



# “Justified” coercive decisions in Switzerland through the lens of international standards : foster care placements

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# Outline



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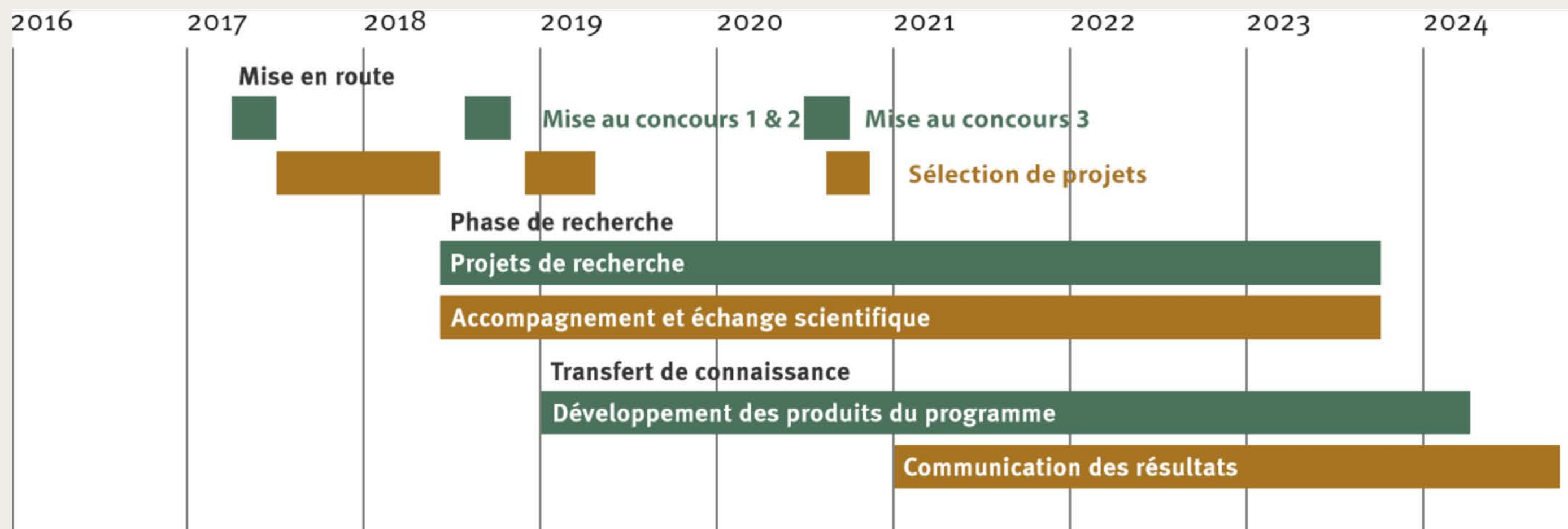
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# Background



- Federal Act on Coercive Measures for The Purpose of Assistance and Extra-Familial Care Prior to 1981, of 30 September 2016, enabled victims of abusive placements to obtain compensation
- NRP 76 identify “possible causes of welfare practices that had an impact on the integrity of the persons concerned.”
- NRP Funding CHF 18 million over 5 years.





### ● Research on «unjustified » coercive decisions in foster care

- Part of third call – selected due to focus on alignment « international standards »
- Started mid-2021 for 20 months
- UNIGE with Child Identity Protection
- Synergies with other SNF research projects / Palatin Next Generation
- « Unjustified » coercive decisions : State's power to interfere in private lives to remove children from their families and place in another family, contrary to international standards

### ● Research team

- Philip Jaffé (lead)
- Mia Dambach (coordinator)
- Cécile Jeannin (researcher/legal/French)
- Laurence Bordier (researcher/legal/French)
- Christina Baglietto (researcher/legal/German)
- Alexandra Levy (researcher/legal/French)
- Andreas von Känel (researcher/anthropologist/German)
- Elena Kreil (researcher/education/German)





### International experts

- Professor David Smolin, Law, University of Samford, USA
- Dr Patricia Fronek, Social work, Griffith University, Australia

