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Report of the Federal Supreme Court of Switzerland

**MECHANISMS FOR DEALING WITH CONFLICTING DECISIONS BY DIFFERENT
NATIONAL COURTS, THE CJEU AND THE ECtHR¹**

¹ By Sonia Sanchez and Sandra Vesco.

I. CJEU

1. How is the case-law of the CJEU studied and observed within your Court? Is there a department dedicated to this area of work, for example?

First of all, it should be emphasised that Switzerland only participates to a limited extent in the internal market of the European Union (EU). It is not a member of the EU. The only way for Switzerland to integrate into Europe is to conclude bilateral agreements with the EU. Moreover, none of these bilateral agreements (with the exception of the Agreement between the Swiss Confederation and the European Community on Air Transport²)³ establishes the CJEU as a supranational appeal body. Consequently, judgments of the CJEU are in principle not binding on the Federal Supreme Court (our supreme court, see Chapter III).⁴

However, some of the bilateral agreements explicitly provide for the case-law of the CJEU to be taken into account when interpreting concepts that are 'equivalent' or 'taken over' from Community law. This applies in particular to the agreements on the free movement of persons (AFMP)⁵ and air transport, as well as Schengen⁶ and Dublin.⁷ However, most agreements are static in nature, which means that the Federal Supreme Court only has to take into account the case-law of the CJEU prior to the signing of the agreement and not subsequent to it (e.g. Article 16(2) AFMP).

However, in order to achieve one of the original aims of the bilateral agreements, namely to simplify cross-border trade, the Federal Supreme Court also takes account of recent developments in case-law where this is essential to ensure a parallel interpretation of the provisions of these agreements with the corresponding provisions of EU law (teleological interpretation).⁸

To support the judges and registrars in this task, the Federal Supreme Court has a scientific service,⁹ the Legal and Information Service (JurInfo). The latter regularly follows the case-law of the CJEU. Decisions applying the above-mentioned bilateral agreements, as well as a

²Agreement between the Swiss Confederation and the European Community on Air Transport, RS 0.748.127.192.68. In specific cases, the agreement stipulates that the CJEU is competent to review the decisions of EU bodies in the final instance, and this also applies to Swiss economic operators. In practice, these cases mainly concern issues of competition and decisions in the context of the European Union Aviation Safety Agency (EASA).

³Federal laws and international treaties can be consulted in the Recueil systématique du droit fédéral (Systematic Compilation of Federal Legislation) on the Confederation's website at <https://www.fedlex.admin.ch/fr/>

⁴ Jonas Racine, L'influence de la CJUE sur la Suisse in: Plaidoyer 1/2016, p. 34.

⁵RS 0.142.112.681.

⁶ Agreement between the Swiss Confederation, the European Union and the European Community on the Swiss Confederation's involvement in the implementation, application and development of the Schengen acquis, RS 0.362.31.

⁷ Agreement between the Swiss Confederation and the European Community concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, RS 0.142.392.68.

⁸ With regard to the AFMP, see Federal Supreme Court decisions 2C_196/2009 published in ATF 136 II 5, recital 3.4; 2C_135/2009 published in ATF 136 II 120, recital 3.5.3 and Aubry Girardin Florence, L'interprétation et l'application de l'Accord sur la libre circulation des personnes du point de vue de la jurisprudence in: The Agreement on the Free Movement of Persons between Switzerland and the EU, 2011, p. 47. All Federal Supreme Court judgments can be consulted free of charge on its website at www.bger.ch.

⁹In accordance with Article 51(1) of the Regulations of the Federal Supreme Court (RTF), RS 173.110.131, the necessary scientific and administrative services are provided at the two locations where the courts sit, i.e. Lausanne and Lucerne

number of other decisions likely to be of interest to the courts of the Federal Supreme Court, are filed in an internal case-law database accessible to all judges.

1.1. If the answer to the previous question is yes, how many people are employed in this department and what is their level of training? What is the role of the department (for example, advisory)?

The JurInfo service has a staff of around 20, including some 15 legal experts. Its role is both informative and advisory. As mentioned above, it administers the electronic case-law database, but this is not its only task. It is also responsible for the publication of Federal Supreme Court judgments, various legal research projects, the preparation of scientific reports for symposia and journals, etc. It works closely with the courts and other scientific and administrative services of the Court, and also maintains links with various international organisations.

2. Is it possible to annul a final decision taken in an administrative dispute if the CJEU hands down a judgment in another case that shows that an earlier final decision of a national court is wrong? If such a procedure exists, in what formation (number of judges) does the administrative court rule?

