformation and incorrect advice (further requirements)
2. Creation of legitimate expectations
3. Private arrangements
4. Causality
5. Balancing Test

Legal Effects

- Law is applied according to the basis of trust
  - Binding effect of incorrect advice: incorrect application of the law
  - No revocation of an administrative action
  - Extension of deadlines
- Rarely: Damages

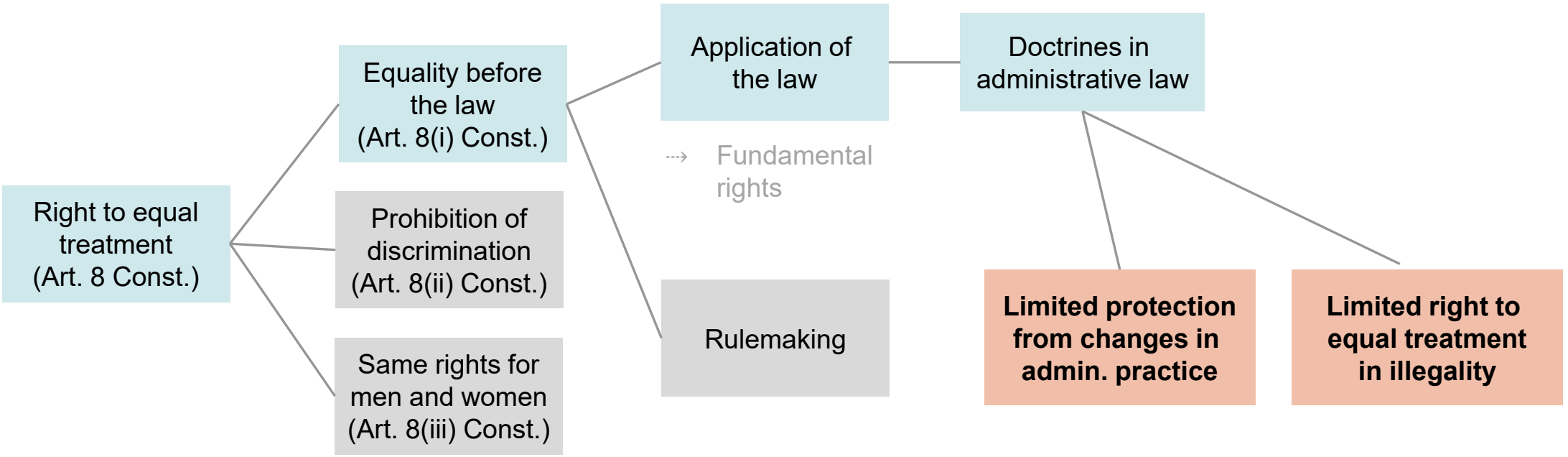
Example 5

Piano Teacher (BGE 137 I 69)

A student failed the final exam in his training as piano teacher in front of an audience. He was allowed to take the repeat exam in camera (without audience) which was against the law. He passed the exam. The (public) conservatory informed him that he successfully completed the study program.

