Introduction to Swiss Civil Law

The History of the Swiss Civil Code

Civil Law I: Law of Persons & Family Law

Elisabetta Fiocchi Malaspina


AI Appenzell Innerrhoden
AR Appenzell Ausserrhoden
BL Basel-Landschaft
BS Basel-Stadt
NW Nidwalden
OW Obwalden
SH Schaffhausen
SO Solothurn
DEUTSCHLAND
FRANKREICH
ÖSTERREICH
LIECHTEN-STEIN
ITALIEN
SH
BS
Thurgau
BL
Aargau
Zurich
Jura
SO
AR
AI
St. Gallen
Zug
Lucern
Schwyz
Glarus
Neuen-burg
NW
Bern
OW
Uri
Freiburg
Graubünden
Waadt
Tessin
Genf
Wallis

Overview of the Lecture

- Historical context / Political circumstances
- Civil codes of the cantons
- Jurisprudence in Switzerland
- The period of codifications:
  - Code of Obligations
  - Swiss Civil Code
- Structure and System of the Swiss Civil Code
- Reception of the Swiss Civil Code
- Swiss Civil Code
- Principles
- Law of Person
- Family Law / Marital Law

Historical Context

- 1798-1803: Helvetic Republic
- 1803: Napoleons Act of Mediation
- 1814-1815: Vienna Congress
- 1815: Federal Treaty of 22 Cantons
- 1848: First Federal Constitution
- 1874 und 1999: Total revision of the Federal Constitution

Napoleon Bonaparte, letter to the delegates of the Helvetic Republic, 1803

« La Suisse ne ressemble à aucun autre État, soit par les événements qui s'y sont succédé depuis plusieurs siècles, soit par la situation géographique, soit par les différentes langues, les différentes religions, et cette extrême différence de moeurs qui existe entre ses différentes parties. La nature a fait votre État fédératif, vouloir la vaincre n'est pas d'un homme sage »

« Ce qui est en même temps le désir, l'intérêt de votre nation et des vastes États qui vous entourent est donc : 1° l'égalité des droits entre vos […] cantons ; 2° une renonciation sincère et volontaire aux privilèges de la part des classes patriciennes ; **3° une organisation fédérative, où chaque canton se trouve organisé suivant sa langue, sa religion, ses moeurs, son intérêt, son opinion** »

Civil Codes of the Cantons: 19th Century

- 3 groups of cantonal civil codes:
  - **Influenced by the Napoleonic Code:**
    - Geneva (1804)
    - Waadt (1819)
    - Tessin (1837)
    - Freiburg (1835-1850)
    - Wallis (1853-1855)
    - Neuenburg (1854-1855)

Civil Codes of the Cantons

- **Influenced by the Austrian Civil Code:**
  - Bern (1824-1831)
  - Luzern (1831-1839)
  - Solothurn (1841-1847)
  - Aargau (1847-1855)
- **Influenced by the Zurich Civil Code** (1853-1856) «Zürcher Privatrechtliches Gesetzbuch» (PGB)
  - Thurgau (1858-1860)
  - Schaffhausen (1863-1865)
  - Glarus (1869-1874)
  - Graubünden (1862) -> Further influenced by the Napoleonic Code, the Prussian and Austrian Civil Code

Jurisprudence in Switzerland

- The increasing scientification of law in Switzerland was most prominently promoted by Friedrich Ludwig Keller (1799-1869) and Johann Caspar Bluntschli (1808-1881)
- Keller und Bluntschli were students of Savigny

The period of codification

- With the founding of the federal state in 1848 preliminary discussions concerning a federal legislative power for civil law matters arose
- Need for legal harmonization became apparent because of social developments (e.g. increasing movement of persons and goods)
- Discussions about legal harmonization initially began with regard to commercial- , civil- and exchange law

The period of codification

– **Total revision of the Federal Constitution in 1874**: The Federal legislative power with regard to obligations-, commercial- and exchange law, civil capacity, copyright law, debt enforcement and bankruptcy law

Art. 64 of the Federal Constitution 1874:

(1) The Confederation is entitled to legislate

- on civil capacity,

- on all legal matters relating to commerce and movable property transactions (law of contracts and tort including commercial law and law of bills of exchange),

- on copyrights in literature and arts,

- on suits for debts and bankruptcy.

