



# SWITZERLAND

Situation as of 31 December 2002

**General Overview**

*Preliminary Note: this table is accompanied by an explanatory note*

<b>COUNTRY: SWITZERLAND</b>	<b>Constitutional provisions</b>	<b>Specific legislation</b>	<b>Criminal Law</b>	<b>Civil and Administrative Law</b>	<b>Cantonal Law</b>
<b>Norms concerning discrimination in general</b>	Yes Articles 7 and 8 of the new Federal Constitution of 1 January 2000	No.	No.	Yes, Article 28 et seq. of the Civil Code. Articles 336 (a) and 328 of the Code of Obligations. Act on public transport, Postal Service Act. Section 25a of the LSEE	Yes. In the new cantonal constitutions
<b>Norms concerning racism</b>	Yes Article 8 §2 of the Federal Constitution of 1 January 2000	No.	Yes. Article 261 bis of the Criminal Code and Article 171c of the Code of Military Justice.	No.	Yes.
<b>Relevant jurisprudence</b>	No.	No.	Yes.	Yes.	Yes.

## EXPLANATORY NOTE

### SWITZERLAND / GENERAL OVERVIEW

On 18 June 1993, the Parliament, acting on a proposal of the Swiss government, approved the International Convention of 1965 on the Elimination of all Forms of Racial Discrimination. The Convention came into force in Switzerland on 29 November 1994. However, the government entered two reservations concerning Article 2.1 (a) and Article 4 of the Convention<sup>1</sup>: the first, so as not to modify restrictions on allowing foreign nationals to work in Switzerland<sup>2</sup>, and the second so as to protect freedom of opinion and freedom of association.

In order to adapt Swiss law to the Convention, parliament supplemented (a) the Swiss Criminal Code with Article 261bis, under which public incitement to racial hatred or discrimination, spreading racist ideology, denying crimes against humanity and refusing to supply a public service became offences and (b) the Code of Military Justice with Article 171c, the contents of which are virtually identical to those of Article 261bis.

The people unreservedly approved Articles 261bis and 171c on 25 September 1994 in a referendum which had been requested because some quarters were of the opinion that freedom of expression and opinion were at stake. Switzerland now has anti-racist criminal legislation which came into force on 1 January 1995.

#### Reform of the Federal Constitution

On 18 April 1999 the people and the cantons approved a new Federal Constitution<sup>3</sup>. Among other changes, the reform made it possible to include in the Constitution explicit provisions banning racial discrimination and establishing the principle of equality before the law.

#### Administrative reforms

Over the same period significant reforms were undertaken in other fields of federal law. Some are moreover still pending. For instance, in the branch of law governing the status of foreigners, a number of pieces of legislation recently came into force or are still at the drafting stage:

- The Asylum Act (LAsi)<sup>4</sup> has been completely revised, and the new version came into force on 1 October 1999. In particular, it lays down new rules on the granting of provisional protection, thereby improving the status of persons fleeing war zones and provisionally seeking refuge in Switzerland.
- The draft of the Federal Act on Aliens (LFE) provides for a change in the status of foreigners living in Switzerland. In particular, it aims to introduce clear regulations establishing the conditions to be satisfied in order to obtain a residence permit. These regulations take into account long-term economic needs and humanitarian requirements. Another aim of the proposed new legislation is greater integration of foreigners lawfully living in Switzerland on a permanent basis.

<sup>1</sup> See Federal Order of 9 March 1993, RO 1995 1163.

<sup>2</sup> See ATF 123 I 23, preambular paragraph 4.

<sup>3</sup> The new Federal Constitution was approved on 18 April 1999 by 969,310 votes (59.2%) for and 669,158 votes (40.8%) against. Turnout was 36%. 12 cantons and 2 half-cantons were in favour, and 8 cantons and 4 half-cantons against (FF, 1999, 5306). It came into force on 1 January 2000 (RO, 1999, 2555 et seq.; RS 101).

<sup>4</sup> RS 142.31

- The Federal Act on Residence and Settlement of Foreigners (LSEE)<sup>5</sup> has been supplemented with a new section 25a, which came into force on 1 October 1999<sup>6</sup>. It regulates funding of integration projects by the Confederation.

On 31 March 1999 the Federal Council approved a Message concerning the Convention on the Prevention and Punishment of the Crime of Genocide and the corresponding revision of criminal law<sup>7</sup>. This text was passed by the chambers of parliament in March 2000 and ratified in October 2000. It came into force on 15 December 2000.

Lastly, it can be noted that the Framework Convention for the Protection of National Minorities, signed on 1 February 1995, was ratified on 21 October 1998.

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<sup>5</sup> RS 142.20

<sup>6</sup> RO, 1999, 1111, 2253; FF, 1996, II, 1

<sup>7</sup> FF, 1999,4911

**Constitutional Law  
Switzerland**

*Preliminary Note: this table is accompanied by an explanatory note*

Constitutional provision	Scope	Relevant jurisprudence	Remarks
<p>Article 7: Human dignity Article 8: Equality</p>	<p>«Human dignity shall be respected and safeguarded.»</p> <p>«1 All human beings are equal before the law.</p> <p>2 No one shall be discriminated against, in particular on grounds of origin, race, gender, age, language, social status, way of life, religious, philosophical or political beliefs, or on account of a physical, mental or psychological impairment.</p> <p>3 Men and women shall be equal in rights. The law shall provide for equality in law and in fact, in particular in the family, training and work spheres. Men and women shall be entitled to equal pay for work of equal value.</p> <p>4 The law shall provide for measures to eliminate inequalities suffered by persons with disabilities.»</p>		<p>A number of cantonal constitutions have recently been revised to include provisions clearly prohibiting discrimination. This applies for instance to the cantons of Vaud (2002), Neuchatel (2000) and Ticino.</p>

## EXPLANATORY NOTE

### SWITZERLAND / CONSTITUTIONAL LAW

#### 1. The Federal Constitution

The overall reform process resulting in the new Constitution was based on a stage-by-stage drafting approach, involving three main steps<sup>8</sup>. First, the old Federal Constitution was updated, and the resulting text was approved by the people and the cantons on 18 April 1999. Second, proposals were put forward for reforming rights of citizenship, i.e. the instruments of direct democracy. Lastly, proposals for reforming the judicial system were made.

