Seminar Comparative Constitutional Law

Switzerland – China – Hong Kong

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The role of the Swiss Supreme Court in protecting human rights

Subject 3b

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DE VRIES REILINGH JEANINE, L'application des Pactes des Nations Unies relatifs aux droits de l'homme de 1966, Diss., Geneva 1998

FLEINER THOMAS/MISIC ALEXANDER/TÖPPERWIEN NICOLE, Swiss Constitutional Law, The Hague 2005

HÄFELIN ULRICH/HALLER WALTER, Schweizerisches Bundesstaatsrecht, 6th Edition, Zurich 2005

HÄFELIN ULRICH/HALLER WALTER/KELLER HELEN, Bundesgericht und Verfassungsgerichtsbarkeit nach der Justizreform. Supplement to the 6th Edition of the „Schweizerisches Bundesstaatsrecht", Zurich 2006

HAEFLIGER ARTHUR/SCHÜRMANN FRANK, Die Europäische Menschenrechtskonvention und die Schweiz, 2nd Edition, Bern 1999

HAFNER FELIX, Glaubens- und Gewissensfreiheit, in: Thürer/Aubert/Müller (Ed.), Verfassungsrecht der Schweiz, Zurich 2001

HOTTELIER MICHEL, La Convention Européenne des Droits de l'Homme dans la jurisprudence du Tribunal Fédéral, Geneva 1985

HOTTELIER MICHEL/MOCK HANSPETER/PUÉCHAVY MICHEL, La Suisse devant la Cour européenne des droits de l`homme, Bruxelles 2005

JAAG TOBIAS, Europarecht, Die europäischen Institutionen aus schweizerischer Sicht, Zurich 2003

KELLER HELEN, Rezeption des Völkerrechts, Berlin 2003

KIENER REGINA/KÄLIN WALTER, Grundrechte, Bern 2007

KLEY ANDREAS, Verfassungsgeschichte der Neuzeit, Bern 2004

KÖLZ ALFRED, Neuere schweizerische Verfassungsgeschichte; Von 1848 bis in die Gegenwart, Bern 2004

MÜLLER JÖRG PAUL, Praxis der Grundrechte, 4th Edition, Bern 1988

MÜLLER JÖRG PAUL/WILDHABER LUZIUS, Praxis des Völkerrechts, 3rd Edition, Bern 2001

POLEDNA THOMAS, Praxis zur Europäischen Menschenrechtskonvention aus schweizerischer Sicht, Zurich 1993

RHINOW RENÉ, Grundzüge des Schweizerischen Verfassungsrechts, Basel 2003

SALADIN PETER, Grundrechte im Wandel, 3rd Edition, Bern 1982

SCHEFER MARKUS, Grundrechte in der Schweiz, Bern 2005

SCHWEIZER RAINER J., Verfassungsrechtlicher Persönlichkeitsschutz, in: Thürer/Aubert/Müller (Ed.), Verfassungsrecht der Schweiz, Zurich 2001

TSCHANNEN PIERRE, Staatsrecht der Schweizerischen Eidgenossenschaft, 2nd Edition, Bern 2007

1. Introduction

This thesis wants to demonstrate the role that the Swiss Supreme Court holds in the protection of human rights. Therefore a closer look to the jurisdiction of the Court is required. First of all it is important to figure which acts the federal judges can refer to and under which circumstances a direct applicability is given. In relation with this it appears interesting to show how an individual can appeal against a particular human rights violation at the Supreme Court. Since the judges do not only apply the law, but also elaborate fundamental practice by developing and concretising the law in their judgements, a closer look to the history and the current case law is indispensable. For this reason a selection of precedents in different areas of human rights guarantees should demonstrate the independent practice of the Court. Moreover by analysing the practice it might lead to the finding of regularities in its jurisdiction. One should not forget the influence of the international human rights institutions, especially the European Court of Human Rights. It has to be established if the Swiss Supreme Court respects its judgements and what level of relevance these decisions is conceded, to finally get an overview of all the different aspects regarding the Supreme Court's function in the protection of human rights.

2. Competence of the Swiss Supreme Court

For a better comprehension of the jurisprudence in Switzerland a short introduction to the Court and its competence is required as well as a short report on the Swiss federal system.

2.1. Legal status

According to Article 188 Paragraph 1 of the Federal Constitution, the Swiss Supreme Court is the highest national judicial authority. It is placed over the Federal Criminal Court, the Federal Administrative Court and the Cantonal Judicial Authorities.[1] In

[1] HÄFELIN/HALLER/KELLER, 2.