### Advisory board

- Dr Gaelle Aeby (sociologist, Palatin project, SNF project)
- Maud de Boer-Buquicchio (UN SR on sale and sexual exploitation, Deputy SG COE, Registrar ECtHR)
- Prof Andrea Büchler (Chair of Private and Comparative Law, Faculty of Law, UZH)
- Dr Nigel Cantwell (participant in drafting of CRC Convention and principal drafter UN Guidelines on the Alternative Care of Children)
- Prof Michelle Cottier (Professor of private law at the Faculty of Law, UNIGE)
- Dr Gaëlle Sauthier (President Child Adult Protection Authority in the Valais)
- Prof Stefan Schnurr (Professor of Social Work. He is Head of the Institute for Studies in Children and Youth Services, School of Social Work FHNW)





# Research methodology

(including legislative review)





- « Working definition » coercive decision-making
  - coercive decisions comprise any decision to remove a child from parental care that is made against the will of the parent(s) (Art 9.1. CRC) or of the child (Arts 9.2 and 12 CRC).
  - “**against the will**” encompasses :
    - i. where the parent(s) and/or child have maintained their refusal
    - i. unwillingly acquiesced in response to pressure or threats
    - ii. when no viable alternative options are offered
- Coercive decision-making in foster care (removal and placement)
  - when coercive decision-making may “justifiably” occur
  - balancing the State’s protective powers and the right to private and family life
  - responsibility for States to protect children from abuse and harm
  - States do not have unfettered powers





### ● Research questions

- (i) How were/are coercive decisions leading to the **removal of children, prevented** through family support initiatives, adapted in light of evolving international standards?
- (ii) How were/are coercive decisions related to the **foster care placement**, adapted in light of evolving international standards?
- (iii) When coercive decisions fall outside of “justifiable” scope of evolving international standards, what **pathways were/are available for accessing justice**?



