

Swiss Administrative Law and Administrative Procedure (Introduction)

Prof. Dr. Felix Uhlmann
MLaw Florian Brunner

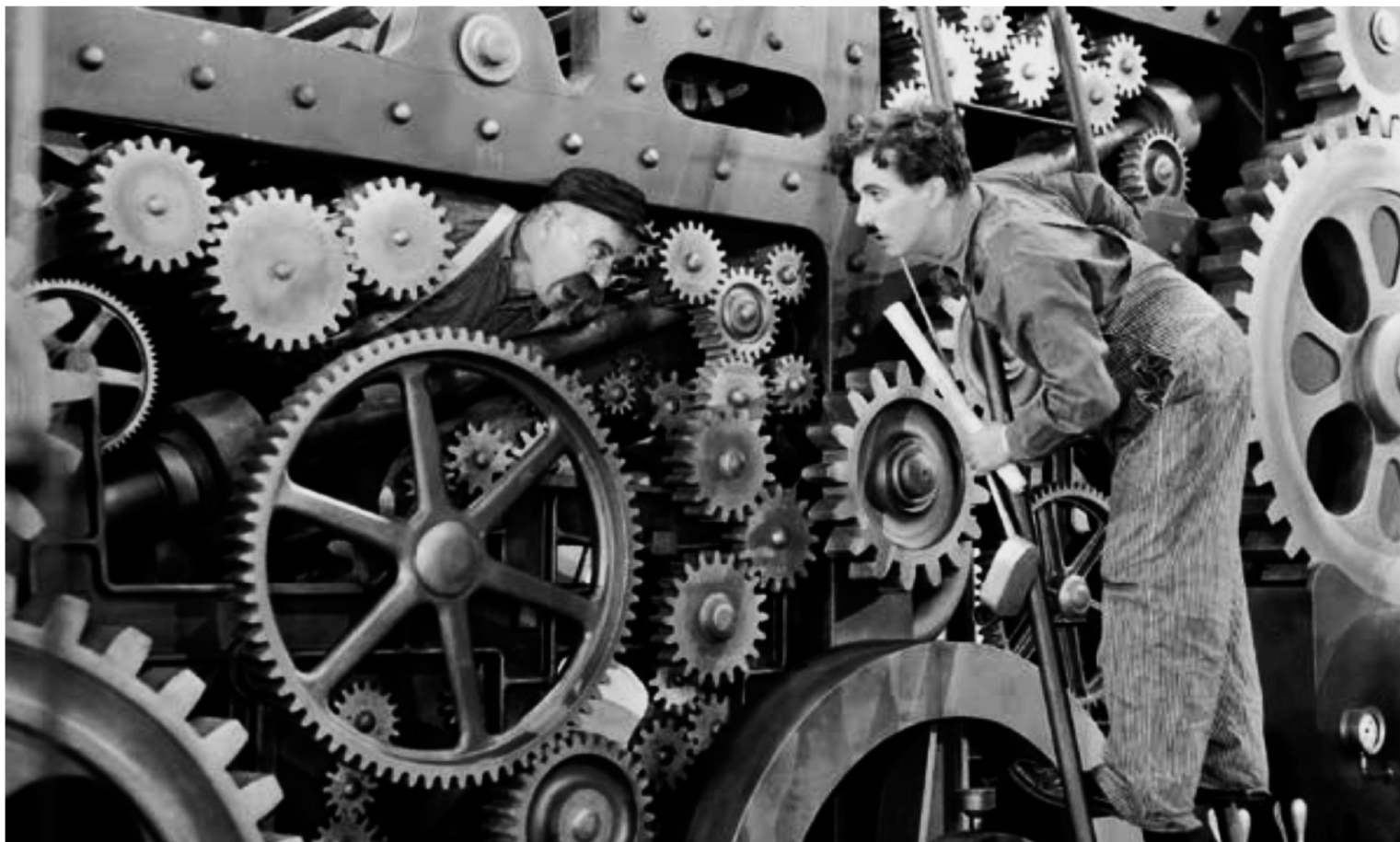
Chair of Constitutional and Administrative Law and Theory of Legislation



Universität Zürich

September 21, 2018

I. The Machinery of the Legal Sources



A. Overview

- **Codes** on the federal and cantonal levels

- Constitution
- Acts (Laws)
- Ordinances
 - Purely executive ordinances
 - Quasi-legislative ordinances

- Other sources

- International treaties
- Domestic treaties
- General legal principles (\neq general constitutional principles)
- Customary law
- Case law



B. Codes in Particular

- No general codification of administrative law
 - Myriad of federal and cantonal codes on specific subjects matters
 - 4,768 codes (over 65,000 pages) on the federal level (2013)
 - 16'788 codes on the cantonal level (2013)
- Distribution of competences

Federal level:

Immigration, competition, environmental protection, banks, transportation, communication, energy, employment, social security, etc.

Cantonal level:

Construction, welfare, health, (undergraduate) education etc.

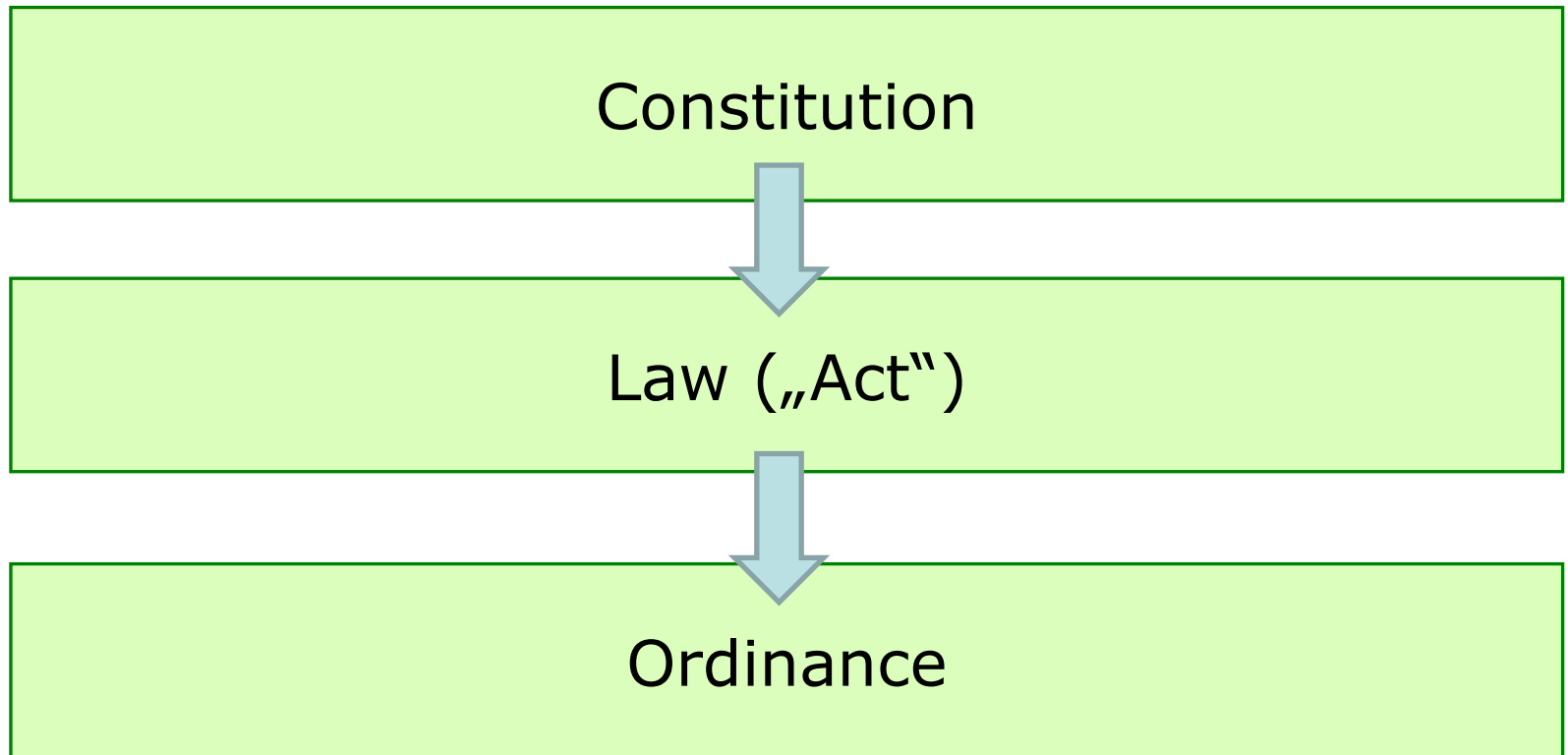
Federal and cantonal level:

Taxation (→ Prof. Simonek), zoning, police, civil servants, public liability, administrative organization, procurement etc.

