Pázmány Law Review
V. 2017. • 217–227

THE LEGAL LIMITS OF POPULAR INITIATIVES IN SWITZERLAND

Daniel Moeckli
Professor of Public International Law and Constitutional Law,
University of Zurich

1. Introduction

On 29 November 2009, 58% of Swiss voters approved a popular federal initiative for a constitutional ban on the construction of minarets.[1] The outcome of the vote was internationally condemned as a discriminatory measure in violation of the right to freedom of religion.[2] Almost exactly a year later, on 28 November 2010, a 53% majority of voters backed a proposal for a new constitutional provision requiring the automatic expulsion of foreign nationals convicted of certain criminal offences.[3] Prior to the vote, the Federal Council (the federal government) had warned that the new provision would be incompatible with a number of human rights, in particular the right to private and family life, guaranteed by international treaties ratified by Switzerland such as the European Convention on Human Rights 1950 (ECHR), the International Covenant on Civil and Political Rights 1966 (ICCPR), and the Convention on the Rights of the Child 1989.[4] On 9 February 2014, the popular initiative "against mass immigration" was approved with a slim majority of 50.3%.[5]

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1 Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 29 November 2009. *Bundesblatt,* 2010. 3437. 3440. See Lorenz Langer: Panacea or Pathetic Fallacy? The Swiss Ban on Minarets. *Vanderbilt Journal of Transnational Law*, vol. 43. (2010) 863.

2 See Human Rights Council Res 13/16, 25 March 2010, A/HRC/RES/13/16, paragraph 8; PACE Res 1743 (2010), paragraph 13.

3 Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 28. November 2010. *Bundesblatt,* 2011. 2771. 2773.

4 Botschaft zur Volksinitiative „für die Ausschaffung krimineller Ausländer (Ausschaffungsinitiative)". *Bundesblatt,* 2009. 5097. 5106–5113. Switzerland ratified the ECHR on 28 November 1974, the ICCPR on 18 June 1992, and the Convention on the Rights of the Child on 24 February 1997.

5 Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 9. Februar 2014. *Bundesblatt,* 2014. 4117. 4120.

The yearly quotas for immigration permits demanded by the initiative are in conflict with the Agreement on the Free Movement of Persons concluded between Switzerland and the European Union.[6] Also in 2014, there was a popular vote on the "Ecopop" initiative. The initiative demanded, first, additional immigration restrictions and, second, the promotion of birth control measures in developing countries, thus raising concerns with regard to its conformity with the requirement of consistency of the subject matter ("single-subject rule").[7] However, a majority of voters rejected the initiative.[8] On 14 June 2015, finally, a popular initiative demanding a reform of the system of inheritance tax was rejected.[9] The suggested reform would have introduced an inheritance tax that would have applied retroactively, raising the question as to its compatibility with the principle that a law should not apply to facts that occurred before the law entered into force.[10]

These are just a few of many examples that illustrate that in Switzerland the instrument of the popular initiative has, in recent years, been increasingly used to advance demands that may clash with fundamental rule-of-law requirements. This short paper starts by explaining the background of this development, which is, very briefly stated, that the legal limits on what can be demanded with a popular initiative are currently set rather low (Section 3). Subsequently, the paper gives an overview of the different proposals that have been made to reform the current system with a view to recalibrating the relationship between popular sovereignty on the one hand and the rule of law on the other and assesses these reform proposals (Section 4). Finally, I will outline a way forward (Section 5). First of all, it is necessary, however, to give some background information on the popular initiative in Switzerland (Section 2).

2. The Swiss Popular Initiative

The popular initiative gives 100 000 persons eligible to vote the right to propose a complete or partial revision of the Federal Constitution.[11] The right to propose a partial revision of the Constitution was not introduced until 1891, more than 40 years after the creation of modern Switzerland as a federal state in 1848. The number of signatories required to launch a popular initiative was only raised once, from 50 000 to 100 000 in 1977, not least as a reaction to the introduction of women's suffrage in

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6 Botschaft zur Volksinitiative „Gegen Masseneinwanderung". *Bundesblatt,* 2013. 291. 335–336. The Agreement on the Free Movement of Persons was ratified by Switzerland on 16 October 2000.

