CC

Art. 1 CC: Application of the Law, Interpretation and Judicial Gap-Filling

Function and structure of the provision

Art. 1 CC sets out three steps for applying the law. Under para. 1, the court is bound by the statute "according to its wording or interpretation" wherever the statute contains a provision. Para. 2 applies only "in the absence of a provision". The court then decides according to customary law and, failing that, according to the rule it would make as legislator. Under para. 3, the court follows established doctrine and case law in doing so **Art. 1 CC**.

The article has not changed in substance since 1912. The only recorded change is terminological: the term "court" was introduced by the Federal Act of 26 June 1998, in force since 1 January 2000, and applies throughout the Code **Art. 1 CC**.

Two features of the case law determine how far the provision reaches.

- Scope beyond private law. The courts use Art. 1 CC as the general method of Swiss law. The Federal Supreme Court cites Art. 1 para. 2 CC when it fills gaps in social insurance law **9C_628/2011**. A cantonal court has held that gap-filling in criminal procedure follows "grundsätzlich nach der gleichen Methode" ("in principle the same method") as in other fields **Nr. 51/2001/40**. Limits specific to individual fields are discussed below.
- The boundary is itself a matter of interpretation. Whether there is a gap or a qualified silence "ist durch Auslegung zu ermitteln" ("is to be determined by interpretation") **1C_648/2023**. Paras. 1 and 2 therefore form a continuum, not two separate tests.

Interpretation under para. 1

Wording as the starting point and departure from clear wording

The Federal Supreme Court's standard formula reads: "Gesetzesbestimmungen sind in erster Linie nach ihrem Wortlaut auszulegen." ("Statutory provisions are to be interpreted primarily according to their wording.") It adds: "An einen klaren Gesetzeswortlaut ist die rechtsanwendende Behörde gebunden." ("The authority applying the law is bound by clear statutory wording.") **5A_806/2019**

Even clear wording binds only in principle. A court may depart from it exceptionally where "triftige Gründe" ("compelling reasons") show that the wording does not express the true meaning. Such reasons may come from the legislative history, the purpose of the provision, or its relationship with other provisions **B_112/06**. French-language decisions speak of "raisons objectives" **1C_383/2008** or of "raisons sérieuses de penser que le texte de la loi ne reflète pas la volonté réelle du législateur" ("serious reasons to think that the text of the law does not reflect the legislator's real will") **4A_444/2023**.

Decisions on both sides of the line show what counts as a compelling reason.

- Departure accepted for an oversight. The legislative history can supply compelling reasons where it shows that the legislator overlooked a question. In BGE 138 III 558 the Court found no sign of qualified silence. It held that leaving Art. 7 ZPO out of Art. 198 lit. f ZPO was "ein offensichtliches Versehen des Gesetzgebers" ("an obvious oversight of the legislator"), so no conciliation is required for disputes under Art. 7 ZPO either **BGE 138 III 558**.
- Departure refused where the materials confirm the text. In 8C_415/2012 the Court refused to extend an exemption from the contribution period to detention abroad. The dispatch did not show that the legislator wanted exceptions, so there were "keine triftigen Gründe, vom unmissverständlichen Wortlaut abzuweichen" ("no compelling reasons to depart from the unmistakable wording") **8C_415/2012**.
- Same test for quasi-legislative acts. In 4A_444/2023 the Court applied the test to a cantonal extension order for a collective labour agreement and let the literal text control **4A_444/2023**. A Ticino court applied the federal formula to a cantonal decree **34.2001.67**.

An unsatisfactory result does not by itself justify a departure. If the literal result is merely "sachlich unbefriedigend" ("unsatisfactory in substance"), there is at most an improper gap, and the court may correct it only under strict conditions (see the section on improper gaps below) **8C_415/2012**.

Methodological pluralism without hierarchy

If the wording is not clear, the court looks for the true scope of the norm. It considers the preparatory works (historical element), the purpose, spirit and protected interest (teleological element), and the relationship with other provisions (systematic element) **2C_818/2009**. The Court "einen pragmatischen Methodenpluralismus befolgt und es ablehnt, die einzelnen Auslegungselemente einer Prioritätsordnung zu unterstellen" ("follows a pragmatic pluralism of methods and refuses to rank the individual elements of interpretation in an order of priority") **5A_806/2019**. The published case law says the same **BGE 134 V 170** . The Court relies on the literal meaning alone only "s'il en découle sans ambiguïté une solution matériellement juste" ("if it unambiguously yields a substantively correct solution") **1C_383/2008**.