Article 191c, the Constitution guarantees the judicial authorities independence in exercising their jurisdictional function, which is fundamental to ensure neutral and fair proceeding.[2]
The 38 judges of the Supreme Court are elected by the Federal Parliament whereby the different languages and regions of Switzerland are duly considered in the selection process.[3] A federal judge is elected for a term of 6 years and may run for re-election until the age of 68.[4]

2.2. Federal structure

The allocation of rights and duties between the Confederation and the Cantons as its sub entities are regulated in Article 3 and 42 of the Constitution; the Cantons exercise all the rights that the Constitution does not transfer explicitly to the Confederation.[5] The competencies of the Swiss Supreme Court are to be found in Article 189 of the Constitution.

2.3. Competent jurisdiction in human right matters

According to this Article 189, the Swiss Supreme Court shall have jurisdiction over violations of federal, public international and inter-cantonal law, cantonal constitutional rights, autonomy of municipalities and federal and cantonal provisions and political rights as well as public law disputes between the Confederation and the Cantons or amongst the Cantons and further grounds when provided by the statute.
The human rights in the Swiss legal system can be found first of all in the Federal Constitution in the list of civil rights in Chapter One. Furthermore all the cantonal constitutions contain more or less detailed lists of civil rights, depending on how recently they were revised. The Swiss Supreme Court prioritises federal law, so that the rights of a cantonal constitution will only prevail if the protection it guarantees extends further than the federal equivalent. As the list of civil rights in the Federal

[2] TSCHANNEN, 515 et seqq.
[3] www.bger.ch/index/federal/federal-inherit-template/federal-richter.htm (21.8.08).
[4] HÄFELIN/HALLER/KELLER, 4.
[5] FLEINER/MISIC/TÖPPERWIEN, 102 et seq.

Constitution is rather detailed, the relevance of the cantonal civil rights lists is rather low.[6]

Of greater significance with respect to human rights protection than the cantonal constitutions are the international human rights guarantees. The most important are the European Convention on Human Rights which became effective for Switzerland on the 28th of November 1974, the International Covenant on Economic, Social and Cultural Rights (UN-Pact I) and the International Covenant on Civil and Political Rights (UN-Pact II), both became effective on the 18th of September 1992. Since Switzerland has adopted the monistic system, the treaties do not need any transformation to the national legal system.

Regardless of the legislative level by which the human right is protected, in the Federal Constitution, a Cantonal Constitution or an international contract, all the sources of human rights are included in the list of Article 189 of the Constitution, so the Supreme Court is always the competent forum.[7]

3. Appeal at the Swiss Supreme Court

There are two possibilities to appeal at the Supreme Court in human rights issues, the appeal in public law affairs on the one hand and the subsidiary constitutional appeal on the other hand. Both appeals are regulated in the new Federal Act of 17 June 2005 on the Federal Supreme Court.

3.1. Appeal in public law affaires

According to this Federal Act, the Supreme Court judges the decisions made in public law affaires. The person who claims a violation of a right must have passed through the courts of lower instances and the claimant must be affected personally or needs to have an interest that is worthy of protection by the Supreme Court. The reasons for a complaint are similar to the reasons listed in Article 189 Paragraph 1 of the Constitution, amongst others the violation of federal law, of public international law, as long as the treaties have self-executing character, and of cantonal

[6] KIENER/KÄLIN, 10 et seq.
[7] KIENER/KÄLIN, 67.

constitutional law.[8] The human rights in Switzerland are all contained in this list (see chapter 2.3), so an individual can refer to them when appealing at the Supreme Court.

3.2. Subsidiary constitutional appeal

If against a decision of an authority of last instance a normal appeal in public law affairs is not possible, an individual has the possibility to claim a violation of a human right with a subsidiary constitutional appeal.[9]

4. Case law

By judging cases, the Swiss Supreme Court can interpret and concretise the law. Of course the judges are strictly bound on the law, but there is always a large scope of interpretation, which gives the Court an important function in creating case law. A new leading case is a guide for later jurisdiction, so it can be considered as unwritten law, whereby the Court acts as the legislator.

