

Drafting Laws That Account for Technological Innovation

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How to Build in Flexibility for Innovation Into the Law

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Zurich^{UZH}**

I. The Need for Flexibility



Verzasca Valley, Switzerland

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I. The Need for Flexibility



Maggia Valley, Switzerland

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II. Flexibility and Deference

1. Courts

220

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Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations)

of 30 March 1911 (Status as of 1 January 2025)

II. Flexibility and Deference

1. The Court

VII. Protection
of the em-
ployee's person-
ality rights

1. In general

Art. 328

¹ Within the employment relationship, the employer must acknowledge and safeguard the employee's personality rights, have due regard for his health and ensure that proper moral standards are maintained. In particular, he must ensure that employees are not sexually harassed and that any victim of sexual harassment suffers no further adverse consequences.¹²⁰

² In order to safeguard the personal safety, health and integrity of his employees he must take all measures that are shown by experience to be necessary, that are feasible using the latest technology and that are appropriate to the particular circumstances of the workplace or the household, provided such measures may reasonably be expected of him in the light of each specific employment relationship and the nature of the work.^{121 122}

II. Flexibility and Deference

2. The Government

B. Recognised financial reporting standards

Art. 962a

¹ If financial statements are prepared in accordance with a recognised financial reporting standard, details of the standard must be given in the financial statements.

² The chosen recognised standard must be applied in its entirety and for the financial statements as a whole.

³ Compliance with the recognised standard must be verified by a qualified audit specialist. An ordinary audit must be made of the financial statements.

⁴ Financial statements in accordance with a recognised standard must be submitted to the supreme management body when the annual accounts are submitted for approval, although they do not require approval.

⁵ The Federal Council shall specify the recognised standards. It may stipulate requirements that must be met when choosing a standard or when changing from one standard to another.

II. Flexibility and Deference

3. The Agency

956.1

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**Federal Act
on the Swiss Financial Market Supervisory Authority
(Financial Market Supervision Act, FINMASA)**

of 22 June 2007 (Status as of 1 March 2024)

II. Flexibility and Deference

3. The Agency

Art. 7 Principles of regulation

¹ FINMA exercises its regulatory powers by issuing:

- a. ordinances, where so provided in the financial market legislation; and
- b. circulars on the application of the financial market legislation.

² It issues ordinances and circulars only to the extent required for the purposes of supervision, limiting itself as far as possible to the definition of principles. In doing so, it takes account of overriding federal law and in particular of:²⁴

- a. the costs that the supervised persons and entities incur due to regulation;
- b. the effect that regulation has on competition, innovative ability and the international competitiveness of Switzerland's financial centre;
- c.²⁵ the different sizes, complexities, structures, business activities and risks of the supervised persons and entities; and
- d. the international minimum standards.

³ It supports self-regulation and may recognise and implement the same as a minimum standard within terms of its supervisory powers.

III. Pitfalls



III. Pitfalls

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Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 13–7120

SAMUEL JAMES JOHNSON, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 2015]



III. Pitfalls

Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves **grave uncertainty** about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined “ordinary case” of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the “ordinary case” of a crime involves? “A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?” *United States v. Mayer*, 560 F. 3d 948, 952 (CA9 2009) (Kozinski, C. J., dissenting from denial of rehearing en banc). To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe?

IV. Short Assessment

Courts are often best positioned to define technical standards from a constitutional perspective, as they are generally viewed as impartial and less susceptible to regulatory capture. However, their implementation tends to be slow, inconsistent, and unpredictable, leading to a lack of legal certainty and guidance. While government decisions may carry greater legitimacy than those made by agencies, they can also be politicized and unpredictable. On the other hand, agency standards are ideally more informed and timely but may raise constitutional concerns due to their vagueness and potential for regulatory capture.