

Swiss Institute of Comparative Law

Lausanne, April 26, 2012

*The Impact of Foreign and International Law on National Legal Systems:
Comparisons in Legal Development*

u^b

**b
UNIVERSITÄT
BERN**

*Switzerland –
Dealing with Comparative Law and European Law:
Overview of the „Swiss Approach“*

by

Peter V. Kunz

Prof. Dr. iur., Attorney-at-law, LL.M. (Georgetown)

Full-tenure Professor for Economic Law and Comparative Law

University of Berne Law School

Head of the Institute for National and International Economic Law

kunz@iwr.unibe.ch

www.iwr.unibe.ch

Contents

1. Introduction
2. Switzerland and the „Swiss Approach“
3. Comparative Law
4. European Law

Introduction

a) Swiss Peculiarities

- Past – Switzerland as „*Legal Exporter*“:
e.g. Swiss Civil Code (Turkey: 1926), Swiss Code of Obligations (Germany: 1900).

- Present – Switzerland as „*Legal Importer*“:
i.e. „Americanization“, „Europeanization“ and „Internationalization“.

- Switzerland as „*Heaven*“ for Comparative Law:
Swiss Supreme Court in Lausanne, Swiss Institute for Comparative Law etc.

- *Why?*

Introduction

b) Details

- *Peter V. Kunz*, Einführung zur Rechtsvergleichung in der Schweiz – Ein bedeutsames juristisches Fachgebiet für Studenten sowie für Praktiker zwischen „notwendigem Übel“ sowie „Königdisziplin“, recht 24 (2006) 37 – 54;
- *Peter V. Kunz*, Instrumente der Rechtsvergleichung in der Schweiz bei der Rechtssetzung und bei der Rechtsanwendung, ZVglRWiss 108 (2009) 31 – 82;
- *Peter V. Kunz*, Amerikanisierung, Europäisierung sowie Internationalisierung im schweizerischen (Wirtschafts-)Recht, recht 30 (2012) – tbp in summer 2012.

Switzerland and the „Swiss Approach“

a) Background

- Are Swiss Lawyers *aware* of International Law?
Yes...
- Are Swiss Lawyers *prepared* for its Challenges?
Not all – but the „University Level“ is steadily changing.
- Arguments „pro“ Comparative Law:
e.g. necessity for a small country, multi-lingual background.
- Arguments „con“ Comparative Law:
no „Nativism“ (yet) in Switzerland...

Switzerland and the „Swiss Approach“

b) Influence of International Law

- Q: Which State Level is influenced?
A: International Law takes center stage with *Federal Laws* only.

- Q: Are all Swiss Courts „involved“?
A: Focus is primarily on *Swiss Supreme Court* in Lausanne.

- Q: Governmental Authorities?
A: International Law is largely neglected.

Comparative Law

a) Swiss Legislation

- *Formal Proceedings re Comparison:*
e.g. Art. 141 ParlA (Parliament Act: SR 171.10) and two Guidelines by the Swiss Government.
- *Primary Focus (today) on „European Law“ – Art. 141 ParlA:*
„The Federal Council shall submit its bills to the Federal Assembly together with a dispatch. In the dispatch, the Federal Council shall provide justification for the bill and if necessary comment on the individual provisions. In addition, it shall explain (...) the *relationship with European Law* (...)“.
- *Guidelines broaden the Perspective considerably:*
i.e. not only „European Law“ but *any International Law* might be of interest.
- *Pressure and Eclecticism and References to „International Standards“ etc.*

Comparative Law

b) Swiss Adjudication

- *Informal Proceedings re Comparison:*
i.e. no legal obligation for Courts to compare Swiss law with International Law.

- **Is there a „Method of Comparison“?**
Dispute among Commentators (so-called „rechtsvergleichendes Auslegungselement“)...

- **Main „Door Opener“ for Comparative Law:**
so-called „Statutory Gap“ („echte Gesetzeslücke“) which needs to be filled by the Court.

European Law

a) Main Focus = European Union (EU)

- *EU as Key Aspect of Swiss Foreign Policy:*
Switzerland is *not EU-Member* and *not EEA-Member* (as of Today).

- *Swiss Approach is the Agreement on Bilateral Treaties with the EU:*
i.e. „Bilaterals I“ and „Bilaterals II“ (and maybe „Bilaterals III“) – but the present relationship between Switzerland and the EU is *somewhat „edgy“* on both sides!

- *Formal „Door Openers“ for EU Law both in Legislation and in Adjudication:*
e.g. Art. 141 ParlA (see above) and ...

European Law

b) Variety of „Door Openers“ for European Law

- Focus on *Legislation*, not on Adjudication:
Changes are likely due to EU demands...

- *Legislation*:
e.g. International Treaties with the EU („Staatsverträge“ als Rechtsgrundlage), so-called „Checking on EU Compatibility of Swiss Legislation“ („EU-Kompatibilitätsprüfung“), so-called „Autonomous Adoption of EU Law“ („autonomer Nachvollzug von EU-Recht“).

- *Adjudication*:
e.g. Interpretation of EU Treaties, so-called „Interpretation of Swiss Law in Accordance with EU Law“ („europarechtskonforme Auslegung“ = „Leges Europaea“)

Finally, I thank you for your Attention..!

Peter V. Kunz

University of Berne Law School
Institute for National and International Economic Law
Schanzeneckstrasse 1
CH-3001 Berne
Tel.: 031 / 631 55 88

kunz@iwr.unibe.ch

www.iwr.unibe.ch