4.1. History

The first Swiss Constitution, enacted by liberal cantons in 1848, guaranteed only few basic rights, but it stands for the change from a loose confederation to a federal state. The Swiss Supreme Court had a weak position in this constitution; the power was given mostly to the Parliament and the Federal Council.[10] The jurisdiction by the democratically elected Parliament seemed to be more appropriate at this time. The Supreme Court could only decide cases given to it by the Parliament. This happened only once between 1848 and 1874 and as the judgment in the "Dupré Case" was not

[8] HÄFELIN/HALLER/KELLER, 19 et seqq.
[9] HÄFELIN/HALLER/KELLER, 40 et seqq.
[10] KLEY, 156 et seqq.

liberal enough in the eyes of the Parliament, it decided not to transfer anymore cases to the Supreme Court.[11]

With the complete revision of the Federal Constitution in 1874, the competence of the Supreme Court was extended, thus it became the highest judicial body and was now responsible for appeals of individuals in constitutional law matters.[12] Most of the appeals that the Supreme Court had to deal with were about the equality before the law. The Court first conformed to the restrictive jurisdiction of the other authorities, but over the years it developed its own practice. Based on the equality of the Swiss before the law, the Court developed the principles of prohibition of arbitrariness, the prohibition of denial and retardation of justice, the right to be heard at a process, the equality between men and women and other rights extending beyond the scope of the text of this Article 4 of the Swiss Constitution of 1874.[13]

But the Court did not only surprise with this extensive interpretation of basic rights, it also acted progressive by recognizing new rights. After the revision in 1874, the Swiss Constitution's enumeration of civil liberties was still not complete. This became evident after World War I, when the importance and necessity of secure civil liberties was increasing, but another revision of the Constitution was not an option. So, from 1959 onwards, the Supreme Court started to recognize new unwritten civil liberty rights, notably the freedom of expression, the personal freedom, the freedom of assembly and the freedom of language.[14] In a decision of the Swiss Supreme Court, the judges described the freedom of language as necessary for the execution of other basic rights and therefore recognise it in agreement with the doctrine as an unwritten basic right of the Federal Constitution.[15]

The unwritten basic rights, which the Supreme Court included in its jurisdiction, were fundamental for the list of basic rights in the current Federal Constitution of 1999. While elaborating the current Constitution, the Parliament underlined that the Supreme Court should still have the possibility to produce new basic rights, even though the actual list of basic rights seems to be fairly comprehensive.[16]

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[11] KÖLZ, 488 et seqq.
[12] KLEY, 162 et seq.
[13] KÖLZ, 806 et seqq.
[14] KLEY, 166; KÖLZ, 817 et seqq.
[15] Decision of the Swiss Supreme Court 91 I 480, 485.
[16] HÄFELIN/HALLER, 73.

4.2. Applicability of human rights treaties

The issue whether an individual can directly invoke international human rights treaties is a question that the Swiss Supreme Court frequently responds to in its decisions. It is a very fundamental question of law if the rights guaranteed in a treaty have immediate legal consequences or if they have only programmatic character. According to the Court, the international treaty provisions have self-executing character under two conditions; firstly that they regulate directly the rights and duties of an individual and secondly that they are sufficiently substantiated to be binding for a court or other authorities.[17]

4.2.1. Convention of the Council of Europe

The most important convention released by the Council of Europe is the European Convention of Human Rights. It guarantees a minimal standard of basic rights that numerous countries recognize.[18] Switzerland joined the Convention in 1974 and has adopted some of the rights into its national constitution.[19] Therefore the basic rights of the Federal Constitution of 1999 and the rights of the Convention correspond to a large extent. Therefore it is no surprise that the human rights in the Convention all have self-executing character.[20] The Supreme Court even considered shortly after the Convention became effective, that the Convention's guarantees have to be determined in conjunction with the Federal Constitution's rights and that a violation of the Convention is according to the procedure equal to a violation of constitutional rights.[21] While the judgments of the Supreme Court between 1975 and 1987 suggested that the reach of the Convention's human right guarantees does not exceed the scope of the fundamental rights in the Federal Constitution, the practice changed after the first few reprimands by the European Court of Human Rights (ECHR). The Supreme Court focused more on the Convention to avoid any further reprehensions and tried to join the conventional and the constitutional rights. Since the end of the eighties it bases its decisions systematically on the rights of the Convention and

[17] FLEINER/MISIC/TÖPPERWIEN, 43 et seq.
[18] Decision of the Swiss Supreme Court 117 Ib 367, 371.
[19] KLEY, 166.
[20] KIENER/KÄLIN, 17.
[21] Decision of the Swiss Supreme Court 101 Ia 67, 69.