In the field with which we are concerned here, the new Federal Constitution now includes a full list of fundamental rights and express provisions banning discrimination and laying down the principle of equality of opportunity.

Fundamental rights, which were formerly governed by provisions scattered throughout the text of the old Federal Constitution of 1874, guaranteed by various international conventions or enshrined in unwritten constitutional law, deriving from the case-law of the Federal Tribunal and the practice of the bodies responsible for applying the conventions, are now grouped together in a single chapter (Articles 7 to 36).

As a result, the Federal Constitution now expressly deals with such basic fundamental rights as the right to life and personal freedom, the right to human dignity, the ban on discrimination and freedom of opinion.

Articles 7 and 8 lay the essential legal foundations of the fight against racism.

Article 7 of the Federal Constitution guarantees general protection of human dignity, providing:

"Human dignity shall be respected and safeguarded."

Article 8, paragraph 2 of which sets out the general ban on discrimination, is worded as follows:

"Equality

1 All human beings are equal before the law.

2 No one shall be discriminated against, in particular on grounds of origin, race, gender, age, language, social status, way of life, religious, philosophical or political beliefs, or on account of a physical, mental or psychological impairment.

3 Men and women shall be equal in rights. The law shall provide for equality in law and in fact, in particular in the family, training and work spheres. Men and women shall be entitled to equal pay for work of equal value.

4 The law shall provide for measures to eliminate inequalities suffered by persons with disabilities."

In October 1995 the Federal Tribunal recognised an unwritten constitutional right to minimum means of subsistence, which might be duly exercised (ATF 121 I 367). The Federal Tribunal held that satisfaction of basic human needs was essential in a society founded on the rule of law and democracy. It endorsed the legal theory that recognition of this right ensued from the following constitutional principles: the principle of human dignity, guaranteeing

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<sup>8</sup> See the Federal Council's voluminous (over 600-page) Message of 20 November 1997 relating to a new Federal Constitution (FF, 1997, I, 1)

everyone the support they are entitled to expect from the community in order to lead a humane existence; the right to life, the primary component of personal freedom, which would no longer be guaranteed if a person's survival was not ensured; personal freedom, which guarantees all the elementary forms of personal well-being; and equality, which also serves to guarantee a minimum of material justice. The Federal Tribunal held that, just like Swiss citizens, foreigners could assert this right to minimum means of subsistence, irrespective of their residential status<sup>9</sup>. This judgment prompted the Steering Committee for Human Rights of the Council of Europe to launch a debate on the right to satisfaction of elementary human needs and legal means of asserting that right<sup>10</sup>.

Article 12 of the Federal Constitution incorporates this precedent established by the Federal Tribunal, mentioning the right to assistance in situations of distress:

"All persons in distress and unable to take care of themselves shall be entitled to help and assistance and to essential means of leading a life consistent with human dignity."

## 2. The cantonal constitutions

A number of recent revisions of cantonal constitutions have resulted in the inclusion of provisions clearly prohibiting discrimination (for example, Article 10 § 1 of the Constitution of the Canton of Berne of 6 June 1993<sup>11</sup> and Article 5 § 2 of the Constitution of the Canton of Appenzell Inner Rhodes of 30 April 1995<sup>12</sup>). The most unambiguous provision in this respect is that contained in the new Constitution of the Canton of Vaud, adopted on 22 September 2002, Article 9 of which provides that human dignity shall be respected and safeguarded, and Article 10 "All human beings are equal before the law. No one shall be discriminated against, in particular on grounds of origin, gender, age, language, social status, civil status, way of life, genetic heritage, physical appearance, disability, beliefs or opinions." Article 11 bans arbitrariness and guarantees good faith.

## 3. Constitutional case-law in religious matters

Attention should moreover be drawn to the case-law of the Federal Tribunal concerning the problems of religious minorities and, in particular, religious aspects of school life. In this field, the Federal Tribunal's leading decisions are generally characterised by their tolerance<sup>13</sup>. For instance, in a judgment of 21 June 1999 the Tribunal, Switzerland's highest court, ruled that access to public education could not be made subject to the condition that pupils should belong to a given religion and that, although the existence of religious schools was lawful, it would be anti-constitutional if those schools were to restrict the possibility of being educated in a minority language to members of a given religion<sup>14</sup>. In addition, when required to decide the case of a teacher in Geneva who wore the Islamic veil<sup>15</sup>, the Federal Tribunal did not treat the case in isolation but held that the same assessment must apply to the wearing of other powerful religious symbols (such as the cross, cassock, kippa or chador).

<sup>9</sup> The Federal Tribunal has specified the scope and the limits of this fundamental right in other decisions (see, for example, ATF 122 II 193 and 122 I 101).