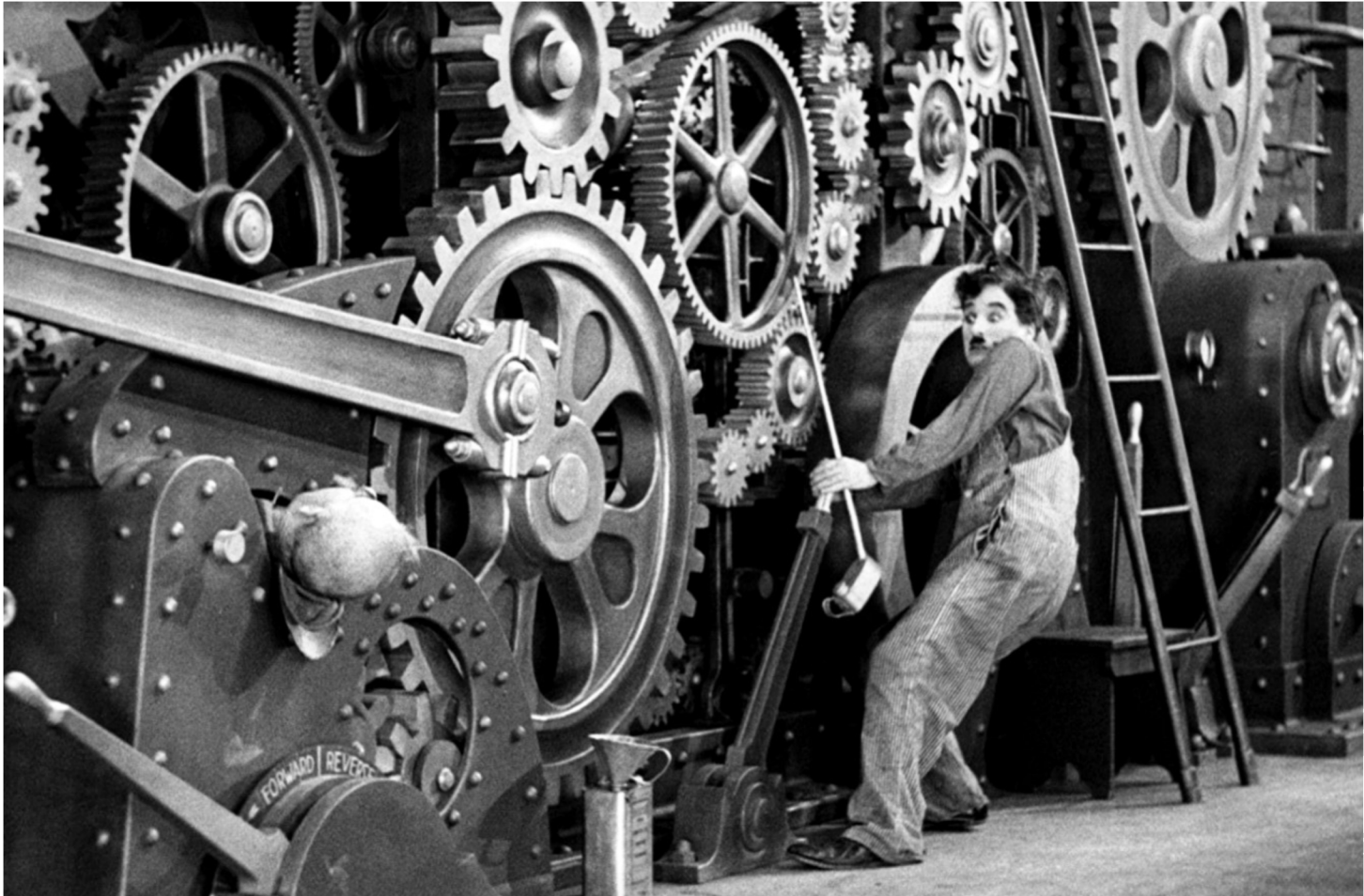
- *Caveat:* Many federal laws are executed and implemented by cantonal administrations



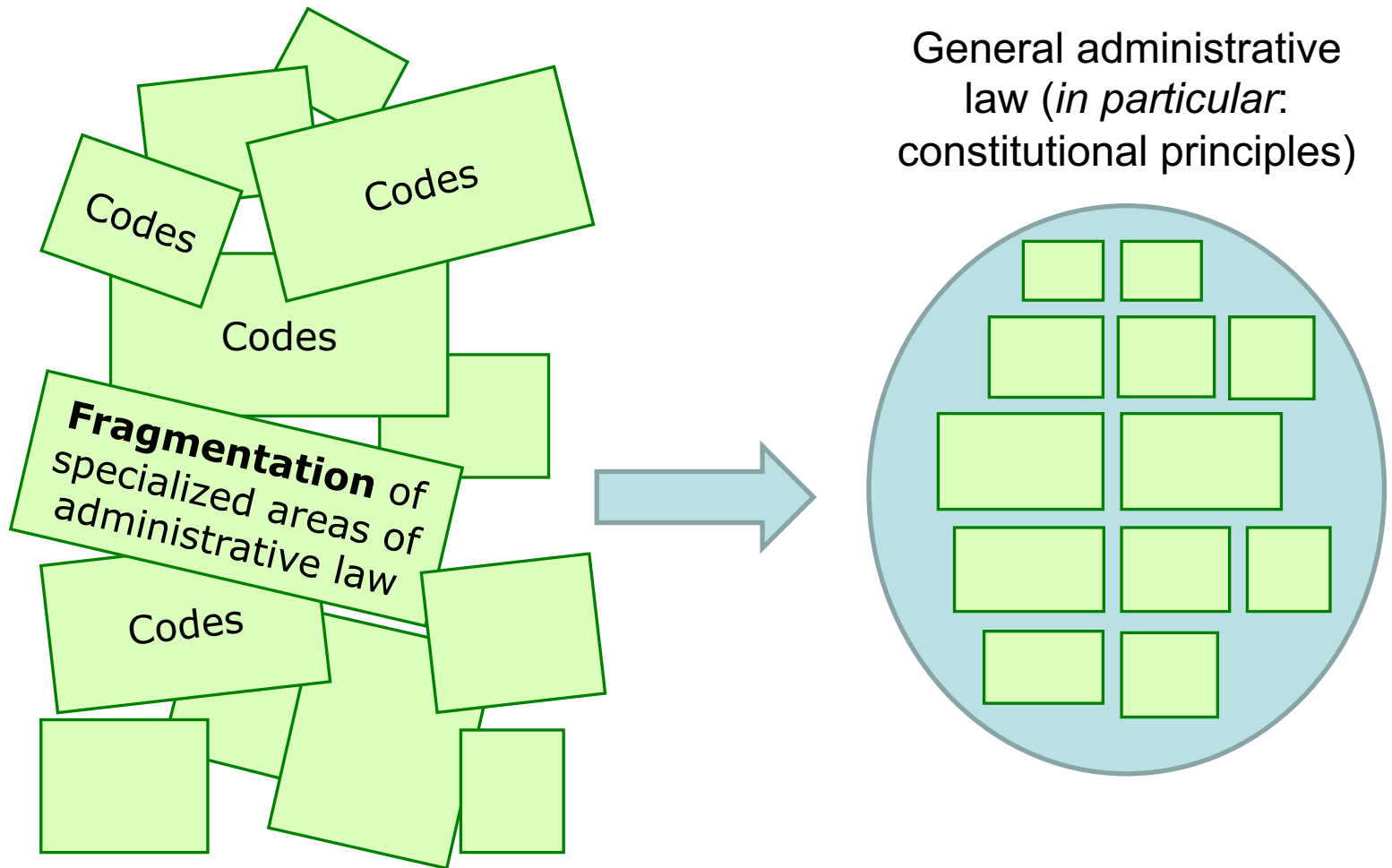
C. Hierarchy of the Legal System



II. General Constitutional Principles



A. „Taming“ the Laws



B. “General” Administrative Law As Discipline

Training in Administrative Law

- (General) Administrative Law, including
 - General Principles
 - Administrative Action and Enforcement
 - Administrative Organization
 - Public Liability, Monopolies, etc.
 - Administrative Procedure
-
- *Separately*: Specialized areas of Administrative Law



C. Constitutional Provisions

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. 8 Equality before the law

¹ Every person is equal before the 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.



D. Overview

**Principle of
Proportionality**

**Principle of
Legality**

**Principle of
Public Interest**

**Principle of
Good Faith**

**Prohibition of
Arbitrariness**

**Equality Before
the Law**



E. Principle of Legality

- Rationale
 - Rule of law
 - Legal certainty
 - Equality before the law
 - Democratic legitimation of administrative action
- **Two-tier test**

Requirement of a **legal provision**

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

Requirement of **sufficient level of the statute**

- Important decisions must be taken by the legislator (i.e. the parliament)



E. Principle of Legality

Art. 164 Legislation

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.