sometimes even applies them exclusively, without a combination with Constitutional rights.[22]

4.2.2. Conventions of the United Nations (UNO)

The United Nations released two human rights pacts in 1966, in order to harmonize basic rights, as it is a purpose in the UN-Charter Article 1 Paragraph 4.
The UN-Pact I on economic, social and cultural rights corresponds to the European Social Charter, a treaty Switzerland has not yet joined. The first time the Swiss Supreme Court had to deal with the applicability of the UN-Pacts was in an issue about the levy of taxes for students at the University of Zurich in 1994.[23] The court had to judge if Article 13 of the UN-Pact I, the right to education, has self-executing character, especially Paragraph 2 (3) which contains the access to higher education and the progressive introduction of free education. In its decision it argued that the prescriptions of the UN-Pact I are directed to the legislators of the contracting states as a guideline and not to individuals. The Court allowed only programmatic character and declared the UN-Pact I generally as "non-self-executing" and followed the message of the Federal Council.[24] In its message to the accession of Switzerland to the two international human rights pacts of 1966, the Federal Council clearly stated the UN-Pact I as not applicable to individuals and that a judge could only use it as an aid for interpretations.[25]
But the question of applicability is always directed to the individual right stipulated in the treaty and not to the treaty in its entirety. Therefore the Supreme Court made a few exceptions in its judgements and declared some of the rights in the UN-Pact I as directly applicable, for example the right of everyone to form trade unions and join the trade union of his choice in Article 8 Paragraph 1.[26]
Even though the Supreme Court sees its judgement on the applicability of the UN-Pact I as conform to the doctrine[27], the judgments of the Supreme Court and the message of the Federal Council are criticised by Swiss human rights activists or the

[22] HOTTELIER/MOCK/PUÉCHAVY, 39 et seqq.
[23] DE VRIES, 200.
[24] Decision of the Swiss Supreme Court 120 Ia 1, 11 et seq.
[25] Federal Gazette 1991 I, 1202.
[26] Decision of the Swiss Supreme Court 121 V 246, 250.
[27] Decision of the Swiss Supreme Court 121 V 246, 249.

United Nations Committee on Economic, Social and Cultural Rights in a Concluding Observation on Switzerland in 1998.[28]

The Federal Council's comment on the self-executing character of the UN-Pact II was somewhat reserved as well.[29] But the Supreme Court strictly ruled that the guarantees of the UN-Pact II on Civil and Political Rights in their majority are directly applicable for individuals.[30] Its guarantees correspond largely to those of the European Convention of Human Rights and the Supreme Court treats them the same manner.[31]

Switzerland has joined other UN-conventions on human rights, as for example the Convention on the Rights of the Child. In a case about the applicability of Article 12 of the Convention, the Court approved its self-executing character because of its clear and sufficiently substantiated content.[32] The Convention on the Elimination of All Forms of Discrimination against Women on the other hand, which engages the contracting state to take measures to protect the advancement and development of women, only substantiates and complements the UN-Pact II in the eyes of the federal judges.[33]

4.3. Position of the international law in the jurisprudence

In the practice of the authorities and the doctrine, the principle of the priority of international law over national law is widely recognised and applied. This principle was developed out of the short Article 5 Paragraph 4 of the Federal Constitution, which obliges the Confederation to respect international law.[34]

In case of incompatibility between an international norm and the national law, the question must be asked where the judiciary is to set the priority. According to Article 190 of the Federal Constitution, the Supreme Court shall follow the federal statutes

[28] www.humanrights.ch/home/de/Themendossiers/Sozialrechte/Schweiz/idart_5460-content.html (28.8.08); www.unhchr.ch/tbs/doc.nsf/(Symbol)/b4eeccfc529902c3802566d400587184?Opendocument (28.8.08).
[29] Federal Gazette 1991 I, 1202 et seq.
[30] Decision of the Swiss Supreme Court 120 Ia 1, 12.
[31] RHINOW, 180; Decision of the Swiss Supreme Court 122 I 109, 114.
[32] Decision of the Swiss Supreme Court 124 III 90, 92.
[33] Decision of the Swiss Supreme Court 125 I 21, 34 et seq.
[34] RHINOW, 566; Decision of the Swiss Supreme Court 122 II 234, 239.

and international law. The Court stated in its decisions that in first instance it must seek to interpret the national law in conformity with the international law.[35]

