

Business & Contract Law



Week 2

PART 1: GENERAL ASPECTS

B/Legal Procedures and Trials

4. Legal Issues
5. Criminal Procedure
6. Civil Procedure
7. Administrative Procedure
8. Swiss Judiciary

4 – Legal Issues

Legal issues arise because:

- An individual has committed an offence against society
- Parties cannot find an agreement over an issue
- One party disagrees with an administrative decision.

4 – Legal Issues

They are decided upon or settled in courts according to:

- A specified procedure proper to the area of law, be it, public, private, or administrative.
- A specified justice system that is hierarchical so as to render appeals feasible.

5 - Criminal Procedure

5-1/ Offences & Crimes

5-1-1/ Wrongful acts are those that the State recognizes as deserving of control and punishment in the interests of society as a whole.

The State prosecutes the alleged perpetrators to ensure that safety of the public and to preserve the rule of law, which is the foundation of our democratic society.

5 - Criminal Procedure

5-1-2/ Scope of Application:

- The rule of law prevails
- The retroactive application of law is prohibited
- Laws are geographically delimited

5 - Criminal Procedure

5-1-3/ Elements of the Offence:

- The wrongful act, *actus reus*, is the act or omission (i.e. failure to act) that has been identified by the legislator as sufficiently harmful to warrant state intervention.
- The willful mental element, *mens rea*, that accompanies the act in that mere omission of the prohibited act is insufficient for criminal liability i.e. the act must be done with a blameworthy state of mind that is to be proven beyond any reasonable doubt.

5 - Criminal Procedure

5-2/ Criminal Procedure; since the *onus of proof* resides with the state, the following are considered:

- Crime scene labs to bring forth evidence
- Arrest procedures respecting the constitutional liberties of offenders
- Appearance in court taking into account the presumption of innocence

5 - Criminal Procedure

5-3/ Trial:

- Arraignment (reading of the charge)
- Execution of the sentence / plea bargain / jury trial
- Jury constitution – applicable for jury trials
- Trial proper
- Execution of the sentence if found guilty

6 – Civil Procedure

6-1/ Litigation is a civil lawsuit procedure initiated by the claimant who makes a claim for the liability of the defendant.

The principle guiding such cause of action is that “any person who unlawfully causes loss or damage to another, whether willfully or negligently, is obliged to provide compensation” ([CO art 41](#)).

6 – Civil Procedure

6-2/ Civil Procedure:

1. The plaintiff determines that there is a *cause of action* (i.e. a valid reason for suing) ([CO art 42](#))
2. Since the burden of proof lies with the plaintiff, evidence must be made available
3. Then the plaintiff needs to *file a claim* ([CPC art 62](#))
 - a) with *the appropriate court* and
 - b) within a *certain period*

6 – Civil Procedure

4. The defendant then may seek to negotiate an *out-of-court settlement*. If not, the claim must be replied
5. When all claims and evidence is collected, a *conciliatory hearing* is ordered by the court ([CPC art 197 ff](#))
6. If the parties reach an agreement during the hearing the case is dismissed; if not the plaintiff is given authorization to pursue the proceedings
7. Plaintiff and defense are invited to submit further evidence as well as witnesses ([CPC art 150 ff](#))
8. Then comes the trial proper ([CPC art 219 ff](#))

7 – Administrative Procedure

7-1/ Administrative decisions include all decisions made by the state

7-2/ Procedure:

1. File claim against decision with the competent authority
- 2 . If the disagreement persists, file claim with Cantonal Courts