The Federal Supreme Court Act (LTF)¹⁰ does not provide for a procedure for amending a final decision handed down by the Federal Supreme Court for reasons relating to a subsequent different decision or position of the CJEU (unlike in the case of the ECtHR, see Article 122 LTF and the answer to question 4, Chapter II).

2.1. Are the parties entitled to take the initiative to set aside a final decision in the above-mentioned case? In addition to the parties, is any other body (authority, etc.) involved in these proceedings? Is there a deadline for submitting this application?

As indicated above, there is no such procedure for decisions handed down by the Federal Supreme Court.

2.2. Is the administrative court authorised to react *ex officio* in the above-mentioned case? Is there a time limit for such an action?

As indicated above, there is no such procedure for decisions handed down by the Federal Supreme Court.

Furthermore, as a general rule, the Federal Supreme Court never takes up a case of its own motion. Its intervention always presupposes an appeal (or application) by a party to the proceedings.

2.3. If there is a contradiction between a decision of a national court and a more recent judgment of the CJEU, what procedure is followed to establish that the earlier final decision is not in line with the position of the CJEU? How are the positions of the parties obtained in such a procedure?

As indicated above, there is no such procedure for decisions handed down by the Federal Supreme Court.

However, when a decision handed down by a lower court is subject to review by the Federal Supreme Court, the latter takes account of the case-law of the CJEU when interpreting the 'equivalent' or 'taken over' provisions of Community law that it applies (see the answer to question 1 above).

¹⁰RS 173.110.

2.4. Can such a decision be appealed?

No, the Federal Supreme Court is Switzerland's highest court. It is therefore not possible to appeal at national level against decisions handed down by the Federal Supreme Court.

Furthermore, as already mentioned, no bilateral agreement between Switzerland and the EU (with the exception of the air transport agreement) establishes the CJEU as a supranational appeal body.

2.5. If the above-mentioned procedure exists, in approximately how many or in what types of administrative disputes during the period 2012-2022 was the possibility of amending a final decision that diverges from the subsequent position of the CJEU used?

As indicated above, there is no such procedure for decisions handed down by the Federal Supreme Court. There is also no information on the number of judgments handed down by the Federal Supreme Court on appeals against decisions of lower courts in which the Federal Supreme Court took into account a subsequent decision of the CJEU.

3. Has any legislation been amended because of contradictions between the case-law of national courts and that of the CJEU? If so, please provide an example.

4. As already mentioned, the case-law of the CJEU is not in principle binding on the Federal Supreme Court. However, in order to ensure uniform development of the provisions of bilateral agreements with the corresponding provisions of Community law, the Federal Supreme Court takes into account not only the case-law of the CJEU prior to the entry into force of the bilateral agreements, but also subsequent case-law (see answer to question 1, Chapter I). On the other hand, as regards the autonomous adaptation of Swiss law, i.e. the adaptation of Swiss law to developments in the EU decided by national authorities without there being a contractual constraint, the case-law of the CJEU has little impact.¹¹

¹¹Jonas Racine, L'influence de la CJUE sur la Suisse in: Plaidoyer 1/2016, p. 34.

II. ECtHR

1. How is the case-law of the ECtHR studied and observed within your Court? Is there a department dedicated to this area of work, for example?

Unlike the case-law of the CJEU, the case-law of the European Court of Human Rights (ECtHR) is applied directly in our country and is binding on all authorities. Switzerland is a member of the Council of Europe and is subject to the European Court of Human Rights, its supreme judicial body. The courts of the Federal Supreme Court are therefore constantly monitoring developments in the case-law of the ECtHR and are supported in this task by the JurInfo service.¹² In particular, the latter informs the courts, by email and on the intranet, as soon as a case concerning Switzerland is communicated, and is also responsible for monitoring judicial practice for cases concerning other countries. All cases notified concerning Switzerland and a selection of judgments and decisions relating to other States, in particular the Court's leading cases and those selected by the Federal Office of Justice (FOJ) in its quarterly reports¹³, are loaded into an internal database, which makes it possible to maintain an overview of Strasbourg case-law.

1.1. If the answer to the previous question is yes, how many people are employed in this department and what is their level of training? What is the role of the department (for example, advisory)?

See answer to question 1.1, Chapter I.