The period of codification

- 1874: Civil status and marriage law act (entered into force in 1876)
- 1881: Code of Obligations (entered into force in 1883)
- 1898: General legislative power on the federal level for civil law matters

Art. 64 of the Federal Constitution 1874:

(2) The Confederation is also entitled to legislate in the other fields of civil law.

Code of Obligations (1881/1883)

- Preliminary work started in 1863 with the appointment of Walther Munzinger (1830-1873) to draft a commercial code for the canton Bern and to submit a prior assessment of a federal commercial code
- 1871: First draft of the Code of Obligations (influenced by the PGB, Napoleonic Code and the Austrian Civil Code)
- 1877: Second draft of the Code of Obligations (Heinrich Fink)→ adopted in 1881 and entered into force in 1883
- The Code of Obligations of 1881 (1911 and 1937) comprised provisions regarding:
  - the general and specific law of obligations (contracts and torts)
  - Commercial- and exchange law
- Unified discipline of civil and commercial obligations.

Swiss Civil Code (1907/1912)

Eugen Huber (1849-1923):

- President of the Swiss Lawyer‘s Association
- Professor of Public Law, Private Law and Legal History at the universities Basel and Bern
- Supporter of the Germanist‘s approach of the German Historical School
- 1886-1893: „System und Geschichte des schweizerischen Privatrechts“ (System and History of Swiss Private Law)-> basis for unification of Swiss private law on a federal level
- 1892: appointment of Huber to prepare a first draft of the Swiss Civil Code



Swiss Civil Code (1907/1912)

- 1904: First draft of the Swiss Civil Code
- 1907: unanimous adoption of the draft code
- 1911: revision of the Code of Obligations to adapt to the Civil Code (first revision, entered into force on January 1st 1912)
- 1 January 1912: Entry into force of the Swiss Civil Code
- 1936: second revision of the Code of Obligations „Bundesgesetz über die Revision der Titel 24-33 des Obligationenrechts“ (entered into force on 1 July 1937)

Structure and system of the Swiss Civil Code

- Code of Obligations as the 5th part of the Swiss Civil Code
- SCC:
  - Introductory provisions
  - Law of Persons (I)
  - Family Law (II)
  - Law of Inheritance (III)
  - Law of Things (IV)

Art. 1 para. 2 Swiss Civil Code:

> In the absence of a provision, the court shall decide in accordance with customary law, and in the absence of customary law, in accordance with the rule that it would make as legislator.

Reception of the Swiss Civil Code (including the Code of Obligations)

- Swiss Civil Code and Code of Obligations served as models for modern and progressive civil law codifications:
  - Liechtenstein
  - Italy (*Codice Civile* of 1942)
  - Greece
  - Peru
  - Siam
  - China (until 1949)
  - Turkey (adopted the Swiss Civil Code almost entirely)

Emilie Kempin-Spyri (1853-1901)



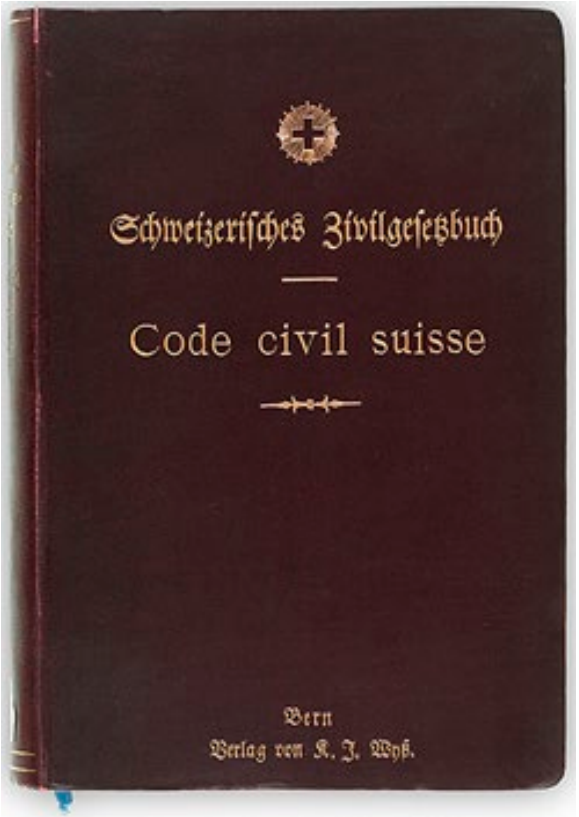
- first female Doctor of Law in Switzerland
- not admitted to the bar
- not allowed lecture at university
- 1888: she went to New York
- She founded a Woman's Law Class
- Back to Zurich: private lecturer at the UZH
- Moved to Berlin: German Civil Code





Swiss Civil Code

- 977 Articles
- “final title”: Commencement and Implementing Provisions
- general principles of Swiss law (10 introductory articles)
- Part 1 (Articles 11–89c) covers the Law of Persons
- Part 2 is dedicated to Family Law (Articles 90–456)
- Part 3 of the Civil Code (Articles 457–640) deals with the Law of Succession
- Part 4 (Articles 641–977) focuses on Property Law.