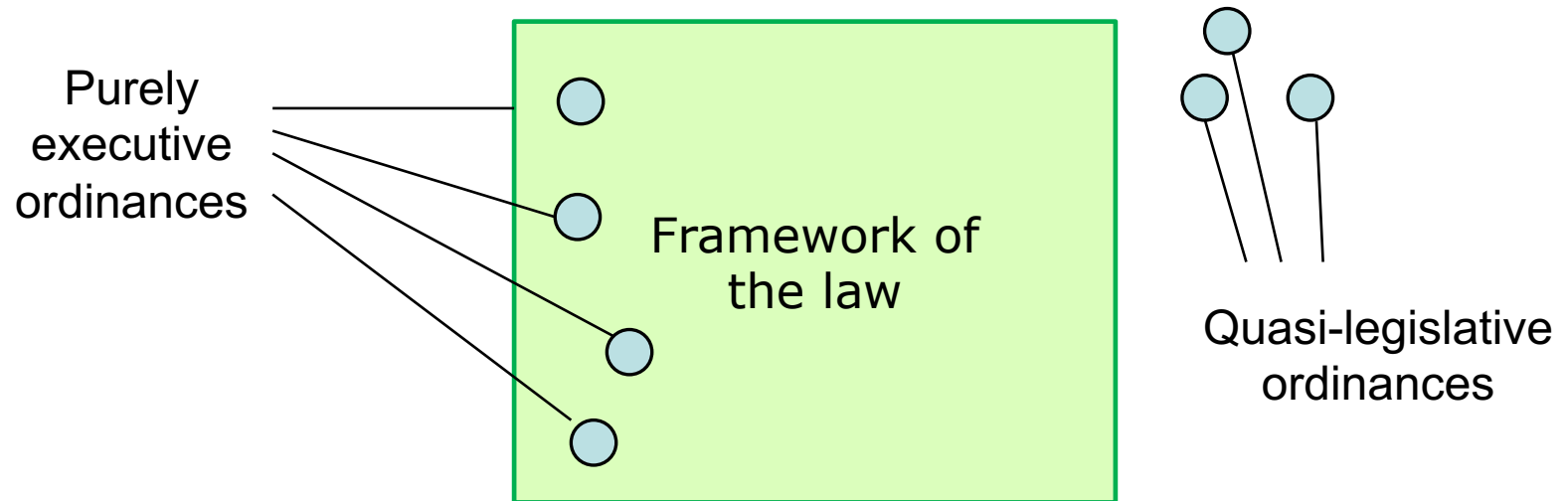


E. Principle of Legality

Delegated Legislation

- Legislator confers its competence to legislate to the executive branch

→ Executive branch enacts ordinances



E. Principle of Legality

- Purely executive ordinances
 - **No** further requirements → admissible
- Quasi-legislative ordinances

- Requirement of a **delegation clause**
 - Not excluded by the constitution
 - Delegation clause in the law itself
 - Precisely defined and limited questions
 - Fundamental (important) principles in the law itself

- If requirements are met → provision in an ordinance satisfies principle of legality



E. Principle of Legality

- Different standards of review
 - Stricter standard: Significant restrictions (fundamental rights)
 - Less strict standard: Technical areas, etc.
- Judicial review
 - Principle of legality as a **flexible** device
 - Full* judicial review for the claims:
 - „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!“

* *Caveat*: Standard of Review may be restricted by law
(e.g. with respect to cantonal law before the Federal Supreme Court)



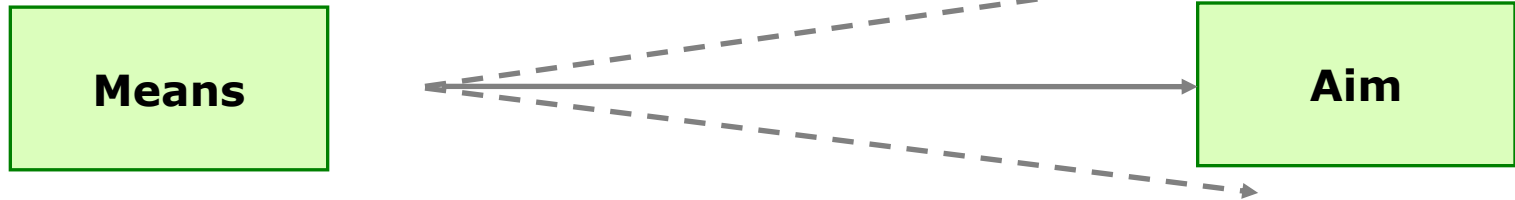
F. Principle of Public Interest

- State activities must be conducted in the public interest
 - Rather comprehensive interpretation
 - Security
 - Public peace
 - Environmental protection
 - Fiscal interests
 - Social policy
 - etc. etc.
 - Usually unproblematic
- *Essentially*: Benchmark for proportionality test

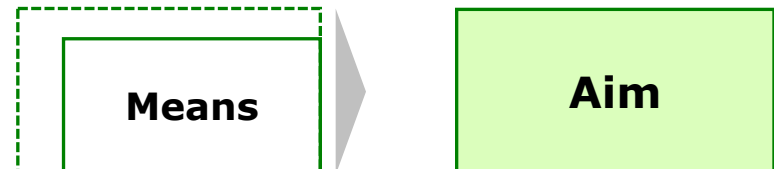


G. Principle of Proportionality

Suitability

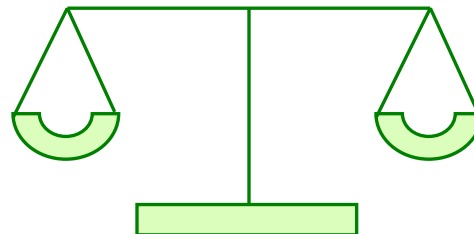


Necessity



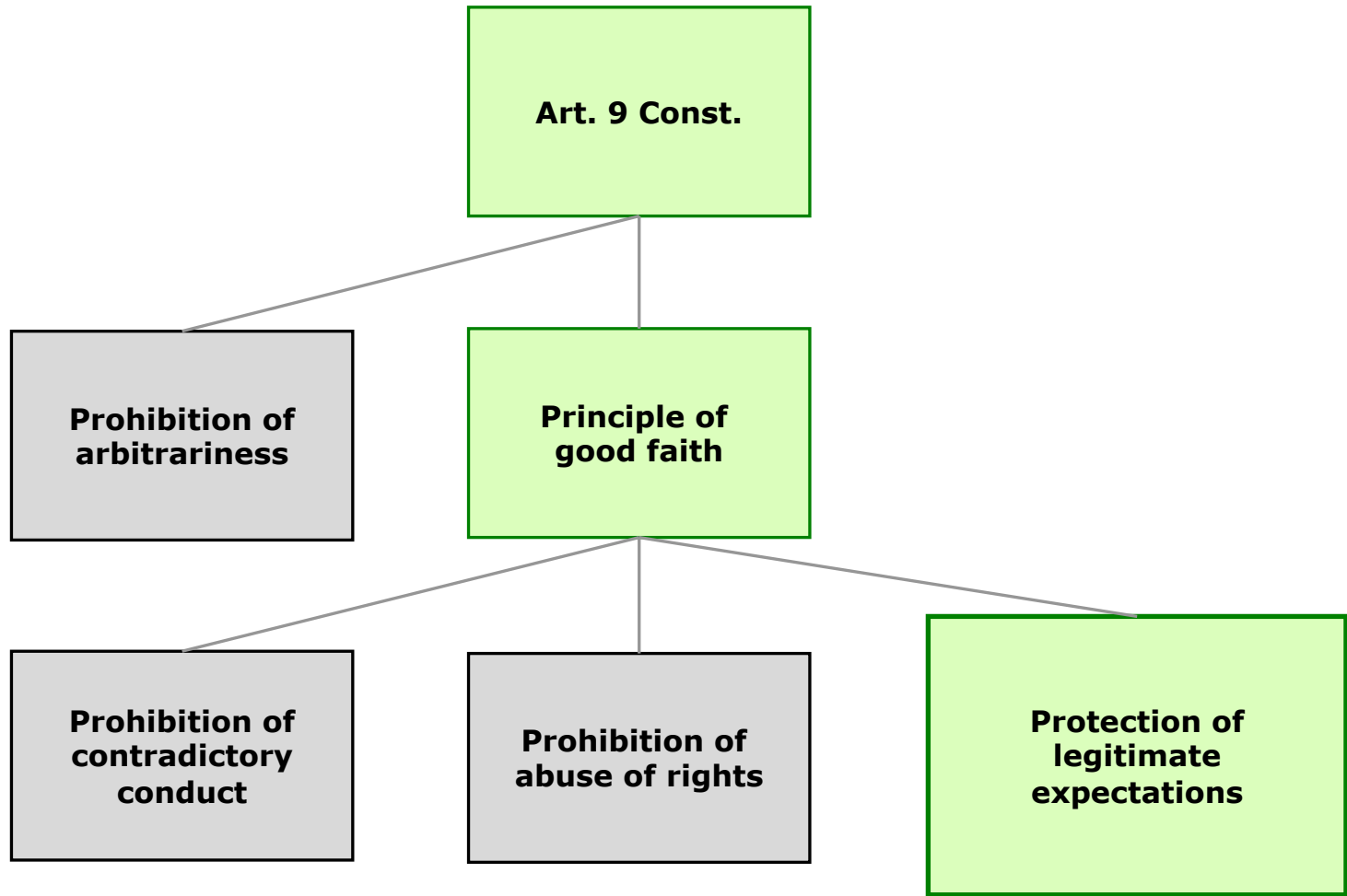
Reasonableness

Aim of the means
(public interest)