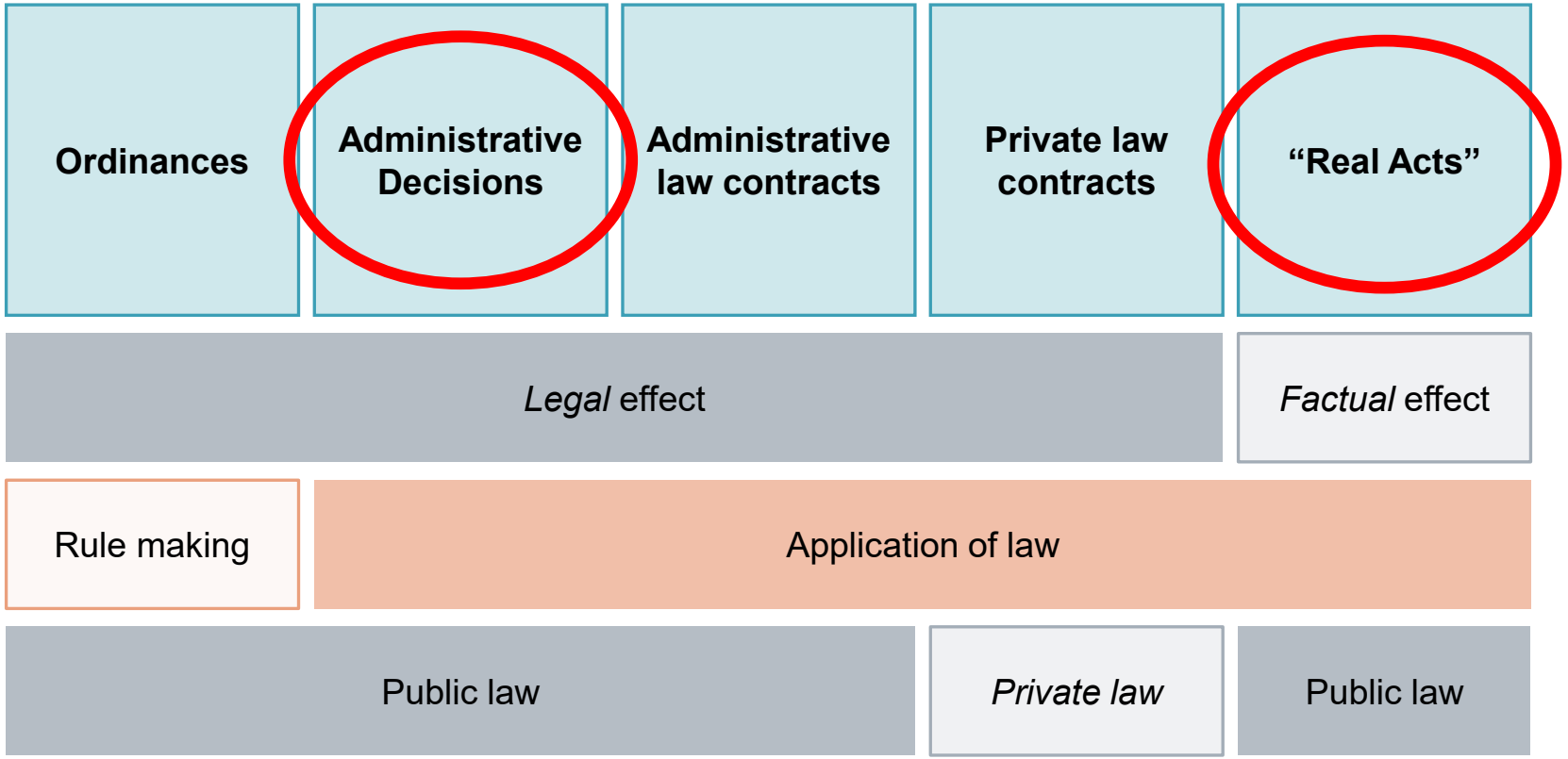
Later, the competent administrative authority refused to issue the necessary diploma. It argued that the student was unlawfully admitted to the repeat exam. The student claims that his legitimate expectations to take the exam are protected and that he has a right to receive the diploma.

Equality Before the Law



Forms of Administrative Action

Forms of Administrative Action



Administrative Decisions

Administrative decision = **archetype** of administration action

– The power to administer includes the power to issue administrative decisions.

Definition: An administrative decision is an act of sovereignty addressed to an individual which bindingly regulates a specific legal relationship under administrative law. In an administrative decision, a general-abstract code (i.e. a or an ordinance) is applied to a concrete individual case. It is usually issued by an executive authority (government or administration).

Elements

(1) Establishment, amendment, withdrawal of rights or obligations or finding of their (non-)existence

(2) Unilateral

(3) Binding and enforceable

(4) Individual-concrete

(5) Rooted in public law

Consequence → Form requirements apply

Administrative Decisions

Example of an Administrative Decision

Building Department
of the Canton Y, (...)

Registered Mail

X, Examplestreet 10, (...)

Administrative Decision

Decision:

1. X must, within thirty days of this administrative decision to enter into legal force, remove the advertising sign showing (...) on the northern facade of the building on Examplestreet 10.
2. Costs: CHF 300.–.

Merits

When the cantonal building inspector visited (...).