Structure of the Swiss Civil Code

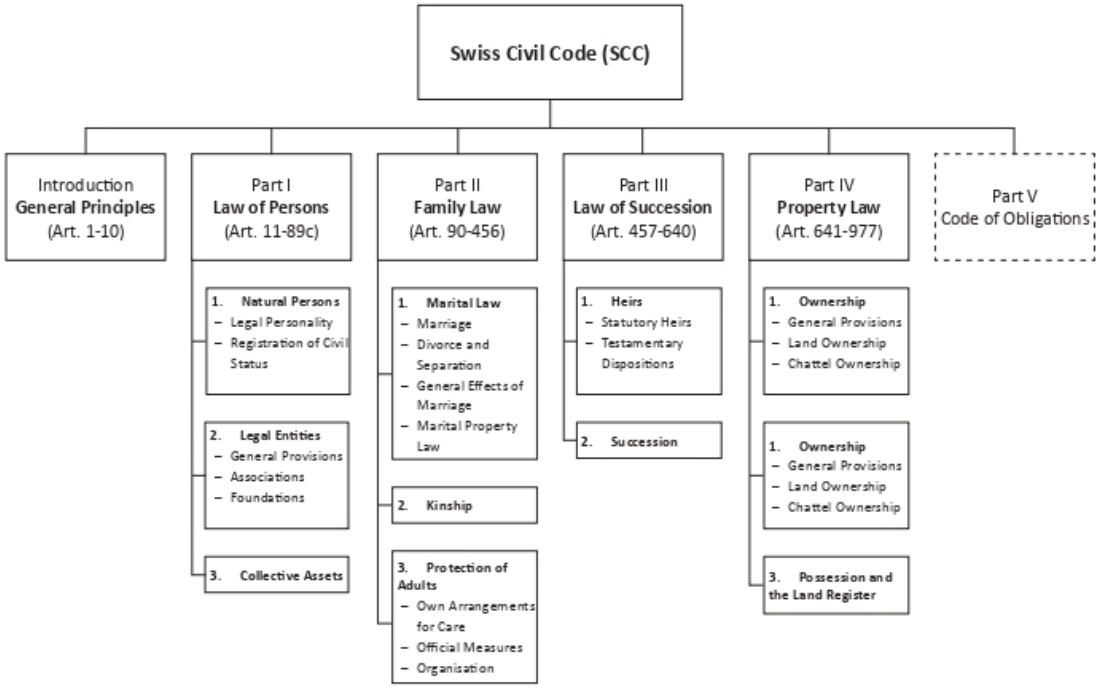


Figure 3: Structure of the Civil Code

https://www.admin.ch/opc/en/classified-compilation/19070042/index.html

General Principles

Art. 1 A. Application of the law

[1] The law applies according to its wording or interpretation to all legal questions for which it contains a provision.

[2] In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.

[3] In doing so, the court shall follow established doctrine and case law.

„civil law‘s expression of the constitutionally protected and fundamental principle of the rule of law“

- Separation of power
- Establish a specific methodology (interpretation of law)
- Prohibition of arbitrary decision

Acting as legislator

Federal Supreme Court and the common legal interpretation methods:

- grammatical interpretation
- systematic interpretation
- teleological interpretation
- realistic interpretation
- historical interpretation
- constitutional interpretation

Good Faith

Art. 2 (B. Scope and limits of legal relationships / I. Acting in good faith)

[1] Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.

[2] The manifest abuse of a right is not protected by law.

- Principle of mutual respect and consideration
- Prohibition of abuse of right

Art. 3 (B. Scope and limits of legal relationships / II. Good faith)

[1] Where the law makes a legal effect conditional on the good faith of a person, there shall be a presumption of good faith.

[2] No person may invoke the presumption of good faith if he or she has failed exercise the diligence required by the circumstances.