Pluralism does not mean the elements always carry equal weight. In a tenancy case the Court reasoned "auf der Basis einer teleologischen Verständnismethode" ("on the basis of a teleological method of understanding"). It relied on purpose to reject a narrow reading of the protection against termination in Art. 271a para. 1 lit. d CO **4C.248/2004**.

Weight of legislative materials and age of the statute

The courts take a middle course between subjective-historical and objective interpretation.

- Materials do not bind. Preparatory works are "weder verbindlich noch für die Auslegung unmittelbar entscheidend" ("neither binding nor directly decisive for interpretation"), because once in force a statute exists independently of the legislator's will **BGE 134 V 170**.
- Their weight declines with age. Materials count only where they give a clear answer to an unclear provision. They count for less the further back the statute's enactment lies. For a building law enacted 15 to 20 years earlier, after significant developments in planning law, they had only "eine geringe Bedeutung" ("little

significance") **BGE 108 Ia 33**.
- Recent statutes. The historical legislator's will may not be passed over. If the debates expressly rejected a proposal to supplement the statute along the lines of a reading now being advanced, that reading is excluded **BGE 134 V 170**.

Drafting history can decide a case. BGE 134 V 170 allowed self-employed persons to withdraw pension assets for business investments, although this "ergibt sich zwar aus keiner sprachlichen Version des Wortlautes" ("does not follow from any language version of the wording"). The Court relied in particular on the deliberate deletion of the word "ausschliesslich" ("exclusively") from the draft **BGE 134 V 170**. The same decision also says that a will not reflected in the text is not decisive **BGE 134 V 170**. The two statements can be reconciled because the deletion was itself a choice about the text. A clear drafting history can therefore carry weight even where the final wording is silent.

Interpretation may also take account of changed facts. Even in criminal law, courts must take into account "veränderten lebensweltlichen (u.a. technischen) Rahmenbedingungen" ("changed real-world, including technical, circumstances"), provided the result remains within the meaning of the statute **6B_122/2024**.

Equal authenticity of the three language versions

For enactments, the German, French and Italian versions are equally binding under Art. 14 para. 1 of the Publications Act in its adopted text **BBl 2004 3121**. If they diverge, the court uses the usual methods to decide which version best expresses the meaning of the rule **I 82/02**. Any version can prevail:

- In I 82/02 the French and Italian texts of an invalidity insurance ordinance prevailed over the German, because they fitted the purpose of the coordination rule **I 82/02**.
- In 2C_353/2025 the German text of the Tobacco Products Act prevailed because it followed the EU directive. The other versions reflected "une simple inadvertance" ("a mere inadvertence"). Once the divergence had been resolved by interpretation, there was "par définition, aucune lacune" ("by definition, no gap") **2C_353/2025**.
- If all three versions agree, the literal reading is strengthened, as for Art. 156 para. 2 SchKG, which mentions only pledged titles in all three languages **5A_806/2019**.

Constitution-conforming interpretation and Art. 190 Cst.

Under Art. 190 Cst., federal statutes are binding on the Federal Supreme Court and the other authorities applying the law **BBl 2017 5355**. The provision imposes a duty to apply them. It is "kein Prüfungsverbot" ("not a prohibition on review") **BBl 2017 5355**.

- Rule. "Sind mehrere Auslegungen möglich, ist jene zu wählen, die den verfassungsrechtlichen Vorgaben am besten entspricht." ("Where several interpretations are possible, the one that best meets constitutional requirements must be chosen.") **1C_555/2011**
- Limit. This method "findet dabei im klaren Wortlaut und Sinn einer Gesetzesbestimmung ihre Schranken" ("finds its limits in the clear wording and meaning of a statutory provision") **1C_555/2011**. Once text and meaning are absolutely clear, the Court must apply the federal statute even if it is unconstitutional. It may only point out the conflict **2C_327/2017**.

Four decisions show how this works in practice.