7 Botschaft zur Volksinitiative „Stopp der Überbevölkerung – zur Sicherung der natürlichen Lebensgrundlagen". *Bundesblatt*, 2013. 8693. 8701–8703.

8 Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 30. November 2014. *Bundesblatt,* 2015. 1813. 1816.

9 Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 14. Juni 2015. *Bundesblatt,* 2015. 6313. 6318.

10 Botschaft zur Volksinitiative „Millionen-Erbschaften besteuern für unsere AHV (Erbschaftssteuerreform)". *Bundesblatt,* 2014. 125. 144–145.

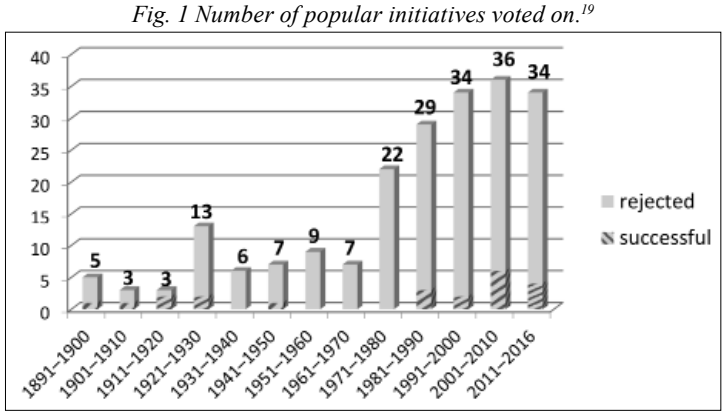
11 Articles 138 and 139 Federal Constitution.

1971.[12] Today, that number equals 1.9% of the 5.2 million citizens who are eligible to vote (out of a total population of 8.3 million).

Any measure that can be formulated as a constitutional norm may be proposed by way of a popular initiative. This may include proposals that would entail radical changes to the political system of Switzerland, such as the abolition of the armed forces[13] or accession to the European Union.[14] Thus, "the popular initiative enlarges the realm of the politically thinkable and feasible."[15] Apart from the very limited reasons for declaring popular initiatives invalid discussed in Section 3 below, they must be put to the vote in their original wording. The only way in which the Federal Assembly (the federal parliament) can react to an initiative is to issue a recommendation to voters on how to vote and, if it deems appropriate, to draft a counter-proposal.[16] Popular initiatives need to be approved by the double majority of voters and cantons.[17]

Only 22 out of the 209 initiatives voted on so far have managed to overcome this hurdle.[18] However, the number of successful initiatives, as well as the number of initiatives in general, has risen considerably. In the years between 2001 and 2010 alone, six initiatives were approved. Furthermore, already in the last five years as many initiatives have been successful as in the ten years between 1991 and 2000. Moreover, even if not approved, a popular initiative may have a significant indirect impact, putting issues on the political agenda or triggering legislative changes.

Fig. 1 Number of popular initiatives voted on.[19]



[12] Botschaft des Bundesrates an die Bundesversammlung über eine Erhöhung der Unterschriftenzahlen für Initiative und Referendum 9 June 1975. *Bundesblatt,* 1975. II 129. 131 and 138.

[13] In 1989 and 2001 initiatives to abolish the Swiss army were rejected.

[14] In 2001 a proposal to enter into negotiations on acceding to the European Union was rejected.

[15] Wolf Linder: Direct Democracy. In: Ulrich Klöti et al. (eds): *Handbook of Swiss Politics*. Zürich, Neue Zürcher Zeitung Publishing, 2007. 117.

[16] Article 139(5) Federal Constitution.

[17] Articles 139(5) and 142(2) Federal Constitution.

[18] Statistics are available on the website of the Federal Chancellery at http://www.admin.ch/ch/d/pore/vi/vis_2_2_5_9.html

[19] The diagram is based on the statistics provided by the Bundesamt für Statistik (the Federal Statistical Office), available at https://www.bfs.admin.ch/bfs/de/home/statistiken/politik/abstimmungen.