As the principle of the priority of international law over national law is not explicitly written in the Federal Constitution, it is in the discretion of the Supreme Court to decide whether a new national act is conform to the prevailing international law. In the famous "Schubert"-case[36], a ruling of the Supreme Court in 1973 about an Austrian citizen, who was barred from buying a parcel of land because of a federal resolution which violated an old international contract from 1875, the Court established the "Schubert"-practice. It declared the old international contract as not operative, because the legislator enacted the resolution knowing that it does not conform to international law.[37]

But this exception of the principle of the priority of international law is not applicable in human right's matters. In a ruling, the Supreme Court stated that this principle is even more essential if the purpose of the international norm is the protection of human rights, as the European Convention of Human Rights.[38]

So in human right's affairs the Court strictly respects the priority of international over national law, which shows the high significance of human rights in the Court's practice.

Especially the guarantees of the mentioned European Convention of Human Rights get a lot of credit by the Supreme Court. In a case in which Article 8 Paragraph 1 of the Convention was invoked, the judges accorded that the scope of its protection is even larger then that of its equivalent in the constitution.[39]

4.4. Influence of the European Court of Human Rights

The European Court of Human Rights was created as the exclusive instance of jurisdiction by the additional protocol No. 11 in 1998. Before, the Court and the Commission shared this function. Individuals who claim the violation of a human right can file an action before the European Court of Human Rights after having exhausted the legal remedies of their national judicial system. Nations can also file

[35] Decision of the Swiss Supreme Court 125 II 417, 424.
[36] Decision of the Swiss Supreme Court 99 Ib 39.
[37] MÜLLER/WILDHABER, 171 et seqq.
[38] Decision of the Swiss Supreme Court 125 II 417, 425.
[39] HÄFELIN/HALLER, 75; Decision of the Swiss Supreme Court 109 Ib 183, 186.

complaints about the violation of the Convention by another state, but this only occurs rarely in comparison to the large number of appeals by individuals, which is constantly rising.[40] If a national act is found to be violating the Convention of Human Rights, the European Court does not have the competence to cancel it, but with its competence to state the violation and to order measures to be taken and reparation for damages to be made, it is powerful anyhow. The member states are bound to respect the judgment of the Court and its consequences.[41]

During the first 11 months of 2007, the European Court registered 148 appeals against Switzerland, whereof 107 were concerning a court case of the Swiss Supreme Court. In six of seven of the court cases, which were judged during the year, the European Court considered a violation of the Convention. Two cases were concerning arrest issues and another two cases were about the freedom of expression.[42]

One of the first times the European Court of Human Rights had to judge a possible violation of the Convention by the Swiss authorities was the case Belilos against Switzerland[43]. Marlène Belilos had been ordered to pay a fine for taking part in an illegal demonstration. She denied having participated and appealed at the cantonal court and finally at the Swiss Supreme Court, claiming a violation of Article 6 Paragraph 1 of the European Convention of Human Rights, especially the right to access to an independent tribunal, because the fine was given by the police department without any material enquiry by a tribunal. The Supreme Court dismissed the claim because of a reservation on this Article 6 the Federal Council had made when he ratified the Convention. Finally the European Court of Human Rights stated in its verdict in 1988, that the conditions for a reservation are not given, so Switzerland can not avoid the duties of the Convention. The judgment caused quite a heavy reaction in Switzerland; the parliament almost withdrew from the Convention. But Swiss Supreme Court accepted the verdict and followed the practice of the European Court. It even declared the new reservations, which the Federal Council had created after verdict, as not conform to the Convention and therefore as illegal.[44]

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[40] MÜLLER/WILDHABER, 614 et seqq.; HAEFLIGER/SCHÜRMANN, 435 et seq.
[41] HÄFELIN/HALLER, 74 et seq.
[42] Annual report of the Swiss Supreme Court 2007, 17 in: www.bger.ch (29.8.08).
[43] ECHR, Belilos vs. Switzerland, No. 10328/83, 29.04.1988.
[44] MÜLLER/WILDHABER, 624 et seqq.