- Successful. In 1C_555/2011 the wording of Art. 58a of the former Citizenship Act was open. The Court read it so that descent through mothers and fathers was treated equally. In the alternative, it would have found a "planwidrigen Unvollständigkeit" ("unintended incompleteness") **1C_555/2011**.
- Combined with purpose. In 5A_630/2016 the Court extended the absolute exemption from seizure in Art. 92 para. 1 no. 9a SchKG to a Liechtenstein old-age pension "über deren strikten Wortlaut hinaus" ("beyond its strict wording"). It relied on the purpose of the exemption and on equal treatment under Art. 8 para. 1 Cst. **5A_630/2016**
- Refused. In 9C_882/2012 the Court rejected a cantonal court's extension of income limits in the law on supplementary benefits. The judge may not "se substituer au législateur par le biais d'une interprétation extensive" ("substitute itself for the legislator by way of extensive interpretation"), and doing so would infringe Art. 190 Cst. **9C_882/2012**
- Clear unconstitutional text. In 2C_327/2017 Art. 7 para. 2 of the Geoinformation Act had to be applied despite conflicting with the guarantee of access to a court in Art. 29a Cst. **2C_327/2017**

Cantonal norms are treated differently. In abstract review, they are annulled only if they cannot be given any interpretation consistent with the Constitution and international law **2P.305/2002**. For cantonal law, conforming interpretation can save a norm from annulment. For federal statutes, Art. 190 Cst. requires application in any event.

EU-conforming interpretation of autonomously adopted law

Where Swiss law was adapted to EU law by autonomous adoption, domestic law adopted in this way is, in case of doubt, to be interpreted in conformity with European law ("Nachvollzogenes Binnenrecht ist im Zweifel europarechtskonform auszulegen."). The EU legal order then serves as an aid to interpretation **BGE 129 III 335**. On this basis, the acquirer's joint liability under Art. 333 para. 3 CO does not apply where a business is taken over out of bankruptcy **BGE 129 III 335**. In the law on mass dismissals, the Court relied on the legislator's aim of implementing the directive when it decided the consequences of failing to notify the cantonal employment office **BGE 132 III 406**.

Two limits follow from the case law.

- Subsidiarity. EU-conforming interpretation comes into play only where doubt about the meaning of a norm persists after the ordinary methods of interpretation have been applied: "En cas de doute persistant sur l'interprétation à donner à une norme conformément à ce qui précède" ("in case of persisting doubt about the interpretation to be given to a norm in accordance with the foregoing") **2C_353/2025**.
- Later developments in EU law. BGE 129 III 335 required courts to keep in view how the harmonised EU law develops further **BGE 129 III 335**. BGE 149 III 98 expressly left open whether ECJ case law issued after Art. 335d CO entered into force may be taken into account, because the legislator had not clearly expressed a will to keep aligning Swiss law **BGE 149 III 98**. That reservation concerns Art. 335d CO and the legislative intent behind that provision. BGE 149 III 98 does not lay down a general rule against taking later EU developments into account in other autonomously adopted provisions.

Treaties and ordinances

International treaties follow the Vienna Convention on the Law of Treaties, not Art. 1 CC. They are interpreted in good faith, according to the ordinary meaning of their terms in context and in light of their object and purpose. These rules bind as customary international law, even for periods before the Convention entered into force for Switzerland. Subsequent practice that reflects the parties' agreement counts as authentic interpretation **2C_743/2011**. Under the Agreement on the Free Movement of Persons, ECJ case law prior to 21 June 1999 is relevant. The Federal Supreme Court departs from later ECJ judgments only for compelling reasons and "nicht leichthin" ("not lightly") **2C_269/2009**.

Ordinances are interpreted by the same methods, but their validity depends on the statute they implement.

- Executive ordinances. These may regulate only intra legem, not praeter legem. Without an express delegation, they cannot create new restrictions or duties. Art. 16 lit. b of the Family Allowances Ordinance was held inapplicable on this ground **8C_667/2025**.

- Broad delegations. Where a statute grants very wide discretion, that discretion binds the Court under Art. 190 Cst. Review is then limited to whether the ordinance clearly exceeds the delegation or is otherwise unlawful or unconstitutional. The scope of the delegation is established by historical interpretation, among other methods **4A_494/2025**.

Classifying gaps under para. 2

Genuine gap, improper gap and qualified silence

Para. 2 presupposes a gap. The case law uses stable definitions.