2. What place does the Convention occupy in the hierarchy of legal rules in your Member State?

According to the Federal Supreme Court, in the event of a conflict, the rules of international law that are binding on Switzerland take precedence over those of domestic law that are at odds with it.¹⁴ Leaving aside international treaties that expressly provide for the right of States parties not to apply them – or certain of their clauses – in the event of conflict with domestic law (as in the case of the provisional application of treaties prior to their ratification),¹⁵ the principle of the primacy of international law could only be derogated from where the legislator deliberately wished to ignore the international obligation and deliberately assume the corresponding political responsibility.¹⁶ However, such a derogation is excluded when Switzerland's human rights obligations are at stake;¹⁷ in such cases, international public law takes precedence over domestic law, even if the Swiss legislator wishes to depart from it. To this first exception has been added a second. The Federal Supreme Court has ruled that the primacy of domestic law that voluntarily departs from international law must be denied in the case of treaty law governing relations between Switzerland and the European Union.¹⁸ This means that, although there is no constitutional court in Switzerland, there is a human rights court. Federal laws are examined by the Federal Supreme Court as to their compatibility with the human rights requirements guaranteed by international treaties and, if necessary, their

¹²See also answer to question 1, Chapter I.

¹³See also answer to question 6, Chapter II; Federal Office of Justice, Case-law of the ECtHR <https://www.bj.admin.ch/bj/fr/home/staat/menschenrechte/egmr.html>.

¹⁴ ATF 147 IV 182 recital 2.1; 146 V 87 recital 8.2.2; 144 II 293 recital 6.3; for a recent presentation of the case-law, see Martin Kocher, *Die bundesgerichtliche Kontrolle von Steuernormen*, Berne 2018, Ch. 214 et seq., p. 81 et seq.; see also A. Zünd, *Grundrechtsverwirklichung ohne Verfassungsgerichtsbarkeit*, AJP 2013, p. 1349 et seq., 1351.

¹⁵for the Energy Charter, RS 0.700.0, cf. ATF 149 III 131.

¹⁶ATF 144 II 293 recital 6.3; 142 II 35 recital 3.2; 138 II 524 recital 5.3.2; 99 Ib 39 recital 3, the so-called Schubert case-law, which has been much criticised in the legal literature from the outset, cf. e.g. L. Wildhaber, *Bemerkungen zum Fall Schubert betreffend das Verhältnis von Völkerrecht und Landesrecht*, *Annuaire suisse de droit international*, 1974, p. 195 et seq.; A. Grisel, *Traité de droit administratif*, 1984 I p. 92; A. Haefliger, *Le Tribunal fédéral suisse*, in *Annuaire international de Justice constitutionnelle* 1990, p. 195 et seq., 210.

¹⁷ATF 142 II 35 recital 3.2; 139 I 16 recital 5.1; 125 II 417 recital 4d, the so-called PKK case-law.

¹⁸ATF 142 II 35 recital 3.2; 133 V 367 recital 11.4 to 11.6; A. Zünd, *loc. cit.*

application is refused.¹⁹ There is therefore a difference in treatment, depending on whether the finding of unconstitutionality corresponds to a finding of incompatibility with international conventions in the area of fundamental rights or with regard to the organisational provisions of the State, for example with regard to the subsidiarity of federal action (Article 5(a) of the Federal Constitution of the Swiss Confederation (Cst.))²⁰ or the room for manoeuvre left to the cantons in the implementation of federal law (Article 46(3) Cst.). In reviewing the application of federal laws, the effect of the principle of the authority of Article 190 Cst. in relations between the federal states means that, unlike in a vast area of constitutional rights, no international judicial legal protection comes to the rescue of these rules as a substitute instrument. Article 190 Cst. therefore applies directly to the cantons, in contrast to the fundamental rights of citizens.²¹

While the Federal Supreme Court is obliged to ensure the jurisdiction of fundamental rights, as required by the treaties that Switzerland has concluded and to which it is bound, it is also obliged to exercise caution and restraint in the use of a power that has been conferred on it only indirectly.²²

2.1. What impact does this have on the application of the Convention in administrative disputes (is the Convention applied directly)?

Article 1 of the ECHR obliges Contracting States to extend the guarantees of the ECHR to everyone within their jurisdiction. These guarantees are directly applicable in Switzerland in the same way as national law, including in the context of administrative disputes.

2.2. Does a specific body (court) monitor the application of the Convention in administrative disputes?

The guarantees of the ECHR are binding on those authorities that exercise all powers (legislative, executive or judicial) at all levels of government.²³ This means that each authority must verify the application of the Convention and the case-law of the ECtHR.

It should be emphasised that at cantonal level, each canton has a law governing proceedings before its own administrative courts.²⁴ The scope of their powers and the way they are organised may vary from one canton to another.