Effect of the means
(private interest)

H. Principle of Good Faith



H. Principle of Good Faith

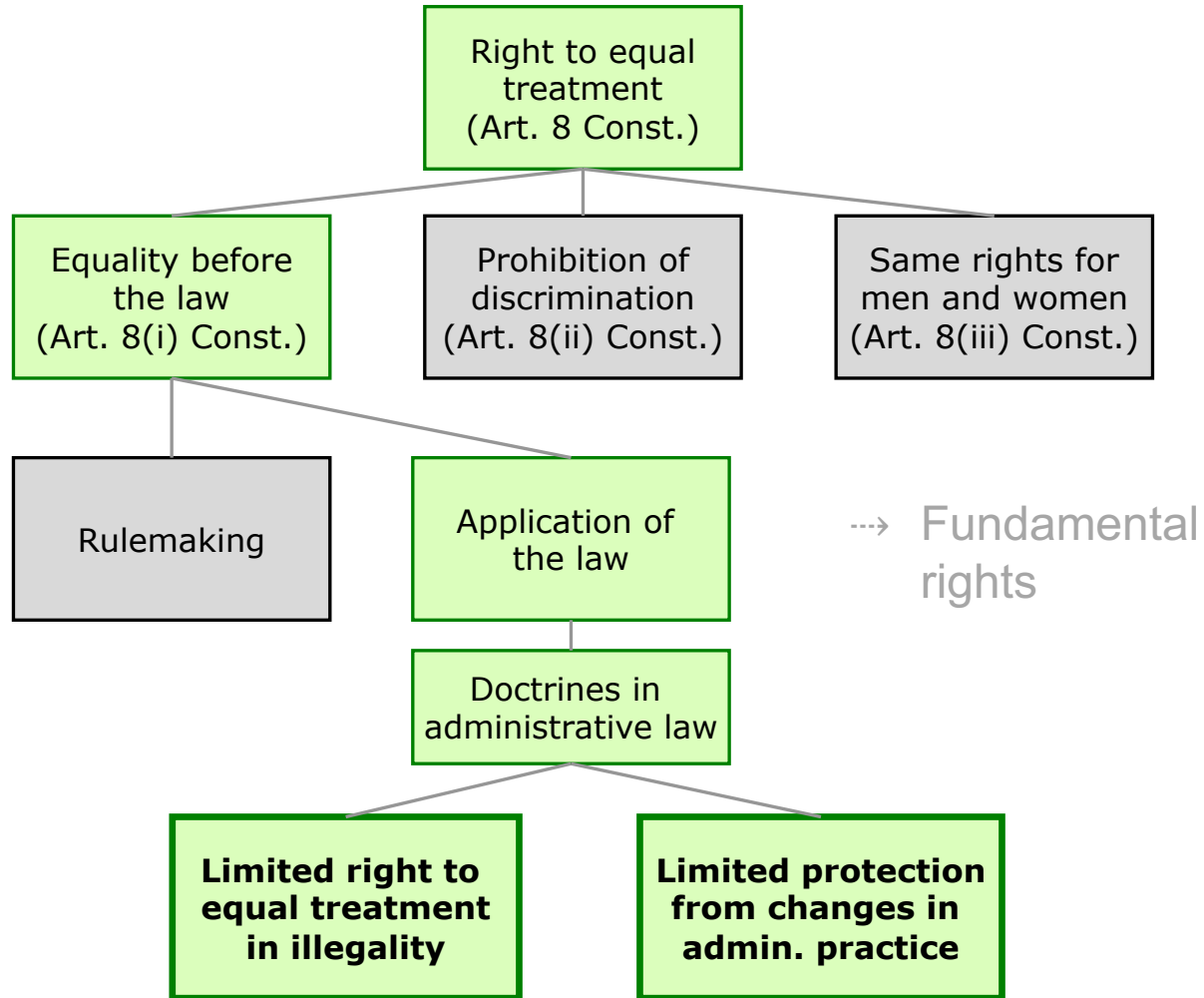
Requirements

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

- No revocation of an administrative action
- Extension of deadlines
- Binding effect of incorrect advice: incorrect application of the law
- *Rarely*: Damages

I. Equality Before the Law



I. Equality Before the Law

Limited right to equal treatment in illegality

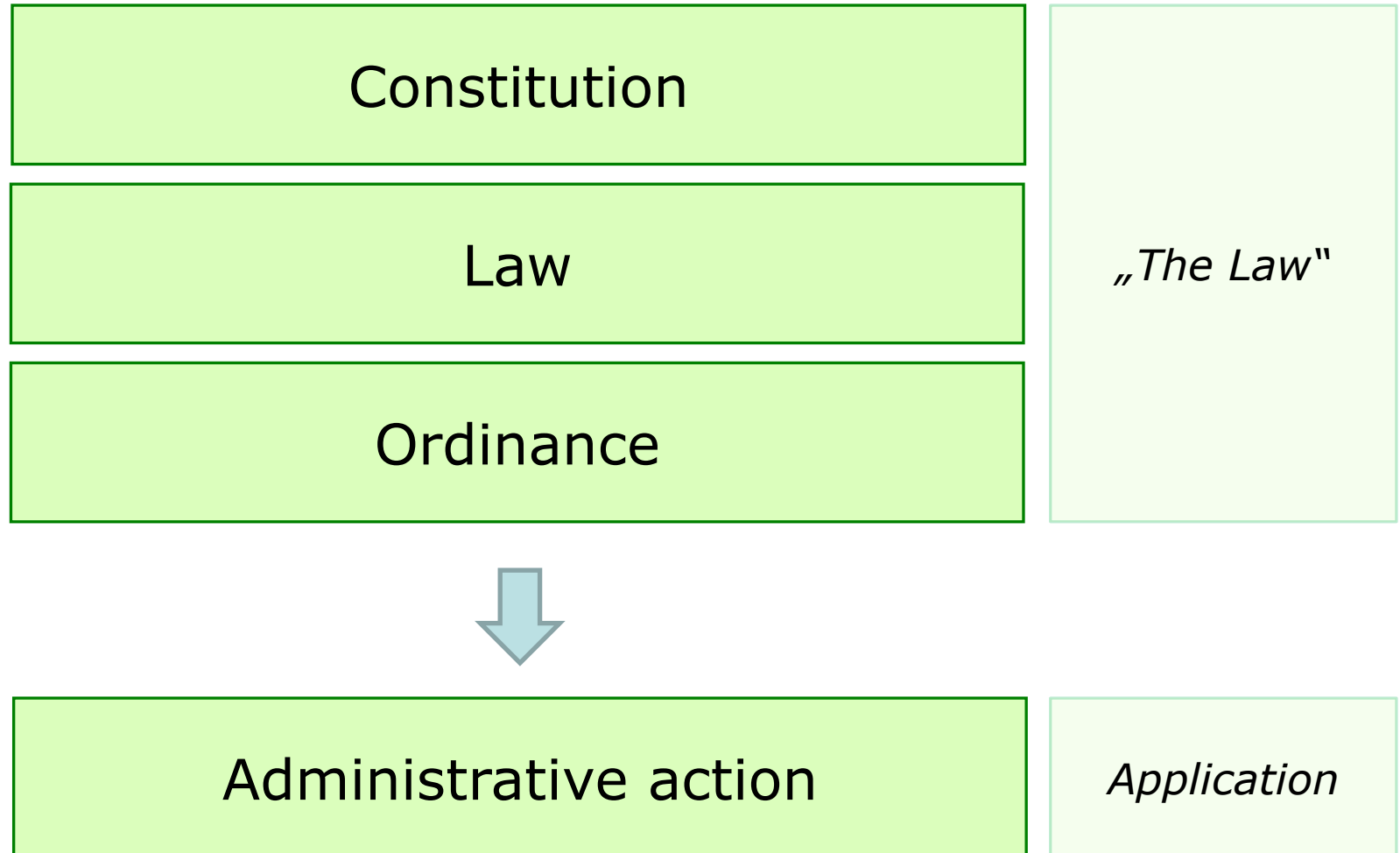
1. Illegal practice
2. Practice continues
3. No preponderant public or private interests