In order to launch a popular initiative, its authors must, first of all, submit the signature sheet to the Federal Chancellery. The Federal Chancellery carries out a preliminary, purely formal examination of the initiative, reviewing whether the signature sheet contains the information required by law (names of the authors of the initiative; title of the initiative, which may not be misleading; a withdrawal clause etc.).[20] If these requirements are met, the initiative is published in the Federal Gazette.[21] From the moment of official publication, the authors have 18 months to collect and submit the required 100 000 signatures.[22] After the collection of the signatures, but before the popular vote is held, the Federal Assembly, based on a report of the Federal Council,[23] reviews the initiative for its compliance with the limits set out below in Section 3. If one of the limits is violated, the Federal Assembly declares the initiative (completely or partially) invalid.[24] If the initiative is found to comply with the limits, it is put to the vote. The decision of the Federal Assembly on the validity of an initiative is final; it cannot be challenged before the Federal Court (or any other body).[25]

3. Limits

Article 139(3) of the Federal Constitution lists three requirements that a popular initiative must meet. First, it must take the form of either a general proposal or a specific draft, but not a hybrid between the two (requirement of consistency of the form). Not a single initiative has been found to be in breach of this limit until today.

Second, initiatives must observe the requirement of consistency of the subject matter ("single-subject rule"). The Federal Assembly's practice of applying this limit has been very generous; it has only declared two initiatives invalid on this basis. In 1977, it found an initiative against inflation that combined a number of various demands (including state control of prices and capital investments, progressive taxation and the introduction of guarantees of economic and social rights) to be incompatible with the requirement of consistency of the subject matter.[26] In 1995, it declared an initiative invalid that demanded that the military budget be reduced by half, while at the same time requiring that this money be used for purposes of peace-keeping and the provision of social security.[27] In contrast, the "Ecopop" initiative

assetdetail.1866592.html

20 Articles 68–69 Federal Act on Political Rights.

21 Article 69(4) Federal Act on Political Rights.

22 Article 139(1) Federal Constitution.

23 See Article 97(1)(a) Federal Act on the Federal Assembly.

24 Article 139(3) Federal Constitution.

25 See Article 189(4) Federal Constitution.

26 Bundesbeschluss über die Volksinitiative „gegen Teuerung und Inflation" vom 16. Dezember 1977. *Bundesblatt,* 1977 III 919.

27 Bundesbeschluss über die Volksinitiative „Für weniger Militärausgaben und mehr Friedenspolitik" vom 20. Juni 1995. *Bundesblatt,* 1995. III 570.

referred to above was declared valid, despite the fact that it demanded, on the one hand, enhanced immigration restrictions and, on the other, the promotion of birth control measures in developing countries.[28]

Third, initiatives must not conflict with "peremptory norms of international law". While some authors argue that this is a reference to the corpus of law that is internationally recognised as constituting *ius cogens*,[29] others think that it is an autonomous term of Swiss constitutional law that can be interpreted more broadly to also include fundamental norms of international law that have not (yet) attained *ius cogens* status.[30] The Federal Council and the Federal Assembly today seem to side with the latter group of authors and thus to understand "peremptory norms of international law" as an autonomous constitutional term.[31] In any event, they interpret the term narrowly, limiting it to those rules that are of such fundamental importance to the international community that they must be regarded as binding upon any state that respects the rule of law and that can thus never be derogated from.[32] These rules are said to include the prohibitions of genocide, slavery, and torture, the principle of non-refoulement, the core guarantees of international humanitarian law, and the non-derogable guarantees of the ECHR and the ICCPR.[33] Since international responsibility for violation of this body of international law simply cannot be evaded, it makes good sense that norms of domestic law that are incompatible with it should never come into force, regardless of their democratic legitimacy. Given its narrow definition, however, this validity requirement does not present a major obstacle; only two popular initiatives have been declared invalid on this basis. In 1996, the Federal Assembly adjudged an initiative demanding the immediate expulsion of all asylum-seekers who have entered the country illegally to be incompatible with the principle of non-refoulement.[34] In 2015, an initiative designed to enforce the expulsion of foreign criminals was declared partially invalid. The Federal Assembly held that the part of the initiative that wanted to provide, for the purposes of the initiative, an

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[28] Bundesbeschluss über die Volksinitiative „Stopp der Überbevölkerung – zur Sicherung der natürlichen Lebensgrundlagen" vom 20. Juni 2014. *Bundesblatt,* 2014. 5073.