Instructions on the right to appeal

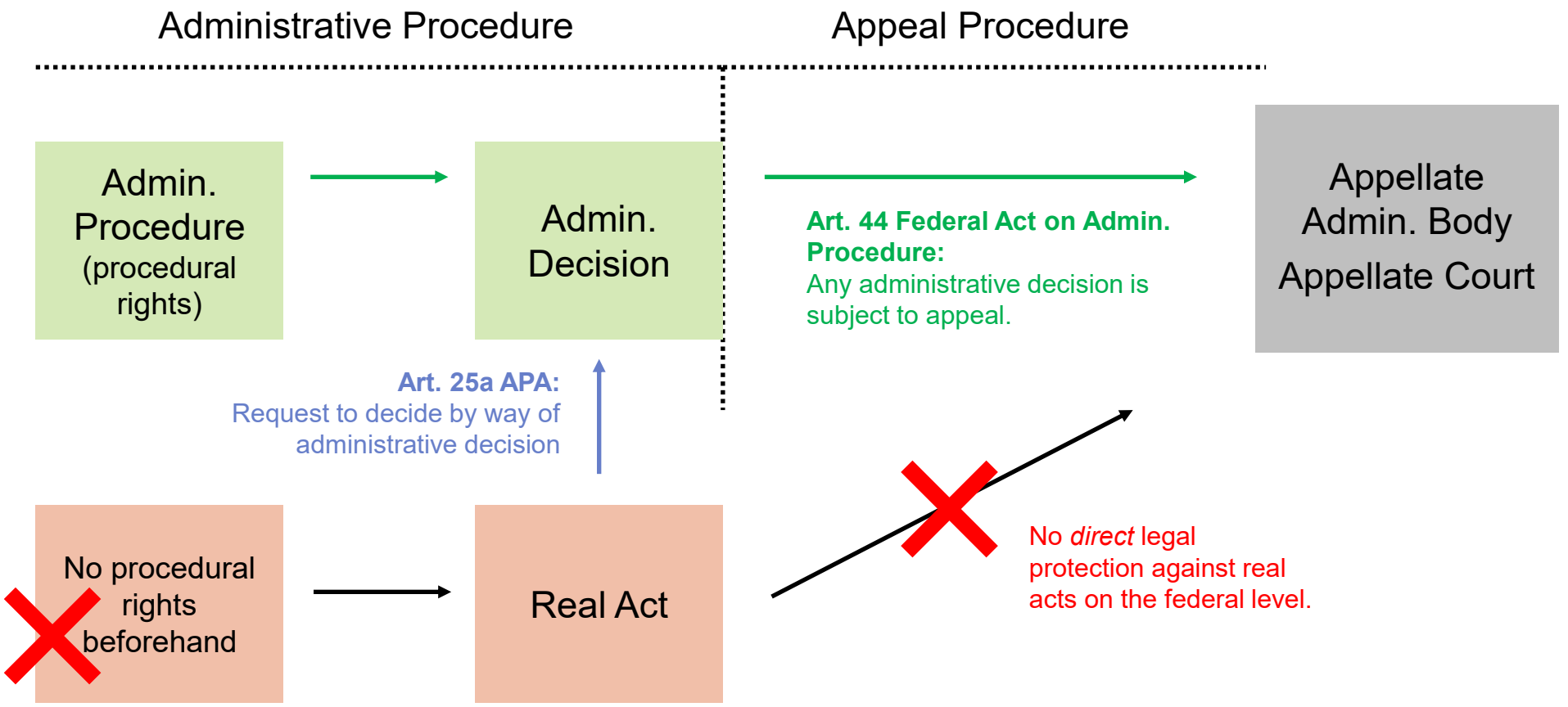
Against this administrative, an appeal can be lodged within thirty days of receipt to the Construction Complaints Court.

Informal Acts (Real Acts)

- Informal acts are not *aimed* at regulating a legal relationship and affecting the legal situation of the addressees:
  - Actions within a public school taken by teachers
  - Actions within a public hospital (surgeries, etc.)
  - Police actions (patrolling, roadside checks, etc.)
  - Governmental information activities
- They can, however, affect their legal situation nevertheless.

Administrative Procedure

Procedural Differences Administrative Decision ↔ Real Act



Legal Remedies Against Real Acts (Federal Level)

Legal remedies against real acts (federal level)?