Another leading case for the national practice was the case Minelli against Switzerland.[45] It is an early case as well and as most of the appeals it is about the violation of a procedural right.[46] The journalist Ludwig A. Minelli was taken to court by a company after publishing an article, in which he accused executive company employees of cheating. The cantonal court first had to decide a similar case about the same affair, but after this verdict the Minelli case was already time-barred. Nevertheless the authorities charged him the procedural costs, with the reason that Mr. Minelli would have been judged guilty, as his case is nearly equal to the one judged before. Mr. Minelli appealed at the Swiss Supreme Court against this decision, but his appeal was rejected. Finally he appealed with success to the European Court of Human Rights, which in its ruling maintained that there had been a violation of the presumption of innocence of article 6 paragraph 2 of the Convention, because the cantonal court's decision made the claimant look guilty, without having given him the opportunity to defend himself. After this verdict of the European Court of Human Rights, the Swiss Supreme Court aligned its practice in imposing costs with the practice of the European Court.[47]

The impression should not be created, that the Supreme Court only reacts to decisions by the European Court of Human Rights if Switzerland is involved. Its entire practice is respected and if necessary consequences are taken. As for example in the case of De Cubber against Belgium in 1984 when a Belgian appealed against the fact, that the investigating judge later also was judge in court in his case. The European Court confirmed his opinion and stated this personal union as a violation of Article 6 Paragraph 1 of the Convention.[48] As a consequence of this the Supreme Court changed its practice according to the judgement of the European Court and directly referred to it in its jurisdiction.[49]

The biggest motivation for member states to follow the practice of the European Court of Human Rights is that they want to avoid being brought before the Court of Human Rights by their own. After a verdict against the Netherlands, the Swiss authorities changed their military penal law, which shows that the Swiss Supreme

[45] ECHR, Minelli vs. Switzerland, No. 8660/79, 25.03.1983.
[46] HAEFLIGER/SCHÜRMANN, 438 et seq.
[47] HAEFLIGER/SCHÜRMANN, 213 et seqq.; 439.
[48] ECHR, De Cubber vs. Belgium, No. 9186/80, 26.10.1984.
[49] HAEFLIGER/SCHÜRMANN, 171; Decision of the Swiss Supreme Court 112 Ia 290, 294.

Court is not the only Swiss authority which pays attention to the decisions of the European Court.[50]

All in all the Swiss Supreme Court tries to respect the jurisdiction of the European Court of Human Rights and applies the Convention's guarantees in a tolerant and attentive way.[51]

4.5. Prevailing case law

In more than 100 years of jurisdiction, the Swiss Supreme Court developed a human rights practice, which improves, specifies and completes the law. The following review on the courts practise is divided into three selected sections of human rights. The first subject; the right to liberty and personal freedom, is one of the most fundamental human rights. The freedom of religion is a well established human right guarantee and regularly the issue of active discussions and decisions, also currently in Switzerland. And the last point; the procedural guarantees are often grounds for an appeal, both at the Swiss Supreme Court and at the European Court of Human Rights.[52]

4.5.1. Right to liberty and personal freedom

In the Federal Constitutions of 1848 and 1874, the personal freedom was not yet contained.[53] But the Swiss Supreme Court recognised this right as an unwritten constitutional right since 1963. In its leading case, it declared that the right over one's own body is a requirement for the exercise of all the other fundamental rights of freedom, which shows the necessity of this right.[54] One year later the scope of protection of the unwritten right was further established by the court. In this case, a man caused an accident under the influence of alcohol. The cantonal authority ordered two psychiatric surveys, where the man had to drink the same amount of alcohol which had caused him several days of hospitalisation. The Supreme Court

[50] JAAG, 68.
[51] HAEFLIGER/SCHÜRMANN, 439.
[52] HAEFLIGER/SCHÜRMANN, 131.
[53] SCHWEIZER, 693.
[54] MÜLLER, 1; Decision of the Swiss Supreme Court 89 I 92, 98.

repealed this order after the man appealed and stated that the personal freedom protects not only the body but also the autonomy of the individual.[55] In 1980 the judges even ruled that the right to privacy is unrestrictedly comprised within the scope of the personal freedom and they considered a damage of a reputation as an illegal violation of this unwritten constitutional right.[56]

In the present Federal Constitution of 1999 the personal freedom is incorporated in Article 10 Paragraph 2 and, in conjunction with the European Convention's right to liberty, it has created a large scope of protection in various areas. The Supreme Court sets the details for the exercise of the basic rights; it decides who is able to invoke the rights and where the boundaries of the scope are to be set.[57]