Changes in court or administrative practice

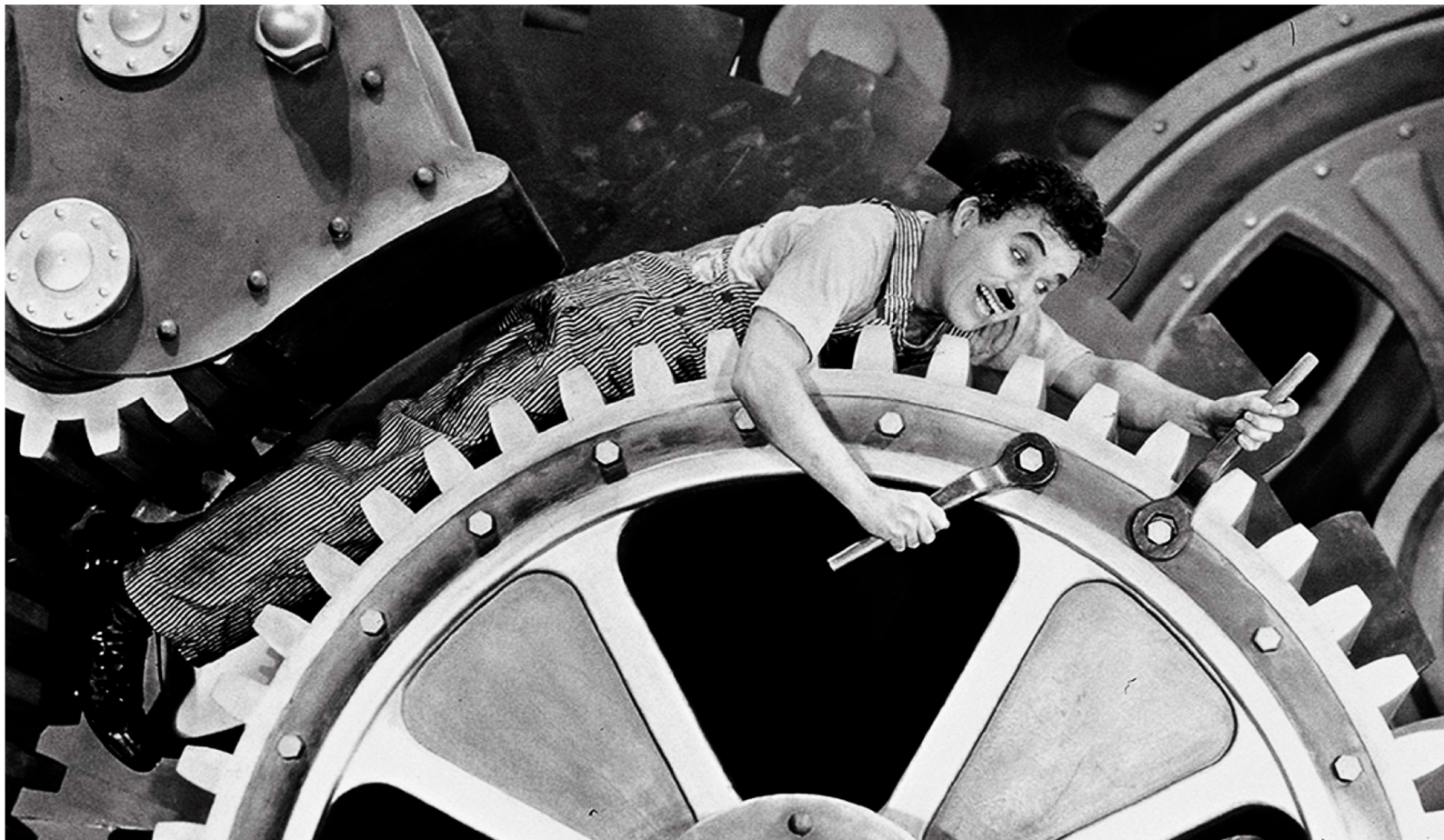
1. Valid reason for the change of practice
2. Change is categorical
3. Interest in the correct application of the law outweighs the interest in legal certainty
4. Duly announcement of the change of practice (no breach of good faith)



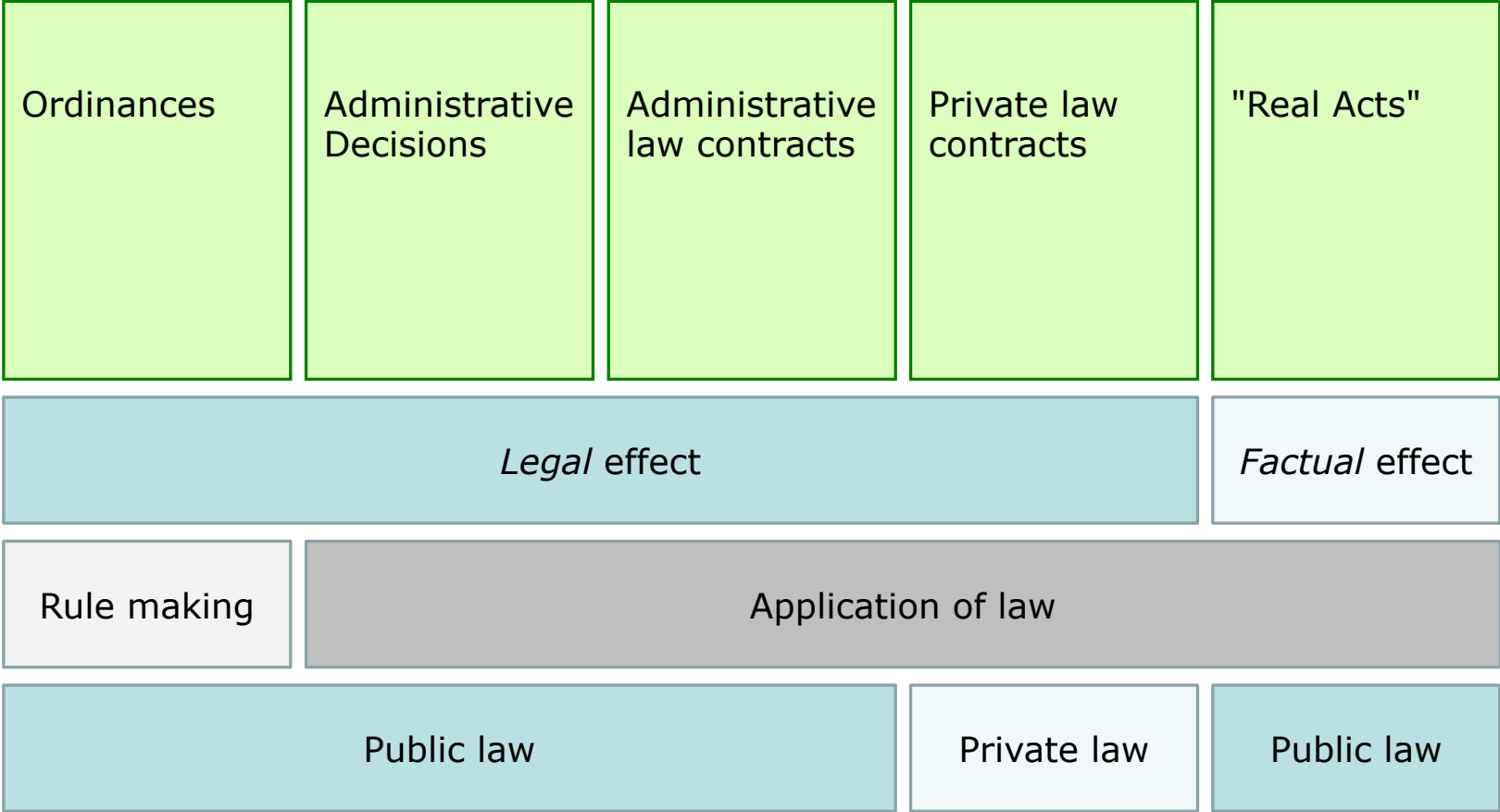
III. Forms of Administrative Action



A. „Forms“ as Means of the Administration



B. Overview



C. Administrative Decisions

Art. 5 of the Federal Act on Administrative Procedure

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.



C. Administrative Decisions

- Administrative decision as **archetype** of administration action
 - „The power to administer includes the power to issue administrative decisions.“
 - Bridge and *traditionally* prerequisite for legal remedies: „No legal protection without administrative decision.“

- **Elements**

- Establishment, amendment, withdrawal of rights or obligations or finding of their (non-)existence
- Unilateral
- Binding and enforceable
- Individual-concrete
- Rooted in public law

- Consequence → Form requirements



C. Administrative Decisions

Example

Building Department
of the Canton of Zurich
(...)