<sup>10</sup> See Recommendation No. R (2000) 3 of the Committee of Ministers to Member States on the Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship, adopted on 19 January 2000.

<sup>11</sup> RS 131.212

<sup>12</sup> RS 131.224.1

<sup>13</sup> See Paul Richli, *Berufsverbot für Primarlehrerin wegen eines islamischen Kopftuchs?*, comments on ATF 123 I 296, in ZBJV, 134 (1998) pp. 228 ff. and p. 230.

<sup>14</sup> ATF 125 I 347 et seq.

<sup>15</sup> ATF 123 I 296

#### **4. The Emmen case<sup>16</sup>**

In March 2000 naturalisation applications lodged by 48 people originating from the Balkans were refused by virtue of a popular vote held in Emmen (Canton of Lucerne). Following those refusals, some, highly contested, legal writers asserted that the applicants were entitled to lodge a public-law appeal with the Federal Tribunal for breach of the ban on arbitrary treatment or of the ban on discrimination. The case is currently pending in the Federal Tribunal.

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[http://www.domainepublic.ch/archives/Title\\_Albert\\_Naturalisation\\_Emmen\\_la\\_ma\\_ai\\_.html](http://www.domainepublic.ch/archives/Title_Albert_Naturalisation_Emmen_la_ma_ai_.html)



**Criminal Law  
Switzerland**

*Preliminary Note: this table is accompanied by an explanatory note*

<b>Offence</b>	<b>Source</b>	<b>Scope</b>	<b>Sanction</b>	<b>Relevant jurisprudence</b>	<b>Remarks</b>
General rule laying down penalty.	Article 63 of the Criminal Code	Increased penalty for offences motivated by racism.			
Non-applicability of statutory limitation to crimes aimed at the extermination of a population group.	Article 75bis of the Criminal Code.	Non-applicability of statutory limitation to crimes aimed at the extermination of a population group on account of its nationality, race, religion, ethnic or social origin, or membership of a political party.  Non-applicability of statutory limitation to serious crimes covered by the Geneva Conventions of 12 August 1949.		Yes	In force since 1 January 1983.

Offence	Source	Scope	Sanction	Relevant jurisprudence	Remarks
Racial discrimination.	Article 261bis of the Criminal Code.	<p>This covers:</p> <ul style="list-style-type: none"> <li>- incitement to racial hatred or discrimination towards a person or group of persons because of their race, ethnic origin or religion;</li> <li>- spreading an ideology aimed at systematically disparaging or denigrating the members of an ethnic group, race or religion;</li> <li>- taking part in acts of propaganda;</li> <li>- public discrimination through word, writing, pictorial representation, gesture or assault upon a person or group of persons because of their ethnic origin, race or religion;</li> <li>- the denial, gross minimisation or justification of genocide or other crimes against humanity;</li> <li>- refusal to provide services aimed at the general public to a person or a group of persons because of their racial, ethnic or religious origin (e.g. refusal to let a hotel room).</li> </ul>	Imprisonment or fine.	Yes Many established precedents	<p>The provision came into force on 1 January 1995.</p> <p>Contractual relations between private persons (e.g. tenancy agreements and employment contracts) are not covered by new Article 261bis. It covers only behaviour in public, apart from the supply of goods and services intended for the use of the public.</p> <p><i>Ex officio</i> prosecution.</p>

Offence	Source	Scope	Sanction	Relevant jurisprudence	Remarks
Preparatory measures of a criminal nature	Article 260bis of the Criminal Code	This article concerns the planned implementation of practical measures of a technical or organisational nature with the aim of perpetrating a genocide.	" <i>Réclusion</i> " (extended imprisonment) for five years at most or imprisonment	No, provision too recent.	Came into force on 15 December 2000
Genocide	Article 264 of the Criminal Code	This article concerns the full or partial elimination of a national, racial, religious or ethnic group.	Life imprisonment (" <i>réclusion</i> ") or " <i>réclusion</i> " for at least ten years	No, provision too recent	Came into force on 15 December 2000

## EXPLANATORY NOTE

### SWITZERLAND / CRIMINAL LAW

#### Some comments on the new provision of the Criminal Code

The purpose of new Article 261bis is to introduce the penalty of a fine or imprisonment for any public act of racial discrimination, especially racial hatred, violation of human dignity, denial of crimes against humanity or a refusal to supply public services on racial, ethnic or religious grounds. Unlike the Code's provisions on defamation, which protect the reputation of the individual, the interest legally protected by Article 261bis is *public peace*, not merely the dignity of a private person, even if they are the victim of the offence. Here we are dealing with an offence involving an abstract threat, that is to say that the behaviour at issue contains a greater risk of jeopardy, irrespective of whether the victim has been injured. Racist offences are prosecuted *ex officio* as they break the peace.

Although freedom of opinion and information is not enshrined in the Federal Constitution, it is regarded as a fundamental, unwritten right. The Swiss legal system nevertheless permits restrictions to be placed on the scope of this fundamental principle in the interests of public order and third parties' rights. The fact that the spreading of racist ideas might threaten public order therefore justifies a criminal law restriction on the freedom of opinion and information<sup>17</sup>.

Lastly, it must be made clear that new Article 261 bis:

- concerns only the public sphere, which means all deeds and gestures intended for a wide public such as comments at a conference, demonstrations, press articles, tracts, announcements, leaflets and books;
- does not concern contractual relations, such as leases or employment contracts, as freedom of contract is unchanged and liberty to establish and carry on any trade or industry is still guaranteed.