Important: administration must have taken a decision

8 - Swiss Judiciary

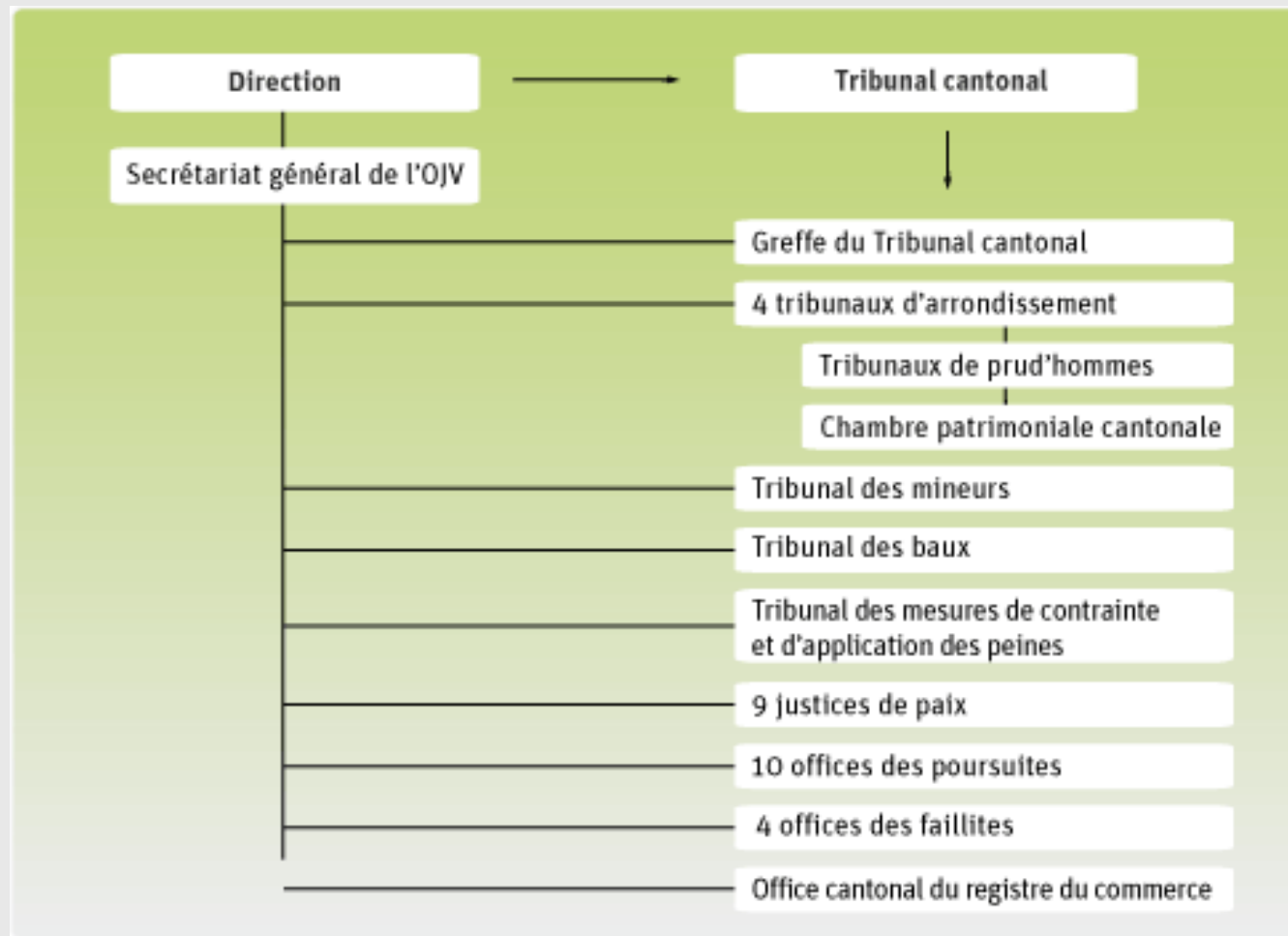
8-1/ Judicial Competency: one needs to be careful with what type of court can deal with what issue! The issue is *judicial competency* i.e. who is competent to judge what issue.

Exemple: Vaud:

- Judiciary code that aims at designating the judicial authorities
- Law of judiciary organization outlining the responsibilities of judges and courts