- Genuine gap. There is a gap for the court to fill where the legislator "etwas zu regeln unterlassen hat, was er hätte regeln sollen" ("failed to regulate something it ought to have regulated") and no rule can be derived from the statute by its wording or by interpretation **5A_806/2019**.
- Qualified silence. The legislator did not overlook the question but decided it tacitly in the negative. In that case "bleibt kein Raum für richterliche Lückenfüllung" ("there is no room for judicial gap-filling") **5A_806/2019**. There is also qualified silence where a solution is deliberately not extended to other situations **5C.76/2003**.
- Improper (legal-policy) gap. The statute gives an answer, but not a satisfactory one **5A_806/2019**.
- Analogy needs a gap. Analogy fills a gap but cannot create one: it presupposes "dass zunächst das Vorliegen einer Lücke im Gesetz festgestellt wird" ("that a gap in the law has first been established") **5A_806/2019**.

The hardest step is telling an oversight from a deliberate choice. The case law offers several indicators:

- Silence is not presumed qualified. Silence "ne peut pas être interprété d'emblée comme un silence qualifié" ("cannot from the outset be read as a qualified silence"). The question is whether the statute needs completing or is exhaustive **6B_218/2013**.
- Preparatory works. If the materials do not show an intentional choice, the omission is "un oubli du législateur" ("an oversight of the legislator") **2A.105/2005**. The same reasoning applies where the rules are not exhaustive **5C.76/2003**.
- Exhaustive regimes. Where a statutory structure is exhaustive, the absence of a rule is "folgerichtig" ("consistent") and there is no gap. On this basis the Court held that cooperatives may not issue participation certificates **4A_363/2013**.
- Rejected options. The legislator had considered electronic communication but did not include videoconference hearings in the ZPO. The Court therefore refused to anticipate legislative development by invoking undefined "Richterrecht" ("judge-made law") **4A_180/2020**. In these decisions, the negative inference does not rest on a free-standing argumentum e contrario but on the finding that the regime is exhaustive.
- Time. Classifying a non-regulation as qualified silence "grundsätzlich stets unter dem Vorbehalt eines geänderten rechtlichen oder tatsächlichen Kontextes steht" ("is in principle always subject to a changed legal or factual context") **4A_363/2013**.

Applications: when a gap was found or denied

- No gap despite no qualified silence. In 5A_806/2019 the cantonal court had applied Art. 156 para. 2 SchKG by analogy to seized mortgage certificates. The Federal Supreme Court found no indication of qualified silence, but also no genuine gap and no "planwidrige Unvollständigkeit" ("unintended incompleteness"). The statute gave an answer, even if an unsatisfactory one **5A_806/2019**. Ruling out qualified silence does not therefore establish a gap.
- No gap in condominium law. The lack of specific rules on modifying exclusive use rights granted by an assembly decision was not a genuine gap. The ordinary majority rules applied **5A_932/2025**.
- Gap in social insurance law. Neither the statute nor the ordinance governed when supplementary benefits begin after a nursing-home resident re-applies. The Court applied Art. 12 para. 2 ELG by analogy **9C_628/2011**.
- Gap filled to the individual's detriment. The former Citizenship Act was silent on whether a husband's forfeiture of citizenship extended to his wife's citizenship acquired by marriage. The Court classified the silence as a genuine gap and filled it by analogy against the wife **1C_648/2023**. Outside criminal law, gap-filling is therefore not limited to results that favour the individual.
- Cantonal refusal. A Ticino court held that a dismissed magistrate had no claim to the liquidation indemnity available to magistrates who resign. The legislator had "scientemente tralasciato" ("knowingly omitted") it, and the omission had survived repeated amendments **34.2001.67**.

Hidden gaps and teleological reduction

A genuine gap may be hidden. This is the case where the legislator "a omis d'adjoindre, à une règle conçue de façon générale, la restriction ou la précision que le sens et le but de la règle considérée ou d'une autre règle légale imposent dans certains cas" ("omitted to add to a generally framed rule the restriction or clarification that the meaning and purpose of that rule or of another legal rule require in certain cases") **2C_818/2009**. In 2C_818/2009 a literal application of a Vaud tax refund provision would have emptied a related sanction mechanism of much of its effect. The refund was therefore reduced by 20% for each year of ownership. The Federal Supreme Court reviewed this cantonal-law ruling only for arbitrariness **2C_818/2009**.