#### New comments on the case-law relating to Article 261bis of the Criminal Code

##### 1. Cantonal case-law

Since the anti-racism legislation came into force on 1 January 1995 some 300 judgments have been delivered (including those terminating proceedings<sup>18</sup>). It is difficult to classify the decisions handed down to date, since the circumstances of each case differ. The greatest number of convictions are to be found in proceedings for antisemitism. Convictions were based on readers' letters<sup>19</sup>, comments made in a circular issued by a religious group, a satirical carnival stunt and other antisemitic acts (deeds or words)<sup>20</sup>. However, it is above all documents denying, playing down or attempting to justify the Holocaust<sup>21</sup> or citing notorious antisemitic statements<sup>22</sup>, that have given rise to a large number of judgments.

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<sup>17</sup> See message of the Federal Council, *Feuille Fédérale* 1992, Vol. III, p. 299.

<sup>18</sup> For an overall picture, see the regularly updated chronology by H. Stutz on web-site: <http://www.gra.ch>

<sup>19</sup> Sentence Order of 28 May 1998 by the investigating judge of the district of North Vaud

<sup>20</sup> See, in particular, the judgments of the Basel City Criminal Court of 17 March 1998 and 22 April 1998 (the Nazi salute).

<sup>21</sup> See, in particular, the judgments of the Vaud Cantonal Court of 8 June 1998 and the Vevey District Criminal Court of 8 October 1997 ("The founding myths of Israeli policy") and the Sentence Order of 14 August 1997 by the Public Prosecutor of the Canton of Geneva (also concerning the same book).

<sup>22</sup> See, in particular, the Sentence Order of 18 March 1997 by the investigating judge of Schaffhouse.

In addition, mention must be made here of the variety of charges found to have been proved, ranging from "tags"<sup>23</sup> to threats of physical assault<sup>24</sup>, via rude remarks and insults<sup>25</sup>. Nor do decisions finding Article 261 bis inapplicable constitute a source of telling information, especially since it is not always possible to determine whether criminal proceedings were terminated for lack of clear proof or because the decision-making authority held that the offence was not constituted. It must be noted here that Article 261 bis of the Criminal Code has frequently been deemed inapplicable simply on the ground that the condition for bringing a prosecution was not fulfilled, especially where there were no witnesses to a dispute.

Recently, on 25 November 2002, an investigating judge in Central Valais dismissed a complaint lodged on 15 November 2002. During a debate on asylum the Chairman of the Democratic Union of Central Valais (UDC) had virulently criticised dictators, *inter alia* in African countries, referring to them as "monkeys". A complaint was lodged under Article 261 bis of the Criminal Code. On 25 November 2002 the investigating judge sent the plaintiff and the parties a short assessment:

"The remarks you attribute to Mr O.F., the accuracy of which does not, in the light of the press articles I have read, appear open to challenge, do not come within the ambit of this article."

The judge argued that the Chairman of the UDC used the term "monkeys" to describe "African dictators not Africans". It accordingly followed that "even if it has to be accepted that his remarks related solely to the black populations who are in a majority on the African continent, the fact remains that they concerned only the dictators holding power over those populations and not the populations themselves. And dictators can certainly be of any racial, ethnic or religious origin."

A number of judicial proceedings under the anti-racism legislation have received extensive media coverage and attracted significant public interest.

One of the most spectacular cases concerned the prosecution of a well-known Holocaust denier<sup>26</sup>. In April 1996 the Public Prosecutor pressed charges of racial discrimination before the Baden District Court (Canton of Aargau), and in July 1998 the defendant was sentenced to 15 months' imprisonment (non-suspended) and fined CHF 8,000. In addition, he had to pay CHF 1,000 to a plaintiff who had brought civil proceedings against him for insult, and CHF 10,000 in proceeds from the sale of revisionist books were seized. The Supreme Court of the Canton of Aargau upheld the judgment in June 1999, whereupon the defendant appealed on points of law to the Federal Tribunal. However, on 22 March 2000 the Tribunal dismissed the appeal as ill-founded and confirmed the fifteen-month unsuspended prison sentence<sup>27</sup>.

Under Article 1, paragraph 16 of the Disclosure Order of 28 November 1994<sup>28</sup>, cantonal authorities are obliged to inform the public prosecution service of all judgments, administrative decisions and discharge orders relating to Article 261 bis of the Criminal Code. The public prosecution service provides copies of such judgments to the Federal Commission against Racism, *inter alia*.

<sup>23</sup> See, in particular, the decision of 14 July 1995 by the probation authority of the district of Uster.

<sup>24</sup> See, in particular, the judgment of the Zurich District Court of 16 February 1998.

<sup>25</sup> See, in particular the Sentence Order of 10 March 1998 by the investigating judge of the district of Sankt Gallen (Saint-Gall)

<sup>26</sup> The press regularly reported on the progress of these proceedings (see, for example, the issues of *Neue Zürcher Zeitung* of 6 July 1995, 10 April 1996, 12 March 1998, 17 July 1998, 22 July 1998, 24 July 1999, 30 December 1999 and 27 April 2000).

<sup>27</sup> Judgment 6S.719/1999 of 22 March 2000

<sup>28</sup> RS 312.3

## **2. Case-law of the Federal Tribunal**

On 5 December 1997 the Federal Tribunal delivered its first judgment pursuant to the new legal provision.

