

# Codification of Administrative Law: Theory, Methods and Consequences

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# I. Introduction

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A piano teacher had a nervous breakdown during a practical exam in concert. The board of examiners allows him to repeat the concert without an audience. He passes the exam. Later on, the conservatory revokes his diploma as the board of examiners incorrectly consented to a concert without an audience. Is the revocation permissible?

# I. Introduction

## Revocation: Question of good faith

### **Federal Constitution of the Swiss Confederation**

of 18 April 1999 (Status as of 11 March 2012)

#### **Art. 5** Rule of law

<sup>1</sup> All activities of the state shall be based on and limited by law.

<sup>2</sup> State activities must be conducted in the public interest and be proportionate to the ends sought.

<sup>3</sup> State institutions and private persons shall act in good faith.

<sup>4</sup> The Confederation and the Cantons shall respect international law.

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

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

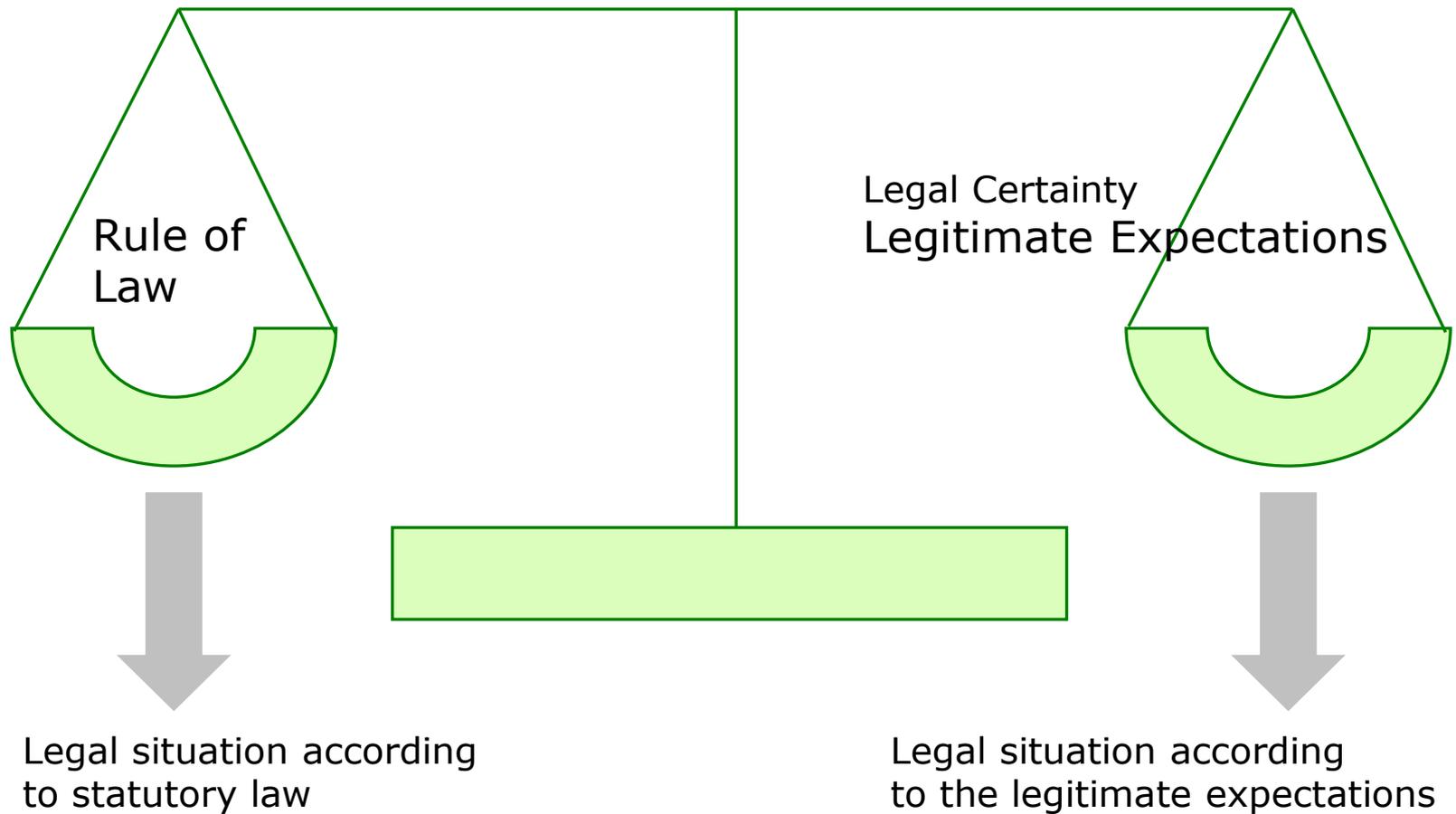
# I. Introduction

## Revocation: Question of good faith

<b>Representation (Basis)</b>	Administrative decisions, administrative contracts, (individual) advice. Limited: Laws, administrative practice, general information, passivity.
<b>Good Faith</b>	Presumed. The question, whether someone is or can be in good faith, must be considered with regard to all specifics of the case.
<b>Detrimental Dispositions</b>	Acts or omissions based on false assumptions lead to damages or inconveniences at least.