[29] See, Yvo Hangartner – Andreas Kley: *Die demokratischen Rechte in Bund und Kantonen der Schweizerischen Eidgenossenschaft.* Zürich, Schulthess, 2000. 227–228.

[30] See, Daniel Thürer: Verfassungsrecht und Völkerrecht. In: Daniel Thürer – Jean-François Aubert – Jörg Paul Müller (eds.): *Verfassungsrecht der Schweiz.* Zürich, Schulthess, 2001. 179. 184–185.

[31] See, Botschaft zur Volksinitiative „Zur Durchsetzung der Ausschaffung krimineller Ausländer (Durchsetzungsinitiative)". *Bundesblatt,* 2013. 9459. 9467–9470.

[32] For an overview see Robert Baumann: Völkerrechtliche Schranken der Verfassungsrevision. *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht*. vol. 108. (2007) 181. 190–206.

[33] See, Botschaft zur Volksinitiative „Zur Durchsetzung der Ausschaffung krimineller Ausländer (Durchsetzungsinitiative)". *Bundesblatt*, 2013. 9459. 9467–9470.; Botschaft zur Eidgenössischen Volksinitiative „für demokratische Einbürgerungen". *Bundesblatt*, 2006. 8953. 8962.; Botschaft über eine neue Bundesverfassung. *Bundesblatt*, 1997. I. 1. 362.

[34] Botschaft über die Volksinitiativen „für eine vernünftige Asylpolitik" und „gegen die illegale Einwanderung". *Bundesblatt*, 1994. III. 1486. 1499.; Bundesbeschluss über die Volksinitiative „für eine vernünftige Asylpolitik", *Bundesblatt*, 1996. I. 1355.

exhaustive list of peremptory norms of international law was not compatible with the principle of non-refoulement.[35]

Finally, a fourth, unwritten, requirement is that it must be practically feasible for the initiative to be implemented.[36] In 1955, an initiative that demanded a reduction of the military budget within a certain time period was held to be in breach of this requirement as it was impossible to hold the popular vote on the initiative early enough to allow for its implementation.[37]

In summary, only four popular initiatives have been declared invalid so far, one has been held to be partially invalid. Many initiatives that do not amount to a violation of peremptory norms of international law, but clash with other norms of international law, had to be put to the vote. Some of them, including those mentioned in the Introduction, have been approved by voters. Allowing popular votes on such initiatives to go ahead creates a dilemma: After an affirmative vote, there is only the choice to either respect the outcome and thus create a conflict within the legal system (between the newly adopted measure on the one hand and international law on the other) or to ignore, or at least not fully implement, it. The first solution creates legal uncertainty, the second is bound to lead to political controversy. In addition, several initiatives that have been submitted to a popular vote raise problems with regard to the requirement of consistency of the subject matter or rule-of-law requirements such as the principle of non-retroactivity.

4. Reform Proposals

In order to address the problems that are caused by the fact that the legal limits on popular initiatives are currently set rather low, a number of reform proposals have been put forward by a range of actors/bodies, including the Federal Council, members of Parliament, legal scholars, and various organisations.[38]

One set of proposed changes relates to the *preliminary review* of popular initiatives prior to the start of the collection of signatures, which is currently restricted to a purely formal review of the signature sheets by the Federal Chancellery. The Federal Council

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[35] Botschaft zur Volksinitiative „Zur Durchsetzung der Ausschaffung krimineller Ausländer (Durchsetzungsinitiative)". *Bundesblatt*, 2013. 9459. 9467–9472.; Bundesbeschluss über die Volksinitiative „Zur Durchsetzung der Ausschaffung krimineller Ausländer (Durchsetzungsinitiative)" vom 20. März 2015. *Bundesblatt*, 2015. 2701.