In judgment ATF 123 IV 202 the Federal Tribunal, ruling on paragraphs 1 and 4 of Article 261 bis of the Criminal Code, held that this legislation safeguarded the dignity of individuals as members of a racial, ethnic or religious group. This meant that anyone who discriminated against a person on account of that person's assumed race, ethnic origin or religious beliefs, whether or not the assumption was correct, was guilty of the offence (recital 3a). The concept of "inciting hatred" also included kindling or exacerbating such feelings (recital 3b). The court regarded anything aimed at a wide audience as particularly public in nature (recital 3d). From a subjective standpoint, the offence entailed acting with intent for reasons of racial discrimination (recital 4c). The case under consideration concerned the sending of many letters containing antisemitic statements. The Federal Tribunal upheld the unsuspended four-month prison sentence and the CHF 5,000 fine imposed on the appellant.

In judgment ATF 124 IV 21 the Federal Tribunal confirmed that confiscating brochures and compact disks with racist content was justified. In this judgment, delivered on 30 April 1998, it held that, even where no punishable offence had been committed, racist literature could be confiscated and destroyed. It thereby upheld the Neuchâtel Cantonal Court's decision to order the destruction of 20 periodicals and 30 compact disks with racist content, although the addressees had not been found guilty. The Federal Tribunal held that, regardless of its form or the medium used to convey it, the message that members of a given race, ethnic group or religion were of lesser value in terms of human dignity came within the ambit of Article 261 bis, paragraph 1 of the Criminal Code (recital 2b).

### The Federal Tribunal and the question of the chain of liability

In a judgment of 10 August 1999 the Federal Tribunal held that the principle of the chain of liability could not apply in cases of racial discrimination<sup>29</sup>. A person who distributed a book containing racist comments could not rely on the defence of the chain of liability, existing in criminal law concerning the press, and assert that full criminal liability lay with the author alone<sup>30</sup>. This is the conclusion that can be drawn from the reasoning of the Federal Tribunal's judgment in the case of a bookseller, who had distributed and sold the revisionist book "The founding myths of Israeli policy" by the French author Roger Garaudy. The Tribunal held that where legislation expressly prohibited the publication of certain types of content, deeming that sole liability lay with the author of a text would be counter to the aim of the law. An example was the ban on depicting violence and on hard-core pornography (Articles 135 and 197 of the Criminal Code); in such cases it would be shocking to spare the person who distributed such materials and to punish only the producer or importer. According to the above-mentioned judgment the same reasoning applied to criminal offences of racial discrimination. The aim of the anti-racist criminal law, which was in particular to ban publications containing racist comments, would be thwarted if the distributors of such texts could avail themselves of the privilege granted under criminal law on the press and liability could be transferred to the author alone.

## **Holocaust denial**

In a judgment of 3 November 1999 the Federal Tribunal clarified its case-law on denial of the genocide (in the case under consideration the genocide of the Jews) perpetrated by the German Third Reich. The Court of Cassation in Criminal Matters held that a punishable offence was also committed where the statements in question were made before third parties, not merely before the Jews concerned.

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<sup>29</sup> Judgment of the Federal Tribunal's Court of Cassation in Criminal Matters of 10 August 1999 (6S.810-813/1998)

<sup>30</sup> "Where an offence is perpetrated through publication in the press, the author of the text shall alone be held liable [...]" (Article 27, paragraph 1 of the Criminal Code)

The Federal Tribunal's Court of Cassation in Criminal Matters overturned the conviction of a newspaper editor on the ground that two terms in the challenged text were not relevant under criminal law. First, there was the term "Holocaust hysteria" (*Holocaust-Hysterie*), which, in the Federal Tribunal's view, did not concern the Holocaust as such, but the way in which the subject was dealt with at present. For the Federal Tribunal the term, taken in context, did not mean that the crimes against the Jews were in actual fact far less serious than was generally assumed to be the case, whether in their extent or their nature; this "uncalled-for" term rather referred to the way in which the Holocaust was dealt with at present, in particular the extent and the nature of the information provided by the media. Second, there was the comment on "obsession with the gas chambers and obsession with re-education" (*Gaskammer- und Umerziehungsgeist*). The criticism voiced here was aimed at the measures reminding today's young people of the events of the past and the role Switzerland had played in those events. The Federal Tribunal thought the term was "in poor taste", but nonetheless could not be deemed to amount to crude playing down of the Holocaust's importance, within the meaning of Article 261 bis of the Criminal Code. Nor did the texts criticising "*Holocaust-Hysterie*" and "*Gaskammer- und Umerziehungsgeist*" constitute denigration of Jews, an offence punishable by law. Indeed, if the law was interpreted in the light of the principle of freedom of speech and of opinion, as laid down in the Constitution, only truly base remarks, reflecting a real denial of human dignity, could constitute the offence of racism.

On 22 March 2000 the Federal Tribunal upheld a 15-month unsuspended prison sentence imposed on a well-known revisionist by the Baden District Court (Canton of Aargau) and confirmed by the Aargau Supreme Court. The defendant was the author of a number of books and press articles denying the planned mass extermination of millions of Jews and, in particular, the building of gas chambers for that purpose. He appealed against a decision by the Baden District Court of July 1998 finding him guilty on a number of counts of racial discrimination and of insults and sentencing him to 15 months' imprisonment (unsuspended) and a CHF 8,000 fine. Before the Federal Tribunal he argued, inter alia, that he had not questioned the existence of the Holocaust as such in any of his publications, but simply the use of gas and gas chambers and the "number of several million victims" usually cited.