- State liability (very difficult)
- New provision in the APA: **Art. 25a APA**

Art. 25a APA:

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

a. refrains from, discontinues or revokes unlawful real acts;

b. rectifies the consequences of unlawful real acts;

c. confirms the illegality of such real acts.

[2] The authority shall decide by way of an administrative decision.

Example 6

Qualify the following actions either as administrative decision or as real act:

1. The Canton of Geneva prohibits smoking in public buildings (BGE 133 I 110 ff.).
2. An authority informs a party by letter that it cannot assert party rights in a particular case.
3. A post office is renamed (BGE 109 Ib 253).

Example 7

Qualify the following actions:

X is the owner of a property near the border. For several weeks, the Swiss Confederation uses drones and helicopters to monitor border traffic. X considers his privacy to be invaded by the drones and wants to do something against the flights.

a) As which form of administrative action do the helicopter and drone flights qualify?

b) What can X do against the flights?

Example 8

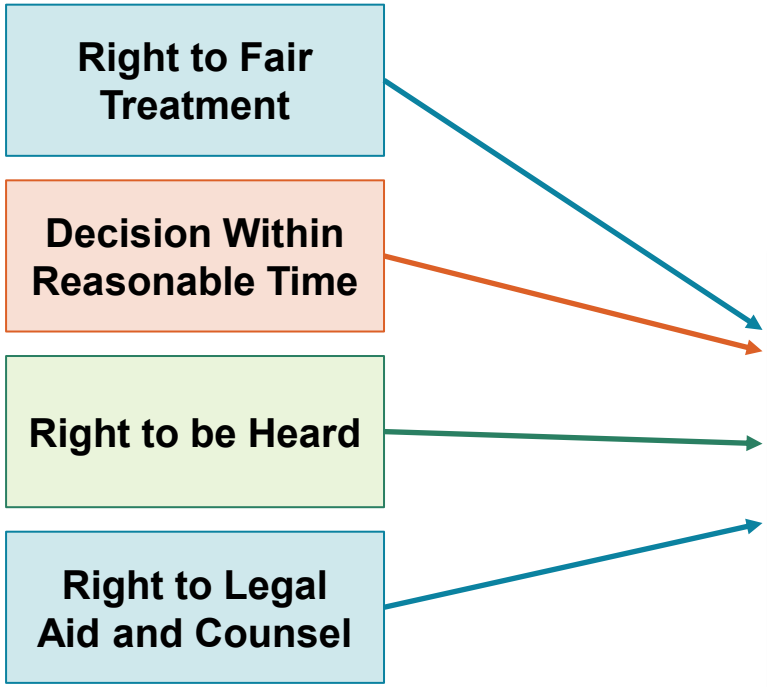
LOVE LIFE – regret nothing (BGE 144 II 233):

The “LOVE LIFE”-campaign by the Federal Office of Public Health appears yearly. It highlights the risks of infection with HIV and other STDs. In 2014, the billboards depicted couples and showed them in an erotic manner.

Based on art. 25a APA, several children request the issuance of an administrative decision. They argue that their special right to be protected as children and young people (art. 11 Cst.) is affected by the campaign.

Must the Office of Public Health issue an administrative decision?

Procedural Rights in the Constitution



Art. 29 Cst. sets forth constitutional procedural rights. It applies in ***all* proceedings** (cantonal, federal or municipal / before courts or admin. bodies)

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.

Procedural Rights in the Laws

- Confederation and Cantons have their own codes / laws of administrative procedure.
  - Procedural rights and obligations are more specifically embedded in these laws
  - ***But:*** Federal Constitution contains **minimum guarantees**
- Applicable laws on the federal level:
  - Federal Act on Administrative Procedure
  - Act on the Swiss Federal Administrative Court
  - Act on the Swiss Federal Supreme Court

Right to Fair Treatment

- Procedural fairness rule and “catch all”-right
- Certain important contents:
  - Prohibition of denial of legal protection
  - Prohibition of an excessive formalism
  - Right to a competent, legally constituted and independent authority

Example 9

Naturalization (BGE 140 I 99):

A, B, C and D applied for citizenship in the municipality of Weiningen. The municipal naturalization committee invited them for a conversation to “get to know the applicants and their motivation for naturalization”. In reality, the commission examined the suitability of the applicants and later rejected their application.