Registered Mail
X
Examplestreet 10
(...)

Administrative Decision

Operative part

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 ten days of receipt to the Construction Complaints Court.



D. Administrative Law Contracts

- Negotiating administrative action?
 - Administrative law contracts as the „liaison dangereuse“ of Swiss administrative law
 - Sometimes due to „psychological“ rather than legal considerations
- Stability by creation of mutual rights and obligations

Admissibility

- Law leaves room or at least does not exclude contractual regulation
- Objective reasons, i.e. Contract appears as more suitable
- Consent
- Formal requirements (?)



E. Private Law Contracts

- No evasion of state obligations by „escaping into private law“
- *Still*: Acting based on private law may be **admissible** if
 - No subordination; and
 - No *immediate* fulfillment of public tasks
- Traditionally in the following areas:
 - Public procurement
 - Management of financial assets
 - Profit-oriented state action
- Demarcation from public law
 - Sovereignty/subordination? (*Subordinationstheorie*)
 - Public interest and mandate? (*Interessen- und Funktionstheorie*)
 - Consequences? (*Modaltheorie*)



F. Informal Acts (Real Acts)

- Informal acts do not *deliberately* affect the legal situation of citizens
 - Actions within a public school taken by teachers
 - Actions within a public hospital (surgeries, etc.)
 - Police actions (patrolling, roadside checks, etc.)
 - Governmental information activities (→ *Vacherin Mont d'Or*)
- Legal remedies against real acts?
 - State liability (*very difficult*)
 - New provision in the Federal Act on Administrative Procedure:
Art. 25a



F. Informal Acts (Real Acts)

Federal Act on Administrative Procedure:

Art. 44

A. Principle⁷⁵ Any ruling shall be subject to an appeal.

Art. 25a⁵⁹

Fbis. Ruling on
real acts

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.



Example 1

New Billboard

A request for a new billboard is rejected because the billboard is not – as the law requires – "esthetically satisfying".



Example 2

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.

Example 3

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.“

Assume that there is no provision in the law on the dress code.



Example 4

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 under any given circumstances.



Example 5

Monitoring of the Border Traffic

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 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?



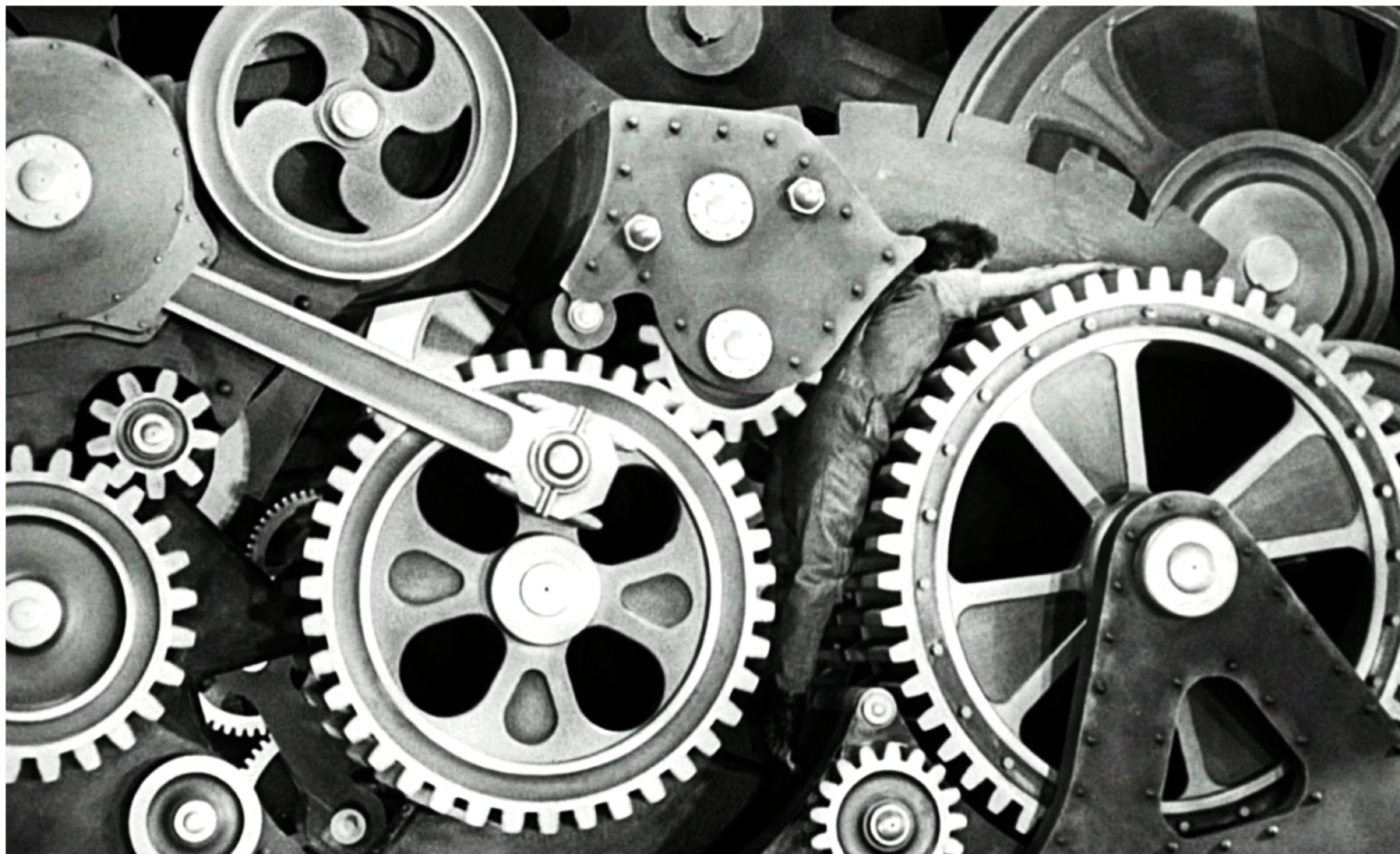
Example 6

Vacherin Mont d'Or

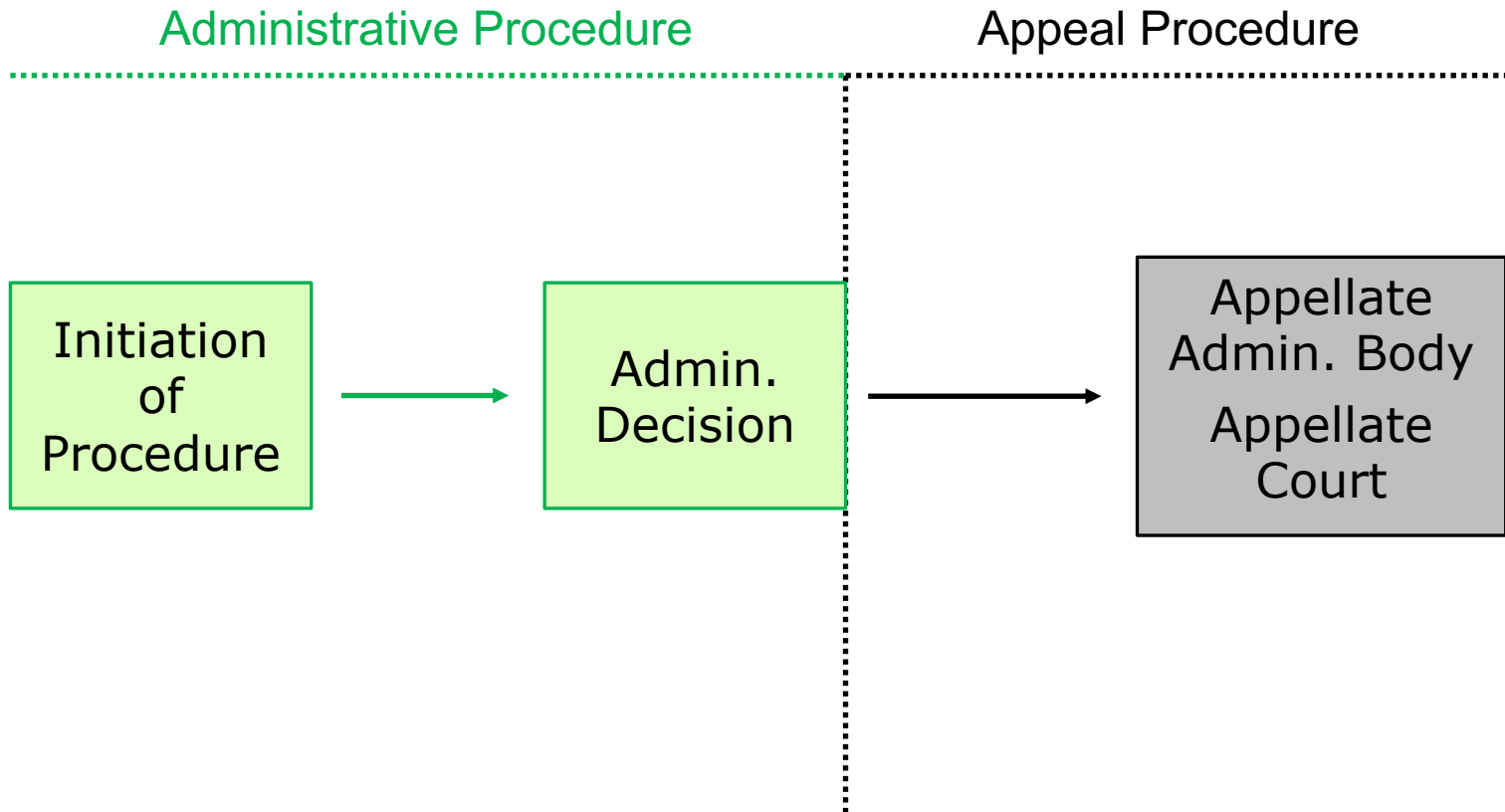
Demand of Vacherin Mont d'Or sharply declines after the Federal Office of Public Health informs of the danger of listeriosis in cheese (BGE 118 Ib 473).