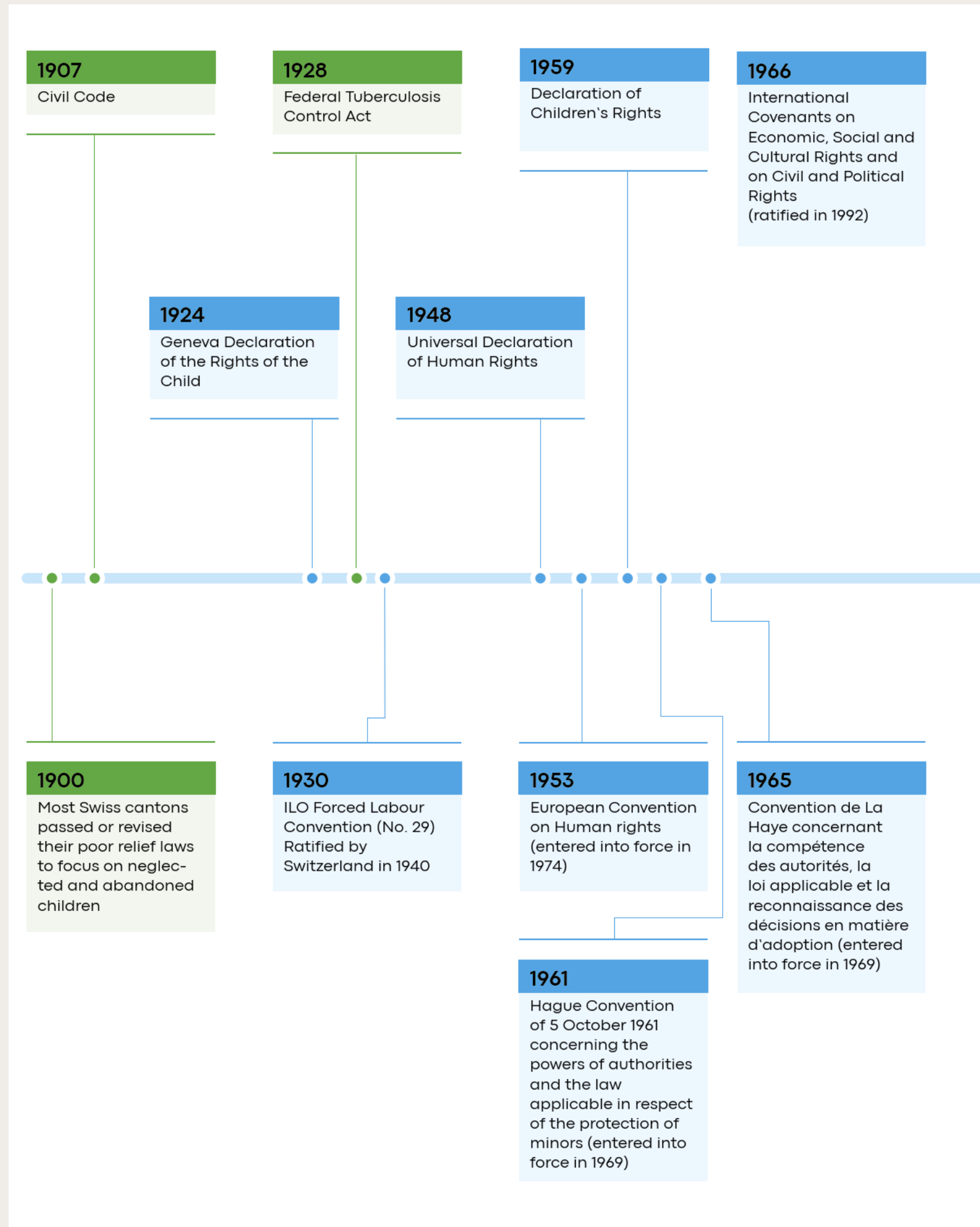


# ● Project development

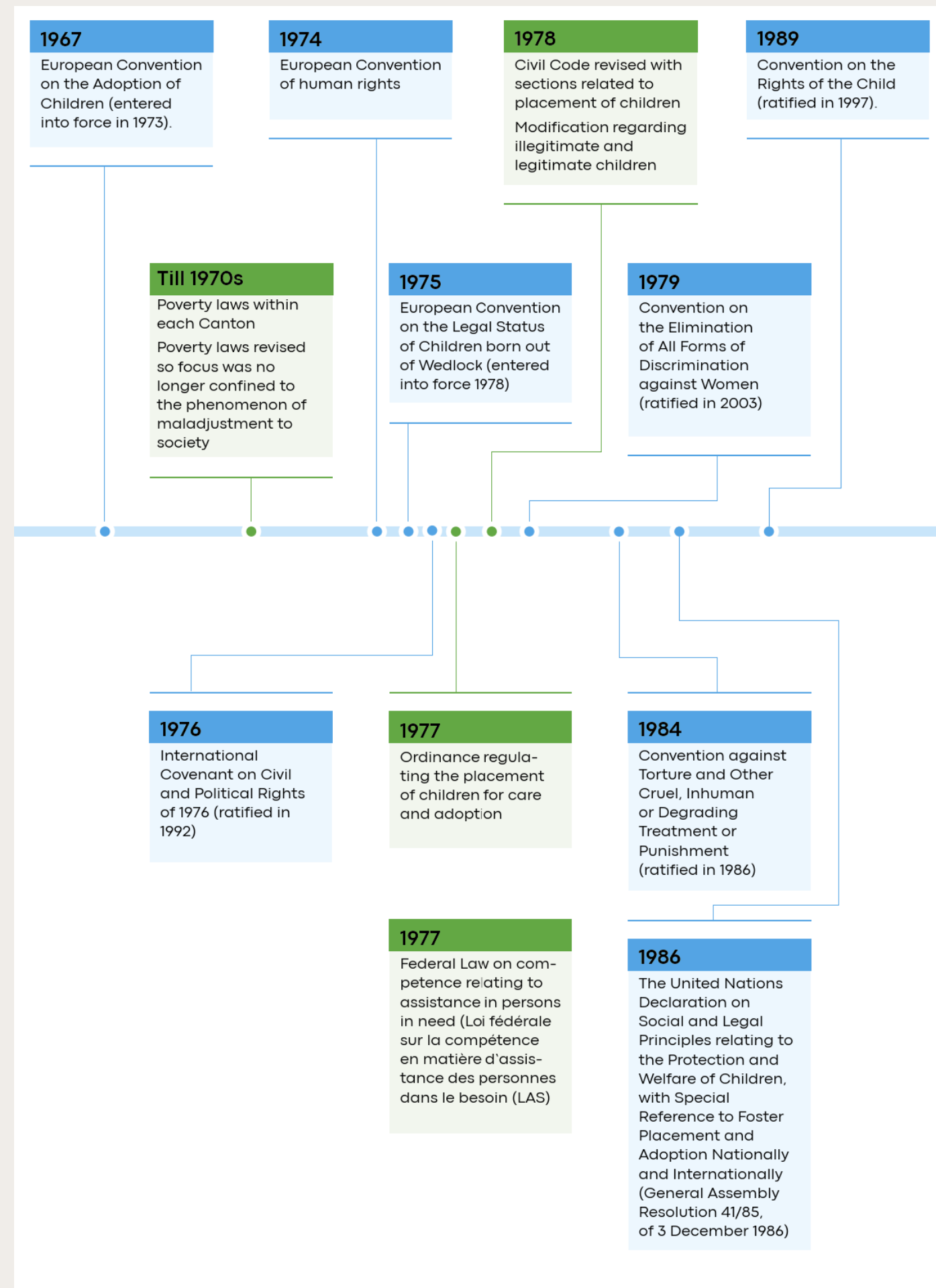
- Establishment of research team /advisory committee
- Two time periods (1900 till 1989, 1989 to now)
- Examine national standards in context of international frameworks that existed at the time
- Secondary research (e.g. context, build on existing research and leverage expertise of team)
- Two Cantons : Valais and Zurich
- Expert interviews (approx. 30)
- Case reviews (approx. 60)