At federal level, the application of the ECHR in administrative disputes is monitored by the Federal Administrative Court and the Federal Supreme Court, which is the supreme judicial authority in Switzerland. The Federal Administrative Court rules at first instance on appeals against decisions of the federal authorities. Its judgments can generally be appealed to the Federal Supreme Court, except in a few areas such as asylum law or international administrative assistance, where the Federal Administrative Court is the court of last instance (see also answer to question 2, Chapter III).

¹⁹A. Zünd, loc. cit.

²⁰RS 101.

²¹cf. Y. Hangartner, *Zwischenhalt in der Verfassungsgerichtsbarkeit*, AJP 2012, p. 1213 et seq., 1216 et seq.

²²A. Zünd, op. cit., p. 1352.

²³Switzerland is a federal state with a three-tier structure. It is made up of a federal state (the Confederation), federated states (the cantons) and a third tier (the municipalities – the lowest tier of public authorities). The three powers of the State (legislative, executive and judicial) are distributed across all levels of the State (Confederation, cantons and municipalities). The division of powers between the Confederation and the cantons is dominated by the principle of subsidiarity: Article 3 Cst. states that the cantons shall exercise all powers not directly attributed to the Confederation by the Federal Constitution. As for the relationship between the cantons and the municipalities, it is in principle the canton that determines which areas fall under municipal jurisdiction; however, special rules may also exist at federal level. It should be noted that each municipality enjoys municipal autonomy, a constitutional right that can be asserted before the Federal Supreme Court.

²⁴Unlike legislation governing civil and criminal procedure, administrative procedure in Switzerland is not the exclusive responsibility of the Confederation. There are therefore procedural rules at federal, cantonal and even municipal level. Many of the basic rules are set out in the Federal Administrative Procedure Act (PA; RS 172.021) and the Federal Supreme Court Act (LTF) for appeals to the Federal Supreme Court; each canton also has its own Administrative Procedure Act.

3. Under national law (or case-law), does a violation of the Convention or any departure from the case-law of the ECtHR, found by a national court (such as a court of appeal), constitute possible grounds for setting aside the decision of a lower court that was guilty of that violation? If so, what legal remedies or instruments are available and how does the procedure work?

Yes, a breach of the ECHR constitutes possible grounds for annulment of the previous court's decision.

Proceedings before the Federal Administrative Court are governed by the Federal Administrative Procedure Act (PA), insofar as the Federal Administrative Court Act (LTAF)²⁵ does not provide otherwise (Article 2(4) PA, Article 37 LTAF). Pursuant to Article 49(a) PA, the appellant may plead infringement of federal law, including excess or abuse of discretionary power. Federal law includes not only legislative acts enacted by the federal authorities, but also international agreements, including the ECHR, ratified by Switzerland. If it finds that there has been a violation of the ECHR, the Federal Administrative Court may issue a reformatory or cassatory decision and refer the case back to the lower court with binding instructions (Article 61 PA).

With regard to proceedings before the Federal Supreme Court, under Article 95(a) and (b) LTF, an appeal may be lodged with the Court on the grounds of a breach of federal or international law. In its case-law, the Federal Supreme Court has made it clear that complaints brought before the ECtHR must be capable of being examined beforehand by the Federal Supreme Court, and that complaints that can be examined by the latter must also be capable of being examined by the lower courts. A person whose rights under the ECHR have been infringed must be given the opportunity, before any application is lodged with the ECtHR, to have the alleged infringement established in an appeal against the act in question [...].²⁶ If the Federal Supreme Court upholds the appeal, it will itself rule on the merits or refer the case back to the previous authority for a new decision. It may also refer the case back to the authority that ruled in the first instance (Article 107(2) LTF).

4. What procedural options are available to a party whose administrative case is closed, even though the ECtHR has found a violation of the Convention in this respect?

If the ECtHR finds that there has been a violation of the ECHR, a party may, under certain conditions, seek a review of the contested judgment.

A review of Federal Supreme Court judgments may only be requested on one of the grounds set out exhaustively in Article 121 et seq. LTF and within the time limits set out in Article 124 LTF.

In accordance with Article 122 LTF (in the version in force from 1 July 2022),²⁷ an application for review of a Federal Supreme Court judgment for breach of the ECHR may be made under the following conditions: the European Court of Human Rights has found a breach of the ECHR or its protocols in a final judgment (Article 44 ECHR), or has concluded the case by means of an amicable settlement²⁸ (Article 39 ECHR) (letter (a)); compensation is not likely to remedy the effects of the breach (letter (b)); and the review is necessary to remedy the effects of the breach (letter (c)). All three conditions must be met to justify a review.