The applicants appealed against the decision and claimed that their right to fair treatment was violated by unexpectedly being examined.

Example 10

Right to Fair Treatment:

- The Cantonal Administrative Court informs you that an appeal against its decision can be lodged with the Federal Supreme Court within 60 days. You file your appeal within 45 days. The Supreme Court does not hear the case on the merits because the correct deadline is 30 days.
- A bar exam candidate waits in the examination room. The examiner enters the room with the remark “it stinks here” and opens the window.

Right to Decision Within Reasonable Time

- Possibility of appeal in case of unlawful refusal or delay in issuing an administrative decision
  - See e.g. Art. 46a APA
- Reasonableness is to be considered in light of the circumstances, such as
  - Complexity of the case
  - Urgency of the matter
  - Behavior of the parties
  - Example: A procedure for a disability pension lasts nearly ten years until the appeal judgement is rendered (BGE 129 V 411 ff.).

Right to be Heard

Transparency:

- Announcement of the content of the administrative decision
- Right to receive information on the proceedings
- Right to access the relevant documents
  - May be restricted. Balancing test: Preponderant public or private interests?

Right to present one's case:

- Right to present one's case and be heard with one's arguments before issuance of administrative decision

Right to participate in the adducing of evidence:

- Right to propose witnesses and other means of evidence
- Right of reply to the standpoint and filings of opposing parties (Replikrecht)
- etc.

Right to Legal Aid

- Requirements
  - Lacking financial means to pay procedural costs
  - Case has a sufficient prospect of success
- Effect
  - Party is exempted from paying procedural costs and advance payments
  - Appointment of an attorney-at-law representing the party if necessary to safeguard rights
    - Complexity of the matter
    - Abilities of the private party

University of Zurich[UZH]

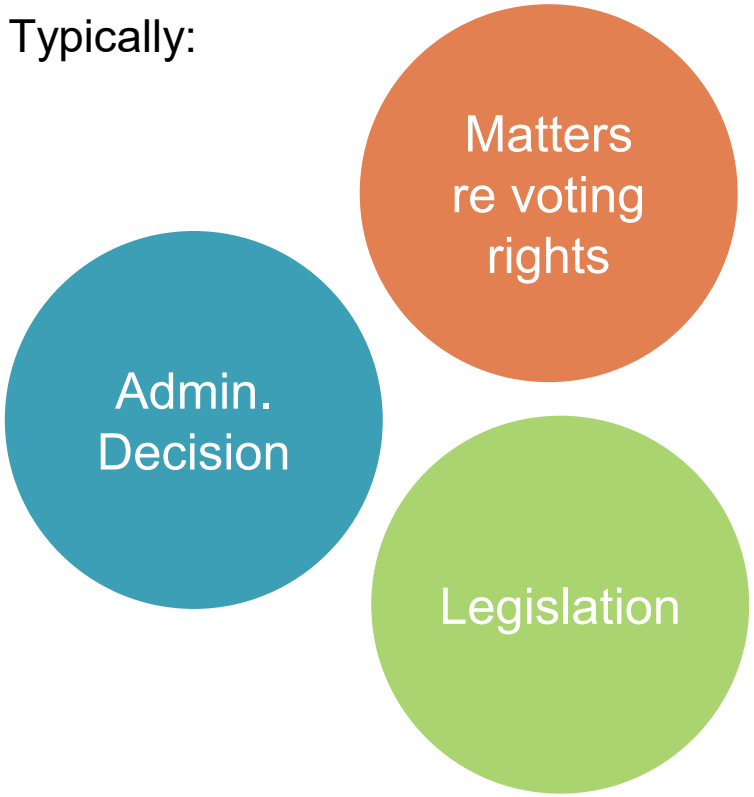
Faculty of Law

Appeal Procedure

Objects of Appeal: Overview

Object of appeal = What can be appealed against?