[36] See Giovanni Biaggini: *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft*. Zürich, Orell Füssli, 2007. Art. 139, No. 14; Bernhard Waldmann – Eva Maria Belser – Astrid Epiney (eds.): *Bundesverfassung – Basler Kommentar*. Basel, Helbing, 2015. Art. 139, No. 45–46.

[37] Zweiter Bericht des Bundesrates an die Bundesversammlung über das Volksbegehren für eine vorübergehende Herabsetzung der Militärausgaben (Volksinitiative für eine Rüstungspause). *Bundesblatt*, 1955. II. 325; Bundesbeschluss über das Volksbegehren für eine vorübergehende Herabsetzung der Militärausgaben (Volksinitiative für eine Rüstungspause) vom 15. Dezember 1955. *Bundesblatt*, 1955. II. 1463.

[38] For an overview of these, and further, proposals for reform, see also Ulrich Häfelin – Walter Haller – Helen Keller – Daniela Thurnherr: *Schweizerisches Bundesstaatsrecht*. Zürich, Schulthess, ^{9}2016. 551–555.

has suggested that this review should be extended to include an assessment, carried out by a department of the government, of the conformity of popular initiatives with international law. However, this preliminary assessment would not be binding on the authors of the initiative or the Federal Assembly. Instead, its purpose would merely be to inform the authors of the initiative about possible conflicts with international law, and, thus enable them to amend its text. In addition, a 'warning sign' would be added to the signature sheets, informing potential signatories as to whether the initiative violates international law.[39] The general thrust of this proposal is to be welcomed. It is important that citizens are able to make an informed decision as to whether or not to sign and, later, vote for or against a popular initiative. However, it would be naïve to assume that better information would automatically lead to a reduction of the number of popular initiatives that violate international law.[40] Empirical evidence suggests that the vast majority of Swiss citizens do not care much about the legal implications of the popular initiatives they vote on.[41]

A second set of proposals is directed at reforming the *procedure* for reviewing popular initiatives for their validity after submission of the required number of signatures. As mentioned before, under current law this review is the exclusive domain of the Federal Assembly. Thus, it has been suggested that this competence should be transferred to the Federal Court[42] or some newly created judicial body;[43] or that it should be possible to bring a legal challenge against the Federal Assembly's decision;[44] or, at the very least, that the Federal Assembly should be able to request a legal opinion from the Federal Court.[45] Changing the procedure would make a lot of sense. The current solution is highly problematic from the perspective of the rule of law: Whether an initiative meets or does not meet the requirements listed in the Federal Constitution is a purely legal decision. Therefore, the final word on this question should not belong to Parliament, a body that acts according to political considerations.[46] A look at the respective debates in the Federal Assembly (especially

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[39] Zusatzbericht des Bundesrates zu seinem Bericht vom 5. März 2010 über das Verhältnis von Völkerrecht und Landesrecht, 31 March 2011. *Bundesblatt*, 2011. 3613. 3632–3640.

[40] But see for this assumption, ibid. 3632, 3637.

[41] Anna Christmann: Do Voters Care about Rights? Protection of Rights and the Rule of Law in a (Semi-)Direct Democracy. Paper presented at the ECPR General Conference, 2009.

[42] Staatspolitische Kommission des Nationalrates, Medienmitteilung: Gültigkeit von Volksinitiativen: Kommission will Bundesgericht einbeziehen, 21 August 2008; Bernard Dutoit – Stephen V. Berti – Peter Isler – Pascal Pichonnaz – Daniel Thürer – Hans Peter Walter: Préface: Ordre populaire v. démocratie. *Zeitschrift für Schweizerisches Recht,* vol. 130. (2011), 3.

[43] Helen Keller – Markus Lanter – Andreas Fischer: Volksinitiativen und Völkerrecht: die Zeit ist reif für eine Verfassungsänderung. *Schweizerisches Zentralblatt f*ür *Staats- und Verwaltungsrecht,* vol. 109. (2008), 121. 151.