The test for teleological reduction is strict. The court asks whether the rule, read with the usual methods, proves "zu undifferenziert" ("too undifferentiated") and whether its purpose demands an exception. If so, the rule may be declared inapplicable to a case that still falls within its possible literal meaning. The court remains bound by the clear purpose of the existing rule ("Das Gericht bleibt dabei aber an die klare Zwecksetzung der bestehenden Regelung gebunden") **4C.334/2002**. In the following private-law decisions the argument failed:

- the exclusive tenancy jurisdiction under Art. 16 of the Lugano Convention also covers disputes only about rent **4C.334/2002**;
- Art. 271a para. 1 lit. d CO could not be narrowed "entgegen dem Gesetzeswortlaut" ("against the statutory wording"), because its protective purpose requires a broad scope **4C.248/2004**.

A party seeking a reduction must therefore show that the purpose of the norm itself requires the exception. Showing that the result is harsh is not enough.

Improper gaps: correction only in exceptional cases

Only a genuine gap calls for judicial intervention. Correcting improper gaps is in principle prohibited, "selon la conception traditionnelle qui découle notamment du principe de la séparation des pouvoirs" ("according to the traditional view, which derives in particular from the principle of the separation of powers") **4A_569/2024**. A 2025 decision states the exception: correction is possible where relying on the established meaning of the norm amounts to an abuse of right or violates the Constitution. An unsatisfactory solution is not enough unless the result is "choquant" ("shocking") or unconstitutional **5A_932/2025**. The courts have tested and rejected the claim that a literal reading leads to a "stossenden Ergebnis" ("shocking result") **4C.248/2004**. A Ticino court placed such corrections within the exceptional conditions of Art. 2 CC, which serve to prevent untenable or abusive results **34.2001.67**. For federal statutes, Art. 190 Cst. adds a further barrier, as described above **9C_882/2012**.

Filling the gap

Customary law first

Customary law is "ungeschriebenes, objektives Recht" ("unwritten, objective law"). It requires a long-standing, uninterrupted practice based on the legal conviction of both the authorities and those affected (opinio iuris et necessitatis). It also requires a gap in written law and "ein unabweisliches Bedürfnis" ("an unavoidable need") to fill it **BGE 119 Ia 59**. Customary law is strictly subsidiary: "Wo gesetztes Recht besteht, bleibt Raum weder für abweichendes noch für bestätigendes Gewohnheitsrecht." ("Where enacted law exists, there is room neither for derogating nor for confirming customary law.") **BGE 119 Ia 59** For that reason, no federal private-law custom could set an 18% interest ceiling, because Art. 73 para. 2 CO deliberately leaves the fight against interest abuse to public law **BGE 119 Ia 59**.

Further decisions confirm how hard it is to establish custom.

- Public law. Custom must be "ancienne, ininterrompue, uniforme" ("old, uninterrupted, uniform") and carry opinio juris. As a rule it cannot derogate from a formal statute. A practice lasting a few years, which was not uniform, was insufficient **6B_218/2013**.
- Cantonal constitutional law. Custom was recognised exceptionally. A rule giving the smallest municipalities at least two seats in the Zug cantonal parliament had been applied without interruption since 1942, reflected the conviction of all concerned, and the cantonal constitution left room for supplementation **1C_127/2010**.
- Local usage. Local usage must be distinguished from custom. Under Art. 740 CC it applies only within the federal reservation and cannot enlarge a servitude entered in the land register **5C.137/2004**.

The rule the court would make as legislator

Where there is no custom, the rule is stated as follows: "Beim Ausfüllen einer echten Lücke hat das Gericht diejenige Regel zu bilden, die es als Gesetzgeber aufstellen würde" ("when filling a genuine gap, the court must form the rule it would lay down as legislator"). The rule "muss sich widerspruchslos in das bestehende Gesetzesrecht und dessen Wertungen einfügen" ("must fit without contradiction into the existing statutory law and its value judgments") **5A_235/2007**. Gap-filling produces a general-abstract rule **4A_363/2013**. Its method differs from an equitable decision under Art. 4 CC (see below).

The cases show both how the rule is built and where it stops.