# I. Introduction

## Revocation: Question of good faith



# I. Introduction

## Revocation: Question of administrative procedure

**Gesamte Rechtsvorschrift für Allgemeines Verwaltungsverfahrensgesetz 1991, Fassung vom 31.05.2019**

### **2. Abschnitt: Sonstige Abänderung von Bescheiden**

#### **Abänderung und Behebung von Amts wegen**

#### **§ 68.**

(2) Von Amts wegen können Bescheide, aus denen niemandem ein Recht erwachsen ist, sowohl von der Behörde, die den Bescheid erlassen hat, als auch in Ausübung des Aufsichtsrechtes von der sachlich in Betracht kommenden Oberbehörde aufgehoben oder abgeändert werden.

(3) Andere Bescheide kann die Behörde, die den Bescheid in letzter Instanz erlassen hat, oder die sachlich in Betracht kommende Oberbehörde im öffentlichen Interesse insoweit abändern, als dies zur Beseitigung von das Leben oder die Gesundheit von Menschen gefährdenden Mißständen oder zur Abwehr schwerer volkswirtschaftlicher Schädigungen notwendig und unvermeidlich ist. In allen Fällen hat die Behörde mit möglichster Schonung erworbener Rechte vorzugehen.

# I. Introduction

## Revocation: Question of administrative procedure

(2) An administrative decision not resulting in any rights of someone may be repealed or modified *ex officio* either by the authority which issued it or by the higher authority having jurisdiction in the matter in exercise of its right of supervision.

(3) Other administrative decisions may be modified in the public interest by the authority that issued the administrative decision in the last instance or the higher authority having jurisdiction in the matter, to the extent that this is necessary and inevitable for eliminating grievances resulting in detriment to life or health of people or for avoiding severe damage to the economy. In all such cases the authority shall proceed in a manner not interfering, to the extent possible, with any rights already arisen to somebody.

similar to some Swiss cantons

# II. Codified and Non-codified Administrative Law

## Administrative Law

### **(General) Administrative Law**

Every modern legal order needs a set of general rules to enforce administrative law. These rules are "general" because they apply regardless of the specific subject area. They impose principles of action, of procedure and of organization of the authorities and form the core of the general administrative law.

## II. Codified and Non-codified Administrative Law

### Codification

#### **Codification of Administrative Law**

The legal basis of general administrative law is quite different. Countries with a common law tradition often (but with notable exceptions) have little written in Parliamentary acts. In other countries, there is a mixture between judicial development and selective interventions by the legislator. There are also countries in which the general administrative law has been converted into a comprehensive codification, in particular the Netherlands (Algemene wet bestuursrecht, Dutch General Administrative Law Act). Here, codification denominates any form of written rules issued by Parliament (or the executive branch).