The Federal Tribunal regarded this argument as "pure hypocrisy" and "apparently pseudo-scientific reasoning". Questioning the existence of the gas chambers was already, in itself, crude playing down of the Holocaust. According to widely circulated estimates based on countless pieces of evidence, some six million Jews had been murdered, a significant number of whom had been gassed. By asserting that only a few hundred thousand Jews had been murdered, the defendant denied or crudely played down one of the most terrible crimes in human history. The Federal Tribunal regarded as ill-founded the refutation that the defendant was persuaded that his information was correct on the basis of his research and that he accordingly could not be taxed with dishonesty.

As the Federal Tribunal explained in its judgment, in criminal law the notion of "denial" did not entail acting dishonestly. It was sufficient that the defendant had accepted the inaccuracy of his assertions and acted with possible malicious intent. The Federal Tribunal held that the theory of a Jewish conspiracy against the Christian West, spread by the defendant, was an ideology aimed at systematically disparaging and denigrating Jews (Article 261 bis, paragraph 2 of the Criminal Code).

### **Refusal to provide services**

The majority of convictions under criminal law prohibiting racial discrimination are concerned with punishing racist or antisemitic conduct, statements or writings. It was not until 1998 that someone was found guilty of refusing to provide a publicly available service. This situation can be ascribed in particular to the difficulty of proving that a service was refused on racist grounds where the refusal is communicated orally and the person concerned subsequently denies that they acted out of racist motives<sup>31</sup>. Some legal writers have

<sup>31</sup> See the Discharge Order of 10 July 1998 by the Public Prosecutor of the district of Zurich. The alleged breach of Article 261 bis, paragraphs 4 and 5 concerned refusal to sell a cinema ticket to a black man. With regard to paragraph 5, the accused argued that the refusal was not based on the complainant's skin colour

accordingly proposed that the burden of proof be reversed, as is the case under the law on gender equality.

### **Racism and the Internet**

Special mention must be made here of the problem of racism on the Internet. The Swiss Federal Police Office has produced a very comprehensive report on the subject<sup>32</sup>. Ideological and political groups on the Far Left and Far Right have used their Internet sites to encourage violence and have distributed documents of a racist nature. It is difficult to suppress extremist web-sites with violent or racist content, firstly because the law is hazy on such matters and secondly because censorship measures can quite easily be circumvented by publishing documents on other sites (particularly those hosted in the USA and accordingly protected by the first amendment of the US Constitution) or by using servers enabling publishers to remain anonymous.

Mention must be made here of the efforts of a private association "*Aktion Kinder des Holocaust*" (AkdH)<sup>33</sup>, which for the past five years has been keeping watch on the web to detect right-wing extremist sites. The aim is not just to suppress the sites, but also to identify the authors.

### **Military Criminal Code**

From 12 to 30 April 1999 the Lausanne Military Tribunal tried the former mayor of the municipality of Mushubati, Prefecture of Gitarama (Rwanda). At the time Switzerland had not ratified the Convention on Genocide, and the charges against Mr X were based on the Geneva Conventions of 1949. The military prosecutor gave the seven military judges a methodical account of the history of the Rwandan genocide, showing how administrative and political authorities were a party to it and, above all, how they involved a large part of the population in a planned genocide, conceived by a modern elite, ready to do anything to remain in power.

On 30 April 1999 the Lausanne Military Tribunal sentenced Mr X to life imprisonment under Article 116 of the Military Criminal Code. He was found guilty of murder, incitement to murder and serious breaches of the Geneva Conventions.

Mr X appealed, and on 26 May 2000 Military Appeal Court No. 1, having its seat in Geneva, sentenced him to fourteen years' imprisonment (*réclusion*) and 15 years' expulsion from Switzerland and ordered him to pay full costs<sup>34</sup>.

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but was a result of her general ill humour, to the point where she would have refused to sell anyone a ticket. The case accordingly did not constitute a refusal of services on racial grounds. It was decided that there was no case to answer.

<sup>32</sup> [http://internet.bap.admin.ch/f/aktuell/berichte/Cybercrime\\_SAB\\_200110\\_f.pdf](http://internet.bap.admin.ch/f/aktuell/berichte/Cybercrime_SAB_200110_f.pdf)

<sup>33</sup> <http://www.akdh.ch/aktuell.html>

<sup>34</sup> <http://www.vbs.admin.ch/internet/gst/kvr/f/actu-fn-29-5-2000.html>



**Civil and Administrative Law  
Switzerland**

*Preliminary Note: this table is accompanied by an explanatory note*

<b>Provision</b>	<b>Scope</b>	<b>Consequences of breach</b>	<b>Relevant jurisprudence</b>	<b>Remarks</b>
Civil law. Article 28 of the Civil Code: protection of reputation.	The authorities responsible for applying this text must interpret it in the light of the principle that not to suffer discrimination is a fundamental right.	Cessation of the violation. Damages.		Legal theory recognises the indirect horizontal effect of the individual freedoms established in the Federal Constitution. This means that the prohibition of discrimination must be taken into account when applying Article 28 of the Civil Code.
Tenancy law. Article 271 of the Code of Obligations, protection of tenants in the event of unlawful termination of the lease.	The authorities responsible for applying this text must interpret it in the light of the principle that not to suffer discrimination is a fundamental right.			Legal theory recognises the indirect horizontal effect of the individual freedoms established in the Federal Constitution. This means that the prohibition of discrimination must be taken into account when applying this Article.
Aliens Law, LSEE Article 25	This article regulates funding of integration projects by the Confederation	No	No	In force since 1 October 1999