²⁵RS 173.32.

²⁶ATF 137 I 296 recital 4.3.2 and 4.3.4.

²⁷RO 2022 289.

²⁸Before 1 July 2022, a Federal Supreme Court judgment could not be reviewed if the case had been settled amicably, but only if the ECtHR had handed down a final judgment against Switzerland.

The provisions of the LTF governing review (Article 121 et seq. LTF) also apply to the review of judgments of the Federal Administrative Court (Article 45 LTAF).

4.1. Does the party have to respond within a set period?

Pursuant to Article 124(1) LTF, an application for review of a breach of the ECHR must be lodged with the Federal Supreme Court no later than 90 days after the judgment of the ECtHR has become final within the meaning of Article 44 ECHR.

4.2. If the party has not submitted an application to modify the final decision (i.e. to recommence proceedings, for example), is the administrative court entitled to react *ex officio*?

No, the review does not take place automatically, but always presupposes an explicit request to that effect by the party concerned.²⁹

4.3. In what formation (number of judges) does the administrative court adopt its decisions to modify the final decision?

As a rule, applications for review are heard by a three-judge panel of the Federal Supreme Court (pursuant to Article 20(1) LTF). A court rules with five judges when the case raises a legal question of principle or when a judge so requests (Article 20(2) LTF).³⁰

The composition is the same for applications for review examined by the Federal Administrative Court. Generally speaking, the courts rule with three judges (Article 21(1) LTAF). They rule with five judges if the President so orders in the interests of the development of the law or the uniformity of case-law (Article 21(2) LTAF).

4.4. If there is a contradiction between a decision of a national court and a more recent judgment of the ECtHR, what procedure can be used to establish that the earlier final decision is not in line with the position of the ECtHR? Is the fact that the previous final decision does not comply with the position of the ECtHR established in a special procedure? Are parties to other administrative disputes entitled to seek the modification of their final decisions on the basis of the decision handed down by the ECtHR in another case? Is there a deadline for submitting this application? How are the positions of the parties obtained in such a procedure? Is it possible to lodge a legal appeal against a decision of the national court ruling on the case?

If the ECtHR has not handed down a judgment or concluded the case with an amicable settlement in respect of a party, a review under Article 122(a) LTF cannot be accepted. It is not sufficient for the Court to have handed down a final judgment in a case dealing with an issue identical to that which a party has referred to the Federal Supreme Court but concerning a third party. Standing to seek review of a Federal Supreme Court judgment presupposes that the party was a party to the proceedings that led to the judgment in question, which was found to be in breach of the ECHR, and can therefore assert an interest in the resumption of the proceedings that is worthy of protection.³¹

²⁹Michel Hottelier, Hanspeter Mock, Michel Puéchavy, *La Suisse devant la Cour européenne des droits de l'homme*, 2nd ed. Geneva: Schulthess, 2011, p. 339.

³⁰For an application for review examined by five judges, see in particular the judgment of the Federal Supreme Court published in ATF 144 I 214.

³¹Federal Supreme Court judgment 9F_18/2022 recital 5 and the references cited.

4.5. In approximately how many or in what types of administrative disputes during the period 2012-2022 was an application made to modify the final decision because it was inconsistent with the position of the ECtHR?

Over the period 2012-2022, around 10 applications for review were lodged with the Federal Supreme Court following a judgment of the ECtHR concerning administrative disputes (particularly in the areas of the law on foreign nationals and social insurance).

5. In what types of administrative dispute are violations of the rights guaranteed by the Convention most often established? Is there an explanation for this?

In addition to procedural disputes and violations of Article 6 ECHR (right to a fair trial), to which we will return in more detail in question 7, Chapter II, violations of Article 8 ECHR (right to respect for private and family life) are most often established in cases concerning Switzerland, particularly in matters of the law on foreign nationals. The protection of migrants has developed in Strasbourg case-law, and the Court has extended the scope of the guarantees in Article 8 ECHR. It has also imposed positive obligations on States concerning not only the living conditions of foreign nationals in the host country, but also the conditions under which they are removed.

6. Is there a special body in your country responsible for enforcing ECtHR judgments (with the exception of the government, with regard to just satisfaction awarded in ECtHR judgments), and what is its name? If there is such a body, what is its composition and what powers does it have (what instruments does it use to ensure that the case-law of national courts does not contradict that of the ECtHR)?