## II. Codified and Non-codified Administrative Law

### Effects of codification

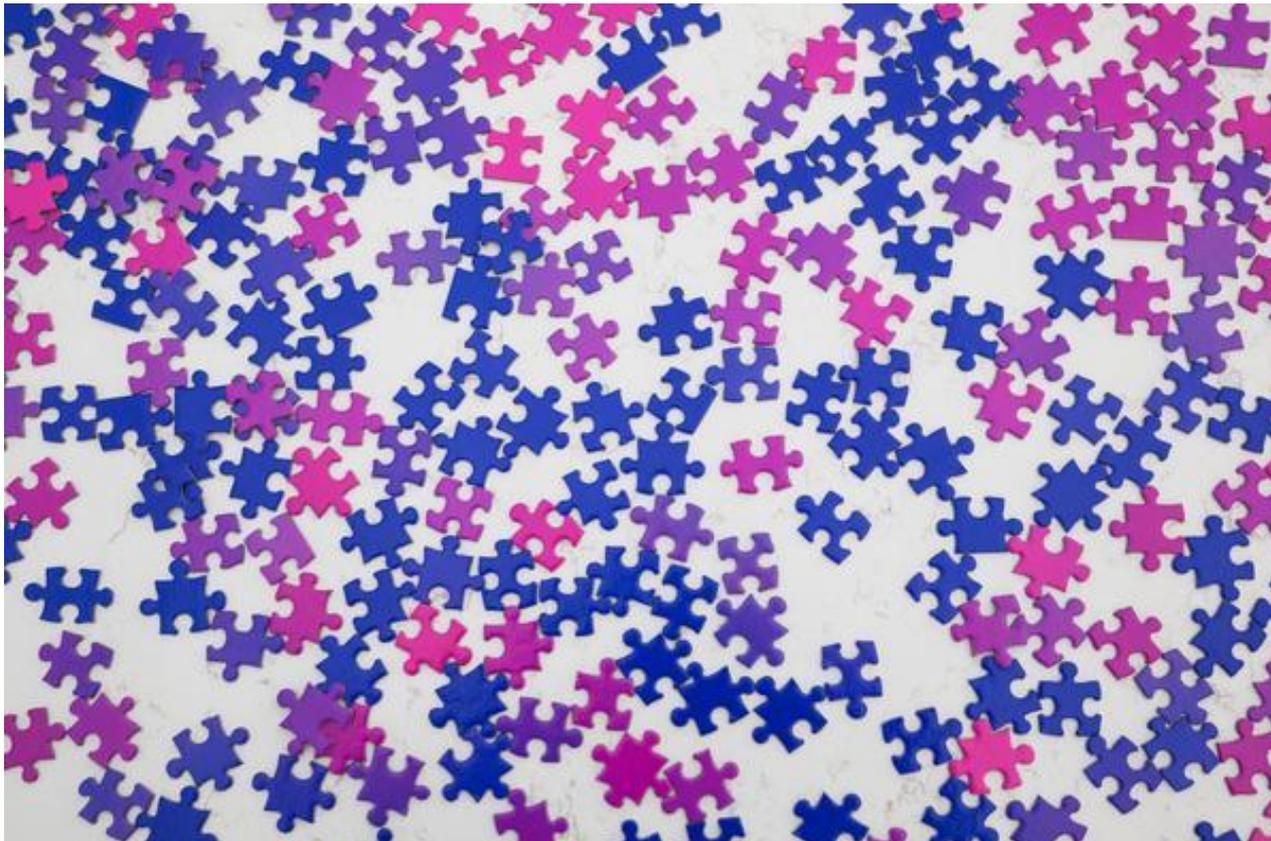


**Predictability?**  
(legal certainty)

## II. Codified and Non-codified Administrative Law

Effects of codification

**Illusion of Completeness?**



## II. Codified and Non-codified Administrative Law

### Effects of codification



**Petrification?**

# II. Codified and Non-codified Administrative Law

Effects of codification

Legitimacy?



## II. Codified and Non-codified Administrative Law

Effects of codification

### **Contradiction and Conflicts?**

(Conflicts between judge-made law – from the constitution? – and acts of Parliament)

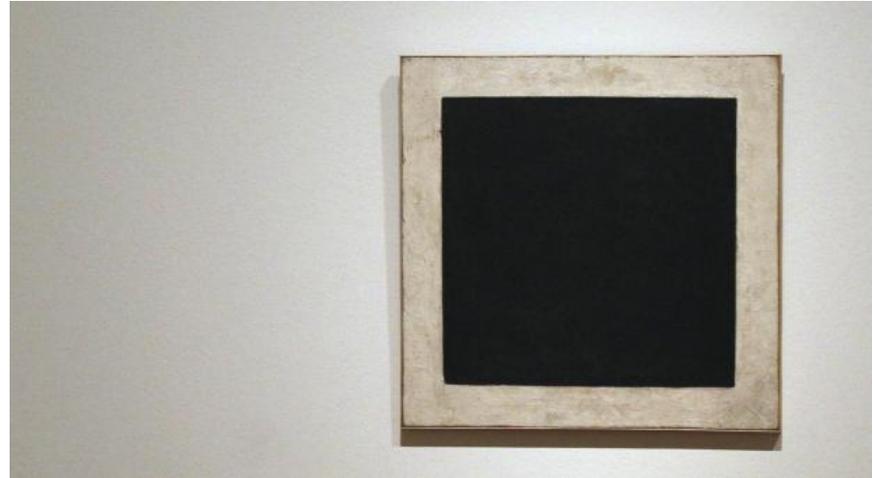


## II. Codified and Non-codified Administrative Law

Effects of codification

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**Banality?**



# GENERAL ADMINISTRATIVE LAW ACT

*Division 3.2 Duty of care and balancing of interests*

### **Article 3:2**

When preparing a decision an administrative authority shall collect the necessary information concerning the relevant facts and the interests to be considered.

## II. Codified and Non-codified Administrative Law

### Effects of codification

#### **Uniformity?**

(Can codification create uniformity that courts are no longer able to do so?)



# II. Codified and Non-codified Administrative Law

Effects of codification

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## Uniformity

(Can codification create uniformity that courts are no longer able to do so?)

**Bundesgesetz  
über Finanzhilfen und Abgeltungen**  
(Subventionsgesetz, SuG)

616.1

vom 5. Oktober 1990 (Stand am 1. Januar 2016)

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## 1. Kapitel: Zweck, Geltungsbereich und Begriffe

**Art. 1**      Zweck

<sup>2</sup> Es stellt Grundsätze für die Rechtsetzung auf und formuliert allgemeine Bestimmungen über die einzelnen Finanzhilfe- und Abgeltungsverhältnisse.

[The law stipulates principles for legislation and general rules for subsidies.]

# III. Final remarks

## **Codification of Administrative Law**

It has hardly been researched which consequences arise from the different degree of codification of the general administrative law.

Does codification increase predictability and legal certainty? Does the codification lead to a "petrification" of general administrative law? Does codification enhance legitimacy of administrative law? To which degree does the constitution shape administrative law and will there be conflicts in case of codification? Can uniformity achieved only by codification?

Which areas of general administrative law are suitable for a codification, which are not, and why and why not?