Art. 4 (B. Scope and limits of legal relationships / III. Judicial discretion)

Where the law confers discretion on the court or makes reference to an assessment of the circumstances or to good cause, the court must reach its decision in accordance with the principles of justice and equity.

Art. 8 (E. Rules of evidence / I. Burden of proof)

Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact.

Art. 9 (E. Rules of evidence / II. Proof by public document)

[1] Public registers and public deeds constitute full proof of the facts evidenced by them, unless their content is shown to be incorrect.

[2] Such proof of incorrectness does not require to be in any particular form

Law of Persons

Natural Persons

Adults and Capacity

Place of Origin and Domicile

Beginning and end of „Personality“

Juridical Persons

Associations

Foundations

Law of Persons

Title One: Natural Persons

Chapter One: Legal Personality

Art. 11 (A. Personality in general / I. Legal capacity)

[1] Every person has legal capacity.

[2] Accordingly, within the limits of the law, every person has the same capacity to have rights and obligations.

Art. 12 (A. Personality in general / II. Capacity to act / 1. Nature)

A person who has capacity to act has the capacity to create rights and obligations through his actions.

Law of Persons

Art. 13 (A. Personality in general / II. Capacity to act / 2. Requirements / a. In general)

A person who is of age and is capable of judgement has the capacity to act.

Art. 14 (A. Personality in general / II. Capacity to act / 2. Requirements / b. Majority)

A person is of age if he or she has reached the age of 18.

Art. 16 (A. Personality in general / II. Capacity to act / 2. Requirements / d. Capacity of judgement)

A person is capable of judgement within the meaning of the law if he or she does not lack the capacity to act rationally by virtue of being under age or because of a mental disability, mental disorder, intoxication or similar circumstances.

Art. 17 (A. Personality in general / III. Incapacity / 1. In general)

A person does not have the capacity to act if he or she is incapable of judgement or is under age or is subject to a general deputyship.

Art. 18 (A. Personality in general / III. Incapacity / 2. Lack of capacity of judgement)

A person who is incapable of judgement cannot create legal effect by his or her actions, unless the law provides otherwise.

Art. 19 (A. Personality in general / III. Incapacity / 3. Persons capable of judgement but lacking the capacity to act. / a. Principle)

[1] Persons who are capable of judgement but lack the capacity to act may only enter into obligations or give up rights with the consent of their legal representative.

[2] Without such consent, they may only accept advantages that are free of charge or carry out minor everyday transactions.

[3] They are liable in damages for unpermitted acts.

Art. 20 (A. Personality in general / IV. Kinship by blood and by marriage / 1. Blood kinship)

[1] The degree of kinship is determined by the number of intermediary generations.

[2] Lineal kinship exists between two persons where one is descended from the other and collateral kinship exists between two persons where both are descended from a third person and are not related lineally.

Art. 22 (A. Personality in general / V. Place of origin and domicile / 1. Origin)

[1] The place of origin of a person is determined by his or her citizenship.

[2] Citizenship is governed by public law.

[3] If a person is a citizen of more than one place, his or her place of origin is the one in which he or she is or was most recently resident or, in the absence of any such residence, the one in which he or she or his or her ancestors last acquired citizenship.

Art. 29 (B. Protection of legal personality / III. Right to use one's name / 1. Protection of one's name)

[1] If a person's use of his or her name is disputed, he or she may apply for a court declaration confirming his rights.

[2] If a person is adversely affected because another person is using his or her name, he or she may seek an order prohibiting such use and, if the user is at fault, may bring a claim for damages and, where justified by the nature of the infringement, for satisfaction.

Art. 31 (C. Beginning and end of personality rights / I. Birth and death)

[1] Personality rights begin on the birth of the living child and end on death.

[2] An unborn child has legal capacity provided that it survives birth.

Art. 35

[1] If it is highly probable that a person is dead because he or she has disappeared in extremely life-threatening circumstances or has been missing for a lengthy period without any sign of life, the court may declare that person presumed dead on application by any person deriving rights from his or her death.

Art. 36

[1] The application may be made when at least one year has elapsed since the life-threatening event or five years have elapsed since the last sign of life.

[2] The court must, by suitable public means, call on any person who may provide information about the missing person to come forward within a specified period.