– Typically:



– The relevant law determines the admissible objects of appeal
  – Cf. Art. 82 Act on the Swiss Federal Supreme Court
    – Decisions in public law matters
    – Cantonal legislation (as opposed to *federal* legislation)
    – Matters concerning voting rights
  – Cf. Art. 31 Act on the Swiss Federal Administrative Court
    – Administrative decisions

Objects of Appeal: Legislation

Direct / abstract challenge of legislation

Object of appeal:

– Statute / statutory provision

Examination of the provision:

– Detached from a specific case

Procedural effect:

– Rescission of the statute / statutory provision

Indirect / concrete challenge of legislation

Object of appeal:

– Administrative decision

Examination of the provision:

– On the basis of a concrete case

Procedural effect:

– No rescission of the provision but non-application of the provision in the specific case

– Repeal of the administrative decision

Example 11

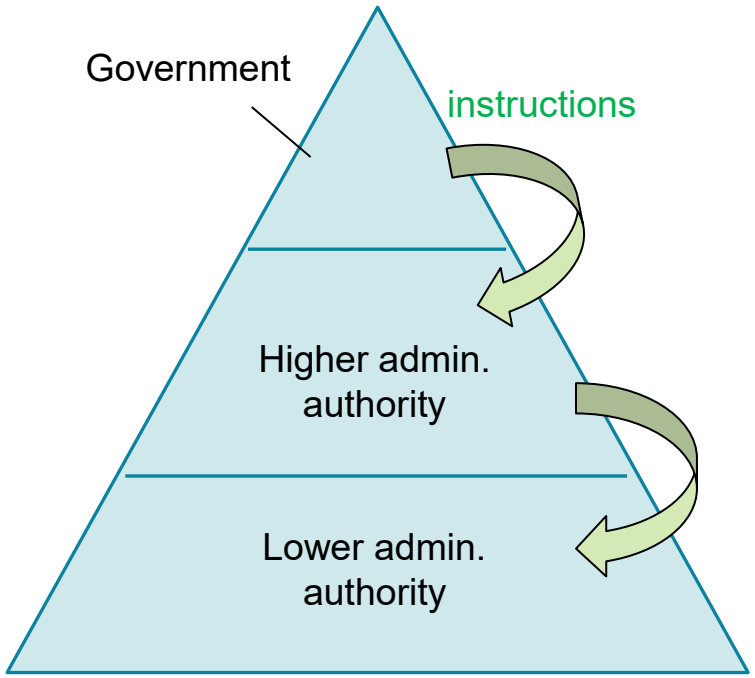
Concrete Challenge of Legislation

The parliament of the Canton X adopted the Police Act. Some years later, relying on the Police Act, the police directs Y away from a public square for two days and hands out a respective administrative decision. Y thinks that the Police Act violates certain provisions of the Federal Constitution. She wants to challenge the legislation. However, the time to directly challenge the Police Act has expired.

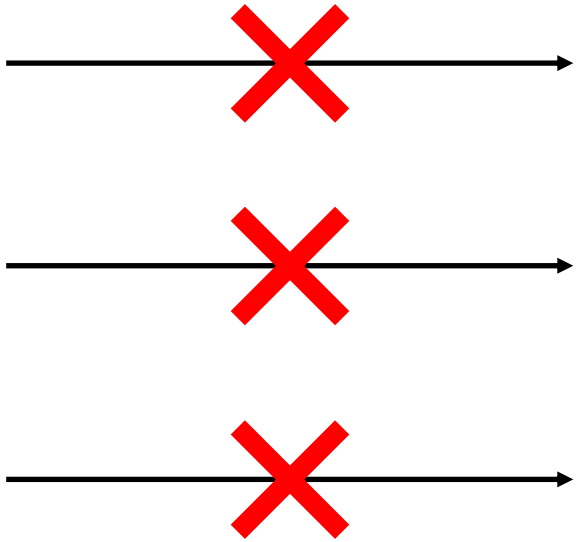
a) Against which object of appeal does Y have to appeal?
b) Will the appellate body hear Y's argument on the unconstitutionality of the Police Act?
c) What will happen with the Police Act if the appeal is successful?