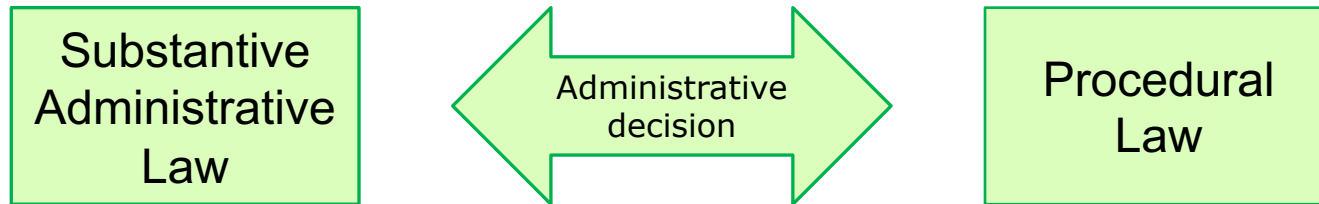
IV. Administrative Procedure




A. Hinge Function of Admin. Decisions



A. Hinge Function of Admin. Decisions



- Administrative decision as trigger
 - Initiation of administrative procedure triggers certain procedural rights
 - Issuance of the administrative decision triggers the possibility of legal protection

 „*The hunt for administrative decisions*“

- Art. 25a Federal Act on Administrative Procedure
 - Most cantons have implemented a similar provision in their respective code

B. Relevant Laws

- Each level has its own code of administrative procedure
 - Federal and Cantonal laws
- On the federal level
 - Federal Act on Administrative Procedure
 - Act on the Swiss Federal Administrative Court
 - Act on the Swiss Federal Supreme Court
- Questions: Where to find...
 - ... the deadlines to file an appeal to the Federal Supreme Court?
 - ... the answer to the question whether federal legislation may be directly challenged?
 - ... provisions regulating the consequences of a violation of the right to be heard in a cantonal proceeding?



C. Procedural Rights

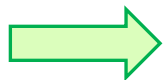
Art. 29 Constitution applies in *all* proceedings

Art. 29 General procedural guarantees

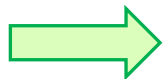
¹ Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.

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

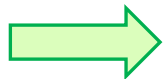
³ Any person who does not have sufficient means has the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is necessary in order to safeguard their rights, they also have the right to free legal representation in court.



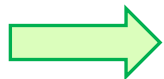
Right to be heard



Right to a decision within reasonable time



Right to legal aid and counsel



Constitutional guarantees as **minimum guarantees**

Procedural rights are more specifically embedded in the laws

C. Procedural Rights

- Owners of procedural rights: the parties

Art. 6

II. Parties Parties are persons whose rights or obligations are intended to be affected by the ruling and other persons, organisations or authorities who have a legal remedy against the ruling.

- “Material” notion of parties

D. 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.



E. 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 Act on Administrative Procedure
- Reasonableness is to be considered in light of the circumstances, such as
 - Complexity of the case
 - Urgency of the matter
 - Behavior of the parties



F. 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



G. Further Constitutional Guarantees

- Art. 30 Constitution: Additional requirements in *judicial* proceedings

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 Unless otherwise provided by law, any person against whom civil proceedings have been raised has the right to have their case decided by a court within the jurisdiction in which they reside.

³ Unless the law provides otherwise, court hearings and the delivery of judgments shall be in public.

- Cf. also art. 31 (deprivation of liberty) and art. 32 (criminal proceedings)



V. Appeal Procedure



V. Objects of Appeal

- Typically:



- *Keep in mind:* 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
 - Art. 31 Act on the Swiss Federal Administrative Court
 - „Administrative decisions in the sense of Art. 5 Administrative Procedure Act“
- Exceptions must be stated in the law

A. Objects of Appeal

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 provision

Indirect/concrete challenge of legislation

Object of appeal:

administrative decision

Examination of the provision:

On the basis of a concrete case

Procedural Effect:

- Non-application of the provision in the specific case
- Repeal of the administrative decision



B. Right to Appeal (*locus standi*)

- Basic rule

Art. 48⁸⁹

D. Locus standi

¹ A right of appeal shall be accorded to anyone who:

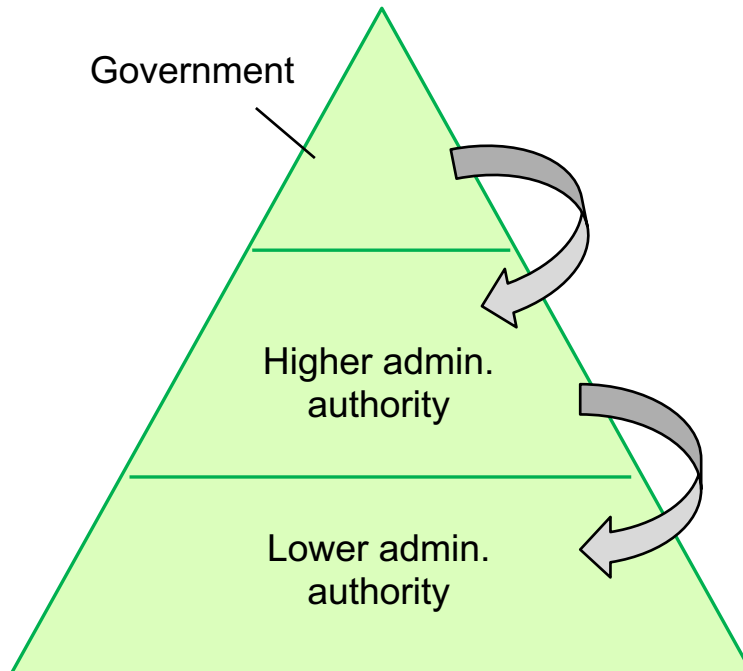
- a. has participated or has been refused the opportunity to participate in proceedings before the lower instance;
- b. has been specifically affected by the contested ruling; and
- c. has an interest that is worthy of protection in the revocation or amendment of the ruling.

² Persons, organisations and authorities who are granted a right of appeal by another federal act shall also be entitled to appeal.