[3] The period shall run for at least one year following the first public notice

Juridical Persons

Two theories:

- theory of fiction (Friedrich Karl Savigny): the legislator pretends that entities have, like man, the attributes of a person. The legislator extends, fictitiously, the category of human beings and creates a kind of artificial man.
- theory of reality (Otto von Gierke): legal persons were like man endowed with their own will and bearers of their interest, distinct from that of the physical persons of the members.

Switzerland

- theory of reality + abstraction theory:

Legal persons are neither mere fictions nor pure "natural beings". Rather, according to this theory, they were abstractions of something actual and thus did not have to be fictitious because they already existed.

The extent of the rights granted to a legal person in Switzerland should therefore depend on what society wanted to grant them.

Art. 52 and 53

Legal Entities

Art. 52 (A. Legal personality)

[1] Associations of persons organised as corporate bodies and independent bodies with a specific purpose acquire legal personality on being entered in the commercial register.

[2] Public law corporations and bodies, and associations that do not have a commercial purpose do not require registration.

[3] Associations of persons and bodies which pursue an immoral or unlawful purpose may not acquire legal personality.

Art. 53 (B. Legal capacity)

Legal entities have all the rights and duties other than those which presuppose intrinsically human attributes, such as gender, age or kinship.

Action on behalf of legal entity

Art. 55.

[1]The governing bodies express the will of the legal entity.

[2] They bind the legal entity by concluding transactions and by their other actions.

[3] The governing officers are also personally liable for their wrongful acts.

Associations

Art. 60 (A. Formation I. Corporate group of persons)

[1] Associations with a political, religious, scientific, cultural, charitable, social or other non-commercial purpose acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association.

[2] The articles of association must be done in writing and indicate the objects of the association, its resources and its organisation.

Foundations

Art. 80 (A. Formation I. In general)

A foundation is established by the endowment of assets for a particular purpose.

Art. 81 (A. Formation II. Form of establishment)

[1] A foundation may be created by public deed or by testamentary disposition.

[2] The foundation is entered in the commercial register based on its charter and, as the case may be, in accordance with any directions issued by the supervisory authority, and the entry must indicate the members of the board of trustees.

[3] The probate authority shall inform the commercial registrar of the creation of the foundation by testamentary disposition.