Article 5 of the Convention focuses principally on arrest issues, the equivalent in the Constitution is the freedom of movement in Article 10 Paragraph 2 and the Habeas Corpus in Article 31. In cases where the scope of protection of the right to liberty in the Convention is equal to the scope of the constitutional personal freedom, the Supreme Court consults the judgements of the European authorities for interpretations.[58] The European Court for example had to decide on the violation of Article 5 Paragraph 1 of the Convention in a case about an arrest of asylum-seekers at the airport of Paris. The four siblings from Somalia had to stay in the international zone of the airport for 20 days without getting any judicial assistance. The judges considered this a breach of Article 5 Paragraph 1 because of the duration of the detention and the circumstances of the arrest, which it held to be a serious limitation of the freedom of movement.[59] One year later the Supreme Court had to deal with a similar case. An asylum-seeker from Zaïre was detained at the Zurich airport for 15 days, before getting sent back. The Supreme Court referred to the judgement of the European Court and decided that even an arrest for less than 20 days needs to be examined and ordered by a judge and that conform to the European practise a violation of the convention had occurred.[60]

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[55] SCHWEIZER, 694; MÜLLER, 5 et seq.; Decision of the Swiss Supreme Court 90 I 29.
[56] SALADIN, XXXII.
[57] SCHWEIZER, 697.
[58] HAEFLIGER/SCHÜRMANN, 82.
[59] ECHR, Amuur vs. France, No. 19776/92, 25.6.1996.
[60] HAEFLIGER/SCHÜRMANN, 85; Decision of the Swiss Supreme Court 123 II 193, 197 et seqq.

4.5.2. Freedom of religion

The freedom of religion is based on Article 15 of the Federal Constitution, Article 9 of the European Convention and Article 18 of the UN-Pact II, all in a similar manner. While this guarantee was not often brought to the Supreme Court until the eighties, it is more regularly used nowadays, since with the appearance of members of other religions than Christianity a new potential for conflict in Switzerland has arisen.[61]

In the Swiss Supreme Court's leading case on the possibility of being released from attending swimming lessons at school for religious reasons, the judges described the scope of the freedom of religion. According to this decision, every kind of association concerning the relation of men to god is protected; the liberty to believe or not as well as the liberty to express, exercise and publish the religious or ideological beliefs.[62]

But this protection also has limits, especially for the state. Its authorities have to be neutral and must respect the different beliefs equally. This caused several cases regarding the obligation to observe religious neutrality in public schools. In a ruling about a crucifix, a cross to hang on the wall as a catholic symbol, the federal judges decided in 1990 that the display of a religious symbol in a classroom is not compatible to the neutrality of the state, because students and parents with other beliefs could be offended in their religious freedom.[63] A similar decision was taken by the Supreme Court in 1997, when a teacher appealed against the ban on headscarves imposed by the cantonal authority. Her right to wear clothes according to her religious beliefs is indeed protected, but it is forbidden in her position as a teacher of a public school, because it is a kind of a religious symbol in the classroom like the crucifix, the judges declared.[64] In a decision about the dispensation of students for religious holidays, the Court ruled, that the dispensation has to be checked individually in terms of the proportionality, a consideration of the freedom of religion against the public interest of the student visiting school.[65]

A popular initiative, recently brought by conservative politicians, seeks to impose a ban on building minarets in Switzerland. According to the initiators, the objective of the initiative is not in violation of the freedom of religion; it is only directed against

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[61] KIENER/KÄLIN, 265; SALADIN, XVII.
[62] HAFNER, 708; Decision of the Swiss Supreme Court 119Ia 178, 183 et seq.
[63] HAEFLIGER/SCHÜRMANN, 280; Decision of the Swiss Supreme Court 116 Ia 252, 261 et seqq.
[64] Decision of the Swiss Supreme Court 123 I 296.
[65] POLEDNA, 195; Decision of the Swiss Supreme Court 114 Ia 129; 136 et seq.

the symbol of the religious and political claim to power of the concerned religion.[66] But according to the Federal Constitution, it is the Federal Parliament who decides over the validity of a popular initiative, the Swiss Supreme Court is not able to decide in this matter.[67]