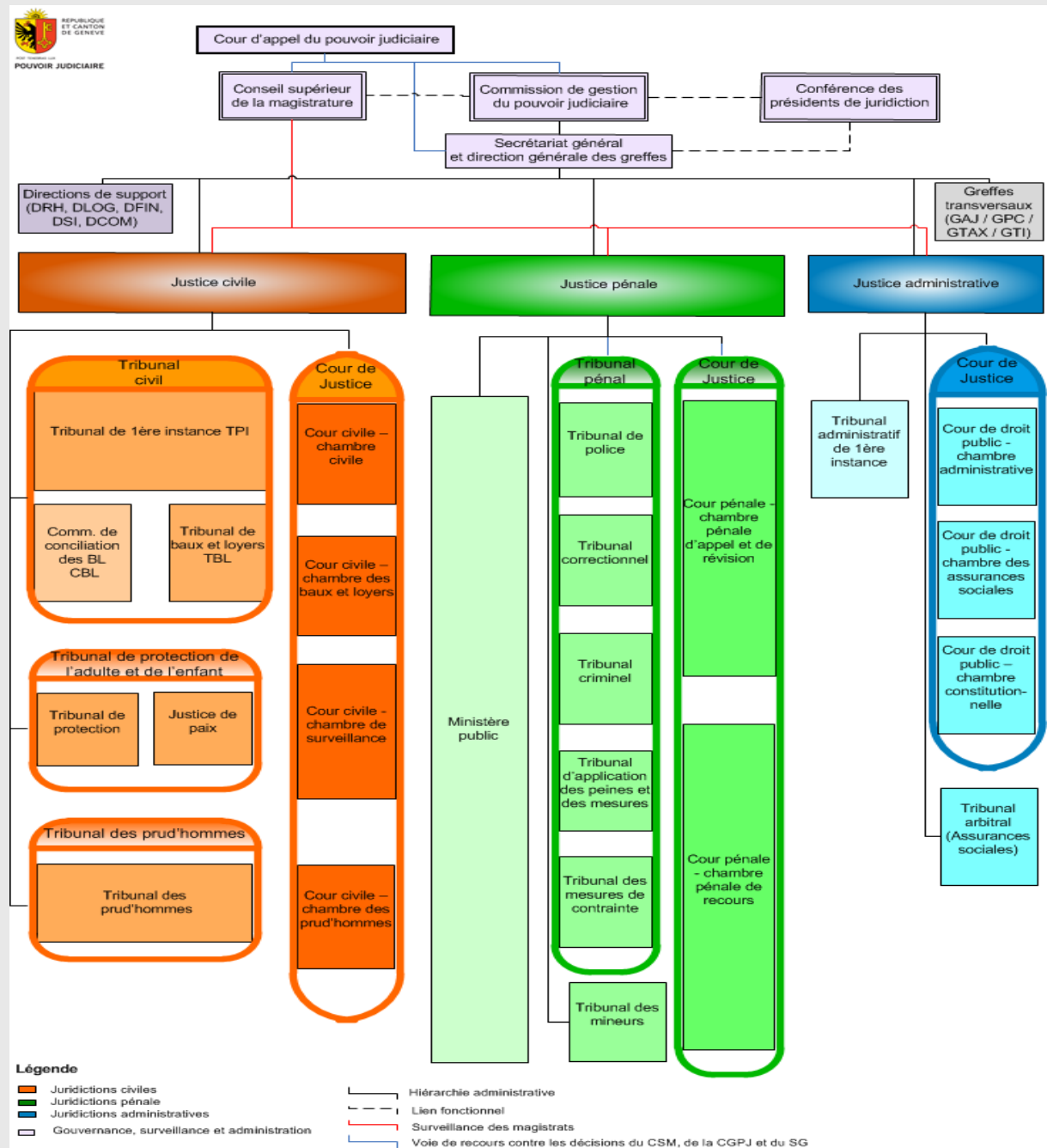
8 - Swiss Judiciary

The two texts define the Vaud judiciary organisation



8 - Swiss Judiciary

In the same way:
Geneva judiciary
organisation



8 - Swiss Judiciary

8-2/ 1st Instance Courts: the main bodies & functions are the same albeit having a different name owing to the Cantonal logic

8-2-1/ Criminal Procedures:

e.g.

- Tribunal of Coersive Measures
- Public Ministry
- Police Court
- Correctional Court
- Criminal Court Prefecture

Etc.

8 - Swiss Judiciary

8-2-2/ Civil Procedure:

e.g.

- Justice of Peace: small issues (up to 8'000.-), inheritance
- First instance tribunal : important issues (< 100'000.-), family, obligations, etc
- Second instance tribunal: important issues (>100'000.-), family, obligations, etc
- Prud'hommes: employment issues
- Lease (baux): tenancy issues
- Commerce courts

8 - Swiss Judiciary

8-3/ 2nd Instance Tribunals: Cantonal tribunals often acting as appeal late tribunals

Example: Vaud

- Organization
- Laws
- Jurisprudence



8 - Swiss Judiciary

Example: Geneva

- Organization
- Laws
- Jurisprudence



8 - Swiss Judiciary

8-4/ 3rd Instance Tribunal: Federal Tribunal, higher instance dealing with

- Public law
- Civil law
- Criminal law
- Social law – insurance
- Administrative law



Source:

<http://www.bger.ch/fr/index.htm>

8 - Swiss Judiciary

8-4/ 4th Instance Tribunal? Only the European Court of Human Rights has supranational authority over human rights issues only:

Source:

<http://www.echr.coe.int/echr/>



Reading:

ECHR and Switzerland: http://www.swissinfo.ch/eng/40-years_echr-under-pressure-on-swiss-anniversary/41132266