Structure of the Swiss Civil Code

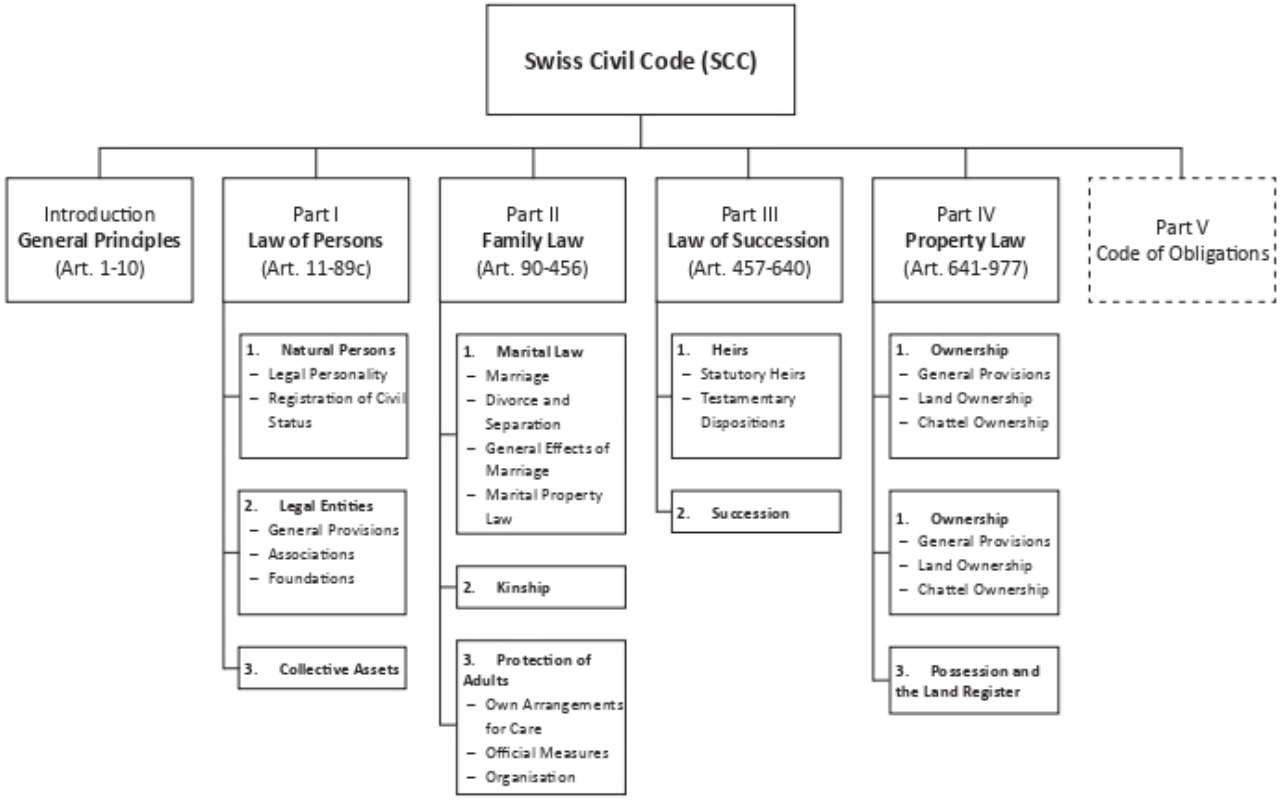


Figure 3: Structure of the Civil Code

Family Law

Art. 159 (A. Marital union; rights and duties of spouses)

[1] The wedding ceremony binds the spouses in marital union.

[2] They mutually undertake to strive to safeguard the interests of the marital union and to care jointly for the children.

[3] They owe each other loyalty and support.

Art. 163 (E. Maintenance of the family / I. In general)

1 The spouses jointly provide for the proper maintenance of the family, each according to his or her ability.

2 They agree on the contributions each of them will make, notably by providing money, looking after the household, caring for the children or supporting the other's career or business.

3 In so doing they take due account of the needs of the marital union and of their own personal circumstances.

Art. 164 (E. Maintenance of the family / II. Allowance for personal use)

1 A spouse who looks after the household, cares for the children or supports the career or business of the other spouse is entitled to receive from the latter a reasonable allowance for his or her own personal use.

2 When determining said allowance, account must be taken of the personal resources of the receiving spouse and the need to provide conscientiously for the family, career and business.

Art. 165 (E. Maintenance of the family / III. Extraordinary contributions by one spouse)

[1] Where the contribution made by one spouse to the other's career or business is significantly greater than required in the light of the latter's contribution to the maintenance of the family, he or she is entitled to reasonable compensation.

[2] The same applies if a spouse has contributed significantly more of his or her own income or assets to the maintenance of the family than he or she was obliged to contribute.

[3] However, a spouse is not entitled to compensation if such extraordinary contribution was made under a work, loan or partnership agreement or on the basis of some other legal relationship.

Art. 166 (F. Representation of the marital union)

[1] While living together under the same roof, both spouses represent the marital union with regard to the day-to-day needs of the family.

[2] A spouse may represent the marital union with regard to the other needs of the family only if:

1. authorised so to do by the other spouse or by court order;
2. the interests of the marital union brook no delay and the other spouse is unable to consent due to illness, absence or other similar reasons.

[3] Each spouse is personally liable for his or her own actions and, to the extent that these do not exceed his or her powers of representation in a manner apparent to third parties, also renders the other spouse jointly and severally liable for such actions.

Art. 170 J. Duty to inform

[1] Each spouse has the right to demand information from the other concerning his or her income, assets and debts.

[2] At the request of one spouse, the court may order the other spouse or a third party to furnish the information required and to produce the necessary documents.

[3] This does not apply to any information held by lawyers, solicitors, doctors, clergy and their auxiliary staff which is subject to professional confidentiality.

Marital Property Law

3 Marital property regimes:

1) The marital property regime of participation in acquired property (196-220)

property acquired during the marriage from

the individual property belonging to each individual spouse

Property acquired during the marriage:

proceeds from employment (e.g. salaries);

benefits received from staff welfare schemes, social security, and social welfare institutions; – compensation for inability to work; – income derived from individual property

Individual property belonging to each individual spouse

personal belongings used exclusively by that spouse (e.g. jewellery, musical instruments, etc.); assets belonging to one spouse as well as donated and inherited property; claims for satisfaction

Marital property regime is dissolved through 1) divorce; 2) death of the spouse 3) implementation of a different regime

2) Marital property regime of community property (221-246)

It comprises:

- Individual assets of each spouse
- Common assets of the couple

3) Separation of property regime (247-251)

The individual property of each spouse