Institutional Framework: Appeal System

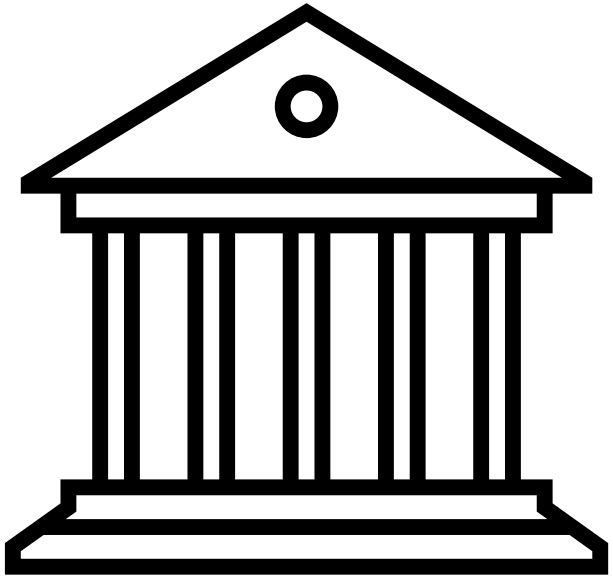
Administrative Bodies
(hierarchy)



no instructions



Courts
(independency)



Institutional Framework: Appeal System

Guarantee of access to a court (Art. 29a Cst.)

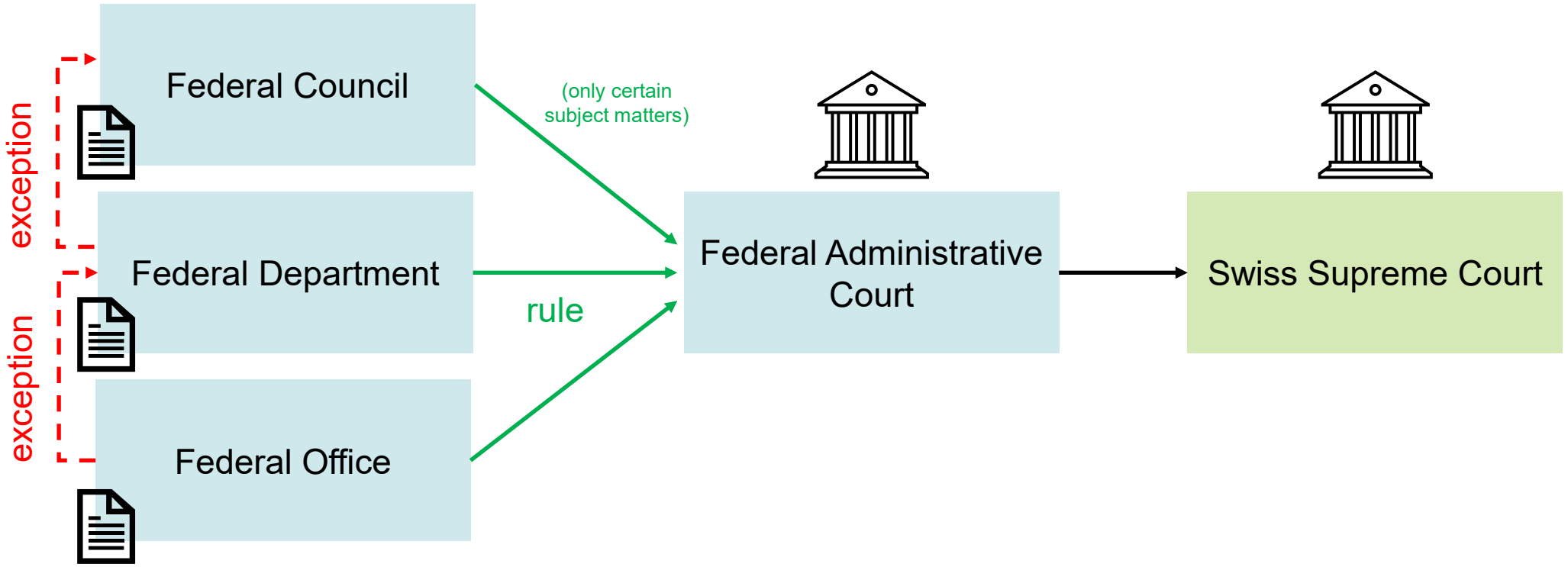
- Required:
  - One single, first instance *full* review of the facts and of the law by a court (judicial body)
  - Appeal to the Federal Supreme Court does *not* suffice!
- *Not* encompassed
  - Review of an administrative decision based on discretion
  - Right to appeal against the judicial decision

Art. 29a Cst.:

"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."