[44] Giusep Nay: Vorschlag für eine Ergänzung der Bundesverfassung als Diskussionsgrundlage. 11 October 2010., available at https://bit.ly/2Vklglv

[45] See Bericht des Bundesrates über das Verhältnis von Völkerrecht und Landesrecht, 5 March 2010. *Bundesblatt,* 2010. 2263. 2336–2337.

[46] Biaggini op. cit. 36. Art. 139, No. 10; Bernhard Ehrenzeller – Benjamin Schindler – Rainer J. Schweizer – Klaus A. Vallender (eds.): *Die schweizerische Bundesverfassung – St. Galler*

in the National Council, the first chamber) confirms that it is often the case that political instead of legal arguments are advanced in favour of the validity, or lack of validity, of a given initiative.[47] Unfortunately, however, there is little prospect that the existing procedure could be reformed as a majority of parliamentarians are simply not willing to give up (or share) the power to decide on the validity of initiatives.

A third set of proposals is directed at changing the *legal limits* on popular initiatives themselves. Thus, it has been suggested that an initiative should not only be declared invalid if it violates peremptory norms of international law but also if it conflicts with "norms of international law that are of vital importance to Switzerland",[48] international human rights guarantees (in particular those contained in the ECHR),[49] "rights forming part of the European public order",[50] or a number of international norms that would be explicitly listed.[51] The Federal Council, for its part, suggested in 2011 adding a new validity requirement according to which popular initiatives must respect 'the core (*Kerngehalt*) of fundamental rights', a term of art of Swiss constitutional law that describes those aspects of fundamental rights that enjoy absolute protection and can thus never be restricted.[52] Consequently, an initiative could have been declared invalid if it violated the prohibition of the death penalty (belonging to the core of the right to life), the right not to be forced to perform a religious act (belonging to the core of the freedom of religion), or the prohibition of forced marriage (belonging to the core of the right to marriage). Yet even this very modest proposal for reform, which would not have prevented the problematic initiatives listed at the beginning of this paper, has not been able to garner sufficient political support.[53] More recently, a commission of the Council of States (the second chamber of the Federal Assembly) has proposed changes that would entail a more stringent definition and application of the requirement of consistency of the subject matter and the introduction of a new limit, according to which an initiative may not contain any retroactive provisions.[54] These changes, which are currently being

Kommentar. Zürich – St. Gallen, Dike, [3]2014. Art. 173, No. 109–110.; Pierre Tschannen: *Stimmrecht und politische Verständigung: Beiträge zu einem erneuerten Verständnis von direkter Demokratie*. Basel, Helbing & Lichtenhahn, 1995. No. 726.

47 See for the example of the „Durchsetzungsinitiative". *Amtliches Bulletin,* 2014. No. 490.

48 Keller–Lanter–Fischer op. cit. 43. 149.

49 Parlamentarische Initiative 07.477 (Vischer), Gültigkeit von Volksinitiativen, 5 October 2007.

50 Maya Hertig Randall: L'internationalisation de la jurisdiction constitutionelle: défis et perspectives. *Zeitschrift für Schweizerisches Recht*, vol. 129. (2010), 221. 355.

51 See Bericht des Bundesrates über das Verhältnis von Völkerrecht und Landesrecht, 5 March 2010. *Bundesblatt,* 2010. 2263. 2333–2334.

52 Zusatzbericht des Bundesrates zu seinem Bericht vom 5. März 2010 über das Verhältnis von Völkerrecht und Landesrecht, 31 March 2011. *Bundesblatt,* 2011. 3613. 3642–3646.

53 See Bericht des Bundesrats vom 19. Februar 2014 zur Abschreibung der Motionen 11 3468 und 11 3751 der beiden Staatspolitischen Kommissionen über Massnahmen zur besseren Vereinbarkeit von Volksinitiativen mit den Grundrechten. *Bundesblatt,* 2014. 2337.

54 Bericht der Staatspolitischen Kommission des Ständerates vom 20. August 2015, Anforderungen an die Gültigkeit von Volksinitiativen: Prüfung des Reformbedarfs. *Bundesblatt,* 2015. 7099.

discussed, would, however, not address the key problem raised by the current system, namely the increasing number of popular initiatives that clash with international law.