Provision	Scope	Consequences of breach	Relevant jurisprudence	Remarks
Labour law Article 328 of the Code of Obligations, protection of an employee's reputation.	The authorities responsible for applying this text must interpret it in the light of the principle that not to suffer discrimination is a fundamental right.	Damages.		Legal theory recognises the indirect horizontal effect of the individual freedoms established in the Federal Constitution. This means that the prohibition of discrimination must be taken into account when applying this Article.
Labour law Article 336 (1a) of the Code of Obligations, protection against wrongful dismissal.	The authorities responsible for applying this text must interpret it in the light of the principle that not to suffer discrimination is a fundamental right.	Damages.	Case-law, Warro, Federal Court, 11 November 1993: dismissal of 3 Angolans (tacit reason: workers were African) declared unlawful.	Legal theory recognises the indirect horizontal effect of the individual freedoms established in the Federal Constitution. This means that the prohibition of discrimination should be taken into account when this Article is applied.
Section 3 of the Federal Act on public transport of 4 October 1985.	This Act expressly provides that all enterprises subject to the Act are obliged as a matter of principle to carry all persons.	Damages/fine.		

## EXPLANATORY NOTE

### SWITZERLAND / CIVIL AND ADMINISTRATIVE LAW

#### 1. General comments

The principles of individual freedom and freedom of contract are pillars of the Swiss legal system. According to prevalent opinion and theory, the prohibition of discrimination, as it is defined in Article 4 of the Constitution, cannot have a direct effect on relations between individuals, e.g. equal treatment cannot be prescribed when contracts are made. Nevertheless, legal theory does acknowledge the indirect horizontal effect<sup>35</sup> of the individual freedoms established in the Federal Constitution. For example, when the courts have to interpret imprecise legal terms, they can and must therefore apply the principle that not to suffer discrimination is a fundamental right. Legal writers quote, among the statutory provisions of private law which lend themselves to this interpretation of the prohibition of discrimination, Articles 27 and 28 of the Civil Code (subsequently referred to as the CC) relating to protection of reputation, Article 2 of the CC concerning prohibition of the abuse of right, Articles 19 and 20 of the Code of Obligations (CO) concerning the invalidity of a contract pertaining to something which is impossible, illegal or immoral, Article 271 CO on the protection of tenants in the event of the termination of a lease, Article 328 CO (labour law) on the protection of employees' reputation and Article 336 CO on wrongful dismissal. Dismissal may be declared unlawful if the reasons for it are inherently due to the individual characteristics of the other party<sup>36</sup>.

These comments must, however, be qualified by saying that in Swiss private law there is no obligation to contract. Private individuals may therefore sign employment contracts or leases with another party of their choice, despite the ban on racial discrimination. Article 261bis of the Criminal Code, which was recently adopted, does not alter this principle in any way. Nevertheless, it will make it possible to enforce the prohibition of racial discrimination in some public sectors, even with respect to private individuals, when the independence of the private person must bow to the protection of the human dignity of certain groups of persons.

#### 2. Administrative law

In the branch of law governing the status of foreigners a number of pieces of legislation recently came into force or are still at the drafting stage:

The Asylum Act (LAsi)<sup>37</sup> has been completely revised, and the new version came into force on 1 October 1999. In particular, it lays down new rules on the granting of provisional protection, thereby improving the status of persons fleeing war zones and provisionally seeking refuge in Switzerland<sup>38</sup>.

The draft of the Federal Act on Aliens (LEtr.), published by the Federal Council on 8 March 2002<sup>39</sup>, provides for a change in the status of foreigners living in Switzerland. In particular, it aims to introduce clear regulations establishing the conditions to be satisfied in order to obtain a residence permit. These regulations take into account long-term economic needs and humanitarian requirements. Another aim of the proposed new legislation is greater integration of foreigners lawfully living in Switzerland on a permanent basis. The draft law

<sup>35</sup> In German "*Drittwirkung*".

<sup>36</sup> The message of the Federal Council concerning protection against dismissal includes distinctive characteristics such as race, origin, nationality, sex, family status and religious belief among the unlawful reasons it expressly mentions. *Feuille Fédérale*, 1984, Vol. III, p. 662.

<sup>37</sup> RS 142.31

<sup>38</sup> See <http://www.ejpd.admin.ch/doks/mm/2002/020308a-f.html>.

<sup>39</sup> At present (November 2002) the draft legislation is being examined by the Management Committee of the National Council.

moreover sets out the principles and objectives of integration policy. For instance, for those living in Switzerland on a long-term basis access to "economic, social and cultural life" will be facilitated. However, the precondition is that those concerned should be willing to integrate. New instruments are being set up, for instance with the aim of improving co-ordination of the various integration measures at both the federal and the cantonal levels. The cantons are required to designate integration offices for that purpose.

The Federal Act on Residence and Settlement of Foreigners (LSEE)<sup>40</sup> has been supplemented with a new section 25a, which came into force on 1 October 1999<sup>41</sup>. It regulates funding of integration projects by the Confederation<sup>42</sup>.

### 3. Specific measures taken by the authorities

#### By the Confederation

- In 1970, the Federal Council set up the Federal Commission on Questions relating to Aliens (CFE). Its terms of reference were to find ways of securing better co-existence between the Swiss and foreigners. The commission has 26 members, 6 of whom are of foreign origin. It has two main fields of action: on the one hand, it provides assistance in order to make it easier for the Swiss to understand the problems facing foreigners and their differences, on the other, it supports efforts to help foreigners integrate more smoothly into a Swiss environment.
- In August 1995, the Federal Council set up a Federal Commission against Racism, which has only an advisory role. Its responsibilities include analysing the reasons for xenophobia and racist attitudes, cataloguing measures already taken and proposing, coordinating and supporting new measures at all levels.
- 83 (out of 246) members of the federal parliament recently founded a Parliamentary Group against Racism and Xenophobia.