- Analogy guided by protected interests. The omission to regulate set-off during the public inventory procedure was a genuine gap. It was filled by analogy with the moratorium rules (Art. 297 para. 4 SchKG), because creditors face the same risk of abusive set-off **5C.76/2003**.
- Pending legislation as a guide, but no new sanctions. Art. 727f CO left open what happens when a company does not pay the advance for appointing an auditor. The Court took the draft Art. 731b OR as guidance. However, it refused to create a new ground for bankruptcy, because the legislator had deliberately not extended those grounds **5A_235/2007**. Gap-filling cannot override a negative decision taken elsewhere in the system.
- Public law first in public-law gaps. A gap in public law is filled primarily by analogy with public-law rules for related cases. Private-law rules come in only subsidiarily, and failing both, the judge lays down a rule of their own **2A.709/2005**. On this basis, the missing limitation period for VAT default interest was aligned with the five-year period for the tax claim **2A.709/2005**.
- Collective labour agreements. Gap-filling extends to them. A night-shift leave entitlement that could not be taken in kind before the end of employment was compensated in cash, by analogy with the rules on unused holidays **4A_569/2024**.

Para. 3: established doctrine and case law

Para. 3 makes doctrine and case law guides, not binding sources. The Federal Supreme Court refused to overrule a precedent merely because of continuing academic criticism. Differing scholarly opinions "können deshalb eine Änderung von BGE 131 III 300 für sich allein nicht rechtfertigen" ("cannot therefore by themselves justify a change of BGE 131 III 300") **BGE 136 III 6**. Conversely, a single author's thesis that is not held "weder in der herrschenden wissenschaftlichen Lehre noch in der bundesgerichtlichen Rechtsprechung" ("neither in the prevailing academic doctrine nor in Federal Supreme Court case law") will not support a rule **BGE 119 Ia 59**. An earlier precedent's statement does not acquire the binding force of customary law **BGE 119 Ia 59**.

Changes of case law

Precedents do not bind in the sense of stare decisis, but changing them requires justification. A change is regularly justified only where the new solution reflects a better understanding of the ratio legis, changed external circumstances or a changed legal view. Otherwise the existing practice is maintained. The reasons must be all the weightier the longer the old practice has been applied **BGE 136 III 6**. A change "plus la jurisprudence est constante" ("the more settled the case law") requires correspondingly stronger reasons **4A_215/2008**.

The decisions distinguish carefully between substantive and procedural changes when it comes to timing.

- Immediate application. "Die neue Praxis ist grundsätzlich sofort und in allen hängigen Verfahren anzuwenden." ("The new practice is in principle to be applied immediately and in all pending proceedings.") **1A.254/2005**
- Procedural changes need prior notice. Where a change concerns admissibility, in particular the calculation of time limits for appeals, and would cause a loss of rights the party could have avoided, it may not be applied without prior announcement. On that ground, a clarification of deadline computation could not deprive the appellant of its appeal **1A.254/2005**.
- No loss, no protection. Where the statute itself opens a new time limit, as Art. 32 para. 3 SchKG does after dismissal for lack of jurisdiction, the new precedent applies immediately **4A_161/2009**. Nor is notice owed where the change had already been published long before **4A_215/2008**.
- Substantive changes. There is "keinen allgemeinen Vertrauensschutz gegen Änderungen der materiellen Praxis" ("no general protection of legitimate expectations against changes of substantive practice"). This applies even after years of receiving a benefit under the old administrative practice **8C_118/2020**.

Distinction from discretion under Art. 4 CC

Gap-filling under Art. 1 para. 2 CC produces a general rule. A decision in equity under Art. 4 CC "verlangt, dass alle wesentlichen Besonderheiten des konkreten Falles beachtet werden" ("requires that all essential particularities of the concrete case be taken into account") **BGE 109 II 389**. The standard of review differs accordingly.

- Equity decisions. The Federal Supreme Court reviews them with "grosse Zurückhaltung" ("great restraint"). It intervenes only where the lower court departed without reason from principles established by doctrine and case law, relied on irrelevant facts, ignored decisive facts, or reached a result that is "offensichtlich unbillig" ("manifestly inequitable") **BGE 109 II 389**. The same formula applies to the indemnity for abusive dismissal **4C.370/2006**.
- Gap-filling. By contrast, "Eine Lückenfüllung, bei der eine generell-abstrakte Regel gefunden werden muss, wie sie der Gesetzgeber getroffen hätte, setzt eine umfassende Prüfungsbefugnis voraus" ("gap-filling, in which a general-abstract rule must be found as the legislator would have made it, requires full power of review") **4A_363/2013**.