5. Solving the Conflict at the Implementation Stage

As is evident from the discussion in the previous Section, virtually all efforts to reform the legal regime of the popular initiative have failed so far. Given that this instrument has been in use for over 125 years, it has become politically nearly impossible to impose any new restrictions on it. In any event, the creation of new substantive hurdles for popular initiatives is, in my view, not an appropriate solution. The right to launch a popular initiative is a political right of central importance in the Swiss system of direct democracy. Any restrictions should be kept to a minimum. Within certain, narrowly defined limits, citizens should be able to *propose* what they want.

However, the extent to which a proposed measure is compatible with already existing norms and can thus be *implemented* and *applied* is a different issue. Whether a constitutional amendment complies with international law or not can be better assessed *ex post*, by reviewing individual cases in which the respective measure is applied, rather than through an *ex ante* review of an abstract proposal. In the case of complex proposals it may be especially difficult to predict, whether or not, they will lead to a conflict with international law. Therefore, the decision as to the conformity of a constitutional amendment with international law should be taken *by the courts at the stage of application*.

So, how should the courts solve a conflict between a new constitutional norm created by way of a successful popular initiative and international law? First of all, they have to interpret the constitutional provision, if ever possible, in such a manner that it is compatible with international law. This duty follows from Article 5(4) of the Federal Constitution, which provides that the Confederation shall respect international law. Accordingly, it must be presumed that the drafters of a constitutional provision intended it to be compatible with international law.[55]

Yet not all conflicts can be avoided by way of an interpretation in conformity with international law. The Federal Constitution does not contain any explicit rules as to how the conflict is then to be solved. Although the above-mentioned Article 5(4) requires respect of international law, it does not explain whether international law or constitutional law prevails in case of a conflict. Similarly, Article 190 obliges courts to apply international law (as well as federal acts) but does not establish a hierarchical relationship between the different categories of norms.[56] Only with regard to peremptory norms of international law does the Constitution contain explicit rules: By providing that constitutional amendments are only valid if they do not violate

[55] Roger Nobs: *Volksinitiative und Völkerrecht: Eine Studie zur Volksinitiative im Kontext der schweizerischen Aussenpolitik unter besonderer Berücksichtigung des Verhältnisses zum Völkerrecht.* Zürich – St. Gallen, Dike, 2006. 347–351.; Ehrenzeller–Schindler–Schweizer–Vallender op. cit. 46., Art. 5., No. 84., 90.

[56] Biaggini op. cit. 36., Art. 190., No. 16.

peremptory norms of international law, the Constitution makes it clear that the latter prevail over all domestic law.[57]

With regard to norms of international law that do not qualify as peremptory, views on how the conflict is to be solved are divided. A first group of scholars holds that newer constitutional law should prevail over conflicting international law. They argue that the Federal Constitution refers to peremptory norms of international law as the sole limitation on popular initiatives, thus allowing popular votes on proposals that violate other norms of international law. It would, they suggest, make a mockery of the democratic process if a constitutional norm approved by the people was not implemented because courts are prevented from applying it.[58] The Federal Council has sided with this first group of scholars. In its report on the relationship between international and domestic law of 2010, it has stated that a directly applicable and newer constitutional norm, such as the minarets ban, should prevail over older international law.[59] Where a popular initiative was clearly intended to violate international law, its approval by voters and cantons must, according to the Federal Council, be interpreted as a mandate to withdraw from the respective international obligations.[60] However, this raises the difficult problem of establishing voters' intentions. Can it really be argued that, by approving the minarets ban, the majority of voters intended, or even only accepted, a violation of the ECHR? Moreover, as the Federal Council also acknowledges, with regard to certain international treaties, including the ECHR, political reasons make withdrawal an unrealistic option.[61]

A second group of scholars argues that international law should prevail over conflicting norms of the Federal Constitution. They base their argument mainly on Article 190 of the Constitution, which requires courts to apply international law but fails to mention constitutional law. Based on a literal interpretation of this provision they conclude that, in case of a conflict, courts are bound to apply international law and, thus, prevented from applying the conflicting constitutional norm.[62] The view that international law should take precedence is especially compelling as far as the ECHR is concerned. The ECHR is distinct from other international instruments in that, with

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57 Tschumi–Schindler op. cit. 55., Art. 5., No. 75.