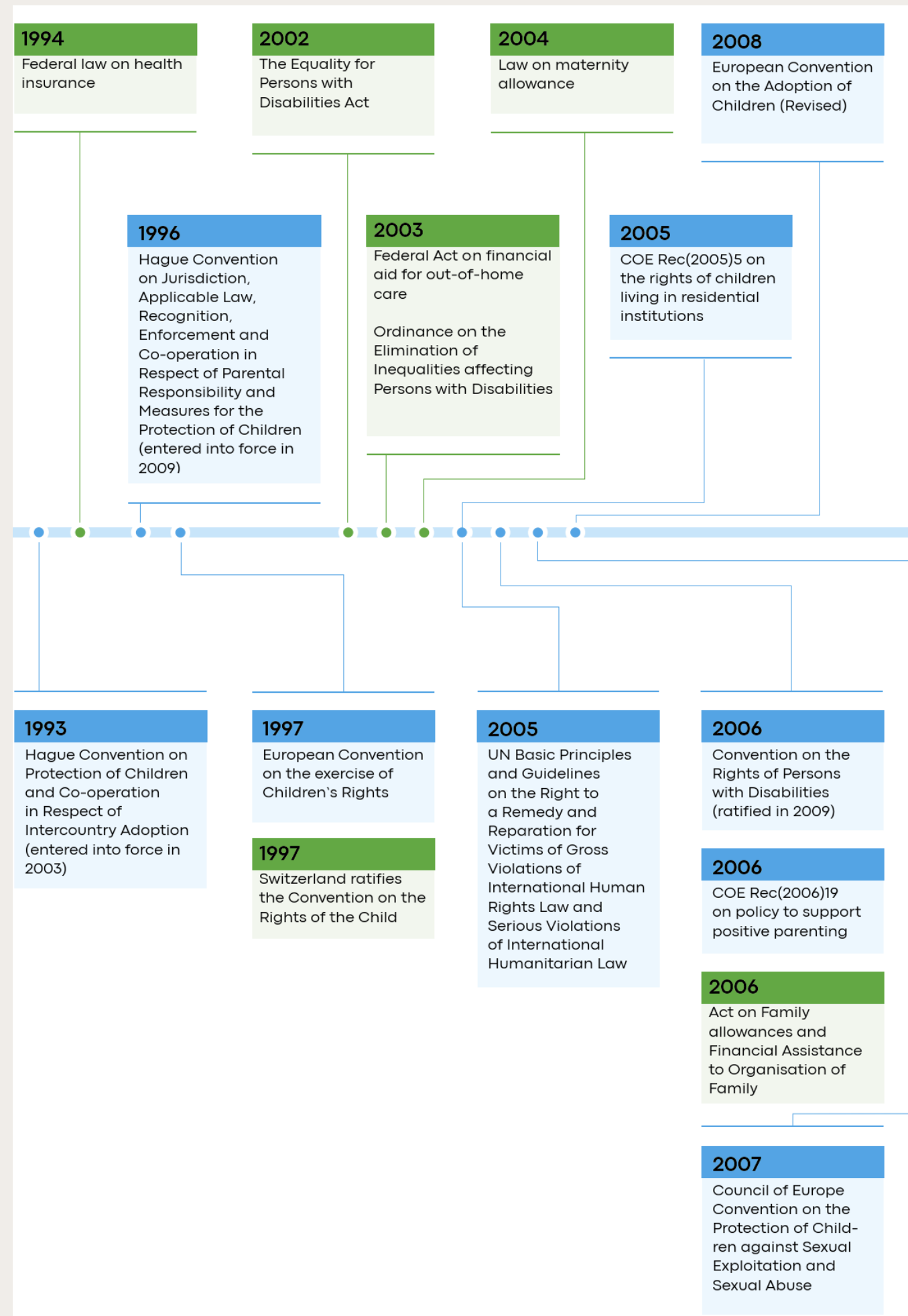
# Research methodology, including legislative review



