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“JUSTICE AND THE MEDIA”

National report

**prepared by
the Swiss delegation**

1. Preliminary comments

Switzerland is a federal state. The cantons still have their own powers with regard to the organisation of the courts. Each has its own procedural rules and practice in relations with the media, and so the answers below apply mainly to the Swiss Federal Court and to most of the cantons.

2. Application of Recommendation Rec (2003) 13 on the provision of information through the media in relation to criminal proceedings

Recommendation Rec (2003) 13 and the Council of Europe instruments referred to therein are not relevant to hearings in the Criminal Court of Cassation of the Federal Court because this court sits in camera (Article 17 of the Federal Judiciary Act). Only 3% of cases examined by the Court of Cassation are actually heard in court, the remainder being decided by circulating the file among the judges. Decisions are placed at the disposal of the accredited press and the public.

3. Recommendation Rec (2002) 2 on access to official documents

Recommendation Rec (2002) 2 was taken into account during preparation of the draft federal law on the principle of accountability in administration (the Accountability Act, LTRANS). The bill was passed by the Federal Parliament on 17 December 2004 and is currently subject to the referendum procedure until 7 April 2005. In a communication to the Federal Parliament, the Federal Council notes that the law fulfils practically all of the Committee of Ministers' main recommendations (2003 Federal Gazette, p. 1881: <http://www.admin.ch/ch/f/ff/2003/1807.pdf>).

4. National legislation on access to information, access for journalists to hearings and case files, and the legal basis for journalists' responsibilities

(a) National legislation on access to information

The Federal Constitution of the Swiss Confederation contains a provision guaranteeing freedom of opinion and information (Article 16). The third paragraph of this Article provides that everyone is entitled to receive information freely, gather it from generally accessible sources, and disseminate it.

Once it comes into force, the Federal Law on the principle of accountability in administration (LTRANS) of 17 December 2004, will also help to facilitate public access to information.

(b) Access for journalists to hearings and case files

In accordance with the relevant rules, the Swiss Federal Court runs a system of accreditation for journalists. On the Internet site of the Federal Court, there is a press page, on which any journalist who wishes to write legal reports on Federal Court cases will find an accreditation form. He or she can fill it in on line and send it back to the Court, which will then contact the journalist to ask for the necessary supporting documents, i.e. his or her curriculum vitae and certificate of registration on the professional register. Until the mid-1990s, journalists also had to have legal training

to be awarded accreditation and, in practice, most accredited journalists are lawyers or experienced legal columnists. At the end of the accreditation process, the Federal Court grants or refuses accreditation.

Journalists who spend most of their time reporting on Federal Court cases are granted *special accreditation*, which gives them greater access to information. The Federal Court sends them all decisions relating to so-called high-profile cases (decisions attracting particular media interest, which are given preferential treatment at the request of journalists) and judgments to be published in the official digest of Federal Court judgments (ATF). Any other decisions and judgments have to be consulted at the Federal Court press centre.

Journalists without special accreditation must come to the law courts to consult all judgments and decisions are placed at their disposal at the press centre.

Journalists do not have access to the court's case file. It is for the court to provide journalists with all the documents they need to produce an accurate report. For this purpose, a summary of the facts is provided for the press before each hearing. The Federal Court's judgments are the main source of information for journalists. Many judgments are provided to the press in non-anonymous form, meaning that it is then the journalists' responsibility to decide, on the basis of their own code of conduct, whether or not to publish the names of the parties.

The accreditation rules help to ensure that the accredited press has access to information and gives it the right to attend the Court's deliberations using the seating reserved for the purpose.

c. The legal basis for journalists' liability

Journalists may incur civil liability because they have infringed personality rights; victims of such infringements are protected by Articles 28 et seq. of the Swiss Civil Code (CC), which include a right of reply (Article 28g, CC).

In criminal law, the press's liability is ordered on the cascade principle by Article 27 of the Swiss Criminal Code. Victims of defamation and infringements of secrecy or privacy are protected by the criminal provisions in Articles 173 et seq. of the Criminal Code.

5. Relevant national case-law on freedom of expression, protection of privacy and human dignity

a. Freedom of expression

Here are some summaries of recent judgments of the Swiss Federal Court concerning freedom of expression:

- A journalist was refused access to Davos during the World Economic Forum in 2001. The Federal Court found that the police decision to prohibit the journalist from going to Davos to attend the Forum was an infringement of his personal freedom and the freedom of opinion, information and the press. However, it did not find that there

had been a violation of the Constitution in this case because there were sound reasons warranting the infringement of these freedoms (ATF [Official Digest], 130 I 369 , point 2).

- In another judgment, the Federal Court found that a rule prohibiting the posting of advertising for tobacco and for beverages with an alcohol content of over 15% in public did not infringe the freedom of the press, opinion or information (ATF 128 I 295, point 5a).

- Often, guarantees of freedom are examined in relation to criminal provisions, particularly those punishing racial discrimination. The Federal Court has found that the principle of freedom of expression dictates that it should not be too readily accepted that there has been racial discrimination in a political debate (ATF 130 IV, not yet published, point 3). In another judgment, the Federal Court found that a ban on the distribution of magazines and video-cassettes containing hardcore pornography did not violate the right to freedom of expression (ATF 128 IV 201, point 1).

b. Protection of privacy and human dignity

Here is a sample of recent Federal Court case-law in this area:

- The Federal Court found that a reference in the press to a prison sentence served years previously infringed, among other things, the privacy of the person concerned. An infringement of this type is serious and cannot be regarded as a fair means to a legitimate end (ATF 122 III 449). The same applied to a radio documentary concerning a criminal that was broadcast long after the events (ATF 109 II 353, point 3).

- The publication in a court gazette of extracts of final decisions or judgments granting a divorce is, without exception, incompatible with the federal law prohibiting private individuals from consulting the register of births, deaths and marriages (ATF 114 II 307).

- Human dignity is protected under Article 7 of the Federal Constitution. Recent decisions given in relation to this Article have related in particular to forced medical treatment, which is an infringement of human dignity and requires full assessment of all the interests at stake (ATF 130 I 16, points 3-5, and ATF 127 I).

The case-law cited above may be consulted in the case-law section of the data base of leading decisions since 1954 (Jurisprudence – Principaux arrêts dès 1954) on the Swiss Federal Court's Internet site (www.tribunal-federal.ch).

6. Good national practice intended to improve relations between the courts and the media

Journalists are expected to give a precise account of the reasons underlying the Court's decisions and, in most cases, they do so conscientiously and accurately. However, in its attempt to appeal to the general public, the press can over-simplify matters and so, in particularly complex or sensitive cases, the Federal Court has

started to issue press releases highlighting the main reasons for decisions at the same time as it publishes its judgments.

Good relations between the courts and the media are based on mutual confidence between the two partners, who have a joint interest in disseminating case-law. This is why it is essential for the Courts to comply with certain elementary principles in its relations with the media, particularly the rule that journalists must be treated equally and provided with their raw material, ie the judgments, in good time for them to deal with them properly.

The service provided for accredited journalists by the Federal Court will shortly be improved further – they will no longer have to go to the law courts in person to consult judgments, because a data base is being set up exclusively for accredited journalists which will enable them to consult Federal Court case-law from their own editorial offices.

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