4.5.3. Procedural guarantees

The often claimed procedural guarantees are to be found in the Articles 29 to 32 of the Federal Constitution. Their scope has been completed by the Convention of Human Rights and the UN-Pact II. Also in this area of human rights, the Swiss Supreme Court aligned its judicial practice to the practice of the European Court of Human Rights. One example is the definition of the term "civil rights and obligations" in Article 6 Paragraph 1 of the Convention by the European judges. They ruled that all expropriation matters are comprised by this term and the Supreme Court followed this practise and even extended it correspondingly to also apply to plans that may lead to an expropriation or other similar cases.[68] This is remarkable because the Supreme Court had to depart from the national definition of this term.[69]
The strict abidance to the European practice is most evident in the example of the presumption of innocence, which is guaranteed by Article 6 Paragraph 2 of the Convention and Article 32 Paragraph 1 of the Constitution. In the practice of the Supreme Court, it had always been legal to impose procedural costs even to acquitted participators of a trial, if they have participated in the cause of the criminal procedure. Until 1981, the federal judges affirmed that this is a part of the Swiss law tradition, not to let the tax-payer compensate for procedural costs and that it will not change its practice until the European Court of Human Rights publishes a contradictory leading case.[70] Only one and a half years later this leading case was brought up by the Court in the case Minelli against Switzerland (see chapter 4.4.). The Supreme Court concretised the Conventions guarantee due to the European verdict and stated that if a court imposes the costs on a person who is considered as

[66] NZZ online: www.nzz.ch/nachrichten/schweiz/bundesrat_minarett_initiative_ablehnung_botschaft_1.817029.html (04.09.08).
[67] HÄFELIN/HALLER, 452, 513.
[68] HAEFLIGER/SCHÜRMANN, 142 et seq.; Decision of the Swiss Supreme Court 120 Ib 136, 139 et seq.
[69] HÄFELIN/HALLER, 244.
[70] Decision of the Swiss Supreme Court 107 Ia 166.

not guilty, it makes this person look guilty which again is a violation of the presumption of innocence.[71] So the Supreme Court almost demanded the European judges to establish a new practice.[72]

5. Conclusion

The Swiss Supreme Court, as the highest judicial authority in Switzerland has the constitutional given competence of judging human rights cases. Individuals can claim violations of human rights at the Court if they passed the stages of appeal at the courts of lower instances.

Before 1874 the Supreme Court was in a weak position compared to the Federal Parliament and the Federal Council. The court's competences in jurisdiction did pretty much not exist by this time. But after the complete revision of the Constitution in 1874 and the gain of power involved, the Court started to interpret the rights extensively and liberal. It even played an important role in the creation of new fundamental rights, which were elaborated by the doctrine and the judges in their decisions and got the status of unwritten constitutional law. The Supreme Court has kept this legislative function down to the present day.

The human right guarantees are not only listed in the Constitution's list of fundamental rights, but also a number of important human rights have its sources in international treaties. It is the job of the Supreme Court to decide, whether individuals can refer directly to an act or if it only has programmatic character as a guideline for the authorities. The federal judges stated all the guarantees of the most important treaty of this sector, the European Convention of Human Rights, as self-executing and therefore as directly applicable by individuals. Also self executing character is admitted to most of the guarantees of the UN-Pact II which contains similar rights as in the Constitution and the Convention. The UN-Pact II on the other hand is generally stated as non self executing, because it tends to the states authorities and does not regulate directly the rights and duties of an individual.

The Swiss Supreme Court admits the international human rights treaties a high status in the national law system. The principle of the priority of international law over national law is strictly used in human rights matters, especially in the application of

[71] Decision of the Swiss Supreme Court 116 Ia 162, 165 et seq.
[72] KELLER, 627 et seq.

the European Convention on Human Rights. With this special treatment on the human rights acts the judges demonstrate the great respect for the human rights.

If an individual does not agree with the judgement of the Supreme Court, it can appeal at the European Court of Human Rights. Its verdicts are strictly respected by the Swiss Supreme Court. The federal judges always react fast and tolerant on new leading decisions of the European Court and align their jurisdiction conform to the European practice, even if they have to make a complete change of their constant routine. The European Court's leading cases are relevant for the Supreme Court whether it is involved in the case or not.

In its decisions, the federal judges try to apply the human rights carefully and individually to avoid stereotypes and generalisations. Overall the Swiss Supreme Court plays a fundamental role in the protection of human rights and it performs it in a very tolerant and liberal way, constantly paying attention to follow the jurisdiction of the European Court of Human Rights.

Hiermit erkläre ich, dass ich die vorliegende schriftliche Arbeit selbständig und nur unter Zuhilfenahme der in den Verzeichnissen oder in den Anmerkungen genannten Quellen angefertigt habe. Ich versichere zudem, diese Arbeit nicht bereits anderweitig als Leistungsnachweis verwendet zu haben. Eine Überprüfung der Arbeit auf Plagiate unter Einsatz entsprechender Software darf vorgenommen werden.

Zürich, 10.09.08 Benedikt Homberger