Field-specific limits and neighbouring regimes

Criminal law and tax law

In substantive criminal law, the legality principle overrides gap-filling against the accused. Interpretation may depart from the letter of the law, even to the accused's detriment. However, the court may not create new offences or new punishable consequences. If there is a genuine gap, the court must fill it "comme il le ferait en droit civil" ("as it would in civil law"), but only in the accused's favour **6B_96/2024**. Extending the catalogue of mandatory expulsion in Art. 66a CP to a further offence was therefore barred. Only the legislator could do this, and it later did **6B_96/2024**. Within the meaning of the statute, interpretation may follow technological change: digitally rejuvenated adult performers were brought under the former Art. 197 CP without violating Art. 1 CP **6B_122/2024**.

In tax law, a genuine gap may be filled in a constitution-conforming way. This is permitted provided that doing so neither extends the class of taxpayers nor creates new taxable objects or taxable events. On that basis, the gross gaming revenue of a casino taxed for part of a year was annualised to set the rate **2A.105/2005**.

Procedural law

Gap-filling by analogy is permitted in criminal procedure, "im Unterschied zum materiellen Strafrecht" ("unlike in substantive criminal law"). A cantonal court assigned the power to order DNA profiling to the investigating judge, by analogy with the cantonal rule on physical examinations, because the existing rules did not adequately protect fundamental rights **Nr. 51/2001/40**. Under the Swiss ZPO, the Court held that its silence on filing an appeal with the wrong authority was not qualified. It applied the general procedural principle reflected in Art. 48 para. 3 BGG, limiting it to filings with the lower court (iudex a quo) **4A_476/2014**. In contrast, the rules of the Swiss CrimPC on succession to the status of private claimant are exhaustive. Heirs therefore cannot invoke a gap or Art. 83 ZPO by analogy **6B_1266/2020**.

Circumvention of the law and abuse of right

Circumvention exists where a person avoids a norm that imposes or prohibits a result by relying on another norm that seemingly permits it. The question is whether the evaded norm, by its purpose, prohibits only a method or the result itself. In the latter case it must be applied despite the construction used to avoid it **4A_609/2012**. The Federal Supreme Court notes that this is largely treated as a matter of interpreting the evaded norm, not of Art. 2 para. 2 CC **4A_609/2012**. The party invoking the evaded norm bears the burden of proof. Successive fixed-term leases are in principle lawful unless they are used solely to defeat mandatory tenant protection, and circumvention was not proven in that case **4A_609/2012**. In public law the abuse must be manifest, and the authority must establish it or at least show serious indications. A company formed by a person subject to a childcare ban in order to continue the same activity was caught by the ban **2C_653/2023**.

Statutes, contracts and regulations

The method of Art. 1 CC applies to legal norms, not to contracts. Normative clauses of collective labour agreements are interpreted "de la même manière qu'une loi" ("in the same way as a statute"), but the distinction from contract interpretation should not be exaggerated, because the parties' will carries more weight than the legislator's **4A_467/2016**. Statutes of public-law pension institutions are interpreted primarily according to their wording, like legislation **B_112/06**. Regulations of private pension funds, by contrast, follow the principles of contract interpretation under Art. 18 CO and the principle of good faith, and unclear wording is construed against its author **9C_37/2012**.

Standard of review before the Federal Supreme Court and pleading points

The Federal Supreme Court applies federal law of its own motion (Art. 106 para. 1 BGG). It reviews the application of cantonal law only for arbitrariness, on a specifically pleaded complaint. This also applies where federal provisions apply only through a reference in cantonal law **4A_133/2014**. The interpretation of a normative text is a question of law, not of fact **4A_569/2024**. Whether a gap exists and how it is filled in federal law are reviewed without restriction (see the distinction from Art. 4 CC above) **4A_363/2013**. In cantonal law, by contrast, the Court only asks whether a hidden-gap restriction is tenable (see the section on hidden gaps) **2C_818/2009**.

For pleading, the sequence matters. A party arguing against clear wording needs compelling reasons, ideally evidence of a legislative oversight, not merely a harsh result (see the section on departure from clear wording) **BGE 138 III 558 8C_415/2012**. A party arguing for a gap must first rule out an answer through interpretation and qualified silence **1C_648/2023**. Only then can it propose an analogy that fits the system **5A_235/2007**. A party relying on superseded procedural case law is protected only against avoidable losses of rights in admissibility questions (see the section on changes of case law) **4A_161/2009**. Before the Federal Supreme Court, it should be made clear early on whether the provision at issue is federal or cantonal law, because this decides between free review and arbitrariness review with its qualified duty to plead **4A_133/2014**.