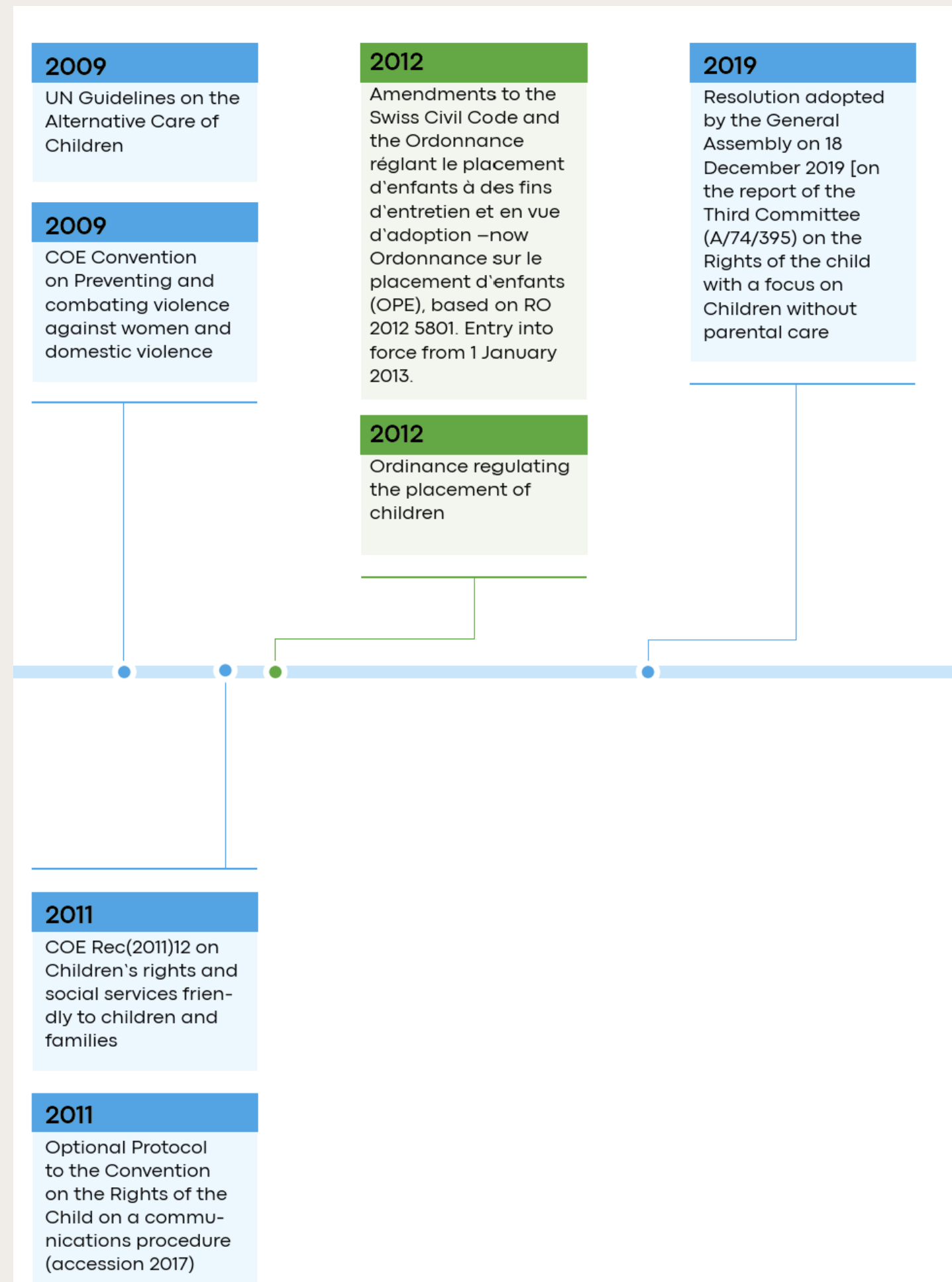
# Research project including legislative review