In the field of information, it must be pointed out that, because of freedom of the press and the independence of radio and television as far as programmes are concerned, the Confederation has no means of directly influencing the planning of radio and television programmes, for example by ordering channels to launch a campaign against racism. The terms of its charter nevertheless oblige the *Société Suisse de Radiodiffusion et Télévision* to contribute to international understanding<sup>43</sup>. The broadcasting of racist programmes would therefore infringe the charter.

In March 2001 a Department for Combating Racism (SLR)<sup>44</sup> was set up with the principal task of co-ordinating the many activities pursued at the federal, cantonal and municipal levels to prevent and combat racism, antisemitism and xenophobia. The SLR seeks to cooperate with private institutions and organisations. It has a co-ordinating role and provides information in the following fields:

- Networking of initiatives against racism, antisemitism and far right extremism (co-ordinating role in these fields within the federal administration; point of contact for the cantonal and municipal administrations);

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<sup>40</sup> RS 142.20

<sup>41</sup> RO, 1999, 1111, 2253; FF, 1996, II, 1

<sup>42</sup> See the report by the Federal Office for Justice on this subject, published on web-site: <http://www.ejpd.admin.ch/f/dossiers/int/integrationsbericht.pdf>

<sup>43</sup> Article 3 of the SSR Charter of 18 November 1992.

<sup>44</sup> [http://www.edi.admin.ch/ara/f/frb\\_fachstelle.html](http://www.edi.admin.ch/ara/f/frb_fachstelle.html)

- Participation in and co-ordination of specialist bodies at an international level (Council of Europe, ECRI, UN, CERD, EU);
- Providing a documentation and information service for civil servants and the general public;
- Managing the Fund for Projects Combating Racism and Promoting Human Rights<sup>45</sup>;
- Co-operation and exchanges with non-governmental organisations and research institutes working in this field.

The department's aim is, inter alia, to help establish a network of aid agencies and counselling centres for victims of racial discrimination. With that aim in mind, it brought out a brochure<sup>46</sup> in March 2002, containing the addresses of 130 centres offering assistance along those lines.

With the creation of the SLR the Federal Commission against Racism can now make a priority of its work on substantive issues and awareness-raising. The SLR will henceforth assume responsibility for all of the federal administration's internal tasks in the fields concerned.

### ***Publication of the Bergier Report***

In December 1996 the Federal Assembly (parliament) unanimously decided to appoint an expert committee to review, from the historical and legal standpoints, the quantity and fate of assets deposited in Switzerland before, during and immediately after the Second World War. Following five years' research, the Swiss Committee of Independent Experts - Second World War (CIE) presented its final report (known as the Bergier Report) on 19 December 2001<sup>47</sup>.

In accordance with its terms of reference the Committee focussed on gold and currency transactions with the Swiss National Bank and private commercial banks. It also reviewed all assets, including insurance policies and cultural property, deposited in Switzerland by either victims of the Nazi regime or its representatives and those collaborating with it. Relations between Swiss commercial and industrial firms and German economic circles were analysed from the twofold angle of participation in the "Aryanisation" measures and exploitation of forced labour. Another area of study was refugee policy in the context of Switzerland's relations with both the Axis powers and the Allies. The post-war years also come within the scope of the review, which investigated measures taken by the state to return pillaged property (the Washington Agreement of 1946, the Federal Order of 1962 on Swiss-held assets of foreigners or stateless persons persecuted on racial, religious or political grounds).

On the occasion of the report's publication, the Federal Council decided to make an unambiguous gesture by establishing the Fund for Projects Combating Racism and Promoting Human Rights. Over the 2001-2005 period CHF 15 million (or approximately CHF 3 million per year) will be allocated to training, awareness-raising and prevention projects and to counselling centres for victims of discrimination and war. One-sixth of this sum is earmarked for school projects<sup>48</sup>.

Every year a specific theme will be chosen for more detailed consideration, with particular emphasis on certain fields or subjects. Other projects of a high standard may also be considered, in particular projects proposed by aid agencies or counselling centres for victims of racial discrimination or projects to establish such centres.

<sup>45</sup> [http://www.edi.admin.ch/ara/f/fonds\\_index.html](http://www.edi.admin.ch/ara/f/fonds_index.html)

<sup>46</sup> [http://www.edi.admin.ch/ara/f/frb\\_adressbuch.html](http://www.edi.admin.ch/ara/f/frb_adressbuch.html)

<sup>47</sup> <http://www.uek.ch/fr/index.html>

<sup>48</sup> <http://www.globaleducation.ch/francais/pagesnav/frames.html>

### **By the cantons**

Education and training are the responsibility of the cantons. During the consultation procedure concerning Switzerland's accession to the UN Convention of 1965, some cantons gave their opinion about the steps they were prepared to take in the educational field to intensify the battle against racist behaviour, e.g. legal provisions enabling all children to attend school, irrespective of the legal status of their parents, improving the education given to children who speak a foreign language, greater emphasis on intercultural education in teacher training, etc.

On 6 June 1991, the Conference of Cantonal Directors of State Education recorded that schools at all levels had a duty to train pupils in respect for their fellow human beings, tolerance among religious, ethnic and social groups and peace among peoples.