- Special rules on locus standi in cases of direct challenge of legislation
 - It is enough to be potentially affected in the future

C. Institutional Framework

Administrative Bodies (hierarchy)



Courts (independency)



C. Institutional Framework

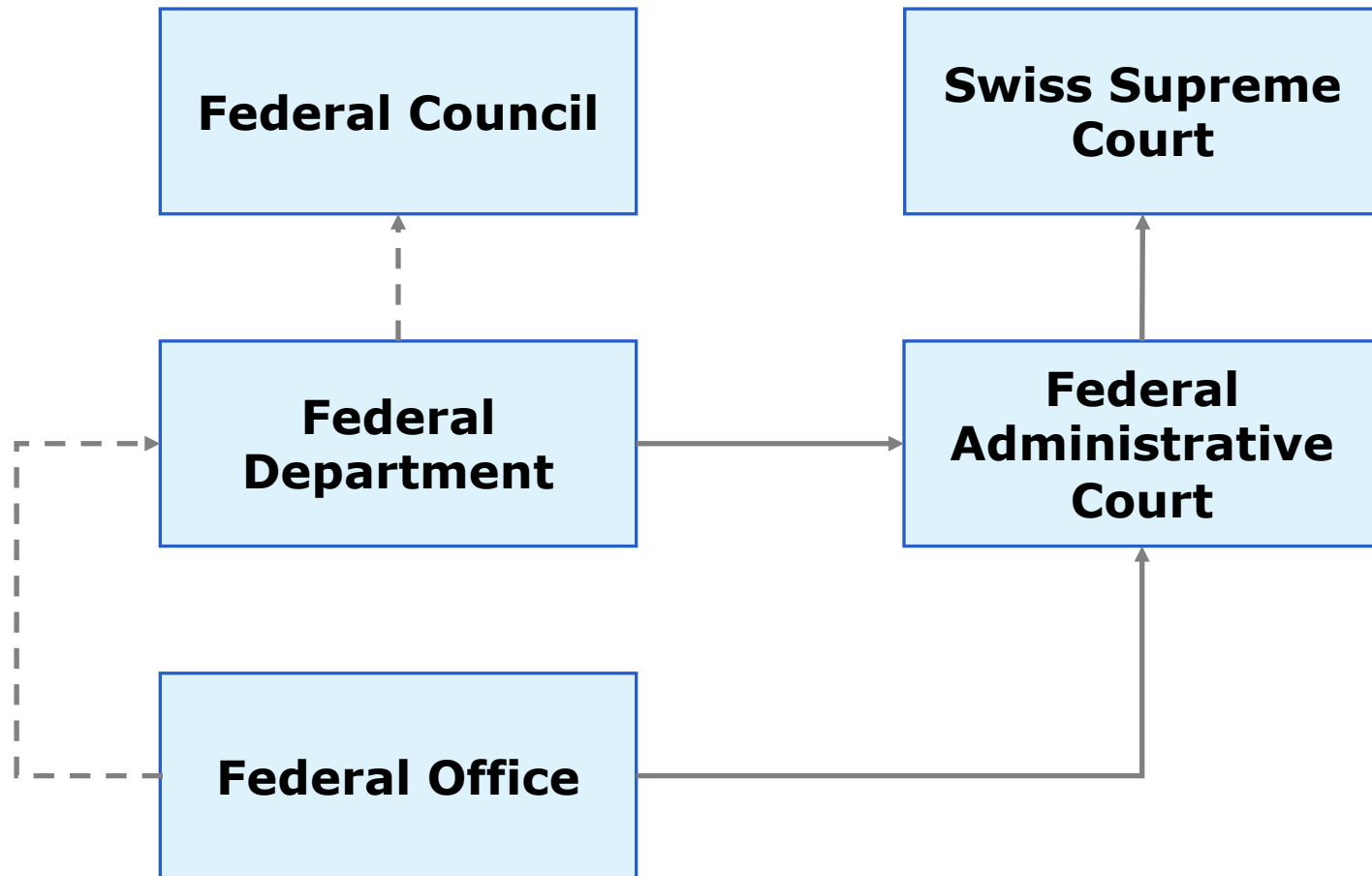
- **Guarantee of access to a court:** Art. 29a Const.

Art. 29a³ Guarantee of access to the courts

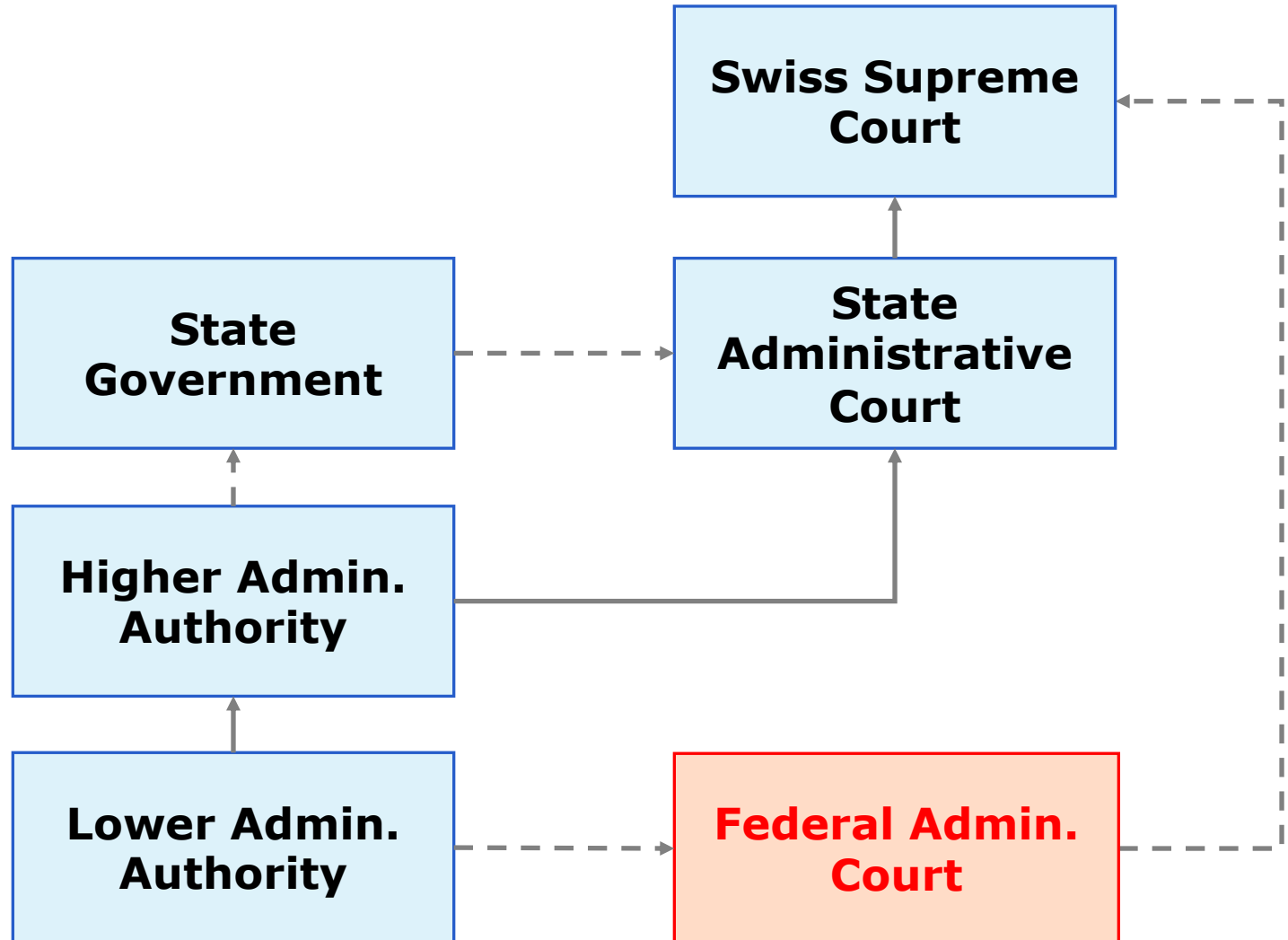
In a legal dispute, every person has the right to have their case determined by a judicial authority. The Confederation and the Cantons may by law preclude the determination by the courts of certain exceptional categories of case.

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

D. Appeal System before Federal Authorities



E. App' System before Cantonal Authorities



F. The Swiss Federal Supreme Court

- Situated in Lausanne, 38 judges
- **Objects of appeal**
 - Decisions in public law matters
 - Cantonal legislation
 - Matters concerning voting rights
 - Subsidiary constitutional appeal (*special case*): decisions of last cantonal instances

- **Grounds for appeal**

- Federal law, international and intercantonal law
- In principle, ***no review of cantonal law***
 - Except cantonal constitutional law and cantonal provisions on voting rights
- In principle, ***no review of facts***
 - Except in manifestly erroneous cases



G. Particularities of the Swiss System

- No special constitutional court in Switzerland
 - Decision of constitutional questions by courts and administrative bodies ("*diffuse*" system)
- Most important restriction on judicial review vis-à-vis federal laws in Switzerland

Art. 190 Applicable law

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

- Courts must apply **federal** laws that are unconstitutional (some exceptions)



Example 7

Energy supply stop (BGE 137 I 120)

The Canton of Basel industrial works (IWB) are legally obliged to deliver energy to buildings. A, an owner of a building, has not paid his energy bills for two years. IWB formally notified A that it would cut energy supply should he not pay the outstanding amount. A did not pay. IWB stopped energy supply. According to the statutory law, supply may only be cut if it does not constitute unreasonable hardship for third parties such as tenants.

X, a tenant in the building, appealed and claimed his right to be heard was violated because the supply stop was not issued in the form of an administrative decision.



Example 8

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 9

Zurich Police Act (BGE 136 I 87)

The parliament of the Canton of Zurich adopted the Police Act. Y, a private person living in Zurich, thinks that the law violates certain provisions of the federal constitution. She wants to challenge the legislation.

- a) Which legal remedy to which appellate body can Y take?
- b) Does Y have locus standi?