In Switzerland, the Federal Office of Justice (FOJ), through its International Protection of Human Rights Unit, is responsible for the procedure for monitoring the enforcement of a Strasbourg judgment. The head of the International Protection of Human Rights Unit is the Swiss government's agent before the Court.

The FOJ has no power of decision or injunction. At European level, its role is that of a liaison office between the Committee of Ministers and the Swiss authorities in the enforcement of judgments. Internally, it ensures coordination with the federal and cantonal authorities. As soon as it receives a final case from the Court concerning Switzerland, it forwards it to all the federal and cantonal authorities concerned, indicating, where appropriate, what individual and general measures may be taken to comply with the judgment.³²

To facilitate access to Strasbourg case-law, the FOJ also produces quarterly reports on the Court's case-law, which it distributes widely to the federal and cantonal authorities. In addition to cases directly concerning Switzerland, these reports also include selected judgments and decisions against other States, insofar as they are fundamental and may also be of relevance to our country.³³

³²Samantha Besson, *Les effets et l'exécution des arrêts de la Cour européenne des droits de l'homme – Le cas de la Suisse*, p. 182.

³³Federal Office of Justice, *Case-law of the ECtHR*
<https://www.bj.admin.ch/bj/fr/home/staat/menschenrechte/egmr.html>.

7. Has any legislation been amended because of contradictions between the case-law of national courts and that of the ECtHR? Please give an example!

The ECHR and the case-law of the Court have influenced the Swiss legal system in many ways, at both constitutional and legislative level.³⁴ The authorities not only reacted to the findings of infringement made against our country, but also took into account judgments relating to other States.

As regards administrative courts in particular, the material scope of the right to a fair trial enshrined in Article 6 ECHR has been significantly extended by Strasbourg case-law to include matters of administrative law, such as planning, construction and expropriation law. In the Swiss cantons, this extension has led to a major reform of the administrative jurisdiction. In many of them, administrative litigation was the responsibility of the administrative authorities, with the cantonal executive often acting as the final appeal authority.³⁵ Administrative courts have been set up in cantons where they did not exist, and their jurisdiction has been considerably extended in other cantons to offer litigants all the guarantees of a fair trial within the meaning of Article 6 ECHR.³⁶

The judgment in *Belilos v Switzerland*³⁷, dating from 1988, was the trigger for profound changes in the Swiss judicial system. The applicant, a social activist who had taken part in an unauthorised demonstration, complained that she had been fined by an administrative authority, the Police Commission, which was not an independent and impartial tribunal within the meaning of Article 6(1) Article 1 ECHR. The remedies available had not made it possible to rectify this shortcoming, as neither of the two courts concerned had full jurisdiction. The Court, ruling in plenary session, found Switzerland to be in breach of Article 6 ECHR. This judgment provoked a strong reaction in Switzerland and was even followed by a postulate aimed at repudiating the ECHR, which was narrowly rejected.³⁸ What was most disturbing was that the Court had invalidated express reservations that Switzerland had made when ratifying the Convention on the scope of Article 6 ECHR. Following the *Belilos* case, the right of access to the courts became widespread in Switzerland and the new Article 29(a) Cst. was strongly inspired by the Strasbourg case-law on Article 6 ECHR.

A more recent example is the Grand Chamber case of *Beeler v Switzerland*.³⁹ The Court considered Article 24(1) 2 of the Federal Old-Age and Survivors' Insurance Act (LAVS)⁴⁰, which provides that the pension of a widower lapses when the youngest child reaches the age of majority, unlike the pension of a widow. The Court found Switzerland to be in breach of Article 14 ECHR in conjunction with Article 8 ECHR by arguing that the inequality of treatment suffered by the applicant could not be regarded as being based on a reasonable and objective justification. Following this judgment and pending an adjustment of the legal bases, the Swiss government adopted measures to re-establish equal rights for widowers and widows, and a transitional system was put in place to ensure that the widower's pension no longer lapses

³⁴For the impact of the ECHR on the Swiss legal system, see in particular '40 ans d'adhésion de la Suisse à la CEDH: Bilan et perspectives'. Report of the Federal Council of 19 November 2014 in execution of Stöckli's postulate 13.4187 of 12 December 2013, FF 2015 353.

³⁵Michel Hottelier, Hanspeter Mock, Michel Puéchavy, *La Suisse devant la Cour européenne des droits de l'homme*, 2nd ed. Geneva: Schulthess, 2011, p. 34. Giorgio Malinverni, *Les modifications législatives consécutives à des jugements de la Cour européenne des droits de l'homme*, LEGES 2016/3, p. 380.