58 See Robert Baumann: Die Umsetzung völkerrechtswidriger Volksinitiativen. *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht*, vol 111. (2010) 242. 260–263.; Yvo Hangartner: Das Verhältnis von Völkerrecht und Landesrecht. *Schweizerische Juristen-Zeitung*, vol. 94. (1998) 201. 204–206.

59 Bericht des Bundesrates über das Verhältnis von Völkerrecht und Landesrecht, 5 March 2010. *Bundesblatt*, 2010. 2263. 2310, 2323, 2331.

60 Ibid. 2317. See also ibid. 2323, 2328–2329.

61 Ibid. 2317., 2323., 2328–2329.

62 See Jörg Künzli: Demokratische Partizipationsrechte bei neuen Formen der Begründung und bei der Auflösung völkerrechtlicher Verpflichtungen. *Zeitschrift für Schweizerisches Recht*, vol. 47. (2009) 70–73.; Regina Kiener – Melanie Krüsi: Bedeutungswandel des Rechtsstaats und Folgen für die (direkte) Demokratie am Beispiel völkerrechtswidriger Volksinitiativen. *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht,* 2009. 237. 250–252.; Jörg Paul Müller: Wie wird sich das Bundesgericht mit dem Minarettverbot der BV auseinandersetzen? *Jusletter,* 1 March 2010. paragraphs 17–19.

the European Court of Human Rights, it has an authoritative and respected judicial control mechanism. Since a finding of a violation of the ECHR by the European Court constitutes a ground to revise the preceding decision of the Federal Court,[63] the latter arguably has a duty to prevent findings of violations by the Strasbourg Court. The Federal Court now seems to have adopted this position as well. In 2012, it suggested, in an *obiter dictum*, that, at the very least in the case of the ECHR, treaty law prevails over any conflicting constitutional norms.[64] In a judgment of 2015 it seemed to indicate that also the Agreement on the Free Movement of Persons concluded between Switzerland and the European Union takes precedence over the Constitution.[65]

6. Conclusion

Not least as a reaction to these comments by Switzerland's highest court, a popular initiative has now been submitted that, if approved, would introduce a strict hierarchy: with the exception of peremptory norms, international law would always be overruled by the Constitution.[66] In other words, the relationship between international and domestic law has now itself become a politically contested issue that will be decided through direct-democratic means.

Strict rules of priority as the ones proposed by this initiative should, in my view, be avoided. Instead, the ranking between international and domestic law should be made on a case-by-case basis and should depend on the *substance* of the respective norms. Thus, norms guaranteeing fundamental rights and fundamental rule-of-law principles should prevail over other norms. This prioritisation according to substance works both ways: an international norm guaranteeing human rights prevails over a conflicting constitutional norm (for example the one banning the construction of minarets), but on the other hand an international treaty (for example a bilateral agreement with a foreign police authority) can be overruled by a constitutional norm guaranteeing fundamental rights. In addition, as explained above, when a treaty provides for a judicial control mechanism, this should also enter the equation. The only sensible way of carrying out this weighing up of the importance of the respective interests embodied in competing norms is on a case-by-case basis, typically by a court at the stage of application.

The downside of the approach advocated here, which basically corresponds to that used by the Federal Court so far, is that the results of some popular votes may not be (fully) implemented because a court refuses to give them effect. However, this can hardly be characterised as a serious limitation on direct democracy. On the contrary, human rights are the lifeblood of democracy and their effective protection is a prerequisite for its very existence.

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63 Article 122 Federal Act on the Federal Court.

64 BGE (Decisions of the Federal Court) 139 I 16, 29–31.

65 BGE 142 II 35, 38–40.

66 Eidgenössische Volksinitiative „Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)". *Bundesblatt*, 2015. 1965. 1968.