# Research project including legislative review



# Research project including legislative review





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# Preliminary findings

(1900 to 1989)



### ○ Legislative review

- Conferences (such as Paris and Geneva) end 1900's on child protection = justifiable “coercive decisions”
- Cantonal laws/private associations (legitimate children, poverty laws, child labour, etc.)
- 1907 **Swiss Civil Code** (protective measures – art.283ss ; children of unknown parents art.330)
- **1924 Geneva Declaration of the Rights of the Child** (orphan and waif must be sheltered and succored, vague and “unfettered” powers)
- **1928 Federal Tuberculosis Control Act** and its 1930 Enforcement Order and cantonal laws (foster families)
- Factors that permitted “unjustified” coercive decisions - morally abandoned, lack of family support, costs primarily incurred by families)
- **29 Forced Labour Convention (ILO 1930)** ratified in 1940
- the **1948 Universal Declaration of Human Rights** (motherhood requires special assistance and no discrimination for children born out of wedlock) and the 1953 ECtHR (private family is a right, limits coercive decisions)
- **1959 Declaration of Children's Rights** (separation must be an exceptional measure and State support)
- SCC covers “exceptional measure” for protective reasons/neglect but not “State support”





## ● Legislative review

- Important modifications of the Swiss Civil Code in 1972 regarding adoption influenced by the **1965 Hague Adoption Convention and the 1967 European Convention of Strasbourg on adoption**
- **Modifications to the Swiss Civil Code in 1976** regarding:
  - **suppression of the distinction between legitimate and illegitimate children** influenced by the **drafting of the 1975 European Convention on the Legal Status of children born out of wedlock, the 1948 UDHR and the Resolution n°1787 of 1973 of the Economic and Social Council**
  - Child protection measures modified with the inclusion of the **principles of subsidiarity and proportionality**
- OPEE in 1977, foster care framework and first uniform regulation at federal level (authorisation, monitoring, training suggested) – cantonal provisions
- Appeal mechanisms (remedy to “unjustified” decisions. Necessity to be more compliant with art.6a11 of the 1953 ECtHR – FF 1974 II1 regarding 1976 modifications.



### ● Legislative review

- 1978 Federal Law introduced new provisions in SCC in 1981 on deprivation of liberty for assistance purposes (SCC, Art.397a-397f), aligned Art. 5 of the European Convention on Human Rights
- Alternative care placements (e.g. limitation of administrative detention/coercive decision)
- Before these reforms, the Swiss Government concedes

“enforced welfare measures represent a dark chapter in the history of Swiss social welfare. The victims of these measures included child labourers, children in homes, travellers, Yeniche children, forced adoptees, but also people committed to secure institutions - so-called "administrative wards”