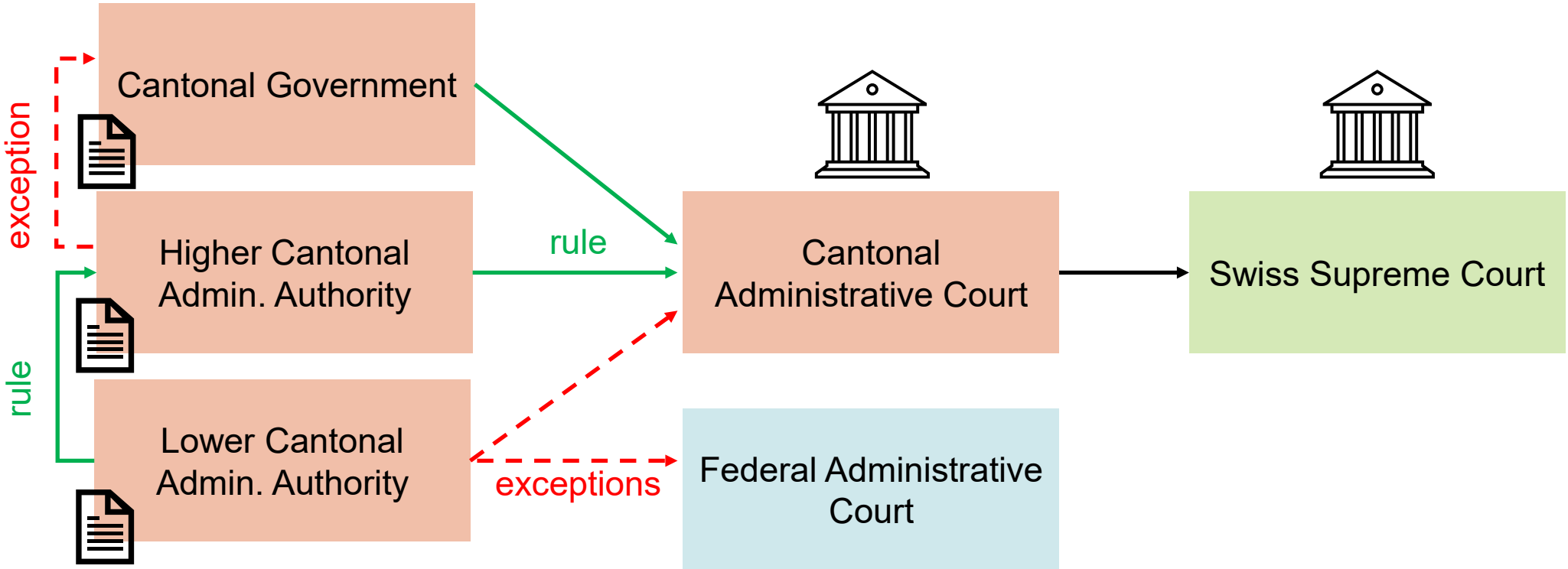
Institutional Framework: Appeal System

Federal Administrative Decision as Object of Appeal



Institutional Framework: Appeal System

Cantonal Administrative Decision as Object of Appeal



Role of the Swiss Federal Supreme Court

- Swiss Federal Supreme Court is not “the” special constitutional court in Switzerland
  - All courts and administrative bodies are competent to decide on constitutional questions
  - ***But:*** Art. 190 Cst. = important restriction on judicial control in Switzerland

    > The Federal Supreme Court and the other judicial authorities apply the federal acts and international law.

  - Courts and authorities must apply unconstitutional federal laws.
- Grounds for appeal show limited role of the Swiss Federal Supreme Court with respect to cantonal law:
  - Federal law, international and intercantonal law
  - In principle, no review of cantonal law
    - Exception: Cantonal constitutional law and cantonal provisions on voting rights

Learning Control: Are the Following Statements Correct?

- Important decisions must be taken by the legislator. Thus, an ordinance is always a sufficient legal basis for administrative action.
- As a rule, an appeal against a decision of a Cantonal Administrative Court must be filed to the Swiss Federal Administrative Court. The appeal may be lodged to the Swiss Federal Supreme Court only in a second step.
- If state action has only limited effects, it may still be suitable and, thus, proportionate.