³⁶Giorgio Malinverni, *Les modifications législatives consécutives à des jugements de la Cour européenne des droits de l'homme*, LEGES 2016/3, p. 380.

³⁷Judgment in *Belilos v Switzerland* of 29 April 1988 (application No 10328/83).

³⁸Postulate 88.453 of 6 June 1988 (Danioth).

³⁹Judgment of the Grand Chamber in *Beeler v Switzerland* of 11 October 2022 (application No 78630/12).

⁴⁰RS 831.10.

when the last child reaches the age of majority, in line with current practice for widows. The project to amend the law is currently under way.⁴¹

8. Has your country ratified Protocol 16 to the Convention (under which it is possible to request advisory opinions)?

No, Switzerland has not ratified Protocol 16 to the Convention.

8.1. Do you think that an advisory opinion could prevent a national court from taking a decision that does not comply with the case law of the ECtHR? Justify your answer.

Yes, national courts could draw conclusions from opinions on similar issues, because although they are 'advisory' and not binding, they have a certain authority.

In a case concerning our country, *D.B. and Others v Switzerland*,⁴² the ECtHR took into account a 2019 advisory opinion requested by the French Court of Cassation,⁴³ and used reasoning based on it to find against Switzerland for violating the privacy of a child born through surrogate motherhood abroad.

This judgment gave rise to two separate and divergent opinions. Judge Krenč, for his part, pointed out that although advisory opinions are not formally binding, they are of interest to all States parties to the Convention and cannot be ignored by those which, like Switzerland, have not ratified Protocol No 16, as the Court interprets the provisions of the Convention that are binding on those States. He added that the Court's interpretation of the Convention in its advisory opinions forms part of its 'case-law', in the same way as its judgments and decisions. In her partly dissenting opinion, Judge Elósegui pointed out that the application of an advisory opinion to the member countries of the Council of Europe creates a certain inconsistency from the point of view of legal certainty and case-law, since, although an opinion is not binding even on the court of the country from which the application emanates, it is subsequently incorporated into the principles of the Court's case-law and thus indirectly becomes binding on all other countries, even those that have not accepted the advisory opinion procedure. In her view, this phenomenon is a source of uncertainty as to the Member States' obligations under the Convention, particularly when it applies to past situations.

8.2. Have you requested an advisory opinion under Protocol No 16 to the Convention? Give an example.

No, because as mentioned above, Protocol No 16 to the Convention has not been ratified by Switzerland.

⁴¹Le Conseil fédéral concrétise la révision des rentes de survivants de l'AVS

<https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-96171.html>.

⁴²Judgment in *D.B. and Others v Switzerland* of 22 November 2022 (applications No 58817/15 and 58252/15).

⁴³Advisory opinion on the recognition in domestic law of a parent-child relationship between a child born as a result of surrogate motherhood carried out abroad and the intended mother, GC, application No P16-2018-001, French Court of Cassation, 10 April 2019.

III. CONSTITUTIONAL COURT:

1. Is there a constitutional court in your country?

The Federal Supreme Court (our supreme court) is the **supreme judicial authority** of the Swiss Confederation (Article 188(1) Cst.).

1.1. If so, what powers does the Constitutional Court have?

The Federal Supreme Court has a dual role. As the highest authority of last instance, it is responsible for enforcing federal legislation in all areas of law (civil, criminal and administrative). As a constitutional court, it guarantees the protection of citizens' constitutional and fundamental rights.

However, unlike in most other countries, the constitutionality of federal law (federal laws and international treaties) cannot be examined by the Swiss constitutional court. This limitation derives from Article 190 Cst., which states that *'the Federal Supreme Court and the other authorities are obliged to apply federal laws and international law'*, even if they are contrary to the Constitution.

The Federal Supreme Court's constitutional jurisdiction therefore extends only to normative acts (laws and ordinances) and decisions emanating from the cantons. An appeal in matters of public law allows an individual to directly challenge a cantonal rule, whose conformity with federal law will be reviewed in the abstract by the Federal Supreme Court, or to challenge it by way of exception in the context of an application decision.

2. Does the Supreme Administrative Court have powers similar to those of the Constitutional Court? Please describe the jurisdiction of these two courts.

As mentioned above, as the highest authority of last instance, the Federal Supreme Court is responsible for enforcing federal legislation **in all areas of law (civil, criminal and administrative)**. The Federal Supreme Court is therefore also the supreme administrative court in Switzerland, except for the areas listed in Article 83 LTF. In these cases, the Federal Administrative Court is the highest administrative court (see also answer to question 2.2, Chapter II). Like the Federal Court, the Federal Administrative Court is required to apply federal and international law in accordance with Article 190 Cst.