### ● Empirical review

- Confirms the work from administrative detention where the Swiss Government acknowledges “up to 1981, tens of thousands of children and young people were indentured by the authorities to farms as a cheap source of labour, or placed in severely managed homes, or in secure institutions or even prisons, without any form of court ruling. **These children and young people often experienced unspeakable suffering and injustice. ... and suffered enormously from the separation from their parents and siblings .”**
- 1924 Declaration was “vague” and did not limit Switzerland’s unfettered powers to interfere in private lives of families. Societal norms created the framework for the both application of the 1924 Declaration and 1907 SCC

### ● Family support

- Fact that child could be “morally abandoned” contributed to floodgate of societal pressures, which then led to removals from maternal care that were not “exceptional”
- prevention support was mentioned only in a single case (out of 15)
- Descriptions by professional as “unsuitable as an unmarried mother” and “not selective in her acquaintances”
- ***“I often admonished her and threatened to take the child away if she did not try harder.”***



### ● Reintegration

- files contain no information on the motivations of mothers to relinquish children
- No information on efforts to facilitate reintegration (e.g. efforts to address reasons for separation)
- Fathers are missing from files
- Taking families apart was one way of helping families living in poverty
- E.g. single mother (17) indicates she wants to keep the child. Child is proposed for adoption prior to mother's consent. After speaking with the social worker, mother changes her mind. Adoption has no cost for commune.

### ● Costs

- “communes” were responsible for supporting families and single parents, most living in poverty
- authorities often placed children in out of home placements, which were less costly than supporting families
- files indicate “debates” between the commune as to where the child should be placed based on which option costs the least (e.g. foster family is less costly than residential care, next to the mother)
- even “costs” were a primary subject of discussion, not always THE determining factor



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# Preliminary findings (1989 to now)



## ● Legislative review

- Introduction of the 1989 Convention on the Rights of the Child (CRC) and 2009 UN Guidelines on the Alternative Care of Children (UN Guidelines) – greater support prior to removal and placement
- 1989 CRC (Art. 9(1)) *child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents etc.*
- 2009 UN Guidelines (Para. 15) *Financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her reintegration, but should be seen as a signal for the need to provide appropriate support to the family.*



## ● Legislative review

- General support to all families (e.g. LaMAL, education, childcare, maternity allowance)
- Targeted services for families at risk (e.g. preventing violence, poverty, children with disabilities)
- Law : automatic removal of parental authority for parents under 18 (Art. 296 SCC, para 36, 41 UN Guidelines)
- Re-integration missing in Swiss national provisions (e.g. Roda and Bonfatti v. Italy (2007) – no contact for 4 years)
- Gatekeeping mechanisms (no proactive requirement to support families, legal representation, positive development with children's right to participate encouraged)
- Foster care framework (e.g. determination of placement, selection of foster, monitoring – every 3 months)
- Access to records and appeal mechanisms





## ● Legislative review

- 2013 Ordonnance sur le placement d'enfants (OPE) – International stds mentioned in the preamble
- **Institutional structure:** Centralisation of competencies in child protection in Cantonal child protection authorities and need for interdisciplinary (Art. 440 CC) and supervisory bodies;
- **Procedural elements:** Roles and responsibilities in relation to foster care, including the authorisation and supervision of foster placements and providers, are set out in Art. 316 CC as well as Arts. 1, 2, 4, 5 and 8 OPE.
- **Minimum safeguards** such as :
  - child's "welfare" when authorising a placement (Art. 1(a)(1) OPE) – best interests not used
  - child information, participation and appointment of a reference person (Art. 1(a)(2) - 10(3) OPE)
  - adequate care (Art. 3 OPE)



## Empirical review

- Moved away from “policing” system where once detected you will be observed – towards “partners”
- Despite the lack of legislation, Switzerland has nevertheless initiated a number of programmes that support families (e.g. paid paternity leave, subsidies for out of home care of children)
- (e.g. action éducative en milieu ouvert (AEMO)/child and youth protection centres established to support families)
- **Case review :**
- most had a connection to another country, economic hardships and health challenges
- majority of families had marital challenges including separation and domestic violence.