3. If the Supreme Administrative Court is of the opinion that a provision of the law applicable in a particular case is unconstitutional, must it initiate appropriate proceedings before the Constitutional Court or is it authorised to interpret the disputed provision in the light of the Constitution?

As mentioned above, the constitutional jurisdiction of the Federal Supreme Court (or the Federal Administrative Court) applies only to normative acts (laws and ordinances) and decisions issued by the cantons and not to federal laws (Article 190 Cst.).

However, the rigour of the rule laid down in Article 190 Cst. is tempered by the principle of **interpretation in conformity with the Constitution**, according to which the court must interpret a legal provision that is open to several interpretations in a way that is in harmony with the Constitution.

Article 190 Cst. does not preclude the Federal Court from **finding** that a federal law violates the Constitution. However, it may not sanction this finding by annulling or refusing to apply the law in question.

Finally, legislative acts other than federal laws, i.e. ordinances of the Federal Assembly and those of the Federal Council, generally escape the restriction of Article 190 Cst.; their constitutionality can therefore in principle be reviewed.

5. Can the parties to an administrative dispute request the annulment of final decisions issued on the basis of a rule that the Constitutional Court has deemed unconstitutional (as part of the abstract constitutionality review process)? Is there a time limit for such an action?

If the appeal is upheld in the context of an abstract review of a cantonal rule, the contested rule is annulled with general effect. However, the Federal Supreme Court cannot itself remove it from the legal text; the cantonal authority must do so through the normal legislative process.⁴⁴

An appeal against a legislative act must be lodged with the Federal Supreme Court within 30 days of its publication under cantonal law (Article 101 LTF). Once this period has expired, the cantonal legislative act can no longer be challenged as such.⁴⁵ Given the short period of time within which the abstract review must take place, it is unlikely that a final decision has already been handed down on the basis of the rule deemed unconstitutional and annulled.

It should, however, be emphasised that in the context of an abstract review, the annulment of all or part of a cantonal legislative act is rare. The Federal Supreme Court shows great restraint and only declares an act void when it cannot be interpreted in accordance with the Federal Constitution.⁴⁶

6. Can parties to an administrative dispute seek the annulment of final decisions that do not comply with the ruling of the Constitutional Court handed down in another person's constitutional action? Is there a time limit for such an action?

The admission of an appeal in the context of a review of a particular act, i.e. a concrete review of a cantonal rule, has effect only between the parties to the proceedings. In this case, the Federal Supreme Court does not have the power to annul a rule found to be unconstitutional. It can only declare it unconstitutional and refrain from applying it in the case in point. However, in practice, the scope of the judgment goes beyond the case in point. As the opinion of the Federal Supreme Court has been made public, it is known to the authorities and to litigants. The unconstitutional rule, although formally still in force, will in practice no longer be applied.⁴⁷

In order to set aside any other decision made on the basis of this rule, the ordinary legal channels must be followed. Thus, once all the previous procedures have been exhausted, an appeal to the Federal Supreme Court may be lodged within 30 days of notification of the complete copy of the contested decision (Article 100 LTF).

⁴⁴Gilbert Kolly, *Le Tribunal fédéral suisse*, 2016, p. 6.

⁴⁵Gilbert Kolly, *Le Tribunal fédéral suisse*, 2016, p. 6.

⁴⁶Gilbert Kolly, *Le Tribunal fédéral suisse*, 2016, p. 7.

⁴⁷Gilbert Kolly, *Le Tribunal fédéral suisse*, 2016, pp. 6 and 7.

IV. RELATIONSHIP BETWEEN THE NATIONAL SUPREME ADMINISTRATIVE COURT AND ANOTHER NATIONAL SUPREME COURT

1. Is there another supreme court in your judicial system?

See answer to question 2, Chapter III.

2. Please describe the jurisdiction of the two supreme courts.

See answer to question 2, Chapter III.

3. In general, how are contradictions between the various decisions of national courts balanced out in your legal system? How are any conflicting positions of the (two) (supreme) courts balanced out?

The case-law of the Swiss Federal Supreme Court carries a certain weight with the lower judicial authorities. As a general rule, these courts endeavour to align their own case-law with that of the Supreme Court, in order to avoid successful appeals against their own decisions.

4. In your opinion, is it possible to prevent contradictions?

See answer to question 3, Chapter IV above.