## ● Family support

- **Support “generally” offered but not “always” effective (two cases where no support indicated on file)**
- E.g.: social worker recommends that mother goes to rehabilitation, at the cost of the father who did not have means
- E.g.: father is absent and the mother died. The two brothers – aged 18 and 16 years – were left alone and without any support. Even though the option of foster family was discussed, it seems that a follow up never occurred. The brother asks that his brother be placed elsewhere, and they end up being sent to two different institutions

### **Support offered for child care and education, but not to address domestic violence or offering “respite” care**

- e.g. Maisonée in the Valais – supported care to single mothers with newborns
- One president notes that when cases arrive at the CAPA, it is often too late and then, they have to urgently respond.  
Due in part to a lack of collaboration, for example with the teachers wait too long before reporting potential risks
- ZH files : lack of support to fathers, in this period, has emerged as a recurring theme.
- e.g. father was not considered capable of caring for third child, as he had “no experience” with young children



## ● Reintegration

- **Efforts to “maintain” ties with family of origin but little to address reasons for separation, to allow for reintegration**
- Case in ZH : father was withdrawing from methadone, struggling to care for child and have stable employment/housing. Initial “temporary” placement of the child leads to “long term” placement and the child eventually not wanting contact with the father. The report shows the father “worked a lot and was obviously under pressure. The unresolved housing situation also caused him problems because he could accommodate [the child] at his place. Since he was hardly reachable, the visits with the child could not be arranged as planned.”
- Initial support was critical and not targeted, leading to permanent separation from the child





## ○ Reintegration

- **Pedersen and Others v. Norway (2020)**, where the ECtHR held that the State failed to support family reunification efforts with the child's family of origin (i.e. two two-hour visits per year)
- **Ombudsman : biological families are not supported and given an opportunity to show improvements**
- **ZH cases : children placed geographically away from families for "their" safety.**
- Potential conflict of interest : DAF mandated to support "foster family"
- Challenges – "all necessary measures" and lack of reintegration framework
- **These case reviews show that while the CAPA has general goals of maintaining family ties, the Child Protection Office, faces a number of challenges when assessing the practical benefits for the child.**
- If the family is already been subject to the supervision of the system, there might be a risk that there is some existing prejudice about their capacity to care for the child, which will limit the efforts to support.
- VS case : child protection authorities decide to "automatically" remove third newborn from mother



### Costs

- Seems that SCC since 1907 creates opportunities for “unjustified” coercive decisions in this field
- SCC allows for allocation of costs of caring for their children parent(s) if they have the means
- Art. 27 CRC 1989 states that (also Art. 18(2)) :
  2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
  3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents
- Involuntary placement (Art. 310 SCC) : CAPA orders and signs the placement contract - responsible for the costs ... then they can allocate to parent(s)
- **Difficult to justify that parents have to pay for the “removal” and “placement” decision itself**
- **Parents asked to bear burden of costs even if facing economic hardships, contrary to State’s need to support**
- Case in VS : mother asked to pay for pupillary chamber even if receiving AI



### ● Costs

- VS case : parents are able to visit the child only if supervised and if they are able to cover the costs.
- "voluntary" decision – families expected to cover costs. Switch can occur where families provide their "consent" for coercive decision by the CAPA due to financial pressure (i.e.: want CAPA to cover the costs)
- Costs can dictate where the child is placed rather than their "best interest"
- E.g.: certain DAFs immediately receive all the financing and then place the child in another Canton, as this is less expensive but further away from birth parent(s)
- promising practice in Bern, where the foster families are paid directly by the Canton and DAF are paid for specific services, so there is more transparency about what is being financed



## Other examples: opportunities for avoiding “unjustified” coercive decisions

### ● Gatekeeping

- Participation of the child and the family
- Professional decision-making / person of trust / legal representative

### ● Foster Care

- Adopt national standards for the quality of alternative care, including for children living with foster families
- Support to foster families and quality of supervision, including leaving care

### ● Records and access to files

### ● Appeal mechanisms and access to justice

- CRC Committee (2021) - Ensure that children are separated from their family only if it is necessary for their best interests and **subject to judicial review**, in accordance with article 9 (1) of the Convention, and that poverty and disability, including autism spectrum disorder, are never the justification for removing a child from parental care



